Case Number 1307553/2019
Type V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Miss K Mistry		**Coventry University**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 25 – 29 April 2022 & 3 – 5 May 2022

EMPLOYMENT JUDGE GASKELL **MEMBERS: Mr E Stanley, Mr MZ Khan**

Representation
For the Claimant: **In Person**
For the Respondent: **Mr A Griffiths (Counsel)**

JUDGMENT

The unanimous Judgement of the tribunal is that:

1 **The respondent did not, at any time material to this claim, act towards the claimant in contravention of Sections 39 or 40 of the Equality Act 2010. The claimant's complaints of direct race and age discrimination; harassment; and victimisation, pursuant to Section 120 of that Act, are dismissed.**
2 **The claimant was fairly dismissed by the respondent. Her claim for unfair dismissal is not well-founded and is dismissed.**
3 **The claimant's claims for unpaid notice pay (breach of contract) and unpaid holiday pay or not well-founded and are dismissed.**

REASONS

Introduction

1 The claimant in this case is Ms Kanta Mistry who was employed by the respondent, Coventry University, as a Management Support Administrator, from 15 October 2001 until 1 August 2019 when she was dismissed. The reason given by the respondent at the time of the claimant's dismissal was capability.

2 By a claim form presented to the tribunal on 2 October 2019, the claimant brings claims for unfair dismissal; for unlawful discrimination on the grounds of

race and/or age; for breach of contract; and for unpaid notice pay and holiday pay.

3 All of the claims are denied: the respondent denies any form of discrimination; it maintains that the claimant was properly paid in lieu of notice and that all outstanding holiday pay was paid on termination of the claimant's employment. It admits that the claimant had sufficient time service to bring a claim for unfair dismissal and that the claimant was dismissed. The respondent maintains that the claimant was dismissed by reason of her capability and that the dismissal was fair.

4 From the initial claim form all it was extremely difficult to discern exactly how the claimant put her case: precisely what acts/omissions on the respondent's part were said to be acts of discrimination. This was all discussed in detail at a preliminary hearing conducted by Employment Judge Johnson on 30 March 2020. Following that hearing the case was listed for final hearing with a time allocation of six days commencing on Monday 19 April 2021. Judge Johnson set out a List of Issues which are stated at Paragraph 7 of his Case Management Order. The issues identified by Judge Johnson can be summarised as follows: -

(a) Time issues relating to the discrimination claims
(b) Issues as to the reason for and the fairness of the dismissal
(c) Direct discrimination on the grounds of race and/or age
(d) Victimisation
(e) Unpaid holiday pay
(f) Unpaid notice pay (breach of contract)

The claimant was ordered to provide full particulars of the acts/omissions said by the amount to acts of direct discrimination and/or victimisation.

5 The case came on for final hearing before a full panel chaired by Employment Judge Cookson on 19 April 2021. By then however it was clear that the case which the claimant sought to present was rather more extensive than that which could be discerned from her claim form; from the list of issues; or from her further particulars. The final hearing was abandoned on the second day: Judge Cookson made Case Management Orders which we have not seen but which from a later Case Management Order, we understand to have included full guidance to the claimant as to how she should proceed in an application to amend the claim.

6 The amendment application was heard by Employment Judge Dimbylow on 9 August 2021 with judgement delivered in open tribunal on 14 September 2021. The amendment application was refused.

7 Notwithstanding Judge Dimbylow's judgement, the case which the claimant has presented before us was considerably more extensive than that confined to the list of issues or the claimant's pleaded case. In the face of reasonable objections from Mr Griffiths, we have allowed the claimant considerable latitude in the presentation of her case; and ultimately, the issues which we have decided are: -

(a) Time issues relating to the discrimination claims
(b) Issues as to the reason for and the fairness of the dismissal
(c) Direct discrimination on the grounds of race and/or age
(d) Harassment on the grounds of race and/or age
(d) Victimisation

8 In support of her claims for direct discrimination; harassment; and victimisation, the claimant has advanced particulars of incidents and identities of alleged discriminators not previously pleaded and not previously referred to in Case Management Orders.

9 On the other hand, the claims for unpaid holiday pay and unpaid notice pay have not been pursued at all by the claimant during the course of this hearing.

The Evidence

10 By agreement, the respondent presented its case first. The respondent relied on the evidence of five witnesses: -

Ms Laura Moten:	Faculty Operations Manager
Mrs Gemma Bailey:	People Advisor
Professor Heather McLaughlin:	Academic Dean, Faculty of Business & Law
Mr Nicholas Sale:	Independent Governor
Mr Michael Fitzpatrick:	Pro-Vice-Chancellor, Engineering, Environment & Computing

11 The claimant gave evidence on her own account: she did not call any additional witnesses.

12 In addition, we were provided with an agreed trial bundle running to 654 pages to which were added to additional documents during the course of the hearing we have considered the documents from within the bundle to which we were referred by the parties during the course of the hearing.

13 Without exception, we found the evidence given by the respondent's witnesses to be clear; consistent; credible; and compelling. The evidence remained consistent internally throughout cross-examination; it was consistent with contemporaneous documents; and the evidence given by the witnesses was consistent with that given by other witnesses.

14 By contrast, the evidence given by the claimant was confused; inconsistent; and largely not credible. We set out below examples of these findings: -

(a) **Confused:** At one point in the narrative, the claimant complained about what she perceived to be an unfair allocation of duties as between herself and a colleague. The claimant could give no coherent explanation for her being reversed - but did not appear to appreciate that this would inevitably mean that the alleged unfairness would simply be reversed. More generally the claimant simply failed consistently to answer very simple questions with direct simple answers preferring instead to avoid an answer or launch into her own narrative.

(b) **Inconsistent:** The claimant could not account for her failure to complain about alleged discrimination at any time during the course of employment or even when pursuing her appeal against dismissal. When she cross-examined the respondent's witnesses, she did not suggest that any such complaint had ever been raised; there is no mention of such in her pleaded case; or in her witness statement; and no reference to such a complaint in any contemporaneous document. Initially during evidence, she explained that she had not raised a complaint because she was fearful of recriminations. But later she suggested that complaints had been raised verbally but not recorded. During the course of her cross examination the claimant consistently stated that she had no recollection of events which were inconvenient to her case - whilst at the same time claiming and unfailing recollection of contemporaneous events which she felt supported her case.

(c) **Not Credible:** The claimant was adamant that she had been unaware of complaints by colleagues that she appeared to be covertly photographing and/or filming and/or recording them during the working day until she saw reference to such complaints in the trial bundle. She was then taken to a document which had not only been read by her but also annotated with her comments which clearly detailed these complaints. Confronted with this, the claimant firstly challenged the authenticity of the annotated document (having originally accepted it) and then changed her account to suggest that she was aware of the complaints but had not seen the originating emails.

15 In one respect we find the claimant to have been dishonest in her evidence. This finding relates to allegations in the claimant's witness statement to the effect that Ms Moten racially harassed her by describing her as a "*chaiwallah*" and making abusive comments about "*temples*" and "*wailing prayers*". These allegations do not appear anywhere in the claimant's pleaded case nor in any contemporaneous document or any of her many complaints. Neither did she raise these allegations at the preliminary hearings conducted by Employment Judge Johnson, Employment Judge Cookson, or Employment Judge Dimbylow. We find these allegations to be recent concoctions made to bolster the claimant's race discrimination claim and that the allegations are untrue.

16 To the extent that there are factual differences between the evidence given on behalf of the respondent and that given by the claimant, we prefer the evidence of the respondents witnesses and have made our findings of fact accordingly.

The Facts

17 Although the claimant's case is that her difficulties at work started when she raised a complaint on 1 April 2014, this is clearly not the case as emails in the bundle suggest conflict and complaints regarding the duties allocated to the claimant from as early as 2012. Further, we accept the unchallenged evidence given by Ms Moten to the effect that she became the claimant's line manager in 2012 following a breakdown in the claimant's relationship with her previous line manager.

18 On 1 April 2014, the claimant wrote to Ms Moten expressing concerns about certain aspects of her role and the allocation of duties between her and colleagues. The claimant expressly did not raise a formal grievance and there was no suggestion in her letter of any form discrimination.

19 The respondent reacted promptly and positively. Individual meetings took place between Mrs Eileen McAuliffe and the claimant and Mrs McAuliffe and Ms Moten. There was then a meeting with all parties present, held on 7 April 2014 (the claimant was accompanied by a colleague). So far as the respondent is concerned the issues raised by the claimant were resolved and there is a meeting note which confirms this.

20 At the meeting on 7 April 2014 however Mrs McAuliffe told the claimant of concerns which have been raised by colleagues who found her behaviour to be volatile or threatening the claimant was told that her approach to dealing with issues of discontent was not acceptable the claimant was given a clear pathway to address such concerns in the future.

21 In May 2014, Ms Moten queried a lengthy absence by the claimant from her workstation we have read the relevant emails and the query appears to be entirely appropriate enquiry from a manager to a member of her team however the claimant's reaction was both rude and inappropriate.

22 In June 2014, a query arose as to whether the claimant was entitled to paid leave for a number of medical and dental appointments. Having, during the course of Ms Moten's evidence, examined the relevant policy, it appears to us that the policy was correctly applied. The version of the policy produced to us is dated February 2017: the claimant insists that radical changes have been made to the earlier version. However, despite a promise to do so, the claimant failed to provide a copy of the earlier version so as to justify her complaint.

23 Throughout the rest of 2014 and 2015, there were numerous incidents of conflict and disagreement between the claimant; Ms Moten; and other colleagues. Ms Moten was the recipient of complaints from the claimant's colleagues as to her attitude towards them and the claimant consistently complained about unfair allocation of duties and lack of appropriate training. Having considered the evidence given by Ms Moten, and that given by the claimant, we are firstly satisfied that the claimant was provided with all of the training she requested; the same training as other colleagues; and that she was offered further training if she needed it but she did not take up training opportunities which were offered to her. We are further satisfied that Ms Moten attempted throughout to resolve issues and difficulties in a proper and professional manner: however, her attempts were often thwarted by the claimant who refused to meet her; or insisted on unnecessary representation at routine meetings. There are emails sent by the claimant during this period which are threatening and wholly inappropriate. The claimant wholly failed to engage in a professional or positive manner and was an unwilling recipient of any degree of criticism.

24 The claimant's case is that there is an element of inconsistency in the respondent's case with regard to her Development and Performance Review (DPR) for November 2015. On the one hand, the claimant is rated as "strong" but on the other hand Ms Moten was still expressing concerns as to some elements of the claimant's performance. We are satisfied with Ms Moten's explanation of this apparent inconsistency: namely, that an overall strong performance was being consistently undermined by the claimant's weaknesses and by her attitude towards colleagues; towards managers; and towards any form of criticism.

25 At a Performance Action Planning Review Meeting held on 27 November 2015, the claimant's conduct towards Ms Moten was extreme and unacceptable. The claimant accused Ms Moten of "behaving criminally" stating that Ms Moten had no right to question her she described Ms Moten as pathetic and the

respondent's system as pathetic. The claimant raised her voice and was very aggressive. Towards the end of the meeting, she sat back in her chair and started singing as Ms Moten was trying to speak. Ms Moten's evidence was that she was left feeling shaken and uncomfortable and reported the incident to Mr Steve Galliford – Deputy Dean.

26 This incident led to a disciplinary investigation and on, 12 July 2016, the claimant attended a disciplinary hearing before a panel chaired by Ms Beverley Steventon – Associate Dean. The outcome was that the claimant was given a final written warning for unprofessional conduct. This outcome was upheld on appeal. Ms Moten was replaced as the claimant's line manager by Ms Mykala Croft. Ms Moten was Ms Croft's line manager and thus remained part of the claimant's management chain.

27 Before, during and after the disciplinary process, efforts were being made to assist the claimant to improve her performance and her professionalism by instituting an informal Performance Improvement Plan (PIP). The documents in the bundle clearly show that the claimant was obstructive in this process: unwilling to engage in a positive manner; and believing that no improvement was required. During 2016, other rather trivial matters of dispute arose: including for example, the claimant taking a taxi home from work at 7:30pm one evening and claiming the cost on her expenses without having followed the appropriate procedures.

28 In early 2018, a new and relatively inexperienced staff member Sadie Cartmill joined the team. Before long there was considerable tension in the working relationship between the claimant and Ms Cartmill. In an effort to defuse these tensions, the claimant's then line manager Ms Samantha Clark drew up a table allocating duties as between Ms Cartmill and the claimant. The claimant objected to the allocation. Ms Clark asked her to explain her concerns; claimant refused to do so insisting that they should simply reverse the allocation. As stated earlier, the claimant has insufficient self-awareness to appreciate that what she was therefore asking for was the unfairness to be allocated to Ms Cartmill. At the meeting to resolve this, Ms Cartmill was driven to tears. The claimant refuses to acknowledge that any conduct of hers may have contributed to this.

29 Over the period to June 2018, there was an accumulation of concerns directed to Ms Moten from Ms Cartmill, Ms Clark, Ms Deesha Halley, and another manager Ms Rosie Halliday. Ms Moten asked for a meeting with the claimant to discuss these concerns initially the claimant refused to meet.

30 In September 2018, Ms Clark was concerned that the claimant was not meeting deadlines. The claimant's response was that she was experiencing a

heavy workload. In an effort to assist, Ms Clark suggested that the claimant should maintain a work-log which could then be discussed and if appropriate some of the claimant's duties could be reassigned. The claimant objected to maintaining the work-log in these circumstances unless all members of staff were required to do the same. She explained to us that she regarded this as unmerited scrutiny of her work.

31 In view of these accumulating concerns, on 6 September 2018, Ms Clark implemented a PIP which clearly set out improvements which were required to both the claimant's performance and her conduct. The plan was subject to its first review at a meeting on 24 September 2018.

32 In the period between 6 September 2018 and 24 September 2018, three members of staff complained that the claimant appeared to have been covertly photographing or filming them in the workplace. The claimant was asked to meet Ms Clark about this but refused. The record of the review meeting on the 24 September 2018 contains details of this allegation: it was discussed with the claimant at that meeting as were other areas in which performance had fallen below the improvements specified. A further review meeting was fixed for 8 October 2018. It became necessary to rearrange that date because of the unavailability of the claimant's representative. Before the rearranged meeting could take place, on 11 October 2018, the claimant commenced a what was to become a prolonged period of sickness absence.

33 The claimant was absent from work until 8 January 2019 - a total of 63.5 working days. She submitted medical certificates from her GP which stated the cause of her absence to be "*low mood*". The respondent referred the claimant for an OH assessment; she was examined for this purpose on 13 December 2018. The subsequent report indicated that there appeared to be no formal diagnosis of a medical condition; that the claimant remained absence due to the situation at work; there was no certainty as to when she would be able to return; there appeared to be no medical reason why she could not undertake a full range of duties. A phased return to work was suggested.

34 In early January, the claimant intimated that she would be returning to work on 8 January 2019. A return to work meeting was arranged with Ms Moten and Mrs Bailey for 3pm that day. The claimant was unwilling to attend without union representation, but happily her union representative was able to make himself available. The following steps were agreed at the meeting: -

(a) The claimant would have a phased return to work: building up to full hours and her full range of duties over a period of four weeks.
(b) Pursuant to the OH report, the claimant was encouraged to arrange a workstation assessment.

(c) The PIP would be suspended until the end of the phased return and the resumption of the full range of duties.

35 On 13 January 2019, the claimant wrote to Professor Stephen Hardy – Head of Coventry Law School, expressing concern as to the allocation of duties between herself and Ms Lauren Hammond. The claimant stated that she felt she had been demoted. There was extensive exchange of emails between the claimant and Professor Hardy in an effort to resolve this issue. However, by 6 February 2019, the claimant's discontent had begun to manifest itself as hostility towards Ms Hammond. Ms Hammond wrote a detailed letter of complaint regarding the claimant's conduct towards her: and, at a meeting on 25 February 2019, the claimant was again given formal advice as to her conduct towards colleagues. Professor Hardy was himself aware of the incident between the claimant and Ms Hammond on 6 February 2019 he was extremely concerned as to the claimant's conduct and for Ms Hammond's welfare.

36 18 February 2019 had been intended as the first review meeting of the PIP following the claimant's return to work. Unfortunately, the claimant suffered a family bereavement and the meeting was postponed in an effort to restart the process Ms Moten provided the claimant and her union representative with a copy of the PIP from 24 September 2019. Ultimately, the review meeting was planned to take place in late March 2019 however it did not take place because, on 27 March 2019, the claimant commenced a further period of what was to become prolonged sickness absence from which she did not return to work.

37 From March 2019, regular fit notes were provided from the claimant's GP stating that the claimant was unfit for work due to "*chest pains*" and "*vertigo*". It was not until 25 June 2019, that there was reference to the claimant being absent due to "*stress at work*". Contrary to the claimant's assertions, there is no documented diagnosis of the claimant suffering from "*depression*". There are two brief GP reports in our bundle both of which refer to "*anxiety*" and "*stress*", but not to depression.

38 On 21 May 2019, Ms Moten made a welfare call to the claimant who advised that she was not fit to return to work. In the light of this, the respondent made a further referral to its OH provider. The claimant was seen for assessment on 13 June 2019 and the subsequent report is dated 20 June 2019. As with the earlier report, it confirmed that there was no medical reason why the claimant could not perform her duties by regular attendance at work; there was no formal medical diagnosis; the issue appeared simply to be that the claimant could not work in circumstances which she believed to be unfair. The principal reason for perceived unfairness was the PIP and the requirement to improve her performance and her conduct towards her colleagues. The report confirmed that medical redeployment was inappropriate as was ill health retirement. The report

strongly urged that meetings should take place to resolve the workplace differences but acknowledged that the claimant had indicated a reluctance to attend such meetings. The author of the report suggested that delaying meetings was more harmful in ensuring that they took place. The recommended adjustments were the same as before: namely, a phased return to work.

39 On 15 June 2019, Professor Hardy wrote to Ms Moten expressing concern at the claimant's continued absence and as to the detrimental effect this was having on the efficiency of the Law School and the increased workload caused to other staff. When giving evidence, the claimant was extremely dismissive of Professor Hardy's concerns: she stated that she could not understand why the respondent could not continue to cover her absence indefinitely.

40 The respondent's Sickness Absence Policy provides for a two-stage procedure. The use of Stage I is most appropriate in cases of repeated short-term absence. The policy expressly permits progress direct to Stage II in the case of long-term absence. On 19 June 2019, Ms Louise Hopkins - People Advisor wrote to the claimant inviting her to a Stage II Absence Review Meeting. Professor McLaughlin had been asked to chair the meeting supported by Ms Hopkins. The claimant was advised that the management case would be presented by Ms Moten; that she was entitled to trade union representation at the meeting; and that a possible outcome of the meeting would be a recommendation that her employment should be terminated.

41 The meeting took place on 18 July 2019: the claimant attended accompanied by her trade union representative. This the claimant had been continuously absent from work since 27 March 2019 (72 working days); and she had been absent for a total of 166.5 working days during the previous 21 months. (It is right to record that the claimant strongly believes that a 14 day absence in November/December 2017 should be discounted as should a period of five days compassionate leave in February 2019 - but we are satisfied that, even if those periods were discounted, the outcome of the Stage II meeting would have been the same.)

42 We accept the evidence given by Professor McLaughlin: she concluded that the claimant's absence could no longer be allowed to continue indefinitely and that there was no reasonable prospect of a sustained return to work in the foreseeable future. As had happened in January, even if the claimant were to return, within a short period relations would again break down leading to further absences. Professor McLaughlin considered whether there were realistic redeployment opportunities and found that there were none, and, although there was no suggestion that the claimant was a disabled person, she considered what adjustments might be made to facilitate a sustained return to work again she found there were none beyond those which had been made available in January.

The simple fact was that the claimant would not accept the need for a PIP - and the respondent could not accept allowing the claimant to work without such measures in place. (Although, as in January, the PIP could be suspended during a period of phased return.) Professor McLaughlin made clear in her outcome letter that the claimant had not been dismissed because of the performance issues - but because the claimant was unable to perform her duties satisfactorily because of her prolonged and repeated absence from work.

43 Professor McLaughlin concluded that she would make a recommendation to the Vice-Chancellor that the claimant's employment should be terminated with full contractual notice. On 22 July 2019, she wrote to the claimant advising her of this outcome. In accordance with the respondent's procedures, the claimant was given the opportunity to make representations to the Vice-Chancellor before a final decision was made. Pursuant to this opportunity, on 30 July 2019, the claimant wrote to Professor Latham making her representations. In the event the representations were considered by Professor Ian Marshall - Acting Vice-Chancellor: he considered the claimant's representations together with Professor McLaughlin's decision. It was Professor Marshall who made the final decision to terminate the claimant's employment with contractual notice. On 1 August 2019, Professor Marshall wrote to the claimant informing her of his decision and advising her of her right to appeal.

44 The appeal hearing took place on 22 October 2019: the panel was chaired by Mr Sale and comprised Mr Fitzpatrick and Ms Katie Jennings - People Partner. Professor McLaughlin presented the management case the claimant attended accompanied by her trade union representative. We accept the evidence given by Mr Sale and Mr Fitzpatrick that the claimant's grounds of appeal were fully considered but ultimately the panel concluded that the decision to terminate the claimant's employment was the correct decision and her dismissal was upheld.

45 We should record that in the claimant's letter of representation to the Vice-Chancellor, and in her grounds of appeal against dismissal, she raised no allegations that any of her treatment was related to discrimination on the grounds of race or age.

46 Within the bundle there is a copy of the respondent's form GR1: this is the form used to initiate a formal grievance under the respondent's grievance procedure. It is clear from the document that it had been drafted by the claimant but was never submitted to the respondent. It is significant that, whilst the document uses the words "*discrimination*" and "*victimisation*", it contains no complaint of discrimination on the grounds of any protected characteristic nor does it provide details of any protected act.

47 We repeat and confirm our earlier stated findings with regard to the claimant's allegations of racial harassment (Paragraph 15 above).

48 The documentation available to the tribunal suggests that all appropriate payments for notice and holiday pay were made on termination of the claimant's employment. As stated above these elements of the claim have not been pursued during this hearing and are taken to have been abandoned.

The Law

Race and/or Age Discrimination

49 **The Equality Act 2010 (EqA)**

Section 4: The protected characteristics

The following characteristics are protected characteristics
age;
disability;
gender reassignment;
marriage and civil partnership;
pregnancy and maternity;
race;
religion or belief;
sex;
sexual orientation.

Section 13: Direct discrimination

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

Section 26: Harassment

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

(*a*) A engages in unwanted conduct related to a relevant protected characteristic and
(*b*) the conduct has the purpose or effect of

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

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

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are:-
age;
disability;
gender reassignment;
race;
religion or belief;
sex;
sexual orientation.

Section 27: Victimisation

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

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

(2) Each of the following is a protected act—

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

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

Section 39: Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—

(*a*) as to B's terms of employment;

(*b*) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(*c*) by dismissing B;
(*d*) by subjecting B to any other detriment.

Section 40: Employees and applicants: harassment

(1) An employer (A) must not, in relation to employment by A, harass a person (B)

(*a*) who is an employee of A's;

Section 123: Time limits

(1) Proceedings on a complaint within section 120 may not be brought after the end of—

(*a*) the period of 3 months starting with the date of the act to which the complaint relates, or
(*b*) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(*a*) conduct extending over a period is to be treated as done at the end of the period;
(*b*) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(*a*) when P does an act inconsistent with doing it, or
(*b*) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Section 136: Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(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.

50 **Decided Cases – Discrimination**

Nagarajan v London Regional Transport **[1999] IRLR 572 (HL)**
Villalba v Merrill Lynch & Co **[2006] IRLR 437 (EAT)**

If a protected characteristic or protected acts had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence. Discrimination and victimisation may be conscious or sub-conscious.

Ladele –v- London Borough of Islington **[2010] IRLR 211 (CA)**
JP Morgan Europe Limited –v- Chweidan **[2011] IRLR 673 (CA)**

There can be no question of direct discrimination or discrimination arising from disability where everyone is treated the same.

Bahl –v- The Law Society & Others **[2004] IRLR 799 (CA)**
Eagle Place Services Limited –v- Rudd **[2010] IRLR 486 (CA)**

Mere proof that an employer has behaved unreasonably or unfairly would not, by itself, trigger the transfer of the burden of proof, let alone prove discrimination.

Richmond Pharmacology Limited v Dhaliwa **[2009] IRLR 336 (EAT)**
Grant –v- HM Land Registry **[2011] IRLR 748 (CA)**

The necessary elements of liability for harassment are threefold: (1) Did the respondent engage in unwanted conduct? (2) Did the conduct in question either (a) have the purpose or (b) the effect of either (i) violating the claimant's dignity or (ii) creating an adverse environment for him. (3) Was the conduct on a prohibited ground? There is substantial overlap between these questions. Whether conduct was "unwanted" will overlap with whether it creates an adverse environment.

It may be material to consider whether it should reasonably have been apparent whether the conduct was or was not intended to produce the proscribed consequences: the same remark may have a very different weight if it was evidently innocently intended rather than if it was evidently intended to hurt.

Where harassment is said to result from the effect of the conduct - that effect must actually be achieved. However, the question of whether or not conduct had

that adverse effect is an objective one - it must reasonably be considered to have that effect; although the alleged victim's perception of the effect is a relevant factor.

Igen Limited –v- Wong **[2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc **[2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

Rihal –v- London Borough of Ealing **[2004] IRLR 642 (CA)**
Anya –v- University of Oxford **[2001] IRLR 377 (CA)**
Shamoon –v- Chief Constable of the RUC **[2003] IRLR 285 (HL)**
R –v-Governing Body of JFS **[2010] IRLR 186 (SC)**

In a case involving a number of potentially related incidents the tribunal should not take a fragmented approach to individual complaints, but any inferences should be drawn on all relevant primary findings to assess the full picture. Any inference of discrimination must be founded on those primary findings. Where there is no actual comparator a better approach to determining whether there has been less favourable treatment on prescribed grounds is often not to dwell in isolation on the hypothetical comparator but to ask the crucial question "why did the treatment occur?" In deciding whether action complained of was taken on grounds of race a distinction is to be drawn between action which is inherently racially discriminatory and that which is not; to establish that the action was taken on racial grounds in the former case motive or intention of the perpetrator is not relevant - in the latter it is relevant.

Laing –v- Manchester City Council **[2006] IRLR 748**

In reaching its conclusion as to whether or not the claimant has established facts from which the tribunal *could* conclude that there had been unlawful discrimination the tribunal is entitled to take into account evidence adduced by the respondent. A tribunal should have regard to all facts at the first stage to see what proper inferences can be drawn.

Unfair Dismissal

51 **The Employment Rights Act 1996 (ERA)**

Section 94: The Right not to be unfairly dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 98: General Fairness

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

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

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

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) ……where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer

acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

52 **Decided Cases – Unfair Dismissal**

Wilson –v- Post Office **[2000] IRLR 834 (CA)**

Categorisation of the true reason for a dismissal under Section 98(1) and (2) ERA is a question of legal analysis the and a matter for the tribunal to determine.

Taylor –v- Alidair Limited **[1978] IRLR 82 (CA)**

In a capability dismissal the correct test of fairness is whether the employer honestly and reasonably held the belief that the employee was not capable and whether there was a reasonable ground for that belief.

Lynock –v- Cereal Packaging Limited **[1988] IRLR 510 (EAT)**

In determining whether to dismiss an employee with a poor record of sickness absence and employers approach should be based on sympathy understanding and compassion. Factors which may prove important include: the nature of the illness; the likelihood of the illness recurring; or of some other illness arising; the length of the various absences and the periods of good health between them; the need of the employer to have its work done; the impact of the absences on those who work with the employee; the adoption and exercise of a policy in connection with absence due to sickness; the importance of a personal assessment in the ultimate decision; and the extent to which the difficulty of the situation and the position of the employer have been explained to the employee. A disciplinary approach, involving warnings, is not appropriate in a case of intermittent sickness absence - but the employee should be cautioned that the stage has been reached when it has become impossible to continue with the employment.

Polkey –v- AE Dayton Services Ltd. **[1987] IRLR 503 (HL)**

In a case of incapacity, an employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to improve and show that she can do the job.

Iceland Frozen Foods v Jones **[1982] IRLR 439 (EAT)**
Post Office –v- Foley & HSBC Bank plc –v- Madden **[2000] IRLR 827 (CA)**

It is not for the tribunal to substitute its own view but to consider whether the respondent's decision came within a range of reasonable responses by a reasonable employer acting reasonably.

Sainsbury's Supermarkets Limited –v- Hitt **[2003] IRLR 23 (CA)**

The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed.

53 **The ACAS Code**

We have considered the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code") and the ACAS Guide: Discipline and Grievances at Work (2019).

The Claimant's Case

54 Put simply the claimant's case is: -

(a) That during the period 2014 - 2019 she was subject to a campaign of persecution on the grounds of her race and/or age. She relies on the series of incidents set out in Paragraphs 17 – 39 above. For the purposes of these claims, the claimant identifies her racial heritage as "Indian"; and the relevant age group as "over 50". The claimant specifically accuses Ms Moten and Professor Hardy of directly discriminating against her; and she maintains the others including Ms Clark and Ms Cartmill were manipulated by Ms Moten for discriminatory reasons.
(b) That because of the campaign of persecution, in October 2018, she started to have mental health difficulties which she categorises as depression. The illness led to lengthy absences from work between October 2018 - January 2019, and again from March 2019 onwards. It is the claimant's case that these absences are wholly attributable to her treatment by the respondent; and, accordingly, were entirely the responsibility of the respondent. The absences should not have attracted any adverse consequences for the claimant.
(c) That accordingly it was outside the range of reasonable responses for the respondent to dismiss the claimant on grounds of capability.

The Respondent's Case

55 The respondent's case is that none of the treatment about which the claimant complains was unfair or unreasonable. It amounts to proper and legitimate management action which the claimant simply would not accept. Even if, which the respondent does not admit, any management actions were unfair, there is no basis upon which associate such actions with the claimant's age or her race.

56 The respondent maintains that the claimant has not established that she was suffering from any recognised mental illness; still less, that its actions were the cause of such illness. In any event, causation is of only marginal relevance. When it came to the Absence Review Procedure, the respondent was properly focused on the future: whether the claimant would be in a position to resume duties and maintain a satisfactory attendance record.

57 Professor McLaughlin concluded that it was most unlikely that the claimant would resume duties on a satisfactory basis and maintain satisfactory attendance. There was ample evidence upon which to justify such a conclusion and all proper enquiries were made and alternatives considered. On this basis, the respondent's case is that the claimant was fairly dismissed.

Discussion

Discrimination

58 We have carefully considered all of the evidence advanced by the parties, both oral and documentary, and we cannot find any example of the claimant being treated unreasonably; unfairly; unfavourably; or less favourably than any comparable employee. The claimant's relationship broke down with successive managers and with her colleagues. We find that Ms Moten was patient and determined in trying to address issues with the claimant's performance and conduct. These were not merely her concerns but concerns regularly expressed by others. Fundamental to the issues, in our judgement, is the fact that the claimant simply would not accept authority from Ms Moten or from anyone else. And she was determined not to be subject to an effective PIP.

59 Further there is no basis to associate any of the acts about which the claimant complains or her age. Even if we have found that you have been unreasonable or differential treatment this would not have been sufficient to lead us to a conclusion of discrimination.

60 Absent any basis upon which we could conclude that the claimant had been treated less favourably than a comparable employee - real or hypothetical,

and absent any basis to link the conduct complained of to any protected characteristic, it must follow that the claimant has not established before us facts from which we could properly infer that there had been discrimination on grounds of age or race.

61 Accordingly, it follows that the claimant's claims for direct discrimination and harassment must fail and will be dismissed.

62 So far as the victimisation claim is concerned, on the basis of what we have found above, it follows that we made no finding of detrimental treatment. But, more importantly, there is simply no evidence of the claimant ever having committed a protected act as required by the provisions of Section 27 EqA to ground a victimisation claim. Accordingly, this claimant must also fail and will be dismissed.

63 The incidents which the claimant specifically claims were acts of discrimination; harassment; or victimisation took place whilst the claimant was in the workplace under the direct or indirect line management of Ms Moten. She was absent from the workplace from March 2019 onwards: decisions taken thereafter were taken by more senior managers than Ms Moten including Professor Hardy and Professor McLaughlin. In our judgement, any suggestion of a continuing act of discrimination must have come to an end in March 2019. On that basis, the discrimination claim was presented out of time by reference to Section 123(1)(a) EqA. The claimant has advanced no case as to why it would be just and equitable for time to be extended pursuant to Section 123(1)(b) EqA. It follows therefore that, even if we had not dismissed the discrimination claims substantively, we would have found that, pursuant to Section 123 EqA, the tribunal lacked jurisdiction to consider them.

Unfair Dismissal

64 The respondent has established to our satisfaction that the sole reason for the claimant's dismissal was the respondent's belief that, looking to the future, there was no reasonable prospect that she would be able to improve her attendance so as to perform the duties satisfactorily. Accordingly, we find that the claimant was dismissed for a reason relating to capability; a potentially fair reason pursuant to Section 98(1) and (2) ERA.

65 There was ample evidence to justify this conclusion: the claimant had taken two lengthy absences; one from October 2018 - January 2019; the second from March 29 onwards. In neither case was there any definitive diagnosis or prognosis: the OH report indicated that there was no medical reason why the claimant could not attend work and perform her duties. It was evident to Professor McLaughlin and to the appeal panel that the claimant was unwilling to

return to work and submit to the PIP. If she had returned soon after the Stage II meeting, they concluded that within a short period arrangements would again break down and there would be further absences.

66 Redeployment opportunities were considered: non-were available. And, even if it had been possible to deploy the claimant elsewhere, the PIP would still have been necessary and would have caused further breakdowns.

67 In the light of these reasonable conclusions, in our judgement, the decision to dismiss the claimant may be regarded as a harsh decision, but it was within the range of reasonable responses available to the respondent.

68 The respondent followed a conspicuously fair procedure fully compliant with the ACAS Code.

69 In these circumstances we find that the claimant was fairly dismissed. Her claim for unfair dismissal is not well-founded and will be dismissed.

Other Claims

70 As stated earlier, the claimant's claims for unpaid holiday pay and unpaid notice pay (breach of contract) have not been pursued at the hearing before us. We take them to have been abandoned. But, in any event, absent any evidence to support such claims, we find that they are not well-founded and they will be dismissed.

Conclusions

71 Accordingly, for the reasons given, the claims are dismissed in their entirety.

Employment Judge Gaskell
5 May 2022