



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103693/2022

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**Hearing held in Dundee by Cloud Video Platform (CVP)
on 7,8,30 March & 4 April 2023
(and Member's Meetings on 5,14 April 2023)**

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**Employment Judge: R Sorrell
Members: A Shanahan
C Rochford**

Dr L Munjoma

**Claimant
In Person**

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The Scottish Ministers

**Respondent
Represented by:
Ms M Armstrong -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The unanimous judgment of the Tribunal is that the claimant's complaints of direct discrimination because of race and harassment related to race do not succeed and are dismissed.

REASONS

Introduction

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1. The claimant presented a complaint of direct discrimination because of race and harassment related to race on 1 July 2022. The respondent denied that the claimant had been discriminated against.
2. Prior to this hearing, there were two case management preliminary hearings heard by telephone conference call that took place on 31 August 2022 and 9 November 2022. The claimant's amendment application to include a complaint of disability discrimination was heard by EJ McCluskey at a further

preliminary hearing by way of the Cloud Video Platform on 12 January 2023 and was refused by Order dated 3 February 2023.

3. This hearing was scheduled to determine the claim. It was a virtual hearing held by way of the Cloud Video Platform.
- 5 4. Following the second case management preliminary hearing, the claimant provided further and better particulars of her claim. These particulars were relied upon at the Hearing by the claimant as to the alleged acts of discriminatory treatment.
- 10 5. As the claimant was a party litigant, the Tribunal explained the purpose and procedure for the hearing and that the Tribunal was required to adhere to the Overriding Objective under Rule 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 of dealing with cases justly and fairly and to ensure that parties were on an equal footing. Prior to the claimant's cross examination of the respondent witnesses, the Tribunal further explained to the claimant that it was necessary she put her
15 case to the witnesses in order that the Tribunal may attach due weight to all the evidence heard.
6. A joint bundle of productions was lodged prior to the hearing. Further documents were lodged during the course of the hearing.
- 20 7. The claimant did not call any witnesses. The respondent called Mr S Smith, Learning Consultant, Social Security Scotland and Mr W Vandal, Operational and Continuous Development Manager, Social Security Scotland.

Preliminary Issues

- 25 8. There was a delay in the commencement of proceedings due to documents sought by the claimant from the respondent prior to the hearing not being provided for which the respondent required time to produce.

Findings in Fact

The following facts have been admitted or found by the Tribunal to be proven:

9. The claimant's date of birth is 19 July 1961.
10. The claimant describes herself as a person of colour and of Zimbabwean origin.
11. The respondent is the legal entity which enters into contracts and which
5 employs staff who may be assigned to the Scottish Government and its agencies. Social Security Scotland ('SSS') is an executive agency of the Scottish Government.
12. The claimant was employed by Pertemps Recruitment Partnership Limited ("Pertemps") as a Flexible Worker on 30 March 2022. (D35)
- 10 13. On 30 March 2022, Pertemps assigned the claimant to 'SSS' in the role of Learning Facilitator. Mr Vandal was the recruiting manager who liased with Pertemps for that purpose. The claimant was one of 6 or 7 persons recruited at the same time by 'SSS' from Pertemps to undertake this role.
14. The role required the claimant to work from home. The claimant worked 37
15 hours per week and her gross pay was £14.10 per hour. The duration of the assignment was until 15 September 2022 with the possibility of extension. (D10) Clause 1.4 of the claimant's contract of employment with Pertemps provided for the termination of an assignment by Pertemps or 'SSS' at any time without prior notice. (D35)
- 20 15. The claimant's role as Learning Facilitator involved the developing and delivering of online training for a new Adult Disability Payment benefit to 'SSS' client advisors and case managers, which equipped them to take initial claims over the telephone from the public, determine eligibility and process elements of that benefit claim. The role required a working
25 knowledge of MS Teams and Outlook.
16. Mr Smith was the claimant's line manager and Mr Vandal is Mr Smith's line manager. Mr Smith maintained contact with the claimant and the rest of his team through MS Teams, email and by telephone.
17. On commencement of the assignment, the Learning Facilitators were issued
30 with a questionnaire to complete by the On-Boarding Team in order to

identify their equipment needs to perform the role. This information was then passed to the Smarter Working Team to organise couriers to deliver the equipment to them.

5 18. The claimant requested a mouse, keyboard, chair and monitor. On 6 April 2022 the claimant emailed the On-Boarding Team to check when her equipment was arriving. (D14) On 7 April 2022 a member of the Smarter Working Team advised a member of the On-Boarding Team that he would make contact with the claimant regarding her requested equipment, but that unfortunately they would not be able to supply her with a monitor at that time and that she would be contacted once they had received a new supply of
10 monitors that were ready to be dispatched. (D14)

15 19. The claimant spoke to Mr Smith about not receiving a monitor. He informed her there was a shortage of this equipment and 'SSS' did not have the stock to issue monitors to anybody at that point, including the other Pertemps employees who were assigned to 'SSS' at the same time as the claimant. On 3 May 2022 the claimant emailed Mr Vandal to ask if he could escalate her monitor request as it would make things a lot easier for her and that she had made this request before she started her job. (D26) On 3 May 2022 Mr Vandal replied to the claimant's email and advised there was a shortage and
20 it could be around 6 weeks before more were received, but that if she had already requested one, he would try and escalate it to get her one sooner. (D26)

25 20. Training for the role comprised of two elements. An online one week Train the Trainer Event was delivered by Lead Facilitators. The claimant was in an online class with the 6 or 7 other persons assigned to 'SSS' by Pertemps for this training ('the claimant's group'). Following that, there was a two week self-learning preparation period whereby the Learning Facilitators upskilled themselves on the training content and observed other facilitators delivering the training. Mr Smith would also observe the new entrants during the
30 course of their training delivery.

21. The claimant and other Pertemps staff recruited for this role were not provided with the 'SSS' Learning and Development Quality Strategy and

Standards documents or Performance Objectives and were not formally assessed in respect of them during the training they received or in terms of their own training delivery.

- 5 22. The respondent's shared access drive contained the team training calendar and the training topics allocated to each team member. Hard copies of the training materials to be delivered were provided to the claimant and her group during the Train the Trainer Event. On 1 April 2022 Mr Smith requested the Service Desk give the claimant access to the shared drive. (D13) After the Event concluded on 12 April 2022, the claimant advised Mr Smith that she had still not been given access to the shared drive. On 13 10 April 2022 Mr Smith escalated his request and it was actioned on the same date. (D13) It was not unusual for the Service Desk to delay in giving access and there were other people in the claimant's group who also experienced a delay.
- 15 23. Mr Vandal made a decision to reduce the training route-way for the claimant and her group from 6 weeks to 2 weeks in order for them to become familiar with the material and delivery of it.
24. Prior to the claimant's assignment to 'SSS,' she had experience of using MS Teams for job interviews and church meetings.
- 20 25. Soon after the claimant's assignment commenced, Mr Smith had concerns about the claimant's lack of familiarity with MS Teams and her difficulties in retaining digital information. She required more support than the rest of her group and he was in frequent contact with her.
- 25 26. These concerns included the claimant's ability to use shared screens and access the training materials which he would discuss and explain to her and then need to repeat on the next occasion. There was also an instance when the claimant advised Mr Smith she could see conversations in MS Teams that she should not be seeing but it transpired she was in the MS Teams Channel where learning products were being discussed which she did not 30 seem to fully grasp. On a further occasion the claimant reported to Mr Smith

and Mr Vandal that her camera was not working on her laptop when the lens cap had been covered which was a basic trouble shooting check. (D25)

27. On 20 April 2022 the claimant emailed Mr Smith and Mr Vandal to thank them for their continued support and patience which had helped to restore her confidence after a period of not working due to suffering from thyroid cancer. (D16)
28. During the self-learning preparation period, Mr Smith had a conversation with the claimant about her preparation for her training delivery and was concerned that this was not on course. In particular, the claimant had only looked at the 'Social Programme Management' once when this should have formed a significant proportion of her preparation time as this was the system used by the client advisors whom the claimant would be training.
29. As a result, Mr Smith and Mr Vandal decided to have a meeting with the claimant on 25 April 2022 to discuss her readiness to deliver the training digitally and identify any appropriate support. The claimant was not notified of the meeting or the purpose of it in advance.
30. In error, the claimant did not log into work on 25 April 2022. Mr Vandal contacted the claimant to ascertain her whereabouts and asked her to log on to speak with him and Mr Smith.
31. At the meeting, Mr Vandal told the claimant that he had concerns about her readiness to deliver the training and her capability to perform the role. The claimant was not receptive to Mr Vandal's concerns and felt upset and humiliated by his remarks. She questioned these concerns as she had not yet started her training and her performance had not been measured. The claimant then said that she felt like a fish out of water being the only black face. Mr Vandal and Mr Smith were taken aback by this comment. When Mr Vandal asked the claimant further about this comment she said that no one in their team had made her feel uncomfortable about the colour of her skin, but that was how she felt. Following further discussion with the claimant about her preparation and her support needs to deliver the training, it was

agreed that the claimant would be allocated an experienced facilitator as a mentor to assist her with that.

32. Mr Vandal subsequently made a note of the meeting which he did not share with the claimant. (D17)

5 33. On 26 April 2022 the claimant complained to her local Constituency Office in Glasgow about the unfair treatment she felt she was receiving from the respondent because of her race. (D18) On the same date 'SSS' received an email from Amy Fraser of the Constituency Office on behalf of the claimant about those concerns and asked that these be responded to. (D19) Danielle
10 Paterson, 'SSS' People Advice and Support Partner replied to this email on 3 May 2022 advising that it had been forwarded to her on 28 April 2022, she had reached out to the claimant and was currently investigating the matter. (D19)

15 34. Ms Paterson contacted the claimant on 28 April 2022 and had a Teams chat with the claimant on 29 April 2022 about what had happened at the meeting on 25 April 2022. The claimant asked for the working relationship to be resolved and for Ms Paterson to speak to Mr Vandal. (D11) On 3 May 2022 Ms Paterson spoke with Mr Vandal about her conversation with the claimant. Mr Vandal advised that he was happy to continue supporting the
20 claimant and that it was Mr Smith's role to deliver feedback if necessary. (D11) On the same date, Ms Paterson relayed her conversation with Mr Vandal and the outcome of it to the claimant who was happy with this approach. (D11)

25 35. The claimant delivered her first training class after the other assigned Pertemps staff because of the additional support she required. This support included the help she received from her mentor in preparation for her first training delivery. (D21)

30 36. Prior to her first training class on 3 May 2022, her mentor fed back to Mr Vandal that he didn't feel the claimant was fully prepared but thought she could do the first day or two of training.

37. On 29 April 2022, Mr Smith informed the claimant that another learning facilitator would be attending her class to assist her. (D20) The facilitator had only recently been assigned by Pertemps to work for 'SSS.' At the class the facilitator observed the claimant and reported back to Mr Smith afterwards about the claimant's training delivery. Mr Smith was concerned to learn from the facilitator that the claimant talked through the benefits module with the learners which was a lot of content, rather than asking them to look over the materials themselves and then check their knowledge and understanding of it.
38. As a result of this feedback, Mr Smith decided that he would observe the claimant's second training class on 4 May 2022. Mr Smith informed the claimant of that on the morning of the class shortly prior to the commencement of it.
39. During the session, Mr Smith observed that the claimant asked the learners to look at a product but when she shared her screen it was a different product. When this was highlighted by the learners it confused the claimant. The same issue then happened again. The claimant subsequently directed the learners to read through some of the learning materials themselves. The claimant and learners remained on the call and on camera. The claimant then opened up a new Teams message for Mr Smith and explained that her reason for doing the learning in this way was because there were two slow learners in the class. When naming one of the learners she indicated this learner had a stutter. As the learners were still on the call and on camera, the claimant inadvertently shared this message with all of the learners as well.
40. Mr Smith immediately interjected because he was angry and upset at what he had observed as it was contrary to 'SSS's tagline of dignity, fairness and respect. He was concerned about how that learner would have felt about being named in this manner and of the possibility of a formal complaint as a result. He therefore stopped the claimant from sharing her screen and told her to log out. At the same time, he told the learners to take a break and removed them from the screen.

41. Mr Smith then had a separate call with the claimant to discuss what had happened and explain the significance of her error in disclosing sensitive information about one of the learners to the whole class.
- 5 42. The claimant was upset and humiliated by Mr Smith's response to the incident. She explained that she had forgotten to minimise her screen before sending the message, that it had only been displayed for thirty seconds and it was not seen by the learners anyway as they were busy reading. She did not acknowledge the seriousness of what she had done or the potential ramifications of that.
- 10 43. Mr Smith then spoke to Mr Vandal about the incident to calm himself down before speaking to the claimant again. The claimant also spoke to Mr Vandal before speaking to Mr Smith again. Mr Vandal advised the claimant to take Mr Smith's feedback on board when he next spoke to her.
- 15 44. The claimant sent Mr Vandal a text message after speaking to Mr Smith. She thanked him for listening to her and said that she took everything on board that he and Mr Smith had said to her. She further said that she was more disappointed with herself, was letting herself down and that she was currently enrolled to learn more about digital learning privately. (D26)
- 20 45. Later that day, the claimant sent Mr Vandal a further text message that she had seen her Doctor who said that her stress levels were a bit high which could cause a relapse and that she would therefore take the following day as sickness leave. (D29)
- 25 46. The learners provided feedback after their training. This feedback included adverse comments regarding both the claimant inadvertently sharing sensitive information about one of the learners with the class on 4 May 2022 and 'SSS's response to that incident. (D28)
47. The claimant remained on sickness leave until the termination of her assignment with 'SSS.'
- 30 48. On 13 June 2022, Jade Downey, Operations Manager of Pertemps emailed Ms Paterson to advise that provided she felt well enough, the claimant was

due to return to work on 29 June 2022 and asked that the proposed return to work plan detailed in the email could be put in place two weeks before the claimant returned to work to allow her time to review and prepare. (D32)

49. On 15 June 2022 Mr Vandal emailed Ms Paterson as follows -

5 *“Further to our call yesterday I wish to advise that unfortunately the role of facilitator has not worked out for Linda and I wish to terminate her contract. Please see reasons below:*

(i) *Linda started with us on the 30th March and to date she has only managed 1 day’s delivery.*

10 (ii) *It became apparent from the start of her contract that Linda lacked the basic IT skills for the job role and even with all the additional support, this showed no signs of improvement. By her own admission, Linda advised it would take her approximately 3 months for this to improve.*

15 (iii) *Following discussions with her line manager, other facilitators and myself, we had concerns that Linda was not going to be ready for her first delivery and I was worried regarding the impact this would have on her class.*

20 (iv) *I provided additional support for Linda. Getting an experienced facilitator to support her with her preparation and again the facilitator had concerns that he was not confident she was going to be able to deliver.*

25 (v) *Following this support my plan was to put in extra resources to support Linda in class, including facilitators delivering the more technical modules, allowing Linda to observe delivery.*

(vi) *Linda’s Line manager joined her class to offer support on the 2nd day and our fears were realised and he had to stop the delivery and take over.*

- (vii) *During this period Linda was kept informed of the additional support provided and the reasons for this. Linda did not always receive feedback in a positive manner.*
- 5 (viii) *During his observation Linda's Line manager witnessed a serious IT breach which has subsequently resulted in a complaint being made against Linda. We have managed to deal with this in house to prevent it being escalated but I would need to address this with Linda if she was to return.*
- 10 (ix) *Looking at the further support I would need to put in place and the length of time this would take to get Linda ready for delivery. It would be nearing the end of her 6 month contract. I currently also do not have the additional resources available to offer this level of support.*
- 15 (x) *Not having Linda available to deliver and also the fact that she may not return after her current fit note expires, I feel that from a business need that it would not be practical to have Linda return following her illness. I am also concerned regarding the impact this may have on Linda's health." (D33)*
50. The claimant was thereafter informed by Pertemps that her assignment to 'SSS' had been terminated.
- 20 51. The employment status of those who work for 'SSS' is mixed. There are permanent employees, employees on fixed term appointments and temporary contract workers. There is an open formal recruitment process in place in respect of applications for permanent roles available at 'SSS.'
- 25 52. None of the Pertemps staff assigned to 'SSS' at the same time as the claimant had their contracts extended beyond the initial contract period of 6 months or were offered permanent employment with 'SSS.'
53. The claimant has not worked since the termination of her assignment to 'SSS.'

Submissions

54. The Tribunal has read and digested the oral submissions made by parties' and taken account of them in our findings.

Relevant Law

5 *Contract Workers*

55. Section 41(1) of the Equality Act 2010 ("EA") provides that: "*A principal must not discriminate against a contract worker –*

(a) *as to the terms on which the principal allows the worker to do the work;*

10 (b) *by not allowing the worker to do, or to continue to do, the work;*

(c) *in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;*

(d) *by subjecting the worker to any other detriment."*

15 56. Section 41 (2) of the EA provides that: "*A principal must not, in relation to contract work, harass a contract worker."*

Direct Discrimination

20 57. Section 13 (1) of the EA provides that: "*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."*

58. Section 9 of the EA concerns the protected characteristic of race and provides that: "*Race includes (a) colour, (b) nationality, (c) ethnic or national origins."*

25 59. Direct discrimination requires consideration of whether the claimant was treated less favourably than others and whether the reason for that treatment was because of a protected characteristic.

60. The Tribunal may first consider whether the claimant received less favourable treatment than the appropriate comparator and then secondly whether the less favourable treatment was on discriminatory grounds.
61. The claimant must have been treated less favourably than a real or hypothetical comparator. Section 23 of the EA provides there must be no material differences between the relevant circumstances of the claimant and their comparator. If there is no less favourable treatment, there is no requirement to consider the reason why.
62. Where the appropriate comparator is disputed or hypothetical, the less favourable issue may be resolved by first considering the reason why the claimant received the treatment. (***Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337***)
63. The reason for the treatment need not be the main or sole reason but the protected characteristic does require to have a significant influence on the outcome. (***Nagarajan v London Regional Transport [1999] 4 All ER 65***)
64. It is unusual to have direct evidence as to the reason for the treatment. Direct discrimination may be intentional or unconscious bias and the tribunal must consider the mental processes which caused the employer to act. (***Nagarajan v London Regional Transport [1999] 4 All ER 65***) The reason why may be proven by direct evidence or by reasonable inference drawn from primary facts.

Harassment

65. Section 26 (1) of the EA states that “A person (A) harasses another (B) if:
- (a) *A engages in unwanted conduct related to a relevant protected characteristic, and*
- (b) *The conduct has the purpose or effect of:*
- (i) *Violating B’s dignity, or*
- (ii) *Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.”*

66. Section 26 (4) of the EA states that: *“In deciding 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;*

5 (b) *The other circumstances of the case;*

(c) *Whether it is reasonable for the conduct to have that effect.”*

67. There are accordingly three essential elements of a harassment claim; unwanted conduct that has the proscribed purpose or effect which relates to a relevant protected characteristic.

10 *Burden of proof*

68. Section 136 (2) of the EA provides that: *“If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred.”*

15 69. The standard of proof is on a balance of probabilities.

70. The burden of proof is considered in two stages. At the first stage, it is for the claimant to prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has treated the claimant less favourably because of a protected characteristic or harassment related to a protected characteristic.

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71. Having a protected characteristic and there being a difference in treatment is not sufficient and the claimant must also prove at the first stage the reason for difference in treatment by way of “something more.” (***Madarassy v Nomura International Plc [2007] ICR 867***)

25 72. If the claimant does not satisfy the burden of the first stage, their claim will fail. If the claimant satisfies the first stage, at the second stage, it is for the respondent to prove that the respondent has not treated the claimant less favourably because of a protected characteristic. If the respondent does not

satisfy the burden of the second stage, the claim will succeed. (*Igen v Wong [2005] ICR 935*)

5 73. While at the first stage the tribunal has no regard to evidence as to the respondent's explanation for its conduct, the tribunal must consider all other evidence relevant to the question of whether the alleged discriminatory act occurred, whether the evidence is adduced by the claimant or the respondent, or supports or contradicts the claimant's case. (*Laing v Manchester City Council [2006] IRLR 748*)

10 74. The burden of proof provisions are not relevant where the facts are not disputed or the tribunal is in a position to make positive findings on the evidence. In *Martin v Devonshires Solicitors 2011 ICR 352, EAT*, Underhill P stressed that while *"the burden of proof provisions in discrimination cases... are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination — generally, that is, facts about the respondent's motivation... they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law."* This view was endorsed in *Hewage v Grampian Health Board [2012] UKSC 37, SC* and more recently by the Supreme Court in *Efobi v Royal Mail Group Ltd 2021 ICR 1263, SC*.

25 75. Where there is a breach of the EA, compensation is considered under Section 124 and refers to Section 119 of the EA which includes a provision for injury to feelings. The focus is on the actual injury suffered by the claimant and not the gravity of the acts of the respondent. (*Komeng v Creative Support Ltd UKEAT/0275/18/JOJ*) The authority of *Vento v Chief Constable of West Yorkshire Police (No.2) [2003] IRLR 102* gives guidance on the level of award that may be made and sets out three bands for injury to feelings; lower, middle and upper. An award may also be made for financial losses sustained as a result of discrimination and there is a duty of mitigation. The Tribunal may include interest on the sums awarded at a prescribed rate.

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Issues to be Determined by the Tribunal

76. The Tribunal identified the following issues require to be determined:

- i. Did the respondent subject the claimant to less favourable treatment because of her race, and/or colour, and/or national origin?
- 5 ii. Did the respondent subject the claimant to unwanted conduct related to her race, and/or colour, and/or national origin that had the proscribed purpose or effect?
- iii. If any complaint is upheld, what compensation should be awarded to the claimant?

10 **Conclusions**

77. The Tribunal first considered the credibility of the claimant and the two respondent witnesses, Mr Smith and Mr Vandal.

78. The Tribunal found the claimant was honest and passionate about how she felt she was treated in life generally because of the colour of skin. She was
15 evidently distressed and upset about the treatment she perceived she had received by the respondent. At times the claimant became slightly muddled in her evidence which we recognised may have been due to her distress, but also as a result of how she was presenting it by using both a mobile phone and a screen.

20 79. Whilst the Tribunal considered the claimant to be a largely honest witness, we did not find her material evidence to be particularly reliable. This is because overall she exhibited a lack of acceptance and self-awareness about the additional support she needed in order to fulfil her role and an unwillingness to acknowledge her error in the disclosure of sensitive
25 information, which we considered in turn then influenced her interpretation of events and her perception of the treatment she received from the respondent.

80. In respect to the respondent witnesses, the Tribunal found Mr Smith to be a largely credible and reliable witness who gave his evidence in a clear and

measured manner. We further found Mr Vandal to be a largely credible and consistent witness who generally gave his evidence in a straightforward manner, albeit he became slightly frustrated on occasion during cross examination. We considered that both Mr Smith and Mr Vandal were sincere
5 in their ongoing efforts to support the claimant to perform her role.

Direct Discrimination

81. The Tribunal considered that the appropriate comparator in this case was hypothetical. This is because while the claimant did compare her alleged treatment to the rest of the Pertemps staff who were assigned to 'SSS' at
10 the same time in general terms, she did not provide evidence of any actual comparators. Although when giving her evidence the claimant did refer to another Pertemps female assigned at the same time who had been given a 6 week training route-way, this had not been put to the respondent witnesses and the Tribunal could therefore attach little weight to that.

15 82. In applying ***Shamoon***, the issue of less favourable treatment in respect to each alleged discriminatory act was therefore resolved by first considering the reason why the claimant received the treatment.

(i) The claimant was not allocated the right working equipment to carry out her role. She was not given two computer screens as required.

20 83. The Tribunal found Mr Smith and Mr Vandal's evidence credible, which was supported by the documentary evidence, that the reason for this treatment was a global supply shortage of computer monitors that led to a delay in these being provided to the claimant and the other Pertemps staff assigned at the same time who had requested a second computer monitor.

25 84. Notwithstanding the above, the Tribunal considered it a concern that those affected by the supply shortage were still expected by the respondent to fulfil their role without the appropriate equipment.

(ii) The claimant was not given her training calendar timetable after her training.

85. The Tribunal accepted Mr Smith's evidence as reliable that the reason for this treatment was that he had requested access to the shared drive (that included the training calendar timetable) for the claimant from the Service Desk on 1 April 2022, but there had been a delay in some of the Pertemps assigned staff, including the claimant, receiving access which was not unusual. Once the claimant informed him she had still not received access on 12 April 2022, he escalated his request on 13 April 2022 and it was actioned on the same date, which was supported by the documentary evidence produced.

10 (iii) When the claimant was given her training calendar timetable, it was a reduced calendar of 2 weeks rather than 6 weeks.

86. The Tribunal found the evidence of Mr Smith and Mr Vandal consistent and reliable that the reason for this treatment was a decision taken by Mr Vandal in respect of the claimant and the other Pertemps staff assigned at the same time in order for them to become familiar with the material and delivery of it.

15 (iv) On 25 April 2022, at an early stage of the claimant's assignment to 'SSS' and before she had started to deliver training, Mr Vandal and Mr Smith met with the claimant. Mr Vandal told her that he did not think she was going to be able to do this job and that they may have to let her go. The claimant had to strongly argue that this should not happen. The claimant felt humiliated and degraded by this treatment.

87. The Tribunal found that the reason for Mr Vandal and Mr Smith deciding to meet with the claimant on 25 April 2022 was to discuss her readiness to deliver the training digitally and identify any appropriate support. In reaching this view, the Tribunal considered Mr Smith's evidence credible that soon after the claimant's assignment commenced, he had concerns about the claimant's lack of familiarity with MS Teams and her difficulties in retaining digital information and subsequently, that her preparation for her training delivery was not on course. Even though the claimant disputed this evidence, the Tribunal noted that she did not challenge the examples given by Mr Smith in support of his evidence and considered that her email of 20 April 2022 to Mr Smith and Mr Vandal which thanked them for their

continuing support and patience indicated an element of recognition by the claimant of the additional support she in fact required.

5 88. The Tribunal were satisfied that at the meeting Mr Vandal told the claimant he had concerns about her readiness to deliver the training and her capability to perform the role and that the claimant did not accept his concerns which she questioned as she had not yet started her training delivery and her performance had not been measured. The Tribunal further accepted the claimant said that she felt like a fish out of water being the only black face, that no one in their team had made her feel uncomfortable about 10 the colour of her skin, but that was how she felt. It was also not in dispute that it was agreed the claimant would be allocated an experienced facilitator as a mentor to support her in preparation for her training delivery.

15 89. However, on the basis that the Tribunal found Mr Smith and Mr Vandal's reasons for the meeting to be credible, the Tribunal did not accept the claimant's evidence that Mr Vandal said the claimant was not suitable for the job or that she was not going to be able to do it as this was simply not consistent with their previous actions to support the claimant and which the claimant had herself acknowledged.

20 90. Notwithstanding that, the Tribunal questioned the veracity of Mr Vandal's note of that meeting. Mr Vandal was unclear about when this note was written and it was undated. Mr Smith was equally unclear about when he first saw it. The claimant did not see this note until it was produced for the Hearing and she was therefore not given an opportunity to agree the content of it. The claimant was also not notified of the meeting or the purpose of it in 25 advance.

30 91. When asked by the claimant in cross examination why he did not give the claimant a copy of the note, Mr Vandal replied that it was not a formal or official meeting. The Tribunal considered this a curious statement to make in view of the importance of that meeting and that his actions in this regard, as well as not notifying the claimant of the meeting or the purpose of it in advance, were indicative of a wider more informal based approach by the respondent in their overall management of the assigned Pertemps staff.

(v) *On 3 May 2022, the first day of the claimant's facilitation, the claimant's class was attended and monitored by another facilitator which she was given no notice of.*

5 92. The Tribunal considered that the reason for this treatment was due to Mr Smith and Mr Vandal's ongoing concerns around the claimant's readiness to deliver the digital training and the importance of obtaining feedback about the claimant's delivery on her first day of training because of that. On this basis the Tribunal did not accept Mr Smith's or Mr Vandal's evidence that the attendance of the facilitator was for the mutual benefit of the facilitator and the claimant, particularly when the facilitator had only recently been assigned to work for the respondent. Although the claimant was only informed about the attendance of the facilitator on 29 April 2022, the Tribunal accepted Mr Smith's evidence that the claimant was previously made aware that facilitators could attend other facilitator's training sessions.

15 (vi) *On 4 May 2022, the second day of the claimant's facilitation, Mr Smith told the claimant he was attending her class to monitor her 10 minutes before it started. During the training session the claimant felt harassed by Mr Smith when he abruptly intervened and stopped her from completing the training. This embarrassed her and she completely lost confidence. She felt humiliated in front of the trainees.*

25 93. Whilst the Tribunal accepted that the claimant was made aware Mr Smith would usually attend a facilitator's training session during the route-way, we found that Mr Smith only informed the claimant of his attendance at her second training session on the morning of it, which we considered would have put the claimant under additional pressure. Although the Tribunal accepted the reason for Mr Smith's sudden decision to attend the training session was due to the feedback he received from the facilitator who had attended the claimant's training session the previous day, the Tribunal considered there was an element of panic management in his decision and that this situation could have been avoided by giving the claimant more notice in light of his ongoing concerns.

94. The Tribunal found Mr Smith's evidence credible that the reason for his actions during the claimant's training session were because the claimant had inadvertently shared sensitive information about one of the learners at the session with all of the learners which the Tribunal considered an appropriate course of action in the circumstances.

95. In reaching this view, it was of concern to the Tribunal that the claimant did not seem to acknowledge the seriousness of what had happened or the potential ramifications of that. Whilst she appeared to accept she had made a mistake in her text to Mr Vandal shortly after the incident, she was adamant in her evidence that the learners would not have seen this information as they were reading and that the adverse learner feedback about this incident had been engineered by the respondent.

(vii) The claimant's assignment was terminated on 15 June 2022. The other Pertemps staff assigned at the same time were given permanent employment after 6 months.

96. The Tribunal found Mr Vandal's evidence credible that the reasons for the termination of the claimant's assignment were as set out in his email to Ms Paterson on 15 June 2022. This is because these reasons were consistent with his and Mr Smith's ongoing concerns about the claimant's capability to deliver digital training, the additional support she received and would require to be ready for delivery if she returned, which by then would be nearing the end of her 6 month contract.

97. The Tribunal further found Mr Smith and Mr Vandal's evidence reliable and consistent that none of the Pertemps staff assigned at the same time as the claimant had their contracts extended beyond the initial 6 month period or were given permanent employment. In reaching this view, the Tribunal also noted the claimant's evidence that she did not know the circumstances of three individuals whom she said were given permanent positions and that Mr Vandal was best placed to comment on that.

(viii) The claimant's abilities were not properly assessed before a decision was made regarding her capabilities.

98. The Tribunal considered that the reason for the lack of any formal performance assessment of the claimant related to the more informal approach taken by the respondent with the assigned Pertemps staff as compared to their own employees. Although the respondent lodged a number of policies regarding Quality standards, the Tribunal found there was no reliable evidence to indicate these were formally used by the respondent to assess the claimant and the other assigned Pertemps staff in terms of their performance. In this regard, the Tribunal preferred the evidence of the claimant to Mr Smith's in that copies of these policies were also not provided to them.

99. The Tribunal noted this was a core element of the claimant's complaint as she was clear in her evidence that where there is no documentary evidence of formal performance assessment or appraisal, there can be no performance issue and that in the absence of such, the reason for the respondent treatment was because of her race.

100. Whilst the Tribunal was not persuaded by the claimant's reasoning in this regard, the Tribunal considered that the respondent's lack of formality and therefore transparency in the performance assessment process for the claimant and the other assigned Pertemps staff made the respondent more vulnerable to complaints of this nature.

(ix) The claimant's complaints were not taken seriously.

101. Although the claimant did have a Pertemps contract of employment which provided for a grievance procedure, as a contract worker for the respondent and an employee of Pertemps, the Tribunal understood the claimant's frustration that it was not particularly clear in practice whom she should make complaints to about what and we considered that the lines of communication between 'SSS' and Pertemps could have been clearer. However, the Tribunal found that the claimant's complaint to her local Constituency Office on 26 April 2022 about the alleged unfair treatment from the respondent because of her race was dealt with in a professional and timely manner by Ms Paterson which was corroborated by the documentary evidence.

102. In light of these positive findings on the evidence in respect of the respondent's reasons for their treatment of the claimant and applying **Hewage** ("*supra*") and **Efobi** ("*supra*"), the Tribunal has not considered the burden of proof provisions further.

5 103. In view of all the above, the Tribunal concluded that the reasons for the respondent's treatment of the claimant were in no way whatsoever because of the claimant's race and/or colour and/or national origin.

104. The claimant's complaint of direct discrimination accordingly does not succeed and is dismissed.

10 *Harassment*

(i) *On 25 April 2022, at an early stage of the claimant's assignment to 'SSS' and before she had started to deliver training, Mr Vandal and Mr Smith met with the claimant. Mr Vandal told her that he did not think she was going to be able to do this job and that they may have to let her go. The claimant had to strongly argue that this should not happen. The claimant felt humiliated and degraded by this treatment.*

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105. In respect to the Tribunal's findings as to what Mr Vandal said to the claimant at this meeting about her readiness to deliver the training and her capability to perform the role, the Tribunal accepted that this amounted to unwanted conduct for the claimant. However, the Tribunal did not consider that the conduct related to the claimant's race because we were satisfied that Mr Vandal's remarks stemmed from ongoing concerns about the claimant's working knowledge of MS Teams and her retention of digital information, which then formed the basis of his discussion with the claimant about her preparation to deliver the training digitally and to identify any appropriate support.

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106. Whilst the Tribunal accepted the claimant's perception that the effect of this conduct created a humiliating environment, we did not find that it was reasonable for the conduct to have that effect. This was because the Tribunal considered the claimant was not receptive to the feedback she

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received from Mr Vandal and due to the supportive nature of the discussion Mr Vandal had with her at the meeting and the outcome of that.

(i) *On 4 May 2022, the second day of the claimant's facilitation, Mr Smith told the claimant he was attending her class to monitor her 10 minutes before it started. During the training session the claimant felt harassed by Mr Smith when he abruptly intervened and stopped her from completing the training. This embarrassed her and she completely lost confidence. She felt humiliated in front of the trainees.*

10 107. The Tribunal accepted that Mr Smith's actions did amount to unwanted conduct for the claimant. However, the Tribunal did not consider that the conduct related to the claimant's race because we were satisfied that the reason for Mr Smith's actions was because the claimant had inadvertently shared sensitive information about one of the learners at the training session with all of the learners.

15 108. Notwithstanding that, the Tribunal accepted the claimant's perception that the effect of this conduct created a humiliating environment and that in the circumstances it was reasonable for the conduct to have that effect. However, in reaching this view, although the Tribunal recognised Mr Smith's conduct would have upset the claimant in this way which was most unfortunate, we considered that the claimant's inadvertent disclosure of such sensitive information was in breach of 'SSS's tagline of dignity, fairness and respect that presented a particularly challenging situation for Mr Smith and which required an immediate and appropriate intervention.

20 109. In light of these positive findings on the evidence in respect of the respondent's reasons for their treatment of the claimant and applying **Hewage** ("*supra*") and **Efobi** ("*supra*"), the Tribunal has not considered the burden of proof provisions further.

25 110. In view of all the above, the Tribunal concluded that it has not been established the unwanted conduct related to race.

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111. The claimant's complaint of harassment accordingly does not succeed and is dismissed.

112. For all these reasons the complaints of direct discrimination because of race and harassment related to race are not upheld.

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Employment Judge : R Sorrell
Date of Judgment : 18 May 2023
Date sent to parties : 23 May 2023