Case Number: 3307422/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs Edith Fanny Djomseu-Takeu	**v**	North West Anglia NHS Foundation Trust

Heard at: Cambridge

On: 24, 25 & 26 May 2022
26 & 27 September 2022
In Chambers: 28 September 2022

Before: Employment Judge Tynan

Members: Mrs A Carvell and Mrs H Gunnell

Appearances
For the Claimant: In person
For the Respondent: Ms Aysha Ahmad, Counsel

RESERVED JUDGMENT

The Tribunal's unanimous Reserved Judgment is as follows:

1. In circumstances where the Employment Tribunal is satisfied that it was reasonably practicable for the Claim to be presented by no later than 11 July 2020, being the primary limitation period within which to bring any Claim, the Employment Tribunal has no jurisdiction to consider the Claimant's complaint that she was unfairly dismissed by the Respondent as it was not presented to the Tribunal by 11 July 2020. The complaint of unfair dismissal is therefore dismissed.

2. The Claimant's further complaints that she was directly discriminated against because of the protected characteristic of race, in contravention of s.13 of the Equality Act 2010 and subjected to harassment related to race, in contravention of s.26 of the Equality Act 2010, are not well founded and are dismissed.

RESERVED REASONS

1. The Claimant was employed by the Respondent as a Radiographer. She commenced employment with the Respondent on 4 July 2011 and, as we set out below, was summarily dismissed on 19 February 2020 as the Respondent believed she did not have the legal right to work in the UK. The Claimant was re-employed by the Respondent with effect from 18 March 2020 and thereafter continued in the Respondent's employment until 18 February 2022 when her employment ended following her resignation. Whilst the Claimant refers in some detail in her witness statement to events following her dismissal, including the Respondent's handling of her February 2021 grievance, and concludes with a statement that the Claimant felt she had no choice but to look for another job in a completely different field as a result of an allegedly hostile environment at the Respondent, the Claimant has not brought any claim against the Respondent in respect of her 2022 resignation or in respect of any other matters said to have occurred after 11 March 2020, namely when an email was issued to the Radiotherapy Department by the Claimant's Manager, Paula Brown.

2. The "effective date of termination" for the purposes of s.111 of the Employment Rights Act 1996 ("ERA") was 19 February 2020, meaning that the Claimant needed to notify any potential claim in respect of her dismissal to ACAS under the Early Conciliation scheme by no later than 18 May 2020. The Claimant contacted ACAS in time on 11 May 2020 and an Early Conciliation Certificate was issued on 11 June 2020. The effect was to extend the Claimant's time for presenting any claim for unfair dismissal to the Employment Tribunals to 11 July 2020 (section 207B(4) of ERA). In the event, the claim was not presented until 29 July 2020. For the reasons set out below, the Tribunal has concluded that it was reasonably practicable for the complaint to be presented by 11 July 2020 and in the circumstances that it has no jurisdiction to consider the Claimant's unfair dismissal complaint.

3. It has not been necessary for the Tribunal to separately consider whether some or all of the discrimination complaints have been brought outside the primary time limit for bringing any claim since, for the reasons set out below, the complaints are not well founded.

4. The case was originally listed for a final hearing on 23 to 27 May 2022, but due to the lack of any Judge being available to hear the matter on 23 May 2022 the Hearing commenced instead on 24 May 2022. In the course of her evidence on 25 May 2022 the Tribunal asked the Claimant about the outcome of a hearing on 22 November 2019 at the Upper Tribunal of the Immigration and Asylum Chamber (the "Upper Tribunal") which the Tribunal considered may be pertinent to the issue of her right to work in the UK. The Claimant was uncertain on the matter. The hearing on 25 May 2022 was therefore adjourned and the Claimant directed to locate any further documents pertaining to the Upper Tribunal hearing, since the

limited documents available to the Tribunal seemed to indicate that the Claimant had succeeded in her appeal against a First Tier Tribunal decision rejecting her right to permanent residence in the UK. When the hearing resumed on 26 May 2022 the Claimant produced a written Judgment of the Upper Tribunal which confirmed her entitlement to a permanent residence card. Certainly once issued, the card would conclusively establish the Claimant's legal right to work in the UK. It was apparent (and for the avoidance of doubt, we find) that the outcome of the Upper Tribunal hearing on 22 November 2019 was not communicated to the Respondent. We find that the Claimant did not understand the potential significance of the Judgment. She did not provide a copy of it to the Respondent during her employment or by way of disclosure in these proceedings. It first had sight of the Judgment on 25 or 26 May 2022. Given the potential implications in terms of the issues to be determined in these proceedings, including as regards any potential Polkey reduction or determination of contributory conduct, the Tribunal granted Ms Ahmad's request on 26 May 2022 to adjourn the hearing to allow the Respondent a reasonable opportunity to consider the Judgment and, as appropriate, file supplementary witness evidence. Thereafter, the Hearing resumed on 26 September 2022.

5. The Claimant gave evidence and we also heard evidence from the following individuals, each of whom had made written statements:

- Kevin Tucker of the Society of Radiographers who supported the Claimant at her dismissal appeal hearing on 22 October 2020;
- Justin Cullinan of the Society of Radiographers who also provided support to the Claimant during the appeal process and attended an appeal hearing with her on 13 November 2020; and
- Oforiwa Asare, one of the Claimant's Radiographer colleagues.

6. We also heard evidence from Nicola Smith of the Society of Radiographers who attended Tribunal pursuant to a Witness Order.

7. For the Respondent we heard evidence from the following individuals, each of whom had made written statements:

- Paula Brown, Radiotherapy Service Manager and the Claimant's line manager, at the relevant time:
- Fergus Browne, Divisional Operations Manager since 2020 and who was the hearing officer at the dismissal stage – Mr Browne made a supplementary witness statement in light of the further documents disclosed on 26 May 2022;
- Tracy Priestman, Resourcing Manager with responsibility for the team at the Respondent that carries out right to work and other employment checks;
- Emma Morley, Associate Director for Culture, Organisation Development, Talent and Wellbeing – Ms Morley was an HR Business Partner at the relevant time and provided various HR input and support;

- Sue Somers, Divisional Operations Manager of Theatres and who was the appeal hearing officer.

8. There was a single agreed Bundle comprising 579 pages, though this was supplemented by the Upper Tribunal documents already referred to and some further documents that the Claimant requested should be added to the Hearing Bundle. The page references in this Judgment are to the page numbers of the Hearing Bundle.

9. Both the Claimant and Ms Ahmad made oral closing submissions. We do not repeat them here, though confirm that we have re-read our notes of their submissions in coming to this Judgment.

Employment Rights Act 1996 – s.111(2)

10. An email from ACAS at page 42 of the Hearing Bundle confirms that the Claimant took responsibility on 11 May 2020 for notifying ACAS under the Early Conciliation scheme that she was contemplating a claim against the Respondent. In any event, the Claimant also confirms this at paragraph 34 of her witness statement. Further emails at page 43 of the Hearing Bundle evidence that the Claimant had included Ms Smith contact details as her representative in the matter. We are satisfied that the Claimant understood that she needed to contact ACAS under the Early Conciliation scheme within three months of her effective date of termination. In her evidence at Tribunal, the Claimant confirmed that she had sought employment law advice at the time, albeit focused mainly on the issue of her continuous service and the preservation of her terms, conditions and benefits of employment. She was also being advised and supported in the matter by her professional association, the Society of Radiographers. Her case was being managed by Ms Smith on behalf of the Society. The Respondent did not challenge Ms Smith's evidence that she contracted Covid, with the result that she was absent from work between 1 and 15 June 2020. Her evidence was that although she returned to work, she continued to experience symptoms consistent with Long Covid. She was also in the process of leaving the Society to take up a position elsewhere. Her evidence was that these two factors in combination led her to inadvertently fail to advise the Claimant of the required timescale to present a Claim Form to the Tribunals herself. The Hearing Bundle does not include emails or other evidence of any communications between the Claimant and Ms Smith, or the Society, regarding any advice given to the Claimant or confirming which of them would be responsible for submitting the Claim Form to the Tribunals.

11. On 22 December 2020, the Tribunal made an Order for the Claimant to provide further information in relation to why it had not been reasonably practicable for her to file her Claim Form with the Tribunal by 11 July 2020. The Claimant responded in a letter dated 20 January 2021 and provided additional comments in a further letter dated 2 February 2021 in response to the Respondent's observations on her initial response (pages 51 to 64). She acknowledged that Ms Smith had been assisting her not just with her

Tribunal claim, but also her appeal against her dismissal. She explained that as a result of "many" difficulties she experienced in contacting Ms Smith, she contacted Mr Cullinan, another Case Worker at the Society, and made him aware of the difficulties she was experiencing in securing a response from Ms Smith. Following her return from sickness absence, Ms Smith was then involved in arrangements to schedule a hearing in respect of the Claimant's appeal against her dismissal. The Claimant states that she and Mr Cullinan lost contact with Ms Smith again (from which we infer that Mr Cullinan had remained involved in her case) and that Ms Smith did not answer messages. On 27 July 2020, the Claimant asked Mr Cullinan to forward her queries to another Case Worker and when she did not receive a response she contacted ACAS directly on 29 July 2020. Her evidence is that she then learned that an Early Conciliation Certificate had been issued to Ms Smith on 11 June 2020. In her letter of 2 February 2021 to the Tribunal, the Claimant wrote,

> *"Had she forwarded me the letter from ACAS when she returned from sickness leave* [after 15 June 2020]*, I would have been able to put my application to the Tribunal on time".*

Her comments further evidence to the Tribunal that the Claimant understood there was a limited period of time following the conclusion of Early Conciliation within which any claim must be presented to the Tribunals. We find that she both knew that ACAS must be notified of any potential claim within three months of her dismissal and, further, that Early Conciliation could only continue for a period of up to six weeks.

12. The Claimant is an intelligent, articulate and capable individual. She has represented herself successfully at the Upper Tribunal of the Immigration and Asylum Chamber and she represented herself skilfully before us. We find that she did not agree with Ms Smith, Mr Cullinen or anyone else at the Society of Radiographers that the Society would be responsible for filing her Claim Form with the Tribunals, even if Ms Smith was her nominated point of contact for ACAS in connection with any discussions aimed at resolving any dispute between the parties. The Claimant was not a passive bystander in the matter and indeed, she was evidently sufficiently concerned by the lack of contact from Ms Smith that she took matters up with Mr Cullinan in June 2020. That evidences to us that she understood the clock was ticking down on her claim. We find that the Claimant's general awareness of her rights extended to the existence of time limits for bringing any claim.

13. In many cases a professional advisor's incorrect advice about time limits, or other fault leading to the late submission of a claim, will bind the Claimant, meaning that it is unlikely the Tribunal will find it was not reasonably practicable for the Claimant to have presented their claim in time. However, each case must be decided on its facts and will therefore turn on the specific circumstances of the case. In cases involving solicitors or other skilled professional advisors, it was said in Dedman v British Building and Engineering Appliances Limited [1974] ICR53 Ca.,

> *"If a man engages skilled advisors to act for him – and they mistake the time limit and present* [the claim] *too late – he is out. His remedy is against them."*

In Agrico UK Limited v Ireland EATS 0024/05, a decision of the Scottish EAT, a solicitor's negligence was compounded by his secretary falling ill and failing to action his instructions given from holiday, instead asking someone else to do so in her absence. The claim was submitted out of time and the secretary's absence still did not mean it was not reasonably practicable to present the claim in time.

14. According to Dean Rogers, Director of Industrial Strategy and Member Relations at the Society of Radiographers, there was a failure to advise the Claimant of the required timescale to submit a claim to the Tribunal herself (page 46). However, we note a different explanation was offered by Mr Cullinan in his email to the Claimant of 1 February 2021 (and into which Mr Rogers was copied), namely that the Claimant's deadline had been missed due to Ms Smith being off work (page 63). If Ms Smith returned to work on or around 15 or 16 June 2020, there was a further period of four weeks within which the matter might have been dealt with. According to Mr Rogers, any failure on Ms Smith's part was as much oversight as it was health related. In Times Newspapers Limited v O'Regan [1977] IRLR101, the Dedman principles were said to extend to union representatives, since they are generally assumed to know the time limits and to appreciate the necessity of presenting claims in time. There is no suggestion that Ms Smith, Mr Cullinan or others at the Society lacked knowledge in this regard. It may reasonably be assumed that the Society has in place systems to identify and record time limits in cases where it is assisting or representing its members to ensure that time limits are not missed, including in cases where the designated advisor is unexpectedly absent as a result of ill-health. In this case, Mr Cullinan was aware that Ms Smith was unwell and on notice from the Claimant that she was said to be unresponsive. He had some personal responsibility in the matter to apprise himself of the situation and to take reasonable steps to safeguard the Claimant's position. Be that as it may, in any event as we have observed already, the Claimant was not a passive bystander in the matter. She personally notified her potential claim to ACAS, was in regular contact with the Society and contacted Mr Cullinan in June 2020 when Ms Smith proved unresponsive. We find that she had a broad understanding of the relevant time limits, including that Early Conciliation was limited to a period of six weeks. She would have understood therefore by 22 June 2020 (six weeks after she notified ACAS of her potential claim) that the Early Conciliation period was at an end. In circumstances where she had concerns regarding her lack of contact from Ms Smith, as an intelligent, articulate and capable individual with experience of representing herself in legal proceedings, including in an appeal to the Upper Tribunal where time limits apply, we find that by no later than 22 June 2020 the Claimant ought reasonably to have sought explicit assurances from Ms Smith, Mr Cullinan or someone else within the Member Relations Team at the Society, that

the preparation and submission of her Claim Form was in hand (and indeed as to the cut-off date by which it must be presented) and, had such assurances not been forthcoming, thereafter to have taken the matter into her own hands. She might also have researched the matter on the internet where there is a wealth of information as to the time limits in the Tribunals. Instead she effectively delayed until 27 July 2020 to take action to protect her position, by which date she was already out of time. From 22 June 2020 the Claimant effectively had three weeks in which to ensure her rights and position were protected. She unreasonably failed to do so. In all the circumstances we conclude that it was reasonably practicable for her to present her claim to the Employment Tribunals by 11 July 2020. Given she failed to do so, the Tribunal has no jurisdiction to consider the complaint of unfair dismissal and it shall therefore be dismissed.

The Claimant's remaining complaints

15. The Claimant's remaining complaints are that she was directly discriminated against because of the protected characteristic of race and subjected to race harassment.

16. The Claimant's direct race discrimination complaints are set out at paragraphs (9) to (12) of Employment Judge T Brown's Case Management Summary of 18 January 2022 (pages 98 - 99). As well as complaining that her dismissal was an act of direct race discrimination, the Claimant also pursues complaints in respect of the following alleged matters:

> (10) The decision to dismiss her was taken before she was heard i.e., before she had an opportunity to explain her situation;
>
> (11) The Respondent failed to inform her at the dismissal meeting on 19 February 2020 that she would have a right of appeal against her dismissal; and
>
> (12) The Respondent advised her that she would have to re-apply for her position if she wanted it back, once a vacancy became available.

17. The race harassment complaints are summarised at paragraph (16) of the Summary (pages 99 - 100). They are as follows (the first complaint having been further clarified in the course of the Final Hearing):

> (i) On the morning of 19 February 2020, Ms Priestman shared the Claimant's personal information, namely details of her immigration status with Nicole Jessop;
>
> (ii) On the morning of 24 February 2020, Paula Brown disclosed to at least 10 members of staff (comprising radiographers, a physicist and planners) at an ad hoc meeting that the Claimant had been dismissed for not having the right to work in the UK; and

(iii) On 11 March 2020, Paula Brown sent an email to the radiotherapy department, referring to "issues" between the Claimant and the Home Office and the Respondent's attempts to bring the Claimant back to work.

18. The findings of fact that follow are inevitably focused on those complaints.

19. As noted already, the Claimant commenced employment with the Respondent on 4 July 2011. The Claimant was a highly regarded member of the Respondent's Radiography Team. Her qualifications, skills, experience and attributes have never been in issue. She was recognised within the Trust as someone who went above and beyond, and who made a significant contribution. The Claimant was part of a respected team of Radiographers who worked effectively together and enjoyed positive working relationships. Ms Brown and Jamie Fairfoul, Head of Radiotherapy Physics, wrote glowing references in 2020 in support of the Claimant's application for indefinite leave to remain in the UK. Mr Fairfoul wrote of the exemplary skills, values and compassion the Claimant brought to her role as a Radiographer, as well as the medical, emotional, practical and psychological help that she made available to cancer patients (pages 325 – 326). He described her as "an incredible asset". Ms Brown, who is alleged to have harassed the Claimant, described the Claimant on 3 March 2020 as,

> *"A valued and indispensable member of the team … who goes above and beyond to ensure that all the patients receive the best possible care at a difficult time in their lives. She is a very honest and reliable member of staff with excellent work ethics… The Department would miss her greatly if she was unable to remain as she has a very positive, determined and enthusiastic outlook on life which always lifts the spirits of others."* (pages 316 – 317)

20. The Claimant was employed under Agenda for Change. A Statement of Principle Terms and Conditions of Employment is at pages 196 – 207 of the Hearing Bundle. It does not explicitly reference the requirement in the UK that employees have the legal right to work. The Respondent does not have a specific policy regarding the legal right to work, something it may wish to reflect upon and address. A copy of the Home Office 'Employer's Guide to Right to Work Checks' dated 28 January 2019 is at pages 209 – 248 of the Hearing Bundle. Extensive reference was made to it in the course of the Hearing. The 26 June 2020 version of the Respondent's Disciplinary Policy is at pages 161 – 195 of the Hearing Bundle. We accept the Respondent's evidence that there are no material differences between that Policy and the Policy in force at the date of the Claimant's dismissal.

21. Ms Priestman is a highly experience Resourcing Manager who manages the Respondent's recruitment function for medical and general staff. She manages a team of 12 individuals who are responsible for carrying out

employment checks and ensuring that the Respondent complies with its obligations to prevent illegal working. Prior to the events that took place in February 2020, Ms Priestman had no previous interactions with the Claimant. The Claimant was recorded on the Respondent's recruitment database as having a time limited right to work in the UK.

22. Ms Priestman was an impressive witness who was consistently clear, articulate and knowledgeable in her evidence to the Tribunal. When the Tribunal raised issues with her regarding the right to work which had not been addressed in her witness statement, her responses evidenced a detailed understanding of the relevant legal framework.

23. We find that Mr Browne and Ms Morley were effectively entirely dependent upon Ms Priestman for advice as to whether the Claimant had the legal right to work in the UK, regarding the right to work checks that needed to be undertaken in relation to her and as to the circumstances in which an employer may avail themselves of the 'statutory excuse' against the imposition of civil penalties for employing individuals who lack the legal right to work in the UK. Notwithstanding, at the time of the events in question, Ms Morley was an HR Business Partner and provided HR advice and support to Mr Browne in dealing with the issues regarding the Claimant's right to work in the UK, she evidently had limited understanding or experience of right to work checks and issues. Whilst she was aware of the 2019 Home Office Guide referred to above, she disclosed at Tribunal that she was unaware of the 2014 Code of Practice for employers on avoiding unlawful discrimination while preventing illegal working. Mr Browne was unaware of both the Guide and Code.

24. The events leading up to the termination of the Claimant's employment can be stated fairly briefly. Sharon Watkinson, Resourcing Team Leader, was in contact with the Claimant in August 2019 regarding her application for a residence card. Ms Watkinson followed the matter up again on 7 February 2020, asking the Claimant if she had received her card. An existing 'positive verification notice' from the Home Office Employer Checking Service, which afforded the Respondent a statutory excuse against the imposition of a civil penalty for continuing to employ the Claimant in the event she in fact lacked the legal right to work in the UK, was due to expire on 26 February 2020. With the benefit of hindsight, Ms Watkinson might have followed the matter up a little earlier with the Claimant. The Claimant responded to Ms Watkinson's email on 12 February 2020 as follows,

> *"Dear Sharon*
>
> *Thanks for your enquiry. I had another hearing on 12 / 11 / 2019 and I am still waiting to hear from the Home Office. Please find attached letter of last hearing.*
>
> *As far as I know, I continue to have the right to work.*

I am waiting for six months after the hearing to contact them in case I have not heard anything back, simply because the Home Office sometimes takes time to respond.

Please feel free to contact the Home Office or my Solicitors directly regarding my right to work if you have any queries.

Please let me know if you have any further questions."

The attached letter referred to was a letter to the Claimant from the Upper Tribunal dated 13 February 2020 acknowledging receipt of the Secretary of State's application for permission to appeal to the Court of Appeal (the "Notice of Receipt" - page 283). When our attention was drawn to the Notice, we asked questions of the Claimant in order that we might secure a clearer understanding regarding the decision that the Secretary of State was seeking to appeal against. On the face of it, the Notice indicated to us that the Claimant had succeeded before the Upper Tribunal. We wanted to know whether the Claimant had secured a ruling from the Upper Tribunal that meant she enjoyed the legal right to work in the UK. We were puzzled why the Claimant might not have shared this seemingly relevant information with the Respondent, particularly when it further emerged that the Upper Tribunal had sent the Claimant a copy of its Judgment on 22 January 2020, namely just a couple of weeks before Ms Watkinson contacted the Claimant for an update. Whilst the Claimant could not recall the exact date she had received the Upper Tribunal's Judgment, we find that the Claimant was in receipt of its decision by 12 February 2020 and accordingly that it was fresh in her mind when she emailed Ms Watkinson that day. Nevertheless, we do not consider, as Ms Ahmad's invited us to find, that the Claimant was deliberately seeking to withhold potentially embarrassing information contained in the Judgment regarding the breakdown in her marriage. Equally, however, nor do we consider, as the Claimant speculated at Tribunal, that she may have been influenced by an Order of the Upper Tribunal that prevented media reports of her name. Instead, and as was abundantly evident at Tribunal on 25 and 26 May 2022, we conclude that the Claimant failed to appreciate the potential significance of the Judgment, focusing instead on the Secretary of State's application for permission to appeal as the basis of her ongoing legal right to work in the UK. In a sense, she was right to do so since the Judgment itself did not confer permanent residence or the associated legal right to work in the UK. If the Claimant was culpable in failing to provide the Respondent with the complete picture, so too was the Respondent in failing to ask the Claimant basic questions about the outcome of the 22 November 2019 hearing and in failing to give active thought to the obvious implications of the Secretary of State's application for permission to appeal.

25. On 17 February 2020, Ms Watkinson submitted a 'verification application' to the Employer Checking Service (pages 284 and 285). The application was completed by Ms Watkinson with reference to *"an ongoing application for leave to remain in the UK".*

26. On 19 February 2020, the Employer Checking Service emailed the 'verification response' to the Respondent. Rebecca Thomas from the Status Verification, Enquiries and Checking Team wrote,

> *"As the certificate of application is more than six months old and therefore invalid, the worker needs to arrange to get a replacement. The attachment provides the information to enable them to do this. Please pass this information to the worker."*

Strictly, the 'certificate of application' was not more than six months old, since it was not otherwise due to expire until 26 February 2020. Be that as it may, with effect from 19 February 2020 the Respondent was issued with a "no statutory excuse notice", meaning that it no longer had a statutory excuse in the event the Claimant was working illegally in the UK, thereby exposing it to the risk of a civil penalty of up to £20,000 if it continued to employ the Claimant in circumstances where she was working illegally. However, it is important to note that the fact a 'no statutory excuse notice' had been issued did not of itself mean that the Claimant was in fact working illegally in the UK.

27. The stated reason for the lack of a statutory excuse was that there was no current Home Office 'certificate of application' confirming an outstanding application by the Claimant for a residence card. Although the Respondent did not know this at the time, the Home Office had failed to update its records following the Upper Tribunal's Judgment and Secretary of State's application for permission to appeal, with the result that there was no current 'certificate of application' by reference to which a 'positive verification notice' could be issued to the Respondent.

28. Ms Priestman became involved in the matter on 19 February 2020. She attempted to contact Ms Brown, but in Ms Brown's absence on leave initially spoke with Ms Brown's senior colleague Nicole Jessop, Principal Clinical Scientist and apprised her of the situation. She plainly needed to make a senior manager aware that there was an issue regarding the Claimant's right to work, so that it might be escalated as appropriate. In an email timed at 10:18 on 19 February 2020, Ms Priestman summarised the background and legal position to Ms Jessop, copying in Paula Jones, Clinical Operations Manager and Katy Everitt, HR Business Partner. It was entirely appropriate that she copy them in on the matter in Ms Brown's absence given the urgency of the situation and the potential civil, criminal and reputational risks to the Respondent of continuing to employ the Claimant. Ms Jones shared management responsibility with Ms Brown for all staff in the Radiography department. Ms Everitt was brought into copy from an HR perspective.

29. Ms Priestman wrote,

> *"A 'negative verification notice' confirms that the employee does not have the right to work in the UK and to continue to employ them*

after receiving this notice will mean that we are liable to civil and criminal penalties which includes a fine of £20,000 and a potential prison sentence, we also risk losing our licence to sponsor which would mean that every employee we currently sponsor would lose their legal right to work for us and in the UK…"

30. As we have noted already, a 'no statutory excuse notice' does not mean that an employee lacks the legal right to work in the UK. As the notice itself states, the person named in the notice may still have the right to reside and work in the UK. Nevertheless, Ms Priestman was plainly right to highlight the risk to the Respondent of becoming liable for a civil penalty. In her email she seemed to say that any penalty would be £20,000. That is the maximum penalty that can be imposed, something Ms Priestman might have conveyed more clearly. She might also have clarified that a criminal offence is only committed where an employer employs a person in the knowledge, or having reasonable cause to believe, that they have no legal right to work in the UK. Finally, whilst we think Ms Priestman was right to highlight the reputational risks to the Respondent as a licenced sponsor, we think she possibly overstated the risk in so far as she referred to the Respondent losing its licence. Whilst we think it unlikely that an NHS Trust would have its licence revoked, certainly in respect of a single breach, we recognise that any breach could lead to increased scrutiny and audit by the Home Office. We have been careful not to judge Ms Priestman's advice with the benefit of hindsight and, more importantly, with the luxury of time that was not then available to her. The receipt by the Respondent of a 'no statutory excuse notice' meant that it had to move very quickly to assess the situation and take appropriate action. Ms Priestman was called upon to advise at very short notice. Had more time been available to her she might have expressed herself in more nuanced terms or gone into a little more detail, but that was not the situation in which she found herself. It does not alter our view of her credibility as a witness.

31. Ms Priestman's advice was relayed to Mr Browne and Ms Morley. Mr Browne, who had recently assumed line management responsibility for Ms Brown, was tasked with managing the issue in Ms Brown's absence and Ms Morley was on hand to provide HR support and guidance. It seems that neither Mr Browne nor Ms Morley spoke to Ms Priestman, meaning that there was a lost opportunity for further discussion and for Ms Priestman to amplify or finesse what she had written in her email. This was potentially compounded by the Respondent's failure to forward the Employer Checking Service email of 19 February 2020 to the Claimant, including the 'no statutory excuse notice' referred to. A text from the Claimant to Mr Browne sent at 17:18 on 19 February 2020, after the Claimant had been dismissed, confirms that she did not have the opportunity to consider either document and comment upon them, or seek legal advice on them, before she was dismissed.

32. As noted already, it was Mr Browne' decision to dismiss the Claimant. He phoned the Claimant on 19 February 2020 to request that she meet with

him to discuss "her work permit". The Claimant was on leave and not at home when Mr Browne called her. Having had some time to consider her position, she phoned him back to confirm that she would attend a meeting that day but that she first wanted to go home to check whether she had any other information that might be relevant to her right to work. It seems that she had in mind the Notice of Receipt. It is unfortunate that she did not think to bring a copy of the Upper Tribunal's Judgment with her to the meeting. Mr Browne asked her if she wanted to be accompanied at the meeting and whilst she initially said that she did not, it was subsequently arranged that Ms Jones would attend the meeting to support the Claimant.

33. In the course of his evidence at Tribunal, Mr Bowne confirmed that he did not discuss the Claimant's situation with Ms Watkinson or Ms Priestman either prior to or following his meeting with the Claimant on 19 February 2020, meaning that he was reliant upon Ms Morley to relay Ms Priestman's advice. He did not know that Ms Morley had limited understanding or experience of right to work checks and related issues. According to his unchallenged evidence (paragraph 2.1 of his witness statement), he understood that the 'no statutory excuse notice' meant that the Claimant did not have the right to work in the UK and that there were serious implications for the Respondent if it continued to employ her.

34. When the Claimant met with Mr Browne and Ms Morley on 19 February 2020, she produced a copy of the Notice of Receipt. Inexplicably, neither of them thought fit to take a copy of it nor did they seek Ms Priestman or Ms Watkinson's further advice in the matter. Had Ms Priestman or Ms Watkinson had sight of the Notice, we find that they would either have followed the matter up with the Claimant or, at the very least, advised Mr Browne and Ms Morley to do so. Given their knowledge, experience and expertise, we find that had they been made aware of the Secretary of State's application for permission to appeal they would, as we did, have inferred from this that the Claimant had succeeded before the Upper Tribunal and would have explored this further with the Claimant or asked Mr Browne and Ms Morley to do so (with clear guidance as to what further information was required from her).

35. It is not necessary that we make any findings regarding the Claimant's subsequent appeal against her dismissal or in respect of her 2021 grievance since neither sheds any further light on the issues we have to determine, including the mental processes of Mr Browne and the other individuals whose advice and input informed his decision to terminate the Claimant's employment. The Claimant's evidence at Tribunal was that she first began to believe that she may have been discriminated against following a meeting with Ms Brown on 11 March 2020 to discuss her reinstatement to her previous role. She says that her concerns were amplified the same day when Ms Brown issued an email to the Radiotherapy Department. If so, she failed to raise her concerns during the appeal process. The first time that we can identify any complaint of potential discrimination is in the Claimant's Claim Form submitted on 29 July 2020.

36. The Claimant alleges that her dismissal was pre-determined. There is some evidence in the Hearing Bundle that Ms Jones and Mr Fairfoul assumed the Claimant would be dismissed. We refer in this regard to their emails of 25 February 2020 at pages 309 – 310 of the Hearing Bundle, albeit written after the Claimant had in fact been dismissed. Although the Claimant did not question the Respondent's witnesses on this issue, we probed Mr Browne about it. We accept his evidence that he went into the meeting with the Claimant on 19 February 2020 with an entirely open mind, indeed not anticipating that it might result in her dismissal. As a result of his phone calls with the Claimant earlier in the day he understood that she would be bringing relevant documents with her to their meeting, even if she did not specifically identify what these might be. She gave him the impression that she was confident of her right to work and, in turn, he went into the meeting anticipating that the Respondent's concerns would be fully addressed.

37. The Claimant complains that Mr Browne and Ms Morley failed to remind her of her appeal rights during the meeting on 19 February 2020. Neither could recall whether this was something they had discussed with her. However, an initial draft of the dismissal letter (pages 295 – 296) makes no mention of her appeal rights and we infer from this that they also overlooked this on 19 February 2020. The Respondent's Disciplinary Policy (which Mr Browne and Ms Morley stated at Tribunal they were following in dealing with the situation) provides that the Chair of the panel (in this case, Mr Browne) *"will explain the employee's rights of appeal under this procedure"* (paragraph 17.2 – page 176). We find that they overlooked the matter in the pressure of the moment.

38. The Claimant further complains that Ms Morley advised her that she would have to re-apply for her position if she wanted it back, once a vacancy became available Neither Mr Browne nor Ms Morley could recall whether this or something similar had been said to the Claimant. Notwithstanding that the dismissal letter (including the initial draft) includes positive comments about supporting the Claimant to return to the Trust, we accept the Claimant's evidence on this issue. We return below to the question of whether it was an act of race discrimination.

39. We have indicated already why we think Ms Priestman's advice might have been expressed in fuller and more nuanced terms. We have also noted the Respondent's failure to make enquiries of the Claimant regarding the outcome of the 22 November 2019 Upper Tribunal hearing, its failure to share Ms Thomas' email of 17 February 2020 with the Claimant and its further failure to take a copy of the Notice of Receipt or to seek Ms Priestman or Ms Watkinson's further advice on it. We additionally note the Respondent's failure, notwithstanding the limited time available to it in the matter, to issue the Claimant with a written invitation to the meeting with Mr Browne, which warned her that her continued employment was potentially at risk and reminded her of her right to be accompanied. No notes were kept of the meeting on 19 February 2020,

notwithstanding Ms Morley attendance as an HR Business Partner. We have noted already that Ms Morley lacked material knowledge, training and experience of the law regarding the right to work in the UK. Outside of Ms Priestman's team there was limited awareness of the relevant Home Office Code and Guide. The Respondent may wish to reflect on whether relevant skills and knowledge are currently embedded within its HR teams (as opposed to its resourcing teams) and whether it ought to take steps to ensure that one or more HR colleagues receive training in this area, so that they are better placed in the future to support Managers who may have to deal with similar situations in the future.

40. It will be clear therefore that we consider there to have been significant elements of unfairness in terms of how the Claimant was treated by the Respondent, even if the Claimant's failure to provide relevant information regarding her appeal to the Upper Tribunal was a contributory factor in her dismissal. We return below to the question of what, if any, inferences the Tribunal should draw from this unfairness.

41. The Claimant pursues three complaints of harassment. Her first complaint is that Ms Priestman shared details of her immigration status with Ms Jessop. Our findings in relation to this are at paragraph 28 above.

42. The Claimant complains that on the morning of 24 February 2020, Ms Brown disclosed to at least 10 members of staff (comprising radiographers, a physicist and planners) at an ad hoc meeting that the Claimant had been dismissed for not having the right to work in the UK. It is not in dispute that Ms Brown did so. The Claimant was obviously not present. Ms Brown's account of the meeting is at paragraph 2.6 of her witness statement. We accept her account, namely that she limited herself to providing basic factual information, including that the Respondent was trying to resolve the matter to enable the Claimant to return, and that she did not answer any questions from staff who attended the meeting. We also accept her explanation at Tribunal that she gave basic information as to the reasons why the Claimant had been dismissed as she wanted to avoid any speculation that the Claimant had been dismissed for misconduct or poor performance.

43. On 26 February 2020 the Claimant wrote in an email to Ms Brown:

> *"Thanks for all your efforts … It makes a big difference to know that you are supporting me through this trying time …"*

44. We have referred already to the glowing reference provided by Ms Brown on 3 March 2020.

45. The Claimant complains that on 11 March 2020, Paula Brown sent an email to the Radiotherapy department, referring to "issues" between the Claimant and the Home Office and the Respondent's attempts to bring the Claimant back to work. The email is at page 334 of the Hearing Bundle. We accept Ms Brown's evidence that the email was sent at the Claimant and Ms Smith's request as the Claimant was becoming stressed and

anxious about colleagues contacting her. The available documents in the Hearing Bundle evidence a number of sensitive and supportive messages from colleagues, all of whom evidently thought highly of the Claimant. Nevertheless, we recognise that however well-intentioned their messages may have been the Claimant did not necessarily welcome the attention and understandably regarded her immigration status as a private matter. That does not alter the fact that Ms Brown's email was an agreed action, and that she drafted and sent the email in the Claimant and Ms Smith's presence after the Claimant had confirmed what she wanted it to say. Ms Smith could not recollect their meeting in detail but confirmed in her evidence at Tribunal that Ms Brown sat at her computer, asking questions and typing. The fact the email in question was sent at 15.36 is consistent with it having been drafted and sent during the meeting which took place during the afternoon of 11 March 2020. It is also notable that the Claimant emailed Ms Smith at 16.30 on 11 March 2020, having read the email and expressed no concern with either the fact the email had been sent or what it said. On the contrary she seemed to be satisfied with the outcome of the meeting as she told Ms Smith that there was no further need for her to speak with Ms Brown.

The Law and Conclusions

46. For the reasons set out in our findings above, the Claimant's complaint that the decision to dismiss her was taken before she was heard (and that this was direct race discrimination) is not well founded, since she has failed to establish the primary facts upon which her complaint is founded. We have found that Mr Browne did not make any decision before meeting with the Claimant on 19 February 2020 and hearing what she had to say. We address the Claimant's remaining complaints below.

Direct Discrimination

47. Section 13 of the Equality Act 2010 provides,

> 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.

48. During the hearing we explained to the Claimant that in considering her direct discrimination complaints we would focus on the 'reasons why' the Respondent had acted (or failed to act) as it did. That is because, other than in cases of obvious discrimination, the Tribunals will want to consider the mental processes of the alleged discriminator(s): Nagarajan v London Regional Transport [1999] ICR 877.

49. We further explained to the Claimant that in order to succeed in any of his complaints she must do more than simply establish that she has a protected characteristic and was treated unfavourably: Madarassy v

Nomura International plc [2007] IRLR 246. There must be facts from which we could conclude, in the absence of an adequate explanation, that the Claimant was discriminated against. This reflects the statutory burden of proof in section 136 of the Equality Act 2010, but also long established legal guidance, including by the Court of Appeal in Igen v Wong [2005] ICR 931. It has been referred to as something "more", though equally it has been said that it need not be a great deal more: Sedley LJ in Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279. A Claimant is not required to adduce positive evidence that a difference in treatment was on the protected ground in order to establish a *prima facie* case.

50. The grounds of any treatment often have to be deduced, or inferred, from the surrounding circumstances and in order to justify an inference one must first make findings of primary fact from which the inference could properly be drawn.

51. This is generally done by a Claimant placing before the Tribunal evidential material from which an inference can be drawn that they were treated less favourably than they would have been treated if they had not been a particular race, gender, religion etc: Shamoon v RUC [2003] ICR337. 'Comparators', provide evidential material. But ultimately they are no more than tools which may or may not justify an inference of discrimination on the relevant protected ground, in this case race. The usefulness of any comparator will, in any particular case, depend upon the extent to which the comparator's circumstances are the same as the Claimant's. The more significant the difference or differences the less cogent will be the case for drawing an inference.

52. In the absence of an actual comparator whose treatment can be contrasted with the Claimant's, the Tribunal can have regard to how the employer would have treated a hypothetical comparator. Otherwise some other material must be identified that is capable of supporting the requisite inference of discrimination. This may include a relevant statutory code of practice. Discriminatory comments made by the alleged discriminator about the Claimant might, in some cases, also suffice. There were no such comments in this case.

53. Unconvincing denials of a discriminatory intent given by the alleged discriminator, coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision, might in some case suffice. Discrimination may be inferred if there is no explanation for unreasonable/unfair treatment. This is not an inference from unreasonable/unfair treatment itself but from the absence of any explanation for it.

54. It is only once a *prima facie* case is established that the burden of proof moves to the Respondent to prove that it has not committed any act of unlawful discrimination, so that the absence of an adequate explanation of

the differential treatment becomes relevant: Madarassy v Nomura [2007] EWCA Civ 33.

55. In our discussions regarding the Claimant's direct discrimination complaints, we have held in mind that we are ultimately concerned with the reasons why each of the alleged perpetrators acted as they did in relation to the Claimant.

56. The outstanding matters relied upon by the Claimant as being less favourable treatment are set out at paragraphs 9, 11 and 12 of the List of Issues. Our conclusions in relation to those Issues are as follows:

(9) Mr Browne decided to dismiss the Claimant because he genuinely, albeit mistakenly, believed that she did not have the legal right to work in the UK and accordingly that the Respondent could no longer lawfully employ her without exposing itself to civil, criminal and reputational consequences. We are in no doubt whatever that he would have dismissed any other employee in materially the same circumstances and that he would not have delayed his decision or approached the matter differently if for example he had been dealing with a white Eastern European or Australian, or a non-black African. He acted on professional advice, from which he understood that he had no option but to dismiss the Claimant with immediate effect. He did not appreciate that he could delay his decision and lacked the knowledge and experience to ask questions of the Claimant that might have called into question whether she was in fact working illegally. Ms Priestman's advice, relayed by Ms Jones and Ms Everitt and relied upon by Ms Morley, was not tainted in any way by discrimination even if it might have been a little fuller and more nuanced. If Ms Morley failed to steer Mr Browne in the right direction that was her own lack of knowledge and experience in the matter rather than evidence of discriminatory thinking or assumptions on her part. In any event, the Claimant never advanced a positive case against Ms Priestman, Ms Everitt or Ms Morley that their advice, or the mental processes by which they had arrived at their advice, was biased or otherwise tainted by discrimination in some way. The process itself could undoubtedly have been managed more effectively, but the failings we have identified above do not lead us to infer or conclude that the Claimant was discriminated against. Instead they are the shortcomings of a dismissal process that was started and concluded within a matter of hours, and where the decision maker and his HR advisor lacked essential knowledge, training and experience in dealing with the situation. We are in no doubt whatever that the same mistakes would have been made regardless of the Claimant's protected characteristics.

(11) & (12) The same considerations apply as above. Mr Browne and Ms Morley failed to remind the Claimant of her right of appeal in the pressure of the moment. It was a pure oversight on their part, that was corrected when Mr Browne wrote to the Claimant on 26 February 2020. There was no intention to deprive the Claimant of her appeal rights and indeed she did subsequently appeal against her dismissal. Their failure to advise her

of her rights during the appeal hearing itself was nothing whatever to do with the Claimant's race, rather it reflects the rushed quality of the process in which other errors were made. In so far as the Claimant was informed that she would have to re-apply for her role if a vacancy became available, that was factually accurate in so far as Ms Morley and Mr Browne had overlooked in the meeting that the Claimant could appeal against her dismissal. Once again, the position was subsequently clarified in Mr Browne's letter of 26 February 2020. The Respondent was true to the assurances given in that letter, as it swiftly reinstated the Claimant to her role once a Certificate of Application was issued by the Home Office on 24 February 2020 and a Positive Verification Notice generated on 28 February 2020. She did not have to re-apply for her role. If there was any unfairness in these aspects of the Respondent's treatment of the Claimant, and we think any claimed unfairness was insignificant, it does not support an inference or finding that the Claimant was directly discriminated against. We are satisfied that any employee who did not share the Claimant's protected characteristics would have been treated identically in materially the same circumstances.

Harassment Claims

57. Section 26 of the Equality Act 2010 ("EqA") provides,

> (1) A person (A) harasses another (B) if-
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic; and
>
> (b) the conduct has the purpose or effect of-
>
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

58. In Richmond Pharmacology v Dhaliwal [2009] ICR724 it was observed,

> "A Respondent should not be held liable merely because his conduct has had the effect of producing a prescribed consequence: it should be *reasonable* that that consequence has occurred… overall the criterion is objective because what the Tribunal is required to consider is whether, if the Claimant has experienced those feelings or perceptions, and it was reasonable for her to do so. Plus if, for example the Tribunal believes that the Claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for the Claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the Tribunal as to what would important for it to have regard to all the relevant circumstances including the context of the conduct in question. One question that may be material is whether it should reasonably be apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the prescribed consequence): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt…

> (22) …dignity is not necessarily violated by what was said or done which was trivial or transitory, which should have been clear but any offence was unintended. But it is very important that employers and Tribunals are sensitive to the hurt which can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

59. In Land Registry v Grant [2011] ICR 1390,CA, Elias J said,

> "It is not importing intent into the concept of effect to say that intent would generally be relevant to assessing effect. It would also be relevant to deciding whether the response of the alleged victim is reasonable".

60. The conduct relied upon by the Claimant as being unwanted conduct is set out at paragraph (16) of the List of Issues. In each case we are satisfied that the conduct in question related to the Claimant's race, namely as a black person from Cameroon with an outstanding application for a residence card. Our conclusions in relation to those Issues are as follows:

(i) Ms Priestman shared the Claimant's personal information with Ms Jessop on 19 February 2020 because Ms Jessop was a senior manager covering in Ms Brown's absence. As such, she had a legitimate interest in the matter and was someone who might have dealt with the matter in Ms Brown's absence. In our judgement, it is irrelevant that the issue was referred on to Ms Jones and thereafter escalated to Mr Browne. It required urgent attention and Ms Priestman needed to alert a manager within the Radiography department to the situation. It would be unreasonable for the Claimant to experience feelings of intimidation, hostility, degradation, humiliation or offence because Ms Priestman's first point of contact happened to be Ms Jessop. Ms Priestman was not sharing sensitive information with a colleague who had no legitimate interest in the matter.

(ii) Likewise, though she would understandably have been distressed by her dismissal, it would be unreasonable for the Claimant to experience feelings of intimidation, hostility, degradation, humiliation or offence because Ms Brown disclosed to colleagues that the Claimant had been dismissed, particularly in circumstances where limited facts were disclosed and Ms Brown's main aim was to communicate the Trust's ongoing support for the Claimant and to avoid damaging speculation that her dismissal was conduct or performance related. In any event, the Claimant's communications at this time evidence that she was appreciative of all that Ms Brown was doing for her and that she did not perceive Ms Brown's handling of the situation, including her communications, to have created an intimidating etc environment for her. On the contrary, she acknowledged Ms Brown's efforts and support.

(iii) It would be entirely unreasonable for the Claimant to experience feelings of intimidation, hostility, degradation, humiliation or offence because Ms Brown sent the email dated 11 March 2020 to the Radiotherapy department, since, as we have found, that email was sent at the Claimant and her representative's request and the Claimant effectively dictated its content.

61. For the reasons above, the Claimant's complaints that she was directly discriminated against and harassed because of the protected characteristic of race are not well founded and will be dismissed.

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Employment Judge Tynan

Date: 16 December 2022.

Sent to the parties on: 19 December 2022

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For the Tribunal Office