EMPLOYMENT TRIBUNALS

Claimant: **Ms N Fazilova**

Respondent: **Moorfields Eye Hospital NHS Foundation Trust (1)**
Ms G Jackson (2)
Ms C Feasby (3)

Heard via CVP (London Central) **On: 5, 6, 7, 8 June 2023 and 9 June 2023 (in chambers)**

Before: **Employment Judge Davidson**
Mr M Reuby
Ms J Costley

Representation
Claimant: in person
Respondent: Mr C Kennedy, Counsel

RESERVED JUDGMENT

The claimant's complaints of unfair constructive dismissal, direct race discrimination and harassment fail and are hereby dismissed.

REASONS

Issues

1. The claimant brings claims of:

    a. constructive unfair dismissal (s.95(2) Employment Rights Act 1996 ('ERA')) against the first respondent only;
    b. direct race discrimination (s.13 Equality Act 2010 ('EqA')) against all respondents; and
    c. harassment on the ground of race (s.26 EqA) against all respondents.

2. The claimant relies on the protected characteristic of race. The claimant describes her race and ethnicity as Asian and from Uzbekistan.

3. The issues were agreed at a previous case management hearing before Employment Judge J Burns on 19 August 2022.

4. The claimant relies on the following alleged acts for each head of claim:

    a. Between September 2020 and October 2021, the second respondent regularly humiliated the claimant in weekly one to one meetings by repeatedly asking “Do you understand?” and “Is it clear to you?” and put a similar comment in a group email on 10 May 2021 (Allegation A).

    b. In November 2020, the second respondent did not help the claimant and instead told her to call a general number for assistance (Allegation B).

    c. In November 2020, the second respondent asked the claimant to draft emails to managers rather than consultants (Allegation C).

    d. In December 2020, the second and third respondents’ conduct of the claimant’s annual appraisal: the claimant states that the meetings were excessively long, the manner of questions were inappropriate and that she was given a “satisfactory” grade rather than “good” or “excellent” as in previous assessments. The second respondent submitted the claimant’s annual appraisal report without her consent or signature and did not provide her with a copy. The third respondent told the claimant that she would not be promoted (Allegation D).

    e. On 24 February 2021, the second respondent made comments about “clarity of communications” during an informal resolution meeting (Allegation E).

    f. The dismissal of the claimant’s grievance dated 2 March 2021 against the second respondent and third respondents, which was dismissed in a report dated 10 November 2021 (Allegation F).

    g. On 29 June 2021, the second respondent said that she would provide a table of clinics to the claimant. She did not give it to the claimant and told the grievance investigating officer that the claimant did not “nag her for it” (Allegation G).

    h. In September 2021, the third respondent threatened to terminate the claimant’s contract and questioned her right to work as the claimant’s visa had expired and she had to apply to the Home Office for a new visa, which she did (Allegation H).

    i. The third respondent did not give the claimant an annual appraisal after the December 2020 appraisal, up until the claimant’s resignation. The claimant claims she should have been appraised again in December 2021 (Allegation I).

j. From 8 December 2020 onwards, the claimant was not given a development plan (Allegation J).

k. From November 2020 onwards, the claimant was not given Standard Operational Practice forms, despite being promised these by the second respondent (Allegation K).

l. On 3 March 2022 and 26 April 2022, both appeals by the claimant against the dismissal of her grievances were dismissed (Allegation L).

Jurisdiction (Limitation period)

5. In respect of those of the claimant's discrimination claims that arose prior to 9 May 2022, which the respondents assert are out of time:

    a. do any or all of those matters form part of a course of conduct by the respondents extending over a period of time such as to render them in time?

    b. If not, is it just and equitable to extend time in respect of those allegations?

Constructive unfair dismissal

6. Was the claimant dismissed?

    a. In respect of the acts claimed at Paragraph 4, did the first respondent act as alleged?

    b. If found, did any or a combination of these acts breach the implied term of trust and confidence? The Tribunal will need to decide:
        i. Whether the first respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the first respondent;
        ii. Whether the first respondent had reasonable and proper cause for doing so?

    c. Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

    d. Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

    e. Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

7. If the claimant was constructively dismissed, what was the reason or principal reason for her dismissal and is it a potentially fair reason within section 98(1)(b) and (2) ERA?

Direct discrimination (race)

8. In relation to the act alleged at Paragraph 3(a), the claimant relies on the actual comparators "Maria from Somalia**"** and "Pierra from Italy". In relation to all other matters, the claimant relies on a hypothetical comparator. For each allegation of discrimination, the comparator must be in materially the same set of circumstances but treated differently. Are the named individuals appropriate comparators?

9. The claimant relies on each of the alleged acts as set out at paragraph 4 above.

10. In respect of each of the claims of direct discrimination, did the respondents act as alleged?

11. If so, did the respondents:

    a. treat the claimant less favourably than they treated or would have treated her comparators; and

    b. if so, was the less favourable treatment because of the claimant's race?

Harassment (race)

12. Did the respondents act as alleged at paragraph 4 above?

13. If so, did the respondents engage in unwanted conduct related to the claimant's race?

14. If so, did the unwanted conduct have the purpose or effect of violating the claimant's dignity, and/or did the conduct create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

15. Was it reasonable for this conduct to have that effect?

Evidence

16. The tribunal heard evidence from the claimant on her own behalf and from the second respondent, the third respondent, Jean Pierre (investigating manager), Justin Betts (appeal manager) and Natalie O'Shea (appeal manager) on behalf of the respondents. The tribunal also had sight of a witness statement from Carolyn Watson on behalf of the claimant but she was unable to attend to give evidence. We gave little weight to this evidence as Carolyn Watson did not attend to be cross examined and we did not consider that her evidence was relevant to the issues before us.

17. The tribunal had before it a bundle of documents running to 2691 pages. We asked the parties at the start of the hearing what they would like us to read and we were referred to the pleadings, the witness statements and documents mentioned in the statements. We have read those documents together with any documents referred to during cross examination.

18. For our deliberations, we had the benefit of written submissions from counsel for the respondent, written submissions from the claimant and Claimant's skeleton argument on the limitation point, prepared for the preliminary hearing.

Facts

19. The tribunal found the following facts on the balance of probabilities.

20. The first respondent operates a specialized eye hospital in Central London which includes a private patient clinic, treating (among others) international patients. The claimant joined the first respondent in February 2016 as a Referrals Coordinator. Her role involved co-ordinating appointments for overseas, VIP and corporate patients and their sponsors. She also assisted with co-ordinating referrals for new patients.

21. The second respondent joined the first respondent in September 2020 as Head of Marketing. The third respondent joined the first respondent in October 2019 as Associate Director of Marketing and Communications.

22. The claimant was managed by Tom Griggs until he left his role in August 2020. In the four appraisals conducted by Tom Griggs, the claimant had been graded as Outstanding or Good.

23. After he left, the managerial roles were restructured and the second respondent was appointed in September 2020 and became the claimant's line manager. She held regular one to one (121) meetings with the claimant.

24. Shortly after the second respondent joined, the claimant indicated that she was thinking of resigning. She said she wanted a promotion but was told that there were no available roles at the time. She had previously expressed an interest in taking over Tom Griggs' role when he left but was told that the roles were being reorganised and his role was not being replaced. In the end, she decided to stay and informed the second respondent of this on 4 November 2020 in their regular 121 meeting.

25. In November 2020, the claimant was invited to a meeting at which a former colleague, Jack, would be present. The claimant had not had a good experience working with Jack previously and she refused to be in a team with him in it. She raised a grievance on 11 November 2020 alleging that she had experienced 'bullying, harassment and discrimination' on many occasions. Following her grievance, there was an informal meeting between the claimant, the second respondent and Karen Massie of HR at which the matter was resolved.

26. In November 2020, the claimant needed to contact the Matron and asked the second respondent for her number. The second respondent was, at that time, still new to the business and did not know the Matron's contact details. She suggested that the claimant should ask switchboard if they knew the number and, if they didn't, she would think of another solution. In the event, switchboard was able to help and the matter was resolved.

27. It was the policy of the first respondent that paediatric patients were not seen in 'MPOC' because the nursing staff were not trained in paediatrics. All paediatric patients were referred to 'RDCEC'. This was communicated by and operated by Rachel Bainton (Head of Operations).

28. On 4 November 2020, a consultant asked Rachel Bainton if a paediatric patient (from an embassy) could be seen in MPOC as RDCEC had no capacity that week. In response Rachel Bainton gave a time when RDCEC would be available. The claimant became involved and replied to Rachel Bainton, saying that this time was not convenient for the Consultant, asking for an exemption for this child. Rachel Bainton explained that they could not make an exception as it was a governance issue. The claimant pushed back saying the consultant did not need nursing support and saying that she 'would like to avoid the Embassy to complain again'.

29. Rachel Bainton found the tone of the claimant's email to be rude and mentioned this to the second respondent. The second respondent and the claimant discussed this at a 121 phone meeting. The second respondent then drafted an email which the claimant could use as a basis for her email to the consultant, explaining the policy and suggesting alternative options.

30. The claimant was given the current Standard Operating Practice (SOP) forms. These are dynamic documents which are updated with the input of the manager and the team member at mapping sessions. The claimant was invited to take part in these sessions but did not do so due to her perception of pressure of work not allowing her to spend the time at the session. Once the grievance process started, she said she did not want to have any interaction with the second respondent and therefore no mapping sessions were arranged.

31. The claimant's annual appraisal was due to take place on 2 December 2020. As the second respondent had not been the claimant's manager for very long, she invited the third respondent to attend the appraisal meeting as she had worked with the claimant over the previous year. The third respondent was included in the Teams invite and her role was explained at the start of the meeting. There is a conflict of evidence as to whether the third respondent's involvement was mentioned in advance: the second respondent says she mentioned it verbally at a 121 meeting but the claimant denies it. At the time the claimant did not object to the third respondent's participation in the appraisal meeting.

32. The appraisal meeting took place over Teams and the claimant had connection issues, which meant that time was lost in starting the meeting. As a result, the full appraisal could not be completed and a second meeting was arranged for the following week, on 8 December 2020. The meeting resumed on 8 December and was attended by the claimant, the second respondent and the third respondent.

33. According to the first respondent's policy, the appraisal process comprises the following:

A review of the past year:
An introductory conversation

A review of performance against objectives and core parts of the role
A review of the Personal Development Plan
A discussion about how well they demonstrated The Moorfields Way
A check of mandatory compliance

Planning for the year ahead:
An introductory conversation
Agreeing objectives and goals
A discussion about The Moorfields Way and any improvement required
A new Personal Development Plan review of objectives.

34. The 'Moorfields Way' is a set of values divided into four sections: caring, organised, excellent and inclusive. These values form part of the appraisal process.

35. We find that the claimant was asked, during the appraisal if there were any areas in which she wanted to self-reflect, with a view to improving those areas in the coming year. The claimant's account is that she was asked 'how she had failed the Moorfields Way'. We find it more likely that the second respondent asked what could have gone better over the previous year rather than using the language of failure. We note that '*what could have gone better?*' is the heading of once of the sections of the appraisal form and we find that the second and third respondents were likely to have used the form as a template for the discussion. We find that this is likely to be the case in all the appraisals conducted by the second and third respondents.

36. The overall feedback was positive but the claimant identified that she had communication issues and this was an element of her performance that she could work on improving.

37. We find that the third respondent and the claimant discussed promotion opportunities in July and October 2020, when the third respondent told the claimant that there were no vacancies at those times. We find that this was not part of the discussion at the appraisal meetings in December 2020.

38. At the conclusion of the appraisal, the second and third respondents agreed that 'Satisfactory' was the appropriate grading. This is defined as "*Performance is in line with expectations for their role. Met many objectives but required some to be carried forward*." The final comments from the appraiser were "*Overall, Nargiza has performed well in a challenging year. She has consistently maintained our patients and customers as her first priority. She has engaged in the appraisal process to identify areas for improvement. Nargiza has a lot of potential and I look forward to working with her over the coming year to help her develop her skills*."

39. The appraisal form includes a box for 'Team member final comments'. The form was sent to the claimant by the second respondent on 16 December 2020 asking her to review and come back to her with any comments or if she was happy with it, to confirm by reply and she would file the paperwork. The claimant did not respond and the second respondent reminded her during their 121 on 31 December 2020.

40. The appraisal form included a section setting out a personal development plan for the claimant. She complains that she was not given a plan. During the hearing, the claimant re-framed the complaint as the failure to implement the personal development plan. This is not the issue within the List of Issues. However, we note that the claimant did complete some of the tasks, she had sickness absence during this period and she wanted to avoid contact with the second respondent during the grievance process. We therefore disagree that there was a failure to implement the personal development plan.

41. Given that the claimant had not completed the appraisal form, it could not be submitted as a finalised document. However, the second respondent did not want the claimant to be 'non-compliant' on her HR record and asked HR for advice. Karen Massie told her that she should tell Learning & Development (L&D) that the appraisal meeting had taken place, even if the paperwork had not been completed. At that time any completed paperwork would not have been sent to L&D but would have been retained by the manager.

42. We find that the second respondent informed L&D that the appraisal meeting(s) had taken place but did not submit any paperwork and did not forge the claimant's signature or present the appraisal as a completed document.

43. After receiving the appraisal document for her comments, the claimant contacted her trade union. Her trade union representative, Neil Smith, contacted HR and an informal meeting was arranged for 24 February 2021 with the claimant, her union representative, the second respondent and Karen Massie of HR. They discussed the claimant's appraisal experience and the outcome was that the appraisal would be reviewed and the claimant and the second respondent would re-do the appraisal process.

44. On 2 March 2021, the second respondent sent an email to the claimant with a proposed agenda for the forthcoming 121 meeting. This included a review of the appraisal including '*Rating: what rating do we think you should receive and why?*'. The second respondent told us in evidence that she was open to a discussion about the appraisal grade.

45. Later that day, 2 March 2021, the claimant submitted a grievance about her grading alleging that she had experienced bullying, harassment and discrimination. In particular, she states that she felt discriminated against by the second respondent because she is not English, relying on the second respondent's offer to draft emails for her. The grievance was investigated by Jean Pierre (Admissions Manager) at the request of Claudia Gomes, the decision maker. Claudia Gomes has since left the first respondent's employment and did not give evidence before the tribunal. However, Jean Pierre did give evidence to the tribunal.

46. Originally, the HR support for the grievance was going to be provided by Karen Massie. The claimant objected due to Karen Massie's previous involvement with her and Adebola Fayomi provided the HR input to the grievance process.

47. There were two elements to the grievance and it was therefore heard under both the Grievance Policy and the Dignity at Work Policy

The allegations raised were as follows:

Under the grievance policy

- *An unfair grade offered after an appraisal without fair justification.*
- *NF not receiving support from her line manager.*
- *NF was told by CF that there would be no promotion for her, which she took as a personal threat to her career growth as she believes she has grounds for promotion.*

Under the Dignity at Work policy:

- *Feels discriminated against for not being English*
- *Using threatening and bullying language in meetings*
- *Being bullied within her appraisal by being asked to come up with examples of when the Moorfields way wasn't followed*
- *Feeling that the following behaviours have been displayed by GP to NF: Unfair, Inconsistent, strong minded always believing they are right, insists on high standards but always blames others if things are not right.*
- *Feels victimised by receiving a performance rating of 'satisfactory' and believes this is due to a formal grievance raised on 10" November 2020*

48. The grievance investigation took place from June 2021 to September 2021. .

49. The claimant alleges that the second respondent repeatedly humiliated her by asking whether she understood things in their 121s. She did not bring any specific examples in evidence of verbal exchanges of this nature. The second respondent accepts that she routinely checks with colleagues whether they have understood what she was saying but that this was not related to the other person's English skills but it was her style of management. We note that the claimant did not raise any objections to this at the time or suggest that she felt humiliated by these meetings until much later, during the grievance process.

50. The claimant relies on a written example in an email from the second respondent to the claimant and two colleagues dated 10 May 2021 in which she passed to the claimant new Government COVID guidance relating to international patients travelling, asking her to read through it and to let her know if 'anything isn't clear to you'. In the same email, she asked the claimant's colleagues (who performed a different role to the claimant) to check the website and update any references to the applicable COVID guidance.

51. In June 2021, the first respondent was merging with another practice known as the Claremont Clinic. This meant that consultants from the first respondent and from Claremont Clinic were being re-organised as the merger took place. The claimant asked the second respondent for a table of clinics so that she could refer patients appropriately. The second respondent spoke to Lana, who was managing the merger, who told her that the clinics were still in flux and there was no published list. The second respondent therefore did not give the claimant the list she had requested, nor did she tell her that there was no list. The claimant went on sick leave on 2 August 2021. By the time she returned from sick leave on 2 September 2021, all the clinics had been loaded on the first respondent's systems and there

was no need for a list to be given to the claimant. During the investigation meeting between Jean Pierre and the second respondent, the issue of not providing the list was raised as the claimant had mentioned to Jean Pierre. The second respondent's accepted that she had not sent it as it did not exist at the time, but added that the claimant had not 'nagged her for it'.

52. The claimant is a national of Uzbekistan and, as such, requires a visa to work in the United Kingdom. She has previously been reminded by the first respondent of the need to provide documents evidencing her right to work. Her visa was due to expire on 29 November 2021. In September 2021, HR told the second respondent to remind the claimant that her visa was up for renewal, which she did. The claimant replied that she would apply for a visa extension 'soon'.

53. On 17 September 2021, the third respondent took over management of the claimant from the second respondent.

54. Jean Pierre continued her grievance investigation and, when she had concluded the investigation, she prepared two reports: one related to bullying and harassment allegations and the other into the grievance. She supplied these to Claudia Gomes in September 2021. Each compromised a pack of documents of approximately 300 pages, which Claudia Gomes then considered before making her decision. On 10 November 2021, the claimant was informed that her grievance was not upheld. This was followed by letter dated 11 November 2021.

55. The claimant appealed against the grievance outcome on 23 November 2022. The appeals were dealt with by two different managers, Justin Betts (Deputy Chief Financial Officer) and Natalie O'Shea (Deputy Divisional Manager). Neither of them had any previous knowledge or involvement with the claimant.

56. By this time, HR had not received the claimant's visa documents. HR advised the third respondent to send a standard from letter which reminds the employee of the need to evidence their right to work in the UK and sets out the consequences if this is not done. The third respondent sent the claimant this letter on 22 November 2021. The letter comprised an invitation to a meeting to discuss the issue on 29 November 2021 and a warning to the claimant that, if the documentation was not received, she was at risk of suspension and, ultimately, that her contract of employment may be terminated if she still had not produced the required evidence at the end of the 28 day grace period.

57. The claimant's immigration solicitors then wrote to the first respondent explaining that she had a retained right to work, having been married to an EU citizen. The first respondent accepted the information and the claimant was not suspended and suffered no loss of income. We disagree with the claimant that the letter of 22 November 2021 was threatening. It simply recorded the first respondent's legal obligations. Moreover, it was a standard form letter used for all employees requiring visas to work in the United Kingdom and was not amended to take account of the claimant's Uzbekistan nationality.

58. The claimant was due to have her 2021 appraisal in December 2021. By that point, the claimant had appealed against the grievance outcome. On 4 January 2022,

the second respondent wrote an email to the claimant confirming the content of their 121 earlier that day. This records that the claimant had indicated that she preferred to settle the grievance appeals before the new appraisal process was commenced.

59. The claimant attended an appeal hearing on 3 March 2022 conducted by Justin Betts and on 26 April 2022, conducted by Natalie O'Shea. The appeal outcomes were communicated to the claimant on 10 March 2022 and 26 April 2022 respectively. In both appeals, one of the three grounds of appeal was upheld (regarding delay in the process) and the other grounds of appeal were rejected.

60. The claimant was on sick leave from 31 January 2022 until 1 March 2022 and from 10 March 2022 until her resignation on 27 April 2022, which took effect on 25 May 2022.

61. She contacted ACAS on 30 May 2022 and the ACAS early conciliation certificate was issued on 1 June 2022. The claim form was submitted on 5 June 2022.

Law

62. The relevant law is as follows:

Direct discrimination

63. Section 13 of the Equality Act 2010 provides that a person must not be treated less favourably than another because of a protected characteristic.

64. The person can compare themselves with an actual person who was treated more favourably or a hypothetical comparator, who would have been treated more favourably. There must be no material differences between the circumstances of the claimant and the comparator other than the protected characteristic.

65. Direct discrimination also encompasses *unconscious* discrimination. As stated by Lord Browne-Wilkinson in the House of Lords case *Strathclyde Regional Council v Zafar* [1997] UKHL 54: *"those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them."*

66. The less favourable treatment must be because of the protected characteristic. Treating two people differently does not, of itself, mean that one has been less favourably treated than another. There must be 'something more' from which the tribunal could conclude that the difference in treatment was because of the claimant's protected characteristic (*Maderassy v Nomura International plc* [2007] IRLR 246). If there are facts from which the tribunal could conclude that discrimination occurred, the burden of proof shifts to the respondents to provide an adequate non-discriminatory explanation.

67. Guidance on the burden of proof was given by the Court of Appeal in *Igen v Wong* [2005] ICR 931. In *Igen* the Court of Appeal established that the correct approach

for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove — again on the balance of probabilities — that the treatment in question was 'in no sense whatsoever' on the protected ground.

68. Unreasonable or unfair treatment is not sufficient to transfer the burden of proof to the respondent. There must be other indications of discrimination relating to the treatment in question according to the EAT in *Commissioner of Police of the Metropolis v Osinaike [2010] UKEAT 0373*.

Harassment

69. Section 26 of the Equality Act 2010 provides that a person harasses another if they engage in unwanted conduct related to a relevant protected characteristic which has the purpose or effect of either violating the other person's dignity or creating an intimidating, hostile, degrading, humiliating environment for them.

70. In determining whether the conduct has that effect, the tribunal must consider the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. There is therefore a subjective element and an objective element.

71. In *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336, the EAT noted "*not every racially slanted adverse comment or conduct [would violate] a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct, it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.*"

Constructive unfair dismissal

72. An employee is regarded as dismissed where the employee terminates the contract of employment in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

73. There must be a breach of contract by the employer which is sufficiently serious to justify the employee leaving, or it must be the last in a series of incidents which justify his leaving (last straw doctrine). The employee must leave in response to the breach and not for some other unconnected reason and the employee must not delay too long otherwise he may be deemed to have waived the breach and affirmed the contract.

74. The implied terms of mutual trust and confidence was established by the House of Lords in *Malik v BCCI* [1998] AC 20, which provided that the employer shall not

'*without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*".

75. This is an objective test (*London Borough of Waltham Forest v Omilaju* [2005] IRLR 35).

Limitation period under the Equality Act 2010

76. Section 123 of the Equality Act 2010 provides that claims for discrimination must be brought within three months of the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable. If the claimant alleges that there is a continuing act of discrimination, the time runs from the latest act.

77. Where a claimant alleges that they have been subject to discrimination and then raises a grievance in relation to the same matter, it is not necessarily the case that the ongoing grievance process will be considered to be part of a continuing act with the act (or acts) of discrimination. If the grievance process or outcome is, itself, discriminatory then it is possible that it could form part of a continuing act with the original act or acts of discrimination. However, if the grievance process is handled in a non-discriminatory manner, it is unlikely that it would be considered to be part of a continuing act (given that it is not, itself, discriminatory; *South Western Ambulance Service NHS Foundation Trust v King [2020] IRLR 168*).

78. When considering whether it would be just and equitable, the following legal principles apply.

79. It is for the claimant to satisfy that it is just and equitable to extend the time limit. There is no presumption that a tribunal will exercise its discretion to extend time. It is the exception rather than the rule (*Robertson v Bexley Community Centre* [2003] IRLR 434).

80. Waiting for the outcome of a grievance process could potentially form part of the factual matrix in an application for an extension of time on just and equitable grounds. However, raising a grievance should not, necessarily, lead to delay in commencing proceedings.

81. In *British Coal Corporation v Keeble* [1997] IRLR 336 the EAT said that in considering this discretion a court should consider the prejudice which each party would suffer as the result of refusing or granting an extension and have regard to all the circumstances of the case, including:

    a. the length of and reasons for the delay;
    b. the extent to which the cogency of the evidence is likely to be affected by the delay;
    c. the extent to which the party against whom the claim is brought has cooperated with any requests for information;

d. the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action;
e. the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

82. In applying the just and equitable formula, the Court of Appeal held in *Southwark London Borough v Afolabi* [2003] IRLR 220 that while these factors will frequently serve as a useful checklist, there is no legal requirement for a tribunal to go through such a list in every case, "provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion". This was approved more recently by the Court of Appeal in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640 when it noted that:

> "*factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).*"

Determination of the Issues

Discrimination allegations

Comparators

83. The claimant relies on two comparators for allegation A, namely Maria from Somalia and Pierra from Italy. We heard very little about these individuals and nothing in relation to the issues in allegation A. We therefore conclude that these are not relevant comparators and we will proceed on the basis of hypothetical comparators.

Discussion of the factual allegations

Allegation A

84. We find that it is likely that the second respondent from time to time, as part of her day-to-day management, checked with the claimant that she understood what was being discussed at 121s and we see it in an email of 10 May 2021 where she expressly asks the claimant to let her know if anything is not clear. However, we do not consider that this is less favourable treatment than her comparators and we accept the second respondent's evidence that this is her management style.

85. In relation to the email of 10 May 2021, we note that the second respondent was referring to the latest Government COVID guidance for international travellers. This guidance changed regularly and it was vital information for the claimant to understand in order to perform her role. The other individuals copied on the email were not responsible for booking appointments and did not need to understand the guidance to the same extent as the claimant.

86. We find that the claimant's race was not a factor in the way the second respondent interacted with the claimant.

Allegation B

87. We find that in November 2020, the second respondent suggested that the claimant asked the switchboard for Matron's number as she did not have it herself. We do not find that this is less favourable treatment and we find that the second respondent would have treated any employee in the same way. In any event, we do not consider that this demonstrates a lack of support. The claimant presented a problem to the second respondent who suggested a solution, the solution was effective and the second respondent followed up to make sure the problem had been solved. She also told the claimant that she should come back to her if her suggestion did not help. We cannot see how the second respondent acted in anyway inappropriately or unfairly.

Allegation C

88. We find that in November 2020 the second respondent drafted a suggested email for the claimant to send following feedback from a stakeholder that she had found the claimant's email to her rude. We find that the second respondent would have done the same for any employee in that situation and we find that this is not related to the claimant's ability in the English language. It followed more from a curt tone of voice, which the second respondent pointed out, can happen in email communications. We therefore find that this was not less favourable treatment and, in any event, was not related to her race.

Allegation D

89. We find that the appraisal in December 2020 was conducted by two managers, the second respondent and the third respondent. Although this may not be the usual practice, it is not unprecedented. Another appraisal at that time was conducted by the second respondent and the third respondent for the same reason. We accept that the claimant may not have realised that the third respondent would be in attendance but we cannot see that this would be a detriment for her in circumstances where the third respondent had more insight into her performance that the second respondent, who had recently joined the business. We also note that the claimant did not object at the time. The decision to have two managers was due to the recent arrival to the business of the claimant's line manager and was not related to the claimant's race.

90. We find that the appraisal was spread over two meetings, which was unusual. However, we do not find that the total time taken was unreasonable. The first meeting was partly taken up with technical difficulties and so there was insufficient time to complete the appraisal, which therefore continued on another day. We understand the claimant's frustration at being away from her desk for a couple of hours in total when she did not have any colleagues who would pick up her work while she was in these meetings. However, the appraisal is important for both parties and the respondent was entitled to take the view that sufficient time should be allocated for it. We do not consider that the time taken was excessively long.

The time taken was partly due to time lost for technical difficulties and not related to the claimant's race.

91. We find that the appraisal discussion included an element of asking the claimant if there was anything she could have done better over the past year. The claimant alleges that she was asked how she had 'failed to live up the Moorfields Way'. While that part of the grievance discussion might appear to be asking for a list of failings, we do not find that this was the way the second respondent expressed herself. Having reviewed the notes of the appraisal (accepted by the claimant as accurate), we see that the discussion followed the format of the form. We note the second respondent's assessment of the Moorfields Way values gave the claimant 'Often' (second best out of five possible scores) for each of the four categories. The areas for improvement were identified by the claimant herself, having been asked to reflect on where she might be able to improve. We find that there was no less favourable treatment and, in any event, the treatment was not related to her race.

92. We find that the claimant was given a 'Satisfactory' grade. We note that the claimant had previously received better grades of 'Good' or 'Excellent' from her previous manager. We understand why the claimant would regard this is as a negative outcome and less favourable treatment. It is not our role to determine what grade we feel the claimant deserved. We must determine whether we find that the second respondent gave the claimant the Satisfactory grade because of her race. We find that this was not the reason. The second respondent has articulated why she thought that grade was appropriate, bearing in mind the definition in the appraisal document and the agreement with the claimant that there were areas for improvement in her performance, and explained that 'Satisfactory' is her default grade and she does not consider this to be a negative outcome. The grading was within the manager's remit and she reached it after discussion with the third respondent. We also note that the second respondent was prepared to engage in a discussion with the claimant and was open to reconsideration of the grade but the claimant pursued a grievance instead. We do not consider that the second and third respondents reached this grade on the basis of the claimant's race.

93. We find that the second respondent did not submit the appraisal report as it had not been finalised. The claimant was provided with a draft of the appraisal report and invited to add her comments, which she passed to her union representative and which resulted in the informal meeting on 24 February 2021. The claimant's allegation that the appraisal report had been submitted without her consent and without her signature is not true. She appears to have jumped to that conclusion when she saw that she was regarded as 'compliant', which includes having had an appraisal. We accept the second respondent's evidence that there is a distinction between recording the fact of the meeting and filing the appraisal report. The claimant reached a conclusion without making proper enquiry of the second respondent which led to her making serious and unfounded allegations. The suggestion that the second respondent forged her signature, without any evidence of this, is inaccurate and inflammatory.

94. We find that the claimant had discussed promotion opportunities with the third respondent in July 2020 and October 2020. We accept the third respondent's evidence that this was not discussed at the appraisal meeting and we find that the appraisal report does not refer to this. In October 2020, the claimant was considering resigning. She discussed her future with the third respondent who made it clear they wanted her to stay but confirmed that there were no promotion opportunities at that time. We do not consider that this was less favourable treatment and, in any event, was not related to her race.

Allegation E

95. We are unsure of what complaint the claimant is making in relation to the informal resolution meeting on 24 February 2021. She did not address this with the respondent's witnesses during cross examination. In any event, if a comment about clarity of communication was made, we do not see how this would be less favourable treatment or treatment based on race.

Allegation F

96. The claimant relies on the dismissal of her grievance as an act of discrimination. However, in cross-examination she conceded that she did not consider the grievance outcome itself to be tainted by race. In these circumstances, this claim must fail.

Allegation G

97. In June 2021, the second respondent said that she would give the claimant a table of clinics which the claimant had verbally requested because of the merger between the first respondent and The Claremont Clinics, so that she could ensure she was booking appointments in the most appropriate place. The second respondent told us that she asked Lana, who was dealing with the merger, for the table but was told it did not exist yet as the situation was in a state of flux. The second respondent did not go back to the claimant and let her know but nor did the claimant follow up. By the time the claimant returned from sick leave, there was no need for the table as both clinics were in the first respondent's booking system. We do not find that this is less favourable treatment. The second respondent did not provide the information because it was not available to be provided. We might criticise her for not updating the claimant of this but, given the lack of follow up by the claimant, we accept that it was not an important issue for the second respondent and, in the event, matters overtook the request. We do not find that the treatment was related to the claimant's race.

Allegation H

98. We find, in relation to the visa issue, that the claimant was treated in the same way as any other employee would have been whose visa was due to expire. She was sent a standard form letter. The need to send it had only arisen due to her failure to engage with the process. The first respondent is under strict legal obligations and, in our view, managed to balance those with their duty of care to the claimant in a fair and reasonable way and we find nothing to criticise in relation to the visa

issue. In particular, we do not find that it is 'threatening' to inform an employee of possible consequences of their situation given the seriousness to the employer and the employee of a failure to comply with statutory requirements.

Allegation I

99. Given that the claimant expressly asked for her 2021 appraisal to be postponed pending outcome of the grievance, we do not uphold this allegation. After the final appraisal outcome, the claimant was on sick leave and then she resigned so there was no opportunity for the appraisal to take place. We find that this is not less favourable treatment and is not related to race.

Allegation J

100. The claimant was given a development plan within her appraisal report and this allegation fails. In addition, some of the development plan had been put into action.

Allegation K

101. The claimant was given SOP forms and this allegation fails. We accept the respondents' explanation why the claimant did not attend the mapping sessions.

Allegation L

102. Both appeals by the claimant against the grievance outcomes were dismissed. The claimant relies on the fact that the appeal managers were white English and the grievance manager was white English. We note that the appeals were split between two separate managers, neither of whom knew the claimant, and both of whom upheld part of her appeal, while dismissing the rest of the appeal.

103. The claimant must show more than a difference in protected characteristic in order to shift the burden of proof (*Maderassy*). The claimant has not shown any reason for us to believe that there was discriminatory conduct other than the appeals against her original allegations were not upheld. We are satisfied that the appeal outcomes, which are cogently expressed, were based on the evidence before the appeal managers. We find that the outcomes are not tainted by discrimination.

Harassment

104. In the light of the findings above, we find that the respondents did not engage in unwanted conduct related to the claimant's race. Taking the allegations as a whole, we find that the claimant has been oversensitive. The matters she complains of are normal managerial exchanges and, in our view, fall nowhere near the threshold of making an intimidating workplace. There are bound to be, in any manager/employee relationship, points of disagreement or frustration but these do not amount to a claim for harassment on grounds of race. Further, we have found that race played no part in the claimant's treatment and the harassment claim must therefore fail.

Constructive dismissal

105. The claimant has put her case for constructive dismissal on the basis that the breach of contract relied on is the racially discriminatory conduct of the first respondent. We find that the first respondent has not acted in a discriminatory way towards the claimant and therefore there is no fundamental breach of contract. Her constructive dismissal claim must therefore fail.

Jurisdiction

106. Having found that there were no acts of discrimination, we do not need to consider the time point. However, we find that the matters complained of by the claimant would not have formed part of a continuing act with the last act (appeal outcome) within time. The appeal process was entirely separate, conducted by different individuals and we have found that the appeal outcome was not tainted by discrimination in any event.

107. We are asked to consider whether it would be just and equitable to extend time. Time limits are to be complied with and any extension of time should be an exception. To a degree the question is academic as we have not found for the claimant. However, we do not exercise our discretion to extend time as no reasoning has been put forward by the claimant to support such an application and no explanation has been given for the delay. We are aware that she was receiving advice from her trade union at an early stage.

108. We accept that there was no significant prejudice to the respondents other than the non-attendance of Claudia Gomes and that they have managed to defend the claims successfully. In considering whether to exercise our discretion, we are entitled to take into account the merits of the claimant's claims. Given that she has not succeeded in her claims, we do not find that it would be just and equitable to extend time.

Conclusion

109. In conclusion, we find that none of the respondents have discriminated against the claimant. We accept that her claim was based on a genuine sense of grievance, primarily about her appraisal grading, but we found no suggestion of any discrimination on grounds of race.

110. The claimant chose to frame her complaints as acts of 'bullying harassment and discrimination' and told us that she believed that all three elements were present in each complaint relied on and her case was that the bullying and harassment were due to her race and therefore she brought the claim as a race discrimination claim.

111. We have no hesitation in confirming that the conclusion of the tribunal is that the second respondent and the third respondent, as individuals, committed no acts of race discrimination against the claimant. We also find that the first respondent committed no acts of race discrimination against the claimant.

112. In the light of our findings, the claimant's claims are hereby dismissed.

Employment Judge Davidson
Date 13 June 2023

JUDGMENT SENT TO THE PARTIES ON

.13/06/2023

FOR EMPLOYMENT TRIBUNALS

Notes

Public access to employment tribunal decisions: Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

CVP hearing

This has been a remote which has been consented to by the parties. The form of remote hearing was Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.