EMPLOYMENT TRIBUNALS

Claimant: **Ms C T Chinkuli**

Respondent: **One Housing Group Limited**

Heard at: **East London Hearing Centre**

On: **20 – 22 July, 11 August and (in chambers) 16 August and 5 September 2022**

Before: **Employment Judge Goodrich**
Members: **Mr P Quinn**
Mr M Rowe

Representation:
For the Claimant: **Representing herself**
For the Respondent: **Mr H Sheehan (Counsel)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the Claimant's complaint of race discrimination fails and is dismissed, as further set out below.

REASONS

Background and the Issues

1. The background to this hearing is as follows.

2. The Claimant presented her Employment Tribunal claim on 24 June 2020. Before doing so she had obtained an early conciliation certificate from ACAS. The date of receipt by ACAS of the early conciliation notification was 7 May 2020; and the date of issue of the certificate was 7 June 2020.

3. In section 8 of her ET1 claim form the Claimant ticked the boxes for bringing claims for unfair dismissal (including constructive dismissal) and race discrimination. She also ticked that she was making another type of claim, namely a breach of the Health & Safety Act 1974 for work related anxiety and stress.

4. The Claimant gave her dates of employment as being from 7 August 2019 to 14 February 2020 so that she did not have the necessary two years continuous employment in order to bring an "ordinary" complaint of unfair dismissal.

5. A Preliminary Hearing of the case was conducted by Employment Judge Walker on 3 November 2020.

6. Employment Judge Walker struck out the Claimant's unfair dismissal claim on the basis that it had no reasonable prospect of success because she did not have the necessary two years qualifying employment; and recorded that the Claimant's race discrimination claims would proceed.

7. Employment Judge Walker discussed the Claimant's race discrimination complaints, noting that the Claimant had put them forward as claims for harassment although it seemed to the Judge that at least one of the claims was more properly a direct discrimination claim, rather than a harassment claim. The Judge also stated that the list of issues would need to be reviewed by the Tribunal hearing the claim.

8. Employment Judge Walker set out the list of issues in the case and made case management orders for the preparation of the case for the full merits hearing of this case. The case had already been listed for a hearing for five days.

9. There were various disputes between the parties on case management matters, including a request for specific discovery made by the Claimant; and an application for relabelling and withdrawal of the issues and matters identified by Judge Walker at the Preliminary Hearing to which we have referred.

10. On 25 February 2022 a further Preliminary Hearing took place before Employment Judge Hallen. He made an order for specific discovery, for the Respondent to produce a number of documents. He also recorded a number of complaints in Judge Walker's list of issues that the Claimant no longer wished to rely on; and agreed to a reclassification of some of the complaints of race discrimination harassment as being complaints of direct race discrimination. In his order for specific discovery, he ordered that the Respondent provide the documents concerned; or, if unable to produce this specific discovery, to explain in writing why this could not be done.

11. The Respondent provided to the Claimant some of the documents ordered; and provided an explanation for those ordered it did not provide (that the document in question did not exist).

12. The Claimant, by email dated 17 March 2022, made an application for the list of issues that had been drawn up at the two Preliminary Hearings to be amended again, highlighting some additional issues she wished to have included.

13. The Claimant's application was considered by Employment Judge Hallen who refused the application. The reasons given were that they had been determined at the Preliminary Hearing by Judge Walker and revisited on 25 February 2022, when further changes were made. Judge Hallen stated that it was made clear to the Claimant at the time that she could not continually attempt to change the list of issues that had already been defined by Judge Walker on 3 November 2020 as it was not fair to the Respondent, nor a proportionate use

of the Tribunal's resources and stated that no further changes will be permitted to the list of issues.

14. Although Judge Hallen's Preliminary Hearing document did not attach an updated list of issues to reflect the changes made at the Preliminary Hearing conducted by him, the Respondent had drawn up a list to reflect the changes. I asked the Respondent's representative and the Claimant whether this was now agreed to be the list of issues and they both confirmed that it was.

15. As the Claimant was representing herself, the Tribunal noted that the list of issues of race discrimination, harassment did not include an issue that the Claimant's constructive dismissal was an act of race discrimination harassment. The Judge asked the Claimant about this, and she made an application to amend the list of issues to include such an issue.

16. Mr Sheehan, on behalf of the Respondent, objected to the Claimant's application and the Tribunal heard submissions on the point. The Judge informed the parties that the Tribunal will be considering the matter in accordance with the guidance given in the case of *Selkent v Moore*; and *Vaughan v Modality*, together with the Tribunal's overriding objective.

17. The Claimant's submissions included the following points:

17.1 She did not know, having had her complaint of constructive unfair dismissal struck out, that her dismissal could be in the list of race discrimination allegations.

17.2 Although she had gone to a Citizens Advice Bureau to obtain advice, the advice she was given was vague and so she did the case herself.

17.3 She did not know the ins and outs of employment law and had always wished to bring a complaint about her dismissal.

17.4 The reason for her dismissal was the harassment she suffered, and the last straw was her meeting with Ms Judge.

18. On behalf of the Respondent the submissions of Mr Sheehan included the following points:

18.1 If the application to include the Claimant's dismissal as an act of race discrimination harassment had been made at the first hearing it could probably have been considered as a minor amendment. This was a claim that had already been clarified at two Preliminary Hearings. It was a major change because it changed the Claimant's case from isolated incidents of alleged race discrimination to looking at the employment of the Claimant as a whole.

18.2 The complaint was not on the list of issues and the application is by now miles out of time on a case which has had multiple hearings.

18.3 There would be substantial prejudice to the Respondent if the complaint was allowed. They had not come prepared to deal with this and it was a case where the Claimant had not made a grievance at the time or complained at the time so further evidence and instructions would be needed on issues such

as the Claimant's reasons for resignation and whether she had waived her right to bring a claim. Further discovery might be needed as the Claimant's WhatsApp texts were selectively raised where there may be other documents relevant to her resignation that were not before the Tribunal.

18.4 The value of the claim stood to increase substantially if the constructive dismissal complaint were to be allowed and the Respondent might have chosen a more senior barrister if the claim were to have been for a higher value.

18.5 Further instructions would be needed and one of the Respondent's witnesses (who had left the Respondent's employment) was not available today.

19. The Tribunal, after considering the Tribunal's overriding objective and the guidance given in cases such as *Selkent v Moore* and *Vaughan v Modality* (referred to above) decided, on balance, to reject the application because:

19.1 None of this Tribunal were present at either of the Preliminary Hearings where the list of issues was discussed, so we are unaware whether a claim that the Claimant's (constructive) dismissal was an act of race discrimination was discussed.

19.2 The Claimant had ticked in box 8 of her claim form that she was bringing a claim of race discrimination so, to that extent, her application on the first day of this hearing was not out of time.

19.3 The Claimant's details of claim were drafted in a lengthy narrative which read like diary entries, giving different dates for events the Claimant said had occurred. It was difficult to determine what parts of her claim were meant as background or general narrative, or what were intended to be complaints of race discrimination for the Tribunal to decide.

19.4 If we had been conducting either of the two Preliminary Hearings and the Claimant was wishing to put forward a complaint that her constructive dismissal was an act of race discrimination, we would almost certainly have allowed it. There was enough in her claim form to consider that it was a claim she wished to bring. At most it we would have considered it to be a minor amendment.

19.5 The difficulty we have with the application is that it has been made at such a late stage, with the extensive case management that has already taken place.

19.6 Employment Judge Hallen gave specific consideration to the Claimant seeking to make further amendments to the list of issues after he had conducted the Preliminary Hearing on 25 February 2022. In a letter from the Tribunal written at his direction, it was stated as follows:

"…Judge Walker at the Preliminary Hearing on **3 November 2020** set out the list of issues to be determined at the …hearing….and further changes made to (sic) is as set out in the order of **25 February 2022**. It was made clear to you at the time that you could not continually attempt to change the list of

issues that had already been defined by Judge Walker on **3 November 2020** as it was not fair to the Respondent or a proportionate list of resources.

As the list of issues have already been defined by Judge Walker and further amended by Judge Hallen on **25 February 2022**, no further changes will be permitted to the list of issues that have been defined for the substantive hearing. Your application is refused."

19.7 So far as we are aware the Claimant was not asking to amend the list of issues to include an issue that her dismissal was an act of race discrimination. Employment Judge Hallen, however, did state very clearly that no further changes to the list of issues would be amended.

19.8 If, therefore, the Tribunal were to amend the list of issues as requested, this would be in direct contradiction of what Employment Judge Hallen had stated. Guidance has been given to Employment Tribunals that only in rare circumstances should a Tribunal interfere with an earlier order made by a judge of equivalent jurisdiction.

19.9 As the Claimant brought a claim of race discrimination in her claim form and it was then a matter of working out what that claim was, we do not consider time limits to be a significant consideration. If the Claimant had the necessary two years continuous employment to bring her constructive unfair dismissal claim, it would have been in time.

19.10 There would potentially be prejudice to the Claimant if her application were to be refused. Refusing to allow the addition to the list of issues would make it highly unlikely that she could bring a claim for loss of earnings, which forms a substantial part of her schedule of loss.

19.11 There would also be prejudice to the Respondent if we were to allow the addition to the list of issues. They would be having to respond to a claim that they have not been prepared to defend. This would require further inquiries on their part and, possibly, further witness evidence. There might be witness evidence as to any oral reasons the Claimant gave for resigning, for example, or some documents to be considered. It is also difficult for the Respondent that one of their witnesses has left their employment and would not be present on the first day of the case. These kinds of issues had the potential to de-rail this hearing, which already had less than three days of the five days allocated to it. Such difficulties might cause further delay and expense in deciding the case.

19.12 On balance, therefore, the Tribunal decided to refuse the application.

20. Another issue the Tribunal considered on the first morning of the hearing was whether the Tribunal should consider evidence on remedy so that, if the Claimant were to be successful in all or part of her claim, a judgment could be given on remedy.

21. The Tribunal heard representations on this issue. The Claimant's documents included a claim for loss of earnings (albeit one in the light of the Tribunal's decision on the constructive dismissal point might be hard to sustain) did not include mitigation evidence up

to the point of finding a new job from which she was no longer claiming loss of earnings. Nor did her witness statement include evidence on remedy.

22. As the Tribunal's timetable was already tight, with the Tribunal only having three days available (and one day finishing early) for a case that had been listed for five days, the Tribunal considered it undesirable to seek to add remedy evidence and submissions as well as deciding whether the claims succeeded or not.

23. In addition, the Tribunal was mindful of a request for reasonable adjustments made by Mr Sheehan. He explained that he had recently had major surgery from which he was recovering and would be classified as disabled. He asked for more regular breaks than might usually be the case and to have some additional time to prepare typed closing submissions, rather than needing to work late after the end of the Tribunal's day. The Tribunal agreed to this request.

24. The Tribunal decided, therefore, to make this hearing one to consider liability only, with a separate remedy hearing to be conducted if the Claimant were to be wholly or partly successful in her case.

25. Another problem identified by the Tribunal was that the list of issues on time limits contained no reference to whether, if any of the complaints were out of time, was the complaint presented within such other period as the Employment Tribunal thinks just and equitable. This, in the Tribunal's experience, is a standard question on time limits in discrimination claims.

26. An additional problem was that the Claimant's witness statement did not contain any evidence dealing with whether it would be just and equitable for the Claimant to extend time limits.

27. The Tribunal raised this issue with the parties. The Respondent objected to the Claimant being able to give evidence on this topic and the Tribunal heard submissions for and against her being allowed to do so.

28. The Tribunal decided to permit the Claimant to give oral evidence on the question of, if any of her complaints were out of time, why the claim was presented when it was rather than at an earlier date through the Judge asking the Claimant some questions on the issue, the Claimant giving her evidence and being cross-examined on the point. The Tribunal considered its overriding objective, and our reasons were:

28.1 Time limits are a jurisdictional issue – if a complaint is out of time (and time limits are not extended) the Tribunal cannot consider the complaint in question. If the list of issues had made no reference to time limits the Tribunal would have needed to nonetheless consider time limits if a complaint was out of time- we consider, therefore, that this issue differs from our considerations above as to adding to the race discrimination issues. We would have had expected the issue of whether it would be just and equitable to extend time limits to have been in the list of issues.

28.2 Regrettably, the Claimant's witness statement did not contain the necessary evidence in order to enable the Tribunal to consider whether time limits should be extended for any complaints that are held to be out of time. In the Tribunal's

experience this is not uncommon with Claimants representing themselves. These are the kinds of problems that Employment Tribunals dealing with Claimants representing themselves are used to dealing with. For example, it is not uncommon, in our experience, for Claimants not to put in their witness statements evidence relevant to remedy even although a case is listed both for liability and (if successful) remedy. The Tribunal would not refuse the Claimant any remedy award but would deal with these sorts of problems proportionately. Part of the Tribunal's overriding objective is, so far as practicable, to ensure that the parties are on an equal footing.

28.3 So far as prejudice to the Claimant is concerned if not allowed to give such evidence, she would be greatly disadvantaged as her claim would have to be rejected even if well founded.

28.4 So far as prejudice to the Respondent is concerned, if the Claimant were to be allowed to give such evidence, we detect no prejudice to them. The Respondent is professionally presented by a competent representative experienced in employment law. The Tribunal also offered the Respondent an adjournment to take further instructions if they so wished following the Claimant's evidence on the extension of time limits issue (an offer which they did not take up).

29. The list of issues is attached to this judgment. In view of our decision above, the list is amended so that, at the section on the time limits at (b), there is to be added the sentence "if a complaint is out of time was it presented within such other period as the Employment Tribunal thinks just and equitable?". for the reasons set out above.

30. As the case had been listed for five days, but a Tribunal only available for three of those days (on one of which it was necessary to finish early) closing submissions were given by Cloud Video Platform remotely and orders made for the Respondent to file and serve their closing submissions by or before **6pm** on **26 July 2022;** and for the Claimant, by or before 4pm on **28 July 2022** to file and serve her closing submissions.

The Relevant Law

31. The Claimant has brought two types of race discrimination complaint, namely of direct race discrimination and race discrimination harassment.

32. Direct race discrimination involves consideration of section 13 Equality Act 2010 ("EQA") in conjunction with section 39.

33. Race discrimination harassment concerns section 26 EQA when read in conjunction with section 39.

34. The effect of section 212(1) EQA is that harassment and direct discrimination are mutually exclusive, so that a Claimant cannot succeed for the same allegation for both types of race discrimination claim.

35. For direct race discrimination section 23(1) EQA provides that there must be no material difference between the circumstances relating to each case. A comparator may be a named or hypothetical comparator. A Tribunal must be astute as to the material

circumstances of the comparators; and a comparator whose circumstances may have material differences with the Claimant may nevertheless be evidence of how a hypothetical comparator would have been treated.

36. In both direct race discrimination and race discrimination harassment claims the Tribunal needs to consider matters in accordance with the burden of proof provisions of section 136 EQA.

37. Guidance was given in the case of *Igen Limited V Wong 2005 IRLR 258 CA* and many subsequent cases as to how the burden of proof provisions should be approached.

38. In *Igen v Wong*, guidance was given that 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, apart from the section, conclude in the absence of an adequate explanation, that the Respondent has committed, or is to be treated as having committed the unlawful act of discrimination against the Respondent. The second stage, which only comes into effect if the complainant has proved those facts, requires the Respondent to prove that it did not commit, or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld.

39. *Igen v Wong* set out 13 points as to what needed to be proved in relation to the burden of proof provisions. We do not set them out in detail here, although we have borne them in mind.

40. In *Madarassy v Nomura International Plc (2007) EWCA Civ 33* it was stated that the bare facts of a difference in status and difference in treatment only indicate the possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that, on the balance of probabilities, the Respondent has committed an act of unlawful discrimination.

41. Tribunals have also been encouraged to concentrate on the question of why a Claimant in a case was treated in the way he or she was. Was the treatment on the prescribed ground or was it for some other reason? If the former, guidance was given that there will usually be no difficulty in deciding whether the treatment afforded to the Claimant on the prescribed ground was less favourable than was or would have been afforded to others.

42. In relation to race discrimination harassment, guidance was given in the case of *Richmond Pharmacology Limited v Dhaliwal 2009 IRLR 36* EAT that the necessary elements of liability for harassment are threefold namely:

42.1 Did the Respondent engage in unwanted conduct?

42.2 Did the conduct in question have either the purpose or the effect of either violating the Claimant's dignity or creating an adverse environment for him or her – the proscribed consequences.

42.3 Was the conduct on a prohibited ground?

43. The Tribunal also has a duty to take into account, where it considers it relevant, the Equality and Human Rights Commission's Code of Practice on Employment.

44. The primary time limit for bringing a race discrimination claim is set out in section 123 EQA. The primary time limit is the period of three months starting with the date of the act to which the complaint relates or, in the case of an omission to do something, three months from the date when the person in question decided on it. This primary time limit is, however, subject to qualifications.

45. Section 123(3) provides that conduct extending over a period is to be treated as done at the end of the period. The burden of proof is on the Claimant to show that incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs. In determining whether there was an act extending over a period the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs.

46. Beyond that, statutory time limits may be affected by the extension of time provisions contained in the early conciliation regulations.

47. Where a claim is out of time, a Tribunal has a discretion to extend time limits to such other period as the Employment Tribunal thinks just and equitable. This is a wide discretion although it must be judicially exercised.

48. Each case needs to be considered in its particular circumstances. The starting point is that statutory time limits are meant to be observed and the burden of proof is on the Claimant to satisfy a Tribunal that it would be just and equitable to extend time limits. The kinds of factors that are usually apt for the Tribunal to consider are the length and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued had cooperated with any requests for information, the promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action, and the steps taken by the Claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

The Evidence

49. On behalf of the Claimant, the Tribunal heard evidence from the Claimant herself, Ms Caroline Chinkuli.

50. On behalf of the Respondent, the Tribunal heard evidence from Ms Hilary Judge, Head of HR (Operations) and Ms Rosamund (“Rosie”) Crabtree, formerly an HR Advisor for the Respondent.

51. In addition, the Tribunal considered the documents to which it was referred in the bundle of documents provided to us.

Findings of Fact

52. The findings we make below are the findings the Tribunal considers relevant and necessary to determine the issues we are required to decide. We do not seek to set out each detail provided to us, nor to determine every detail on which the parties were not agreed. We have, however, considered all the evidence provided to us and we have borne it in mind.

53. The Claimant, Ms Caroline Chinkuli, worked for the Respondent from 7 August 2019 until she gave notice of resignation in an email on 10 February 2020. Her notice of termination took effect on 14 February 2020 which was the effective date of termination of her employment.

54. The Respondent, One Housing Group Limited, is a large housing association. In box 2.7 of their ET3 response form they stated that they employ approximately 1,720 employees in Great Britain.

55. One Housing Group was described in their grounds of resistance as being a registered provider of social housing, regulated by the Regulator for Social Housing. They manage over 16,000 homes in 26 London boroughs and the surrounding counties.

56. Prior to her appointment for her position as a Housing Assistant, the Claimant was interviewed for the position by Ms Rosamund ("Rosie") Crabtree, who was to be her line manager; and Ms Amanda Enwuchola, HR Manager.

57. There was a conflict of evidence as to whether the Claimant's position with the Respondent was the first HR role she had ever performed, as was her evidence; or whether she had previously had a position as an HR assistant in a small housing association, as was Ms Crabtree's evidence. Unhelpfully, the Tribunal was not provided with the Claimant's CV or any details as to the other job applicants and were informed that these had been lost. Be that as it may, the Claimant was inexperienced in the role she was to perform, as will be explored later in this judgment.

58. The Claimant describes her racial origins as being black African.

59. The Human Resources Team consisted of about 17 employees split into different teams. Of these 17 employees, approximately 7 or 8 were not white.

60. The Claimant's immediate line manager, until she left the Respondent's employment on 5 February 2020, was Ms Crabtree. Ms Crabtree is white.

61. Upon Ms Crabtree's departure the Claimant's line manager was Ms Asmeret Haile. Ms Haile was appointed in November 2019 and the Claimant was also working to her. Ms Haile is black.

62. Ms Crabtree's line manager was Ms Hilary Judge, Head of HR (Operations). Ms Judge is white.

63. The vacancy that the Claimant applied for was caused by the promotion of the previous HR Assistant managed by Ms Crabtree. Ms Crabtree described her as having been "fantastic", not requiring much management, using her initiative, being proactive and organised.

64. In dispute was whether the Claimant, who was the successful candidate following the interviews for the HR Assistant role was appointed as a "token black girl" to meet the organisation's diversity goals, as was the Claimant's evidence. Ms Crabtree's evidence was that she was the best candidate for the role and that they needed to fill the role, but that she was not "super impressed" by her application and interview performance.

65. On this dispute the Tribunal prefers Ms Crabtree's evidence. The composition of the HR Department was reasonably diverse. The Claimant, as we will describe later, was hard pressed to get through the work she was required to do, so there was clearly a need for the post to be filled. In the Tribunal's experience it is not uncommon for employers with an urgent need to fill a post to appoint the best candidate that has applied for the job, even if they have some reservations about their suitability, preferring to take a chance with the candidate than leave the post unfilled. Ms Crabtree's evidence, therefore, appeared plausible and credible. Additionally, in view of the amount of work Ms Crabtree needed to put into training a new HR Assistant with limited experience, or no experience, of the work involved, it is unlikely that she would have appointed the Claimant unless she did believe that she was capable of doing the job.

66. The impression given to the Tribunal, however, was also that Ms Crabtree was influenced from very soon into the Claimant's employment by comparisons with her own capabilities when she had been an HR Assistant and those of the Claimant's predecessor, rather than having a realistic assessment of how quickly the Claimant would be able to perform the role competently, even if not to a level to make her an early candidate for promotion. Nor, at some points, to which we refer later, did her management style appear particularly empathic, as will be explored later.

67. The Claimant was issued with a contract of employment. Amongst the contents of the contract of employment were the following:

67.1 Clause 1.2 provided that the first six months of her employment would constitute her probationary period; and that during that period her employment might be terminated at any time on one week's prior notice. It was also provided that the Respondent might at its absolute discretion extend her probationary period; and that during this time her performance and suitability for her continuing employment would be monitored.

67.2 There was a provision that the Claimant might be required to undertake such other duties as might reasonably be required of her in the HR Assistant role, or in a comparable job at any of the Respondent's premises.

67.3 The normal hours of work were described as being 35 hours per week between 8am to 6pm, Monday to Friday exclusive of a lunch break of one hour daily. The actual working hours were to be agreed with her line manager. The Respondent reserved the right to vary these times and hours on a temporary or permanent basis as might be necessary to meet business needs. There was also a provision that she might be required to work overtime in addition to her normal hours of work, for which she would be granted time off in lieu of periods of more than 1 hour, provided that they had been authorised in advance.

67.4 The provisions on annual leave were that the annual leave year ran from 1 January to 31 December each year. The contract provided that the Claimant should give at least two weeks' notice of any proposed holiday dates and that these must be agreed by her line manager in writing in advance.

68. The Respondent, as one would expect of a large employer, has a number of policies including policies such as discipline and grievance, equality and diversity, capability, flexible working and dignity at work.

69. The Respondent's probation policy contained details of how probation would be conducted. Amongst the provisions were the following:

69.1 The employee was expected to fully demonstrate their suitability for the post by reaching and maintaining a satisfactory standard of conduct, performance, time keeping and attendance. The manager was to assist that by ensuring that the necessary information, training and support was provided.

69.2 The manager was expected to meet with the new employee during their first week, ideally on their first day, to discuss the induction and probation process, clarify roles and responsibilities in line with the job description.

69.3 During the probation period, support and monitoring must be undertaken through direct meetings which should assess performance and progress and be properly planned to allow both parties to prepare.

69.4 Where problems were highlighted and/or training needs identified, appropriate support would be provided. The manager should meet with the employee on probation to explain the shortfall between the expected standards and those achieved, and to discuss any additional support or training which could be offered.

69.5 In extreme cases of under-performance, misconduct, other unacceptable behaviour or unsuitability for the role, the manager could decide to conclude the probationary period early and terminate the new employee's employment before the end of the probationary period.

69.6 The probationary period could be extended where the new employee had not performed to the expected standards. There should be evidence to suggest that performance is likely to improve given extra time, which the manager would discuss with the employee.

69.7 If progress was considered unsatisfactory, after an extension or during the initial six-month period, a formal probation review meeting would be conducted and there was provision for the employee to be advised that their employment would be terminated.

69.8 There was a right of appeal against termination.

70. Although the Respondent had a capability policy this policy excluded staff who had not completed their probation period.

71. The Respondent had a flexible working policy and procedure. An application could only be made, however, by an employee who had worked continuously for the Respondent for a minimum of 26 weeks at the date of the application.

72. The day-to-day duties that the Claimant was responsible for performing were notified by Ms Crabtree in an email dated 11 November 2019. Her responsibilities were described as follows:

72.1 First point of contact for general queries.

72.2 MyView.

72.3 Payroll queries.

72.4 Absence management such as inputting of sickness, maternity and paternity records.

72.5 Issuing of contracts and change of term letters.

72.6 Successful probation letters.

72.7 General recruitment updates.

72.8 Staff benefits.

73. The role was predominantly, therefore, to carry out lower-level HR Administration, with the higher-level work being performed by the HR Advisors.

74. Ms Crabtree met with the Claimant on her first day of employment with the Respondent and clarified her objectives for her first week and a half of employment. She confirmed these discussions in an email dated 7 August 2019.

75. On 14 August 2019 Ms Crabtree wrote the Claimant an email setting out her objectives for the following week, following a discussion with her.

76. On 22 August 2019, again following a conversation with the Claimant, Ms Crabtree sent an email to confirm the next things she wanted the Claimant to look at.

77. On 20 September 2019 Ms Crabtree sent the Claimant a much more detailed email following discussions they had had earlier. In that email she raised some concerns about how the Claimant was managing her workload and gave instructions on how she could stay on top of work, manage deadlines and support customers and manager with their queries.

78. On 30 September 2019 she wrote the Claimant another email setting out actions needed by the Claimant.

79. The Claimant by late September was feeling stressed and struggling to cope with her workload. She exchanged a series of text messages with a friend of hers on 27 September in which she described getting to work by 8am in order to get work done before the "floodgates" at 9am; and stated that she was experiencing stress and that she had more work to do than others.

80. On 1 October 2019 the Claimant wrote to her friend complaining of having had to leave work at around 7pm. She wrote to Ms Crabtree on 3 October to inform her that she did not have the capacity to helping every manager who said that they could not use MyView and stated that she was just about managing her current workload to a point of leaving at 7pm. On 18 October she was assessed by a CBT psychotherapist to be referred for six sessions because she presented with symptoms consistent with anxiety. The sessions were to focus on improving her relationships by managing better difficult emotions.

81. In response to the Claimant's email on 3 October Ms Crabtree asked her to document her day by setting out exactly what she had done. The following week, on 11 October 2019 she sent the Claimant a lengthy email. The email started by telling her that she had seen some great work from her and received positive feedback, but that there were a few areas where she was not quite where she would like her to have been at the two-month period. She set out clear details of what she expected in order to meet those improvements. The main issues she perceived were ones of organisation, time management and confidence. At the end of her email, she stated that she needed to see improvement and to work with her to help her get there; and reminded her that she was in probation so that if she did not see improvement then it might affect her employment. She also made reference to time management, acknowledging that the Claimant had been working quite late and attributing this as a concern because she was not currently doing the full role she would like her to do.

82. Ms Crabtree's emails were business-like and undoubtedly as set out in the Respondent's probationary employment policy to which we have referred earlier. They also showed a certain lack of warmth or empathy in their response to the Claimant's perceptions and perspective. We have no doubt, from considering the evidence, that the Claimant was working hard and doing her best in the job and feeling stressed.

83. It is, of course, a difficult balance between setting out clearly the standards expected on an employee who is perceived to be under-performing and consequences if they do not with supporting them; and avoiding attacking the employee's confidence to an extent that the under-performance becomes a self-fulfilling prophesy. In this case, both Ms Crabtree and the Claimant referred to her confidence in performing the job, so the balance was a difficult one to strike.

Allegation (c2) – On 5 November 2019, RC told the Claimant that she was to work under a new HR advisor when the Claimant was already overworked and looking after more work than other members of the team (direct race discrimination)

84. In early November, a new HR advisor was recruited by the Respondent, Ms Asmeret Haile. The post had been vacant for some months as the Respondent had struggled to recruit to the post. Whilst the position was vacant the work to be covered by Asmeret Haile had been temporarily allocated to Ms Crabtree and one of the other HR Advisors, Ms Amanda Enwuchola.

85. After Ms Haile joined, the Claimant continued to carry out the part of the work that had been temporarily covered by Ms Crabtree and performed that element of Ms Haile's work. The Claimant accepted, when cross-examined, that the work she carried out for Ms Haile was not new work but work that was reallocated from Ms Crabtree to Ms Haile.

86. It is correct, as was the Claimant's evidence, that she was covering more service areas of the Respondent than the other HR assistants, as was accepted by the Respondent's witnesses in their evidence. In dispute is whether the Claimant was overworked in comparison to the other HR assistants and, whether or not she was overworked in comparison to them, whether this was because of her race.

87. The Claimant's evidence on being overworked in comparison to her comparators was that she was working long hours and felt overworked; and she was covering more service areas than the other HR assistants. In contrast, the Respondent's evidence was that, although there were more service areas for the Claimant to cover, not all service areas had

an equal volume of work. For example, the Corporate and Finance area which was part of what the Claimant covered had much lower turnover of staff than other service areas so generated less work. The Claimant accepted when cross-examined that she did not know how much work the service areas covered by the other HR assistants generated. Nor was there any convincing evidence that the allocation of work between the HR assistants had any other reasons than the business needs of the organisation rather than the racial origins of the HR assistants. Although, therefore, the Claimant sent text messages to her friend on 5 November 2019 that she was being allocated additional business areas, this conflicts with her evidence when cross-examined. We find that, although not every HR assistant had identical amount workloads at any given time, their workloads were roughly comparable.

Allegation (f3) – On 5 November 2019, RC told the Claimant in front of others that she had to move immediately to sit with the HR Team (race discrimination harassment)

88. Although the Claimant stated in her evidence that the Respondent's HR team moved office premises to Atelier House on 5 November, it is probable that they moved a few weeks before that. The Tribunal notes that emails from Ms Crabtree in early October were giving their previous premises as their address, by 21 October both Ms Crabtree and the Claimant were giving their address as Atelier House.

89. The office premises that the HR Team moved to, had fewer office desks than staff so that the team members were expected to "hot desk". Additionally, they were expected to spend time in the business areas of their clients.

90. In a meeting between Ms Crabtree and the Claimant on 4 November 2019, Ms Crabtree informed the Claimant (and confirmed in her notes of the meeting) that she should start sitting with Customer Services and Property Management (two of the service areas she covered) once a week each.

91. The expectation from Ms Crabtree and Ms Judge was that the HR assistants should spend part of each day in the allocated HR service area and part of the day with their clients. The expectation was that the HR assistants would spend the first part of the day, if possible, in the HR Department.

92. On 5 November 2019, when the Claimant arrived for work, the desks in the HR department were all taken, so she moved to one of her client areas, the Property department, as had been instructed in her conversation with Ms Crabtree the previous day.

93. Later that morning a desk in the HR department had become available. Ms Crabtree wanted the Claimant to move back to the HR department. She went over to the Claimant to ask her to move back to the HR area.

94. In dispute was whether Ms Crabtree asked the Claimant to move back by having a quiet word, not loudly enough to attract attention, as was her evidence; or whether it was loud enough to attract the attention of those nearby.

95. The difference between the evidence is probably more one of interpretation in that whether Ms Crabtree spoke in little more than a whisper or loudly enough for people nearby to hear. The Claimant felt humiliated by needing to move desk and follow her manager back to the HR Department.

96. The Tribunal has some sympathy with the Claimant's perception on this incident. Ms Crabtree accepted that the Claimant was short with her when made the request. From the Claimant's perception she felt that she was being escorted to a desk like a disobedient child.

97. The Tribunal accepts the Claimant's perception that the incident felt upsetting for her. She had been given an instruction the previous day to spend time with her clients, then was told to return to the HR Department and to be following her manager immediately, rather than being given a more low-key request such as asking her to return at some point that felt convenient to her. It was an illustration of the impression the Tribunal got that although it was a perfectly appropriate management request or instruction from Ms Crabtree, it was handled in a way that lacked tact and sensitivity to how the instruction might be received.

Allegation (f8) – On 13 December 2019, put the Claimant's name in full against an error on the BACS spreadsheet, when the error was made by another member of staff and other errors were marked up as HR errors and not attributed to a named individual

98. The HR Department kept a spreadsheet to record payments outside the ordinary payroll cycle. Included in the spreadsheet was a record of errors that had been made and the last column gave the person responsible for the error.

99. The spreadsheet in question recorded errors that had been made, including some by the Respondent's HR department.

100. All the HR department errors were named as "HR" rather than giving the individual name of the HR individual who had made the error. There was one exception which gave the name "Caroline" (i.e., the Claimant).

101. On 13 December there was an exchange of emails between the Claimant and an individual who had received the wrong salary payment and the individual's manager, who confirmed what the correct payment for his salary should have been. She authorised an additional payment to be made to the individual concerned.

102. Although the error was attributed to the Claimant it was not in fact her that made the error.

103. The spreadsheet appears, from the email exchange about the incident, to have been filled in by Ms Haile.

104. The Claimant wrote to Ms Haile, by email dated 27 January 2020, stating that she had noticed that her name had wrongly been entered as the person who made the error.

105. Ms Haile replied by email the following morning stating that she did not remember putting her name (the Claimant's) but that she (Ms Haile) had put her own name down as to who had made the error and had made Hilary (Judge) aware of this.

106. Whatever was on the spreadsheet, therefore, Ms Judge was aware that it was not the Claimant that had made the error.

Allegation (c1) – On 17 December 2019, RC told the Claimant she had to turn up for work at approximately 9am each day when she was in fact entitled to come between 8am and 10am and other HR Assistants on probation were allowed to do that

107. At or around the date that the Claimant started working for the Respondent, Ms Crabtree told her that her normal working hours should be 9am to 5pm.

108. Ms Crabtree's explanation for wanting to work these hours was that, on the whole, these were the hours that she worked, and she did not want her to be working on her own for long periods in the evening if she had started work late.

109. The Claimant, from the records that we have seen or her clocking-in time to the Atelier offices of the Respondent showed that, in general, she started work after 9am.

110. There is no dispute either that on 17 December 2019 the Claimant arrived at work at 10:02am and Ms Crabtree told her that she expected her to be working from 9am to 5pm. From her perspective she did not mind the Claimant starting work a bit later, perhaps 9:15pm or thirty minutes later but that generally she expected her to keep these hours.

111. As far as the Claimant's named comparators are concerned, Ms Crabtree did not manage any of the three HR Assistants with whom the Claimant compares herself. Nor do we have comparative records of their clock-in times in comparison to the Claimant. Even, however, if they had different arrangements with their line managers for when they could start, this would be in line with the Respondent's policy for probationary employees that their times of work were to be agreed by their manager.

112. The Claimant's evidence was also that, in general she arrived at work between 9am and 9:30am. The Tribunal infers from this that the Claimant did in fact have greater flexibility than being required to work from 9am but that Ms Crabtree was expressing concern when she was arriving at work after 10am.

113. The Tribunal has, therefore, some doubts as to whether there was a difference in treatment between how she and the other named comparators were treated.

Allegation (f10) – On 3 January 2020 after the Claimant had asked another HR assistant to clarify her work role for her, HJ whispered about the Claimant, sufficiently loudly for the Claimant to hear, questioning how she not know that (race discrimination harassment)

114. There is an inaccuracy in the above in that the Claimant's evidence was that she was speaking to Ms Haile, who was an HR advisor rather than HR assistant.

115. The Claimant felt unclear as to what business areas Ms Haile was covering and what were being covered by Ms Crabtree.

116. She walked over to where Ms Haile was working. She asked Ms Haile for clarification.

117. Ms Haile was sitting next to Ms Judge so both of them heard the Claimant's question.
118. Possibly in dispute is whether, as was the Claimant's evidence, Ms Judge whispered, "how does she not know this?" as the Claimant was walking away from them but in her earshot. Ms Judge accepted that she might have said this although disputed that she would have whispered it. Also, in dispute is whether Ms Judge sniggered to Ms Haile.

119. The Tribunal finds that Ms Judge did indeed whisper to Ms Haile "how does she not know that?" We so find because the remark represented what Ms Judge was feeling as well as the Claimant being clear that the remark was made and Ms Judge accepted that she might have made the remark. On 16 December 2019 Ms Judge had sent an email to the HR department members setting out what the different HR "patches" were being covered by which members of the team. She felt concerned, or irritated, that the Claimant was asking such a question when this document had recently been sent to her and the Clamant had by then been in post for over five months. The Tribunal doubts, and does not find, that Ms Judge sniggered when she said this, although her tone may have suggested some frustration or exasperation.

120. Ms Judge's explanation for the remark, if she made it, was that she may have expressed surprise at the Claimant not knowing what patches her line managers were covering and that she would have expressed the same surprise if another HR assistant with the same length of service as the Claimant had asked the same question.

121. Ms Haile emailed the Claimant that day resending the information that had been sent on 16 December.

Allegation (f11) – On 27 January 2020, HJ ignored the Claimant when introducing a new HR Advisor to the staff, making comments about them being a good team but excluding the Claimant from that description

122. The incident in question is likely to have taken place on 29 January 2020, not 27 January.

123. Ms Judge agrees that she would have introduced the new starter to the team.

124. In dispute is whether Ms Judge excluded the Claimant from the introduction by walking past her and introducing her to the other members of the team present by saying "oh, let us see who we can introduce you too next. Oh, that looks like a good bunch over there, let us go over".

125. The Tribunal finds, having listened to the evidence of both the individuals that Ms Judge did not make the introduction of the new team member in that way including because:

125.1 There is no contemporaneous documentary evidence, so far as we are aware, from the Claimant to support the remark.

125.2 In contrast, the Claimant did send a contemporaneous text to her friend complaining about meetings that took place with Ms Judge on 30 January to discuss her probationary employment and on 10 February when she complained of another remark of Ms Judge (to which we refer further below).

125.3 If the Claimant was as upset as she would have been, it would have been in keeping with other incidents she was unhappy with for her to have sent a contemporaneous text to her friend.

125.4 More likely, we consider, is that the Claimant has been looking at the event on 29 January through the lens of what happened later. The first mention of the remark, so far as the Tribunal is aware, was when the Claimant drafted

her ET1 claim form about six months later. In her ET1 she gives in quotations Ms Judge's exact words which would be unusually good recollection after that passage of time.

125.5 Not only would it have been humiliating for the Claimant if Ms Judge had introduced the new starter in that way, it would also have given a bad impression to the new starter. As an experienced HR manager of many years standing with the Respondent, the Tribunal does not believe that she would have acted in this way; and, although we have some criticisms of Ms Judge's treatment of the Claimant, we do not believe from listening to her that she would have behaved in this way.

Allegation (c3) – On 30 January 2020, at the Claimant's probationary review meeting RC complained about

- *The Claimant making payroll errors when she had only made two such errors;*
- *The Claimant's failure to accurately process a salary increase when she had done everything possible to process it with the relevant manager;*
- *Told the Claimant that there was only one positive feedback from her colleagues about her, suggesting that other managers had been asked but had nothing positive to say*

126. On 30 January 2020 a meeting took place between Ms Crabtree, Ms Haile and the Claimant for her three-month probationary review. Ms Haile was present at the meeting because Ms Crabtree had given in her notice and was to be finishing her employment with the Respondent on 5 February 2020. Ms Haile was taking over as the Claimant's line manager.

127. We find that there was indeed a discussion about the Claimant making payroll errors as this was the Claimant's evidence and also referred to in Ms Haile's record of conversations between them between 30 December 2019 and 30 January 2020. There is a reference to a business objective being measured by "reduced payroll errors by HR, Managers and Zellis" …

128. When cross-examined on this allegation, it being put to the Claimant that Ms Crabtree would have raised the same errors with any HR assistant at probation meeting, the Claimant accepted that she would have done so, so this allegation must fail and need not be explored further.

129. As regards the Claimant's allegation that she had failed to accurately process a salary increase when she had done everything possible to process it with the relevant manager, we disagree with the Respondent's representative that such a concession was made. Whilst the Claimant accepted that Ms Crabtree would have raised a failure to accurately process a salary increase with any HR assistant at a probationary review, the Claimant's answer was that discussing the situation and putting blame were two different things.

130. In a series of emails between payroll and HR between 28 and 30 January 2020, a payroll error was identified. There appeared to be a dispute between HR and the payroll

team as to who had made the error although none of the emails show Ms Crabtree blaming the Claimant for the error.

131. Of note and consistent with Ms Crabtree's evidence that she gave examples of errors made by the Claimant, rather than seeking to give an exhaustive list, are the reasons given for the Claimant's extension of probationary review in her letter to the Claimant dated 3 February 2020.

132. The reasons given by Ms Crabtree for extending the Claimant's probationary employment were that "although it is recognised that you have demonstrated improvement and received positive feedback from stakeholders, you have been spoken to about a number of concerns at various stages, specifically tone of communication, proactivity in the supporting and advising managers with One Form and MyView queries, and competence in using the HR Database Resource Link".

133. Also, of note, as referred to earlier above, was that a manager should only extend a probationary review under their probationary policy if there was evidence that the employee would improve.

134. The background to the Claimant's allegation that on 30 January 2020 she was told by Ms Crabtree that there was only one positive feedback from her colleagues is as follows.

135. Ms Crabtree wished to conduct her three-month probationary review with the Claimant which was due in November 2019. As the Claimant was on holiday at that point the probationary three-month review took place on 12 December 2019.

136. The bundle of documents shows that there were exchanges of emails between Ms Crabtree and Ms Manney; and between Ms Crabtree and Ms Issacs in preparation for the three month review meeting.

137. Ms Manney was one of the Claimant's clients for whom she had carried out a significant amount of work. This was Ms Crabtree's explanation for asking her for feedback.

138. Ms Manney's feedback for the Claimant was positive describing her as a very thorough and always available to help.

139. Ms Isaac was one of the HR Assistants. Ms Crabtree's explanation for asking her for feedback was that she was a peer of the Claimant who had been expected to provide some training and support to the Claimant during her probationary period.

140. Ms Isaac's feedback on the Claimant was more mixed. It was, generally, positive, although she did identify areas that she thought the Claimant needed to improve on. These were that the Claimant had not provided her with a good handover before going on holiday; and also referred to her time management needing improvement. She stated, however, that she had improved "loads".

141. Ms Crabtree replied to Ms Isaac's email thanking her and stating that it was "really good to know that there has been improvement".

142. The impression given by these contemporaneous email exchanges was, therefore, of Ms Crabtree being a manager with genuine concerns about the Claimant's performance alongside a genuine wish that she would improve.

143. On 30 January 2020 Ms Crabtree conducted the Claimant's six months probationary review meeting.

144. Amongst Ms Crabtree's preparations for the meeting, she had discussions with Ms Judge and Ms Enwuchola.

145. Ms Enwuchola had verbally expressed concerns to Ms Crabtree about the Claimant's performance and Ms Isaac had told Ms Crabtree that she had "bailed" the Claimant out on more than one occasion.

146. In the course of Ms Crabtree's discussions with Ms Judge, Ms Crabtree suggested that the Claimant's probationary period of employment should be extended.

147. Ms Crabtree's explanation for this decision was that she did not consider that she had performed sufficiently well in order to have her probationary period approved and permanent employment offered; but that she had shown signs of improvement so as to extend probation, rather than dismissing the Claimant. Her additional explanation was that Ms Haile was taking over as the Claimant's manager so that she would be able to work with the Claimant and reach her own independent judgement of her performance.

148. There is a dispute between the parties as to exactly what Ms Crabtree said to the Claimant about the feedback she had had from other managers about the Claimant's work performance. The Claimant's evidence was that she had emailed several managers but that only one positive feedback had come back; and that the rest were not positive or had mixed things to say about her. In contrast Ms Crabtree disputes this and says that she did not allude to others being asked but not having anything positive to say.

149. The dispute may be more one of interpretation than a major dispute about what had occurred.

150. In Ms Crabtree letter explaining her decision to extend the Claimant's probation she stated that although she recognised that the Claimant had demonstrated improvement and received positive feedback from stakeholders she had been spoken to about a number of concerns at various stages and set out what those concerns were. These were described as tone of communication, proactivity in supporting and advising managers with One Form and my MyView queries and competence in using the HR database ResourceLink. This suggests that Ms Crabtree did convey to the Claimant that she had received positive feedback. As the documents only show emails with Ms Manney and Ms Isaac, we accept that these were the only written communications giving feedback. Ms Crabtree had, however, spoke with Ms Enwuchola and Ms Isaac prior to the review meeting at the end of January both of whom expressed some concerns. It is likely, therefore, that Ms Crabtree gave feedback on these concerns as part of her overall assessment of the Claimant.

Allegation (f13) on February 2020, at a meeting, HJ:

- *commented to the Claimant repeatedly asking what possessed her, or what on earth possessed her, in relation to her request for holiday leave which she had already discussed with her colleagues;*

- *complained to the Claimant about a new starter not having been given his contract of employment when the individual was "on boarded" by another employee during the Claimant's holiday leave;*

- *complained the Claimant took her lunch late (race discrimination harassment)*

151. The background to the allegation about holiday leave is as follows:

152. The Claimant submitted a written request, on 5 February 2020, for annual leave from 17 February to 28 February.

153. The request was, therefore, less than the two weeks' written notice that employees were expected to give before requesting annual leave, although the Claimant's evidence was that she had asked verbally sooner that on 5 February.

154. The request for annual leave is recorded as having been rejected.

155. By 5 February 2020 Ms Crabtree was about to leave the Respondent's employment and Ms Haile was taking over as the Claimant's manager.

156. Although the form does not state who it was that rejected the Claimant's holiday request it is likely that it was Ms Haile, probably in consultation with Ms Judge, rather than Ms Crabtree. Ms Judge's explanations for the refusal of the request were that it was made at short notice; Ms Crabtree would have left the organisation; and the Claimant's probationary period had been extended only five days earlier, together with other members of the HR team already taken leave during this period.

157. The request for leave form records that the request was rejected, although it was not stated who it was that rejected the request. As Ms Judge's witness statement contains the explanation for the refusal of request and Ms Haile had only just started as the Claimant's manager it is likely that Ms Judge played at least some part in the refusal of the request.

158. Ms Judge was unhappy about the Claimant's request for annual leave, particularly coming so soon after the Claimant had had her probationary period extended. In conjunction with Ms Haile, Ms Judge prepared an agenda for a meeting with the Claimant on 10 February 2020. The agenda not only referred to the request for annual leave but also a number of concerns about the Claimant's work performance.

159. Ms Judge, on 10 February, had an exchange of text messages with Ms Crabtree about the Claimant's annual leave request. He asked Ms Crabtree whether she had agreed for the Claimant to have two weeks leave from the following Monday.

160. In reply Ms Crabtree stated: "no! she mentioned she was planning on booking something but did not say when or submit a request".

161. Ms Judge felt frustrated by the Claimant's request for annual leave and the manner in which it was made.

162. Both parties agree that the meeting on 10 February did not go well.

163. Possibly in dispute is whether Ms Judge said to the Claimant at that meeting "what possessed you, or what on earth possessed you, to take annual leave?" (the Claimant is adamant that she did say it and Ms Judge accepts that she might have said it).

164. The Tribunal finds that the remark was indeed made both for the reasons above, and it is consistent with a mere contemporaneous text message exchange the Claimant had with a friend on 12 February 2020. In her text message exchange, the Claimant complained about Ms Judge "yelling why did I book annual leave when so many other people are on leave. Whatever possessed me to book leave at such notice". We find that Ms Judge, expressing frustration, may have said this more than once, although we doubt and do not find that she was "yelling".

165. The Claimant was upset at Ms Judge's remark and manner over the holiday leave dispute.

166. It was evident when the Claimant was cross-examining Ms Judge on this issue it did upset her. The Claimant became tearful and left the Tribunal room abruptly. The gist of the Claimant's cross-examination was that, with her African heritage, the remarks suggested that the Claimant was being possessed by evil spirits.

167. Ms Judge was also irritated because she thought (whether rightly or wrongly) that the Claimant had been misleading in saying that she had discussed her request for holiday leave when Ms Crabtree had informed Ms Judge in the text message (referred to above) that the holiday request had not been submitted.

168. Possible in dispute (Ms Judge stating that she did not recollect the issue) was whether Ms Judge complained to the Claimant about a new starter not having been given his contract of employment when the individual was 'on boarded' by another employee during the Claimant's holiday leave.

169. The Tribunal finds that Ms Judge did indeed make such a complaint because there is reference in the agenda compiled by Ms Judge for that meeting to 'concerns remain about standard of contracts being issued'; and the Claimant herself complained in a text message to a friend that day about being blamed for someone not having a contract even though she did not process her paperwork.

170. The Claimant was on leave at a time when one of the new employees would normally have had their starter paperwork issued by her, so the Claimant did not do the necessary paperwork. The Claimant believed that another HR assistant would carry out the task but in fact it was not done. HR assistants were expected to cover for one another whilst the colleague was on leave.

171. Ms Judge's explanation for having criticised the Claimant over the new starter not having been given the necessary paperwork was that it was an example of the Claimant's

failure and inability to take ownership over her work. Her expectation was that it was the Claimant's responsibility to check that others had done what she had asked for them whilst she was away on leave. This criticism appeared to the Tribunal to have been a little harsh when the Respondent expected the HR assistant to cover one another when one was on leave. Nonetheless, issuing the correct paperwork to "onboard" new starters was part of an HR assistant's job and the new starter would be working on one of the patches covered by the Claimant.

172. It is agreed between the parties that Ms Judge did raise with the Claimant or complain to her about her taking a late lunch at 4pm rather than the usual time that she would be expected to take it.

173. Ms Judge's explanation for this complaint was that the Claimant was showing poor time management by taking her lunch break so late; and that the service needs were to have HR assistance available when their clients needed them.

174. The Claimant felt upset and distressed at what had taken place during the meeting with Ms Judge and Ms Haile. Shortly after the end of the meeting, she sent an email to Ms Haile stating; 'I hereby give my notice of resignation effective of today. My last day of employment with One Housing will be Friday 14 February.'

175. The Claimant's resignation drew a hostile response from Ms Judge. Ms Dent, Ms Judge's manager, expressed concern that the Claimant was having what she described as an intense conversation with another HR assistant deliberately out of her earshot. She expressed concern at making sure that the HR assistant did not have any overly negative view of what had happened.

176. In response, Ms Judge sent an email to Ms Dent stating, 'she will provide an untrue version of her reality.' In other words, she was suggesting that the Claimant would give an untrue account of what had happened at the meeting. Ms Judge's explanation for that hostility was that she felt frustrated with the Claimant. She believed that the Claimant had resigned because her holiday leave request had been refused and that the Claimant had misled her about having discussed her holiday request with Ms Crabtree.

177. The following day, Ms Haile sent an email to the Claimant stating that they accepted her resignation. So far as the Tribunal is aware, there was no attempt on the part of Ms Haile or Ms Judge to discuss the Claimant's reasons for her resignation. We infer therefore that the Respondent was probably relieved that the Claimant had resigned and had no desire to seek to change her mind.

Claimant's explanation for why she put in her claim when she did

178. The Claimant gave her explanation for when she decided to issue her claim in answer to questions from the judge and when cross-examined.

179. The Claimant's explanations to the Tribunal were as follows.

180. The Claimant explained that she was 'mentally not in the right head space'; inexperienced in what she was doing; and finding it very difficult at the time.

181. The Claimant sought advice from a CAB. She was already aware that employment Tribunals existed and that she could bring a claim although she did not know what the time limits were. The Claimant stated that she was informed by the CAB that the time limit was 90 days from the date of her last complaint.

182. The Tribunal finds that the Claimant probably misunderstood the advice that she received from the CAB and it appears unlikely that they would have given her the wrong advice on this by not making any reference to the time limit being 90 days from the incident that she was complaining about.

183. From the emails that we have referred to above in the findings of fact, it is apparent that the Claimant was unhappy about her treatment in her job from early on in her employment. In answers to questions in cross-examinations she stated that she felt that she had been racially discriminated against from an early point in her employment.

184. At the time of the Claimant's resignation, she was involved in a series of text messages with a friend of hers called Rachel. Rachel was encouraging her in her text messages to fight the treatment that she had received. Rachel stated in text messages on 10 February 'but you could really fight this' and also stating that she understood that she (Claimant) 'wanted peace'. This suggests that the Claimant was unsure at that time whether she wanted to take the matter further. Rachel also referred to having given the Claimant a phone number and asking her whether she had phoned it although it is not clear who she had suggested that the Claimant should telephone.

Closing submissions

185. Typed closing submissions were exchanged between the parties before the Tribunal reconvened on 11 August 2022 to hear all submissions.

186. Both sets of typed submissions were lengthy. We do not set out below the typed and oral submissions in great detail, although we have read and listened to them and borne them all in mind.

187. On behalf of the Respondent, Mr Sheehan's closing submissions included the following points:

187.1 Submissions as to the findings of fact the Tribunal were invited to make and reasons for preferring the Respondent's evidence when disputed.

187.2 Submissions as to the relevant law.

187.3 The Claimant's complaints that occurred more than 3 months before early conciliation was sought were out of time. They were not amounting to conduct extending over a period.

187.4 It would not be just and equitable to extend time limits.

187.5 The Claimant had not proved facts so as to cause the burden of proof to shift.

187.6 Even if the burden of proof did shift, the Respondent had given sufficient non-discriminatory explanations for the treatment in question.

187.7 As regards, the Claimant's complaints about failure to produce relevant documents, the Respondent had given explanations for the documents it did not provide, and no adverse inference should be drawn from this.

187.8 Much of the Claimant's submissions read like a witness statement and amounted to new evidence.

188. On behalf of the Claimant, her closing submissions included the following points:

188.1 Submissions as to the findings of facts the Tribunal was invited to make and reasons for this (in so far as the Claimant's submissions amounted to new evidence not contained in her witness statement, the Tribunal does not take these points into account).

188.2 The acts of race discrimination were a series of incidents so as that they were all within the time limit.

188.3 The burden of proof did shift to the Respondent so as to disprove race discrimination.

188.4 The Respondent had failed to discharge that burden of proof.

188.5 The Respondent had failed to disclose documents she wanted disclosed.

188.6 She did in fact perform better than other HR assistance and was racially discriminated against by Ms Crabtree and Ms Judge.

Conclusions

189. The Claimant has been able to show, as demonstrated in our findings of fact above, some unfavourable, or detrimental treatment from the Respondent as regards the allegations the Tribunal is required to decide.

190. We have considered in all instances whether the Claimant has proved, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed the acts alleged; and also considered why the acts in question occurred. We are also mindful of the possibility that discrimination may be unconscious, rather than conscious, discrimination.

191. As the Tribunal's findings of unfavourable treatment are primarily those concerning treatment of the Claimant by Ms Judge, we have considered the question of whether the burden of proof had shifted to the Respondent to disprove race discrimination separately for the two individuals.

192. In her evidence and closing submissions the Claimant made criticisms of certain documents that the Respondent did not disclose. The Tribunal has considered whether an adverse inference should be drawn, as was the Claimant's case. We have concluded that no such inference should be drawn. The Respondent provided an explanation for the documents it could not provide because they did not have them. Documents that they no longer had were the notes and records of the interviews for the post to which the Claimant was appointed. If the Claimant had been bringing a race discrimination claim because she had not been appointed to the position of HR Assistant, we might well have drawn an adverse inference/ decided that the burden of proof shifted because of this. As, however, the Claimant was appointed to the post we do not draw an adverse inference from the interview notes not having been kept.

193. The Tribunals finds and concludes that the burden of proof does not shift to the Respondent to disprove race discrimination in relation to the allegations made against Ms Crabtree because;

193.1 Ms Crabtree was responsible along with Ms Enwuchola for recruiting the Claimant in the first place. Although the Claimant's evidence was that she was recruiting her as a token black woman, the Tribunal did not accept this account for the reasons given earlier in our findings of fact.

193.2 The Respondent's HR department as a whole was reasonably diverse with 7 out of the 17 individuals no being white. Although the Claimant complained that Ms Judge's part of the HR department was not racially diverse, in the small team that Ms Judge managed, the Claimant was not the only black employee. Ms Haile also being black.

193.3 Although in our findings of fact we found a few instances where Ms Crabtree might have shown more tact, or more empathy, towards the Claimant, different managers have different styles and the instances in point were all reasonable management responses to the issue concerned that any manager might have made.

193.4 For the reasons given in findings of fact above, Ms Crabtree had genuine concerns about aspects of the Claimant's performance. Although the Tribunal considered that her expectations might have been over high and influenced by her high performing predecessor, the Tribunal does not doubt that they were genuine and well recorded. Nor did Ms Crabtree fail to give the Claimant praise where she felt that praise was due.

193.5 Under the Respondent's policies, probation should only be extended if there was sufficient evidence of improvement to justify an extension of probation. Ms Crabtree could have terminated the Claimant's probationary employment in accordance with their policies rather than extending it. We do not accept that she was being extended in order to get through the end of the financial year, both of these conflicts with the contemporaneous document which show enough evidence of improvements to justify extending probation and it appears unlikely that the employment would be extended if the employee's underperformance was such as to be damaging the human resources department's reputation.

194. Even if, contrary to our findings and conclusions above, the Tribunal does need to consider Ms Crabtree's explanations for the treatment concerned, we are satisfied that the explanations are in no sense whatever because of, or related to, the Claimant's race.

195. Allegation (c2), of the Claimant was not made out on the findings of fact, of the Claimant looking after more work than the other HR assistants, was not borne out in our findings of fact.

196. Allegation (f3), of the Claimant being told to move back was a reasonable instruction based on the needs of the service, even although it could have been made more tactfully.

197. Allegation (c1), as to when the Claimant had to start work and when the other HR assistants were expected to was explained by Ms Crabtree to the Tribunal's satisfaction. She wanted the Claimant to work approximately similar hours as she (Ms Crabtree) did and the Respondent's policy supported this, as set out in our findings of fact.

198. The allegations at (c3) relate to the conduct of Ms Crabtree at the probation meeting. One of the allegations fails because of the Claimant accepting than any other HR assistant would have been treated in the same way. The allegation concerning the failure to accurately process a salary increase was an inquiry a manager might be expected to make when considering an employee's performance at a probationary review meeting. The allegation about feedback from stakeholders has been explained in our findings of fact

199. The Claimant's allegation against Ms Crabtree, therefore, fail.

200. The issue of whether the burden of proof shifts for the allegations against Ms Judge shift on the Respondent to prove that the treatment in question was in no sense whatsoever because of her race, or related to her race, is more finely balanced. Our considerations include the following:

200.1 the Respondent's HR department was reasonably diverse, as referred to above. By the time of the Claimant's resignation, two members of the small team managed by Ms Judge, were black.

200.2 Ms Judge accepted Ms Crabtree's recommendation for the Claimant's probationary employment to be extended, she did not require Ms Crabtree to dismiss the Claimant.

200.3 The remark from Ms Judge that the Claimant overheard her questioning how did the Claimant not know that, was done in a way that was upsetting to the Claimant and unprofessional.

200.4 Likewise, the Claimant was understandably upset at the remark about what possessed or what on earth possessed her.

200.5 The email by Ms Judge in the immediate aftermath of the Claimant's resignation stating that the Claimant would provide an untrue version of events was hostile.

200.6 One of the criticisms of the Claimant at the meeting on 10 February, of work not having been done properly by a colleague of the Claimant whilst the Claimant was on holiday appeared to the Tribunal to be harsh.

201. The Tribunal finds and concludes, therefore, that the burden of proof does shift to the Respondent in respect at least to some of the allegations made against her. We, therefore, consider then in turn.

202. Allegation (f8), of putting the Claimant's name down against an error on the BACS spreadsheet was an error that appeared to have been made, and corrected, by Ms Haile, not Ms Judge. Ms Judge was made aware by Ms Haile that it was her (Ms Haile) that made the error. The Tribunal accepts the Respondent's explanation for what occurred.

203. Allegation (f10) shows that Ms Judge whispered to the Claimant sufficiently loudly for the Claimant to hear, questioning how did she not know that.

204. There is a ready non-discriminatory explanation for Ms Judge's remark that we accept. There had been a recent email for which the Claimant was a recipient setting out the division of work of the various sections of the HR team. Ms Judge expected the Claimant to have read and understood it and felt surprised that the Claimant was not needing ask about it. Although it was tactless for Ms Judge to have made such a remark and the Claimant hearing it, the Tribunal is satisfied with the explanation as not being an act of racial discrimination.

205. Allegation (f10), of Ms Judge's behaviour when a new member of team was introduced was not made out on the facts, as set out in our findings of fact.

206. Allegation (f13), the remarks from Ms Judge at the meeting at 10 February 2020 asking the Claimant what possessed her or what on earth possessed her, requires more consideration.

207. The Tribunal takes the everyday meaning of 'what on earth possessed you?' as expressing a surprise for doing something foolish. In this case, Ms Judge was frustrated and thought it foolish of the Claimant to be taking a substantial period of holiday at short notice when she had just had her probationary employment extended.

208. There is also the meaning of 'what on earth possessed you' as referring to a belief that people can be controlled or possessed by evil spirits. This was how the Claimant interpreted the remark.

209. There is nothing convincing to suggest that Ms Judge would not have made the same remark to any employee if she had felt frustrated or exasperated by their request for holiday in the particular circumstances. The most that might be said is that it might have a greater impact on some employees of black origins, although we do not have evidence to that effect and, even if we had, it would be suggestive of indirect, rather than direct race discrimination.

210. The Tribunal accepts Ms Judge's explanation for the remark, that she was unaware that it would cause offence to someone of black African origin. It is a remark that is made

by some people to express frustration or reprise rather than being a remark widely thought of having racial connotations.

211. As regards the allegations about a new starter not having been given a contract of employment, it was correct that that employee was not given the contract. It was, perhaps, harsh to be criticising the Claimant for an omission by a colleague. The Tribunal is satisfied that it was following on from the aspects of Ms Crabtree's assessments of the Claimant's underperformance in aspects of her job, rather than being in any sense because of or related to the Claimant's colour or racial origins.

212. In relation to the complaint that the Claimant was taking her lunch, this could have been expressed more empathically by giving the Claimant credit for working hard or being conscientious. Nonetheless, it is a legitimate concern to have employees taking their lunch breaks at such a late time and having concerns about consistency of service for the clients.

213. On balance of probabilities, therefore, the Tribunal is satisfied that although aspects of Ms Judge's interactions with the Claimant left something to be desired, we accept her explanations as being in no sense whatsoever related to her race.

214. The Claimant's race discrimination complaints, therefore, fail.

Time limits and extension of time

215. As the Claimant's complaints of race discrimination fail, the question of time limits is irrelevant. In any event, only the allegation against Ms Judge of 3 and 27 January, might have been out of time. Had the allegations been successful it is possible that the Tribunal could have considered them to amount to a pattern of conduct towards the Claimant from Ms Judge so as to amount to conduct extending over a period. It is unnecessary, however, to determine the issue.

Employment Judge Goodrich
Dated: 3 October 2022

In the Employment Tribunal (East London) - Case no: 2203713 / 2020

Caroline Chinkuli (the Claimant) v One Housing Group Limited (the Respondent)

LIST OF ISSUES (prepared by the Respondent)

[Copied from the Order of Employment Judge Walker dated 3 November 2020 (pages 64 to 73) as amended by the Order of Employment Judge Hallen dated 25 February 2022 (pages 132 to 134)

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(9) The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

Time limits / limitation issues

(a) The Respondent argues that, given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 8 February 2020 is potentially out of time, so that the Tribunal may not have jurisdiction to deal with it. The Claimant argues that she suffered from a continuing act.

(b) The issues for the Tribunal are therefore whether all of the Claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("**EQA**")? Dealing with this issue will involve consideration of whether there was an act and/or conduct extending over a period.

EQA, discrimination because of race

The Claimant defines herself as black African.

EQA, section 13: direct discrimination because of race

(c) Has the Respondent subjected the Claimant to the following treatment?

(c1) On 17 December 2019, RC told the Claimant she had to turn up for work at approximately 9:00 AM each day when she was in fact entitled to come in between 8:00 and 10:00 AM and other HR assistants on probation were allowed to do that

(c2) On 5 November 2019, RC told the Claimant that she was to work under a new HR advisor when the Claimant was already overworked and looking after more work than other members of the team.

(c3) On 30 January 2020, at the Claimant's probationary review meeting RC complained about:
-the Claimant making payroll errors when she had only made two such errors;
-the Claimant's failure to accurately process a salary increase when she had done everything possible to process it with the relevant manager;
-told the Claimant that there was only one positive feedback from her colleagues about her, suggesting that other managers had been asked but had nothing positive to say

(d) Was that treatment "less favourable treatment", i.e. did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The Claimant relies on the following comparators,

the other HR Assistants being (Noorul-Ain (Asian), Ashini (Asian) and Jonathan (Jewish) and/or hypothetical comparators.

(e) If so, was this because of the Claimant's race?

EQA, section 26: harassment related to race.

(f) Did the Respondent engage in any of the conduct listed below:

(f3) On 5 November 2019, RC told the Claimant in front of others that she had to move immediately to sit with the HR team

(f8) On 13 December 2019, put the Claimant's name in full against an error on the BACS spreadsheet, when the error was made by another member of staff and other errors were marked up as HR errors and not attributed to a named individual

(f10) On 3 January 2020, after the Claimant had asked another HR assistant to clarify her work role for her, HJ whispered about the Claimant, sufficiently loudly for the Claimant to hear, questioning how she did not know that

(f11) On 27 January 2020, HJ ignored the Claimant when introducing a new HR advisor to the staff , making comments about them being a good team but excluding the Claimant from that description

(f13) On 10 February 2020, at a meeting, HJ:
-commented to the Claimant repeatedly asking what possessed her, or what on earth - possessed her, in relation to her request for holiday leave which she had already discussed with her colleagues;
-complained to the Claimant about a new starter not having been given his contract of employment when the individual was "onboarded" by another employee during the Claimant's holiday leave;
-complained the Claimant took her lunch late

(g) In relation to each matter, if it occurred, was that conduct unwanted?

(h) If so, did it relate to the protected characteristic of race?

(i) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

(j) Alternatively, did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

(k) In determining whether the conduct had that effect the Tribunal must take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Remedy

(l) If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the Claimant is awarded compensation and/or damages, will decide how much should be awarded.