Case No: 2402301/2021
2402302/2021
2402320/2021
2402321/2021

EMPLOYMENT TRIBUNALS

Claimant: Mrs F Yasmeen (1)

Mrs S Begum (2)

Respondent: Lancashire County Council (1)

Ian Watson (2)

Marian Taylor (3)

HELD AT: Manchester **ON:** 9, 10, 11, 12, 13 and 16 January 2023

BEFORE: Employment Judge Johnson

REPRESENTATION:

Claimant: Mrs Begum (on behalf of both claimants)
Respondent: Mr K Ali (counsel)

JUDGMENT

The judgment of the Tribunal (and in relation to both the first and second claimants), is that:

(1) The complaint of direct discrimination relating to race (section 13 Equality Act 2010) is not well founded which means it is not successful.

(2) The complaint of direct discrimination relating to religion or belief (section 13 Equality Act 2010) is not well founded which means it is not successful.

(3) The complaint of harassment connected with race (section 26 Equality Act 2010) is not well founded which means it is not successful.

(4) The complaint of harassment connected with religion/belief (section 26 Equality Act 2010) is not well founded which means it is not successful.

(5) The complaint of victimisation (section 27 Equality Act 2010) is not well founded which means it is not successful.

Introduction

1. These claims arise from the claimants' employment as library assistants with the first respondent local authority. They remain employed by the first respondent and the second and third respondents are managers employed by the first respondent's library service.

2. The claim forms were presented on 9 March 2021 following a period of early conciliation in respect of each of the claimants and respondents and which the earliest period began on 25 February 2021 and the later ones beginning on 27 February 2021. The early conciliation period concluded on either 2 or 4 March 2021 with certificates being issued by ACAS as appropriate. The claimants both brought complaints of discrimination on grounds of race and/or religion/belief. They describe themselves as being Asian Muslims.

3. The first respondent's solicitors presented responses on behalf of all three respondents resisting the claims.

4. The case was the subject of case management with a preliminary hearing (PHCM) taking place on 27 May 2021 before Employment Judge ('EJ') Benson. She identified the issues, listed the case for a final hearing for period used for this hearing and made case management orders as appropriate.

5. The case was originally listed to be heard remotely by CVP. On day 1 of the final hearing, only the claimants attended, and it appeared that only they had been informed of the variation of the final hearing format. However, as day 1 was to be used primarily for reading post, once initial discussions had taken place between the parties and the Tribunal, it was possible for everyone to attend as required from day 2. The CVP facility was retained however, as this enabled the third claimant to observe and attend a medical appointment on day 3 and for the second and third respondents to observe the delivery of this judgment today.

Issues

6. The issues were finalised at the preliminary hearing before EJ Benson at the PHCM on 27 May 2021 (pp100 to 105). They are as follows:

<u>Time limits</u>

7. Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 6 November 2019 may not have been brought in time.

8. Were the discrimination and victimisation complaints made within the time limit in section 123 Equality Act (EQA)? The Tribunal will decide:

    a) Was the claim made to the Tribunal within 3 months (allowing for early conciliation extensions) of the act to which the complaint relates?
    b) If not, was there conduct extending over a period?
    c) If so, was the claim made to the Tribunal within 3 months (allowing for any early conciliation extension) of the end of that period?
    d) If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:
        i) Why were the complaints not made to the Tribunal in time?
        ii) In any event, is it just and equitable in all the circumstances to extend time?

Harassment race

9. Use of derogatory and bias language in the Investigatory report and emails produced by Marion Taylor.

10. Marion Taylor making a comment at a staff meeting on 20 July 2020.

11. Ian Watson threatening the claimants at a meeting on 19 November 2019 by accusing the claimants of wrongdoing even though the investigation *'you can put in a grievance but how do you see your careers with LCC?' (para 7 of GoC)*

12. Pressure the claimant Ms Begum into returning to work earlier than intended after a period of sickness absence.

13. If so, was that unwanted conduct?

14. Was it related to race?

15. Did the conduct have the purpose of violating the claimants' dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimants?

16. If not, did it have that effect? the Tribunal will take into account the claimants' perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect?

Harassment religion

17. Did the respondents do the following alleged things:

a) Marion Taylor making a comment at a staff briefing on 20 July 2020, *'oi you two, have you got a problem wearing face masks with your religion an' all?'*

18. If so, was that unwanted conduct?

19. Was it related to race?

20. Did the conduct have the purpose of violating the claimants' dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimants?

21. If not, did it have that effect? the Tribunal will take into account the claimants' perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect?

Direct race discrimination

22. Conduct of disciplinary investigation into the allegations against the claimants was conducted with an assumption of guilt by the respondent. The claimants rely upon a hypothetical white comparator, (paras 1 and 2 GoC).

23. Whether the investigatory report and emails produced by Marion Taylor used derogatory and biased language about the claimants such as *'offender, culprits, suspects and liars'* and *'having a guilty conscience',* (paragraph 1)

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24. Whether investigation was biased and not conducted with integrity as detailed in paras 1 and 2 GoC. The claimants rely upon comparators Shirley Ashton, Catherine Fenton, Anna Cressinden-Wycombe and Michael [x], another library assistant. They say in other disciplinary investigations where there has been no formal disciplinary action, white colleagues were not subjected to the same questioning and discriminatory accusations. They also rely upon a hypothetical white comparator. (paragraphs 1 and 2).

25. Whether the respondent failed to commence any disciplinary investigation into the employees of Thomas Whitham FE College who were involved in the alleged incident and further failed to ask them to provide statements about the incident, which the claimants say would have exonerated them. They rely upon those employees who were white together with hypothetical white comparators. (paragraph 3)66

26. Whether the investigation report concluded that there was no disciplinary action required there was ongoing mistrust and disbelief of the claimants by the respondents, including questioning their integrity, as detailed in paragraph 1, 2 and 5 of the GoC? The claimants rely upon comparators Shirley Ashton, Catherine Fenton, Anna Cressinden-Wycombe and Michael [x], another library assistant and /or hypothetical white comparator. (Paragraph 1)

27. Whether Ian Watson threatened the claimants at a meeting on 19 November 2019 by accusing the claimants of wrongdoing even though the investigation *'you can put in a grievance but how do you see your careers with LCC?'* the claimants rely upon a hypothetical white comparator.

28. Whether the claimant Ms Begum was not permitted to have a phased return to work after a sickness absence using her annual leave entitlement in November 2019. Colleagues who were given such facility were white British, and they include Catherine Barnett, Stephen Greene, Michael [x]. the claimant also relies upon a hypothetical white comparator.

29. Whether the respondent pressurised the claimant Ms Begum into returning to work earlier than intended after a period of sickness absence. The claimant relies upon a hypothetical white comparator. (paragraph 5)

30. Did the claimants reasonably see the treatment as a detriment?

31. If so, have the claimants proven facts from which the Tribunal could conclude that in any of those respects the claimants were treated less favourably than someone in the same material circumstances of a different race was or would have been treated? The comparators relied upon are set out above.

32. If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment because of race?

Direct religious discrimination

33. What are the facts in relation to the following allegations:

a) Marion Taylor making a comment at a staff briefing on 20 July 2020, *'oi you two, have you got a problem wearing face masks with your religion an' all?'*

34. Did the claimants reasonably see the treatment as a detriment?

35. If so, have the claimants proven facts from which the Tribunal could conclude that in any of those respects the claimants were treated less favourably than someone in the same material circumstances of a different religion was or would have been treated? The comparators relied upon are set out above.

36. If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment because of religion?

Vicitmisation

37. Did the claimants do a protected act as follows:

a) By raising a grievance on 11 January 2020.

38. Did the respondents do the following things:

    a) Initially refuse to allow the claimant Ms Begum to undertake voluntary racism training course in January 2021. (paragraph 8)
    b) Requiring the claimant Ms Begum to write a report after training and share it with colleagues. (paragraph 8)
    c) Whether Ian Watson threatened the claimants at a meeting on 19 November 2019 by accusing the claimants of wrongdoing even though the investigation had resulted in no action and in answer to a question as to the next stage, saying *'you can put in a grievance but how do you see your careers with LCC?'* (paragraph 7)

39. By doing so, were the claimants subject to a detriment?

40. If so, have the claimants proven that it was because the claimants did a protected act or because the respondents believed the claimants had done, or might do, a protected act?

41. If so, has the respondents shown that there was no contravention of section 27?

Remedy for discrimination and victimisation

42. [to be determined if the complaints are successful]

Evidence used

43. The Tribunal heard oral evidence from Mrs Yasmeen (C1), Mrs Begum (C2) and Mr Culliney (Unison representative who advised the claimants during their grievance).

44. Oral evidence on the part of the respondents involved hearing Julie Bell (director Education & Skills at LCC) and Carole Whittle (libraries team leader) together with Ian Watson (R2 and Libraries and Museums Manager) and Marian Taylor (R3 and Operational Libraries Manager).

45. All of the witnesses had produced written statements and contained in a single bundle.

46. Documents comprised of core bundle of some 887 pages and a supplemental bundle of 188 pages. The Tribunal was taken to the proceedings and in particular the list of issues by EJ Benson, the documents relating to the claimants' disciplinary investigation, their subsequent grievance and disciplinary procedure.

47. The claimants had been asked to disclose copies of SMS/WhatsApp messages etc relating to discussions about proceedings. They said that as conversations had been in person or by phone, no messages were available. The claimants were cautioned that if it became clear that such documents were available, they would be ordered to produce them, but the need did not arise.

48. During the hearing, Mrs Begum referred to a contemporaneous note of meeting with Ian Watson on 19/11/19 (issues direct and harassment on race), but that it had been disposed of and was no longer available. This seems surprising given it was produced at or around time of the event in question.

49. Mrs Begum also mentioned at the beginning of hearing about documents relating to a possible disability related matter, but she was reminded that her claim related to race, and religion/belief and amendment would be required if any additional claims were to be introduced. She decided not to proceed with such an application.

50. Notes 18/7/19 [p664 of bundle] were produced which were diary entries. They were heavily redacted, and the claimants said that unredacted copies not available. While Mrs Yasmeen (whose diary it was), said that she could not remember what redacted section would have said given that it was more than 3 years after it was made. Nonetheless, the Tribunal finds it surprising she has no memory of what information had been recorded in the redacted section.

Findings of fact

Background

51. R1 ('LCC') is the local authority for the County of Lancashire, and it has responsibility for provision of library services and education in this local authority area.

52. Although community schools and colleges are funded by LCC, we accept that responsibility for management of their staff rests with the school management and not local authority management.

53. This is relevant in this case because it involved an incident which took place at the Burnley Campus which consisted of (at the relevant time) of an LCC library, Thomas Whitham FE College, faith centre and dance studio. We accepted that LCC were responsible for the officers who worked in the library but as previously mentioned, not the College staff.

54. R2 (Mr Watson) was the Libraries and Museums Manager and R3 (Ms Taylor) was the Operational Libraries Manager who was responsible for a number of libraries in the greater Burnley area, including the Burnley Campus site.

55. C1 (Mrs Yasmeen) and C2 (Mrs Begum) were both library assistants and have worked for LCC for more than 5 years and 19 years respectively at date of the hearing. It is understood that both work part time 29.25 hours (Mrs Yasmeen) and 15.5 hours (Mrs Begum) and that this would include in both cases would include alternate Saturdays. It was expected that when the library was open, there would be a presence of 2 librarians minimum and opening time was typically 9am.

56. Within the library building on the Burnley campus, there was a meeting room which was used for a variety of purposes including local authority meetings, College meetings and meetings for external organisations and public. The response described the room as having a variety of titles, Not surprisingly, it was used a great deal and although the Tribunal understood it could be booked, Mrs Yasmeen described the system as not being compulsory and people were expected to do so as an *act of courtesy.* This appeared to relate to users simply reminding library staff it was occupied and that booking would have taken place elsewhere. CCTV present across the site

Eyebrow 'threading' incident

57. On 18 July 2019, Dionne Swift who was the Business Manager of TWC, (and the whole Burnley Campus complex) emailed Ms Taylor stating the following:

"I am in Madrid on a school trip and have found out that one of the library staff has threaded 3 Thomas Whitham Staff eyebrows today during work time. As you can imagine, i am not best pleased. Can we have a chat tomorrow, i get back for lunch, about how we are going to deal with this. I need to manage this carefully. Furious is not the word!"

Given Ms Swift's seniority, the nature of the allegation and the way it was communicated, LCC managers took the matter very seriously and commenced an investigation.

58. Ms Taylor spoke with colleague Heather spencer and agreed it was a potentially disciplinary matter. The next day, she spoke with Ms Swift. There was uncertainty at this point as to what had happened, but Ms Swift said Mrs Yasmeen been seen at 10.30 on 18/7/19 performing the eyebrow threading on 3 Thomas Whitham staff. It was agreed that Ms Swift would deal with the Thomas Whitham staff and Ms Taylor with the LCC staff and on 18 July 2019, it was Mrs Yasmeen and Mrs Begum who were working in the library.

59. Mr Watson appointed Ms Taylor as investigating officer under LCC disciplinary procedure. Ms Taylor emailed Mr Watson as Head of Libraries and explained that she would interview both Mrs Yasmeen and Mrs Begum when they were in work. She identified the five questions she needed to ask of the two assistants including *'did this [incident] actually happen'.* Mrs Yasmeen accepted in cross examination that this demonstrated an open mind and Mrs Begum accepted it represented an *'open question'.* The Tribunal felt

this to be a significant consideration as it represented Ms Taylor beginning the investigation with an open mind and thereby not automatically assuming the claimants were responsible for the alleged conduct.

60. On 22 July 2019, Ms Taylor and Ms Whittle arrived at the Burnley Campus Library to inform the claimants of the disciplinary investigation. Mrs Yasmeen expressed surprise to see them and asked whether they had done something wrong. She says Ms Whittle replied, '*is it a guilty conscience?*' Ms Taylor denied that she heard, and Ms Whittle said she could not recall saying this. The Tribunal was unable to make a positive finding in relation to these comments, although it accepts that is the sort of flippant comment that might be made in such a scenario. Importantly however, we accept that the comments made no reference or inference towards Mrs Yasmeen's race or religion.

Disciplinary investigation of the claimants

61. Both claimants were sent a letter on 22 July 2019 of disciplinary investigation into the allegations [p178 for Mrs Yasmeen and in case of Mrs Begum p184]. The investigation meeting was arranged for 1 August 2019 and union representation was permitted and these matters happened as planned with both claimants being represented by their union Unison.

62. In the case of Mrs Yasmeen, she denied that at the time of the incident on 18 July 2019, she was in meeting room, nor was she involved with threading process. It appeared to have been a case of mistaken identity and further investigation revealed a lady (described as an 'Asian lady') had attended the library shortly after 9am on the day of the incident and had asked to speak with Sarah Clegg of Thomas Whitham College. Mrs Yasmeen contacted Ms Clegg and they went to the meeting room. Mrs Yasmeen did say to the investigation panel that she overheard voices coming from the meeting room and a reference being made to '*eyebrow threading'* but insisted that she did not go into the actual meeting room, and this was supported by CCTV footage.

63. Importantly for the purposes of this case, she revealed that Mrs Begum was not in the library at this time, and she was therefore working alone in the library when each shift should have two staff members present, for the first hour of 18 July 2019. Mrs Yasmeen was recorded during the investigation as saying that she would never thread her own eyebrows and there was a dispute as to whether or not she said that she did not wear make up for religious reasons. This became the subject of a grievance which the claimants brought at a later date.

64. In her interview, Mrs Begum denied knowing anything about the alleged eyebrow threading and explained she had arrived at work late because of a flood at her home. However, CCTV footage revealed that Mrs Begum had arrived at the Burnley Campus at around 9am and was seen leaving The

Barden Primary School which was situated on the Campus site at 10.04am. It turned out that she had gone to see her son's final school assembly. She was meant to be working at the library at this time and had not been given permission prior to this event to have time off work from her shift. She did retrospectively apply for leave to cover the hour where she was not working. However, it was clear that Mrs Begum was an hour late for work not because of the flooding incident but because of her desire to attend the school assembly. Despite this, she emailed her line manager Rebecca Hewitt on 23 July 2019 explaining that she was an hour late because of flooding.

65. While Mrs Begum was clearly not involved with the eyebrow threading incident, the investigation revealed issues regarding her attendance at work on 18 July 2019 between 9am and shortly after 10am and as a consequence, a lack candour about the reasons for that attendance. In cross examination Begum accepted that she was in the assembly between 9am and 10am. (p195) and the Tribunal accepts it was reasonable for management to treat this matter as a potential disciplinary matter.

66. An Investigation report was produced by Ms Taylor. She accepted that meeting room had been used inappropriately, but that no library staff were present. She raised an issue concerning Mrs Yasmeen's denial that she did not know the reason for the Asian lady's visit to the library which she determined was inconsistent with information previously given to her line manager Rebecca Hewitt. She also expressed concern about Mrs Begum making a false declaration concerning the reason for her absence on 18 July 2019 between 9am and 10am. She found that Mrs Yasmeen was aware that Mrs Begum was going to take this unauthorised absence and had failed to inform her line manager. She felt there was a case to answer in relation to these matters. Her recommendation was a review of procedures to ensure rooms were properly used, that there be a greater manager presence for 3 months following this review, the claimants be retrained, and consideration given to her relocation. The Tribunal accepted that the actual decision of steps to take were for Mr Watson to take not Ms Taylor and these were recommendations only.

67. Mr Watson reviewed the allegations against both claimants and decoded that the library meeting room had been used inappropriately but that no library staff had been involved in the incident. No further action was taken in relation to this allegation against either claimant. However, he identified an integrity issue in relation to Mrs Yasmeen in that she denied knowing the Asian female visitor despite mentioning that she did know her to her line manager and in relation to Mrs Begum failing to inform her line manager about her absence between 9 and 10am on 18 July 2019. He also identified an issue involving Mrs Begum where she attributed being late to a flood when it was actually because she attended her son's leavers assembly at the primary school. While sympathetic to her desire to go to the assembly, he stressed the importance of following correct procedures and seeking approval in advance from managers.

68. No further action took place and both claimants were informed that it would be treated as an informal mater under the disciplinary procedure and not recorded on their personnel files. This decision was confirmed in letters [pp292 to 295] sent on 23 October 2019.

69. While the claimants were effectively exonerated insofar as the original allegations were concerned, the letter clearly attributes criticism of both employees in terms of their honesty and while not resulting in formal action, would have left them feeling mistrusted. It was understandable why the claimants were informed of these concerns, but in the case of Mrs Yasmeen, the decision letter was not clear in explaining that the real issue was the inconsistent answers she had given about her knowing the Asian lady in question and there was no inference that she was in any way connected with the use of the room where the eyebrow threading took place. The Tribunal accepts that this may well have left her feeling confused with the outcome, although we did not see any reference in the letter to her race or religion.

70. The claimants did allege that unlike comparators Shirley Ashton, Catherine Fenton, Anna Cressinden-Wycombe and Michael [x], these white colleagues were not subjected to bias or challenges to their integrity as part of an investigation into conduct.

71. There was limited information concerning these comparators, but we accepted the evidence of Ms Taylor that the comparators were involved in an allegation of workplace bullying and that this matter was resolved informally with a discussion around a table, without the need for an investigation taking. Importantly, it involved a different matter which involved a complaint by a member of staff against the behaviour of other members of staff against him or her and they did not want a formal process to take place. This was more analogous to the resolution of a dignity at work matter, whereas the claimants were subject to allegations about conduct by an external organisation.

72. Ultimately, both claimants were subjected to a disciplinary investigation but once the initial significant allegations relating to the eyebrow threading incident had been resolved with no involvement being identified on their part, that matter was concluded very informally without even a warning on their personnel files being given.

73. *Mr Watson gave credible evidence about the application of the LCC disciplinary procedure (pp131-134) and those managers were encouraged under 2.1 to take action which avoided formal disciplinary action as far as possible and that this was encouraged within the service. He explained why the formal route was initially taken because the eyebrow threading incident as alleged could have involved those present accepting payments while using LCC premises and during their time working for LCC. He added that disciplinary processes can involve a 'spectrum' of allegations and the*

claimants' investigation involved something that was 'in the middle, not entirely severe or negligible either'.

Meeting with Mr Watson

74. Mr Watson gave credible evidence that from his lengthy local government experience, he found that officers who had been subject to disciplinary investigations which had resulted in no further action, could nonetheless be left feeling (as he put it), *'bruised'* [p47 of notes]. He offered the claimants a meeting and the Tribunal notes that this is something which he does as a matter of course in matters of this nature. He allowed an hour for the meeting with both claimants, but actually sat with them for a much longer period. He was keen to offer these meetings as an act of closure. He would do this alone and would not keep a note so that the meeting was kept intimate and informal. He acknowledged that with hindsight, he should have had someone with him and recorded the discussion which took place in the meeting in writing.

75. The claimants allege that he responded when they said they wished to put in a grievance, by saying '*you can out in a grievance but how do you see your careers with LCC?'* A comment of this nature would have an implicit threat behind it. Mr Watson however, denied saying it. The Tribunal noted that while both claimants argued that these words were said to them, they did not mention the sentence in their original letters sent following the meeting with Mr Watson (pp299 and 355) nor in their joint grievance of 11 January 2020. It was only when they raised it with their union representative Mr Culliney that he recommended it be used at their grievance meeting. Moreover, in cross examination, Ms Begum said she had made a note of the meeting recording Mr Watson's comment but had disposed of it subsequently. Given the significance of this alleged threatening comment, we find these reactions to be surprising and on balance we accept that Mr Watson did not make the alleged comment. He gave credible and reliable evidence, and we must prefer his version of events on balance over that asserted by the claimants.

76. We acknowledge that he may when told of a possible grievance by the claimants, had reflected upon the need or wisdom in one being brought given that in his opinion, the claimants had been fully exonerated and should focus upon carrying on with their careers. However, while this might have been the case are unable to accept that a threat was made, or comment connected with their race or religion.

Alleged derogatory and biased language/investigation on part of Marion Taylor

77. The claimants said that Ms Taylor used inappropriate language during the investigation using words such as *'offender', 'culprits', 'suspects' and 'liars'.* They became aware of the language when they received papers relating to the investigation following a subject access request in December 2019.

78. The respondents accept that these words were used by Ms Taylor and that although some of the terms appeared in draft forms of documents such as the investigation report, they should not have been used in any event. The Tribunal acknowledges that Ms Taylor's previous employment with a Police service meant that at times she might have used language more suited for that environment than might be expected to be seen in an employee relations matter. It is understandable that the claimants therefore may have felt unhappy with the use of this language.

79. In terms of the use of words such as liars or lying, this related to inconsistent evidence, such as the initial answer given by Mrs Yasmeen to her line manager Rebecca Hewitt and then the different answer given in her investigation interview concerning her knowing the Asian lady involved with the eyebrow threading. While the use of the words would have appeared harsh when read by Mrs Yasmeen and perhaps a more moderate tone would have been better, in the context of the exchange of emails where these words were found, it was not an unreasonable thing to say. Importantly we did not see any inference of the comment being motivated by Mrs Yasmeen's race or religion.

80. Ms Taylor's email seeking guidance from managers on 2 September 2019, used the word 'offenders', but we noted it related to the Thomas Whitham College staff under investigation who were not LCC employees and who were white and non-Muslim.

81. The Tribunal did feel that this particular allegation was not assisted by the awkwardness on the part of LCC in disclosing these documents to the claimants when requested. Instead, by forcing them to make a subject access request, they may well have increased the claimants' suspicions about the documents being disclosed.

Mrs Begum's return to work in November 2019

82. Mrs Begum was absent from work through ill health for a 3-month period from August to October 2019. She had a review meeting towards the end of October 2019 in accordance with the LCC sickness absence procedure in order that a return to work could be discussed, (p.302). She returned to work on 31 October 2019.

83. She argued that she was subject to pressure to return to work earlier than she intended. However, the Tribunal found that Ms Whittle gave convincing evidence that the real issue during Mrs Begum's sickness absence, was the difficulty in being able to contact her at home. She would not answer calls and while she may have had good reasons for not answering caller id withheld messages, she did not appear to make any real effort to provide her employer with an alternative means of easily communicating with her. She was also awkward about completing a stress risk assessment action plan which was sent to her before her return to work. However, she was subject to

OH support and there was a no suggestion that pressure was placed upon her outside of what would reasonably be expected of management in a case of this nature and certainly there was no pressure exercised upon her that was contrary to OH advice.

84. Mrs Begum argued that when she returned to work following a period of sickness absence in November 2019, she not permitted to take a phased return but instead was required to use her annual leave entitlement. She named Catherine Barnett, Stephen Green and Michael [x] as white comparators who had been allowed to undertake phased returns post sickness absence.

85. LCC's Attendance Policy and Procedure (p142) explained that phased return should be discussed with line manager. At her Case Review Meeting on 24 October 2019 Mrs Begum expressly stated she did not want to return using a phased return to work and would instead use her annual leave entitlement. This was something which the Policy permitted her do and her decision was confirmed in an outcome letter sent the same day noting that the decision had been made as she worked part time, (p307).

86. There was no reasonable evidence heard which suggested that Mrs Begum did not understand the purpose of a phased return and her lengthy employment history would support this. There was no evidence of a refusal or any treatment relating to the return to work connected with race or religion and the decision not to proceed with a phased return was her choice. No convincing evidence was heard which suggested that the comparators had been allowed a phased return in similar circumstances and Mrs Begum had been refused.

87. Mrs Begum said she was denied the right to use her annual leave to work in the way that she wanted. This effectively involved not working Saturdays over 2 months, which the LCC said could not accommodate because of service needs. This was explained to Mrs Begum in an email from Mr Watson dated 13 December 2019 and the Tribunal finds that on balance Mrs Begum was inflexible in how she cooperated with LCC in using annual leave as part of her return to work. She was offered Fridays as being suitable days where the service could allow annual leave. It does appear Mrs Begum misunderstood that in taking the use of annual leave as a means to returning to work, it was subject to service needs and she could not demand specific days be taken. The Tribunal accepts that LCC and its managers behaved reasonable and there no evidence that its decision were not motivated by race and/or religion.

<u>Alleged derogatory comments regarding facemasks at staff meeting on 20 July 2020 by Marion Taylor</u>

88. On 20 July 2020 following the initial lockdown imposed by the Covid pandemic, LCC were looking to reopen libraries and had to provide information to all libraries staff in order that they could understand the ongoing

precautions required to ensure the reopening took place in a safe way and respecting governmental advice concerning social distancing and hygiene precautions.

89. Ms Taylor was one of the managers who had to provide this training and she was also nominated as the Covid lead in ensuring the libraries operated in a way which ensured safety for staff and service users. Naturally at the time, this would include advice concerning the safe use of face coverings.

90. She had to provide training to groups of staff at the libraries within her 'cluster' and on 20 July 2020 there were to be 3 meetings involving staff in particular areas. The claimants attended the meeting in the nearby Nelson library and the Tribunal accepted that there were 25 to 30 members of staff from a number of libraries in attendance. With social distancing, Ms Taylor gave credible evidence regarding how she placed information sheets within the library which acted as the meeting area, with each sheet being place 2 metres apart to encourage social distancing. Once these preparations had been put in place, the staff were allowed in so they could find a place, while staying an appropriate distance from each other.

91. Not surprisingly this resulted in a largely spaced group to be addressed and with the expected excitement regarding a possible return to work, seeing colleagues in person following a period of sometime and the understandable anxieties amongst some of those present, this was not the easiest meeting for Ms Taylor to deliver. We accept her evidence that it was difficult to keep everyone's attention and that some people became distracted. It is likely that she would have had to raise her voice and speak directly and loudly to get the attention of those present.

92. It was alleged by the claimants that when Ms Taylor was discussing the issue of facemask wearing, she shouted at them, *"Oi you two, have you got a problem wearing facemasks with your religion and all?"* The claimants accepted that they were both wearing headscarves during the meeting and also that the wearing of the typical elasticated surgical facemasks worn by most people during the pandemic, could cause issues for those whose religion required them to wear a head covering of some description and that some people belonging to these groups could use visors or masks which secured using buttons rather than elastic around the ears.

93. Ms Whittle gave convincing evidence that the remark was not said in the way described by the claimants as she was standing 2 metres away from Ms Taylor at the time and in particular has no recollection of the direct terms *"oi!"* being used.

94. When the allegation was made by the claimants about this comment to LCC, the matter was investigated by Jacquie Crosby who is the Archives and Library Resources Manager. Her report involved the interview of 25 people who were present at the meeting at Nelson library. She asked each of these

members of staff, whether the alleged sentence was used. The outcome was that 4 members of staff had no recollection of the incident, 20 members of staff recall a question being asked by Ms Taylor towards the claimants regarding the wearing of face coverings, 14 members of staff said that Ms Taylor used a sentence similar to that alleged by the claimants. One member of staff may have used the word *"Oi"* to attract their attention, 8 staff members felt that Ms Taylor handled the matter clumsily and 2 members of staff said that they would not have used *'these'* words, which the Tribunal found related to the alleged sentence which Ms Crosby repeated to them. Ms Crosby concluded in her report that:

> *"…that there is insufficient evidence to support the allegation that those were the exact words spoken by Marian Taylor… It is however also concluded that her action on that occasion could be deemed to constitute harassment."*

The Tribunal felt that Ms Crosby was not sufficiently clear in how she concluded her report as to there being any blame or fault on the Ms Taylor, however, we note that management concluded that no disciplinary action should be taken against her.

95. Ms Taylor was concerned that the interview involved the repetition of the alleged sentence when each witness was questioned by Ms Crosby rather than using an open question such as *"can you recall Ms Taylor speaking directly to Mrs Yasmeen and Mrs Begum at the meeting on 20 July 2020 and if so, what did she say".* The problem with asking the witnesses whether a particular sentence was used, meant that they could not rely on their own memory alone when trying to recall the issue several months later, (the interviews took place in April 2021). This meant that there was a real likelihood that their recollection could affected by the alleged sentence being placed at the front of their mind. This could result in unreliable evidence being obtained from individuals who directly involved in the incident. Importantly, there was no evidence of staff suggesting to Ms Taylor following the meeting that she had used inappropriate language or delivered the question in an aggressive way.

96. Ms Taylor's evidence concerning this matter was convincing in that she conceded that the issue of headscarves and the impact on the wearing of face coverings only occurred to her when she saw the claimants at the meeting, and she therefore asked them whether facemasks could be worn. This was a credible statement to make and while it may have resulted in an '*off the cuff*' sentence being delivered, it was done in an abusive or derogatory way.

97. Ultimately, we must conclude on balance that while Ms Taylor may have had to speak loudly to the claimants regarding the use of face masks and it was clearly connected with their use of headscarves as part of observing expectations of their Islamic faith, it was not an abusive or derogatory thing to

say, but an understandable supportive measure which acknowledged that not everyone could use the provided standard 'one size fits all' surgical mask.

Refusal to allow attendance on Racism Training Course in January 2021 and then requiring a report once it was allowed

98. There was no dispute that Mrs Begum did ask to go on a racism training ('Show Racism the Red Card') course on 23 January 2021 when she emailed John Haig who was her line manager at the time (p.557). It involved 6 weeks of training with a 3-hour session each week.

99. This application was initially refused by Mr Watson who was consulted by Mr Haig as she felt it was not role relevant and they could not cover the library for the 6-week period. Ms Bell was very clear of the importance of training for all staff, but at the same time it had to be balanced against the service provision overall. The Tribunal notes that Mr Watson explained to Mrs Begum in an email which covered a number of issues including the training request. He explained that staffing levels meant that she could not be released at that time, but they may be able to accommodate this training at a later date (p841). This was a reasonable refusal given the need to balance training with the overall provision of a library service with the staff available. The correspondence did not suggest that Mrs Begum's race or religion was relevant to this decision and in cross examination she accepted that Mr Watson's reply explains why her request was rejected.

100. On 25 January 2021, Mrs Begum sent an email to Ms Bell advising her that she was unhappy for the reason given for the refusal of the training request and as well as saying that she felt this course would be *'very important for my mental being',* she also stated that she had registered with Unison to become a representative and that this would make her attendance on the course to be more relevant. This was resulted in an email exchange between the library service managers and it is clear that none of them were aware of Mrs Begum's interest in becoming a union representative. However, there was an agreement that had they been aware of these intentions, it would have affected their decision regarding the course, and they were now prepared to allow her to attend the course. Indeed, Ms Taylor stated in her email of 28 January 2021 to Mr Watson that *'I…agree it would be relevant had we been aware she had applied to be a Rep and I would have just confirmed that you were happy for her to attend',* [558-560].

101. Ms Bell confirmed that Mrs Begum could attend the course in her email of 28 January 2021 and explained that *'all staff undertaking conferences and courses write up a report at the end of the event and I would expect that you do submit a report in March after the course.' (p562)* Ms Bell's evidence was clear and credible in relation to this matter, and it is something which was expected of all staff attending courses. It was a sensible use of resources and knowledge gained and was not something which was solely expected of Mrs Begum

102. The Tribunal found Mrs Begum's evidence concerning this issue to be confused and at times she did not appear to appreciate that management's knowledge of her decision to register as a possible Unison representative only arose when she made her request to attend the course following the initial rejection. It was this notification which increased the relevance of the course, and it is that which caused management to reconsider the request and allow it. This was an example of management being thoughtful by reflecting upon their initial decision, rather than resorting to intransigence because of the initial refusal.

Law

Direct discrimination

103. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee of his by, amongst other things, subjecting him to a detriment.

104. Section 13 of the Equality Act 2010 sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of a protected characteristic (race in this case), A treats B less favourably than A treats or would treat others.

Causation

105. If the act is not inherently discriminatory, the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator acted as he did. Although his motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was his reason?

Comparators

106. For the purposes of direct discrimination, section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different. Comparison may be made with an actual individual or a hypothetical individual. The circumstances relating to a case include a person's abilities if on a comparison for the purposes of section 13, the protected characteristic is disability.

Harassment

107. Section 40 of the Equality Act 2010 provides that an employer must not, in relation to employment by him, harass an employee. The definition of harassment is set out in section 26(1) of the Equality Act 2010. A person (A) harasses another (B) if:

(a) A engages in unwanted conduct related to a protected characteristic (race in this case); and

(b) the conduct has the purpose or effect of : -

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

108. Section 26(4) provides that whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account:

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

109. Thus, the test contains both subjective and objective elements. Conduct is not to be treated as having the effect set out in section 26(1)(b) just because the complainant thinks it does. The Tribunal is required to take into account the Claimant's perception, the other circumstances of the case, and whether it is conduct which could reasonably be considered as having that effect.

The burden of proof

110. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

111. Thus, it has been said that the Tribunal must consider a two-stage process. However, Tribunals should not divide hearings into two parts to correspond to those stages.

112. At the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of any other explanation, that the Respondent has committed an act of discrimination. At this stage of the analysis, the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. It is important for Tribunals to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination and in some cases the discrimination will not be an intention but merely an assumption.

113. At the first stage, the Tribunal must assume that there is no adequate explanation for those facts. At this first stage, it is appropriate to make findings based on the evidence from both the Claimant and the Respondent, save for any evidence that would constitute evidence of an adequate explanation for the treatment by the Respondent.

114. However, the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination.

115. If the Claimant does not prove such facts, his or her claim will fail.

116. If, on the other hand, the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of his or her protected characteristic, then the Claimant will succeed.

117. Section 123(1) of the Equality Act 2010 provides that a complaint may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Tribunal thinks just and equitable. Under section 123(3) conduct extending over a period is to be treated as done at the end of the period; and failure to do something is to be treated as occurring when the person in question decided on it. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something (a) when P does an act inconsistent with doing it; or (b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Discussion

Protected characteristics

118. The claimants described themselves as Asian Muslims.

119. The protected characteristics of race under s9 EQA and religion/belief under s10 EQA are therefore relevant.

Direct discrimination

120. There were a number of allegations of direct discrimination relating to race (4.1.1) to (4.1.8) of EJ Benson's list of issues and a further allegation relating to religion (5.1.1), which involved the comments made by Ms Taylor regarding face masks on 20 July 2020.

121. Dealing with these allegations in reverse order, the Tribunal accepted that Ms Taylor directed a question at the meeting at Nelson library on 20 July 2020 to both claimants and with regards to the impact of wearing standard surgical masks with elastic cord being used to go round the users' ears with a head covering such as those used by the claimants.

122. The claimants routinely wear a head covering such as a scarf in accordance with their Islamic faith and were wearing head coverings at the meeting on 20 July 2020. Ms Taylor asked the question when she realised during her delivery about facemasks that this might be an issue for the claimants. As it was asked as a hasty and urgent question it was perhaps slightly clumsy in how it was delivered. It was also in the context of a novel set of circumstances arising from the Covid pandemic, the return to work following the initial lockdown period with inevitable anxieties being experienced by many people. It also took place in a socially distanced space with many people present and a need to get everyone's attention when they at times may have been distracted.

123. Ms Whittle's evidence before the Tribunal was on balance preferred that the comment was made in a derogatory way and the term *'oi'* was not used. We accept that a variety of answers were given by staff during the Crosby investigation, but it was flawed because the alleged statement was put to the interviewees before they had a chance to consider their own recollection as to what or was not said. We were not persuaded that the sentence used by the claimants in this allegation was said by Ms Taylor as described by them, although clearly they were asked about the suitability of using the face masks generally available in conjunction with the headscarves that they typically wore.

124. We accepted Ms Ali's submission that the comment which we believe Ms Taylor made was a supportive one with the aim of ensuring that the specific needs of the claimants in relation to PPE were met. Accordingly, it could not be described as less favourable treatment under section 13 EQA.

125. Although no named comparator was identified, we accept that a hypothetical comparator would have been treated in a similar way and the example suggested of a member of the Sikh faith who wore a turban was appropriate under the circumstances.

126. Accordingly, we cannot find that the claimants were directly discriminated against in relation to this allegation of direct discrimination on grounds of religion/belief.

127. In relation to the allegations of direct race discrimination, the Tribunal would refer the parties to its findings of fact above. We were unable to accept that the investigation into the conduct of the claimants regarding the eyebrow threading incident was conducted with any assumption of guilt and nor was it biased. This was evident by the outcome reached and the way in which it

was resolved informally by management once it was clear that neither claimant was involved with the eyebrow threading alleged by Ms Swift. Management at LCC could clearly only investigate the allegations in relation to their own employees and there was clear evidence that they pressed Ms Swift and her colleagues to disclose information to assist them in this investigation. Thomas Whitham were unhelpful in relation to these queries, although it is understood that the College was subject to a warning of closure at this point and perhaps understandably saw that as a more pressing concern. However, what was clear to the Tribunal that LCC reasonably carried out an investigation in relation to those staff who were working on the day when the alleged incident took place.

128. The comparators named by the claimants while being white, were not the subject of allegations which could be considered similar to those which gave rise to the disciplinary investigation in this case. Theirs was a bullying complaint by a colleague who did not wish to proceed down a formal route and in accordance with the LCC disciplinary procedure, the matter was resolved informally using a roundtable discussion.

129. Importantly, in the case of the claimants, they were only subjected to a formal process for as long as it was necessary and once it was clear that they were not involved with the serious allegations of eyebrow threading, the process did not continue to a formal hearing.

130. The Tribunal accepts that in terms of the investigation and the absence of formal disciplinary action, the claimants were not subjected to less favourable treatment than colleagues who did not share their protected characteristics of race. There is simply no convincing evidence to suggest an assumption of guilt, an absence of integrity, difference of treatment in similar circumstances or an ongoing mistrust or disbelief in the respondents. Accordingly, these allegations are no accepted as being discriminatory on grounds of direct race discrimination, (4.1.1, 4.1.3, 4.1.4 and 4.1.5).

131. We did accept that it may have perhaps been better for the allegations relating to Mrs Begum's absence (Mrs Yasmeen's silence on the matter), to have been dealt with separately to the initial allegations. However, they were not pursued using a formal hearing and did not result in any formal action. To separate them from the eyebrow threading allegations would have assisted the claimants in better understanding that they were exonerated from the more serious matters. That said, this observation in no way amounts to evidence of less favourable treatment. It would also, have been of assistance to agree to a disclosure of the investigation report when asked rather than forcing the claimants to make a Subject Access Request, which had the effect of increasing their suspicions regarding the process.

132. We did recognise that Ms Taylor's use of language was attributed to her former career with the Police and that it would have perhaps been better for more moderate terminology to have been used in a disciplinary

investigation, especially one where there was no criminal element involved. The reference to lying however, did have some justification given the information available to Ms Taylor when she was conducting the investigation However, it did not amount to less favourable treatment connected with race because we accept that this was language which she routinely would use in matters of this nature, and it would not have been restricted to an investigation involving somebody sharing the claimants'' race.

133. We did not accept that Ian Watson made the comments alleged at the informal meeting to discuss the outcome of the investigation. Indeed, his intentions were laudable and well meaning. However, this case clearly made him realise that holding these meetings alone and without a note being taken, could expose him to further allegations. However, at its highest he appeared to express surprise that the claimants wished to bring a grievance and he did not appreciate that they were upset by the outcome. This, however, could not amount to less favourable treatment as the claimants were treated in the same way that Mr Watson would treat employees whose disciplinary investigation had resulted in no further action.

134. We did not accept that Mrs Begum was refused a phased return to work and that she was allowed to use her annual leave as part of her return-to-work following sickness absence in accordance with policy and that this was subject to service need and available dates. This was recorded by her managers. She was not given the dates she requested for that reason but was properly offered alternative days and we find that it could not amount to less favourable treatment as all employees would have been treated in the same way in the same circumstances.

135. We did not hear any convincing evidence that Mrs Begum was pressured into work following sickness absence and she was subject to meetings and the application of sickness absence procedures in the same way as her colleagues would have been. This did not amount to less favourable treatment.

<u>Harassment</u>

136. The Tribunal has already discussed the allegation relating to religion in relating to direct discrimination and it is repeated as an allegation of harassment. The claimant's clearly felt that this was unwanted conduct as it formed part of a complaint that they raised some time after the meeting took place and it was of course related to their religion.

137. Taking into account our findings above, the claimants could not reasonably have concluded that the question asked by Ms Taylor on 20 July 2020 was something which had the purposed of violating the claimants' dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. In the context of the meeting and the absence of any complaint

shortly after the meting took place, the Tribunal does not think that it could reasonably have been considered to have had that effect. They waited after all, until 15 December 2020 before raising this matter as a complaint.

138. In relation to race, we have already considered the issues of Ms Taylor's use of language and while the claimants felt it to be unwanted conduct, we could not accept that there was any evidence that it was related to their race. This was something which she applied as a matter of course and it is likely on balance of probabilities that such language would have been used in other disciplinary cases involving employees who did not share the claimant's race. Nonetheless, it is something that Ms Taylor should reflect upon as it is clearly language which should be used with care and only in appropriate circumstances.

139. In relation to Mr Watson's comments allegedly made at the meeting with the claimants, we have already discussed above that we do not accept that they were made as alleged by the claimants. At most he would have expressed surprise at their decision to bring a grievance, but while the claimants may have felt this to amount to unwanted conduct, it certainly could not have been attributed or related to their race. Mr Watson gave no indication or impression in his evidence of any underlying bias in that regard, and he was actually trying to help the claimants at this meeting understand what had happened and to allow them to return to their jobs.

140. As we do not accept that there was any pressure placed upon Mrs Begum to return to work earlier than anticipated, we do not accept that she was subject to less favourable treatment. The first respondent followed their sickness absence procedure properly and any pressure was caused by Mrs Begum's unwillingness to make herself available to welfare enquiries from management and reasonable communication during sickness absence. While unwanted conduct, this was not related to her race and could not be considered has having the purpose or effect of violating her dignity or creating a hostile environment. It was reasonable behaviour, and a reasonable employee should cooperate accordingly.

<u>Victimisation</u>

141. Victimisation complaints must first of all identify a protected act which complies with section 27(2) EQA. Unfortunately for the claimants in this case, the grievance, which is relied upon, and which was brought on 11 January 2020, while potentially capable of being a protected act, failed to identify alleged acts of discrimination or any failure on the part of the respondents connected with the EQA. Accordingly, this complaint fails at the first hurdle.

142. For the avoidance of doubt, while we are not obliged to consider the alleged detriments, we did not accept that initial refusal of the training course or the requirement once accepted to produce a report were in anyway connected with the grievance, as we have found above, we accepted that

management behaved appropriately and reasonably in relation to Mrs Begum's training request.

143. We did not accept Mr Watson threatened the claimants as they alleged at the meeting on 19 November 2019 for the reasons given above in relation to other complaints and in any event this meeting took place before the actual grievance had ben brought. But in any event, it could not be considered a detriment given our earlier findings.

Time limits

144. Mr Ali helpfully set out the dates of knowledge which were relevant for each of the allegations made by the claimants in relation to their complaints. Given that they all preceded the 26bNovember 2020 date in accordance with section 123 EQA, (apart from the two course related allegations involving Mr Begum), all of these complaints were presented out of time.

145. We did not hear evidence or submissions from claimants about their reasons for delaying the presentation of the claims and note that while unrepresented, they did have union support during the relevant period. There was no evidence that each of the allegations amounted to continuing conduct over a period ending on a date after 26 November 2020 thereby rendering them in time.

146. No just and equitable reason was advanced for an extension of time, but as none of the complaints are found to be successful, there is no need to consider this issue any further.

147. For the avoidance of doubt the course related allegations while in time, have been considered to be not well founded and do not succeed.

Conclusion

148. The judgment of the Tribunal is that:

In relation to both the first and second claimants –

a) The complaint of direct discrimination on grounds of religion or belief contrary to section 13 EQA, is not well founded which means it is not successful.
b) The complaint of direct discrimination on grounds of race contrary to section 13 EQA, is not well founded which means it is not successful.

c) The complaint of victimisation is not well founded, and which means it is not successful.

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Employment Judge Johnson

Date: 27 March 2023

JUDGMENT SENT TO THE PARTIES ON

31 March 2023

FOR THE TRIBUNAL OFFICE