EMPLOYMENT TRIBUNALS

Claimant: **Miss A Bovell**

Respondent: **Reading Borough Council**

Heard at: **Reading Employment Tribunal (Hybrid for the evidence of one witness)**

On: **4 to 7 April 2022, 4 August 2022 and 21 to 24 November 2022 (and in Chambers on 25 November 2022)**

Before: **Employment Judge Eeley**
Ms C Bailey
Mr M Fulton-McAlister

Representation
Claimant: In person
Respondent: Mr A Rhodes, counsel

RESERVED JUDGMENT

1. The claimant's claim of direct race discrimination contrary to section 13 of the Equality Act 2010 fails and is dismissed.

REASONS

Background

1. The claimant pursued a single claim of direct race discrimination arising out of her employment with the respondent (section 13 Equality Act 2010). That claim related to her dismissal from employment with the respondent. (The claimant had originally sought to pursue a range of other legal complaints but these had all been dismissed at various prior stages of the litigation. The only remaining claim for determination by this Tribunal was, therefore, the claimant of direct race discrimination because of race).

2. In order to determine the case the Tribunal received written statements and heard oral evidence from the following witnesses:

    i. The claimant, Angela Bovell, YES youth worker;
    ii. Sarah Gee, the respondent's former Head of Housing, Neighbourhoods and Community Services;
    iii. Gina (Georgina) Carpenter, formerly the respondent's South Children's Action Team Manager;
    iv. Tina Heaford, the respondent's former Area Team Leader of South Reading Youth Service.

3. In addition, the Tribunal was referred to, and read, the relevant pages in the agreed bundle of documents, which ran to circa 772 pages (plus additional pages submitted during the course of the hearing.) We also received written and oral submissions on behalf of both parties, for which we were grateful.

4. Unless otherwise stated, numbers appearing in square brackets are references to page numbers within the Tribunal Hearing Bundle.

The evidence in this case

5. During the hearing and during our deliberations to determine this case we were mindful of the fact that the events in question occurred more than ten years ago. The delay in this case coming to a final hearing has inevitably had an adverse impact upon the quality of the witness evidence available to the Tribunal. The passage of time inevitably undermines the clarity of witnesses' recollection of events. We have borne this strongly in mind in assessing the witness evidence presented on behalf of both parties. Many of the gaps in the available evidence are attributable to this passage of time. Nevertheless, we found some of the evidence presented by the witnesses to be more coherent, complete and credible than other parts of the evidence. In particular, the Tribunal found the evidence presented by Sarah Gee to be impressive. We found her to be a diligent, coherent and, above all, truthful witness. She had clearly given great thought to the dismissal decision that she made regarding the claimant. It was apparent to us that she was anxious to be fair to the claimant, particularly in light of the claimant's long employment with the respondent. In many ways she went 'above and beyond' to scrutinise the evidence available at the time and to give the claimant numerous opportunities to put her case and justify her continued employment with the respondent. Unfortunately, the claimant did not make the most of the opportunities she was given and failed to engage or attend the later Stage 3 meetings.

6. The evidence of the claimant's immediate line manager Tina Heaford was less impressive. She was clearly exasperated by the claimant and had run out of patience with her. This came across clearly during the course of the Tribunal hearing. However, the Tribunal could see that this exasperation and frustration arose out of the claimant's rather chaotic approach to her employment. The claimant was clearly difficult to manage and this was reflected in Tina Heath's attitude towards the claimant.

7. The evidence of Gina Carpenter was similarly less impressive. There were large gaps in her recollection. For example, she denied being present at the Stage 3 meetings even though the contemporaneous records and letters clearly recorded her as being present.

8. The claimant's evidence to the Tribunal was both confused and confusing. In light of this, and in light of the considerable passage of time since the events in question, the Tribunal made considerable reference to (and placed considerable reliance upon) the contemporaneous documents as being the most reliable and coherent evidence as to what happened during the relevant period, when it happened, and why it happened.

Findings of fact

Overall chronology of events

9. The claimant is a Black woman, originally from Barbados, who came to the UK as a child.

10. The claimant began work for the respondent as a part-time youth and community worker in 1983. She became a full-time employee in 1998. The claimant worked under a number of different line managers including, latterly, David Aldred. Unfortunately, Mr Aldred became seriously ill and subsequently passed away. Tina Heaford moved into the claimant's area of operations and became her line manager in April 2010.

11. Even prior to Ms Heaford taking over line management responsibility for the claimant, concerns were raised about the claimant's performance. We were referred to notes of supervision meetings dating back as far as 30 August 2007 [2a] where Mr Aldred noted concerns with the claimant's timekeeping, the absence of a programme plan for the 'SR Junior Club', and the fact that the 'Dance For Life' project had started without a project plan, budget or staffing allocation. Indeed, the claimant was instructed not to hold any further sessions on the Dance for Life project until it was sufficiently planned, budgeted and staffed. The supervision note specifically refers to an informal capability process and records that the claimant was given copies of performance targets that had been set for her as part of that process. They were set to specifically address and refer to the ongoing issues with the claimant's performance. The notes record that Mr Aldred had stressed to the claimant that there would be a focus on these performance targets for the next three months and that, provided that the claimant was able to address these areas during this time and sustain improvement thereafter, there would be no further action. However, should the claimant's performance not improve or if there was a future lapse, then Mr Aldred would move the claimant onto the formal capability process. Support from EAP and discussions with occupational health were also referred to within the notes.

12. These documented performance concerns are particularly notable as the claimant was very complementary about Mr Aldred during the course of the Tribunal hearing. She was keen to point out that she had a good working relationship with him, he was a good manager, and that he had no issues

with her performance in her role. Her account of this working relationship was somewhat at odds with the available contemporaneous documentation. Contrary to the claimant's evidence, it is apparent that her capability problems did not start when Ms Heaford took over line management but, in fact, arose considerably earlier. There is also reference, in later documentation, that performance concerns had been reported not only by Mr Aldred but also by a previous manager, Linda Thomson.

13. Ms Heaford started to express concerns about the claimant's performance and capability in 2010.

14. The claimant was absent from work on sick leave due to stress for a period of eight weeks between July and August 2010.

15. On 3 February 2011 an occupational health report confirmed that the claimant was fit for her duties [22a].

16. On 1 March 2011 Ms Heaford sent the claimant a letter regarding the informal stage of the capability procedure [22(b)]. She recorded that over the last few months she had been discussing areas of unsatisfactory performance with the claimant. She recorded that she continued to have concerns in relation to some areas of the claimant's performance, despite the support that had been given to the claimant. The issues which were identified as requiring improvement and which fell to be discussed at the meeting were: failing to meet the required deadlines; failing to observe the instructions of supervisors in relation to the completion of tasks within a reasonable timescale (particularly in relation to record-keeping on Wolftrax); keeping timesheets up-to-date; checking and responding to emails; keeping the calendar accessible to others (and up-to-date); concerns about the claimant's ability to manage her time and workload appropriately; and the claimant failing to turn up or cancelling planned meetings at short notice and also arriving late to appointments, resulting in complaints from the service's clients.

17. On 9 March 2011 an action plan for improvement was agreed with the claimant. A letter of 18 March 2011 [26] recorded that the meeting had taken place at the informal stage of the capability procedure and that during the meeting the areas of concerns that would be measured were recorded as: calendar; Outlook; timesheets; QES inputting; accreditations; project folder; staff annual timesheets and sickness returns; staff supervision; youth sessions; budget; timekeeping for appointments; and the C card system.

18. It appears that around this time Gina Carpenter and Sarah Walters (from HR) were also made aware of the shortcomings in the claimant's performance and there was certainly discussion about moving her to the formal stage of the capability management process. The areas of concern which were recorded by Gina Carpenter were: maintenance of calendars; Outlook maintenance; timesheet maintenance; QES inputting; accreditation and BPVIs; project folders maintenance; staff annual sick leave and sickness reporting; staff supervision; youth session following procedures; timekeeping; budget maintenance; C card system maintenance. It was unclear during the early part of 2011 whether the proceedings were formalised or remained at the informal stage of the capability process. The correspondence during this period referred to both parts of the procedure. Doing the best that we can with the available evidence, the Tribunal concludes that the claimant

remained on the *informal* procedure during this period (despite discussions to move to the formal part of the procedure.)

19. On 14 June 2011 the claimant was issued with a verbal warning by Ms Heaford. This was due to her changing her timesheets and incorrectly stating that she was working when Ms Heaford had proof that she was not working. It also related to her failure to meet the safeguarding procedure in taking a month to report on a particular issue.

20. The claimant was issued with a letter regarding the verbal warning, a copy of the disciplinary procedure and code of conduct [46, 47]. The claimant asked for a referral to occupational health which was completed by Ms Heaford. The verbal warning was due to remain on the claimant's supervisory file for six months. She was told that there was no right of appeal to a verbal warning but that she had the opportunity to record a response to be kept with the record of the verbal warning. The claimant then took a period of sick leave. It appears that no further action was taken against the claimant pursuant to the disciplinary process.

21. The claimant was absent from work on sick leave due to stress from 15 June 2011 to 1 September 2011.

22. An occupational health report dated 12 September 2011 confirmed that the claimant had returned on a phased return to work. Reference was also made to the claimant's permanent health condition, for which she was on medication and which could affect concentration levels and result in fatigue, which may impact on performance on some occasions [89].

23. Ms Carpenter sent the claimant a letter dated 30 January 2012 [143] informing her that her case would now be dealt with under Stage 1 of the formal capability procedure and inviting her to a meeting on the subject.

24. There was a further period of sickness absence due to stress between 30 January 2012 and 8 February 2012.

25. On 20 February 2012 a meeting took place pursuant to Stage I of the formal capability procedure. It was conducted by Kirsten Carr (who acted as Designated Officer under the procedure.) Ms Carr worked as the Head of Integrated Youth Development Services at that time. The various areas of performance concern were reviewed and discussed with the claimant. Six areas of ongoing concern were specifically identified. The claimant was issued with a written warning for poor performance and a 10 week review period was set [171].

26. The second Stage I Capability Meeting took place on 30 April 2012 [207, 220-221]. The claimant's progress was reviewed by Ms Carr, who concluded that several performance areas still required improvement (seven areas were specifically recorded).The review period was extended by six weeks.

27. On 2 July 2012 a further Stage I Capability Meeting occurred [250]. The adjourned Stage I Capability Meeting concluded on 6 August 2012 [262].

28. Ms Carr sent a letter to the claimant, dated 13 August 2012 [273], confirming that the claimant's progress was to be monitored through fortnightly supervision meetings.

29. A further Stage I Capability Meeting took place on 31 August, chaired by Ms Carr. It concluded that the claimant's performance remained unsatisfactory and she would progress to Stage 2 of the capability process [291].

30. The Stage 2 Capability Meeting took place on 12 September 2012. The claimant was issued with a final written warning [300].

31. A Stage 2 review meeting was held on 12 November 2012 [325(f)] and there was a further discussion on 4 December. The claimant was informed that she was still not meeting the basic requirements of the role despite improvements in some areas. It was confirmed that the matter would progress to Stage 3 of the capability process [332].

32. The Stage 3 meeting was held on 17 December 2012 and was chaired by Sarah Gee [339]. In the course of the meeting Ms Gee decided to seek further input from managers and occupational health. The meeting was, therefore, adjourned halfway through, to be resumed at a later date once the further information had been obtained.

33. The claimant was on sick leave between 13 January 2013 and 15 February 2013, following an operation.

34. The claimant attended an occupational health appointment on 11 March 2013 [373(a)]. Amongst other things, the occupational health report noted that the thyroid and stress conditions affected both the claimant's mood and levels of concentration. The medication the claimant was taking could affect cognitive skills and make task delivery slower. It was noted that stress levels were also likely to affect performance delivery and lack of confidence and trust. It was recorded that the claimant had stated that she would wish to be considered for a youth role in another team. The occupational health clinician recorded that this might help to restore her performance delivery and ease work-related stress levels.

35. The respondent sent the claimant an email making suggestions as to adjustments to her role in light of the occupational health report, including reallocating some of her cases (4 April 2013). The claimant objected to these proposals [404].

36. On 9 April the claimant emailed Ms Heaford making allegations of bullying and harassment by managers [405].

37. On 12 April 2013 the claimant emailed Ms Gee objecting to the reallocation of her cases and referring to bullying and harassment by management. Ms Gee responded to the claimant's concerns, stating that all changes were provisional until the end of the capability process. Ms Gee informed the claimant of a temporary change of manager until the resolution of the capability process. That manager was Ian Barks. The claimant was informed that the Stage 3 Capability Meeting would be reconvened on 25 April 2013.

38. The claimant replied to Ms Gee's email objecting to the reallocation of her work duties and making further allegations of bullying and harassment. She also stated that she was unavailable on 25 April due to another appointment.

39. On 19 April background papers and evidence for that Stage 3 meeting were hand-delivered to the claimant. The claimant emailed Ms Gee stating that she could not attend the Stage 3 meeting due to "block meetings".

40. On 24 April 2013 the claimant submitted a grievance.

41. The meeting time had been amended to accommodate the claimant's hospital appointment but the claimant did not attend. Ms Gee's provisional conclusion was that the claimant had not improved sufficiently to continue in her current role.

42. By letter dated 26 April 2013 Sarah Gee wrote to the claimant confirming her provisional conclusion and offered the claimant a further opportunity to make submissions on the process and to discuss her grievance [492]. Ms Gee noted that the claimant submitted a formal grievance immediately prior to the hearing with a list of unparticularized headings of 'complaint.' Having read that summary Ms Gee confirmed that she was of the view that these were concerns which arose in connection with the ongoing Capability Assessment (and management thereof) which could be dealt with in the context of her planned meeting with the claimant.

43. By letter dated 29 April 2013 Ms Gee wrote to the claimant with detailed feedback on her performance from the meetings of 17 December and 25 April [501]. Sarah Gee offered a further meeting (to take place on 30 April) in order for the claimant to make submissions, discuss her grievance and also consider alternative employment.

44. The claimant's representative emailed Ms Gee on 29 April to inform her that the claimant would not be attending the proposed meeting. Ms Gee offered a further opportunity to meet on 3 May 2013 [518].

45. On 3 May Ms Gee emailed the claimant reiterating the offer to meet but the claimant did not attend a meeting.

46. On 3 May 2013 the claimant was dismissed from her role with 12 weeks' notice [524].

47. On 10 May 2013 the claimant appealed the decision to dismiss alleging bullying, harassment and breach of procedure.

48. The claimant's appeal against dismissal was heard on 28 June 2013 and was chaired by Avril Wilson, Director of Education, Social Services and Housing [585]. Ms Wilson did not uphold the claimant's appeal [596].

49. The effective date of termination of the claimant's employment was 25 July 2013.

50. The claimant sought to appeal, out of time, to the elected members of the respondent Council. That subsequent appeal was not allowed to proceed further as it was presented outside the prescribed timescales.

51. The claimant received advice and representation throughout the course of the capability procedure from her trade union representatives.

The grievance

52. The claimant submitted a grievance to the respondent in the course of the Stage 3 part of the capability proceedings. She complained to the Tribunal that her grievance was not properly addressed and asked the Tribunal to draw the inference that this was due to her race or in some way supported her claim that she had been subjected to race discrimination. The claimant also argued that, as Sarah Gee was named in the grievance, she should not have adjudicated upon it. Instead, the claimant argued that Ms Gee should have passed it to an independent manager for investigation instead.

53. Upon hearing evidence from Sarah Gee it became apparent that the claimant initially delivered what can only be described as a 'bullet point' email indicating a desire to raise a grievance. The more detailed grievance document (which was presented to the Tribunal in the hearing bundle) was not initially sent to Sarah Gee. In those circumstances (and looking at the document she had received) she was not aware that she herself was the subject of the grievance complaint. Nor was she aware of the detailed allegations within the complaint or what exactly needed to be investigated. Her recollection was that no information was provided at this stage to substantiate any claim. Rather, the grievance in simply stated that evidence would follow. In those circumstances, and bearing in mind that the claimant was part way through Stage 3 of the capability process, Sarah Gee took the view that the best way to approach the grievance was to ask the claimant further questions about it at the next Stage 3 meeting (see contents of the letter [493]). By taking this approach Ms Gee could elicit details of the specific allegations and a decision could be made as to how best to proceed in addressing the grievance. Ms Gee anticipated that it might be appropriate to consider the grievance as part of the ongoing capability procedure if the subject matter was closely related to it rather than being an entirely separate grievance. Ms Gee's main objective was to ensure that the claimant's grievances were properly aired and addressed before any final decision was made regarding the claimant's continued employment with the respondent. This was seen as a particularly appropriate way forward given that notification of the claimant's grievance was received immediately before the proposed 25 April Stage 3 meeting.

54. Ms Gee's evidence to the Tribunal was that if the claimant had submitted a detailed grievance, then there would have been a discussion about deferring the capability procedure until the grievance had been properly addressed (possibly by a separate grievance manager, if appropriate.) However, as this was not the nature of the document that she had received, this was not the approach which Sarah Gee took. She decided her approach based on the nature of the grievance document she had seen. If she had been aware of the further particulars and/or of the fact that the claimant was raising a grievance about her (Sarah Gee) specifically then she would have reassessed the proper approach to the grievance and who should be tasked with addressing it. The Tribunal accepts Ms Gee's evidence in this regard.

55. There was some dispute during the course of cross examination as to precisely which grievance document Sarah Gee received. The Tribunal accepts Ms Gee's evidence on this point. We accept that she saw the initial 'bullet point' grievance but not any subsequent document setting out the detailed particulars of the grievance. It appears (from the evidence we heard) that the more detailed and particularised document was subsequently hand delivered to reception at the respondent's premises by the claimant's daughter. Indeed, the claimant's own email says that she will 'update when the evidence is sent forthwith.' This clearly indicates that she did not send the full grievance document initially. Ms Gee did not receive that more detailed document. Hence, when the claimant failed to attend the meeting, Sarah Gee could not obtain the further details she required in order to take the grievance further. The Tribunal also notes that Ms Gee was following HR advice in dealing with the grievance as part of the Stage 3 capability procedure rather than deferring meetings until the grievance had been investigated. (There is clear email correspondence to confirm the HR advice in this regard).

56. Unfortunately, the claimant chose not to attend the meeting on 25 April. This meant that she did not put forward the specific details of her grievance to Sarah Gee for further consideration. Ms Gee could not ask the claimant questions about her grievance either. Even after this date, Ms Gee offered the claimant further opportunities to come and discuss her grievance. Those meetings were also intended to allow the claimant to explore redeployment options. The claimant was offered three such opportunities to meet with Sarah Gee: one prior to the preliminary outcome of the Stage 3 process; and two afterwards.

57. Sarah Gee was also cross examined about the grievance procedure, particularly paragraph 1.4.1 which states:

> "When an employee raises a grievance in the course of disciplinary/capability action in relation to an alleged act of harassment or discrimination which may have implications for the fairness of the disciplinary process, then, in the light of the initial facts presented, the Council will consider (i) suspending the disciplinary procedure for a short period so that the grievance can be addressed or, (ii) consider bringing in another manager to deal with the disciplinary process."

Ms Gee noted that the paragraph states that managers will 'consider' suspending disciplinary processes and will 'consider' bringing in another manager, not that they are obliged to actually do so. She commented that the respondent was at the end of a very long capability process. She observed that it is not unusual for employees to make last-minute allegations of harassment in such circumstances. The question for HR was whether there was any substance to the allegations. The HR advice was that the manager should discuss the grievance as part of the capability procedure. Ms Gee gave clear evidence that if the claimant had provided something to substantiate the allegations she would have taken HR advice and they might have decided to suspend the capability procedure pending resolution of the grievance. However, they did not receive enough information or detail in order to do that and she therefore considered that they had taken the appropriate approach in all the circumstances. Furthermore, Ms Gee noted that later on

in the process (when the claimant appealed the decision to dismiss) the appeal manager looked at her grievance.

58. Ms Gee also pointed out that in the course of her dealings with the claimant, the claimant had not alleged that Ms Heaford was acting in a *racially discriminatory* way, although she did refer to the difficult management relationship. Ms Gee did not consider it surprising that the claimant referred to this difficult management relationship given that Ms Heaford was taking the claimant through the capability process. She essentially queried why race discrimination was not alleged by the claimant at the time if that is what the claimant thought was happening to her at that time.

Comparators

59. For the purposes of her direct discrimination claim the claimant relied on a number of named comparators (as well as a hypothetical comparator in the alternative.) The individuals named were Kevin Black, Lisa Harrop, Dave Bull, a youth worker named 'Gerry,' and Ms Sarah Jane Evans. The Tribunal could see the job roles of these individual comparators at page 242 in the hearing bundle. The claimant was employed as a 'YES Youth Worker.' Kevin Black was a 'Yes Advanced Practitioner.' Dave Bull was a 'PASS Worker.' Sarah Evans was a Temporary Youth Development Worker for the South and West. Lisa Harrop was a Connexions Intensive Personal Adviser. There was no evidence or information available in respect of an employee named Gerry. It is apparent, therefore, that the comparators all had a different job role to the claimant. This is a material difference between the comparators and the claimant for the purposes of the section 13 direct discrimination claim. This alone would undermine any assertion that the individuals were appropriate comparators.

60. The Tribunal also notes that it received little evidence about the named comparators' performance and capability in their roles. We heard insufficient evidence to establish that the comparators' performance in post was in any way comparable to the claimant's. In reality, the only specific evidence which we received related to Kevin Black and indicated that he too had had some issues with the proper completion of his timesheets and calendar. However, the respondent's evidence was that (after an initial period) his performance improved in this regard. Indeed, the documents in the bundle which referred to this all dated back to 2011, some two years prior to the claimant's dismissal. This would seem to suggest that the respondent's evidence is correct and that Mr Black's performance improved and the claimant's did not.

61. The issues raised with regard to the claimant's performance were of a different magnitude to those raised regarding Mr Black's. Issues were raised with the claimant's performance across a whole range of areas whereas she pointed only to performance issues with regard to timesheets and the calendar for Mr Black. Mr Black's situation is not in any way comparable to the claimant's. The Tribunal notes that by the time the decision to dismiss was taken the respondent was examining the claimant's performance across twelve separate areas of concern.

62. In light of the above the Tribunal accepts the respondent's evidence that Kevin Black's performance improved. Even if that were not the case his one

performance 'area of concern' was not in any way truly comparable to the claimant's performance concerns across twelve separate areas.

63. The claimant also directed the Tribunal's attention to notes from team meetings which indicated that the whole team was being 'hammered' on timesheets. Again, the Tribunal notes that this was in 2011. The respondent's position, which we accept, is that the rest of the team gradually improved their performance in this regard, whereas the claimant did not.

64. As part of her grievance the claimant included a quotation from an email allegedly authored by Lisa Harrop. Lisa referred to her relationship with Ms Heaford. She explained how difficult that working relationship was and that she felt bullied by Ms Heaford. She said, "when I requested to move areas as it got to the stage where I could not speak or look at her, I was told the move would only go ahead if I wrote a letter to cite the move was because I wanted to move to the West area, as it was a more multicultural part of Reading than North Reading. I only wish I had joined the union eight years ago! To be honest I am just glad to be finally away from all that and leaving the service wasn't an option in the end it was essential to my well-being and mental health." The claimant alleged that Ms Heaford had bullied Lisa Harrop, that Lisa had asked to move areas because of that bullying and that this request to move had been granted by higher management. She said that her situation was comparable insofar as she too asked to be moved away from Ms Heaford's management. However, the move was not granted in the claimant's case. She alleged that she was treated less favourably in this regard, albeit this was not the claim of direct discrimination which the Tribunal was tasked with determining in these proceedings. The claimant was essentially asking the Tribunal to draw an inference of discrimination in relation to the claimant's dismissal based on her assertion that Tina had discriminated against her and had tainted/influenced the decision to dismiss the claimant.

65. The Tribunal looked at the available evidence in relation to Lisa Harrop's case and found that it was not comparable to the claimant's. Firstly, the claimant asked for a move away from Ms Heaford in the context of Ms Heaford having responsibility for taking the claimant through the capability management procedure. There was no evidence to suggest Lisa Harrop was facing capability proceedings when she sought her move away from Ms Heaford. The context of Harrop's request was entirely different.

66. The Tribunal also noted that, if it is correct that Lisa Harrop had been bullied by Ms Heaford (as the claimant suggests) then this, in fact, undermines the claimant's allegation of racially discriminatory treatment on the part of Ms Heaford given that Ms Harrop was white. Rather, it appears that Ms Heaford may have had difficult managerial relationships with many of the employees, irrespective of their race. In any event, The Tribunal also notes that the respondent's evidence was that there was no disciplinary or grievance recorded on Ms Heaford's personal file in relation to Lisa Harrop. Indeed the respondent's position was that Lisa Harrop did not move role because of Tina Heaford but rather because she wanted to go to another job. The difficulty encountered by the Tribunal is that Lisa Harrop was not a witness at the Tribunal hearing. Her evidence was not tested in cross examination and there is a limit to the weight which can be placed upon the note quoted by the

claimant in her grievance. Indeed, we do not have a copy of the original email from Lisa Harrop indicating that this is what she said.

67. The Tribunal was asked to consider Dave Bull's circumstances as he also moved jobs. The same is true of Dave Bull as of Lisa Harrop. There is no evidence of capability issues being raised in relation to him nor is there any evidence that he alleged that he was being bullied by Ms Heaford. Indeed, the evidence given by the respondent in relation to Dave Bull was that he moved away with his job but then moved back and came back under Ms Heaford's line management at a later point without any complaint or difficulty. We have no reason to disbelieve this evidence.

68. The consequence of the above is that the Tribunal concludes that Ms Heaford may have had difficult managerial relationships with more than one of her direct line reports and that this was the case irrespective of the race of the employee in question. Indeed, in evidence before us Ms Heaford confirmed that she had been told by others that she had an authoritarian and abrasive management style and that this was something that she was aware that she needed to work on. We find that plausible having reviewed the way which the respective witnesses presented at Tribunal. We conclude that this is indicative of Ms Heaford having a difficult or unpopular managerial style 'across the board' rather than a discriminatory approach in which she singled out the claimant as the object of bullying and racial harassment. It is quite feasible (given what Lisa Harrop is alleged to have said) that more than one person had 'fallen out' with Ms Heaford. Indeed this is backed up by the contents of the email authored by Ms Carpenter [at 68c] where she refers to Ms Heaford as being "heavy-handed" at times in her approach to staff. Ms Carpenter had apparently spoken to Ms Heaford about this and the need to ensure that she is supportive as well as challenging. This seems to be the respondent's view of Ms Heaford's approach and demeanour. In addition, we heard evidence from Ms Heaford to confirm that she had taken white employees through the capability process (as well as the claimant). This shows (to some extent) that Ms Heaford did not shy away from tough management decisions in respect of all her direct line management reports, irrespective of their race.

Redeployment

69. To the extent that it is necessary to do so, we note that the claimant's fitness for work statement dated 1 February 2012 recommended a move to a different department and manager but that a subsequent fitness for work statement dated 9 February 2012 recommended that she work under supervision whilst working with another colleague. We are satisfied that Ms Carpenter felt that it was not possible to move the claimant given her underperformance and given the potential wider impact on the service. The first fit note suggested that the claimant was not fit to attend work unless the recommended adjustments were made. Since these adjustments were not practically possible (the move to another job), in order for the claimant to be able to return to work she would need to be signed fit to work with adjustments which the respondent was actually able to implement [155]. Otherwise she was, for all practical purposes, still signed off as unfit for work. This explains why the GP's recommended adjustments changed over time. It did not reflect

any untoward pressure being brought to bear by the respondent's managers. Rather, the updated fit note was sought to facilitate the claimant being signed back to work in a way which could be practically accomplished.

70. Occupational Health also recommended that the claimant be given alternative employment in an email of 5 March 2012 [189]. The respondent understood this to mean that the claimant would need to change job role, not just location. This would not have been possible. The email refers to the fact that any move would be dependent on the availability/suitability of posts, which would be an HR matter. This email was sent to Ms Heaford marked 'confidential.' It was not shared with the claimant directly by Occupational Health. The claimant's managers did not object to the claimant seeing it and there is nothing in the evidence to suggest that they were made aware that she had not seen it at the time. Ms Carpenter did not initially send the email to the claimant because it was marked confidential and she wanted to get occupational health permission before disclosing it [190]. She got such permission and acted upon it.

71. Although there is reference to redeployment in the medical/occupational health notes, these alone did not oblige the respondent to redeploy the claimant into a different job role or location if such a role was not available or if such a redeployment would have an unduly adverse effect on the wider service. Redeployment possibilities were an organisational question rather than a medical one. The respondent had significant capability concerns about the claimant and was entitled to take the view that it would not be appropriate to redeploy her in this line of work if her performance was still below standard. In any event, the claimant was offered a number of opportunities to discuss redeployment but did not attend the relevant meetings and participate in those discussions. It was apparent to the Tribunal that the claimant did not want to be redeployed to a job outside the youth work service.

Filing cabinet

72. As set out above, the claimant asserted that Tina Heaford bullied her and singled her out for mistreatment and that this was on grounds of race. One example she gave related to a filing cabinet in the office. The claimant alleged that Ms Heaford had gone into her personal filing cabinet without permission and "chucked out" the claimant's personal possessions. She had also, allegedly, left items strewn all over the claimant's desk. The claimant felt that this showed a degree of disrespect towards her on Ms Heaford's part.

73. The Tribunal heard evidence about this incident. We find that Ms Heaford was asked to clear some space in the office for the use of other staff who were moving offices. In January 2011 Ms Heaford asked all of the team to clear space in the office. They were asked to go through their belongings and discard anything which was out of date or no longer needed. In essence it was a "clearing out" session. Ms Heaford gave the team a reasonable period of time to comply with this request. The claimant's colleagues did as they were asked. The claimant did not. By March 2011 the issue needed to be resolved and so Ms Heaford took matters into her own hands. Rather than going into the claimant's cupboards and "chucking out" items, she looked through the cupboards and discarded anything which was clearly out of date and not useful to the department or to the claimant in her job role. She left

the remaining items out for the claimant to go through at her convenience. She followed this up with an email to the claimant on 22 March which said: "Hi Angela. I have emptied one of the grey cabinets in the office. This cabinet held what seemed to be your information. Much of the information was out of date and I have cleared these into the recycle blue bag, the remaining items I have placed on your desk to sort. Please sort the items before you try to restore them." This email shows that Ms Heaford did no more than was necessary in the circumstances. She had to take steps to ensure compliance with the earlier instructions and she had given the claimant ample time to do the task herself. The claimant had not done so. The tone of the email indicates that Ms Heaford acted in an entirely respectful way towards the claimant. The claimant has mischaracterized this as an element of bullying behaviour towards her by Ms Heaford. Instead, Ms Heaford has done no more than was necessary and has been polite throughout. We note that everyone else in the team complied with the requirements whereas the claimant did not. The claimant certainly did not help herself in this and other matters. This is not a matter of subjective opinion but rather a clear example of where the claimant's failure to organise herself caused problems for management. This sort of behaviour by the claimant is, we find, a more likely explanation for any frustration displayed by Ms Heaford towards the claimant rather than any issue of race or discrimination.

Shouting incident

74. The claimant raised issues about the way in which Ms Heaford communicated with her. She asserted that Ms Heaford shouted at her and that this was part of a pattern of bullying behaviour. There is evidence in relation to one specific instance about which the Tribunal can make findings of fact. During the earlier stages of the capability procedure there was an ongoing issue about the claimant's timekeeping. The claimant's manager was entitled to query whether the claimant was where she should be, doing what she should be doing, and working the right hours on the right tasks. The claimant had instilled no confidence in management that she was working to time and in the correct way. As a result, Ms Heaford asked other members of the team to monitor the claimant's comings and goings and to report when the claimant was not where she should be. This is something that the claimant resented. She felt that she was being put under surveillance by white colleagues and that a white employee would not have been treated in this way.

75. The Tribunal notes that the respondent's managers were entitled to know (and to check) whether the claimant was in the right place at the right time. The most straightforward way to do this was to ask colleagues to keep an eye on the claimant to see if her timekeeping was up to standard. Unfortunately, if the rest of the team were white employees this would, of necessity, mean that a white employee was monitoring the claimant, a Black employee. Given the racial make-up of the team this would be unavoidable. This does not mean that the claimant was in any sense being monitored *because* she was Black. The claimant's race was not a material factor or significant influence on the decision to monitor her comings and goings. This was done because she was not reliably where she should be during the working day. The Tribunal is satisfied that a white employee in a similar situation would also have been monitored.

76. When the claimant made it clear that she was unhappy being monitored by colleagues Ms Heaford put forward an alternative solution. The claimant was asked to phone Ms Heaford to “check-in” and “check out” during the working day. That way she was not being monitored by colleagues but instead had to take responsibility herself for reporting her whereabouts. The problem this posed was that the claimant continued to be elusive. She did not do as asked. Ms Heaford still struggled to track her down and to know where she was.

77. On one occasion Ms Heaford had been trying to contact the claimant for three days because the claimant had not ‘reported in’ as required. She finally got through to the claimant on the telephone. When the claimant picked up the telephone Ms Heaford shouted, “why didn’t you answer the bloody phone!” The claimant was upset by this. She was with colleagues and became visibly upset. Kevin Black took the phone off her and refused to allow Ms Heaford to speak to the claimant again because the claimant was so distressed. Ms Heaford was clearly frustrated by the lack of communication from the claimant. Hence she shouted. She also realised immediately that she should not have behaved in this way, that it was inappropriate. Consequently, she self-reported the incident to Gina Carpenter because she realised that she had behaved inappropriately.

78. The Tribunal concludes that Ms Heaford reported the incident to Ms Carpenter in order to ‘cover herself’ against any future repercussions. However, she did not follow this up with an apology to the claimant. Such an apology would have been the appropriate way to deal with matters. In the absence of such an apology the claimant was left with a sense of grievance that had not been properly addressed. On having the matter reported to her, Ms Carpenter counselled Ms Heaford in supervision not to repeat such an outburst. No sanction was applied to Ms Heaford and the matter went no further. The Tribunal does not consider that the application of a disciplinary sanction to Ms Heaford would have been necessary or appropriate in the circumstances given the relatively minor, isolated incident. However, the claimant perceived that Ms Carpenter had not reacted appropriately to the incident. This lack of reaction on Ms Carpenter’s part left the claimant feeling aggrieved. Ms Carpenter could have noted the issue formally and reported back to the claimant that she had addressed it with Ms Heaford. This might have avoided the claimant feeling that she was being treated dismissively.

79. The shouting incident and the incident with the filing cabinet show us that there were genuine, substantive and identifiable reasons for the breakdown in the working relationship between Ms Heaford and the claimant. These did not relate in any way to the claimant’s race but rather to her failure to address the requirements of her job role in an appropriate and timely manner. Whilst Ms Heaford may have reacted more harshly than another manager might have in the same circumstances, we accept that she would have reacted in this way towards an employee of any race when faced with the same behaviour on the part of that employee.

80. The Tribunal also heard evidence about the racial composition of the workforce. Ms Heaford confirmed that she had managed not only the claimant but also Leon, Ray and Gary who were all from BAME backgrounds. She also managed many part-time staff of BAME backgrounds and interviewed and chose to recruit BAME employees. This suggests no overt or conscious racial bias on Ms Heaford’s part.

Training

81. The Tribunal heard evidence about a particular incident in August where the claimant had been booked onto a training course provided by an external provider. The training seems to have taken place on 20 August. Prior to this date the employee in charge of coordinating external training (Becky Tyler) issued a service-wide instruction that employees should not turn up late to training with external providers as this had become something of a problem for the respondent. On the morning in question it appears that the claimant was notified of a last-minute appointment with occupational health which was due to take place later that morning. It clashed with a training session (provided by an external provider) that the claimant was supposed to attend. The claimant was keen to attend the occupational health appointment and phoned Ms Heaford to notify her that she would be late to the training session because she was going to the appointment with occupational health first. Ms Heaford's response was to quote Becky Tyler's instruction and to suggest that the claimant should attend the training rather than the occupational health appointment. She said to the claimant that if she attended training late she would not be allowed in. Ms Heaford responded in this way partly because she was prioritising Becky Tyler's instructions and partly because Ms Heaford was not aware that an occupational health appointment had been arranged for the claimant that morning. There was no such appointment in the calendar and she had received no notification of the appointment from any third-party source other than the claimant. In light of her views about the claimant's reliability, she may well have been sceptical about the existence of the appointment based purely on the claimant's phone call. In those circumstances, Ms Heaford took the decision to reiterate the "party line" and told her to come to the training. The claimant then realised that she was going to be more than a couple of minutes late for the training and so she did not attend at all. We do not know whether the claimant didn't attend the training because of what Ms Heaford had said to her or because she wanted to prioritise the occupational health appointment.

82. The claimant was subsequently told by colleagues that two white male employees attended the training late and were admitted to the session. We pause to note that we do not know how late those employees were for the training and we do not know why they were late. We also do not know whether they turned up late unannounced or whether they had phoned ahead (like the claimant) to prewarn the managers that they were running late and would be in attendance at the training late. In those circumstances we do not have enough information to decide whether the claimant's situation was comparable to that of the two white male employees. We do not really know the circumstances in which they were allowed into the training. In light of the lack of evidence we are unable to conclude that the claimant was treated less favourably than her white colleagues in these circumstances or that their circumstances were comparable. Nor are we able to say that it was anything to do with the claimant's race.

Sarah Gee's decision

83. The decision to dismiss the claimant was taken by Sarah Gee. That is the decision which is alleged to be the act of direct race discrimination in these

proceedings. (No other complaints of discrimination are pursued). Sarah Gee was the sole decision maker. We find that she had 'no particular axe to grind' with regard to the claimant. We find that she approached the Stage 3 capability proceedings with an open mind and went through each of the issues of concern, scrutinising the available evidence before reaching a conclusion. She was provided with a pack of evidence and a report from Kirsten Carr. She took the contents of that pack into consideration. She also met with the claimant and heard what the claimant had to say about it. In light of the claimant's representations she decided that she wanted further evidence and commissioned a comparison exercise in relation to project folders and also asked Ms Heaford and Ms Carpenter to carry out session observations of the claimant's work to assess her current standard of performance. The Tribunal is satisfied that these are not the actions of a decision-maker who is seeking to 'rubberstamp' the opinions of others or who is not minded to give an employee a fair opportunity to succeed in capability and performance management terms.

84. We have considered Ms Gee's letter of 29 April in detail [501]. In that letter she addresses each of the areas of concern and we note that where the claimant's performance has improved she recognises this. This evidences her balanced approach to the issues.

85. The claimant has questioned the composition of the capability panel at Stage 3. She has sought to assert that Ms Carpenter and Ms Heaford were part of the panel and were involved in the decision-making process. This is not correct. Sarah Gee was the sole decision-maker. The other managers were present at the meeting in order to present the management statement of case, to answer questions and to provide evidence. This was entirely proper and in line with procedure. This does not mean that they were decision-makers in the claimant's case at Stage 3.

86. Sarah Gee's letter of 29 April set out twelve separate areas of concern and addressed them all. Ms Gee also noted that a further performance concern had come to light during the course of the process and this was relevant to assessing overall capability namely, "quality of safeguarding assessment and incident reporting."

87. The first matter for consideration was "inaccurate completion of calendar not reflecting whereabouts." In considering the evidence, Ms Gee noted that the claimant's performance had improved in respect of this target in December 2012 but that in recent weeks her performance had declined. Kirsten Carr had provided a sample of incidents in her report which demonstrated that when the claimant attended scheduled appointments she frequently was absent for much longer periods than might reasonably be expected without explanation or management agreement. Ms Gee concluded, on the basis of the available evidence, that performance in this area had not improved consistently or sufficiently. She did not rely solely on Ms Heaford's evidence in coming to this conclusion.

88. During the course of the Tribunal hearing the claimant raised a number of matters which she said explained the difficulties with her calendar. She suggested that any discrepancies or inadequacies in the calendar were not her fault and it was therefore unfair and discriminatory to hold such failures against her as part of the capability case.

89. The Tribunal was directed to look at a document at page 218 of the bundle. This was an email from George Fomba dated 2 May 2012. The subject matter was "changes made to your calendar following a call logged with Northgate." Northgate was the respondent's IT support provider. The incident dated 2 March 2012 was logged as follows: "Visited and checked Angela's outlook settings. Her calendar was shared to 2 groups who both had read and modify rights to it. I changed both of these to review only. As for her spreadsheet, we again password protected the file for updating she will make a note of all changes made to the spreadsheet in future as this file is in their S drive. Also asked her to keep a copy of the file on her H drive after every change to be able to see if the shared copy changes." This entry related to the claimant's Outlook calendar and also to timesheet spreadsheets. In relation to the outlook calendar it indicates that up until March 2012 it was possible for other people to enter the claimant's Outlook diary and amend it. After 2 March 2012 this was no longer possible. Other people could look at the contents of the claimant's diary but amendments had to be made by the claimant herself. This indicates that any ongoing discrepancies and shortcomings in the diary were the claimant's responsibility and could not be blamed on other employees or indeed Ms Heaford, her manager. The claimant was unable to point the Tribunal to any evidence that somebody else was improperly accessing or amending her calendar. She could not satisfy us that the blame for the inadequacies in her calendar lay with someone other than the claimant herself.

90. The next area of concern highlighted in Ms Gee's letter was: "Inaccurate and inconsistent completion of timesheets and calendar not reflecting hours legitimately worked. A pattern of "under-working" hours without management authorisation." Ms Gee noted that in June 2011 the claimant had received a verbal warning about not entering correct work times on her timesheet and for claiming hours worked when she was not in work. In December management had reported that the claimant's performance in this area continued to require improvement. Whilst timesheets were being completed, there were still examples where calendars and timesheets did not match and confusion in recording personal and medical appointments. As at the date of Sarah Gee's letter there continued to be discrepancies between the hours claimed on the timesheet and the actual hours worked (as per the examples cited by Kirsten Carr in her April 2013 report.) A review of timesheets disclosed that there had been a pattern of the claimant working less than a 37 hour week then overworking at a later stage in order to 'make up for' lost time but without getting agreement from the claimant's line manager for this. Although this had been raised in previous performance reviews, the claimant had continued to 'under-work.' The failure to work contracted hours also did not take any account of the discrepancies mentioned elsewhere where the claimant had over-claimed a number of hours. The claimant's performance in this area had not improved.

91. During the course of the hearing before the Tribunal, the claimant sought to allege that the problems with her timesheets were the fault of others, in particular Ms Heaford. She sought to shift the blame away from herself. Once again, the evidence in the hearing bundle did not support the claimant in this. It was clear from the document quoted above (at page 218) that after 2 March

2012 her spreadsheet (by which we mean timesheet) was password protected so that it could not be altered by others. Further, the claimant had been advised to make a note of all the changes she made to the spreadsheet in future and to keep a copy of this so that any changes made by other people would be visible and apparent. The claimant was unable to provide us with documents to show that her timesheets had been amended by other people.

92. We had some timesheets provided to us by the respondent during the course of the hearing [773 -776]. Ms Heaford was cross-examined about these documents. The documents in question related to 2011 and so predated the changes made by George Fomba. Ms Heaford accepted that she had inserted comments within the body of the spreadsheets such as "please update spreadsheet correctly" or "please balance your spreadsheet." It is apparent that these were instructions to the claimant to update the spreadsheet. However, she was leaving this task for the claimant to complete as it was the claimant's job to do so. Ms Heaford denied making changes to the figures within the body of the spreadsheet. She denied amending the hours claimed. Indeed, there was no evidence to suggest that she had done this. If she had, there would have been no reason leave written notes in the spreadsheet to ask the claimant to change the figures and update them appropriately. Furthermore, if Ms Heaford had inappropriately tampered with the figures in the claimant's timesheets she would have been able to prove this by reference to her own separately saved copy of the timesheets she had filled in. The claimant was unable to do this. There was also some evidence provided that the spreadsheet calculations had been corrupted on the file at one point. This meant that calculations were inaccurate. Clearly, if this was a design/technical fault with the spreadsheet that was not the claimant's fault. However, we accept Ms Heaford's evidence that this is not what the claimant was being criticised for. The calculations were not the issue. Rather, the issue was the raw hours/data that the claimant was inputting and the fact that this was either incorrect or disclosed problems with the working hours. We are satisfied that none of the evidence the claimant pointed us to during the hearing undermined the respondent's conclusions in relation to this area of capability concern.

93. The next area of concern was: "Not meeting youth accreditation targets." This was an objective measure and not a matter of personal or subjective opinion. Ms Gee recorded that, based on Quarter 2, the claimant's accreditation targets were being met but since then the claimant had not achieved accreditation targets for Quarters 3 and 4. The total number of accreditations which successfully passed moderation for 2012/13 was 27 against a target of 40. Ms Gee was entitled to conclude that performance improvement had not been sustained against this target. She also took account of partial mitigation (the claimant's sick leave.) Based on the available evidence, it appears that Ms Gee came to a reasonable and evidentially sound conclusion in relation to this area of concern.

94. The next area of concern, number four, was: "Inaccurate and late input of Youth Work evaluations into QES the Youth Service performance and quality monitoring system." Ms Gee noted that, as of December, this area of performance had improved but there were ongoing issues of incorrect data inputting and timeliness. Incorrect data and timeliness were recurring themes and a feature of the claimant's work. We have no reason to question Ms Gee's conclusions in relation to this area of concern.

95. The next area of concern was number five: “Non-completion of part-time staff sheets.” Ms Gee noted that, as of December, these were being submitted on time and that this target was therefore met. The claimant was given full credit for this.

96. The sixth area of concern was: “Not maintaining the Outlook inbox so that it remains open.” Once again, Ms Gee noted that, as of December, the email box had remained open and that, therefore, this target had been met. The claimant was given due credit for this.

97. Area number seven was: “Not maintaining project folders with required documentation completed to an acceptable standard in a clearly structured file.” Ms Gee noted that concerns had been raised throughout the capability process about the quality of the claimant’s project folders. This had been an area identified for improvement ever since March 2011 and had been discussed at review meetings throughout the process. Guidance had been given to the claimant on what should be included in the folders and outlined in action plans. This was a particularly important area for the claimant to get right because the folders should include important information for the safe running of the sessions (such as emergency contact details for the young people and up-to-date risk assessments.) She noted that there were also implications for the quality of the delivery as the folder should include the programme plan and any other information needed for the session so that the session could easily be covered by another worker, if necessary. Ms Gee had concluded that the claimant’s project folders were not clearly labelled or organised and were difficult to navigate. They contained information which was irrelevant and/or out of date and there were gaps in the records. Of particular concern was the fact that risk assessments were confusing and several did not relate to the activities which were being delivered or to the building from which they were being delivered. Young people’s membership forms had not been completed so that there were no emergency contact details for some young people. Examples were given of sections where information had been ‘cut and pasted’ from one risk assessment to another. This was of concern, as it indicated a lack of meaningful thought process, analysis or assessment.

98. At the hearing on 17 December Ms Gee had requested a comparison of the quality of the project folders from the claimant as compared to those of other youth workers within the team. She wanted to make sure that the claimant was not just one of many who were underperforming. She wanted to know whether this was a systemic problem or not. The comparison indicated that the quality of the project folders maintained by three colleagues in the claimant’s team was found to be of a consistently higher standard than the claimant’s. Further concerns were raised when, on 23 December, two additional project folders were hand delivered to Ms Gee. These folders were not the same as the existing project folders for Hexham Road and the Studio project (which were still in the office.) The new folders had not previously been seen by management. The new project folders contained programme plans which were different to the original programme plans that had previously been submitted. Ms Gee understandably concluded that the more recent programme plans were written in retrospect as they were submitted on new templates that had not been designed until December 2012. Further,

the content of more recent programme plans was not the same as that discussed in the supervision session on 17 October 2012. In any event, the newly submitted folders still contained undated paperwork and were missing information such as staff contact details. Risk assessments remained inadequate and the quality of the written work was still poor. In light of this, Ms Gee had ample evidence to conclude that performance in this area had not improved and was not meeting minimum acceptable standards. None of these conclusions were based on Ms Heaford's evidence. Rather they were based on the claimant's own work.

99. Area eight concerned: "Programme plans and evaluations not submitted to an acceptable standard and within set deadlines." Ms Gee noted that evaluation reports submitted contained information that did not relate to the youth work programme delivered and it appeared, again, that information had been 'cut and pasted' or copied from other reports. Evaluations were incomplete and the information provided often did not make sense. As the claimant had previously suggested that the summer holidays in 2012 were very pressured and that this had contributed to the late submission of evaluations, Ms Gee asked colleagues to compare the workloads for this period across the team. A breakdown of the hours worked showed that the claimant delivered more youth work hours than her colleagues in the South team but that she also had proportionately more time available for administrative work. This undermined any suggestion that the claimant was at a comparative disadvantage.

100. The claimant had also suggested that other colleagues were given an extended deadline to complete their Quarter 2 programme evaluations. Ms Gee confirmed that this was not the case and other staff submitted their evaluations to deadline.

101. Management undertook a comparison between the 13 week programme plan and the session evaluation statements which the claimant produced. They noted that there appeared to be little link between the programme plans and what was actually delivered, according to the evaluation of sessions. There was little evidence of how evaluations and the views of young people had informed planning for future sessions and actions highlighted in session evaluations did not appear to have been followed up. Taken together, the documents showed little evidence of planning and meaningful review. Ms Gee noted that this was a consistent finding that had been raised in previous review meetings. On the basis of these concerns and in order to provide a more rounded assessment of the claimant's performance, Ms Gee requested the claimant's managers to undertake direct observation of the claimant's practice. This resulted in two reports: one from Ms Heaford and the other from Ms Carpenter. Those reports noted a lack of planned activities and the impact that this had on the quality of delivery and engagement of young people. The claimant complained that the observations by Ms Carpenter and Ms Heaford were not fair or balanced and should not therefore have been relied upon. The Tribunal does not accept this. Even if we were minded to agree with the claimant on this point, there was ample evidence in the documentation to substantiate Sarah Gee's conclusions in this regard (quite apart from those session observations). In short, Sarah Gee was entitled to conclude, on the available evidence, that the quality of the claimant's work in this area was below the minimum acceptable standard. The observation sessions were not determinative. The paperwork spoke for

itself even without those observations from Heaford and Carpenter. Ms Gee was entitled to draw this conclusion.

102. The next area identified was: “Not maintaining cash handling systems.” A review of the documents indicated that there were examples where the claimant had not recorded income information in line with the target or where the income handed in did not match the information recorded. Income had not been handed in on a weekly basis and had to be chased by managers. The claimant had stated in the hearing that there was no written process for cash handling but managers confirmed that there was a procedure and there was a detailed chronology of support offered to the claimant from April 2010 which evidenced the support that had been provided to her on this issue. In light of this, the claimant’s ability to comply with the procedure remained a concern.

103. The Tribunal heard further evidence about cash handling procedures during the course of the Tribunal hearing. On any measure, the claimant’s record-keeping in this regard was inaccurate. The claimant admitted to not wanting to charge the financially poorer young people for the services that were provided. This was not her decision to make. She should have charged the fees which were applicable. In not doing so she was ignoring her manager’s instructions. Furthermore, even if she did not demand payment from all the appropriate young people she should have recorded which individuals *did* make payment. She did not do that. There were clear gaps in the records. Money had gone missing and the claimant was unable to give a coherent explanation as to what had happened to it. She repeatedly sought to pass the blame for this to others.

104. Area of concern number ten was : “Not scheduling and conducting regular supervision of part-time staff members.” This performance issue had been raised in respect of a previous employee as well as the one part-time staff member that the claimant was managing at the time this letter was written. Ms Gee pointed out that the claimant was expected to schedule supervision dates for the whole year. The first supervision session for this member of staff would have been due by 30 October but this had not been done by the time of the December hearing. The claimant had explained that this was due to the employee taking leave and that the dates had now been arranged for the year. A subsequent review of the system indicated that there were records of supervisions being held on 13 November and 2 April. According to the notes of 30 November three further sessions were booked but none of these appeared in the claimant’s calendar and there were no records of the meetings in the intervening period between November and April. One session was booked for 1 February (when the claimant was on sick leave) and the 29 March session fell on a bank holiday. Ms Gee also took into account the fact that the claimant was on sick leave through January to mid-February 2013. The claimant was given credit for partial mitigation but it was noted that the lack of formal, regular supervision of the member of staff remained a concern.

105. Area eleven concerned: “Not achieving expected numbers of young people attending youth clubs and ensuring young people’s participation in programme planning.” Ms Gee had already noted the evidence of inadequate session planning which impacted upon the quality of delivery and the engagement of the young people. The claimant’s written action plan was

reviewed. The numbers attending the sessions had improved but evidence suggested that the quality of engagement had been inadequate.

106. Area twelve concerned: "Failure of records of one-to-one Youth Work to meet acceptable standards." Ms Gee noted that the claimant held two one-to-one youth work cases and that concerns had been raised with the claimant about the quality of file records, the lack of action plans, the failure to record if actions agreed had been implemented, and about the amount of engagement with the two cases held by the claimant. Ms Gee took due account of the fact that there was not a strong record of supporting training on this aspect of performance. She also noted that case management was new to the claimant and was an area of developing practice for the service more widely. However, she also noted that there were generic and long-standing recording principles established in the service and it was a reasonable expectation that any records should be clear and well structured. She found the lack of basic recording on the files of case details and of actions agreed (and taken) concerning. Letters to young people held on the file were poorly written and case notes which were available were not always coherent. In particular, in one instance a letter intended for one young person was sent, in error, to another. This might have had serious consequences. Ms Gee also noted the very significant and unexplained delay from case allocation to first contact for one case and then for the other case there were unacceptable and unexplained gaps in contact. She also noted that the claimant had arranged to undertake one-to-one youth work whilst on duty in the One Stop Shop and that this afforded insufficient privacy for a contact of this nature and was inappropriate. Based on the evidence available, Sarah Gee was entitled to conclude the performance in this area was not at a satisfactory level, although the lack of sufficient training offered some mitigation in respect of case recording.

107. The final area of concern which had arisen was: "Quality of safeguarding assessment and incident reporting." Two safeguarding reports were submitted in November 2012. They raised concerns in terms of the quality of reporting of incidents and concerns about the claimant's understanding and ability to make an appropriate assessment in respect of safeguarding concerns. Ms Gee noted that both reports were poorly written and difficult to follow. The overall quality of analysis and reporting was of concern. Furthermore, a number of the performance issues already identified had implications for the claimant's ability to safely conduct her role.

108. Once Sarah Gee had reviewed the areas of concern she went on to consider any mitigating factors that might be relevant. She considered the claimant's health problems and the impact that these had on her ability to perform her role. She noted the claimant's long-standing thyroid condition and the claimant's sickness absence due to stress and a back condition. She took into account the most recent occupational health reports. She concluded that it was not possible to discern the extent to which health conditions and medication impacted upon the claimant's performance but, as the thyroid condition and the back condition were lifelong conditions, it seemed likely that there was no prospect of improvement for the foreseeable future. She went on to state that, having considered the nature, extent and duration of the performance issues, she did not consider that a move to another team in the youth work role would restore the claimant's performance. It was noted that the claimant's performance levels had been consistently unsatisfactory over

the course of a period of two years. Ms Gee noted that she had considered (along with HR) any adjustments which might be made and had concluded that there were no reasonable compensatory adjustments which would enable the claimant to safely fulfil the requirements of the role. She did not consider that a move to another team in the youth work role would restore the performance.

109. The second mitigation issue considered was the level, nature, frequency and duration of the support that the claimant had received. Ms Gee reviewed the chronological account of additional support, training and supervision provided to her through the capability process. This included bi-weekly supervision between April and July 2012 (including three-way supervision with Gina Carpenter once a month.) It also included weekly supervisions between September and the date of the decision, including three-way supervisions with Gina Carpenter. It included peer 'non-managerial support,' a series of seven sessions between January and June 2012. RBC coaching had been offered but was not taken up by the claimant. The respondent had encouraged the use of the Employee Assistance Programme. The claimant was encouraged to attend the NVQ Level 2 in Youth Work programme in January to July 2010 in order to refresh her skills because of concerns about her performance. The claimant attended the programme which included training in safeguarding, health and safety and youth work planning. There was also additional topic specific input from other colleagues. In light of this list, Sarah Gee found that the claimant had received ongoing and extensive support throughout the capability process thereby affording her every opportunity to improve the performance if able to do so.

110. The third matter considered was the claimant's relationship with her line manager. Sarah Gee noted that in the hearing the claimant stated that her relationship with the line manager was difficult and that supervision meetings have been 'long and not easy.' Ms Gee acknowledged that being subject to this level of scrutiny as part of the performance capability process was uncomfortable but inevitable. The claimant had asked for three-way supervision and managers put this in place, together with weekly check-ins. More recently, they had changed the claimant's immediate line manager in recognition of the levels of stress which the claimant was experiencing and as advised by occupational health. Ms Gee concluded that they had responded to her concerns in a way that was operationally viable and maintained continuity in the performance management process. She also considered the length of the capability process and the length of time which the claimant had been given to address the performance concerns. The informal process had started on 1 March 2011 (over two years earlier.) The length of the process and the review periods within it were, she concluded, sufficient to give the claimant opportunity to demonstrate improvements in performance.

111. In summary, Ms Gee concluded that there had been a significant and ongoing level of concern regarding performance and organisational ability in relation to the planning, delivery and evaluation of youth work. The recent management observations of work sessions led by the claimant and the detailed audit of her project files had further substantiated the concerns raised throughout the performance capability process. She believed that the lack of planned and evaluated activity impacted negatively on the quality of provision and young people's engagement in youth work. There were also

significant concerns about the claimant's ability to understand and assess safeguarding issues although she had had safeguarding training on more than one occasion. The claimant's record-keeping was poor and often chaotic and this limited accountability and quality assurance and was, in itself, a safeguarding issue.

112. The Tribunal is satisfied that the concerns identified by Ms Gee were not minor errors such as small discrepancies in timesheets. They included failing to complete and store risk assessments for vulnerable young people, which could create safeguarding issues and potentially lead to negligence actions against the respondent should any harm come to a young person.

113. As the claimant did not attend the second hearing she was offered an opportunity to discuss redeployment possibilities and to discuss her grievance. Likewise the claimant did not attend the third opportunity to meet and discuss her grievance or redeployment.

Other matters raised by the claimant

114. The claimant challenged the composition of the decision-making panel. As previously stated, the Tribunal finds that Sarah Gee was the sole decision maker. The others were present in order to present the management statement of case and to provide further information and respond to questions. We also note that a lot of the evidence supporting the capability conclusions at Stage 3 was the claimant's own work. It was not based on the subjective opinions and reviews of managers about whom she had complaints. We also find that Ms Carpenter was present at the Stage 3 meeting even though during the course of the Tribunal hearing she said that she was not. We find that the passage of time might explain why she made this mistake and might explain the gaps in her evidence. The Tribunal did not find Ms Carpenter's evidence particularly helpful. There were lots of gaps in it which meant that the Tribunal had to look elsewhere for the relevant information.

115. We note that the claimant alleged that there had been a personal relationship between Kirsten Carr and Gina Carpenter such that one (or both) of them should not have been involved in her capability performance management process. However, the evidence we received was that the personal relationship had come to an end in 2000 (about 10 years prior to the events which form the subject matter of this case.) The prior personal relationship was therefore not relevant to the claimant's case or to the issues before this Tribunal. We do not accept that it undermines the witnesses' suitability or involvement in the claimant's capability process. Nor do we accept that the decision of Sarah Gee was adversely impacted by this factor.

116. The claimant alleged that she was persuaded to withdraw a previous allegation of race discrimination. We were referred to the document at pages 106-107. In particular the latter part of the document stated: "The conversation we had on Monday 7th November 11 I would just like to clarify what was spoken about the non-managerial supervision and what was spoken on Friday 30th October 11. You mentioned on the phone that I said that I was discriminated against and that as a black woman, I didn't have a voice. I have never said I was discriminated against because of my color,

although I do feel that a serious amount of pressure is put on me unnecessarily. Regarding the annual leave my colleagues and I always choose our dates and make sure that there is cover for the days away. Tina is enforcing her opinions on me stating that I have to have every Monday and she is purposely not allowing me to make my checks to choose my own days. When I have meetings with Tina I am being dictated to there is not a discussion, anything I say is automatically dismissed which is the reason why I wanted a union representative at the meeting to ensure that there were decent lines of communication."

117. The Tribunal heard oral evidence from the claimant and the respondent's witnesses in relation to this issue. The evidence was that the claimant had a conversation with Gina Carpenter making some form of allegation of race discrimination against Tina Heaford. Immediately following this conversation Gina Carpenter spoke to the claimant to clarify if the claimant intended to pursue a complaint of race discrimination against Ms Heaford. The odd thing is that prior to that conversation with the claimant, Ms Carpenter spoke to Ms Heaford. She spoke to Ms Heaford and told her that an allegation made against her even before this had been confirmed by the claimant and before Ms Carpenter had taken any HR advice.

118. The Tribunal's view is that Ms Carpenter *did* speak to the claimant and dissuaded her from pursuing the allegations of race discrimination. We do not know what words were used and we do not know whether the claimant has embellished or exaggerated the conversation in her evidence to the Tribunal. However, we are satisfied that enough was said by Ms Carpenter to put the claimant off making the complaint. The fact that Ms Carpenter spoke to Ms Heaford beforehand is also a matter of concern. This was not the appropriate way to handle the matter. Ms Carpenter should have sought confirmation whether the claimant intended to make an allegation before raising it with Ms Heaford at all. She should have raised it with Ms Heaford having had the benefit of advice from HR.

119. The claimant also alleges that she should have been moved to work under a different line manager and that this would have solved the problem. We accept that this was not a decision which Ms Heaford herself could make. We also note the contents of the document at page 68(c). The Tribunal queried why Ms Carpenter did not decide to move claimant to another line manager. We note that one of the reasons (as stated in the email) was that she did not want to undermine Ms Heaford as a manager. We also accept that the respondent took the view that any manager taking an employee through capability procedures is likely to have problems in the managerial relationship. It is, by its very nature, a stressful process which is inclined to damage the managerial relationship with the employee in question. This would be as applicable to any relationship between the claimant and a new manager as it was to Ms Heaford. We also accept that Ms Carpenter was entitled to take into account the likely disruption to the service caused by moving the claimant to another area.

120. In short, there are many and various reasons why managers would decide not to move the claimant to a new manager. Not all of these reasons are documented in the contemporaneous paperwork but we do accept that they were legitimate considerations for Ms Carpenter at the time she made the decision. We also conclude that the respondent *could* have moved the

claimant away from Ms Heaford's line management earlier than it did. The question to which we do not know the answer is whether it would have made a difference to the claimant's performance. The real question is whether this had any impact on the decision to dismiss so as to render it an act of discrimination. Our analysis of the evidence regarding the claimant's performance shows that Ms Heaford's opinion of the claimant formed a relatively small part of the available evidence. Leaving that to one side, there was sufficient objective, documentary evidence (much of it the claimant's own work) on which to base the conclusion that the claimant's performance was inadequate. Our conclusion is that the claimant could possibly have been moved to another line manager but we cannot say that this would have solved the performance problem. The respondent had a number of reasons for not moving the claimant (which were legitimate management considerations). These included not wanting to undermine Ms Heaford. We do not accept that the continued presence of Ms Heaford within the line management structure impacted adversely or undermined the integrity of Ms Gee's decision to dismiss. The decision to dismiss the claimant was based on the documents which were wide-ranging in nature and were objective. We are satisfied that any difficulties in the relationship between Ms Heaford and the claimant did not materially contribute to the decision to dismiss.

121. The Tribunal also noted that the claimant was offered the opportunity to discuss redeployment on three occasions as part of the Stage 3 process: on 25 April; 30 April and 3 May. The claimant did not engage with these opportunities. The respondent went above and beyond what was required of it with regards to this issue. This had not been appreciated by the claimant. We cannot criticise Ms Gee's approach to this. We also note that the respondent's eagerness to look for alternative ways to keep the claimant in employment does is not indicative of racial discrimination. They arguably did more than they were required to in order to keep the claimant in employment with the Council.

122. The Tribunal also considered the stage at which the claimant made her initial allegation of race discrimination and sought to discern whether it undermined or strengthened her case. The claimant had the benefit of trade union representation during the capability process and at no point during the process itself did she suggest that the process was targeting her because of her race. She had over two years to raise a grievance to that effect.

123. The claimant submitted a grievance prior to the resumed Stage 3 meeting. The longer grievance document (at page 444-466) made multiple allegations but none of these were an allegation that the claimant was treated less favourably because of her race. Race was not mentioned at all. The document makes reference to discrimination but not in the context of race. The document refers to bullying, harassment, discrimination, victimisation and breaches of the Equality Act and Disability Discrimination Act, which may suggest that it was drafted by someone with some familiarity with discrimination law and who could have included an allegation of race discrimination if they so wished. In any event, the reference to race as the relevant protected characteristic is absent. Given the length of the document, if the claimant believed that she had been subject to a continuous pattern of race discrimination for over two years she would surely have included such an allegation at this stage, particularly as she was facing the prospect of imminent dismissal. It has also been pointed out to the Tribunal that in her

email conversation with the trade union representative regarding the subject of her grievance, the claimant stated that she wanted bullying and harassment to be mentioned but not victimisation (page 470). There is no reference to race discrimination in the email.

124. The claimant submitted a lengthy appeal document which, again, contained no allegation of race discrimination. There was reference to race and the Race Relations Act (together with other pieces of legislation) in the context of defining harassment (in a section entitled "Employment Law") but no specific allegation of race discrimination in relation to the claimant, whether in respect of her dismissal or otherwise.

125. In the capability appeal meeting held on 28 June 2013 the claimant stated that her grounds of appeal were that she was not formally notified of the resumed Stage 3 meeting on 25 April and that she was unable to attend due to a hospital appointment. During the appeal hearing the claimant discussed all her points of appeal. At no point in the appeal meeting was an allegation made that the claimant's dismissal was an act of race discrimination. The claimant then appealed the decision of the appeal officer. That subsequent appeal did not disclose an allegation that her dismissal was an act of race discrimination.

126. There has been no real explanation by the claimant as to why, despite making various allegations during the whole process, she never alleged that her dismissal was, in itself, an act of race discrimination. She had nothing to lose by doing so. At the very least the claimant's reticence in alleging that her dismissal was an act of race discrimination does not assist her case (and could be seen to undermine it.) It might suggest that she did not think she had been discriminated against because of race at the time she was dismissed.

127. During the Tribunal hearing the claimant further alleged that there was a problem when she was asked to provide her passport to the respondent. She alleged that this process was tainted by racial prejudice in that she was asked for her passport despite having worked for the respondent council for decades and despite having been in the UK since childhood and having Indefinite Leave to Remain. The Tribunal understands why this would be a point of some sensitivity with the claimant in light of the Windrush scandal. However, we heard evidence that all members of the team were required to prove their right to work in the UK in line with government rules and regulations. Therefore, all members of the team were asked for passports and similar documentation in order to establish their right to work. Indeed, Ms Heaford was required to provide her passport (which was issued in Malta.) All members of staff were treated the same in this regard and the respondent was following the requirements set out to it by the government of the time. There was no less favourable treatment of the claimant in this regard and certainly no malicious intent on the part of the respondent's managers.

The Law

Direct discrimination

128. Section 13 Equality Act 2010 states:

> (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.

129. Section 23 of the Equality Act 2010 provides:

> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case…

130. In some cases it may be appropriate to postpone consideration of whether there has been less favourable treatment than of a comparator and decide the reason for the treatment first. Was it because of the protected characteristic? (*Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL; Stockton on Tees Borough Council v Aylott)*

131. The claimant must show that they received the less favourable treatment 'because of' the protected characteristic. In *Nagarajan v London Regional Transport 1999 ICR 877, HL* Lord Nicholls stated: *"a variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds… had a significant influence on the outcome, discrimination is made out'."*

132. The judgment in R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors 2010 IRLR 136, SC summarised the principles that apply in cases of direct discrimination and gave guidance on how to determine the reason for the claimant's treatment. Lord Phillips emphasised that in deciding what were the 'grounds' for discrimination, a court or tribunal is simply required to identify the factual criteria applied by the respondent as the basis for the alleged discrimination. Depending on the form of discrimination at issue, there are two different routes by which to arrive at an answer to this factual inquiry. In some cases, there is no dispute at all about the factual criterion applied by the respondent. It will be obvious why the complainant received the less favourable treatment. If the criterion, or reason, is based on a prohibited ground, direct discrimination will be made out. The decision in such a case is taken on a ground which is inherently discriminatory. The second type of case is one where the reason for the decision or act is not immediately apparent and the act complained of is not inherently discriminatory. The reason for the decision/act may be subjectively discriminatory. In such cases it is necessary to explore the mental processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on his or her mind.

133. Where a claim concerns allegedly subjectively discriminatory treatment it is the mental processes of the alleged discriminator which are to be considered, not the mental processes of others who may have provided information but did not make the relevant decision (Reynolds and ors v CLFIS (UK) Ltd [2015] ICR 1010). In Reynolds the claimant contended that her consultancy arrangement had been terminated because of her age. The decision to terminate was taken by a senior manager but the employment tribunal found that he had been influenced by a presentation made by two other people at which various deficiencies had been identified in the service provided by the claimant. The tribunal examined the terminating manager's mental processes, finding that the principal reason for the termination was the employer's unhappiness with the service that the claimant provided, rather than her age. The Court of Appeal held that there was no error by the tribunal in only considering the senior manager's motivation. If this were a case where the decision to terminate the contract had been made jointly by the senior manager and others, the tribunal would have had to consider the motivation of all those responsible, since a discriminatory motivation on the part of any of them would be sufficient to taint the decision. However, the tribunal's findings showed only that the senior manager reached his decision as a result of (allegedly discriminatory) information provided, and opinions expressed, by other employees. That was not the same as saying that those employees were parties to the decision. The Court found that the tribunal was fully entitled to treat this case as one where the senior manager did indeed make the relevant decision on his own.

134. In light of Reynolds (which has yet to be overruled) in a case of direct discrimination under the Equality Act 2010 the Tribunal must consider the reason for the decision-maker's decision and not the wider motivations of others in the workplace who are not decision-makers. (The test in Royal Mail Group Ltd v Jhuti [2020] ICR 731 was developed in the context of whistleblowing cases and is yet to be applied in direct discrimination claims.)

Burden of Proof

135. Section 136 of the Equality Act 2010 provides that, once there are facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof "shifts" to the respondent to prove any non-discriminatory explanation. The two-stage shifting burden of proof applies to all forms of discrimination under the Equality Act. The wording of section 136 of the act should remain the touchstone.

136. The relevant principles to be considered have been established in the key cases: Igen Ltd v Wong 2005 ICR 931; Laing v Manchester City Council and another ICR 1519; Madarassy v Nomura International Plc 2007 ICR 867; and Hewage v Grampian Health Board 2012 ICR 1054.

137. The correct approach requires a two-stage analysis. At the first stage the claimant must prove facts from which the tribunal could infer that

discrimination has taken place. Only if such facts have been made out on the balance of probabilities is the second stage engaged, whereby the burden then "shifts" to the respondent to prove (on the balance of probabilities) that the treatment in question was "in no sense whatsoever" on the protected ground.

138. The approved guidance in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205 (as adjusted) can be summarised as:

    a) It is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.
    b) In deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. In many cases the discrimination will not be intentional.
    c) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination, it merely has to decide what inferences could be drawn.
    d) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts. These inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information. Inferences may also be drawn from any failure to comply with the relevant Code of Practice.
    e) When there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent. It is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground.
    f) Not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment. Since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden.

139. The shifting burden of proof rule only applies to the discriminatory element of any claim. The burden remains on the claimant to prove that the alleged discriminatory treatment actually happened and that the respondent was

responsible. The statutory burden of proof provisions only play a role where there is room for doubt as to the facts necessary to establish discrimination. In a case where the tribunal is in a position to make positive findings on the evidence one way or another as to whether the claimant was discriminated against on the alleged protected ground, they have no relevance (Hewage). If a tribunal cannot make a positive finding of fact as to whether or not discrimination has taken place it must apply the shifting burden of proof.

140. Where it is alleged that the treatment is inherently discriminatory, an employment tribunal is simply required to identify the factual criterion applied by the respondent and there is no need to inquire into the employer's mental processes. If the reason is clear or the tribunal is able to identify the criteria or reason on the evidence before it, there will be no question of inferring discrimination and thus no need to apply the burden of proof rule. Where the act complained of is not in itself discriminatory and the reason for the less favourable treatment is not immediately apparent, it is necessary to explore the employer's mental processes (conscious or unconscious) to discover the ground or reason behind the act. In this type of case, the tribunal may well need to have recourse to the shifting burden of proof rules to establish an employer's motivation.

141. The claimant bears the initial burden of proving a prima facie case of discrimination on the balance of probabilities. The requirement on the claimant is to prove on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination. The employer's explanation (if any) for the alleged discriminatory treatment should be left out of the equation at the first stage. The tribunal must assume that there is no adequate explanation. The tribunal is required to make an assumption at the first stage which may in fact be contrary to reality. In certain circumstances evidence that is material to the question whether or not a prima facie case has been established may also be relevant to the question whether or not the employer has rebutted that prima facie case.

142. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, with more, sufficient material from which tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination (see Madarassy).

143. If the claimant establishes a prima facie case of discrimination the second stage of the burden of proof is reached and the burden of proof shifts onto the respondent. The respondent must at this stage prove, on balance of probabilities that its treatment of the claimant was in no sense whatsoever based on the protected characteristic.

144. In some instances, it may be appropriate to dispense with the first stage altogether and proceed straight to the second stage (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.) The employment tribunal should examine whether or not the issue of less favourable treatment is inextricably linked with the reason why such treatment has been meted out to the claimant. If such a link is apparent, the tribunal might first consider whether or not it can make a positive finding as to the reason, in which case it will not need to apply the shifting burden of proof rule.

If the tribunal is unable to make a positive finding and finds itself in the situation of being unable to decide the issue of less favourable treatment without examining the reason, it must examine the reason (i.e. conduct the two stage inquiry) and it should be for the employer to prove that the reason is not discriminatory, failing which the claimant must succeed in the claim.

Conclusions

145. Applying the law to the facts as found it is clear that the claimant was subjected to a detriment insofar as she was dismissed from her employment (s39(2)(c) Equality Act 2010.) The Tribunal has to decide whether the claimant was less favourably treated than an appropriate comparator.

146. We do not accept that the named comparators relied upon by the claimant are appropriate comparators by reference to section 23 of the Equality Act 2010. In particular, they were not employed with the same job titles/roles as the claimant and there is insufficient evidence to conclude that their performance in their job roles was sufficiently similar to the claimant's so as to be properly comparable. The performance and capability of the comparators is a material circumstance for the purposes of section 23 of the Equality Act 2010. There are just too many differences between the named comparators and the claimant (apart from any difference of race). As set out above, even where one of the named comparators had performance deficiencies they were not of the same magnitude as the claimant's and were much more limited in scope. The performance of the comparators also improved over time in a way which the claimant's performance did not. If the Tribunal were to compare the claimant with the named comparators it would not be comparing 'like with like' (leaving aside the protected characteristic of race.)

147. If the named comparators are not suitable comparators for the purposes of the section 13 claim it follows that the claimant cannot demonstrate that she was 'less favourably treated' than a comparator by reference to those named comparators. Her section 13 claim cannot succeed by reference to an actual comparator. The claimant must therefore rely on a hypothetical comparator.

148. The Tribunal must ensure that any hypothetical comparator is also a suitable comparator having regard to section 23 of the Equality Act 2010. The hypothetical comparator must be an employee doing the same job as the claimant and with a sufficiently similar performance record to the claimant. There must be no material differences between the comparator and the claimant, save for the difference in race.

149. Once the characteristics of the appropriate hypothetical comparator have been identified, the Tribunal must draw conclusions as to whether the claimant has been less favourably treated than the comparator would have been treated.

150. The claimant has failed to undermine the evidence of significant deficiencies in the standard of her work which would justify the capability procedure being invoked. On the contrary, there is a mass of evidence of a wide range of areas of concern lasting over a sustained period of time. The evidence comes from multiple different sources and does not rely solely on the subjective opinion of one manager. The evidence demonstrates that the respondent had

justified concerns about the claimant's performance. The respondent was justified in invoking and pursuing the capability management procedures which culminated in dismissal. The claimant has not established that any deficiencies in her performance were identical to those of other members of her team who were white/not of Barbadian origin. Furthermore, there were other differences between the claimant and the named comparators, not least the difference in job roles (see above).

151. The hypothetical comparator would have the same or similar performance record to the claimant. There would be similar evidence of underperformance across a similar range of areas over a similar period of time. The Tribunal is unable to conclude that such a hypothetical comparator would have been treated any differently to the claimant. There would have been capability grounds to dismiss the comparator, just as there were capability grounds to dismiss the claimant.

152. In light of our findings of fact above, it is apparent that there was significant evidence of the claimant's failure to meet performance standards in her role. The performance concerns were present over a number of years and the evidence for those concerns was obtained from a variety of sources. The claimant's performance shortcomings were well documented. We are satisfied that a hypothetical comparator, of a different race, would also have been dismissed.

153. The claimant has failed to establish less favourable treatment than a relevant comparator. There is no evidence to suggest that a suitable comparator would have escaped dismissal in similar circumstances.

154. In those circumstances, the claimant's claim of direct discrimination must fail at the first stage: she has failed to prove facts from which the Tribunal could conclude that the respondent has discriminated against her. In those circumstances, the burden of proof does not shift to the respondent.

155. In any event, we are satisfied that the respondent's concerns about the claimant's performance were genuine and longstanding. They were also of sufficient gravity that the respondent was entitled to take the claimant through a performance management process. Similar areas of underperformance were identified and documented with the claimant by different managers at different stages of the process. This undermines any suggestion by the claimant that one or two managers 'had it in for her' or were setting her up for dismissal for discriminatory reasons.

156. The claimant was working with young people. The respondent had a legitimate need to ensure adequate levels of performance, not least from a safeguarding point of view. In any event, the respondent did not rush to dismiss the claimant. In fact, the capability process took over two years to complete. The claimant was given several opportunities to improve her performance and to evidence that any such improvement would be sustained over time. If anything, the claimant was given a longer time to demonstrate performance improvement than many employees would receive. Two years is a lengthy period of time. Capability procedures are often (fairly) concluded within a shorter period of time. The respondent clearly had a need to maintain

adequate standards of record keeping and address safeguarding issues. The claimant was operating within a sector which required a minimum level of competence in order to ensure safe practice with young people. Sarah Gee had evident concerns that the claimant's practice was not safe. A white person with comparable unsafe standards of practice would similarly have been dismissed.

157. Notwithstanding the fact that the claimant has not shift the burden of proof to the respondent, the Tribunal is satisfied that the reason for dismissal was nothing whatsoever to do with the claimant's race. The Tribunal is satisfied that it has sufficient evidence to find as a fact that the reason for the dismissal was the claimant's performance shortcomings. We are satisfied, based on the evidence that we have heard, that the respondent's decision to dismiss the claimant was in no sense whatsoever because of her race.

158. We remind ourselves that we have to consider the mental processes of the person who decided to dismiss the claimant in order to establish whether the dismissal was tainted by discrimination (Reynolds v CLFIS). In this case the sole relevant decision-maker/alleged discriminator was Sarah Gee. Other managers did not take part in the decision to dismiss so, as a matter of fact and law, their motivations are not relevant to the discrimination claim. We are satisfied that the claimant's race did not influence Ms Gee's decision at all.

159. In any event this is not a so-called 'lago' or 'tainted information' case on its facts. We do not accept that the evidence which Sarah Gee based her decision on was tainted by the racial discrimination or discriminatory motivations of the claimant's direct line managers. The evidence was bona fide evidence of underperformance which, as we have said above, was drawn from more than one source. There was objective evidence of underperformance for Ms Gee to consider which could not have been manipulated by Ms Heaford or Ms Carpenter even if that had been their intention (which we do not accept that it was). The Tribunal is not satisfied that either Heaford or Carpenter had the discriminatory motivations (whether conscious or unconscious) which the claimant attributed to them. They did not put together a pack of evidence of the claimant's performance shortcomings to facilitate her dismissal for anything other than genuine performance reasons. The claimant's line managers all had genuine and well-founded concerns about the claimant's performance which they would have had even if the claimant was not Black or of Barbadian heritage. The claimant's race was not an 'effective cause' or a 'significant influence' on the managers' treatment of her. She was being assessed against the same standards as applied to all those in her job role, regardless of race.

160. In any event, given that the relevant decision-maker was Sarah Gee the Tribunal is satisfied that the claimant's race played no part whatsoever in Ms Gee's decision to dismiss the claimant. The claimant's race was not an 'effective cause' or a 'significant influence' on Ms Gee's treatment of her. She would have dismissed any employee with such evidence of underperformance, irrespective of their race. She had no reason to want to dismiss the claimant other than her ongoing failure to meet adequate performance standards. Indeed, Ms Gee offered the claimant a number of opportunities to meet with her and discuss ways of staying in employment with the respondent. It was the claimant who did not engage with these offers.

The original stage 3 meeting on 17 December 2012 was adjourned so that Ms Gee could obtain further evidence from occupational health and to arrange for session observations of the claimant's work. This went beyond what she was required to do by the respondent's procedures and suggests that she was committed to treating the claimant fairly and obtaining as much relevant evidence as possible prior to making any decision about whether to dismiss her. This rather undermines any suggestion of racial discrimination against the claimant by Ms Gee.

161. The very length of the procedure indicates a desire on the part of the respondent to ensure that the claimant had adequate opportunities to improve and to prove that her employment should continue. It does not suggest that the respondent was eager to dismiss the claimant or that it was targeting her on racial grounds. Furthermore, although the claimant complains of the links between the various managers administering the capability process, it is notable that five separate layers of management have considered the case and come to the same conclusion: Gina Carpenter, Tina Heaford, Sarah Gee, Kirsten Carr and Avril Wilson. The documentation and evidence available to us suggests that each of these managers drew their own conclusions following an assessment of the available evidence. None of them merely "rubberstamped" the earlier decisions. Hence the length of time it took to go through the capability process from start to finish. As we have set out above, the evidence relating to the claimant's performance has been scrutinized at length. It is good and reliable evidence to show that the real reason she was dismissed was capability and performance and that her dismissal was in no sense whatsoever because of her race. We do not accept that Ms Heaford in any sense tainted the decisions of the managers at later stages of the process. Nor do we accept that Ms Heaford's assessment of the claimant's performance was itself tainted by race discrimination.

162. With reference to the suggestion that Ms Carpenter dissuaded the claimant from making a complaint of race discrimination about Tina Heaford, we have set out our findings in this regard above. There is nothing about this incident which suggests Ms Carpenter's actions were racially discriminatory. Taken at its highest, she wanted to protect Ms Heaford from any complaint of discrimination. This may not have been the appropriate way to deal with matters but it is not itself race discrimination. More importantly, there is nothing to suggest that Ms Gee was aware of this incident or that her decision to dismiss was materially affected by it. She would have dismissed the claimant based on the evidence of underperformance, irrespective of this particular episode. Furthermore, the claimant could have raised a complaint of race discrimination at any point during the internal capability procedure. She could have made the allegation to Ms Gee that she had been racially discriminated against. She did not. The claimant did not take the opportunity to put Ms Gee 'on notice' of any discrimination by Heaford or Carpenter. Ms Gee remained unaware of this allegation of discrimination when she made the decision to dismiss.

163. Likewise, there is no evidence to suggest that the respondent failed to move the claimant to another line manager at an earlier stage for any reason connected to the claimant's race. Nor can we say that an earlier move to a different manager would have made any difference given that the claimant's

underperformance had been present whilst under the management of more than one manager. In any event, the question for this Tribunal would be what impact this had on the decision to dismiss. We are satisfied that when the reasons for the dismissal are analysed and the evidential basis for the decision is examined, there is ample evidence to show that race played no part whatsoever in the decision to dismiss. The relevant comparator would have had the same evidence of underperformance as the claimant and the respondent would have dismissed such a comparator. The claimant wanted to move away from Ms Heaford. We are not satisfied that Ms Heaford was acting in a racially discriminatory way towards the claimant. Rather, she was having to do the difficult job of managing the claimant's underperformance. This was always going to make this relationship a difficult one. The respondent had a number of reasons for not moving the claimant away from Ms Heaford's line management. These were legitimate management considerations, including a desire not to undermine Ms Heaford's line management authority and a desire to avoid wider disruption within the department. We do not accept that the continued presence of Ms Heaford as the claimant's line manager adversely impacted the integrity of Ms Gee's decision. The performance capability 'case' against the claimant was based on wide ranging evidence of underperformance which came from a number of different sources and much of it was objective, rather than the subjective opinion of Ms Heaford (or Ms Carpenter for that matter). Furthermore, Ms Heaford did not chair any stage of the capability process. Ms Carpenter was initially responsible for Stage 1, Ms Carr took over the latter part of Stage 1 and Stage 2 and Ms Gee was responsible for Stage 3.

164. The Tribunal notes that Ms Heaford was not the first manager to pick up on capability issues with the claimant. As set out above, the claimant's previous line manager, Dave Aldred, had also referred to informal capability processes back in 2007. There is also reference to Linda Thompson having difficulties with the claimant's performance and of course the subsequent decision makers (at Stages 2 and 3 of the capability process) examined the evidence in relation to the claimant's performance and came to the same or similar conclusions to Ms Heaford. The claimant had nothing but good things to say about her previous manager Dave Aldred. This suggests that when he too points out performance concerns, the Tribunal is certainly entitled to take note of them as the claimant does not suggest that he had any untoward or discriminatory agenda. Rather, we accept the respondent's overall position, which was that many managers had identified performance concerns but Ms Heaford was the first manager with the strength of will to take the claimant through the capability process. Other managers had had the same opinion of the claimant's performance but had shied away from taking it through the next stages of the procedure. Indeed, that perhaps fits with the overall characterisation of Ms Heaford's management style and her own concession that she had been described as authoritarian and abrasive. This does not mean that the earlier and later managers had no difficulties or criticisms of the claimant's performance. Rather, it shows that they handled it in a less formal way and perhaps 'ducked' the difficult decisions. It further supports the respondent's position that the claimant's difficulties with Ms Heaford were not the result of racial bullying or discrimination but rather were the product of the innate difficulties and stress caused by being taken through performance management procedures by a manager. This is an unpleasant and difficult process for any employee and it will put additional strain on the employee/manager relationship. This is intrinsic to the process.

165. We are satisfied that the respondent's senior managers were entitled to conclude that, had the claimant moved away from Ms Heaford's direct line management, it is likely that this would not have resolved the issue as far as the claimant was concerned. The claimant did not understand and could not accept that there were good grounds to take her through the capability procedures. This lack of acceptance would have transferred to her relationship with a new line manager, whoever that turned out to be. In short, the difficulty was the fact that the claimant was being taken through the capability process rather than discriminatory treatment on the part of Tina Heaford.

166. In light of all the matters set out above, the Tribunal is able to make a positive finding that the dismissal was not less favourable treatment because of the claimant's race.

167. The unanimous decision of the Tribunal is that the claimant's claim of race discrimination fails and is dismissed.

Employment Judge Eeley

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Date signed: 24 January 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 1 February 2023

FOR EMPLOYMENT TRIBUNALS