EMPLOYMENT TRIBUNALS

Claimant **Respondent**

v

I Obazuaye Bedfordshire Hospitals NHS Trust

Heard at: Watford **On**: 6-14 June 2022

Before: Employment Judge Anderson
P Miller
N Boustred

Appearances
For the Claimant: C Obazuaye
For the Respondent: A Allen QC

RESERVED JUDGMENT

1. The application to amend the victimisation claim is allowed in part.

2. There was no less favourable treatment of the claimant because of her race or sex and her claim for direct race and sex discrimination fails.

3. The claimant was not victimised because of her protected acts and her claim for victimisation fails.

4. The respondent did not fail to make reasonable adjustments.

5. The claimant was not constructively dismissed for discriminatory reasons.

6. The claim is dismissed.

REASONS

Claim

1. By way of a claim filed on 5 November 2019 the claimant, Irene Obazuaye, brought a claim for race, sex, and disability discrimination, including a claim of discriminatory constructive dismissal, against the respondent, Bedfordshire Hospitals NHS trust. The respondent filed a response on 17 December 2019 denying any form of discrimination.

The Hearing

2. The claimant was represented at the hearing by her husband, Mr Obazuaye, an HR professional. The respondent was represented by Mr Allen QC. The tribunal received a bundle of approximately 750 pages, agreed in large part except for a set of documents relating to an allegation regarding an incident on 19 August 2019. The tribunal also received a witness statement bundle which included a witness statement from the claimant and the claimant's witness A Odika, as well as statements from the respondent's six witnesses: E Davage, C Kiernan, N Fletcher, A Rance, P Towers and L Young. All witnesses attended the hearing to give evidence in person.

3. Mr Obazuaye said that he had received the documents relating to the incident on 19 August 2019 but had been unable to open them and had notified the respondent of this. The respondent denied receiving such notification. As the documents were clearly relevant to the case and most of the first day of the hearing was designated for reading which would give Mr Obazuaye an opportunity to take instructions, the tribunal decided that those documents (pages 358.1-16) should form part of the hearing bundle.

4. The tribunal also received a chronology from the respondent, a draft list of issues and correspondence between the parties on that list. Written submissions from the respondent were received at the conclusion of the hearing.

5. The documents before the tribunal did not include any documents containing remedy information. Mr Obazuaye said that he had sent the information to the respondent. The respondent said it had not received it despite requesting it from the claimant. The tribunal asked Mr Obazuaye to provide the information to the respondent by the end of the first day of the hearing. Mr Allen said that there was an issue with the claimant's attendance next week (days 6 and 7 of the hearing) and the respondent was content for remedy to be decided, if necessary, at a separate hearing. Mr Obazuaye said that he had made a mistake when he read the order and thought the hearing was for this week only. He had taken time off this week but not on Monday or Tuesday next week, and also the claimant was booked to travel to Spain for health reasons on Tuesday. He said that he could seek to arrange further time off work if necessary and also that, if necessary, the claimant would forego her travel plans on Tuesday.

6. On the second day of the hearing Mr Allen QC conceded that the respondent had received three documents from the claimant relating to remedy, but these were not sufficient for the purposes of making detailed submissions on remedy.

7. The tribunal accepted that the claimant and Mr Obazuaye had made a genuine mistake in their understanding of when they would be required to attend the hearing and had not understood that attendance would be required on 13 and 14 June 2022. It noted that the matter was now running behind the timetable due to a delayed start on 6 June 2022 and time spent hearing and deciding the application set out below. The tribunal agreed that the hearing would deal with liability only, with a separate hearing to be listed for remedy if necessary.

Applications

8. On 30 June 2020 EJ Hymans made an order which included a draft list of issues. The claimant was ordered to provide comparator information in relation to her claims of direct race and sex discrimination. She was also ordered to set out, in relation to any victimisation claim, the protected acts relied upon and the detrimental conduct which she says she was subject to.

9. The claimant's representative, Mr Obazuaye, sent that information to the respondent and the tribunal on 19 August 2020. The respondent responded on 27 August 2020 and EJ Quill then made an order on 25 November 2020 amending the list of issues to include a victimisation claim in relation to the claimant's claim that she was not provided with a written outcome to a 'resignation in haste' meeting in December 2019.

10. At the hearing on 6 June 2022 there was a dispute between the parties about the final list of issues. The respondent had drawn up a list and the claimant had, on 5 June 2022, sought amendments to the list. In effect the claimant wished to rely on a longer list of detriments than had been discussed at the hearing before EJ Hyams both in respect of the victimisation claim but also as incidents of less favourable treatment for the purposes of the race discrimination claim, and incidents of breach of trust for the discriminatory dismissal claim. The respondent objected to the list but identified three of the acts relied upon as incidents of less favourable treatment for the purposes of the direct race discrimination claim (as set out in the order of EJ Hyams) as also being referred to in the particulars of claim as incidents of victimisation. These are 16a-c as shown in the list of issues below. The tribunal went through the claimant's list of further detriments and in the course of discussions Mr Obazuaye withdrew all of the proposed additions except the following '*R failing to discuss C medical condition and failure to consider reasonable adjustments without delay;'*.

11. The tribunal decided that it was the clear decision of EJ Hyams, after discussion with the parties at the hearing on 25 June 2020, that the list of acts of less favourable treatment and breaches of trust were settled at that hearing. There was no formal application from the claimant to amend her claim in relation to direct discrimination and discriminatory dismissal. The only

further information to be provided on these matters was that relating to comparators for the direct discrimination claim. The matter was not so clear in relation to victimisation and EJ Hyams had sought clarification. The order of EJ Quill refused all amendments other than comparator information and the clarification of the victimisation claim.

12. As the respondent had identified amendments to the victimisation claim which it felt were arguably raised by the claimant in her particulars of claim, the tribunal went on to hear arguments from the parties about the further amendments sought by the claimant, in relation to victimisation only. The tribunal decided that the additions identified by the respondent set out at 16a-c of the list of issues below should be allowed as these matters are identified in the claimant's particulars of claim as being alleged detriments that she says followed after a protected act had been done. The respondent said that it was in a position to answer such claims and would not be disadvantaged by doing so. The tribunal refused the further amendment proposed by the claimant that the list of detriments should include '*R failing to discuss C medical condition and failure to consider reasonable adjustments without delay;*' as references to those matters in the grounds of claim were not clearly pleaded as victimisation or said to have arisen as a result of the claimant doing a protected act. The case is listed for seven days, and eight witnesses are to attend. The proposed amendment is not one the respondent had prepared a response to and is not sufficiently focussed. The claimant has a wide-ranging claim of discrimination which will proceed, the victimisation claim has already been considerably broadened and the tribunal does not find that the claimant will suffer prejudice from its refusal to allow this further amendment.

List of Issues

13. Following the tribunal's decision on amendments set out above the list of issues was agreed as follows:

<u>Detriments</u>

1. *Did the following acts amount to detriments:*
    a. *by Alison Rance (AR) in the manner in which the Claimant's (C's) request to work flexibly was dealt with:*
        i. *by AR on 8 and 9 July 2019 not allowing C to take a 30 min lunch break rather than a 1 hour lunch break*
        ii. *by AR on 8 July 2019 and 5 August 2019 proposing to move C from the eye clinic to the call centre*
    b. *by the respondent (R) requiring C to use her lunch breaks and time off in lieu to attend medical appointments*
    c. *by Claire Kiernan (CK) on 8 and 9 July 2019 and 12 July 2019 and 22 July 2019 asking C for evidence of a medical appointment which C says she attended on 8 July 2019*
    d. *by R failing to investigate C's concerns about Natalie Fletcher (NF) reading C's emails raised in an email from C dated 26th July 2019*
    e. *by CK imposing an improvement notice on C dated 19th August 2019*
    f. *by Pete Towers (PT) sending an email to C on 19th August 2019 in which it was suggested that she should undertake training*
    g. *by R failing to send C a written outcome after her 'resignation in haste' meeting of 14 November 2019?*

Constructive Dismissal

2. *Did any of (a) to (f) individually or collectively amount to a fundamental breach of the implied term of trust and confidence permitting C to resign and claim constructive dismissal.*

Race Discrimination

3. *C is of black African origin.*

4. *Was C treated less favourably:*
    a. *by AR in the manner in which the C's request to work flexibly was dealt with:*
        i. *by AR on 8 and 9 July 2019 not allowing C to take a 30 min lunch break (compared with the person that AR confused C's request with (IM))*
        ii. *by AR on 8 July 2019 and 5 August 2019 proposing to move C from the eye clinic to the call centre (compared with MW, VD, SBB, JJ).*
    b. *by R requiring C to use her lunch breaks and time off in lieu to attend medical appointments*
    c. *by CK on 8 and 9 July 2019 and 12 July 2019 and 22 July 2019 asking C for evidence of a medical appointment which C says she attended on 8 July 2019*
    d. *by R failing to investigate C's concerns re NF raised in an email from C dated 26th July 2019 (compared with NF)*
    e. *by CK imposing an improvement notice on C dated 19th August 2019*
    f. *by PT sending an email to C on 19th August 2019 in which it was suggested that she should undertake training*
    g. *by R failing to send C a written outcome after her 'resignation in haste' meeting of 14 November 2019?*

5. *In addition to the named comparators listed above, C relies on hypothetical comparators.*

6. *If so, did any of that less favourable treatment occur because of race?*

7. *If so (in relation to (a) to (f)), was that race discrimination a reason for C's resignation on 28 August 2019?*

Sex Discrimination

8. *Did PT treat C less favourably than a hypothetical male comparator by sending her an email on 19th August 2019 in which it was suggested that she should undertake training?*

9. *If so, was that less favourable treatment because of sex?*

10. *If so, was that sex discrimination a reason for C's resignation on 28 August 2019?*

Failure to Make Reasonable Adjustments

11. *It is not in dispute that C had a disability at all relevant times, namely Chronic Obstructive Pulmonary Disease (COPD).*

12. *The date of actual or constructive knowledge of disability and of disadvantage is in dispute.*

13. *Did R operate the following provisions, criteria or practices (PCPs):*

a. *requiring staff in the role that the C (and others) held to take a full hour for lunch*
b. *requiring staff to provide evidence of medical appointments, which they wanted to attend during normal working hours*
c. *requiring staff to take unpaid time off to attend medical appointments during normal working hours?*

14. In the case of each such PCP:

a. *(applying section 20(3) of the EqA 2010) did it put the claimant at a substantial disadvantage in comparison with persons who are not disabled?*
b. *(applying paragraph 20 of Schedule 8 to the EqA 2010) did the respondent know, or could the respondent reasonably have been expected to know, that the claimant had a disability which was likely to put her at that substantial disadvantage?*
c. *was it a reasonable step to take to (taking the application of the 3 PCPs set out above in turn):*
    i. *permit the claimant to take a 30-minute rather than a 1-hour lunch break*
    ii. *waive the requirement to provide evidence of the medical appointments in question*
    iii. *allow the claimant to attend medical appointments relating to her disability during paid working time?*
d. *if so, did R fail to take that reasonable step?*

<u>Victimisation</u>

15. Did the following amount to protected acts:

a. *C's request for a reduction in working hours as a reasonable adjustment dated 24 June 2019*
b. *C requesting a reasonable adjustment on 9 July 2019*
c. *C making reference to a reasonable adjustment on 11 July 2019*
d. *C's email of 23 July 2019 alleging discrimination and harassment*
e. *C's email of 26 July 2010 regarding Natalie Fletcher looking at her emails [456]*
f. *C's email of 1 August 2019 making reference to detriments, less favourable treatment, disability related requests and race*
g. *C's email of 4 August 2019 making reference to reasonable adjustments [496]*
h. *C's email of 8 August 2019 making reference to disability*
i. *R issuing an improvement note on 9 August 2019*
j. *C's email of 14 August 2019 making reference to reasonable adjustment*
k. *C's email of 23 July 2019 alleging discrimination and harassment*
l. *C's email of 15 August 2019 alleging discrimination and harassment*
m. *Email from PT of 19 August 2019*
n. *C's resignation email of 28 August 2019 making reference to reasonable adjustment, disability, victimisation / harassment*
o. *C's email of 31 August 2019 making reference to reasonable adjustment [?*

16. Did the following amount to a detriment:

a. *by AR in the manner in which the C's request to work flexibly was dealt with:*
    iv. *by AR on 8 and 9 July 2019 not allowing C to take a 30 min lunch break rather than a 1 hour lunch break*
    v. *by AR on 8 July 2019 and 5 August 2019 proposing to move C from the eye clinic to the call centre*

b. by CK imposing an improvement notice on C dated 19th August 2019
c. by PT sending an email to C on 19th August 2019 in which it was suggested that she should undertake training
d. R failing to send C an 'outcome letter' after her 'resignation in haste' meeting of 14 November 2019?

17. If so, did R subject C to the detriment because she had done a protected act or acts?

Jurisdiction / Time Limits

18. No time limit issue is taken at the outset of the hearing.

19. In relation to the outcome letter matter which was the subject of an amendment application made in C's letter to the tribunal of 19 August 2020 was that amended claim brought out of time? If so, would it be just and equitable to hear the matter out of time?

Remedy

20. If any of the claims succeeds, what compensation should the claimant receive.

The Law

14. The discrimination claims are brought under sections 13, 20, 21, 27 and 39 of the Equality Act 2010. Those sections are reproduced below.

> ***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.*
>
> ***20 Duty to make adjustments***
>
> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *(2) The duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
>
> …
>
> ***21 Failure to comply with duty***
>
> *(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.*
>
> *(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.*
>
> ***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.

39 Employees and applicants

...

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

(a) …

(b) …

(c) by dismissing B;

(d) …

15. For all the Equality Act 2010 claims the burden of proof provisions as set out in section 136 apply. Section 136 reads:

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.
(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

16. The tribunal must make findings of fact and apply the legal tests to those facts. The tests for direct discrimination were discussed in Igen v Wong [2005] ICR 931 and it is clear that all evidence before the tribunal can be taken into account, not just that put forward by the claimant. The test is: is the tribunal satisfied, on the balance of probabilities that this respondent treated this claimant less favourably than they treated or would have treated a male or white employee.

17. If the tribunal is satisfied that the primary facts show less favourable treatment because of sex and race, the tribunal proceeds to the second stage. At this stage, the tribunal looks to the employer for a credible, non-discriminatory explanation or reason for such less favourable treatment as has been proved. In the absence of such an explanation, proved to the tribunal's satisfaction on the balance of probabilities, the tribunal will conclude that the less favourable or unfavourable treatment occurred because of sex or race discrimination.

Findings of Fact

18. Where there is any reference to actual comparators in this section, the comparators are referred to by their initials.

19. The claimant was employed from 1 March 2019 as an outpatient clinic receptionist and call centre clerk at the Luton and Dunstable University Hospital. The outpatients' department includes a call centre and a number of clinics. It was not specified in the claimant's employment contract that she would work in any specific part of the outpatient department. During her employment the claimant worked in the call centre before moving to the eye clinic.

20. The claimant was supervised by Adenrele Odika and Aniqua Ahmed until 30 June 2019. Thereafter she was supervised by Aniqua Ahmed and Nicola Wheeler. The supervisors reported to Claire Kiernan, patient pathway manager, who took up her role in January 2019. Claire Kiernan reported to Alison Rance, outpatient administration service manager, who took up her role on 3 June 2019.

21. On 12 March 2019 the claimant was told by a consultant that she had a lung disease. The respondent accepts that the lung disease is a disability for the purposes of the Equality Act 2010. The tribunal finds that that claimant was disabled at all material times for the purposes of this claim.

22. The claimant said that she told Ms Odika and Ms Ahmed about her medical condition and that she told them she would be required to attend many medical appointments because of her condition. In oral evidence she said that she told them in confidence and said to Ms Odika that she would let her know if she needed anything. Ms Odika confirmed this in her evidence. The claimant was less clear on whether Nicola Wheeler knew about her condition. She said that when working in the call centre the two had spoken and discussed that they both had medical conditions which involved hospital appointments, but no details of the conditions were discussed. She said that she thought Ms Ahmed had told Ms Wheeler. The tribunal finds that the Ms Ahmed and Ms Odika were aware that the claimant had lung disease and that Ms Wheeler was not.

23. As a result of her diagnosis with a serious condition and in an attempt to manage her health condition, the claimant made an application to Alison Rance on 24 June 2019 to reduce her working hours, as follows:

> *Dear Alison,*
> *I am writing to formally request to reduce my hours from 37.5 to 24 hours over a 3 - day week (Monday, Tuesday and Wednesday) having a reduced lunch from an hour to half an hour.*
> *You may not be aware in confidence of course I am currently being treated by L&d Hospital for lung related conditions which impact on my day to day activities including tiredness, breathing, sleeping and coughing etc. Thus, giving rise to a disability pursuant to the Equality Act 2010.*

Having discussed my condition with my family and Doctor, I believe the reduction in hours will help me to better manage my condition. I do enjoy my job and would therefore like to remain at work but a reduction in hours will enable me to maintain a better work/health and family.
I believe the request is do-able as a "reasonable adjustment" as well as fair and proportionate. I do not forsee any disproportionate admin or/and financial inconvenience to the service.
I am happy to meet if required.
Thanks in anticipation of your support
Irene Obazuaye.

24. The respondent's policy on flexible working is that requests to work flexibly can only be made after an employee has been employed for 26 weeks. The claimant did not meet the requirements as she had not been employed for 26 weeks, nevertheless the respondent dealt with the request as if she had met that requirement.

25. Alison Rance responded the same day stating she would get back to the claimant within forty-eight hours. The claimant sent a further email on 26 June 2019 stating that she wished to commence the change of hours in August.

26. On 25 June 2019 Claire Kiernan emailed the claimant to tell her that she was to attend an e-learning course on 8 July 2019.

27. On 4 July 2019 Ms Rance emailed the claimant offering a 3-day week, with a six-hour day and a 30 minute lunch break. The claimant immediately questioned this, having requested to work 24 hours per week.

28. On 8 July 2019 at 16:10 Ms Rance emailed the claimant as follows:

Good afternoon Irene

My apologies, as I have confused matters and the information I sent through was in relation to something else I have been dealing with.

I can confirm the following:-

From Monday 5th August, we can agree a reduction to your working hours from 37.5 per week to 24 hours per
week. These hours will be structure in the following way:-

Monday 08.30 -17.30 with a 1 hour break
Tuesday08.30 -17.30 with a 1 hour break
Wednesday 08.30 -17.30 with a 1 hour break

Your role will need to be in the Call Centre instead of clinic due to this reduction, as the Ophthalmology service requires full time staff to work on Reception. If I can also take this opportunity to politely ask that, where possible, should you need to attend any appointments, these are carried out on your non-working days.

Many thanks and I hope that as well as meeting the service needs, this also satisfies your needs and your request made.

Regards
Alison

29. Ms Rance's evidence was that she was new in the job and had received two flexible working requests from the claimant, who's forename is Irene, and another employee called Iris. She said that she confused the two applications, only having been approached in person by Iris. She said this was brought to her attention by Claire Kiernan. Ms Kiernan's evidence was that Ms Rance had told her that she had agreed for '*Irene in the back office'* to reduce her working hours. Ms Kiernan told Ms Rance that Irene did not work in the back office and Ms Rance said that she must have made an error.

30. The claimant characterises this error as a U-turn. The tribunal finds that Ms Rance made a genuine mistake. Furthermore, she made a similar flexible working offer to the claimant to the one the claimant had requested. The main difference was the length of lunch hour. The fact that Ms Rance did not seek to speak to the claimant in person to explain and apologise for the error at the time she discovered it is poor management practice, but the tribunal finds that it is indicative of nothing more than that.

31. The claimant relies on Iris (IM), the person with whom Ms Rance confused the claimant, as a comparator in relation to her claim that failing to offer a one-hour lunch break was discriminatory. IM is not a suitable comparator for a claim of race discrimination, as IM is black. The respondent offered other comparator information. AS, a white Greek woman, requested a three-day week. It is not known if AS was disabled. The offer made to AS was for a three-day week which included a one-hour lunch. Other documents concerned flexible working requests for shorter days where there would be no break. Some were agreed, others were negotiated so that the terms were slightly different to those originally sought. A hypothetical comparator would be a disabled white person making a flexible working request.

32. Ms Rance gave evidence that there were employees in other departments who did not have a one-hour lunch break. Documentary evidence showed that in the outpatients' department there were employees who had no lunch break as they worked shorter days. Those working full days in the outpatients' department all appeared to have a one-hour lunch break. It was not specified in the claimant's employment contract or any of the documents provided to the tribunal that employees must take a one-hour lunch break. The tribunal finds that the respondent did not have a policy of requiring staff to take a one-hour lunch break.

33. Also on 8 July 2019, in the morning, the claimant attended for e-learning only to be advised by Ms Kiernan that it was due to take place on the following day (9 July). Ms Kiernan acknowledged that she had made a mistake and the claimant returned to her reception duties. The claimant had a medical

appointment that day in the afternoon. She had arranged with Ms Ahmed the previous week that she would use her lunch time and some time off in lieu (TOIL) she had accumulated to cover the appointment time, and she would leave work at 2.30pm for the day. Ms Ahmed, believing that the claimant would be attending training, and her absence would not therefore impact on reception cover, authorised the absence. When Ms Ahmed discovered that the claimant was not training, she advised Ms Kiernan that she had given the claimant permission to use TOIL that afternoon. Ms Kiernan said that as there were unexpected absences in the outpatient department that day Ms Ahmed must tell the claimant that she could not take TOIL. Ms Ahmed then told Ms Kiernan that the claimant's request was in connection with a medical appointment. Ms Kiernan agreed to allow the planned absence to go ahead but asked Ms Ahmed to obtain from the claimant a copy of her medical letter. The claimant refused to show the medical letter to Ms Ahmed and said that she wanted to see the policy in which it was set out that she was obliged to do this. Ms Kiernan's evidence is that Ms Ahmed advised her at around 16.45 that the claimant had refused to provide a copy of the letter.

34. It is the claimant's case that the two matters of the flexible working response from Alison Rance on 8 July 2019 and the request for a copy of the claimant's appointment letter on 8 July 2019 by Claire Keenan, through Ms Ahmed, are linked and that the approach taken by the respondent on these two issues was that because the claimant refused to provide a copy of her appointment letter, the response on her preferred flexible working pattern changed. The tribunal finds that there is no evidence for this. It accepts the evidence of Ms Kiernan that she was unaware of the claimant's request for flexible working until she met with Ms Rance on 11 July 2019. It accepts that Ms Rance may have known that the claimant had been released to attend a medical appointment on the afternoon of the 8 July 2019 but could not have known about the claimant refusing to provide the appointment letter when she emailed the claimant at 16:10 as Ms Kiernan herself did not know about it until after that time.

35. The claimant has various policies and practices which cover the matter of attending appointments in working time and the need to provide proof of that. The relevant sections are as follows:

36. The Leave Policy:

10. PLANNED MEDICAL AND DENTAL APPOINTMENTS

10.1 All employees should wherever practicable, arrange for non-urgent medical and dental appointments in their own time. However it is appreciated that sometimes appointments have to be made during working hours. In such circumstances, employees should arrange for these to be either first thing in the morning or last thing in the afternoon, so as not to interrupt service provision.

10.2 Employees are expected to make up the time for appointments during working hours.

10.3 …

37. The Managing Absence Policy

A7 MEDICAL AND DENTAL APPOINTMENTS
A7.1 In order to cause minimum disruption to the service, employees, whether full or part- time, every effort should be made to schedule hospital/Doctor/Dental appointments outside of normal working hours.

A7.2However, it is accepted that this may not always be possible and thus every effort should then be made to book appointments either at the start or the end of the working day.

A7.3Time off for appointments should be worked back as soon as practically possible and within a period of 4 weeks. Employees must notify their line manager as soon as an appointment is known.

A7.4 For those appointments where an individual may undergo a procedure that may potentially render them unfit to return to work, this should be recorded as a day's sickness absence and this will affect their Bradford Score.

A7.5 In addition, if an appointment is to take more than 4 hours this should be recorded as sickness absence, unless the employee has had annual leave approved for this absence.

A7.6 The Line Manager reserves the right to request evidence of an appointment to support any requests for time off during a working shift.

38. The Outpatient Induction Pack

6. Medical Appointments
If you need to attend medical appointments during the time you are working then let your supervisor have a copy of the appointment letter and the time off can be arranged. However this time will need to be made up at a mutually agreed time between yourself and your supervisor.

39. The tribunal finds that the respondent had a policy of requiring staff to provide evidence of medical appointments which they wanted to take during normal working hours and a policy of requiring staff to make up time they took off to attend appointments during normal working hours. The tribunal finds that there was no policy, as alleged by the claimant, of requiring staff to take unpaid time off to attend medical appointments during normal working hours.

40. Ms Kiernan spoke to the claimant on 9 July 2019 and told her that all staff that attended appointments during working hours needed to provide proof of the appointment. The claimant's position was that as she was using a combination of her lunch hour and TOIL in order to attend her appointment, this was her own time and therefore she did not need to supply a copy of the

appointment letter. This was a position maintained by the claimant in oral evidence to the tribunal. The claimant also said that she did not wish to have her personal medical information held physically on record in the outpatients' department. This position was set out in an email to Alison Rance on 9 July 2019 at 15:28, the main subject of which was the claimant's request to change her working hours. The claimant had not previously provided copies of her medical appointment letters as those appointments, which happened when Ms Odika was supervising, took place during the claimant's lunch hour and therefore proof was not required.

41. The claimant said that she was required to attend the following medical appointments in 2019: 12 March; 26 March; 3 June, 19 June, 8 July, 14 August, 21 August and 22 August. Proof of the appointments on 12 March 2019 and 8 July 2019 were provided to the tribunal. These appointments appear to be connected to the claimant's disability. The report resulting from the patient's appointment on 12 March 2019 refers to a three month follow up.

42. The respondent does not have a TOIL policy. The evidence of Ms Kiernan was that TOIL is taken back at a time agreed between the respondent and an employee and the tribunal accepts that evidence.

43. The tribunal finds that Ms Kiernan was acting within the respondent's policy guidance when requesting a copy of the appointment letter from 8 July 2019. The tribunal finds that where the claimant attended an appointment using TOIL she was attending an appointment during working hours. The claimant claims that she was forced to use her lunch times and TOIL to attend medical appointments. The tribunal finds that there is no evidence to support this claim. The evidence is that time off during working hours could be granted to attend appointments, and the time must then be made back.

44. The claimant claim's that the request for proof of the appointment was an act of direct race discrimination and relies on a hypothetical comparator being a white colleague. This should be a white disabled colleague who had taken TOIL to attend an appointment. The tribunal finds that the claimant was requested to provide proof of her appointment in line with the respondent's policy and a white employee would have been treated the same.

45. Following the claimant's response to her proposed flexible working terms on 8 July 2019 a number of emails were exchanged between the claimant and Ms Rance. The claimant wanted to have a short lunch (30 minutes) and finish at 5pm. Ms Rance offered a one-hour lunch and a 5.30 finish. In her emails the claimant drew a connection between the request for an appointment letter and Ms Rance's flexible working offer. She also referred to her belief that she was disabled for the purposes of the Equality Act 2010 and that she was being asked to use her own time to attend medical appointments. Ms Rance suggested that the two meet on 11 July 2019 and said that she was not dealing with the matter of the appointment letter.

46. A meeting took place on 11 July 2019 between Ms Rance, Ms Kiernan and the claimant. The claimant maintained her position on the appointment letter and Ms Kiernan said that the only information required was the date, time and location of the appointment as other information could be redacted. An occupational health report was sought as regards the flexible working terms.

47. On 19 July 2019 Ms Kiernan spoke to the claimant and another member of staff in a public area about a work-related matter. The claimant was writing in a note book. Ms Kiernan perceived the claimant not to be listening to her and asked her to put the note book away. The claimant says that she was making notes about the conversation. On the same day the claimant raised that she wanted to carry out a certain work-related task (moving a trolly of patient files around departments) less frequently. Ms Kiernan said that the claimant argued and challenged instructions in public. The claimant denies this.

48. On 22 July 2019 as the appointment letter had still not been provided Ms Kiernan emailed the claimant as follows:

> *Can you please provide the evidence by tomorrow Tuesday 23 July as failure to do so will result in the matter being taken further.*

49. The claimant responded on 23 July 2019 with an email headed 'Medical appointment information request – Discrimination and Harassment', in which the claimant accused the respondent of victimisation, linked the matters of the flexible working request and request for proof of the medical appointment and re-iterated her view that TOIL was her own time and proof of the appointment was not required. Ms Kiernan referred the email to Ms Rance and to Alison Harrowell, the department's HR business partner. Ms Rance invited the claimant to a meeting with Ms Rance and Ms Kiernan on 29 July 2019. The claimant said she would rather meet with HR first.

50. On 26 July 2019 the claimant was called away from reception and a colleague, Natalie Fletcher took over her duties temporarily. Ms Fletcher says that the claimant did not properly log out of the computer. When the claimant returned to her desk she saw that she was still logged in and accused Ms Fletcher of reading her emails, which Ms Fletcher denied. The claimant sent an email to Ms Fletcher later that day, copying in Ms Rance, Ms Kiernan and two HR colleagues again accusing Ms Fletcher of reading her emails and stating '*Given the ongoing difficultly I am currently experiencing at work this is another concern for me and a detriment allegedly*'.

51. Ms Fletcher went to see Ms Kiernan about the email, and Ms Kiernan took Ms Fletcher to see Ms Rance. Ms Rance asked her to make a statement. She did so by email on 28 July 2019. Ms Fletcher repeated that the claimant had not logged out correctly and due to pressure of time in terms of patients waiting to be acknowledged, she did not do this for the claimant but logged onto a PC. Ms Fletcher said that the claimant had been unprofessional and that she had raised issues she had with the claimant to management in the past.

52. The claimant says that the respondent failed to investigate her allegation against Ms Fletcher, and this was an act of direct race discrimination. Ms Rance says that she had the email from the claimant and asked Ms Fletcher to make a statement which she did on 28 July 2019. Ms Rance says she intended to hear further from the claimant when she met her on 5 August 2019. The principal reason for the meeting on 5 August 2019 was to discuss an Improvement Notice and details as to how this arose are set out below. Mr Obazuaye noted that the invitation to a meeting on 5 August 2019 came from Ms Kiernan and was not copied to Ms Rance. Ms Kiernan said that she had not understood that Ms Rance was coming to the meeting about the Improvement Notice but Ms Rance had said she would be speaking to the claimant and Ms Fletcher about the incident of 26 July 2019 on 5 August 2019. Ms Rance said that she was intending to attend the Improvement Notice meeting and address the Natalie Fletcher matter with the claimant there. The tribunal finds that it was the intention of Ms Rance to investigate the incident of 26 July further on 5 August 2019 at the meeting with the claimant and Ms Kiernan, and she did not do so as the claimant did not attend the meeting.

53. On 29 July 2019 a meeting took place between Ms Rance, Ms Kiernan and two HR employees – Ms Harrowell and Geraldine Gavin. Ms Gavin suggested that Ms Kiernan meet with the claimant with a view to issuing an Improvement Notice. An Improvement Notice is part of the respondent's disciplinary process. The relevant sections of the policy are as follows:

> *7 INFORMAL ACTION*
>
> *7.2*
> *Cases of minor misconduct or unsatisfactory behaviour are usually best dealt with informally. This should be regarded as the informal day to day process of maintaining an acceptable standard of conduct within a workplace and as such outside the scope of the disciplinary procedure. A file note of the discussion should be made and a copy given to the employee. This may take the form of an "improvement notice". The manager and employee will meet to discuss but the employee will not be entitled to be accompanied by a trade union or professional organisation representative or work colleague at this stage nor will they be able to appeal any outcomes at this stage as it is informal. At the meeting the employee will be set clear targets of improvement and time scales on when these will be achieved. If the employee does not meet their targets then the manager will proceed to the next stage.*
> *…*
> *7.3*
> *Line managers must always discuss conduct issues with their employees at the earliest opportunity.*

54. On 31 July 2019 Ms Rance received the OH report which included the line: *'Irene herself has asked that I add that she feels due to tiredness towards the end of the day she wishes to leave at 5pm with 30 mins lunch'*. Ms Rance asked the report writer if she herself believed that it was best for the claimant

to have a thirty-minute lunch. The report writer said that it made sense if the claimant got tired toward the end of the day. Ms Rance responded that as the claimant would be working longer days, she believed the claimant needed a full hour's lunch. The report writer noted that a three-day week meant more days for recuperation and suggested Ms Rance discuss it with the claimant.

55. On 1 August 2019 Ms Kiernan emailed the claimant as follows:

> *'Can we please meet on Monday 5 August at 2pm to discuss your recent behaviour and the on-going request for evidence to be provided for the medical appointment you attended during working hours.'*

56. The claimant responded the same day noting that she was being threatened with disciplinary action over refusing to provide the medical appointment letter and noting that there had been no response from management to her email to Natalie Fletcher. The claimant referred to being treated detrimentally because of her disability and race. She said that she was consenting to her husband acting on her behalf and granted him permission to access all employment related records.

57. The claimant wrote to Ms Rance on 4 August 2019 complaining about the delay in finalising the flexible working arrangements. She referred to the delay as a detriment and said she believed she was being treated differently or less favourably because of her race or disability. She noted that she was concerned that "*at no time to date has anyone met with me or canvass my view on what I need, support or reasonable adjustments. I have never been invited to discuss my situation or whether I could remain on a full-time contract with support or adjustments."*

58. The claimant did not attend the meeting on 5 August 2019.

59. On 6 August 2019 Ms Rance emailed the claimant agreeing to a flexible working arrangement in the terms first sought by the claimant. She said the arrangement could start from September due to staffing demands, annual leave and the rota for August already being set. She said the claimant's role would be in the call centre.

60. One of the claimant's claims of direct race discrimination is that Ms Rance did not allow her to take a 30-minute lunch break. Ms Rance's evidence on why she did not address with the claimant her reasons for requesting a thirty-minute lunch break or speak to her about why she (Ms Rance) was concerned about it, was simply that she did not know why she had not done that. The evidence shows that Ms Rance was convinced of her own view to the point of arguing with the OH report writer over the matter. However, Ms Rance authorised a 30-minute lunch break on 6 August 2019, approximately six weeks after the initial request, and the tribunal accepts her evidence that her initial reluctance to do so was because she thought that the claimant's health would not be improved by working a long day with a short lunch break.

61. The claimant responded on 7 August that she was disappointed with the September start time and concerned that she was being moved to the call centre.

62. The claimant and Ms Rance met on 8 August 2019 to discuss these matters. After the meeting Ms Rance re-iterated that the arrangement would begin in September. She also had a meeting with eye clinic leads on 12 August 2019 regarding the claimant's wish to remain in the eye clinic. Ms Rance said that due to ongoing issues in the eye clinic the managers took the view that they required full time staff for continuity purposes. This information was passed on by Ms Rance to the claimant in an email on 12 August 2019.

63. The claimant's case is that the intention to move her from the eye clinic to the call centre was an act of race discrimination. The move never happened as the claimant resigned. The claimant relies on the following comparators: MW, VD, SBB and JJ. MW, VD and JJ are white British and SBB is Black Caribbean. The respondent says that these comparators are not appropriate as they did not work in the eye clinic. The tribunal finds that an appropriate comparator in this matter would be a white person who worked in the eye clinic. The tribunal accepts Ms Rance's evidence that the reason for planning to move the claimant out of the eye clinic if her hours were reduced was due to the specific needs of that clinic.

64. On 9 August 2019 Ms Kiernan issued an Improvement Notice to the claimant. The claimant says she did not receive this until 14 August 2019 and the tribunal accepts that. The Improvement Notice recorded five instances of poor behaviour or minor misconduct: (1) failure to provide a copy of the appointment letter, (2) displaying poor behaviour to Ms Kiernan on 19 July 2019 during the conversation between the two and another reception colleague, (3) displaying an unprofessional attitude in relation to the trolley rota, (4) displaying an unprofessional and poor attitude in relation to the incident with Ms Fletcher on 26 August 2019 and (5) failing to adhere to relevant policies in sending the email to Ms Fletcher and copying in various people on 26 July 2019.

65. The claimant's position is that the Improvement Notice was a fait accompli and the respondent had decided to send it as early as 1 August 2019. She points to an email from 1 August 2019 in which Ms Rance says to HR *"Following this email and our conversation earlier on this week, Claire will send the improvement notice to Irene as she clearly doesn't want to engage and we have tried on numerous occasions."* The claimant does not state in her response to the invitation that she will not attend. Ms Kiernan said that the process is to meet with an employee first and listen to their views. She said that if the claimant had attended the meeting, she may not have issued a notice at that time. She said that the meeting was scheduled, and she kept it in her diary. The Improvement Notice was sent out after the meeting date had passed. The tribunal finds that Ms Rance and Ms Kiernan did assume that the claimant would not attend the meeting on 5 August 2019 but accepts that Ms Kiernan did not decide to issue the notice in the format in which it

went out until after the claimant failed to attend the meeting on 5 August 2019 and put forward her views.

66. The claimant says that the imposition of the notice was an act of direct race discrimination and relies on a hypothetical comparator. The tribunal accepts the evidence of the respondent that the Improvement Notice was issued on the advice of HR after a number of incidents had arisen which gave cause for concern over the claimant's behaviour. Furthermore, it finds that the notice may not have been issued had the claimant attended the meeting on 5 August 2019.

67. On 19 August Peter Towers, outpatients' and haematology service manager, emailed the claimant regarding an incident that came up on an error report of a patient who had not been followed up in June 2019. He said that no harm had been done, told her what the error was and explained what should have happened. He suggested that if she wanted further training, she should speak to Ms Kiernan, and copied in Ms Kiernan. He also acknowledged that as the incident happened some time ago, the claimant may well now be aware of the correct processes. The claimant responded the same day querying the delay in raising the matter, asking why her opinion on what happened had not been sought and referring to her on-going difficulties at work. Mr Towers responded by inviting her to meet him to discuss.

68. The claimant alleges that the actions of Mr Towers on 19 August 2019 were acts of race and sex discrimination. Mr Towers' evidence was that it was part of his role to deal with Datix reports (system error reports). There are many hundreds of these each year. He checks initially when received if an incident is serious. If it is not, it is not prioritised. Any investigation into a low or no harm incident is on paper only and his communication with the claimant was entirely in line with how he would deal with any other similar Datix error report. The tribunal accepts that evidence and finds that the way in which Mr Towers handled this incident was in line with his usual processes.

69. Mr Obazuaye questioned Mr Towers on the example provided by the respondent of a similar error made by a doctor that was addressed in a similar manner by Mr Towers. This was someone who Mr Towers knew. Mr Towers said that he had no access to older Datix reports having moved on, he had selected this incident as it was recent, in his memory so he could look it up, and the person concerned was male and of Pakistani origin.

70. The claimant sent a lengthy response to the Improvement Notice to Claire Kiernan and Alison Harrowell on 20 August 2019. She said that she had not been aware that four of the five issues were matters of concern as they had not been raised with her. Ms Kiernan's evidence is that the matters would have been raised with the claimant at the meeting on 5 August 2019 had she attended.

71. Correspondence between Ms Rance and the claimant continued regarding the flexible working agreement. The claimant did not agree to the terms and on 27 August Ms Rance emailed the claimant stating that there was an appeal

policy and until that was resolved the claimant's current working pattern would continue.

72. On 28 August 2019 the claimant emailed Alison Harrowell, copying in Ms Rance and said that she was resigning without notice due to the respondent's behaviour. The claimant referred to race, disability and sex discrimination, victimisation and harassment.

73. Geraldine Gavin of HR discussed the resignation with Louise Young, division general manager, who decided to offer the claimant a 'resignation in haste' meeting. The respondent does not have a written policy on such meetings. Ms Young wrote to the claimant offering the meeting and giving as her reason *'As the contents of your letter concern me I would like to invite you to a meeting to discuss your resignation in more detail.'* Ms Young says that she meant by this simply that she was concerned by the allegations made in the claimant's resignation letter. Ms Davage in her evidence said the same. She said that the respondent holds resignation in haste meetings when an employee has resigned from their post and has raised points within their resignation letter that could be considered as concerning. The claimant took the wording to mean that Ms Young had prior knowledge of the claimant and her work-related issues. Due to the claimant's suspicions about her prior involvement and not being able to allay those suspicions Ms Young asked a colleague, Jenny Cadman, general manager-medicine, to conduct the meeting.

74. The meeting took place on 14 November 2019. The claimant attended with her husband. Erin Davage, an HR business partner, attended along with Ms Cadman. The claimant and Mr Obazuaye set out the claimant's complaints. Ms Cadman asked questions about what had happened to the claimant. The meeting ended with Ms Cadman saying to the claimant *'OK Irene, thank you for adding clarity to the resignation letter you have submitted.'*

75. Following the meeting, on 4 December 2019, Mr Obazuaye sought an outcome letter and copies of the minutes of the meeting. Ms Davage responded that the meeting was informal and there had been no intention to provide an outcome letter or minutes, however, as the minutes had been requested, she supplied a copy with her response.

76. Ms Davage said that it was not usually the case that an outcome letter would be provided after a resignation in haste meeting. She said that this could happen where new evidence had been raised at the meeting which required further investigation. This was not the case here. Ms Davage said she had attended many resignation in haste meetings and encountered a situation in which a letter was sent on only two occasions. In both of these, new evidence was raised at the meeting. In one case the employee was white and in the other the employee was black.

77. The claimant claims that she was victimised in not receiving an outcome letter and that this was an act of direct race discrimination. The tribunal finds that although some of the phrasing in the invitation letters may have given the

impression that the process was more formal than the respondent intended it to be, there is no policy of providing outcome letters after a resignation in haste meeting, the claimant was not led by the respondent to expect that there would be such a letter, and there is no evidence that she was treated differently to others in this respect.

Submissions

78. Mr Allen provided written submissions to the tribunal. In oral and written submissions he noted that it had not been put to the witnesses that the reasons for their actions were because of the claimant's race and/or sex. He also referred to the claimant's oral evidence that if the alleged perpetrators of discriminatory acts had the same protected characteristics as her, she would have brought different claims against them. Mr Allen said that there was no evidence of race or sex discrimination such that the burden of proof moved to the respondent. On disability discrimination Mr Allen said that Ms Kiernan was unaware that the claimant claimed to have a disability until 23 July and Ms Rance became aware on 24 June 2019. He said that the claims of failure to make reasonable adjustments and victimisation had not been made out.

79. Mr Obazuaye said that he had personally found the experiences the claimant had been through to be distressing. He said that the experience of conducting a tribunal was daunting and having an HR background did not make him a lawyer. Mr Obazuaye said that in a large organisation the delay in dealing with the flexible working request, the refusal to allow the change of hours to commence in August and failure to provide paid time off for appointments was inexplicable. Mr Obazuaye said, in relation to the issuing of the Improvement Notice, that the outcome was predetermined. He said the claimant did not say she would not attend the meeting on 5 August 2019 and it would have been reasonable for the respondent to offer to reconvene. He said if the claimant was white or male this would not have happened, and it did so because the claimant had carried out a protected act. Mr Obazuaye said that the respondent's choice of comparator regarding the Datix incident was inappropriate and if there are hundreds of Datix incidents a similar comparator could have been found.

Conclusions

80. In direct discrimination it is for the claimant to establish, on the balance of probabilities, the factual basis of their claim including facts from which a tribunal could conclude, in the absence of any other explanation, that the employer has acted in breach of the Equality Act 2010. It is only once this is established that the burden of proof switches to the respondent, i.e., the respondent then has the responsibility of providing a reason for its act or omission which is not discriminatory.

81. The witnesses all denied in their witness statements that their actions were discriminatory. It was not put by Mr Obazuaye to any of the respondent's witnesses that their actions were because of the claimant's race or sex and the tribunal notes that therefore the respondent's witnesses' written evidence on this matter was not challenged. The tribunal also noted that the claimant stated in oral evidence that the types of discrimination claim brought were

based on the protected characteristics of the people she accused. These are both serious matters which undermine the claimant's case. Nevertheless, the tribunal took into consideration Mr Obazuaye being a lay representative and the complexity of discrimination law and considered all of the evidence before it in reaching the conclusions below.

Direct Race Discrimination

The allegation that the claimant was treated less favourably by Alison Rance in the way in which her flexible working request was dealt with (specifically by not allowing a thirty-minute lunch break and proposing to move the claimant to the call centre).

82. A thirty-minute lunch break was granted approximately six weeks after the claimant made the request. Nothing was said or provided in evidence which indicated that a white disabled employee would have been treated differently to the claimant. The respondent provided comparator information for AS which showed a similar offer of flexible working terms to those made to the claimant. AS is a white Greek woman. There was no indication that the proposed move to the call centre was raised because of the claimant's race and Ms Rance's explanation on 8 July 2019 of the reason for the move as well as her further investigations when the claimant challenged this show that there was a clear nondiscriminatory purpose behind the action which was explained to the claimant at the time. Ms Rance handled the request poorly. She mistook the claimant for another colleague then failed to engage with the claimant over the length of lunch break, instead making assumptions about the claimant's abilities that she could and should have discussed with the claimant. However, the tribunal does not find that because the request was poorly managed by Ms Rance this an act from which it could be inferred that Ms Rance's actions were discriminatory on the grounds of race.

The allegation that the claimant was treated less favourably by the respondent requiring her to use her lunch breaks and time off in lieu to attend medical appointments.

83. The claimant was not required to use her lunch breaks and time off in lieu in order to attend appointments. The respondent's policy was that time taken for appointments in working hours should be worked back. This was applied to all employees. As the claimant was not required to use her lunch break and TOIL for medical appointments, no act of discrimination can be supported by this allegation.

The allegation that the claimant was treated less favourably by Claire Kiernan asking her for evidence of a medical appointment she attended on 8 July 2019.

84. The respondent's policy is that evidence of medical appointments attended during working hours should be provided. The tribunal found that appointments taken using TOIL were appointments taken during working hours. The tribunal finds that the claimant was treated in accordance with

policy and that another employee would have been treated the same regardless of their race.

The allegation that the claimant was treated less favourably by the respondent failing to investigate the claimant's concerns about Natalie Fletcher.

85. Ms Rance investigated the incident in that she received an account from the claimant (the email to Ms Fletcher to which she was copied in) and obtained an account from Ms Fletcher. The tribunal has accepted Ms Rance's evidence that further investigation would have taken place on 5 August 2019 had the claimant attended the meeting with Claire Kiernan. As the respondent investigated the incident no act of discrimination can be supported by the allegation.

The allegation that the claimant was treated less favourably by Claire Kiernan issuing an Improvement Notice dated 9 August 2019.

86. The Improvement Notice process is a part of the respondent's disciplinary processes. Ms Kiernan set out that she had concerns about the claimant's behaviour and she had discussed these with HR who suggested an Improvement Notice. She gave evidence that although drafted before the meeting of 5 August 2019, had the claimant met with her the notice may not have been issued or may been amended. The tribunal accepted this evidence and finds that this was not an act from which it could be inferred that Ms Kiernan's actions were discriminatory on the grounds of race.

The allegation that the claimant was treated less favourably by the respondent failing to send an outcome letter after the resignation in haste meeting.

87. The respondent's evidence was that most resignation in haste meetings were not followed with an outcome letter. Those that were involved new evidence being heard at the meeting which necessitated further investigation. Its position is that the claimant's case did not fall into that scenario. Even if it is arguable that not receiving an outcome letter was less favourable treatment, neither Ms Cadman nor Ms Davage was involved in the claimant's case before her resignation and there is nothing to suggest that their actions were motivated by discrimination. The tribunal finds that this was not an act from which it could be inferred that the respondent's actions were discriminatory on the grounds of race.

Direct Sex and Race discrimination

Was the claimant treated less favourably by Peter Towers sending an email on 19 August 2019 in which it was suggested she should undertake training.

88. The email of 19 August 2019 did not suggest that the claimant should undertake training. It suggested that if she felt she needed training she should access it through her manager. The tribunal concludes that the claimant did not receive the treatment she complained of and therefore this allegation cannot support a claim of discrimination.

Direct Discrimination claim – consideration of acts cumulatively

89. The tribunal considered, in relation to direct discrimination, whether looking cumulatively at those acts relied upon which the tribunal found had occurred, the acts complained of were done on discriminatory grounds. There are seven allegations involving five named individuals and the respondent in general. The tribunal has found that for three of the allegations, the act complained of did not take place in the way suggested by the claimant. The matters complained of were dealt with by different individuals. In the case of Ms Davage and Ms Cadman, they were uninvolved with the claimant until she resigned, when they were tasked specifically with hosting a resignation in haste meeting. Mr Towers was not involved in management of the claimant and simply raised a data processing issue with the claimant. Ms Rance and Ms Kiernan were dealing with separate issues (flexible working and proof of the appointment on 8 July) although there was some cross over due to Ms Rance being the manager of Ms Kiernan. The tribunal finds that the acts complained of were unrelated and that there is no evidence either singly or cumulatively that any of these acts were motivated by discrimination on the grounds of race or sex.

90. The claimant's claim of direct race and sex discrimination fails as she has not shifted the burden of proof to the respondent.

Victimisation

91. Victimisation occurs when a person subjects another person to detriment because that person has done a protected act. A protected act would include alleging that a person had contravened the 2010 Act.

92. The tribunal finds that the following acts of the claimant were protected acts for the purpose of s27 of the Equality Act 2010: the claimant's emails of 24 June 2019 [15:06], 9 July 2019 [15:28], 11 July 2019 [12:17], 23 July 2019 [437], 26 July 2019 [13:08], 1 August 2019 [479], 4 August 2019 [08:06], 8 August 2019 [09:30], 14 August 2019 [08:04], 15 August 2019 [10:34], 28 August 2019 [07:15] and 31 August [15:02]. In all of these emails the claimant refers to discrimination.

93. The tribunal finds that the following acts were not protected acts as they were not acts done by the claimant: (1) the respondent issuing an Improvement Notice dated 9 August 2019 and (2) Peter Towers email to the claimant dated 19 August 2019.

    The allegation that the claimant was not allowed to have a working pattern which included a 30-minute lunch break and it was proposed to move her to the eye clinic, because she had done a protected act.

94. The tribunal found that Ms Rance's concerns about the claimant taking a 30-minute lunch break were due to her concerns about the claimant working a long day in a difficult role with only a short break when she was unwell. The claimant was allowed a working pattern which included a 30-minute lunch break. The tribunal found that the reason for the proposed move to the call

centre was that due to historical problems in the eye clinic the managers of that service wanted full time reception staff to provide continuity. Whilst the tribunal accepts that Ms Rance could have handled the claimant's request differently (for example by meeting with the claimant to tell her that she had confused her request with that of a colleague's and discussing with the claimant why she believed a short lunch was a better option than a later finish time) this is a matter of poor management not victimisation. The tribunal does not accept that the claimant was victimised because she raised Equality Act matters.

The allegation that Claire Kiernan imposed an improvement notice dated 9 August 2019 on the claimant because she had done a protected act.

95. The tribunal found that Ms Kiernan had been advised by HR that in view of a number of concerns about the claimant's behaviour an Improvement Notice was appropriate. The Tribunal accepted that if the claimant had attended the meeting on 5 August 2019 the notice may not have been issued or may have been worded differently. The tribunal does not find that the issuing of the notice was an act of victimisation, as it does not accept that it was issued because the claimant did a protected act, but because of concerns about her behaviour.

The allegation that Peter Towers sent an email to the claimant on 19 August 2019 suggesting that she undertake training, because she had done a protected act.

96. The tribunal does not accept that Mr Towers email suggests that the claimant should undertake training. As the tribunal does not accept that the alleged detriment took place no claim of victimisation can be founded on this allegation.

The allegation that the respondent failed to send an outcome letter after the resignation in haste meeting because the claimant had done a protected act.

97. The tribunal accepts the respondent's evidence that outcome letters were not usual after a resignation in haste meeting and that the claimant's case was not one where such a letter was warranted. No outcomes or actions were agreed at the meeting. The tribunal finds that no letter was sent because there was no practice of sending such letters and this was unconnected to any protected act the claimant did.

98. The claims of victimisation are dismissed.

<u>Failure to Make Reasonable Adjustments</u>

99. The tribunal's task is to first consider the proposed provisions, criteria or practices (PCPs) and determine whether there was a PCP that placed the claimant, as a disabled person, at a substantial disadvantage. The question of whether there was substantial disadvantage requires identification of a non-disabled comparator (usually in these cases, a hypothetical comparator) who would not suffer the disadvantage. If there are one or more such PCPs and the employer has knowledge of the disability and its effects, the tribunal

will move to consider whether the respondent can show it has taken such steps as were reasonable to avoid that disadvantage.

Did the respondent operate the PCP of requiring staff in the role that the Claimant and others held to take a full hour for lunch?

100. The tribunal found that there was no such PCP. Evidence was given by the respondent's witnesses that some staff in other departments had shorter lunch hours. Furthermore, the respondent was not required to take an hour for lunch and her request to reduce her lunch break was agreed six weeks after she requested it.

Did the respondent operate the PCP of requiring staff to provide evidence of medical appointments, which they wanted to attend during normal working hours?

101. The tribunal finds that this was a PCP operated by the respondent. It does not find that the claimant has shown that, as a disabled person, she was substantially disadvantaged by the policy in comparison to non-disabled employees who would also have been asked for evidence. No reason was put forward as to why the claimant's concerns about confidentiality would be particular to a disabled person. The claimant admitted in oral evidence that her disability did not prevent her from or make it difficult for her to provide proof.

Did the respondent operate the PCP of requiring staff to take unpaid time off to attend medical appointments during normal working hours?

102. The tribunal finds that the respondent did not operate such a PCP. However, the tribunal finds that the respondent did operate PCPs of requesting staff to arrange medical appointments outside of working hours where possible and a PCP of not granting paid time off for medical appointments. The tribunal went on to consider whether these PCPs placed the claimant, as a disabled person, at a substantial disadvantage.

103. The claimant had five appointments in the period March to July 2019 and three in August. The tribunal was shown evidence that two were connected to her disability. In the tribunal's view one appointment a month is not a particularly high number of appointments. A non-disabled person with a medical issue could have the same number of appointments. The claimant did not put forward any reason why her disability made it more difficult for her to arrange appointments outside of working hours or why as a disabled person she would be put at a particular disadvantage in not being granted paid time off. The claimant has not shown that, as a disabled person, she was substantially disadvantaged by these PCPs in comparison to non-disabled employees.

104. The claimants claim of failure to make reasonable adjustments is dismissed.

Constructive discriminatory dismissal

105. The claimant's claim of discriminatory dismissal under s39(2)(c) Equality Act 2010 is founded on the same allegations as raised in her direct discrimination claim. As the tribunal has not upheld the claim of direct discrimination, the claim of constructive discriminatory dismissal cannot be upheld and is dismissed.

Time

106. The respondent argued that the claims of race discrimination and victimisation founded on the claimant's claim that no outcome letter was issued after the resignation in haste meeting were out of time. The tribunal has not upheld these claims but did go on to consider the time issue. It was not put by the claimant that the incident was part of a continuing course of conduct. In any event the tribunal found that it was not. The incident concerned two people that were unconnected to the claimant's case and tasked with hosting the meeting after her resignation. The tribunal also decided that it would not be just and equitable to extend time. Whilst there would be no particular prejudice to the respondent in that it had prepared a response to the allegation, and the tribunal notes that Mr Obazuaye is a lay representative, the claim was brought substantially out of time (in the third week of June 2020 at the earliest) and Mr Obazuaye had flagged to the respondent as early as 5 December 2019 that he might seek to amend the claimant's claim which had already been filed by that time. He did not do so, raising the matter only after more than six months had elapsed. He was aware that he needed to make the application, he was aware of the time limits, and he did not take any action.

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Employment Judge Anderson

Date: 18 July 2022

Sent to the parties on: 20 July 2022

For the Tribunal Office

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