EMPLOYMENT TRIBUNALS

Claimant: Miss R Grey

Respondent: RL Retail Services Ltd

Heard at: London Central (conducted by video using CVP)

On: 22-26 & 30 August 2022

Chambers: 26 & 27 September, 24 October 2022, 16 & 17 March and 17 August 2023

Before: Employment Judge Khan
Ms S Went
Mr B Furlong

Representation
Claimant: In person
Respondent: Mr S Brittenden, counsel

JUDGMENT

The unanimous judgment of the tribunal is that:

(1) The complaint of race-related harassment is well-founded in respect of allegation 2(b)(2) and it is just and equitable to extend time in relation to this allegation.

(2) All other complaints fail and are dismissed.

REASONS

1. By an ET1 presented on 30 November 2020, the claimant brought complaints of direct race discrimination or race-related harassment. The respondent resisted these complaints.

2. The respondent's business was transferred to Escada (UK) Limited on 25 June 2021. As is recorded in the tribunal's Case Management Summary and Order which was sent to the parties on 9 November 2021, no application was made

to add this company as a second respondent to these proceedings, for the reason stated in that document.

3. We refused the claimant's application to amend the claim at the end of day two of the hearing and granted the claimant's application to amend the claim on day five (issue 2(c)), for the reasons we gave.

4. Although this hearing had been listed to determine all issues in the case, including remedy, we decided to hear evidence and submissions only in relation to all liability issues because we were satisfied that there was insufficient time available in which to deal with remedy.

The issues

5. There was an agreed list of issues which was refined during the hearing following discussion with the parties. We were required to determine the following issues:

A. Direct race discrimination (section 13 EqA)

1. The claimant describes her racial group as mixed heritage i.e. black Caribbean and white English.

2. Has the respondent subjected the claimant to the following treatment falling within section 39 of the Equality Act 2010 ("EqA"):

   a. Pressured to sign a flexible working form by Nathan Rickerby on 16 August, 26 September and 12 October 2019 and by Daniel Poynter on 13 September 2019.

   b. Subjected to racial abuse on 2 and 3 November 2019 as set out in the claimant's schedule of detriment.

      On 2 November 2019:

      (1) Mr Rickerby asked the claimant whether she had been drinking the night before or if she had "taken anything".
      (2) Mr Rickerby said to the claimant "you're the European Union aren't you, your being mixed race and all", "you're the United Nations" and "you're the United Colours of Benetton".
      (3) Mr Rickerby brought the claimant a croissant from the break room and persuaded her to take a bite of it. Once the claimant had eaten some of the croissant, he told her that he had spat on it.
      (4) Rania Anagnostopoulou took the claimant's perfume from her locker and sprayed the perfume on her arm and put her arm in front of the claimant's face.

      On 3 November 2019:

      (5) Mr Rickerby failed to open a parcel from a client that was addressed to "The Manager" and the claimant.

(6) Mr Rickerby constantly referred to himself as "The Manager" in front of customers and the claimant.
(7) Mr Rickerby made faces behind the claimant's back when she was trying to serve a customer.
(8) Ms Anagnostopoulou took £10 from the claimant's bag whilst in a locker on the Respondent's premises.
(9) Ms Anagnostopoulou stuck products from the new collection over the cupboard doors in the breakroom and, whilst doing so, pulled Sellotape loudly.
(10) Ms Anagnostopoulou stretched over the claimant, tutted and sucked her teeth whilst looking at the claimant.
(11) Ms Anagnostopoulou raised her eyebrows and made kissing faces at the claimant.
(12) Ms Anagnostopoulou made monkey poses.
(13) Ms Anagnostopoulou stood on a chair and pulled the trays that were on top of the lockers roughly back and forth and wiped the top of the locker with her hand so that dust began to fall on the claimant.
(14) Gerda Kvikiyte approached the claimant on the shop floor and said "look at that couple over there…that's what happens when you're white".

c. "Harassed" to put her complaint in writing by Mr Poynter on 30 December 2019, 3 and 6 January 2020 *[added by amendment on 26 August 2022]*.

d. "Harassed" during her sick leave to put her complaint in writing by Sarah Smith on 1 May and 24 July 2020.

e. Not responded to by the respondent in a timely manner in relation to her grievances of 3 and 16 August 2020.

f. Her matters not taken seriously enough by Daniel Poynter, in not preserving the CCTV to substantiate the claimant's claim.

g. From 6 November 2019 to 29 September 2020, the respondent failed to take the issues which the claimant had raised in respect of the matters subsequently forming part of her grievances (submitted on 3 August 2020 and 16 August 2020) seriously.

3. Has the respondent treated the claimant as alleged less favourably than they treated or would have treated the comparators? The claimant relies on a hypothetical comparator; and additionally, Migle Meskonyte as an actual comparator in relation to allegation 2(a).

4. If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the claimant's race?

5. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

B. Harassment (section 13 EqA)

6. Alternatively, in respect of any of the treatment listed above not found to have been direct discrimination, did the respondents engage in the alleged unwanted conduct?

7. If so, did it relate to the claimant's race?

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

9. If not, did the conduct have this effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

10. In considering whether the conduct had that effect, the tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

C. Jurisdiction (section 123 EqA)

11. The ET1 was presented on 30 November 2020. In early conciliation, day A is 1 November 2020 and Day B is 2 November 2020. Accordingly, any act or omission which took place before 2 August 2020 is potentially out of time, so that the tribunal may not have jurisdiction.

12. Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

13. Was any complaint presented within such other period as the tribunal considers just and equitable?

Relevant legal principles

Direct discrimination

6. Section 13(1) EqA provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

7. The protected characteristic need not be the only reason for the treatment but it must have been a substantial or "effective cause". The basic question is "What, out of the whole complex of facts before the tribunal, is the 'effective and predominant cause' or the 'real or efficient cause' of the act complained of?" (*O'Neill v Governors of St Thomas More RC Voluntarily Aided Upper School and anor* 1997 ICR 33, EAT).

8. It is only necessary to consider the mental processes of the putative discriminator if the factors that have influenced them are not clear. The test is what was the putative discriminator's conscious or subconscious reason for

treating the claimant unfavourably (see *Nagarajan v London Regional Transport* 1999 ICR 877, HL). Thus, where the reason for the treatment is patently the protected characteristic relied on or where it is something that it is a proxy for it (see *James v Eastleigh Borough Council* [1990] ICR 544, HL) or where it is neither but clearly something which is not because of the relevant protected characteristic then it will not be necessary to conduct such an exercise.

9. Under section 23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case (see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11).

Harassment

10. Section 26(4) EqA provides that:

> *(1) A person (A) harasses another (B) if –*
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> *(b) the conduct has the purpose or effect of –*
> *(i) violating B's dignity, or*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
> *…*
>
> *(4) In deciding whether conduct has the effect referred to in section (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.*

11. In deciding whether the conduct "related to" a protected characteristic consideration must be given to the mental processes of the putative harasser (see *GMB v Henderson* [2016] IRLR 340, CA).

12. In *Pemberton v Inwood* [2018] IRLR 542, CA Underhill LJ re-formulated his earlier guidance in *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336, EAT, as follows:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b)). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

The claimant's subjective perception of the offence must therefore be objectively reasonable.

13. In *Grant v HM Land Registry* [2011] EWCA Civ 769, CA, Elias LJ emphasised that "violating dignity", and "intimidating, hostile, degrading, humiliating, offensive" are significant words:

> "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

A similar point was made by the EAT in *Dhaliwal*:

> "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 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."

This was endorsed by the EAT in *Betsi Cadwaladr University Health Board v Hughes & Ors* UKEAT/0179/13/JOJ which said this:

> "The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. Violating may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence."

Detriment

14. Section 39(2) EqA provides that:

> *An employer (A) must not discriminate against an employee of A's (B) –*
> *…*
>
> *(a) by subjecting him to any other detriment.*

15. A complainant seeking to establish detriment is not required to show that she has suffered a physical or economic adverse consequence. It is sufficient to show that a reasonable employee would or might take the view that they had been disadvantaged, although an unjustified sense of a grievance cannot amount to a detriment (see *Shamoon v Chief Constable of RUC* [2003] IRLR 285, HL). Any alleged detriment must be capable of being regarded objectively as such (see *St Helens MBC v Derbyshire* [2007] ICR 841). This is reflected in the guidance provided by the EHRC Employment Code of Practice (2011) that "generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage".

Burden of proof

16. Section 136 EqA provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred.

17. Section 136 accordingly envisages a two-stage approach. Where this approach is adopted, the claimant must establish a prima facie case at the first stage. This requires the claimant to prove facts from which a tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination. This requires something more than a mere difference in status and treatment (see *Madarassy v Nomura International plc* [2007] ICR 867, CA) or, in relation to harassment, something more than establishing that the conduct was unwanted and had the proscribed effect (see *Raj v Capita Business Services Limited* [2019] IRLR 1057, EAT, at para 58).

18. The two-stage approach envisaged by section 136 is not obligatory and in many cases it will be appropriate to focus on the reason why the employer treated the claimant as it did and if the reason demonstrates that the protected characteristic played no part whatsoever in the adverse treatment, the complaint fails (see *Chief Constable of Kent Constabulary v Bowler* UKEAT/0214/16/RN). Accordingly, the burden of proof provisions have no role to play where a tribunal can make positive findings of fact (see *Hewage v Grampian Health Board* [2012] IRLR 870, SC at para 32).

19. In exercising its discretion to draw inferences a tribunal must do so based on proper findings of fact (see *Anya v University of Oxford* [2001] EWCA Civ 405 [2001] IRLR 377, CA).

20. Tribunals must be careful to avoid too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground (see *Igen Ltd v Wong* [2005] IRLR 258, para 51).

Mutually exclusive complaints under the EqA

21. A tribunal cannot find both direct discrimination under section 13 EqA and harassment under section 26 in respect of the same treatment. This is because section 212(1) provides that:

> *'detriment' does not, subject to subsection (5) include conduct which amounts to harassment*

Time limits: just and equitable extension

22. Section 123 EqA provides that:

> *(1)…Proceedings on a complaint within section 120 may not be brought after the end of –*
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
> *(b) such other period as the employment tribunal thinks just and equitable.*

23. The discretion to extend time on just and equitable grounds is the exception to the rule but does not require exceptional circumstances. The burden is on the claimant to show that this discretion should be applied. The tribunal has a very broad discretion which should not be fettered or filtered by the use of the checklist of factors enumerated by the EAT in *British Coal Corporation v Keeble* [1997] IRLR 336. A multifactorial approach is required by the tribunal to assess and take account of all the factors in a particular case which it

considers relevant, with no single factor being determinative; factors which will almost always be relevant are (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent, for example, by preventing or inhibiting it from investigating the claim while matters were fresh (see *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] ICR D5; and also *ABM University Local Health Board v Morgan* [2018] IRLR 1050). Any explanation for the delay and the nature of any such reason are relevant matters but there is no requirement for a tribunal to conclude that there was a good reason for the delay before it can conclude that it is just and equitable to extend time (see *Morgan*). The tribunal must also consider the overall prejudice that each party would suffer if the time limit were to be extended or not.

The evidence and the procedure

24. The hearing was a remote public hearing, conducted using the Cloud Video Platform (CVP) under rule 46. In accordance with rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net.

25. We heard evidence from the claimant. At the start of day two the claimant reported that she was unable to participate by video because her laptop was inoperative and it was agreed that she would continue to give evidence via telephone. The claimant was able to participate by video from day three.

26. For the respondent, we heard from: Nathan Rickerby, Store Manager; Rania Anagnostopoulou, former Associate Store Manager; Daniel Poynter, former Senior People & Development Advisor; Sarah Smith, former EMEA People & Development Manager; and Michelle Green, Senior People & Development Manager.

27. Ms Anagnostopoulou gave evidence pursuant to a witness order made under rule 32.

28. The respondent also relied on the witness statement of Sara Hollen, People & Development Business Partnership Lead, Nordics, which was taken as read because the claimant did not take issue with this evidence.

29. There was a hearing bundle of 368 pages. Three new documents were added by consent. We read the pages to which we were referred.

30. We also considered the written and oral submissions made by the parties.

The facts

31. Having considered all the evidence, we make the following findings of fact on the balance of probabilities. These findings are limited to points that are relevant to the legal issues.

Credibility and reliability

32. At the outset, we make the following observations in relation to the credibility and reliability of the witnesses:

(1) The credibility and reliability of witnesses and the weight to be attached to the evidence they give are core considerations for every fact-finding tribunal and especially in a case such as this in which there is a stark variance between the uncorroborated evidence of the principal actors in relation to central allegations.
(2) We start with the presumption that all witnesses seek to give truthful evidence whilst recognising that a truthful witness is not always an accurate one.
(3) We also keep in mind that not all witnesses are truthful.
(4) We recognise that memory is an inherently reconstructive process (see *Gestmin SGPS SA v Credit Suisse UK Ltd* [2013] EWHC 3560 (Comm) at paras 16–21)).
(5) Throughout our extensive deliberations we reminded ourselves that it was necessary to consider each of the allegations on their own merits and of the need to avoid taking a generalised approach to credibility, however, we also remained mindful of any other findings we made on credibility and reliability that we considered to be relevant.
(6) As will be seen, we find that in important respects both the claimant and Nathan Rickerby were unreliable witnesses. We find that much of the claimant's evidence lacked credibility and reliability, for the reasons set out below. We also agree with Mr Brittenden's submission that some of the claimant's allegations were inherently implausible, and find that her evidence was impaired by her belief that her managers and co-workers conspired to cause her harm. In respect of the one allegation we have upheld, we find that Mr Rickerby gave evidence which was not only implausible and evasive but dishonest. This gave us pause for thought when we considered the other allegations which the claimant had made against Mr Rickerby and also the weight to give to his other evidence. However, the weight we gave to the claimant's disputed evidence also had to be assessed by reference to the number and nature of our findings in relation to her credibility and reliability (see paragraphs 43, 46, 51, 53, 60, 62, 64, 65, 67, 68, 69, 70, 74, 83 and 101).

33. The claimant is of mixed heritage i.e. black Caribbean and white English.

34. It is not disputed that the claimant has suffered racial abuse as a woman of mixed heritage which is wholly unrelated to her employment with the respondent.

35. She has been employed by the respondent since 5 November 2015. At all relevant times, she has been employed as a Sales Associate Stylist based at the respondent's flagship store in Sloane Square, and contracted to work for 16 hours per week.

36. Nathan Rickerby became the Store Manager at the Sloane Square store in June 2019. We accept his unchallenged evidence that on commencing this role he found that working practices under his predecessor had been somewhat lax and he was keen to ensure that company procedures were more strictly applied.

37. The claimant was one of seven part-time staff. The other six were recruited by Mr Rickerby and began working at the store between July and September 2019.

38. In early October 2019, Rania Anagnostopoulou joined the store as Associate Store Manager (People Experience).

39. The claimant was on sick leave from 2 August until 20 September 2019 which meant that she had spent very little time working alongside her managers and colleagues when the events on which her claim is centred are alleged to have taken place.

Flexible working (allegation 2(a))

40. Although there was a change of terms and conditions form dated 25 May 2019, [61k] which provided that the claimant was required to work any two days of the week except Tuesday or Thursday, we accept the unchallenged evidence of Mr Rickerby and Daniel Poynter, Senior People & Development ("P & D") Advisor, who provided HR support to Mr Rickerby, that they had not seen this document before these proceedings and understood that the claimant could be rostered to work on any day; this is consistent with an email that Mr Rickerby sent to the claimant on 16 August 2019 [63] (see paragraph 44)). It is also notable that the claimant subsequently agreed that she was employed on a 16-hour "full flexibility" contract which meant that she could work on any day of the week [216].

41. It is agreed that there had been a practice in the store for staff to request ad hoc changes to the roster which continued under Mr Rickerby. The claimant's unchallenged evidence, which we accept, was that she had emailed her availability around her study commitments to the previous store manager which had been accommodated. In this way, she had been routinely rostered to work on weekends, according to her preference and availability, although she also worked on other days of the week as needed.

42. The claimant was not therefore contracted to work only on weekends. As much was implied by her email to Mr Rickerby dated 11 August 2019 [62], headed 'Working weekends', informing him:

> "I just wanted to let you know moving forward that I can only work Saturdays and Sunday's due to my commitments outside of work".

Although this was not framed as a request, it required authorisation from Mr Rickerby because the claimant was seeking a change to her working pattern. Nor did the claimant state that she sought this change for a limited duration, and we do not therefore find that it constituted an ad hoc request to change the roster on a one-off or short-term basis, as the claimant maintained when giving evidence. Consequently, it was reasonable for Mr Rickerby and Mr Poynter, to whom Mr Rickerby forwarded this email for advice, to treat this as a request to change the claimant's working pattern from any two days each week (as they understood the contractual position to be) to two fixed days on the weekend. Because of this, Mr Poynter advised Mr Rickerby that the Flexible Working Policy ("FWP") applied. We accept Mr Poynter's evidence that he would have given the same advice regardless of the race of the person who had made a request of this kind.

43. The respondent produced a table for these proceedings which listed the relevant contractual details of all seven part-time employees, including the claimant, the content of which was not challenged. Most of the other part-time

staff were rostered to work on fixed days. We accept the unchallenged evidence of Mr Rickerby that he recruited them based on their availability, which included any study commitments they had, ensuring that he was able to operate a balanced roster throughout the week. We also accept Mr Rickerby's evidence that none of the other part-time staff made a similar request to the claimant i.e. to change their working pattern at around the same time (or at a later date). We do not therefore accept the claimant's evidence that Migle Meskonyte, who started on 21 August 2019, also requested a change to her working pattern to weekends, because the claimant was unable to provide any further details or evidence to substantiate this assertion and we do not find it plausible that Ms Meskonyte, or any her other part-time colleagues, would have made such a request within such a short space of time from when they had accepted their offers of employment. Nor, accordingly, do we find that Ms Meskonyte was in materially the same circumstances as the claimant in relation to this issue.

44. The claimant and Mr Rickerby first discussed the claimant's request to change her working pattern during a telephone call on 16 August. In accordance with Mr Poynter's advice, Mr Rickerby told the claimant that she would need to submit a flexible working form so that her request could be considered. We find that Mr Rickerby's email to the claimant of the same date, with which he attached copies of the relevant pages of the respondent's Employee Handbook which related to flexible working, and a flexible working application form, is consistent with his ongoing understanding that the claimant sought a contractual change [63]:

> "At present your [sic] contracted to work 16 hours between Sunday and Saturday of any given week. If you wish for your availability to be reviewed you'll need to follow the Company Flexible Working procedure…"

Nor do we find it plausible that he would have treated the claimant's request as one necessitating a flexible working application had the claimant told him that she wanted a short-term accommodation, as she claims. This is also consistent with Mr Rickerby's evidence about this call, which we accept, that having explained to the claimant what she needed to do to progress her request, to which she made no complaint, he came away from their discussion with the expectation that the claimant would compete the form so that her request could be considered.

45. Mr Rickerby reminded the claimant, who remained on sick leave, of the requirement to report any absences and her recent failure to do the same.

46. On 29 August, the claimant forwarded a statement of fitness for work ("fit note") confirming that she was unfit for work for one week by an email in which she signed off "I am really looking forward to seeing you and the team soon" [69]. Following the expiry of this fit note, the claimant emailed Mr Rickerby again on 5 September when she told him "I look forward to seeing you all next week" [75]. Mr Rickerby forwarded the claimant's email to Mr Poynter when he commented tersely: "Update. Still no contact to the store though or confirmation of a return date". We find that this reveals his frustration about the claimant's continued failure to follow the correct procedure as well as the ongoing uncertainty about her return to work. The claimant failed to attend work the next week nor did she contact Mr Rickerby or anyone else at the store in relation to her absence. We do not accept the claimant's explanation that

the reason for her lack of communication was that her dyslexia had caused her to misread the roster because this was contradicted by her email of 5 September in which she referred to coming in to work the next week. We also take account of the claimant's oral evidence that she had made up an excuse about her dyslexia on 2 November 2019 because she felt this was a hostile situation. Nor was this the first time that the claimant had failed to report her absence. The claimant had therefore failed again to comply with the respondent's sickness reporting procedure and was absent without leave.

47. The respondent issued a first unauthorised absence ("AWOL") letter to the claimant on 13 September 2019 [82a-b]. This was based on a standard letter template and signed by Mr Poynter, on behalf of Mr Rickerby. The claimant was reminded that she was required to report her absences, informed her that her current absence was unauthorised and unpaid, and could lead to disciplinary action including dismissal. She was instructed to contact Mr Poynter by no later than 12pm on 16 September and warned that her failure to do so would result in disciplinary action.

48. The claimant's initial response was to email Mr Poynter, on the same date, to appeal against this AWOL letter. When Mr Poynter responded to explain that there was nothing to appeal against and reminded the claimant that she was required to contact him to discuss her absence, she called him. She emailed Mr Poynter later the same day when she complained that the respondent was "pressuring me to sign the flexible working contract, which I am not comfortable with" [78-80] to which Mr Poynter replied "you are not being asked to sign anything at this time", confirmed that a decision had not been made and explained:

> "my purpose in talking to you about your desire to change your availability was to inform and educate you around the process…"

Judging by this email exchange, it had evidently been a difficult conversation for the claimant. Notably, the claimant wrote that she felt Mr Poynter "interpreted me asking questions as me being insolent" [79] to which he responded that he had neither stated nor insinuated this although he agreed that he had remarked that the claimant was

> "getting upset as your tone and manner on the phone indicated that change to me…your tonal change and increasing unwillingness to discuss the matter with me".

It is also likely that their interaction was more fraught because she mistrusted Mr Poynter as a result of an incident in July 2019 when the claimant felt that he had refused to take any action to safeguard her from an ex-employee who had threatened her in the store. Although we find that Mr Poynter could have adopted a more emollient tone in this email correspondence we do not find that he pressurised her to sign the flexible working form. He understood, with good reason, that the claimant had requested a change to her working pattern, and explained what she needed to do by reference to the FWP to achieve this outcome.

49. At a return-to-work meeting on 14 September, the claimant referred to unspecified "stress related issues" in addition to her recent operation [82c].

50. Mr Rickerby raised the flexible working issue with the claimant again on 26 September 2019. She emailed him afterwards [83-4] to confirm that she would not sign a flexible working form because "it is not a legally binding document" and she was "being treated unfairly in comparison with other students and staff that work in store". She referred to ad hoc requests which she had made to the previous manager and to such other requests that her colleagues had made to Mr Rickerby. As we have found, the request made by the claimant was not equivalent. The claimant queried whether Mr Rickerby and the respondent "have another agenda, in my opinion it looks as though you are trying to performance manage me out of the business…" She noted that the respondent was

> "an equal opportunities employer therefore all employees should be treated equally when it comes to all matters, therefore you cannot selectively pick and choose who can and can't sign such documents. If this is a company policy then the whole company should be following it including all of the students that are currently working in store"

Although she had alluded to disparate treatment she did not explicitly state that she was being discriminated against by reference to her race or any other protected characteristic. She explained that she would not be able to work on the "few Mondays and Thursdays next month" she had been rostered because of her studies and requested a formal meeting when she could be accompanied by a union representative. Once again, the claimant failed to state that what she had requested was a short-term change. We do not therefore find that the claimant was being singled out. To the extent that she felt that she was being pressured to make a flexible working request this stemmed from the nature of the request she had made and we have found that none of her other part-time colleagues had made a similar request. Although it was the third time this issue had been raised with the claimant, it is relevant that the claimant had only recently returned to work and it is likely that this was the first opportunity Mr Rickerby had had to discuss this issue with the claimant in person.

51. The final discussion about flexible working took place at a lateness meeting on 12 October 2019 between the claimant and Mr Rickerby. We find that in these circumstances, in which Mr Rickerby was raising the flexible working issue for a third time, his evidence to the tribunal that it made little difference to him whether or nor the claimant signed the form lacked credibility. It is relevant that some two months since the claimant had told him that she would only be available to work on weekends, they were no nearer to resolution and, on Mr Rickerby's evidence, he was having to roster the claimant according to her more limited availability. We find that it is also relevant that the claimant had been AWOL twice and late that morning. In these circumstances, we find it likely that when confronted a further time by the claimant's intransigence and refusal to engage with a process which was necessary because of the nature of the request she had made, Mr Rickerby was frustrated with the claimant and we find that he was more insistent that the claimant signed the form, as her conduct confounded him. However, we do not find that he swore at the claimant as she claims because the claimant failed to refer to this in her witness statement; nor did she refer to this when interviewed during the investigation into her grievance relating to the alleged events on 2 and 3 November 2019, when she alluded to the flexible working issue; the provenance of the claimant's record of this exchange (which was erroneously

dated 12 October 2020) [214] is unclear; we take account of our finding that the claimant's record of a different discussion [237] is unreliable (see paragraph 101); we also take account of our findings that the claimant was an unreliable witness, and Ms Anagnostopolou's evidence that she had never heard Mr Rickerby swear (see paragraph 61).

52. There was no further discussion about the claimant's request. The claimant was thereafter rostered and able to work on some weekdays in addition to weekends.

53. As we have found, the claimant failed to refer to her request as being temporary in any contemporaneous correspondence. We have not accepted the claimant's evidence that she told Mr Rickerby (on 16 August) or Mr Poynter (on 13 September) that her request was for a limited duration. The claimant's evidence on this issue was inconsistent and contradictory: her oral evidence was that she had stated that she wanted this arrangement to last for two months and also until Christmas, which was for more than two months, whereas during the grievance appeal investigation she said that she had wanted this arrangement to last for six months [216]; the claimant also agreed that she had not expressly told Mr Poynter that she wanted a temporary arrangement but had implied this when she told him she was a student, which we do not accept; notably, the claimant's evidence was that she did not need to explain how long she wanted this arrangement to last because she was not making a flexible working request. We therefore prefer the evidence of Mr Rickerby and Mr Poynter and find their actions to be wholly consistent with their ongoing understanding that the claimant had requested a change to her working pattern which necessitated a flexible working application. We find that this was the reason why the claimant was referred to the FWP and told that she would need to complete a flexible working form on 16 August, 13 and 26 September, and 12 October 2019. Whilst we accept that the claimant felt that she was being subjected to undue pressure on all four occasions, we do not find that any pressure was put on her on the first three of these dates, and although we do find that pressure was applied to her on 12 October, this was, in our judgement, for the same reason i.e. because the claimant was deemed to have requested a permanent change which needed to be dealt with under the FWP and formalised by completing a flexible working form and was aggravated by the claimant's conduct which confounded and frustrated Mr Rickerby (see paragraph 51).

54. Contrary to Mr Rickerby's evidence, we find that the working relationship between him and the claimant had become fraught and freighted with mutual distrust: Mr Rickerby had grown frustrated and impatient with the claimant because she had been absent, AWOL and late, had failed to follow the sickness and lateness reporting procedures, and had ostensibly sought a change to her working pattern but had refused to engage with the FWP; the claimant felt she was being singled out and forced out. Fundamentally, however, the claimant had failed to appreciate that the reference to, and insistence on, using the FWP was predicated on the nature of the change she had requested. The claimant instead (mis)understood that this was being driven by a discriminatory agenda to performance manage her out of the business; not only did she feel that she was being singled out because of her race, she was concerned that if she made this application she would be tied to the same working pattern for 12 months and this would be used to dismiss her.

It is likely that this issue informed how the claimant perceived the interactions she had with her managers and colleagues thereafter and fostered the conspiracy narrative she constructed. Indeed, it is notable that the claimant referred to the flexible working issue as "something that started a lot of this" when reflecting on these events a year later at the grievance appeal hearing [214f].

55. On 26 October 2019 a parcel arrived in store addressed to the claimant as the store manager. The arrival of this parcel and the delay in dealing with it, which we find was inadvertent, caused the claimant a great deal of anxiety as she was keen for the parcel to be opened and processed, and for any misunderstanding that she had referred to herself as store manager to be removed.

56. The claimant was adamant that Mr Rickerby and Ms Anagnostopoulou conspired to cause her harm on 2 and 3 November 2019.

The incidents on 2 and 3 November 2019 (allegation 2(b))

2 November 2019

57. On 2 November 2019 Mr Rickerby took the claimant into his office and set her up on his computer in order to complete an online training course. We accept the claimant's evidence that she saw Ms Anagnostopoulou in the stockroom, working on a computer, as she walked through the stockroom to go into the office because Ms Anagnostopoulou's evidence that she could not have been there as this would have meant that both managers would have been off the shopfloor at the same time was not a categoric denial and did not preclude Mr Rickerby taking temporary leave of the shopfloor.

58. The claimant claims that Mr Rickerby told her "Sit down manager" and "do you remember your password manager". This was denied by Mr Rickerby. Although we agree that these are situationally plausible allegations in the circumstances in which the claimant was being directed to sit in Mr Rickerby's chair and at his desk and computer, and to log on using her own password, we do not find that they took place because of the issues with the claimant's reliability and also our related findings about the evidence given by Ms Anagnostopoulou (see paragraph 61).

59. The claimant was unable to log-on. Mr Rickerby tried to assist her without success and they contacted the IT Help Desk for support and waited together in the office. The claimant's evidence was that she feared that Mr Rickerby would strike her when he was trying to assist her which we find, if genuinely held, is or was an extreme response to the claimant's perception of these events whether formed at the time or over time. The claimant claims that Mr Rickerby then asked her whether she had been drinking the night before and had "taken anything" which she understood to be a reference to illegal drugs. Mr Rickerby denied this allegation, although he agreed that he often spoke to the claimant casually about her activities outside of work and also that it was possible that he asked the claimant about her night out. We therefore find it likely that Mr Rickerby initiated a casual enquiry about the claimant's night out, however, we do not find that Mr Rickerby asked the claimant whether she had "taken anything" because of the issues with the claimant's reliability.

60. The claimant also claims that Mr Rickerby made the following comments: "Oh look at that Rikki Grey EU…you're the European Union aren't you, your being mixed race and all", "You're the United Nations" and "You're the United Colours of Benetton". When the claimant was interviewed during the grievance investigation, she explained [174]:

> "My mum[']s Jamaican, that's obviously what he's referring to. You probably haven't been in that situation where you've encountered racial abuse, but I have and it[']s scary."

Although Mr Rickerby emphatically denied these allegations, we prefer the claimant's evidence for the following reasons:

(1) We have found that by this date the relationship between them had become fraught with Mr Rickerby having grown frustrated and mistrustful of the claimant (something which we have found was mutual).
(2) On his own evidence, the claimant brought up the 'UN' comment with Mr Rickerby on 30 November 2019 when she asked him what he had meant by it, which is consistent with it having been made on an earlier date.
(3) In his oral evidence, Mr Rickerby agreed that when the claimant raised this comment with him on that date, he understood that 'UN' had racial connotations and that the claimant was making an allegation of race discrimination. This admission contradicted Mr Rickerby's witness evidence [NR/32] that it was not clear to him at the time what the underlying insinuation was, which is what he also told the claimant on 30 November 2019 [NR/33], Mr Poynter later the same day and the grievance investigator on 7 September 2020 [190]. We therefore find that Mr Rickerby responded dishonestly to the claimant, Mr Poynter and the grievance investigator, and also that he included evidence in his witness statement that he knew was untrue.
(4) We find that Mr Rickerby's evidence that he did not understand the claimant's allegation in relation to the United Colours of Benetton, a well-known high street fashion brand as having racial connotations to be implausible.
(5) We find that the reference to the 'EU' is credible in the context in which the claimant and Mr Rickerby were attempting to log the claimant on to the system and the company email address identified the username by region i.e. "[name] (EU) <……@ralphlauren.com>".
(6) We therefore find that Mr Rickerby's evidence in relation to this allegation was implausible, evasive and dishonest.
(7) We also take account that during his oral evidence, Mr Rickerby used the term "mix of colours" to refer to mixed heritage which is not wholly dissimilar from some of the language we have found he used towards the claimant and from which we conclude that Mr Rickerby was capable of using language in relation to race which was not only clumsy and careless but offensive.
(8) We have considered the issues with the claimant's reliability, and find on the balance of probabilities that this allegation is well-founded because of the foregoing factors.

The claimant claims that Mr Rickerby left the office and went into the stockroom from where she could hear him and Ms Anagnostopoulou laughing loudly, and

Mr Rickerby saying "everyone wants to be the fucking manager" and "I wish I could sit in there like the manager". Although we have found that she was in the stockroom, we find that, overall, Ms Anagnostopoulou gave evidence which was credible and reliable, and we prefer her evidence over the claimant's that she did not have such a discussion with Mr Rickerby about the claimant nor laugh at the claimant. We also accept her evidence that she never heard Mr Rickerby swear nor make gratuitous use of his title of manager (whilst we agree that this does not preclude the possibility that Mr Rickerby could have used such language in the privacy of his office on 12 October, 2 and 3 November 2019, as the claimant alleges, Ms Anagnostopoulou's evidence is a further factor we have taken into account in addition to the other issues relating to the claimant's reliability). We also find that the claimant's evidence is impaired by her belief that Mr Rickerby and Ms Anagnostopoulou were conspiring against her which, in relation to these allegations, she put it to Ms Anagnostopoulou in cross-examination that they had planned these incidents, Ms Anagnostopoulou knew in advance that Mr Rickerby was going to say "Ricky Grey, EU" and abuse her, and they would be the only witnesses. We find that there is no evidence of any conspiracy between these managers and in relation to the 'EU' comment, we find it is even less credible that Mr Rickerby would have planned with Ms Anagnostopoulou, who was Greek, to abuse the claimant in this way.

61. The claimant also claims that Mr Rickerby took a croissant from the breakroom and persuaded her to eat it before telling her he had spat on it. Mr Rickerby vehemently denied this allegation. We accept Ms Anagnostopoulou's evidence that food was only routinely provided to staff for training sessions held on Sunday mornings before the store opened and that she did not purchase any food, including pastries, for staff on 2 November. We also accept her evidence that the response she gave to the grievance investigator about this issue [186] was in relation to the common practice in the store and not to 2 November 2019. We also take account of Mr Rickerby's response when this allegation was put to him during the grievance investigation "Don't know if we can get camera footage but I'd be keen to get it" [191] which we find was a genuine enquiry which reveals that he felt this footage would exonerate him. We do not therefore find that the claimant has established the facts of this allegation in the absence of any corroborative evidence and because of our findings that she was an unreliable witness, notwithstanding the adverse findings we have made against Mr Rickerby.

62. The claimant also alleges that Ms Anagnostopoulou pushed her arm through the door into the stockroom passing near to her face to pick up an item from the desk, she was smirking, and the claimant could smell her own perfume on Ms Anagnostopoulou's arm. Her evidence was also that she could saw pink residue from her perfume on Ms Anagnostopoulou's wrist. The claimant says that she therefore understood that Ms Anagnostopoulou had taken the claimant's perfume from her locker and was trying to provoke her. We prefer Ms Anagnostopoulou's evidence over the claimant's that she did not take the perfume because we find that she was a consistently credible witness. We find that the claimant's evidence in relation to the perfume residue implausible. We also find that the claimant's evidence in relation to Ms Anagnostopoulou is unreliable and impaired by the conspiracy narrative she constructed.

63. It is agreed the claimant was the only member of staff who padlocked her locker but there is a dispute about the date when she started using a padlock to secure her locker. We prefer the claimant's evidence over that of Ms Anagnostopoulou and Mr Rickerby to find that her locker was not padlocked on this date but that she started to secure her locker from 3 November, after she perceived wrongly that Ms Anagnostopoulou had taken and used her perfume, stolen money from her bag, and Mr Rickerby tried to access her Instagram account via her phone. As her managers did not become aware of the relevant allegations until August 2020 and as we find, neither accessed her locker in late 2019, they had no reason to take note of the date when the claimant began to use a padlock nor to make any link between this date and the date of the claimant's allegations.

3 November 2019

64. We find that the Mr Rickerby held a lateness interview with the claimant on 3 November, and reject the claimant's evidence to the contrary because: the claimant arrived an hour late for work; she agreed when giving evidence that upon her arrival Mr Rickerby took her into the men's stockroom and also that in normal circumstances such a meeting would take have taken place; there was a record of this interview [85a] in which Mr Rickerby recounted the details of the claimant's explanation for her late arrival to work; and we do not find it plausible that this record was fabricated nor that the claimant's signature on this record was forged as she alleged. It is likely that this was a short discussion because the claimant had already telephoned Mr Rickerby to explain that she was running late. Although we find that Mr Rickerby instructed her to tidy the shelves before leaving the stockroom, we do not find that he told her "I have manager's jobs to do" [159], as she alleges, and which Mr Rickerby denies, because of the issues with the claimant's reliability and our related findings about the evidence given by Ms Anagnostopoulou (see paragraph 61).

65. We find that it is also relevant to the claimant's perception of these events that she was receiving racial abuse via Instagram on 3 November and believed this to be from Mr Rickerby. Given our findings about Mr Rickerby's conduct a day earlier, this was not an entirely fanciful belief although there is no evidence to suggest that this was in fact the case. This is what the claimant alleged when she was interviewed during the grievance process [176]. In her oral evidence, the claimant also alleged that Mr Rickerby was trying to hack into and access her Instagram account and that he and Ms Anagnostopoulou were conspiring to provoke her to call the police and to ruin her prospective legal career. We find these allegations to be inherently implausible.

66. The claimant alleges that Mr Rickerby stood close to her to make her feel uncomfortable and one occasion made faces behind her back to clients which she viewed in a mirror. We accept Mr Rickerby's evidence that this conduct, which he denied, could have impacted on sales and the claimant was one of the best sales performers in his team. The claimant also alleged that Mr Rickerby referred repeatedly to himself as the store manager with customers around the claimant. Mr Rickerby admitted to referring to himself by his job title when he felt the situation called for it. We find that it is likely that he did refer to himself as store manager with customers but it is not credible that it was on every occasion nor that he intervened and stood close to the claimant with a hostile body language. We also take account of our finding that Ms

Anagnostopoulou did not hear Mr Rickerby make gratuitous use of his title. We find that any references which Mr Rickerby made to being the store manager on the shopfloor were neutral and not intended to needle the claimant or cause offence but had greater resonance for the claimant because of the parcel issue.

67. The claimant alleges that whilst having lunch in the breakroom, Ms Anagnostopoulou harassed her. It is agreed that no words were exchanged during the time that they were both in the same room. The claimant's evidence was that it was possible that she was listening to her phone via an earphone. In respect of the specific conduct alleged, we prefer the evidence of Ms Anagnostopoulou over the claimant because we find the claimant's evidence in relation to these allegations to be neither credible nor reliable and some of these allegations are inherently implausible whereas as noted already, we find Ms Anagnostopoulou was a reliable witness. It is agreed that Ms Anagnostopoulou was not rostered to work that day. We accept her evidence that she came to work to prepare for a virtual visit the next day because we find, on the claimant's own evidence, the activities that Ms Anagnostopoulou was carrying out were consistent with this objective i.e. using Sellotape to stick posters on cupboard doors and tidying items which were on top of the bank of lockers. The claimant's belief that Ms Anagnostopoulou attended work with the aim of racially abusing her is inherently implausible. The claimant's fear that when Ms Anagnostopoulou was standing on a chair tidying items on top of the lockers and was rocking on her chair, Ms Anagnostopoulou was going to deliberately harm herself in order to engineer the claimant's dismissal is both extreme and implausible. We do not find that Ms Anagnostopoulou deliberately pulled the Sellotape loudly as alleged; nor that she tutted or sucked her teeth, raised her eyebrows or made kissing faces at the claimant; nor that she made monkey poses (and we accept Ms Anagnostopoulou's evidence that she was not familiar with this gesture). We find that any dust which fell towards the claimant as a result of Ms Anagnostopoulou's tidying and cleaning of the top of lockers was not directed at the claimant but was inadvertent.

68. Nor do we find that Ms Anagnostopoulou stole £10 from the bag in the claimant's locker. The claimant adduced no evidence to substantiate this allegation other than her perception, which we find wholly misplaced, that Ms Anagnostopoulou felt some animosity towards her. We also find that the claimant's perception and evidence were impaired by her unfounded belief that Ms Anagnostopoulou was acting with Mr Rickerby to remove her.

69. We accept the claimant's evidence that she approached Mr Rickerby about the unopened parcel towards the end of the shift. After the store closed at 6pm, Mr Rickerby called the claimant into his office and telephoned the client who explained that she had named the claimant as the manager on the parcel because she had been the one who had served her in store. The claimant was able to recall this incident in great detail, albeit from her perspective, having made notes on her phone whilst on the shopfloor. This underlines that she was very anxious about this parcel because it had been addressed to her as the store manager. It had been sitting around since 26 October, in the meantime, she had seen that the parcel had been moved around the store several times, she had worked alongside Mr Rickerby on 29 October and 2 November, and this was now the end of their shift on 3 November. It was a refund parcel. We do not find it likely that Mr Rickerby deliberately moved the parcel around the

store to intimidate the claimant, as is alleged. We find that this is implausible and it is more likely that if the parcel was moved it was for incidental reasons which were entirely unrelated to the claimant. We accept Mr Rickerby's evidence that this parcel was not dealt with sooner because it was unusual to process refunds by post, and this was done on this occasion as a gesture of goodwill. It was not therefore a priority. This was not therefore because of or related to the claimant's race.

70. The claimant also alleges that another colleague, Gerda Kvikiyte, approached her on the shop floor and said "look at that couple over there, my boyfriend Roland is very respectful like him, that's what happens when you're white". The claimant referred to this allegation in her second grievance when she commented about her colleagues, including Ms Kvikiyte, "Air punching, passing remarks about me being a lawyer covering her ass, remarks about white couples they all knew…" [164] and when interviewed during the grievance process she stated "Gerda also passed a remark saying how white people are. They were acting menacing and antagonistic [sic]" [174]. It is difficult to understand exactly what the claimant is alleging that amounted to race discrimination. However, it is clear from the comments made by the claimant during the grievance investigation that she perceived this to be a part of the same conspiracy against her. We find that the claimant's evidence in relation to this allegation lacks cogency and is unreliable as it is impaired by this conspiracy narrative.

71. Three days later, the claimant called Kelly Trainor, Area Manager, three times within two minutes for between 1 and 4 seconds [86]. She did not leave a message. She did not attempt to contact Ms Trainor again by phone or otherwise, by text or email. The claimant's evidence was that she did not make further contact as she assumed Ms Trainor had stored her details on her phone and would therefore have known that she had tried to call her on 6 November. The claimant also said that she was unsure how her employer would respond and did not want to alert Ms Trainor by text or email. The claimant was disheartened when Ms Trainor did not respond. We find that the claimant's expectation that Ms Trainor should have followed up on the basis of three missed calls without any message being left by her was misplaced. However, we find that her attempt to contact Ms Trainor, and someone against whom it is agreed she had previously complained, is consistent with her evidence that there was something that she wanted to discuss with Ms Trainor; and the tentative calls she made with a lack of follow-up are consistent with her anxiety about the repercussions of taking such action.

72. The claimant was on sickness absence on 16 and 17 November. At a return to work interview with Ms Anagnostopoulou on 23 November, the claimant explained that she had been "sick, with high fever and coughing" [87a].

73. The claimant was late for work on 30 November, 15, 20 and 21 December 2019.

<u>30 November 2019 (allegation 2(f))</u>

74. The claimant and Mr Rickerby met on 30 November. Although Mr Rickerby's evidence was that this was a return to work meeting, triggered by the claimant's latest sickness absence, to decide on whether further action under

the SAP was required, the only record we were taken to in the bundle with that date referred to a lateness meeting [87b]. Regardless of the purpose for meeting, it is agreed that they met on this date when the claimant queried the 'UN' comment with Mr Rickerby. We find the claimant's evidence on what other allegations she raised with Mr Rickerby unclear and unreliable: in her witness statement [C/104], the claimant states that she discussed "the racial abuse that occurred a few weeks earlier but he denied what he and Rania had done"; in oral evidence, she said that she had referred to "many" of the racial insults she alleged that Mr Rickerby had made on 2 November and when she was asked to confirm which specific allegations she raised, one by one, she then claimed that she raised all allegations, including the croissant allegation and the allegations relating to Ms Anagnostopoulou; and when the claimant referred to this meeting during the grievance investigation she said that Mr Rickerby "denied it all" but only made mention of putting the 'UN' comment to him [178]. We also take account of the claimant's tentative approach in seeking to make contact with Ms Trainor and her anxiety about complaining about her managers. On balance, we do not find that the claimant put any other specific allegations to Mr Rickerby at this meeting.

75. Nevertheless, as Mr Rickerby conceded, he understood what the 'UN' comment connoted and he was therefore left in no doubt that the claimant was alleging that he had subjected her to racially discriminatory conduct. This had been a confrontational encounter which had left him feeling shaken. He called Mr Poynter afterwards whose oral evidence was that he had found Mr Rickerby to be concerned and unnerved during their call.

76. Mr Poynter's witness statement omitted any reference to this call. His oral evidence was that when he was drafting his statement, he did not consider that this was a significant event and the further evidence he saw prompted him to recall more detail. This is plausible given our finding (below) that what Mr Rickerby told him did not raise any alarm bells or cause him to take any action. We accept Mr Poynter's evidence that Mr Rickerby only referred to the 'UN' comment. We do not find that Mr Rickerby identified the date of this allegation. We also accept Mr Poynter's oral evidence that Mr Rickerby categorically denied making such a comment and "went as far as saying he didn't know what UN was". As we have found, this was dishonest.

77. There is a lack of clarity as to exactly how Mr Rickerby conveyed the 'UN' comment to Mr Poynter. He denied understanding what it connoted and it is likely that he did not convey the full context (nor the other related comments which we have upheld). We therefore find that Mr Rickerby gave Mr Poynter minimal information to avoid raising concern about his own conduct, and that, correspondingly Mr Poynter was not on notice of a potential incident of race discrimination on the basis of the limited information he was given; although we find that this warranted further enquiry from Mr Poynter.

78. Mr Poynter failed to take any action. His evidence was that he understood the matter had been resolved, the claimant had gone back to work following the meeting with Mr Rickerby, and he enquired whether Mr Rickerby wanted to raise a grievance about the claimant. Although we find that Mr Poynter was generally a credible witness, in this instance, we do not find his evidence that he also told Mr Rickerby that the claimant was able to make a grievance against Mr Rickerby to be credible, because we find that his focus was on

supporting Mr Rickerby's welfare and it is likely that he did not apply his mind to whether the claimant had a potential grievance against Mr Rickerby. Nor do we find Mr Rickerby's evidence on this issue is reliable because his witness statement [NR/34] refers only to Mr Poynter's advice that the claimant could raise a grievance and makes no reference to Mr Poynter also advising him that he could bring a grievance against the claimant.

79. The claimant claims that in failing to treat this issue seriously, Mr Poynter failed to take steps to secure the CCTV footage. It is likely (and it was not suggested otherwise) that this was video-only footage. It is agreed that the respondent retains CCTV footage for 30 days. The deadline for securing any footage in relation to the 'UN' comment expired on 2 December. The date of this allegation and corresponding deadline were not known to Mr Poynter at the time. Nor is it clear how this footage, had steps been taken to secure it, would have assisted the claimant in relation to the 'UN' comment as it would not have been captured by the footage. We find that Mr Poynter did not take any action because he did not believe any action was required based on his call with Mr Rickerby on 30 November. We also find that had Mr Poynter contacted the claimant following this call it is likely, based on what transpired between 30 December 2019 and 6 January 2020 (which we refer to below), that the claimant would have been reluctant to discuss this allegation without a face-to-face meeting and Mr Poynter would have insisted that it was necessary for the claimant to submit a written complaint pursuant to the Grievance Procedure before any investigative action could be taken.

80. The claimant did not in fact specify the date of the alleged incidents to the respondent until August 2020, some nine months later, and although the claimant's fit note in January 2020 referred to unspecified "racial abuse" in November 2019, this was too late to preserve the CCTV footage in relation to these alleged events.

81. The claimant had a lateness interview with Mr Rickerby on 15 November 2019. In his record of this meeting, Mr Rickerby noted that he had asked the claimant if she was "struggling to fulfil her contracted hours as she studies 5 days a week, and is often late arriving" [92a]. Ms Anagnostopoulou returned to the same theme when she conducted a lateness interview with the claimant on 21 December 2019, when she recorded:

> "…We discussed about her constant lateness and she feels tired of working and study, but she needs to have incomes [sic]. We will talk again next week on how the company can support her (extra time off for holidays and scheduling support) so as to feel more energetic inside the store."

As this contemporaneous record, which was signed by the claimant, demonstrates, having discussed steps to support the claimant on this date, the claimant and Ms Anagnostopoulou agreed to continue this dialogue when the claimant came in to work the next week. As we find below, the claimant was rostered to work, one week later, on Saturday 28 December 2019 and we reject the claimant's allegation that Ms Anagnostopoulou misled her to the contrary as part of a conspiracy with Mr Rickerby to trigger a formal lateness and absence meeting.

Correspondence with Mr Poynter about formalising the complaint of discrimination (allegation 2(c))

82. The claimant complains that instead of meeting with her to discuss her allegations of discrimination, Mr Poynter harassed her to formalise her complaint by referring her to the Grievance Procedure on 30 December 2019, 3 and 6 January 2020. The claimant relies on the respondent's Open Communication Policy (at page 59 of the Employee Handbook) under its Global People Practices Fair Treatment Policy & Procedure ("GPP"), which provides:

> "**a. Open Communication Policy**
> Ralph Lauren believes that a policy of open communication is best for all concerned. We also believe that each employee should have the opportunity to make problems or concerns known. Therefore, when an employee wishes to express their problems, opinions or suggestions, they will find an open door and an attentive listener. We also encourage all Company employees to be open and responsive to comments or suggestions of other employees.
>
> It is the intention of this policy to handle employee problems as efficiently as possible. An employee experiencing a problem is encouraged to first discuss the matter directly with the coworker(s) and/or supervisor(s) involved with the problem. However, if the employee is not satisfied with the response from those individuals, or if the employee feels it inappropriate to speak with them, the employee may discuss the matter with any manager, a member of People and Development and/or Global People Practices.
>
> Misunderstandings, differences of opinion or conflicts can arise in any organization. To ensure effective working relationships, it is important that such matters can be resolved before serious problems develop. The professionals in People and Development at Ralph Lauren are available to discuss problems or complaints, to clarify policy, or to provide suggestions. Should a situation persist than an employee finds of particular concern like discrimination, harassment or retaliation, the situation should be handled through the procedure outlined in this Policy and Procedure."

The relevant procedure under the GPP is set out under the heading "Discrimination, Harassment and Retaliation Complaint and Investigation Procedure & Guiding Principles" (at pages 62-63 of the Employee Handbook) in which employees are encouraged to report allegations of discrimination, harassment or retaliation which will then be investigated; and which provides for the following informal steps to be taken in the same sequence set out above: confronting the alleged offender and/or discussing the issue with their immediate supervisor and/or meeting with their People and Development Partner and/or contacting Global People Practices via the "Make the Difference Hotline" (telephone number provided). These guiding principles underline that:

> "early reporting and intervention have proven to be the most effective method of resolving actual or perceived incidents of harassment, discrimination and/or retaliation."

Accordingly, under the GPP, staff are encouraged to take early action either by the informal means it outlines or by reporting their concerns which can then be investigated. Mr Poynter agreed that he was the relevant HR point of

contact for the claimant under this procedure. He agreed that he did not consider the Open Communication Policy.

83. The claimant failed to attend work on Saturday, 28 December 2019. Mr Rickerby called the claimant, without success, to find out where she was. Prompted by this missed call, the claimant emailed Mr Rickerby, copied to Mr Poynter [94-95], to assert that she had not been rostered to work that day and complained:

> "I feel as though I'm being purposefully discriminated against. I do not appreciate you and rania smiling in my face and acting as though you have my best interests at heart and then as soon as my back is turned things like this are taking place. I feel as though you are trying to performance manage me to HR…"

The claimant stated that she had discussed her rota over the Christmas period with Ms Anagnostopoulou on 21 December, and it had been agreed that she would only be working on 1 January 2020 as she had an exam. She acknowledged that there was an issue with her timekeeping but complained that the rota was "becoming a joke", she was being made to look as though she was not attending shifts and "If anything like this happens again I will be making a formal complaint". She requested a written response. It is difficult to reconcile the claimant's email with the record of her meeting with Ms Anagnostopoulou on 21 December: supportive steps had been discussed but not implemented and she had been expected to come into work the next week, by which we find that she had not been taken off the rota for 28 December. It is agreed that Saturday was the last day of the week in the roster, that the claimant had only worked on the Sunday of that week and that she had not requested annual leave for 28 December. She was therefore required under her contract to work this second day that week. We also accept Ms Anagnostopoulou's unchallenged evidence that this was the busiest week of the year and we do not find that she would have left the store deliberately understaffed on 28 December as the claimant's allegation implies. This is inherently implausible.

84. Mr Rickerby's immediate response was to note that he had not received a holiday request for 28 December to which the claimant queried how that was relevant [93-94]. This correspondence was copied to Mr Poynter. Having sought Mr Poynter's advice on 30 December, Mr Rickerby replied to the claimant on that date [93]:

> "Ralph Lauren takes unacceptable levels of lateness, unauthorized absence and any allegations of discrimination very seriously. As a result, all concerns related to these matters will be discussed as part of a thorough investigation…"

Noting that the claimant's next shift was on 1 January 2020 when there would be limited staff in store, and the claimant would be on leave between 2 and 18 January 2020, Mr Rickerby invited the claimant to an investigation meeting with him on 22 January. In his evidence, Mr Poynter agreed that the claimant had complained about discrimination in relation to management communication and scheduling although it was unclear whether the claimant was complaining that Mr Rickerby had discriminated against her. We find this part of his evidence difficult to follow because the claimant had explicitly cited Mr Rickerby and Ms Anagnostopoulou and complained that they had

discriminated against her in relation to the rota. Mr Poynter's view that it was appropriate for Mr Rickerby to lead this investigation was misplaced as he was already on notice of this allegation.

85. The claimant underlined the point when she emailed Mr Poynter on the same date [101-102] to explain that she would not attend such a meeting with Mr Rickerby

> "as he is one of the individuals that I am making a direct complaint against. (Particularly in relation to my allegation of discrimination)."

Mr Poynter replied on the same date [100-101], to state incorrectly that the claimant had failed to identify the alleged discriminator. He noted that the claimant had not made a formal complaint, having stated that she would take such action if the scheduling issue had not been resolved; and, underlining that the respondent took "allegations of discrimination very seriously", he invited the claimant to take this step:

> "should you wish to raise a complaint against Nathan on the grounds of Discrimination you should do so to me in writing outlining the specific detail of your complaint…"

He referred her to the respondent's Grievance Procedure within the Employee Handbook which he had attached with his email. Mr Poynter confirmed that any allegations of discrimination which the claimant raised formally would be dealt with separately by an impartial manager, and the claimant's alleged lateness and unauthorised absence would be investigated by Mr Rickerby as "I can see no reason why it would be inappropriate to have Nathan investigate these matters as he is your line manager".

86. The claimant responded on the same date [99-100] when she explained:

> "My recent lateness and absence is in relation to the discrimination that I have been experiencing in store my members of staff. Particularly, the member of staff that will be conducting the investigation."

Citing a "clear conflict of interest" and asserting that the proposed investigation would not be "unbiased and impartial", the claimant requested a meeting with Mr Poynter in the following terms: "I will need to speak with you in person before we move forward with this investigation" and she confirmed that she would not be attending the meeting on 22 January nor responding to any related questions until "you set a date to meet in person". The claimant did not refer to the Open Communication Policy. This was the only date when the claimant requested a meeting with Mr Poynter (in her grievance appeal, the claimant stated that she made a second request on 4 January 2020 [213]). We accept the claimant's evidence that she also wanted to discuss her allegations of discrimination as she wanted to know how this would affect her whilst working alongside the alleged perpetrators [C/107]. Although this was not evident from her email, and it was obvious that any discussion about the putative investigation was likely to involve the claimant's allegations of discrimination because the claimant felt they were inter-related.

87. This is what Mr Poynter clearly understood because in replying to the claimant on 3 January 2020 [98-99], he referred again to the Grievance Policy and explained that:

> "In order for us to meet to discuss your allegation of discrimination I first need to receive your written complaint; it is this complaint that forms the basis of the discussion and investigation into your concerns. To your point about fair and equitable treatment this is the process all employees are required to follow in order to raise a formal grievance."

Although he reiterated that it remained appropriate for Mr Rickerby to investigate the claimant's timekeeping and attendance, Mr Poynter agreed that before a final decision was made it would be necessary to deal with the claimant's grievance. He therefore proposed to set up a grievance meeting on 22 January to be heard by an impartial manager which he would attend as notetaker, subject to the claimant submitting "a written grievance detailing the exact nature of your complaint" by 19 January; failing which the investigation into the claimant's lateness and absence would proceed on 22 January.

88. The claimant replied on the same date [98] simply to request that Mr Poynter copied in his "superior" to which Mr Poynter responded on 6 January [97] when he provided the claimant with the email contact for his manager, Sarah Smith, P & D Manager, although he did not copy her in as requested, and contact details for the respondent's Employee Assistance Programme, and added:

> "My telephone number is included in the strip, please feel free to call if you require any further information or clarification on this or anything in the chain below.
>
> In the meantime, I await receipt of your written grievance."

Although Mr Poynter referred the claimant to his telephone number this was not the same as offering a face to face meeting. In her response the next day, the claimant stated that she would provide a formal reply "shortly" [96] and she emailed Mr Poynter again on 14 January 2020 to confirm that she would be sending this on 17 January copied to Ms Smith. This was the last direct correspondence between them. As will be seen, thereafter Ms Smith began corresponding with the claimant in relation to her ongoing sickness absence and complaints.

89. Whilst Mr Poynter had therefore declined to meet with the claimant outside of the grievance process, we do not find that he was failing to take the claimant's assertion of discrimination seriously because he had agreed to set aside the investigation into the claimant's conduct and consider her grievance at the earliest available date. This was not the process the claimant had asked for and it was necessary for the claimant to submit a formal grievance or face an investigation into her timekeeping and attendance by a manager she had complained had discriminated against her. We therefore agree that this put the claimant under some pressure to formalise her complaints although we do not find that this amounted to a form of harassment, as the claimant alleges. We find that there was some justification for asking the claimant to provide further details of the alleged discrimination to which she had alluded, in the circumstances in which her own conduct of being AWOL, a further time, on 28 December, and being late to work on four occasions between 30 November

and 22 December, warranted an investigation that would ordinarily have been conducted by Mr Rickerby. We find that it is clear that Mr Poynter viewed the Grievance Policy as the only available route for the claimant to ventilate such a complaint. He underlined that it would be taken seriously and that an impartial manager would investigate any formal complaint made. It is relevant that the claimant had intimated making a formal complaint if the rota issue was repeated and, as we have found, made no reference to the Open Communication Policy. We find that even had the claimant referred to this policy it is likely that Mr Poynter would have taken the same approach and requested that the claimant put her complaint in writing so that it could be investigated, because we accept his evidence that the claimant was raising a complaint of discrimination which could not be dealt with informally. We find that Mr Poynter would have applied the same approach to another putative complainant of discrimination regardless of their race, particularly one facing an investigation into their own conduct by a manager who was alleged to have discriminated against them.

Correspondence with Ms Smith about formalising the complaint of discrimination (allegation 2(d))

90. When the claimant's annual leave ended she commenced a period of long-term sickness absence on 19 January 2020. She was signed off work initially for one week from 22 January, due to "stress related problem to imminent surgery" [104], however, on 31 January, the claimant forwarded another fit note to Mr Rickerby, Mr Poynter and Ms Smith [107] in which she had been signed off work for three months because of a "Stress-related problem" in which her GP had written:

> "Significant proportion of stress related to work. Rikki reports that she experienced racial abuse from her manager in november [sic] 2019."

We accept the claimant's unchallenged evidence [C/109] that she had a discussion with her GP when she was advised to take time off work to recover and focus on her studies. This is consistent with a letter written by her GP dated 4 February [118] which explained:

> "I saw Miss Grey on the 31st January 2020 in distress. She reports that she has been suffering from racial abuse at her work from a manager. She has seen us frequently throughout this year for physical and mental health. She has experienced significant traumatic events this year, on a background of past traumas…"

The claimant provided no further details to the respondent in relation to the contents of this letter.

91. By this date, Ms Smith had assumed responsibility as the claimant's point of HR contact, which signalled the breakdown of trust between the claimant and Mr Poynter. We accept Ms Smith's evidence (which is consistent with the contemporaneous evidence referred to below) that she was concerned that the claimant was on an extended period of sickness absence which her GP had ascribed to stress resulting from racial abuse; and was keen to understand the cause of this stress by clarifying what the claimant's allegations were and also by obtaining a report from Occupational Health ("OH"). We find that her aim was to support the claimant whilst she was on sick leave to get her back

to work. Ms Smith therefore asked another colleague in HR to send the claimant an OH declaration form to complete. When the claimant received this form she queried its purpose, to which Ms Smith referred her to an email she had already sent to the claimant "which explains everything" [112] (this email was not in the bundle). When the claimant repeated her request for clarification, Ms Smith emailed the claimant to explain that it was needed to facilitate an OH appointment [110]:

> "This meeting is critically important in this instance in which you are absent as a result of work related matters, specifically the very serious allegation of racial abuse. You are required to provide us with the full details in confidence of the complaint in order for us to investigate the matter immediately, take any necessary and appropriate action and support you in returning to work at Club Monaco as soon as possible."

Ms Smith asked the claimant to confirm by the end of the next day whether:

> "you are comfortable in providing us with the full detail of your complaint outside of the occupational health review…"

We find that this was an informative and supportive email which demonstrated that the claimant's sickness absence and her allusion to racial abuse were being taken seriously. The claimant replied to request a copy of the respondent's long-term sickness policy and procedures. These were contained in the Employee Handbook which Mr Poynter had already forwarded to the claimant on 30 December, which Ms Smith re-sent to her.

92. All of the respondent's stores were closed from 19 March 2020 because of the pandemic.

93. The claimant submitted a further fit note to Ms Smith 30 April 2020 in which she had been signed off work until 29 May 2020 because of "Bereavement" [124-125] when she explained that she had suffered two family bereavements on 27 and 28 March and her GP agreed that "it will be within my best interests to take more time off". She also confirmed that she would be submitting a formal grievance "for the racial abuse and bullying that I was subjected to in November 2019" when she returned to work.

94. Ms Smith replied on 1 May 2020 to confirm that the respondent could not address the grievance without receiving it [123]. In oral evidence, the claimant agreed that in writing this Ms Smith was updating the claimant and not requesting anything (and was not therefore harassing the claimant to formalise her complaint).

95. Ms Smith contacted the claimant on 5 June 2020 [132-133] to request an update because the claimant's latest fit note expired on 29 May. She explained that if the claimant failed to provide an update the AWOL process would be initiated. The claimant queried where this policy was as she could not find it in the Employee Handbook.

96. The claimant submitted another fit note in which she had been signed off work until 31 July 2020 by reference to "Stress-related problem and bereavement" [129-130]. This note reiterated "Rikki reports stress related problem as a result of racial abuse from manager in November 2019." When, prompted by Ms

Smith, the claimant sent in a further fit note to cover the missing period of 30 May to 7 June 2020, Ms Smith replied [126-127] to confirm that the claimant's statutory sick pay would end on 26 July and also that the respondent's stores would reopen on 17 June 2020.

97. The claimant was due to return to work in the week commencing 1 August 2020. Ms Smith emailed the claimant on 24 July 2020 [138] to explain that she was about to take one week's leave, and underlined that the claimant's complaint of racial abuse remained to be investigated because:

> "you have not provided us with the details of the alleged racial abuse by your manager. In order to ensure that you feel safe and comfortable returning to the workplace we do need the information as soon as possible…"

Ms Smith asked the claimant to forward this information to Rene Blanchard, District Manager EU, who would deal with this complaint, before 1 August. She told the claimant that she could be temporarily redeployed whilst her complaint was being investigated. Once again, we find that this was a supportive and informative email which underlined that the claimant's allegation was being taken seriously and explained why it had not been possible to investigate it to date. It also followed on from the claimant's email dated 30 April 2020 confirming that she would submit a formal complaint when she returned to work. A return to work was now imminent and the respondent would need to take steps to redeploy the claimant if this is what she wanted, once she had submitted a formal complaint. The claimant replied [137-138] to confirm that she would submit her complaint to Ms Smith when she had returned from leave "as you are the person that I have been dealing with in relation to this matter". She stated that she did not want to be redeployed. Ms Smith responded [136-137] to ask the claimant to send her complaint to her by 3 August. She confirmed that the claimant's first shift would be on 1 August and she was also rostered to work on 2 and 6 August 2020, when Ms Anagnostopoulou would be the manager on duty as Mr Rickerby would be on two weeks' leave from 1 August.

<u>The claimant's grievances (allegation 2(e))</u>

98. The claimant sent Ms Smith a formal grievance on 3 August 2020 [146-149] in relation to her allegations concerning the events on 2 November 2019. Ms Smith acknowledged receipt two days later [144-145] when she emphasised that this grievance would be progressed "at the first opportunity to mitigate any future distress or risk". She explained that Mr Blanchard would investigate the claimant's allegations because of his seniority, adding that these allegations were not only "very upsetting to read [but] are extremely serious and do potentially constitute gross mis-conduct". Ms Smith summarised the claimant's allegations. Noting that Mr Blanchard was about to take two weeks annual leave, she invited the claimant to attend a grievance meeting on the morning of 7 August via Zoom. This was a prompt, comprehensive and sympathetic email in which Ms Smith underlined that the respondent took the claimant's allegations extremely seriously.

99. The claimant replied at 01:17 the next day [143-144] that she was unable to meet Mr Blanchard on the morning of 7 August owing to another appointment. She also referred to a second grievance that she would be submitting relating to events on 3 November 2019 involving the same people. The claimant

complained, wrongly, that she had not been told that she would be required to work on 6 August, and stated, misleadingly, "I usually work on the weekends". Ms Smith responded at 9:32 to ask the claimant to confirm whether she would be coming in to work that day, and referred to her previous email in which the claimant had been notified about this shift. The claimant replied that she would be able to come in by 12 midday. Her shift had been due to start at 10am. Ms Smith suggested a call. The claimant did not respond. The claimant came in to work. When Ms Smith called the store to speak to the claimant she declined to take the call. They agreed to speak the next day. Ms Smith emailed the claimant later that day [140-141] when she explained that the purpose of the call would be to discuss the grievance process and any questions or concerns the claimant had in relation to it. She asked the claimant to submit her second grievance by 12pm on 7 August.

100. As Mr Rickerby was due to return to work from annual leave on 16 August, Ms Smith consulted with Rhiannon Bond, Senior P & D Director, who agreed that because the claimant did not wish to work at another store, she would be placed on paid leave pending the investigation of her grievances. Ms Smith emailed the claimant on 10 August [153] to request that she did not attend work the next day. The claimant second's grievance remained outstanding. We accept Ms Smith's evidence that her aim was to enable the claimant to focus on completing her second grievance and that this step was also required in the circumstances in which the claimant had made very serious allegations against her managers. Although it is clear from the claimant's initial email responses that she was initially resistant, following a discussion about her options with Ms Smith and Ms Bond the next day, it was agreed that the claimant would remain at home on paid leave instead of being relocated to another store. As Ms Smith confirmed by email on 12 August [154-155], now that the respondent was cognisant of the claimant's allegations against both her managers:

> "we cannot allow you to continue working in the store until the investigation is fully and thoroughly investigated and an outcome sought".

Ms Smith requested that the claimant's second grievance was submitted by 17 August 2020.

101. During this call on 11 August 2020, there was a discussion about the grievance process. The claimant was informed that Michelle Green, P&D Manager, would manage the claimant's grievance. We find that when asked by the claimant whether they believed her allegations, they responded "We believe that something has happened" because this was consistent with the evidence of Ms Smith, which we accept, that although she was unable to recall the precisely what was said, she and Ms Bond sought to reassure the claimant and to encourage her to put her faith in the grievance process. However, we do not find that Ms Smith or Ms Bond went further, as the claimant claims, to acknowledge that any abuse or racial discrimination had taken place. We find that it is implausible that two HR professionals, however much they wanted to encourage the claimant to have faith in the process, would have made such a concession at a stage when an investigation had not even begun. Nor do we find that they told the claimant that they did not expect her managers to admit they had discriminated against her, as she claims, as we find Ms Smith's recollection that Ms Bond explained to the claimant that "it can come down to one person's word against the other at times" [SS/40] to be more plausible.

We also find that the claimant's evidence is unreliable because of the inconsistency between her witness statement [C/119], in which she says that both Ms Smith and Ms Bond made this comment, and her list of particulars [56j], in which she ascribes this comment to Ms Bond only. In making these findings it is relevant that we also accept Ms Smith's evidence [SS/51] that when she met with the claimant on 7 April 2021 in advance of the mediation meetings the following day, she did not tell the claimant that she believed that "some kind of racial incident took place between you and the people involved" contrary to what the claimant recorded in her note of this discussion [237]. We do not find this is plausible. We also find that Ms Smith's emails to the claimant were not only compassionate in tone but carefully written which is relevant to our consideration of the likelihood of Ms Smith making the statements which the claimant has ascribed to her. Overall, we found that Ms Smith was a consistently credible and reliable witness.

102. The claimant submitted the second part of her grievance on 16 August 2020 which detailed the alleged events on 3 November 2019 [156-165]. In forwarding these allegations, the claimant explained:

> "It has been very difficult to relive this experience. The incidents that took place on that day have had a serious impact on my life and my mental health. I feel traumatised by it no matter how hard I have tried I cannot get over it. The way that I have been treated by Nathan and Rania is terrible and I feel that they should be ashamed of themselves as managers."

Ms Smith acknowledged this grievance three days later.

103. Ms Green had an initial meeting with the claimant on 20 August 2020, when the claimant said this in relation to her grievances [180]:

> "It's been a lot. I'm traumatised. Made me see the world in a different way. I think to myself why this has happened. I know racism exists everywhere, but I see it more now. Ignorance is bliss. This world is not a nice place when you're dealt with in a certain way because of the colour of your skin…"

104. Having completed her investigation in which she interviewed 11 members of staff, in addition to Mr Rickerby and Ms Anagnostopoulou, Ms Green met the claimant again on 14 September 2020 when she confirmed that she had not upheld her complaints. This outcome was confirmed in writing a week later [205-208]. Ms Green concluded that the claimant's allegations in relation to Mr Rickerby and Ms Anagnostopoulou were unsubstantiated in the absence of any corroborative evidence.

105. The claimant complains that Ms Green did not conduct a thorough investigation as she did not put the claimant's specific allegations to all of the witnesses. As she did not become aware of this until November 2021, when she first saw the records of the investigatory interviews, it was not part of the appeal she submitted on 28 September 2020 [212-213]. It is understood that this complaint relates to the interviews with the other members of staff in respect of the claimant's wider complaint about there being a discriminatory culture at her store. We accept Ms Green's unchallenged evidence that she was unable to interview Ms Kvikiyte [MG/25] as she had left the business. The records of the interviews conducted with the 11 staff members show that the same five open questions were put to each witness, which included being

asked to describe the culture in the store and being asked to confirm whether they had witnessed anything inappropriate or discriminatory from another colleague or manager. We find that the approach taken by Ms Green was reasonable and proportionate. It is relevant that these open questions elicited nothing of concern which warranted any further investigation by Ms Green. Nor do we find that the approach taken in relation to these witnesses evinces a failure to take the claimant's allegations seriously.

106. Of note is a letter from the claimant's GP dated 27 August 2020 [184] in which the following update was provided:

> "This letter is to outline the emotional difficulties that Miss Grey has suffered a result of the ongoing work place grievance and investigation. She describes how she suffered a prolonged period of persistent racial abuse and bullying perpetrated by several colleagues, one of which was in a managerial position. This has had a dramatic effect on her mood, her mental health and her wellbeing. She has sought help from the police and consulted myself and several of my colleagues on multiple occasions regarding the adverse symptoms she has had to endure. Since the events she has suffered with symptoms of anxiety and depression, she has social anxiety and finds herself feeling fearful of going out. She has lived in a state of panic and had a pervasive feeling of threat. She describes how she felt so threatened by the knowledge that her manager had her contact details that she changed her phone number…"

107. The claimant's appeal was heard by Sara Hollen, Director of People & Development, Scandinavia. Following the appeal hearing which took place on 26 October and 9 November 2020, Ms Hollen wrote to the claimant on 10 November 2020 to confirm that she had dismissed the appeal [221-224].

108. In her oral evidence the claimant conceded that the time taken by Ms Green to investigate and conclude the grievance was not unreasonable; and she had no complaints in respect of the appeal process conducted by Ms Hollen. For completeness, we find that the claimant's grievance and appeal were dealt with timeously.

109. The claimant returned to work on 5 December 2020. During the appeal process the claimant had requested separate mediations with Mr Rickerby and Ms Anagnostopoulou. She wanted Ms Smith to act as mediator. They met on 7 April 2021. The claimant attended mediations with her managers on 8 April 2021 supported by Ms Smith [238-240] following which the claimant returned to the Sloane Square store alongside her managers without further incident.

110. The claimant has been signed off work since 19 January 2022 owing to work-related stress.

Conclusions

111. We have found that the following allegations fail on the facts: 2(b)(1), (3), (4), (6), (7), (8), (10), (11), (12), (13), (14), 2(c), 2(d), 2(e) and 2(g).

112. In respect of allegation 2(a), we have found that Mr Rickerby put pressure on the claimant to sign a flexible working form only on 12 October 2019. We have found that this was because the claimant had requested a change to her

working pattern which required an application to be made under the FWP, this was an ongoing issue which required resolution, and this was aggravated by the claimant's conduct (see paragraphs 51 and 53). We find that Mr Rickerby would have acted in the same way in relation to a hypothetical white comparator in materially the same circumstances. We do not therefore find that it was because of or related to the claimant's race. In coming to this finding we have also considered the adverse findings we have made against Mr Rickerby. For completeness, we have also found that the other three occasions on which the claimant was referred to the FWP were not because of or related to the claimant's race (see paragraph 53).

113. In respect of allegation 2(b)(5) we have found that the parcel was not dealt with as a priority but this was not because of or related to the claimant's race (see paragraph 69).

114. In respect of 2(b)(9) we have found that Ms Anagnostopoulou's conduct was not because or related to the claimant race (see paragraph 67).

115. In respect of allegation 2(c) which we have found has failed on the facts, we have also found that to the extent that Mr Poynter applied pressure on the claimant to complete a written complaint, this was not because or related to the claimant's race (see paragraph 89).

116. In respect of allegation 2(f), we have found that whilst Mr Poynter failed to take any action following his discussion with Mr Rickerby on 30 November 2019 to secure the CCTV footage this was not warranted by the limited information which Mr Rickerby relayed to him (see paragraph 77). We have also found that Mr Poynter took no action and was unlikely to take any action unless the claimant had made a formal complaint which is precisely the approach he took when the claimant referred to race discrimination in their correspondence between 30 December 2019 and 6 January 2020 (see paragraph 79). We find that he would have taken the same approach to a hypothetical white comparator in materially the same circumstances. We also find that Mr Poynter's inaction was not a detriment in relation to the 'UN' comment as this would not have been recorded by the video footage.

117. In respect of allegation 2(g), which we have found has failed on the facts:

    (1) We have made no criticism of Ms Trainor for failing to return the claimant's missed calls on 6 November 2019.
    (2) Because of our finding that Mr Poynter was not fully appraised in relation to the 'UN' comment on 30 November 2019, we have found that he was not on notice of a potential allegation of race discrimination until the claimant's email of 28 December 2019.
    (3) In respect of the claimant's correspondence with Mr Poynter between 28 December 2019 and 6 January 2020, we have found that by inviting the claimant to put her complaints in writing so that they could be investigated at a meeting at the earliest available opportunity, on 22 January 2020, it cannot be said that he failed to take the claimant's putative complaint seriously.

(4) The respondent was unable to take any action to investigate the claimant's allegations until she detailed what they were, as Ms Smith explained several times when she invited the claimant to provide this information, having received the claimant's fit notes which alluded to racial abuse and in light of the claimant's ongoing and extended sickness absence.

(5) We have found that as soon as the claimant submitted her first grievance on 3 August 2020, Ms Smith took immediate steps which demonstrated that the claimant's allegations were being taken seriously. An investigation meeting was arranged in the same week, which the claimant was unable attend, and one took place four days after the claimant submitted her second grievance on 16 August 2020.

(6) We have made no criticism of Ms Green.

(7) The claimant made no criticism of Ms Hollen.

118. We have found that allegation 2(b)(2) occurred. The language that we have found Mr Rickerby used was patently related to the claimant's mixed heritage. Because of the nature of this language, we conclude that it had the purpose of creating the environment and of violating her dignity proscribed by section 26 EQA. For completeness, we find in the alternative that it had this effect on the claimant, and taking account of all the circumstances of the case, it was reasonable for this unwanted conduct to have had such an effect. Although we find that the other events that the claimant has complained about which we have not upheld, in particular those on 2 and 3 November 2019, have impacted on the claimant (see paragraph 102), we find that it is likely that the impugned conduct we have upheld contributed to the claimant's extended period of absence in 2020 (see paragraphs 93, 103 and 106). We find that the language used by Mr Rickerby was sufficiently grievous to create the proscribed effect objectively. We also take account of the fact that Mr Rickerby was not another colleague or peer of the claimant's but was the store manager and in a position of power and authority over the claimant.

119. Alternatively, we would have found that it amounted to an act of direct race discrimination because we have found that the language used by Mr Rickerby was patently related to the claimant's mixed heritage so we would also have found that her race was a significant and effective cause of this treatment.

Whether just and equitable to extend time

120. The allegation we have upheld is almost 10 months out of time, the primary limitation period having expired on 1 February 2020 and the ACAS early conciliation dates having no impact on the time limit because they fell outside of the limitation period.

121. We find it would be just and equitable to extend time:

(1) The claimant was on sickness absence from 19 January to 26 July 2020; her GP had told her to rest and focus on her studies; she completed her law degree in July 2020, with her final exam being on 31 July 2020, having been extended by a month on compassionate

grounds; she returned to work on 6 August 2020 when she focused on her grievances which were determined on 21 September and her appeal outcome on 10 November 2020; she had by that date commenced early conciliation with ACAS, on 1 November 2020, and obtained an early conciliation certificate on 2 November 2020.

(2) We do not find that the delay in bringing this allegation put the respondent to any forensic prejudice because this was a stark allegation which Mr Rickerby was able to address when giving evidence (which we have found was dishonest).

(3) In these circumstances, in which we have also found that the allegation is well-founded, we find that the claimant would be put to the greater prejudice if we did not extend time than the respondent will be put to if we extend time.

122. Finally, I would like to apologise for the very lengthy delay in promulgating this judgment. As will be noted, we sat in chambers on six dates (a total of five and half days) to deliberate, reaching our findings of fact and coming to this reasoned judgment. We regret that it has taken us this long.

Employment Judge Khan

24.08.2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

25/08/2023

FOR EMPLOYMENT TRIBUNALS