Case No: 1305273/2021

EMPLOYMENT TRIBUNALS

Claimant: Ms B Mafavuke

Respondent: Home-Start Birmingham North West

Heard: by Cloud Video Platform (Midlands West)

On: 5, 6, 7, 8 and 9 June 2023

Before: Employment Judge Faulkner
Ms S Fritz
Mr M Z Khan

Representation: **Claimant** - in person
Respondent - Mr S Gittins (Counsel)

JUDGMENT

1. The Respondent did not contravene section 39 of the Equality Act 2010 by discriminating against the Claimant because of race. The Claimant's complaints in this respect are therefore dismissed.

2. The Respondent did not contravene section 39 of the Equality Act 2010 by applying a provision, criterion or practice which was discriminatory in relation to the Claimant's race. The Claimant's complaint in this respect is therefore dismissed.

3. The Respondent did not contravene section 39 of the Equality Act 2010 by victimising the Claimant. The Claimant's complaints in this respect are therefore dismissed.

4. The Respondent did not contravene section 40 of the Equality Act 2010 by harassing the Claimant. The Claimant's complaints in this respect are therefore also dismissed.

REASONS

1. Oral judgment, with reasons, was given on the last day of this Hearing, 9 June 2023. These Written Reasons, recording the unanimous decision of the Tribunal panel, are provided in response to an email request from the Claimant made on the same date, confirmed by her in a further email dated 12 June 2023.

Issues

2. The issues to be decided at this Hearing were agreed at a Private Preliminary Hearing before Employment Judge Boyle on 11 May 2023 and confirmed in the resulting Case Summary (see pages 396 to 400 of the Hearing bundle referred to below). The parties confirmed that list of issues, in so far as related to liability, at the outset of this Hearing. It is reproduced, with some clarificatory additions, in the Annex to these Reasons.

Hearing

3. We read statements and heard oral evidence from the Claimant, Ms J Redding (Chair of the Respondent's Board and Designated Safeguarding Lead ("DSL")), Mr P Grigg (CEO of Home Start UK, the central body of the Home Start federation), Mrs V Ellis (the Respondent's Family and Volunteer Co-Ordinator) and Ms S Fisher (formerly the Respondent's Scheme Manager). The Claimant's additional witnesses were by way of character reference and were not present to give evidence, so that less weight could be attached to their testimony. They were Diphetogo Shubane (Assistant Manager HR in the Ministry of Health, Botswana), Modie M Manyala (the Claimant's mother and a retired pharmaceutical officer), and Olga Manyala Ditsie (Mayor of Jwaneng Town in Botswana).

4. The parties presented a hearing bundle of 416 pages. Some audio recordings, including of her disciplinary hearing, were mentioned in the Claimant's statement, but we were not provided with them or asked to listen to them. In order to have any hope of completing at least the hearing of the liability issues in the allocated time, we made clear that before hearing evidence we would only read the witness statements (around 130 pages) and the Claimant's resignation letter. We required most of the first day to do that and made clear to the parties before doing so, and afterwards, that we did not have time to read even the documents referred to in those statements and that it was incumbent on the parties therefore to take us to any documents they wished us to consider in reaching our decision. We were taken to many documents during the oral evidence.

5. We record four further things about the conduct of the Hearing:

5.1. The Claimant wrote to the Tribunal a short time before the Hearing to say she wanted her home address removed from any published document. I assured her that I saw no need to refer to her address in any Judgment or Reasons, and indeed I have not done so. She was content with that.

5.2. The Claimant had also said in correspondence, though without medical evidence, that she wanted substantial amendments to the hearing timetable, for example, three days of rest after the evidence concluded. After I explained how a hearing would normally proceed and that, if we were to accede to her requests,

it would mean the case going part-heard for several months, she was content to proceed without such adjustments.

5.3. She had also asked to see the Respondent's written submissions in advance. Mr Gittins indicated at the outset that he was not proposing to prepare any, and indeed did not do so. The Claimant was content to make her oral submissions after him.

5.4. Finally, Mr Gittens stated when we were discussing the list of issues on day 1 that various matters referred to in the Claimant's statement were not part of that list. The Claimant clarified that they were part of her supporting evidence, not new allegations and that she was not seeking to amend her Claim.

Facts

6. Our findings of fact were based on all of the evidence we read and heard (as summarised above), focused on those matters that were important to deciding the case, not everything the parties referred to. Where there was a conflict of evidence, we decided it on the balance of probabilities, based on that evidence. Page references in these Reasons are of course references to the bundle. Alphanumeric references are references to witness statements, for example "BM10" would refer to paragraph 10 of the Claimant's statement and SF12 would refer to paragraph 12 of Ms Fisher's statement.

7. The Respondent is part of the Home Start federation, with around 180 other charities, but is an independent charity in its own right, providing support for families. It has only ever employed a very small number of employees. The Claimant was originally a volunteer, for around a year. She enjoyed it, telling us (as we accepted) that she had a supportive volunteer co-ordinator. She became employed from 4 January 2021 as a Target Support Worker for Black, Asian, and Minority Ethnic ("BME") families, working 3 days a week, until her resignation effective 30 September 2021. It was a requirement of the funding for the role that the appointee be from a BME background. BME was the terminology used by both parties during the Hearing, and therefore we have also adopted it.

8. In common with all employees, the Claimant's initial six months were a probation period. She was the only employee (there were four in total at the time) from a BME background. In recent years, the Respondent has targeted increasing the number of BME volunteers and employees, changing where it advertises and employing three BME workers, though two have since left – the Claimant and someone else who got a better paid job elsewhere.

9. Ms Redding and Ms Fisher were the interview panel when the Claimant was appointed as an employee (JR5). Ms Fisher was the Claimant's first line manager and initially they got on well, discussing racism and other issues, but the Claimant says things began to change when the Claimant started to support a particular family – see below. For confidentiality reasons, that family is referred to in these Reasons as F123. There is no reason whatsoever to identify them.

Publication of Facebook photos

10. On 12 December 2019 (page 208), when starting as a volunteer, the Claimant signed a document to say that she consented to the use of her image for the Respondent's promotional material. The complaints at paragraphs 2.2.1

and 4.1.1 of the list of issues relate to publication of photographs of her and families she was supporting, whilst she was an employee.

11. As Ms Fisher sets out at SF14, Home Start UK ("HSUK") had asked the Respondent for promotional material evidencing how families were being positively impacted by the support it provided. The Claimant (BM13) asked families she was supporting for photographs, telling us that the mother of F123 stated she was willing to provide one if it was only going to be shared within the Respondent and not on social media. The Claimant says that she mentioned this to Ms Fisher orally.

12. The WhatsApp exchanges between the Claimant and Ms Fisher at pages 215 to 216 provide a somewhat different account. The Claimant sent a photo of the mother to Ms Fisher on 28 April 2021 and said she (the Claimant) could take others if needed. After some discussion about use of the Claimant's own photo (which we return to below) on 7 May 2021 (page 222) Ms Fisher said that the Claimant needed to have asked the families as they may not consent and said, "I assumed this was already done?". The Claimant replied, "I asked the families. Just didn't know mine was for the same reason. I asked them to ask you as well if they were unsure". She then sent further photos of F123 on 11 May 2021 which were subsequently published online.

13. The Claimant says this was without consent and (BM23) believes the mother of F123 was treated in this way because of the mother's race and country of origin, saying her vulnerability was linked to her country of origin and refugee status and (BM287) this did not happen to any of the White or Asian people the Claimant was supporting. She says also that the Respondent wanted to give an image of treating Black people equally, so that publishing the photos online was thus for its benefit, without taking the safeguarding concerns of F123 into account. Ms Fisher told us that White people's photos were posted as well, as whilst HSUK wanted to champion the success of the BME initiative, this was just one of many projects the Respondent was involved in. We can accept that evidence, not least because the Claimant did not suggest otherwise, and also because Ms Fisher's message to the Claimant at page 221 about HSUK's request refers generally to families being supported and not just to BME families.

14. The Claimant says she made clear the Respondent should not publish photos of the Claimant herself, given her experiences with domestic violence and her safety concerns for her and her children. She says (BM18) that for safeguarding reasons she asked Ms Fisher not to use her photograph, but Ms Fisher uploaded pictures of the Claimant and her family anyway, around 19 May 2021. She says her 2019 consent was for her volunteer role only.

15. The WhatsApp messages between the Claimant and Ms Fisher, which concerned both photographs of the Claimant and of F123, show (page 220) that the Claimant sent Ms Fisher a photo of herself and asked Ms Fisher to let her know where she wanted to use it. Ms Fisher replied that it was for HSUK, saying it would be "used nationally" and the Claimant replied, "let's leave mine out for safeguarding reasons". Ms Fisher did not use that picture, but took it, though the Claimant does not accept this, that the Claimant's message related only to that photograph and that initiative. The Claimant says explicit consent is required at all times.

16. It is agreed that the Respondent subsequently published on Facebook the photograph at page 410 which shows the Claimant and Ms Fisher with a donation made to the Respondent. The Claimant says Ms Fisher told her it would only be shared with the donor and not online. The Claimant asked for it to be taken down. She says it was removed when she lodged her Claim Form, whilst Ms Fisher told us it was removed when the Claimant sent an email after her resignation indicating withdrawal of consent. We did not deem it necessary to resolve this conflict of evidence and in any event neither party took us to any further evidence enabling us to do so.

17. The Claimant says (BM37) that family F123 had their support ended, her "calculated suspicion" being that this was related to the mother's objections regarding the use of the photos. We will come to this further below. She also says family "F456" (also a BME family) had their support ended, Mrs Ellis telling her the mother had been argumentative. The Claimant's evidence is that the mother told her (see BM38) that Mrs Ellis offered her a dirty car seat, whilst the Claimant had seen Mrs Ellis offer a White expecting couple a brand-new bath and other items.

18. Family F123 returned to the Respondent for further help after the Claimant left. As to F456, Mrs Ellis told us that she knows she did not take them a dirty car seat, though of course some items are second-hand. She says that the Respondent works with all types of families, and more are from BME backgrounds than White. We accept, as unchallenged, that there were more BME families supported by the Respondent than there were White families. As to the provision of the car seat, it is clear that items of a second-hand nature will usually be in less pristine condition than a new item. The Claimant did not tell us that she saw the car seat herself (at least not when first provided to F456) so that her evidence was hearsay. On balance therefore we preferred Mrs Ellis's evidence on that specific point.

Baby massage

19. The Claimant's job description, dated January 2021 (pages 402 to 403), contained no mention of baby massage. The Claimant nevertheless says that an opportunity to work in this field was offered to her at the outset. Ms Redding told us (JR9) that the Claimant was asked at interview whether, if there was such an opportunity, she would be interested in upskilling to do it. We can accept that as unchallenged evidence. She adds (JR10) that there was no baby massage role in the Respondent at any time. We saw no evidence that there was. Another staff member started shortly after the Claimant left and came qualified to do it. She is Black, though the Claimant says she is not African, which we accept as unchallenged evidence on her part.

20. The Claimant says that the opportunity to undertake baby massage was withdrawn by Ms Fisher on 28 June 2021 at the Claimant's probation review. She says at BM36 that Ms Fisher informed her at this meeting that she had passed her probation but could not do the baby massage training previously promised.

21. In the probation review document (pages 233 to 237) Ms Fisher recorded in relation to baby massage, "Agreed this may not be possible this year but will include in overall aims". The Claimant says Ms Fisher told her it was better not to do the training for financial reasons (confirmed by Ms Fisher at SF23). As

recorded at pages 235 to 236, one of the Claimant's targets was to become trained in baby massage once funding was agreed. Ms Fisher told us it was a planned, rather than current, activity. She denies telling the Claimant she had passed her probation, saying at SF20 that it was extended by three months because the Claimant had not had opportunity to work with the required number of families so that the Respondent could properly assess her work.

22. It could quite properly be viewed as a failure of good management that the Claimant had limited opportunities during her probation, or at least it was apparently outside of her control. Nevertheless, the probation extension is recorded at page 237 and the email at page 239 suggests that the Claimant was sent the probation review document by Ms Fisher and replied on 29 June, "All good". The Claimant says it was not the document at pages 233 to 237 that was sent to her, but we were not shown any alternative version. On the evidence we were taken to therefore, we accepted that this document properly represented what was discussed at the probation review. There was no complaint before us about the extension of the probation itself nor were we invited to draw inferences from it – the Claimant's point was that her signature and some information was added afterwards. We have just dealt with that contention in part and will return to the question of the signature below.

23. The Claimant says that a baby massage role was offered to Sarah Moore on 7 September 2021. At page 262 there is a Facebook post in which the Respondent stated that Ms Moore (at that point a new employee) would be supporting group work including CALM and baby massage. Ms Redding says (JR10) that Ms Moore was not employed to do baby massage nor was she trained for it. The Claimant could not say whether she was or not and therefore we concluded that she was not. Ms Fisher told us that Ms Moore was recruited to support group/creche activities, including whilst parents were being instructed in baby massage by others. Again, that was accepted as unchallenged evidence.

24. Within the probation review document at page 236, Ms Fisher also recorded that the Claimant might benefit from shorter courses to suit her attention span. We were not entirely clear as to Ms Fisher's explanation of this comment, though she told us the Claimant had said she had not completed some courses and that the Claimant herself had referred to her attention span. She says that what she wrote on the form was therefore the conclusion of what they discussed, not racial stereotyping. We accepted that account, given the totality of the evidence before us, something we will return to in our conclusions.

Comments by Ms Fisher

25. The Claimant says at BM50 that she applied for annual leave in summer 2021 and was informed by Ms Fisher that she needed to be at work every week as families needed to be in contact with her. Ms Fisher told us that the Claimant wanted to take off the whole six-week summer break and so Ms Fisher suggested that each week she take two days off and work one day, to ensure families were not left without support from the Claimant for a full six-week period. The Claimant also says at BM51 that Mrs Ellis informed her that she needed to send a message before going into a family home and after leaving, something which was not required of anyone else. Mrs Ellis told us it was standard policy for everyone, for safeguarding reasons. We accepted that account, not least because it makes perfect sense in the context of the work being done.

26. It is agreed that in summer 2021, Ms Fisher used the phrase, "someone did something very stupid" when speaking about the use of a shredding machine or possibly the loss of a cheque (it was not clear to us which, but this did not matter for our purposes). The Claimant says, and Ms Fisher now accepts, that these were two separate occasions. The Claimant says at BM65 that only her and Gill, the office administrator, were present when this comment was made, "and we know it could not have been Gill", because she was experienced. She adds (BM116) that Ms Fisher explained that she might have put it on the wrong pile of papers herself by mistake but went on to check only the papers the Claimant had been working on, implying she was responsible. The Claimant says (BM117) that this was "racial profiling as history shows that Black people have been falsely accused of things going missing". She adds (BM287) that Ms Fisher knew she was the only one still learning how to use the shredder and the only Black person in the office. Ms Fisher thinks everyone was in the office at the time she made the comment and insists the comment was not directed at the Claimant. As for the cheque, she says she and her colleagues searched the whole office, including Ms Fisher's own desk.

27. There was limited evidence for us to go on in resolving this factual dispute. We will return to contextual evidence in our conclusions. What we can say here however is that it makes sense that the Respondent's staff would search everywhere for what was for this organisation a cheque for a large sum of money (£500). Whatever the shredder comment related to, it seems clear it was said generally and was not directed at the Claimant. First, the Claimant herself effectively recognises that by explaining why the comment could not have been intended for Gill. Secondly, it has not been suggested that only the Claimant was involved in shredding – albeit she was perhaps less familiar with it. Both of those facts support Ms Fisher's account.

Alleged protected act

28. On 8 June 2021, the Claimant supported the mother of F123 who was unhappy that her family's photograph had been uploaded to the Respondent's Facebook page, in making a complaint to the Respondent. She says (BM24) that she made the complaint within her capacity as the mother's support worker. The picture was deleted the same day. The Claimant says this was a protected act because F123 was a refugee, but she cannot recall what she (the Claimant herself) said to the Respondent on this occasion and was not party to F123's conversation.

August 2021 – safeguarding concerns

29. The Respondent's Quality Standards (page 164) set out how to raise issues if an employee has any safeguarding concerns. Its Safeguarding Policy, at page 197, says it is better to err on the side of caution if such concerns arise and when they do, the DSL is to be informed. The Claimant was aware of the policy and accepts it was not her role to assess whether a concern required escalation. She also accepts she would not know immediately if another agency had escalated a concern to social services, but her supervisor would know relatively quickly as the Respondent shared a common IT system with other agencies, known as RIO.

30. At pages 102ff, in the Claimant's application for employment, she referred to attending a safeguarding course on 26 January 2021. This was in her capacity as a school governor (she was on the school's safeguarding sub-committee),

which she says meant it was not particularly relevant for her role as an employee and only relevant for her previous work as a volunteer with the Respondent. She says for example that it did not address supporting victims of domestic violence, though Ms Fisher says no safeguarding course would specifically address providing such support, which we thought likely to be correct. The Claimant's application said her Level 3 diploma included some work on safeguarding. She had also done level 1 and 2 safeguarding training with the Respondent whilst a volunteer, though she says the training needed refreshing. One of her objectives for her probation (page 169) was to attend training at levels 3 and 4. As Ms Fisher explained, levels 1 and 2 concern identifying concerns and reporting internally whereas levels 3 and 4 focus on external reporting, which the Claimant was not required or authorised to do. Ms Redding (JR6) did the initial safeguarding training when the Claimant was a volunteer and she also facilitated safeguarding supervision sessions that the Claimant would have attended as both a volunteer and employee. Ms Redding confirmed that the Respondent provides the same training for both staff and volunteers. She also hosted group supervisions online when staff could talk about individual cases, which the Claimant attended.

31. On 24 August 2021, the Claimant met with Ms Fisher (pages 254 to 255). At this meeting, Ms Fisher raised record-keeping concerns. Written reports of each contact with a family are noted on the Respondent's system and Mrs Ellis often checked the reports made by volunteers, to ensure compliance with the Respondent's policies and relevant legislation. In August 2021 she did a random check of the Claimant's notes (there are inevitably instances where volunteers and employees work with the same families) and found (VE11) that various entries were incomplete, incorrect, or recorded under the incorrect family. She says (VE14), and we of course accepted, that it is standard practice to raise issues like this with the person's line manager.

32. The Claimant accepts she made some errors (page 252) and accepts the importance of getting records right, though she says she was not trained on record keeping. At BM9 she says, "I did not receive significant training to ensure that I had the right recording skills". Mrs Ellis told us that record-writing was part of the preparation training for volunteers and that the Claimant had signed to say she understood the Respondent's data protection and confidentiality policy, whilst Ms Fisher says the volunteer training is identical to that given to employees in this respect also. The Respondent's evidence to this effect was not challenged.

33. As a result of this discussion a performance improvement plan ("PIP") was prepared. "Time management" was one of the targets. The Claimant says she had no issues with managing her time and so this was stereotyping Black people as having poor management skills. She also says the Respondent wanted to get rid of her to make room for new (White) people coming in. Ms Fisher told us she was not aware there was a stereotype of Black people having poor management skills. We had no reason to doubt that. The PIP also included a requirement for the Claimant to amend the Respondent's system so that the correct information was filed under the correct family name.

34. After the meeting, on 25 August 2021 (page 248), the Claimant emailed Ms Fisher and said, "Regarding my reporting, please check my records for 24/8 and give me feedback based on them". She also said she might still need a case-by-case review to clarify what she had missed. She could not say in evidence whether she thought it reasonable for Ms Fisher to also check records for dates

other than 24 August. We are satisfied it was in the light of what the Claimant said in this email. Ms Fisher's resulting audit is at page 260. It set out extracts from the Claimant's records.

Suspension

35. Ms Fisher having done those checks, she called the Claimant to a meeting on 31 August 2021, also attended by the Claimant's new manager, Ms D Prescott. Ms Fisher informed the Claimant she had identified three safeguarding concerns (they were all in relation to the same family) adding, the Claimant says, "and they amount to gross misconduct". We return below to the safeguarding issues Ms Fisher identified. As to the alleged comment, Ms Fisher told us that she said that if the evidence supported them, the allegations would amount to gross misconduct. Given what she said at the subsequent investigation meeting (see below) and given she was clearly aware of what her role was, we think it more likely on the balance of probabilities that she indicated the possibility of gross misconduct rather than effectively giving the Claimant a conclusion. The Claimant was then given a pre-prepared, undated, suspension letter (page 251). She accepts she was suspended because of failure to escalate safeguarding issues, though she says at BM70, "I interpreted the intention as deliberate torture, to show me my place as a Black person".

36. The Respondent's evidence on who decided to suspend the Claimant was confused. Ms Redding said (JR17) that she and Ms Fisher agreed the Claimant should be suspended, though it was ultimately a Board decision. Ms Fisher said (SF57 and SF59) both that she decided on the suspension and that it was decided by the Board. Her explanation of this point in oral evidence was unconvincing, namely that the word "I" in SF57 referred to the Respondent. What was clear however was the Respondent's reasons for suspension. As Ms Redding explained, it was because three instances of missed safeguarding issues were found, indicating that the Claimant was not recognising such issues and reporting them so that "we could not be sure that children would be safe with the Claimant remaining in service".

Laptop

37. At the meeting on 31 August, the Claimant returned her work laptop. In subsequent WhatsApp messages, Ms Fisher asked if the laptop she had returned was the one Ms Fisher had given her (at the start of the Claimant's employment). The Claimant asked in reply, "As in did I replace the one I was given by [the Respondent]", to which Ms Fisher replied, "Yes, just confirming it's not your own as it's not what I thought I'd given you. Easier to ask than check the old invoices". The Claimant says Ms Fisher had no right to suspect she had not returned the correct device. Ms Fisher says she was surprised as the device was ten years old and had previously been used by someone else, so that arguably it was not fit for purpose. She says she was "just asking". We think it would have been better had Ms Fisher simply checked the records rather than asking the question of the Claimant, given the sensitivity of the situation (the Claimant had just been suspended). We will return to whether the question was an act of direct race discrimination in our conclusions.

Investigation meeting

38. The Claimant was invited to an investigatory meeting, Ms Fisher says because of the safeguarding concerns, which took place on 8 September 2021. Ms Fisher explained to the Claimant that it was a fact-finding exercise and (SF64) confirmed that if any evidence was provided which amounted to gross misconduct, this could lead to a disciplinary hearing. They then discussed the allegations of safeguarding breaches and whether correct training and procedures had been followed.

39. Ms Fisher says in unchallenged evidence (SF66) that the Claimant confirmed safeguarding training had been received, that she had read the safeguarding policy and had received at least two supervisions where she was asked if she had any safeguarding concerns to report. The three file notes prepared by the Claimant were discussed – see the details below – as was the Respondent's allegation that the Claimant failed to report safeguarding concerns. Ms Fisher says (SF69), again in unchallenged evidence, that she made clear it was beyond the Claimant's remit to decide what was a safeguarding concern or not, which the Claimant accepted, and (SF71) that the Claimant said she would bring up such matters in the future.

Disciplinary hearing

40. It is agreed that the Respondent's disciplinary policy did not apply during probation periods and that therefore the Respondent did not need to invite the Claimant to an investigation or a disciplinary hearing and could have just dismissed her.

41. Ms Fisher nevertheless reported the results of her investigation to Ms Redding who (JR22) decided a disciplinary hearing was needed as the Claimant had acknowledged what had been raised with her were potential safeguarding issues which had not been escalated, agreed she was fully trained and agreed she understood the safeguarding policy. At this point, Ms Redding's only consideration was whether there was a case to answer, not whether the allegations were substantiated (JR27).

42. A letter inviting the Claimant to a disciplinary hearing was sent by Ms Fisher, again undated as she used an online template (page 253). In summary:

42.1. It said that there were three incidents of missed safeguarding of a family.

42.2. The Claimant was warned the hearing could lead to dismissal.

42.3. She was provided with the minutes of the investigation meeting on 8 September, Ms Fisher's audit document, a supervision document dated 2 August, the employee handbook, the Respondent's safeguarding policy, its code of conduct, its confidentiality policy and its disciplinary procedure.

43. Correspondence then followed between the parties before the hearing. There is no need to rehearse that in any detail. On 16 September 2021 (pages 292 to 293) Ms Redding confirmed that the Claimant had all the evidence Ms Fisher would rely on in presenting the management case, and that no evidence would be presented she had not seen. The Claimant requested further information on 18 September and Ms Redding provided it two days later. She

agreed to the Claimant's friend, Mr Ojukwu, being present "as an exception" to the usual rule (JR42).

44. The Claimant says the suspension, investigation and invitation to the disciplinary hearing were all because of race as she was replaced by a White person (Ms Moore). She says this was nepotism by Ms Fisher, who found it much easier to remove the Claimant as someone who did not have a support network in the UK and did not know her rights. She also says no disciplinary action was taken against Mrs Ellis or Ms Fisher in relation to the safeguarding issues.

45. In fact, Mrs Ellis was subject to a disciplinary process. She told us that although she had access to the shared RIO database, she would not necessarily have noted any safeguarding issues raised by others as her task was simply to place material on that system. Nevertheless, although she was not suspended (Ms Fisher says because her ability to safeguard families was not in question) she was called to a disciplinary hearing for not spotting the three safeguarding issues when she was transferring the case notes. The outcome of the disciplinary process was that she was given a "learning experience".

46. Ms Fisher for her part was called to a meeting with the Trustees as they determined that she had not been recording supervisions – across the board – as well as could have been expected. A learning document and new supervision agenda were prepared as a result of these discussions.

47. As for Ms Moore, Ms Fisher told us that she was not the Claimant's replacement, but an additional member of the team. That seems clear as Ms Moore was not recruited specifically to work with BME families.

48. The notes of the disciplinary hearing are at pages 302 to 306 – we did not read them except as taken to by the parties. As the list of issues makes clear, the Claimant has a number of complaints about it. We deal with those in turn, interposing the discussion of the allegations themselves.

Ms Redding and Ms Fisher did not take the Claimant seriously when she questioned Ms Redding chairing the hearing because she had provided safeguarding training to the Claimant and was DSL.

49. Ms Redding has substantial managerial experience outside of the Respondent (her role with the Respondent is a voluntary one). She has regrettably dismissed employees on many occasions, many of them White.

50. She says (JR23) that she had some concern ahead of the disciplinary hearing that the Claimant may say she was not suitable to chair it as she had done the safeguarding training, but felt she was the best person as DSL and the most qualified and experienced trustee in dealing with safeguarding in what is a small charity. This evidence is confirmed by her email at page 265 to another Trustee. When the Claimant raised this part way through the hearing, Ms Redding gave her reasoning (JR71-2), including stating that the Respondent is a small charity, that it was beneficial for the Claimant to have a hearing before a trustee with safeguarding experience, and that if she had any concerns, she could raise them following the outcome. On reflection, Ms Redding considers that the Respondent could have asked someone from another HSUK scheme to chair the Hearing. She nevertheless says (JR121) that if anything, taking the

Claimant through any hearing was more favourable treatment than would have been afforded to others, as the Respondent could have gone straight to dismissal given that she was in her probation period. The Claimant says that Ms Redding and Ms Fisher not taking her concerns on this point seriously was less favourable treatment because of race as it was part of a bigger picture of discrimination. Ms Redding did not know the Claimant's country of origin.

Discussion of allegations

51. Ms Redding only had before her at the disciplinary hearing Ms Fisher's summary of the Claimant's records of the three incidents, not the Claimant's original records themselves. She says the point was that the Claimant had failed to raise a record of concern ("ROCA") in each instance.

52. The first concern related to a record dated 13 July 2021. The Claimant's note said that the mother of the family in question was continuing with counselling and had also been doing something called the "freedom programme". She mentioned to the Claimant that this had helped her realise that when her ex-partner had sex with her in her sleep it was rape. The Claimant says that those who ran the programme did not raise any safeguarding concerns and that the ex-partner was subject to a restraining order. Ms Fisher told us that she would still expect a ROCA to be raised as, unknown to the Claimant, the ex-partner was still trying to contact the mother. Ms Redding told us that if something like this was important enough to be in the case notes, it was important enough to be in a ROCA, to facilitate a discussion with a more senior person.

53. The second concern related to a record dated 20 July 2021. The Claimant's note on this occasion said that the mother had to take one of her children to A&E as they had a cut on their chin. The mother was noted as saying that this had been caused by eyedrops making the child's vision blurry. The Claimant says (BM157) that as the child had been taken to A&E and given that they were attended to professionally there, she did not have any reason to suspect this was a sign of abuse. Ms Fisher would again have expected a ROCA to be completed, so that the Respondent could have decided whether this was part of a pattern that needed reporting outside. Ms Redding says that the Respondent always records an A&E visit on a ROCA.

54. The third concern related to a record dated 10 August 2021. The Claimant's note said that the mother informed her that her four-year-old child went out of the house by himself through the back door at around 8 pm. The Claimant recorded the mother saying it had never happened before and that she would now make sure the door was locked and the key removed from the lock to avoid a repeat. She says at BM159 that she had no reason to doubt the mother was going to keep the keys safe. It was summertime and so not dark at 8pm. Ms Redding says that this was a very concerning incident as the mother did not know where her small child was.

55. There was discussion of the Claimant's training and supervision, during which Ms Fisher confirmed that the Claimant had received safeguarding training which Ms Redding had delivered, and training from the local council (this was the governor training). No refresher training had been given as this was done annually and the Claimant had been employed for less than a year.

Ms Redding interrupted the Claimant.

56. The Claimant says (BM168) that during the disciplinary hearing Ms Redding discouraged her from asking questions and (BM287) that she never saw her interrupting White people. Ms Redding accepts (JR79) that she interrupted the Claimant, on several occasions, she says because the Claimant kept asking questions which were not relevant to the allegations. She was concerned they would run out of time and that the Claimant would not be able to ask the questions she needed to. She says at JR50 for example that she could not see the relevance of discussing probation issues and asked the Claimant if she could explain the relevance. When the Claimant asked Ms Redding (JR60) what the Respondent had done about the three issues raised with her, Ms Redding said that was not relevant either and that they needed to stay on track, though adding that they had all been dealt with in accordance with the Respondent's policy. Ms Redding was also unsure (JR64) why the Claimant was asking about supervisions and asked her to confirm if she was saying she had not been supervised. She asked the Claimant to move on as the questions she was raising had already been answered and to that point the Claimant had not asked any questions regarding the substantive issues. The Claimant then asked questions of Ms Redding herself and was asked to direct questions to Ms Fisher. The Claimant (JR68ff) nevertheless continued to ask questions of Ms Redding, which she answered, concerning who decided a disciplinary hearing was required and whether Ms Redding would make a social care referral for a child taken to A&E (Ms Redding said it may not be necessary to do so, but she would expect this to be discussed with the Claimant's manager).

57. The Claimant says that by these interruptions she was prevented from raising questions such as whether Ms Redding knew she was on probation and whether she had received sufficient training. She wanted to show the allegations did not make sense. The interruptions were because of race, she says, because Ms Redding did not see her as equal to Ms Fisher.

Ms Redding was dismissive when the Claimant raised that Ms Fisher had just said the Claimant was dismissed.

58. Both Ms Fisher and Ms Redding say that at one point during the hearing Ms Fisher stated that if another safeguarding concern she had spotted (relating to another family) had been the only issue, the concerns would have been dismissed – see page 315. When the Claimant said she took this as meaning she was being dismissed, Ms Redding stated that it was a slip of the tongue and that Ms Fisher had been referring to dismissing issues, not dismissing the Claimant. The Claimant told us Ms Redding and Ms Fisher were dismissive because of race on the basis that Ms Redding did not explain Ms Fisher's mistake, and the use of the idiom "slip of the tongue" confused the Claimant so that she could not see what was happening. Ms Redding told us she used that phrase in error, as it was not a slip of the tongue by Ms Fisher; she was trying to reassure the Claimant, but on reflection thinks she made things worse.

The Respondent deliberately made misrepresentations and irregularities.

59. In her statement at BM180, the Claimant says that this allegation referred to Ms Redding saying more than once, when Ms Fisher was answering questions, "What Sarah is trying to say". Ms Redding says this was simply to aid understanding by providing another way of explaining the same point when

questions were repeated. That seemed to us a wholly reasonable explanation of such comments.

60. In oral evidence the Claimant told us that the misrepresentations and irregularities included minutes being incorrectly typed (we were not given or taken to any evidence about incorrect minutes), Ms Fisher's failure to date letters and the Respondent making contradictory statements (as the Claimant sees it) about her probation. She says Ms Fisher knew she had no support network and did not understand UK employment law, so it would be hard for her to know that her rights had been violated and present her case to get justice.

Outcome

61. The hearing was adjourned, and no decision was given on the day. Ms Redding informed the Claimant that there was a range of possible outcomes, from no case to answer, to a finding of misconduct or gross misconduct and a warning or dismissal. She told us the allegations were "as serious as it gets", but she wanted to understand why mistakes were made and make the relationship with the Claimant work.

Indirect discrimination – statements from employees

62. The Claimant says that the Respondent dismisses statements from employees who confirm their first language is not English, without any consideration for racial barriers and disadvantages. As she says at BM168 she raised in the hearing that English is not her first language. She says that Ms Fisher and Ms Redding dismissed her concerns. This is the basis of her complaint of indirect race discrimination.

63. The Claimant's application form for employment (page 106) did not say that she spoke any other language than English, though she says that it is evident from her name this is not her first language. She accepts she understood everything in what ended up being a two-hour disciplinary hearing, apart from use of the phrase "safety net". Ms Redding used that phrase when she asked whether the Claimant saw Ms Fisher as a "safety net", meaning someone who would watch over and check all of the Claimant's work. The Claimant says figures of speech discourage those whose first language is not English and so she may have answered incorrectly. She says Ms Redding did not explain its meaning. When asked about group disadvantage she told us that F123 did not speak good English.

64. Ms Redding said in her statement that she was surprised that in breaks during the disciplinary hearing, the Claimant spoke with Mr Ojukwu in English. She says this was not because she thought all Africans speak the same language but because she thought if the Claimant had concerns about being in the difficult context of a disciplinary hearing when English was not her first language, she might have sought support from someone who also spoke her first language. We found that explanation of her evidence both clear and compelling.

The Claimant's signature

65. The Claimant says that Ms Fisher and Ms Redding forged her signature on 22 September 2021 on the probation review document which Ms Fisher sent to her after the disciplinary hearing. It can be seen from page 237 that the

Claimant's signature is electronic and is in same font as Ms Fisher's own signature. Ms Fisher says (SF28) that the Claimant's signature was typed in after the Claimant confirmed she was happy with the document – see page 239 referred to above. The Claimant says the signature was forged because the document referred to her probation having been extended, when she says she was told it was passed, and the original document had no signature on it at all. Ms Redding says (JR94) that the Respondent always follows a process of emailing such documents, inviting the recipient to raise concerns. If they do not, it is assumed there are none, and electronic signatures are added. The same approach is taken with all staff. Ms Fisher also told us that wet signatures were not collected for numerous documents, for all employees, given the Covid-19 pandemic and a drive to reduce paper usage. We did not see written evidence of the Respondent's wider practice in this respect, but we know that it is something widely adopted in many organisations, and we also note that Ms Fisher's own signature was added to the document in this way. As already indicated, given that we did not see an alternative version of the probation review document and saw the Claimant's email at page 239 telling Ms Fisher, "All good", we concluded that the document at pages 233 to 237 properly records what had been discussed.

66. The Claimant emailed Ms Fisher and Ms Redding after the probation review document was sent to her to say that she had never signed it (page 319). After further exchanges, Ms Redding offered her a grievance as an option to deal with the matter, but the Claimant replied that it was not a written grievance and accepts that she thus did not start the grievance process (see page 325). Ms Redding replied that if the matter was to be considered formally, there would need to be a grievance and that it did not relate to the disciplinary process. The same point about the grievance was made on 29 September 2021 (page 334) and the Claimant accepts that she did not reply to say that this was what she wanted.

67. Ms Redding accepts that during some of these exchanges she spelt the Claimant's first name incorrectly ("Bui" instead of "Boi"). She says it was by mistake and that there is no excuse for it; she has also at times misspelt British-sounding names, which we can readily accept not only as a common occurrence in email correspondence generally but in the absence of any challenge to that assertion by the Claimant. We will come back to this matter in our analysis. The Claimant raised it with Ms Fisher who in turn raised it with Ms Redding. It can be seen from other emails around this time that Ms Redding did regularly get the Claimant's name correct.

Resignation

68. The Claimant submitted her resignation on 23 September 2021, effective from 30 September 2021 – see pages 417 to 419. She stated that it was in response to "indignity, contempt and abuse of power" which she had experienced over the last couple of months, "of which the most recent is the lack of due process, transparency and fairness at my disciplinary hearing". She said her manager informed her that she had already decided to dismiss her, but Ms Redding had described it as a slip of the tongue. She also raised concerns relating to the extension of her probationary period, saying she was told about this at the disciplinary hearing for the first time and that Ms Fisher had then sent her a document (the probation review) which included (improperly) her signature. She concluded by saying it was very clear there was no commitment to the

integrity of a fair, transparent and impartial disciplinary hearing and referred to discrimination. She told us she did not feel safe to complain of discrimination before. The Respondent accepted her resignation and took no further action.

Supervision of the Claimant

69. We were not taken to the Respondent's policy for Staff Supervision and Appraisal and so can say nothing further about that. The Claimant says Ms Fisher and Mrs Ellis provided inadequate supervision throughout her employment, saying at BM6 that she had only three supervision meetings. She says the Respondent was setting her up to fail. Ms Fisher told us that she met with the Claimant each Friday informally, discussions which were not noted down (this was not disputed) and that formal supervisions took place every four to six weeks (SF7).

Minutes of hearing

70. On 23 September 2021 (page 329) Ms Redding said that minutes of the disciplinary hearing would be available by the end of the week. She says (JR106) that as no decision had been made, and the Respondent had accepted the Claimant's wish to resign, it was not the Respondent's normal practice to send any. The Claimant says this treatment was because of race as the Respondent knew she had inadequate support and not having the minutes would make it difficult for her to prove what took place.

Correspondence with Mr Grigg

71. The Claimant says that Mr Grigg did not intervene when she raised concerns about the matters that had led to her resignation. Mr Ojukwu initially wrote to him on the Claimant's behalf on 11 November 2021. As the Claimant says at BM86, Mr Grigg was initially willing to look into the matter saying, "I have shared your emails with my colleagues, and we will be back in touch with a response and, if necessary, to determine a time to discuss". Mr Grigg says that this was because he did not know the detail of the situation at this point, and Mr Ojukwu had suggested the Claimant was employed by HSUK, which we accept.

72. There followed a long correspondence. In short, Mr Grigg was focused on asking whether the Claimant had exhausted the Respondent's complaints process. HSUK's position was that complaints should be dealt with at local level – only then was there potential for him to get involved (PG12 and PG16). He also offered the option of a conversation. Both the Claimant and Mr Ojukwu subsequently said that she had utilised the local procedure, Mr Ojukwu saying, "to the extent she was given the opportunity to engage in the process in a fair and transparent manner". He sent Mr Grigg what he said was the Claimant's formal grievance and told him the Respondent did not reply.

73. On 6 December 2021 Mr Grigg wrote to Mr Ojukwu (page 357) saying he had no evidence a complaint had been raised with the Respondent and the local process exhausted. Mr Ojukwu then replied raising concerns about how Mr Grigg himself had handled the matter. On 8 December, Mr Grigg wrote back (page 349) to say Ms Redding had confirmed the Claimant did not want her complaints dealt with as a grievance so as such there was nothing he could do at national level. The Claimant emailed Mr Grigg directly on that date. On 15 December, Mr Grigg said that in the event a formal complaint was raised with the

Respondent and an unsatisfactory outcome provided, he would then be able to consider the matter further. He also told the Claimant how she could complain about him if she wished to do so.

74. The Claimant's case (BM198) is that Mr Grigg's decision not to investigate her complaint was based on the Respondent's narrative rather than hers. She told us this was direct discrimination because it was a continuing pattern of inequality. Mr Grigg does not accept what the Claimant says, saying he requested details from both the Claimant (mainly via Mr Ojukwu) and the Respondent. He has expressed himself deeply worried about the effect of the Claim on HSUK (PG35) and his role as an ally for progressing inclusion and anti-racism in the charity sector. He has led work to position inclusion as a central strand of the federation's strategic framework.

Reference/email

75. In October 2021, the Claimant applied to be a volunteer at HSCSW (another charity within the HSUK federation) and was offered the role. The offer was later revoked (page 377). HSCSW asked the Respondent, "To your knowledge, has this applicant had employment, voluntary or other positions terminated due to concerns around working with children or adults who may be vulnerable or at risk?". Ms Fisher completed the form by replying, "Yes", adding, "significant missed safeguarding led to a formal investigation and disciplinary hearing. This was not fully complete as notice was accepted before the disciplinary was concluded". She also answered, "Yes" to the question, "To your knowledge, has this applicant had employment, voluntary or other positions terminated due to concerns around working with children or adults who may be vulnerable or at risk?", though she accepts now that this was not the correct answer, saying she was just concerned about what she regarded as unresolved safeguarding issues. At SF133 she says it was an "honest and true reflection of the circumstances at the time".

76. The Claimant asked HSCSW to clarify why it had changed its mind and in response (BM213), they said, "We received an email response from management at [the Respondent] saying that we could not consider you as a volunteer due to unresolved issues regarding reporting and recording" (page 406). Whatever email the Respondent sent to HSCSW was either not in the bundle or not drawn to our attention. In June 2022, the Claimant received an email from SEVACARE with a conditional employment offer. She was later informed she did not receive a satisfactory reference (BM100-2).

Time limits

77. ACAS Early Conciliation took place from 6 to 7 December 2021, with the ET1 Claim Form filed on 27 December 2021. The Claimant accepts she knew of the various matters that relate to out of time complaints but says as someone who is a victim of abuse, she is careful what to disclose and when. She thought her chances of being heard were slim and that speaking out would be "career suicide". She brought her claim when things got unbearable.

Law

Burden of proof

78. Section 136 of the Equality Act 2010 ("the Act") provides as follows:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court [which includes employment tribunals] *could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) But subsection (2) does not apply if A shows that A did not contravene the provision".

79. Tribunals frequently have to consider whether it is possible to infer unlawful conduct from all the material facts. This has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal's judgment in **Wong v Igen Ltd [2005] ICR 931**, updating and modifying the guidance that had been given by the Employment Appeal Tribunal ("EAT") in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205**. The Claimant bears the initial burden of proof. The Court of Appeal held in **Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913** that "there is nothing unfair about requiring that a claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case …) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage".

80. At the first stage, the tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an unlawful act. Instead, it is looking at the primary facts to see what inferences of secondary fact could be drawn from them. As was held in **Madarassy v Nomura International plc [2007] IRLR 246**, "could conclude" refers to what a reasonable tribunal could properly conclude from all of the evidence before it, including evidence as to whether the acts complained of occurred at all. In considering what inferences or conclusions can thus be drawn, the tribunal must assume that there is no adequate explanation for those facts.

81. If the burden of proof moves to the Respondent, it is then for it to prove that it did not commit, or as the case may be, is not to be treated as having committed, the allegedly discriminatory act. That would require that the explanation is adequate to discharge the burden of proof on the balance of probabilities, for which a tribunal would normally expect cogent evidence.

Harassment

82. Section 40 of the Act renders harassment of an employee unlawful. Section 26 defines harassment as follows:

"*(1) A person (A) harasses another (B) if - //(a) A engages in unwanted conduct related to a relevant protected characteristic [here, race], 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 …*

(4) 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; //(b) the other circumstances of the case; //(c) whether it is reasonable for the conduct to have that effect".

83. The Tribunal is thus required to reach conclusions on whether the conduct complained of was unwanted, if so whether it had the requisite purpose or effect and, if it did, whether it was related to race.

84. Unwanted conduct is similar to a detriment (see below) and is not usually difficult to prove. It is to be assessed from the Claimant's perspective, though the conduct does not have to have been directed at her. Unwanted conduct may also be constituted by a series of events and does not necessarily have to be a single event.

85. It is clear that the requirement for the conduct to be "related to" race entails a broader enquiry than whether conduct is because of race as in direct discrimination. What is needed is a link between the treatment and the protected characteristic, though comparisons with how others were or would have been treated may still be instructive. In assessing whether it was related to the protected characteristic, the form of the conduct in question is more important than why the Respondent engaged in it or even how either party perceived it. The conduct itself and the overall context fall to be considered.

86. The question of whether the Respondent had either of the prohibited purposes – to violate the Claimant's dignity or create the requisite environment – requires consideration of each alleged perpetrator's mental processes, and thus the drawing of inferences from the evidence before us. As to whether the conduct had the requisite effect, there are clearly subjective considerations – the Claimant's perception of the impact on her (she must actually have felt or perceived the alleged impact) – but also objective considerations including whether it was reasonable for it to have the effect on this particular claimant, the purpose of the conduct, and all the surrounding context. That much is clear from section 26 and was confirmed by the EAT in **Richmond Pharmacology Ltd v Dhaliwal [2009] ICR 724.** The words of section 26(1)(b) must be carefully considered; conduct which is trivial or transitory is unlikely to be sufficient. Mr. Justice Underhill, as he then was, said in that case:

> *"A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That…creates an objective standard … whether it was reasonable for a claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt …*
>
> *"…We accept that not every racially slanted adverse comment or conduct may constitute the violation of 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 (or indeed comments or*

conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…"

87. It is for the Claimant to establish the necessary facts which go to satisfying the first stage of the burden of proof. If she does, then it is plain that the Respondent can have harassed her even if it was not its purpose to do so, though if something was done innocently that may be relevant to the question of reasonableness under section 26(4)(c). Violating and intimidating are strong words, which will usually require evidence of serious and marked effects. An environment can be created by a one-off comment, but the effects must be lasting. Who makes the comments, and whether others hear, can be relevant, as can whether an employee complained, though it must be recognised that is not always easy to do so. Where there are several instances of alleged harassment, the Tribunal can take a cumulative approach in determining whether the statutory test is met.

Direct discrimination

88. It is section 39 of the Act which renders discrimination unlawful. It provides that:

(2) An employer (A) must not discriminate against an employee of A's (B): -

(a) as to B's terms of employment;

(b) in the way A affords B access … to opportunities … for receiving any … benefit …;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

89. In determining whether the Claimant has been subjected to a detriment (whether for direct discrimination or victimisation), "one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to her detriment? An unjustified sense of grievance cannot amount to 'detriment'" (**Shamoon v Chief Constable of the RUC [2003] UKHL 11**). The word "might" was emphasised in an EAT decision on victimisation which the Claimant drew to our attention, namely **Warburton v The Chief Constable of Northamptonshire Police [2022] EAT 42**.

90. Section 13 of the Act provides, again so far as relevant, "*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*". The protected characteristic relied upon in this case is race. Section 23 provides, as far as relevant, "*(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case*".

91. The Tribunal must therefore consider whether one of the sub-paragraphs of section 39(2) is satisfied, whether there has been less favourable treatment than

(in this case) a hypothetical comparator, and whether this was because of the Claimant's race.

92. The fundamental question in a direct discrimination complaint is the reason why the Claimant was treated as she was. As Lord Nicholls said in **Nagarajan v London Regional Transport [1999] IRLR 572** "this is the crucial question". Her race being part of the circumstances or context leading up to the alleged act of discrimination is insufficient.

93. In most cases – such as **Nagarajan** – the act complained of is not in itself discriminatory but is rendered discriminatory by the mental processes (conscious or otherwise) which led the alleged discriminator to act as they did. Establishing the decision-maker's mental processes is not always easy. What tribunals must consider is whether to draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances. In determining why the alleged discriminator acted as they did, the Tribunal does not have to be satisfied that the protected characteristic was the only or main reason for the treatment. It is enough for the protected characteristic to be significant in the sense of being more than trivial (again, **Nagarajan** and **Igen**) in its impact on the outcome, a test confirmed in the victimisation context in **Warburton**.

94. Unreasonable behaviour of itself is not evidence of discrimination – **Bahl v The Law Society [2004] IRLR 799** – though the Court of Appeal said in **Anya v University of Oxford and anor [2001] ICR 847** that it may be evidence supporting an inference of discrimination if there is nothing else to explain it.

Indirect discrimination

95. Section 19 of the Act provides that indirect discrimination occurs when a person (A) applies to another (B) a provision, criterion or practice ("PCP") that is discriminatory in relation to a relevant protected characteristic of B's. The first question therefore is whether the PCP has been applied. If it has, it is discriminatory when, according to section 19(2):

95.1. A applies, or would apply, the PCP to persons with whom B does not share the relevant protected characteristic.

95.2. The PCP puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share the characteristic.

95.3. The PCP puts, or would put, B at that disadvantage.

95.4. A cannot show that the PCP is a proportionate means of achieving a legitimate aim.

96. The Claimant bears the burden of proof in respect of the first, second and third steps. As to the second step, it is necessary to identify a hurdle that has been placed in the way of the complainant and consider the range of persons affected by it. The EHRC Code of Practice on Employment (2011) states: "In general, the pool should consist of the group which the [PCP] affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively" – paragraph 4.18.

97. In **Pendleton v Derbyshire County Council [2016] IRLR 580** the EAT did not read "particular disadvantage" for these purposes as requiring any particular level or threshold of disadvantage. The term was "apt to cover any disadvantage". In **Essop v Home Office, Naeem v Secretary of State for Justice [2017] UKSC 27**, Baroness Hale noted that "the new formulation [in the Act] was not intended to make it more difficult to establish indirect discrimination: quite the reverse … It was intended to do away with the complexities involved in identifying those who could comply [with the PCP] and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question. It was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages". In brief, the question is whether more people of the same race as the Claimant experience the disadvantage than those who are not of that race. There will need to be some basis, in evidence or on judicial notice, on which to conclude that this is the case.

98. As indicated in the list of issues in the Annex, the Respondent does not contend that the PCP was a proportionate means of achieving a legitimate aim, and so nothing need be said about the law in relation to that.

Victimisation

99. Section 39(4) of the Act says, as far as relevant to this case, that:

"*An employer (A) must not victimise an employee of A's (B): … (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service; // (d) by subjecting B to any other detriment*".

100. Section 27 of the Act defines victimisation as follows:

"*(1) A person (A) victimises another person (B) if A subjects B to a detriment because - //(a) B does a protected act, or //(b) A believes that B has done, or may do, a protected act.*

(2) Each of the following is a protected act - //(a) bringing proceedings under this Act; //(b) giving evidence or information in connection with proceedings under this Act; //(c) doing any other thing for the purposes of or in connection with this Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act".

It is well established that a former employee can be victimised – **Rowstock Ltd and anor v Jessemey [2014] ICR 550**.

101. As to whether a complainant did (or it was believed they would do) "any other thing for the purposes of or in connection with [the Act]" (section 27(2)(c)) this is to be given a broad interpretation – **Aziz v Trinity Street Taxis Ltd [1998] IRLR 204** – and does not require the Claimant to have focused her mind specifically on any provision of the Act**.** Section 27(2)(d) is to be similarly interpreted, and no express reference need be made to the Act, though the asserted facts must, if verified, be capable of amounting to a breach of the Act and what the Claimant does must indicate a relevant complaint. In **Fullah v**

Medical Research Council [2013] UKEAT/0586/12, citing **Durrani v London Borough of Ealing [2013] UKEAT/0454/13**, the EAT held that it is not necessary to use the words "race discrimination" for there to be a protected act, as long as the context made it clear; all is likely to depend on the circumstances. Employers must know what it was constituted a protected act; there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the Act applies.

102. Where a claimant does not rely on having done a protected act (section 27(1)(a)) but on a respondent's belief that she has done, or may do, a protected act (section 27(1)(b)), this is not a question of establishing the Respondent's knowledge of a fact (as in **Scott v London Borough of Hillingdon [2001] EWCA Civ. 2005**) but of establishing the Respondent's decision-makers' belief.

103. No comparator is required for the purposes of a victimisation complaint, but the protected act must be the reason or part of the reason why the Claimant was treated as she was – **Greater Manchester Police v Bailey [2017] EWCA Civ. 425.** Again, this requires consideration of the mental processes of the decision-makers and again the protected act or belief that the Claimant may do a protected act need not be the primary reason for the act or omission in question, though it must be more than a trivial influence on that decision.

Time limits

104. As will become clear from our conclusions below, it is not necessary for us to say anything about the law in relation to time limits.

Other cases

105. We took into account the Claimant's reference in her written submissions to paragraphs 34 to 37 of **Night v Havant and South Downs College**, an employment tribunal decision from 2021. It is not binding on us but sets out how harassment complaints work. It was a case where the tribunal evidently accepted, in assessing whether certain conduct reasonably had the required effect on the claimant, that she reasonably concluded the respondent thought she had "played the race card". That was not an argument pursued in this case at all until the Claimant's written submissions. We could not at that late stage consider it, without an amendment application. No such application was made.

106. We also reviewed a decision of the EAT referred to by Mr Gittens in **Johnson v The Governing Body of Coopers Lane Primary School [2009] UKEAT/0248/09**, the main point of relevance to us being that whilst employers' actions have to be analysed with care, a case of discrimination cannot simply be founded on an alleged stereotypical view – there has to be direct evidence of the same, or a conclusion that such a view can be inferred from the evidence as a whole.

Analysis

Introduction

107. Employment tribunals are very much aware that racially discriminatory behaviour is all too real and that it has very real effects on those subjected to it.

Case law makes clear that it is also very often hidden, even to the perpetrator. Discrimination does not have to be conscious or intended therefore, though (in most cases) it must be an influence on the mind of the decision-maker, consciously or otherwise. Race being part of the context for a particular act or omission is not enough.

108. Tribunals also know that discrimination is not easy to prove, hence the burden of proof provisions referred to above. There is rarely crystal-clear evidence of discrimination, but it does have to be proven, not just asserted. The Claimant therefore had to prove a prima facie case in each instance. Our task was to consider not only evidence directly bearing on each allegation, but also contextual and all other evidence presented to us to see if discrimination had occurred. This was not an unfair dismissal case, and so our task was not to assess whether the Respondent acted reasonably, though had we found that it had acted unreasonably without a satisfactory explanation, that could have led to inferences of discrimination being drawn, as might other proven instances of discrimination, a failure to explain something in the evidence, important contradictions in the evidence, inexplicable gaps in the evidence and the like. We were also conscious that it was important to look at the overall picture presented to us and not see the allegations or any one piece of evidence in isolation.

109. Finally, we were aware that we were required to decide the case as set out in the list of issues in the Annex (prepared late in the day as it was), there having been no amendment application. That was fair to both parties and conducive to orderly litigation. We were not inflexible in our determination of the complaints, but it was not for us to decide a case not put to us by the parties or for which they did not prepare.

110. We began our analysis of the Claimant's complaints by noting some key initial context which emerged from our findings of fact:

110.1. First, the Claimant worked as a volunteer with the Respondent – happily and successfully – for around a year immediately preceding her employment.

110.2. The Respondent then recruited her, knowing her already. She was interviewed and recruited by Ms Fisher and Ms Redding, the two people who are principally said to have subsequently discriminated against her.

110.3. She was recruited specifically to support BME families.

110.4. She and Ms Fisher got on well initially and, as the Claimant told us, their discussions included the topic of racism.

None of that means there was no discrimination of course, but we found it to be very important background, nevertheless, which was supportive of the Respondent's case that it did not discriminate.

Direct discrimination

111. Turning to the complaints of direct race discrimination, there were in relation to each complaint four questions for us to consider:

111.1. Did what the Claimant alleges happen (according to our findings of fact)?

111.2. If so, was she thereby subjected to a detriment?

111.3. If so, was she treated less favourably than an actual or hypothetical comparator whose circumstances were not materially different to her own?

111.4. Finally, if so, was that because of race? This last question is crucial. A difference of race and a difference of treatment is not enough; there must be something more, such as already indicated above, to permit the Tribunal to draw an inference that shifts the burden of proof to the Respondent.

112. We now take each allegation in turn, using the numbering in the list of issues in the Annex.

2.2.1. Between April 2021 and June 2021, did the Respondent publish photographs on Facebook of Black people who the Claimant was supporting (including photographs of herself), by Sarah Fisher of the Respondent, without consent?

113. Taking the photographs of family F123 first, we concluded as follows:

113.1. We were prepared to accept that the photograph the Claimant provided to Ms Fisher in response to the HSUK request for such material was as a matter of fact published without the family's consent. We could not see however how that was a detriment to the Claimant. She did not say, for example, that it negatively affected her relationship with the family or that she was reprimanded by the Respondent because the photograph was published. That part of this complaint failed on that basis alone.

113.2. In any event, the WhatsApp exchanges we have referred to as the best record of the discussions between Ms Fisher and the Claimant, even if they also spoke about family F123 orally, clearly show that Ms Fisher thought the family had given consent and reasonably so. That was plainly the reason why she published the photograph, not the Claimant's or the family's race.

114. As to the Claimant's own photograph:

114.1. The Respondent did publish at least one, and it does appear that this too was, from the Claimant's point of view at least, without her consent. We were prepared to accept that she could reasonably regard this as to her detriment, given her circumstances.

114.2. The Respondent's position was that it had consent from when the Claimant worked as a volunteer. Whilst clearly it would have been good practice to get her consent again when the nature of the relationship between the parties changed, we were satisfied that, rightly or wrongly, it nevertheless held the view that it had the Claimant's consent because it had that earlier signed form and that this was a more than adequate explanation of what took place.

114.3. The Respondent could also properly conclude from the WhatsApp messages between the Claimant and Ms Fisher that when the Claimant said not to use the photograph, that related to use of that specific photograph in that specific context only. Again, it would have been better to clarify the Claimant's meaning, but we are satisfied that this was Ms Fisher's reason for later publishing

the donation photograph, even if she was mistaken as to what the Claimant did and did not want. It may have been regrettable or even careless, but the reason was not the Claimant's race.

115. We were fortified in these conclusions by the fact that when the Claimant made clear in the WhatsApp messages that she did not want her photograph used for the HSUK initiative, Ms Fisher did not use it. That very much suggests that Ms Fisher had no difficulty respecting the Claimant's wishes in this regard.

116. The Claimant said several times that photographs were requested by HSUK in the first place because it (and presumably the Respondent) wanted, in effect, to pretend that it was supporting Black people. There was no complaint of discrimination before us relating to any request for photographs; the complaints were about their publication. If in making this assertion, the Claimant was inviting us to draw an inference of discrimination from such requests being made, we were not prepared to do so. On its face, according to Ms Fisher's message to the Claimant, the request from HSUK was generic, in other words to showcase projects the Respondent was involved in generally, and not specific to BME families.

2.2.2. Was a role of baby massage previously offered to the Claimant? If so, on 28 June 2021 was the baby massage training and the role that had been previously offered to the Claimant withdrawn by Sarah Fisher of the Respondent and on 7 September 2021, had a new person been offered the role, namely Sarah Moore?

117. This complaint failed on its facts. There was no evidence before us of any "role of baby massage" ever being offered to the Claimant. It was not mentioned in her contract or in her job description. Further, no such role was undertaken by any other employee nor was it a substantial part of any other employee's role. As such, it could not have been withdrawn. The detriment on which the Claimant relied was thus not made out. In any event, the Claimant did not establish a prima facie case that she was in this respect subjected to less favourable treatment because, as just said, no-one else had any such role. We were satisfied by the Respondent's evidence that Sarah Moore only facilitated creche sessions whilst others were engaged in supervising massage, and so concluded that Sarah Moore was not more favourably treated than the Claimant. The Claimant also failed to establish a prima facie case that any decision not to progress her in baby massage work was because of race. We noted:

117.1. It was clear from the probation review document – which we have made clear we accept as the record of her discussions with Ms Fisher on 28 June 2021 – that the idea did not progress because the project was not funded and not an immediate priority.

117.2. A Black employee did subsequently do baby massage. Whilst she was not African, this does very much suggest that the decisions the Respondent took in this respect were not influenced by considerations of race.

117.3. The probation document recorded that the Claimant was to be trained in baby massage in the future.

2.2.3, 2.2.5 and 2.2.6. These complaints can be taken together – they concerned the Claimant's suspension, being called to an investigation meeting and then being called to a disciplinary hearing.

118. As noted above, we were not dealing with an unfair dismissal case, although as also already indicated, unreasonable conduct can lead to adverse inferences being drawn if there is no explanation for it.

119. Safeguarding was (and remains) clearly of critical importance to the Respondent's very existence as a charity and, of course, of critical importance to the children and families it supports. In respect of the training the Claimant received in this subject area:

119.1. She had volunteer training on safeguarding which was the same as that which she would have been given as a new employee.

119.2. It could have been refreshed sooner, especially as the nature of the Claimant's relationship with the Respondent had changed, but she also had some formal supervisions and regular Friday catch ups with Ms Fisher as well as online group discussions with Ms Redding.

119.3. Her training for her role as a governor would have been helpful, even if provided in a different context, as would the work she did in her Level 3 Diploma.

119.4. Training at levels 3 and 4 was to come during the probation period, and it was not clear to us why this was not done, but the fact remains that it would have covered things the Claimant was not expected to do in her role (outside reporting and escalation).

119.5. She also had some help informally from Mrs Ellis in relation to recording interactions with families.

120. In short, the Respondent could perfectly reasonably conclude that the training the Claimant had received was adequate to equip her to identify safeguarding concerns and take the action appropriate to her level of authority. As to the disciplinary process:

120.1. We saw nothing untoward in the circumstances by which Mrs Ellis came to identify concerns in the Claimant's notes. We could understand how she might do so when checking the records of volunteers.

120.2. It was obviously reasonable for Ms Fisher to audit the Claimant's notes given the Claimant's email of 25 August 2021.

120.3. The Respondent plainly and genuinely thought that the Claimant's notes and her failure to raise ROCAs raised safeguarding issues. We thought that the explanations its witnesses gave of these matters and why they were of such concern, were wholly credible, notwithstanding the context the Claimant quite rightly sought to emphasise when explaining her conduct to us.

120.4. The Respondent provided us with a perfectly reasonable explanation of why suspension was necessary, one which in no sense suggested that an adverse inference should be drawn. Mrs Ellis was not suspended, but she was not in materially the same circumstances as the Claimant. She had failed to spot

something in another person's records, whereas the Claimant had failed to identify a safeguarding concern arising in her own interactions with a family and to report it. Thus, whilst Ms Fisher's explanation of the confusion in her statement as to who decided to suspend the Claimant was unpersuasive, it was absolutely clear to us why that decision was taken, and it had nothing to do with the Claimant's race.

120.5. The safeguarding concerns also fully explain why the Claimant was called to an investigation meeting and disciplinary hearing, which the Claimant essentially accepted.

120.6. The fact that the Respondent did not need to go through a disciplinary process at all and could simply have dismissed the Claimant as a probationer, was powerful evidence against any adverse inference being drawn. It indicated that, contrary to the Claimant's case, the process was a genuine attempt to explore the issues and not pre-designed to dismiss her.

120.7. The Respondent made an exception to its normal policy as to who the Claimant could bring to the disciplinary hearing as her companion (Mr Ujukwu).

120.8. The Claimant was not replaced by Ms Moore. She was an addition to the team.

120.9. Action was taken against Mrs Ellis, and steps were taken in relation to Ms Fisher, in respect of the same incidents. First, that shows the seriousness with which the Respondent treated the issues. Secondly, whilst they were not comparators as they were not in materially the same circumstances (as we have explained), what happened with them was instructive as to how a hypothetical comparator would have been treated, namely in the same way as the Claimant.

120.10. We were concerned that Ms Redding did not have the Claimant's full records at the disciplinary hearing, as the context of the first issue in particular was important, but that did not in our judgment affect the validity of the Respondent's concerns or the veracity of its explanations of why it acted as it did.

120.11. It seems clear the Respondent did not want to dismiss the Claimant, given the full disciplinary process it followed and the fact that Ms Redding did not make a decision at the end of the disciplinary hearing.

121. In summary, whilst we were in no doubt that the Claimant was subjected to detriments by being suspended and called to a disciplinary hearing, and in all likelihood by being called to an investigatory meeting, she did not in any of these respects make out a prima facie case that she was thereby less favourably treated or prove something more than detrimental treatment from which it could be inferred that what the Respondent did was because of race.

2.2.4 On 31 August 2021, did Sarah Fisher of the Respondent write to the Claimant and say "just confirming that it's not your own as it's not what I thought I'd given you. Easier to ask than check the old invoices"? This allegation relates to the Respondent checking whether the Claimant had returned the correct laptop.

122. The Respondent accepts that Ms Fisher sent this message. There was however no evidence before us that it amounted to racial profiling or

stereotyping. In fact, Ms Fisher's evidence indicated that she recognised the laptop as belonging to the Respondent, as it had been used by someone else before. That was why she was surprised and the reason for her question. It would have been better for her simply to check the position herself, given the sensitivity of the Claimant having just been suspended, but the Claimant has not established that Ms Fisher – no doubt being very busy as a manager in a small organisation – would have done anything differently with others or that her question was because of race. In context, we could not see either how the Claimant could reasonably say that by this enquiry she was subjected to a detriment.

2.2.7 Did Sarah Fisher and/or Jackie Redding of the Respondent forge the Claimant's signature on 22 September 2021?

123. Strictly speaking, this complaint failed on its facts as the Claimant's signature was not forged. It was a typed entry into the probation review document, with no attempt to copy the Claimant's actual signature. There was in any event plainly no less favourable treatment in that it was the Respondent's standard practice for all employees' signatures to be added to such documents in this way. Whether it is good practice or not can be debated, but it was wholly understandable as an explanation of what happened, given the Covid-19 lockdown and the drive towards a paperless office. Further, what Ms Fisher did was plainly not because of race but because she believed the Claimant's email telling her, "All good", meant that the Claimant had checked the document and was fine with it. Given that context, we were not satisfied that the Claimant could reasonably say that she was subjected to a detriment either. Again, therefore she did not prove facts that established a prima facie case of discrimination.

2.2.8. Did Sarah Fisher and Vivienne Ellis of the Respondent provide a lack of adequate supervision in contravention of the Respondent's Staff Supervision and Appraisal policy for the Claimant between 4 January 2021 and 29 September 2021?

124. We were not taken to the policy in question. Furthermore, this complaint had to be seen in the context of the support given to the Claimant overall, which we have summarised above. The Claimant did not establish therefore the detriment on which the complaint relied. In any event, it would have failed on the question of less favourable treatment as Ms Fisher was reprimanded by the Trustees in relation to supervision across the board, not just in relation to the Claimant, so that if there was any shortcoming in the supervision arrangements, it related to all staff.

Summary

125. In summary, all complaints of direct discrimination failed on the basis that the Claimant did not prove facts (the detriment on which she relies and/or that it was a detriment and/or less favourable treatment and/or something more than a difference in race and in treatment) from which the Tribunal could conclude, in the absence of an adequate explanation, that she had been discriminated against. Even had the burden of proof passed to the Respondent (which we concluded it did not), in each instance we were satisfied that the Respondent had shown that its acts or omissions were in no sense whatsoever because of race.

Indirect discrimination

126. As explained in our summary of the law, this complaint required the Claimant to prove that the PCP was applied to her and to people who were not Black African, putting her and people who were Black African at a particular disadvantage by comparison. As noted above, the Respondent did not advance a justification argument. The PCP is set out at point 3.1.1 of the list of issues in the Annex – "the Respondent dismisses statements from employees who confirm that their first language is not English without any consideration for racial barriers and disadvantages for people whose first language is not English". The particular disadvantage (see the list of issues at point 3.4), put at its best, was that the Claimant thus had an unfair disciplinary hearing.

127. The complaint failed on its facts. First, there was no evidence that the Respondent had such a practice as is described in the PCP. Secondly, whilst we accept that a PCP can be something applied as a one-off, the evidence was very much that any statements the Claimant made at the disciplinary hearing (which is when she says the PCP was applied) were not dismissed. It was a two-hour hearing, she was given a full opportunity to ask questions, even of the hearing chair, and when she said her first language was not English, this was not dismissed, but explored and the phrase she did not understand – "safety net" – explained.

128. The complaint would also have failed on basis that there was no evidence the Respondent applied or would have applied the PCP to persons who are not Black Africans. It would have failed too on the alternative basis that there was no evidence put to us to suggest that Black African persons were or would have been put to a particular disadvantage in comparison, for example, to Asian or other White employees whose first language was not English, who seemed to us – given how the PCP was constructed – to be the required comparator group. Put simply, we had no evidence that persons in the comparator group did not have or would not have had statements they made dismissed as well – though we add that, given the Claimant's experience at her disciplinary hearing as summarised above, it is very likely that, like with her, statements they made would not have been dismissed.

129. In any event, we could not accept that the Claimant herself was put to any disadvantage in the disciplinary hearing. She was able to conduct it without any language difficulty over two hours, except in relation to one phrase, which was explained to her and in relation to which she had opportunity for discussion with Mr Ojukwu. And as we have said, she was given a full opportunity to have her say. The hearing was not unfair.

130. For all of these reasons the complaint of indirect discrimination failed.

Harassment

131. Again, it was for the Claimant to establish a prima facie case in relation to her complaints of harassment. In other words, the burden was on her to prove facts from which we could conclude in the absence of an adequate explanation that she was subjected to unwanted conduct, related to race, which had the purpose or effect of violating her dignity or creating the requisite environment. Again, we take each allegation in turn using the numbering found in the Annex.

4.1.1 – On 19 May 2021 and other dates did Sarah Fisher of the Respondent upload pictures of the Claimant on the Respondent's Facebook page despite the Claimant having told the Respondent not to do so because of the Claimant's experiences with domestic violence, including specific safety concerns relating to the Claimant's children and the Claimant herself because of their country of origin?

132. We accepted that this was unwanted conduct, though would add that Ms Fisher did not know it was unwanted. That said, for the reasons already given in relation to the parallel complaint of direct discrimination, the Claimant did not establish a prima facie case that the conduct was in any sense related to race.

4.1.2. In or around Summer 2021, did Sarah Fisher of the Respondent single out the Claimant by asking if she had seen a missing cheque and subsequently checked the Claimant's pile of papers?

4.1.3. In Summer 2021, did Sarah Fisher of the Respondent verbally abuse the Claimant and direct towards the Claimant the comment "someone did something very stupid" when speaking about the use of a shredding machine?

133. We took these complaints together. In relation to both, the facts on which the Claimant relied were not made out on the evidence. The Claimant's own evidence was that Ms Fisher said that she herself may have put the cheque on the wrong pile of papers by mistake; as set out above, we found that everyone's papers were searched; and we also found that Ms Fisher's comment was said to everyone – it was not directed at the Claimant.

134. There was thus no unwanted conduct as pleaded, in that the Claimant was not singled out or abused nor were the question or comment directed at her. Further, she did not establish any case that the conduct was related to race. There was no profiling or stereotyping of the Claimant. The question and comment of themselves were not inherently race-related and contextually they were not so related either. Our view of the totality of the evidence did not lead us to any inference that Ms Fisher was influenced, consciously or unconsciously, by any racial stereotype in these respects or otherwise. We refer to the contextual evidence summarised at the start of our Analysis and at its conclusion below.

4.1.4. On 22 September 2021, did Jackie Redding of the Respondent interrupt the Claimant during her disciplinary hearing?

135. It was accepted that Ms Redding did interrupt the Claimant and we could accept that the interruptions were unwanted conduct – that is not a high hurdle. That said, the Claimant did not establish a prima facie case that the interruptions were in any sense related to race, had the required purpose or could reasonably be said to have had the required effect. We have already made clear that over two hours, the Claimant clearly had her say and asked many questions of both Ms Fisher and Ms Redding, which were answered. It was very much part of Ms Redding's role – and to the Claimant's benefit – to keep the hearing on track and we can see nothing which the Claimant was not permitted to raise. She seems to have raised everything she wished to, often repeatedly.

4.1.5 On or around 22 September 2021, did the Respondent deliberately make misrepresentations and irregularities throughout the disciplinary process which contributed towards the Claimant's resignation?

136. There were a number of parts to this particular complaint:

136.1. First, Ms Redding's use of the phrase, "What Sarah is trying to say". We could not see how that was a misrepresentation or irregular, and thus unwanted conduct, when it was helpful in seeking to assist understanding and explanation, still less that it was something that had the requisite purpose or could reasonably be said to have had the required effect. We could not understand either how it was said to be related to race. It was of benefit to the Claimant.

136.2. The second part concerned minutes being changed, but as we have said, we were not taken to any evidence that they were. The alleged unwanted conduct was therefore not established.

136.3. The third part was the probation period being extended. As set out above, we found as a fact that this was communicated to the Claimant in June 2021 and not only in September, so that there was no misrepresentation or irregularity in this respect either. Again therefore, the unwanted conduct was not made out. In any event, though perhaps not ideal to extend the probation for reasons apparently beyond the Claimant's control, we were satisfied with the explanation of the reasons for it which were not related to race.

136.4. Finally, there were the undated letters. Although perhaps irregular (though not misrepresentation), we could not see how this was properly unwanted conduct, related to race nor could we see how it could be said to have had the requisite purpose or effect. The Respondent provided a satisfactory explanation of how it happened, and we were conscious that it is a small organisation without a dedicated HR function.

137. For these reasons, no prima facie case was made out in relation to this complaint either.

4.1.6 On 22 September 2021, did Jackie Redding of the Respondent act towards the Claimant in a way that was dismissive? Specifically, did Jackie Redding use a dismissive tone towards the Claimant after the Claimant pointed out that Sarah Fisher of the Respondent had just said that the Claimant was dismissed?

138. This complaint failed on its facts. Ms Redding and Ms Fisher were not dismissive in relation to the Claimant raising the question of whether Ms Fisher had said she was dismissed. The Claimant had plainly misunderstood what was said, and whilst Ms Redding now thinks she made things worse by referring to a "slip of the tongue", she clearly sought to explain what had been said and reassure the Claimant, the very opposite of dismissing her concerns. The unwanted conduct was, again, not established. Further, we could not see how, even if Ms Redding's comment caused some lack of clarity, that it was related to race or that it had the required purpose or effect. It was a comment without any racial connotation or connection and, at worst, one that failed to clarify the situation.

4.1.7 On 22 September 2021, did Jackie Redding and Sarah Fisher of the Respondent not take the Claimant seriously when she raised a question about Jackie Redding having a conflict of interest by chairing the meeting whilst she was also the person who offered safeguarding training and the designated safeguarding lead?

139. This complaint also failed on its facts in that the alleged unwanted conduct was not made out. Ms Redding plainly took this matter seriously. She had considered the point carefully and discussed it with another Trustee beforehand. She gave the Claimant an explanation of why she did not consider herself conflicted and in doing so she provided logical and wholly reasonable explanations – in particular, the size of the organisation and her expertise in safeguarding. The fact that she now considers it might have been better to appoint someone else was nothing to the point. Further, there was nothing in Ms Redding's or Ms Fisher's conduct in this regard that was related to race or could sensibly be said to have had the required purpose or effect. The explanations were professional and helpful.

4.1.8 On 23 September 2021, did the totality of the Respondent's actions in subjecting the Claimant to discrimination and harassment lead to the Claimant's resignation?

140. We were in no doubt that the Claimant was unhappy with what had taken place, up to the point of her resignation, but given our findings that up to the date of her resignation, the Respondent did not discriminate against or harass her, she did not establish that she resigned because of discrimination or harassment and this complaint failed accordingly. Obviously, simply saying one has resigned because of discrimination is not sufficient to establish one's case.

4.1.9 Did the Respondent from September 2021 onwards, delay in sending the Claimant the disciplinary hearing minutes?

141. There was a delay, and notwithstanding that the Claimant had a full recording, we were prepared to accept it was unwanted. She did not establish however a prima facie case, or indeed any case at all, that the delay was related to race; it clearly was not. The delay was simply because the Claimant had resigned and so the disciplinary process – which if it had continued would have resulted in the prompt provision of the minutes as Ms Redding had promised – was aborted.

4.1.10 In November and December 2021 did Mr Grigg fail to intervene in addressing the Claimant's concerns about her treatment that led to her resignation?

142. There was no argument from the Respondent that it was not responsible under the Act for Mr Grigg's conduct. We therefore treated this complaint on its merits. On a generous interpretation of the complaint, given Mr Grigg did not intervene to address the Claimant's concerns substantively, we were prepared to say that she had established the conduct on which this complaint relied and that it was unwanted. Again however, she did not establish facts from which we could conclude that Mr Grigg's actions or inactions were related to race or had the required purpose or effect.

143. Mr Grigg did not have a change of heart as the Claimant alleges. He was of course willing to explore the matter initially, not least because Mr Ojukwu indicated that the Claimant was an employee of HSUK, but also because otherwise Mr Grigg could not know if he should intervene or not. Secondly, he plainly sought the views of both parties – extensively in the Claimant's case. Thirdly, his reason for not intervening, rightly or wrongly (we thought rightly), was his belief that the local process with the Respondent had not been exhausted. That is confirmed by his making clear that he would get involved more substantively if that process was followed first and indeed by his providing details for the Claimant to complain about him.

Summary

144. All the complaints of harassment were dismissed on the basis that the Claimant did not prove facts from which we could conclude that the unwanted conduct on which she relied took place and/or that it was unwanted and/or that it related to race and/or that it had the requisite purpose or effect.

Victimisation

145. Finally, the victimisation complaint failed on the basis that the Claimant did not establish that she did a protected act or that the Respondent believed she would do a protected act.

146. The alleged protected act is set out at point 5.1.1 in the Annex – "the Claimant supported a black refugee mother on 8 June 2021 who was upset because her family's photograph was uploaded to the Respondent's Facebook page without consent". The Claimant could not tell us however what she said to the Respondent on 8 June 2021 or what the Respondent believed she might do. That of itself was a considerable difficulty for her in this regard. Being flexible however, we assumed that she said to the Respondent that the mother in question was upset because her family's photograph was uploaded to the Respondent's Facebook page without consent.

147. We appreciate that victimisation is not a straightforward concept, especially for a litigant-in-person, but the Claimant was unable to explain anywhere near to our satisfaction why this was a protected act or meant that the Respondent believed she (it could not be the mother) would do a protected act. It plainly was not (and did not indicate) a claim under the Act, the support of someone bringing such a claim, or a complaint of breach of the Act. As to whether it was something done in connection with the Act, we agreed with Mr Gittins that whatever was done must have been capable of alerting the Respondent to the fact that something had been done or might be done under the Act. There was no indication whatsoever that the Claimant's statement bore any relation to the Act.

148. In any event, we did not see how the two detriments complained of were in any way influenced by any protected act or related belief. We have set out what we concluded were the reasons for the situation with the baby massage role. As to the reference, whilst Ms Fisher should have taken greater care in answering the specific question about termination of the Claimant's employment and could have provided more context than she did, the reason she wrote what she did was clearly the safeguarding concerns with the Claimant and not the refugee mother's concerns about photographs.

Conclusions

149. Stepping back to look at the totality of the evidence to see if certain additional matters the Claimant brought to our attention and the evidential picture overall called into question our conclusions on the specific allegations, we were satisfied that they did not:

149.1. We noted that the Claimant was the only BME employee at the relevant times, but we also noted that the Respondent is a very small organisation and that it has since employed two more BME staff out of a total complement of between five and seven.

149.2. We noted that all of its Trustees are White, so that the Respondent clearly has further work to do in that regard to properly represent the community it serves, but that fact of itself was not sufficient to lead to adverse inferences being drawn, not least given the general issues in this regard in the charity sector referred to by Mr Grigg in his evidence.

149.3. Evidence that BME families were treated less favourably than white families may have led to an adverse inference that the Claimant had been discriminated against, but as we have said, there was no evidence to lead to any such conclusion.

149.4. We have noted the attention span and timekeeping comments in the probation review. We were not satisfied that these were stereotypes of Black African people, having heard no evidence related to the same, but even if they were, the totality of the evidence was more than clear that no such stereotypes operated on Ms Fisher's mind, whether consciously or unconsciously, for the reasons we have set out.

149.5. We were entirely satisfied with the Respondent's explanations of the Claimant's summer holiday arrangements (they were in fact of benefit to the Claimant, enabling her to take most of the six-week period off) and the need for her and other staff to report when going into and leaving family homes (again, of benefit).

149.6. Finally, the misspelling of the Claimant's name by Ms Redding was rightly pointed out by the Claimant and very regrettable, but we accept that it does happen in the speedy sending of emails, that Ms Redding has misspelt White people's names as well, and that both Ms Fisher and Ms Redding herself took the matter seriously and sought to address it.

150. In overall summary, whilst there are some things the Respondent could have done better, the Claimant did not establish a prima facie case of discrimination, harassment, or victimisation. Even if it could have been said that she had, we were satisfied that the Respondent showed that its actions were in no sense whatsoever because of the Claimant's race or any protected act had there been one. The question of time limits did not fall to be considered. All of the Claimant's complaints failed and were dismissed.

Note: The parties attended the hearing remotely. The form of remote hearing was V - video.

Employment Judge Faulkner
Date: 10 July 2023

Note

All judgments and written reasons for the judgments (if provided) are published, in full, online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties in a case.