# EMPLOYMENT TRIBUNALS

**Claimant:** **Mrs O V Onwuemene**

**Respondent:** **Toynbee Hall**

**Heard at:** **East London Hearing Centre (via Cloud Video Platform)**

**On:** **22, 23 and 24 August 2023**

**Before:** **Employment Judge Brewer**
**Members:** **Ms A Berry**
**Ms J Houzer**

**Representation**

Claimant: Mr G Brown, Lay Representative
Respondent: Mr J Buckle, Counsel

# JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's claims of direct race discrimination fail and are dismissed,

2. The claimant's claims of direct age discrimination fail and are dismissed,

3. The claimant's claim of failure to make reasonable adjustments fails and is dismissed,

4. The claimant's claims of victimisation fail and are dismissed.

# REASONS

**Introduction**

1. This case came before us for a three-day hearing. We were provided with an agreed bundle of documents running to 244 pages, a chronology, a cast list and a bundle of witness statements.

2. We heard oral evidence from the claimant, and for the respondent from Mila Smith Head of People at the material times, Amaka Menakaya, Head of Grant Delivery at the material times and Necla Bakirci, Heads of Quality and Compliance at the material times. We also had a witness statement from Xia Lin but she was not present as she had sadly contracted COVID. Mr Buckle confirmed that the respondent was happy to proceed without her giving live evidence and therefore as she was not present to be cross examined, we have given her statement appropriate weight in the circumstances.

3. The evidence and submissions were completed towards the end of day two and we delivered our judgment orally on the afternoon of day three. We set out below detailed reasons for our decisions.

4. Prior to the hearing starting the Tribunal noted that despite there having been a case management hearing, significant correspondence between the parties and between the parties and the Tribunal about the issues in the case, including an application to amend the claim from the claimant, an Unless Order in respect of the provision of further particulars by the claimant and a response to that Order, there was no agreed list of issues. In the circumstances the Tribunal drafted what it understood the claimant's claims to be based on the pleaded case. At the outset of the hearing, we agreed to e-mail a document setting out our understanding of the issues to both representatives for them to consider, amend and agree while the Tribunal took time to read the papers. We agreed to start the evidence at 12 noon on day one and we asked the parties to agree the list of issues prior to that point. In the event the representatives emailed the Tribunal to say that both parties accepted the issues as drafted by the Tribunal, and notwithstanding that some of those issues are rather vague, which reflected how the case was in fact pleaded, given that the parties agreed those issues the Tribunal agreed that they would stand as the agreed list of issues and therefore the matters upon which we had to give judgment.

## Claims and issues

5. The claimant brings claims of:

    a. direct race discrimination,

    b. direct age discrimination,

    c. failure to make a reasonable adjustments, and

    d. victimisation.

6. The issues in the claims are as follows:

    **Direct race discrimination**

    **Claimant is Black African**

    1. Being required to have 1:1 sessions in front of colleagues (seems to be the incident on 18 August 2021 – p60).

2. Not being praised by James Kirkham who did praise Caucasian colleagues.

3. David Adam asking Nick Webster to oversee the team when he was out of office.

4. When DFL took over from MAS, not being given information about new funder requirements and not being given support.

5. Being demoted in July 2021 to Debt Advice Assistant from Debt Adviser.

6. Being effectively suspended from work between 12 December 2021 and 3 March 2022.

**Direct age discrimination**

**Claimant says age was 63**

1. Being side-lined by new young and less experienced colleagues who were given much more attention and support.

2. Having less help with mental health problems than Nick Webster –

    a. C says that she had to take annual leave for her hospital appointments,
    b. C says when she was off sick for 5 days she was reported to HR by her manager, David Adam and he said that her sickness absence "had to be addressed",
    c. Mr Adam called the C at home to ask for her sick notes,
    d. Mr Adam failed to ask the C about her condition,
    e. Nick Webster was off for most of the time, weeks and months, and Mr Adam never said anything about it.

3. When Nick Webster was about to be made redundant, he was sent on a course and given attention and support which the claimant was not.

4. Being removed from the rota for training and mentoring others.

5. Being demoted.

**Failure To Make Reasonable Adjustments**

**Claimant's disability is a spinal problem – disability conceded**

1. No adjustments were made for the claimant's disability - C says the adjustments she had, footstool, chair, keyboard and laptop stand, were removed and neither the chair nor the laptop stand were replaced on her return to the office following the COVID lockdown during which she worked from home.

**Victimisation**

**Protected act was the claimant's grievance – R accepts this was a protected act**

1. Harassed for raising a grievance.

2. Demoted to Debt Advice Assistant from Debt Adviser.

**Law**

7. We set out below the key law we have applied.

**Direct discrimination**

8. In relation to the claims for direct race and age discrimination, for present purposes the following are the key principles.

9. Under section 13 Equality Act 2010 (EqA), there are two issues: (a) less favourable treatment and (b) the reason for that less favourable treatment. These questions need not be answered strictly sequentially (**Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337).

10. Given the treatment must be "less favourable" a comparison is required, and a comparator must "be in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class" (**Shamoon** above).

11. The burden of proof is set out in section 136 EqA. The leading cases on the burden of proof pre-date the Equality Act (**Igen Ltd v Wong** 2005 EWCA Civ 142 and **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, [2007] IRLR 246) but in **Hewage v Grampian Health Board** 2012 the Supreme Court approved the guidance given in **Igen** and **Madarassy**.

12. By virtue of section 136, it is for a claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, *absent* any explanation from the respondent, that the respondent has discriminated against the claimant. If the claimant does that, the burden of proof shifts to the respondent to show it did not discriminate as alleged.

13. In **Madarassy** the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g.race) and a difference in treatment. This merely gives rise to the possibility of discrimination. Something more is needed. Any inference about subconscious motivation has to be based on solid evidence (**South Wales Police Authority v Johnson** 2014 EWCA Civ 73).

**Failure to make reasonable adjustments**

14. Section 20 EqA states that the duty to make adjustments comprises three requirements:

    a. a requirement, where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage — S.20(3),

    b. a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage — S.20(4),

    c. a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid — S.20(5).

15. In the case of an employer, a 'relevant matter' for the above-mentioned purposes is any matter concerned with deciding to whom to offer employment and anything concerning employment by the employer — para 5, Sch 8 EqA.

16. In **Abertawe Bro Morgannwg University Local Health Board v Morgan** 2018 ICR 1194, CA, the Court of Appeal held that the duty to comply with the reasonable adjustments requirement under S.20 begins as soon as the employer can take reasonable steps to avoid the relevant disadvantage.

17. It is no part of the duty to make reasonable adjustments for the employer actively to consult the employee about what adjustments should or could be made (**Tarbuck v Sainsbury's Supermarkets Ltd** 2006 IRLR 664, EAT).

18. The first situation in which the duty to make reasonable adjustments arises is where a 'provision, criterion or practice' (PCP) of the employer's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled — S.20(3) EqA. A PCP is one 'applied by or on behalf of' the employer — para 2(2)(a), Sch 8 EqA.

19. In the non-employment case of **Finnigan v Chief Constable of Northumbria Police** 2014 1 WLR 445, CA, Lord Dyson MR observed that 'the [PCP] represents *the base position* before adjustments are made to accommodate disabilities. It includes all practices and procedures which apply to everyone, but excludes the adjustments.

20. In **Nottingham City Transport Ltd v Harvey** EAT 0032/12 it was held that where a disabled person claims that a 'practice' (as opposed to a provision or criterion) puts him or her at a substantial disadvantage, the alleged practice must have an

element of repetition about it and be applicable to both the disabled person and the non-disabled comparators.

21. In **Secretary of State for Justice v Prospere** EAT 0412/14 the EAT held that 'the importance of properly identifying the PCP cannot be emphasised too strongly', since 'the steps which a respondent is under a duty to take must depend on the particular PCP applied'.

22. In **Griffiths v Secretary of State for Work and Pensions** 2017 ICR 160, *CA* (another case concerning an employer's absence management policy), the Court of Appeal emphasised the importance of identifying not only the relevant PCP but also the precise nature of the disadvantage it creates for a disabled claimant by comparison with a non-disabled person.

**Victimisation**

23. In determining allegations of victimisation three questions should be asked:

    a. did the alleged victimisation arise in any of the prohibited circumstances covered by the EqA,

    b. if so, did the employer subject the claimant to a detriment,

    c. if so, was the claimant subjected to that detriment because he or she had done a protected act, or because the employer believed that he or she had done, or might do, a protected act?

24. Section 39(4) provides that an employer (A) must not victimise an employee of A's (B):

    a. as to B's terms of employment,

    b. in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training, or for any other benefit, facility or service,

    c. by dismissing B, or

    d. by subjecting B to any other detriment

25. Tribunals need to make findings as to the precise detriment pleaded (see for example **Ladiende and ors v Royal Mail Group Ltd** EAT 0197/15).

26. Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related award. A detriment might also include a threat made to the complainant which they take seriously and it is reasonable for them to take it seriously. The claimant will not succeed simply by showing that he or she has

suffered mental distress: it would have to be *objectively reasonable* in all the circumstances.

27. Where it is not entirely obvious that the claimant has suffered a detriment, the situation must be examined from the claimant's point of view (**Chief Constable of West Yorkshire Police v Khan** 2001 ICR 1065, HL, **Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337, HL and **Derbyshire and ors v St Helens Metropolitan Borough Council and ors 2007** ICR 841, HL).

28. To succeed in a claim of victimisation the claimant must show that he or she was subjected to the detriment *because* he or she did a protected act or *because* the employer believed he or she had done or might do a protected act. Where there has been a detriment and a protected act, but the detrimental treatment was due to another reason, e.g. absenteeism or misconduct, a claim of victimisation will not succeed.

29. It is not necessary for the protected act to be the *primary* cause of a detriment, so long as it is a significant factor (**Nagarajan v London Regional Transport** 1999 ICR 877, HL). If protected acts have a 'significant influence' on the employer's decision making, discrimination will be made out.

**Findings of fact**

30. We make the following findings of fact (numbers refer to pages in the agreed bundle unless otherwise stated).

31. The claimant describes herself as of black African origin. At the material times she was 63 years old and suffering from spondylitis. The respondent accepts that the claimant's spondylitis amounted to a disability for the purposes of section 6, EqA and that they had always had knowledge of that.

32. The respondent organisation dates back to 1884. It is a charity based in the East End of London offering advice services, youth and older people's projects and financial inclusion work geared towards supporting members of the local community in times of crisis and on a longer-term basis by providing them with the skills and support they need to open up access to opportunities. The respondent operates alongside some 27 partner organisations such as CABs and Law Centres.

33. The service with which the claimant was involved was debt advice which is a service regulated by the Financial Conduct Authority (FCA). The claimant was engaged as a debt adviser and put simply, the role of the debt advisor was to advise people who get in debt on how to handle the problems created in those circumstances. This may include, for example, assistance with dealing with credit card debt, outstanding utility bills, rent arrears and so on.

34. The advice which is given to individuals has to be evidenced in writing by the debt advisor. We shall return to this question in more detail below.

35. On 10 December 2008 an ergonomic assessment of the claimant's work area was undertaken and it was suggested that she needed some auxiliary aids which

were ordered on 15 December 2008. The claimant retained those auxiliary aids save for a period of around 4 weeks in 2021 (although she was not in the office all of that time as she was working partly from home). The claimant 's claim for failure to make reasonable adjustments relates to this 4 week.

36. The main issues raised by the claimant in this case concern in particular two of her managers, Mr Adam and Mr Kirkham. To put this into context, since the claimant became employed by the respondent in 2008, and prior to Mr Adam becoming her manager, she had been managed by 5 other managers about whom she made no complaint.

37. For our purposes it is material to note that from 2012 the respondent's debt advice service was funded by the Money Advice Service (MAS) who had requirements for reporting and recording the advice given.

38. In early 2019 MAS was replaced as the funder of the debt advice service by Money and Pension Service (MAPS). Mr Adam and Mr Kirkham were employed in this service and initially Mr Adam became the manager of, amongst others, the claimant.

39. One of the consequences of the change in the funder, was that the reporting and recording requirements changed and became rather more strict. Following the change, the debt advice had to be evidenced in a document known as a confirmation of advice.

40. The position on case files is fairly straightforward. Once someone comes to the respondent for debt advice a case file is opened and once the advice has been given, the file is closed. Open files can be the subject of random reviews. Debt advisors are expected to achieve a score of 75% that is to say they must meet 75% of MAPS' reporting and recording requirements. Furthermore, if a debt advisor's file does not evidence that all proper advice has been given, such that it causes or potentially causes the person receiving the advice a detriment (that is to say the advice is so faulty that the individual may be caused further loss or financial harm), the file will receive a score of 0%.

41. It is not common, but it is also not unusual for a file to be reviewed and to receive 0%. The adviser then has an opportunity to rectify the matter by properly recording the advice that has been given or if the advice has not been given, to give it and to record that it has been given.

42. The respondent employs a number of individuals involved in technical supervision and quality assurance who work alongside the debt advisors. Both Mr Adam and Mr Kirkham were technical supervisors.

43. When the new recording requirements were imposed on the respondent by MAPS, template letters were sent out to all debt advisers. Furthermore, from time to time standard paragraphs were emailed to the debt advisers to ensure that they had all of the information they needed to properly give and record their advice. As well as the templates, checklists of advice to give were also provided.

44. As well as the direct provision of the templates, checklists and standard paragraphs, all the advisers were sent a handbook known as COMPASS and all

of the debt advisers had direct access to the technical team, the quality assurance team and online resources both within the respondent and the FCA.

45. If a file is reviewed and receives a low score (below 75%) or a score of 0%, the respondent's policy is to outline a support and development plan for the debt advisor which includes taking remedial action, identifying any gaps in knowledge and to provide training and learning opportunities. It is vital to the respondent's business that this is done because if they do not remedy the faults, they will breach regulatory requirements imposed by the FCA and the requirements of MAPS with the result that they could lose their accreditation and consequently the work.

46. On 12 February 2020 the claimant attended a supervision meeting with Mr Adam. It is clear that at this time Mr Adam had some concerns that the claimant was not meeting the required standards for confirmation of advice letters [105], and it was noted that "although there [are] excellent examples of good work and practise our recording requirements are now changed so we will need to change how we work and we will work with you to help you meet the… standards we are now obliged to meet" [106]. The claimant read Mr Adam's note of the supervision meeting and commented "I have read your notes and I agreed with [what] you said" [107].

47. We find as a fact that at the date of this meeting, if not earlier, the claimant was aware that she was not meeting the new recording requirements and that Mr Adam was concerned about this but also that he had offered support to her as evidenced in the notes of the supervision meeting.

48. Subsequently Mr Adam reviewed some of the claimant's files and having noted that there were detriments, he scored her 0%. Mr Adam met with the claimant on 14 October 2020 which she describes as "a good opportunity for us to discuss the standards I am required to meet" [110].

49. On 15 October 2020 Mr Adam spoke to Mila Smith, who at the time was "Head of People" and told her that he felt that the claimant was unhappy with him as her manager because he was worried that the support that he was trying to give her was being taken in a negative way by the claimant.

50. On 22 October 2020 the claimant sent an e-mail to Mila Smith, to which she attached a response to the concerns raised by Mr Adam about the cases he had reviewed. From this it is clear that the claimant was not happy with the way she was being managed by Mr Adam [109 *et seq*].

51. On 12 January 2021 the claimant sent a second e-mail to Mila Smith with another attachment expressing her concerns about Mr Adam which she said she would like to discuss with Ms Smith [112 *et seq*]. In the attachment the claimant says that she could not work with Mr Adam, that he never supported her and that his focus was on another employee whom she referred to as Nick and who we now know to be Mr Webster. She said that Mr Adam belittled her and that this made her uncomfortable although she goes into no detail as to how she was belittled and what support she had expected, and which had not been forthcoming.

52. In early 2021 the claimant's line manager changed from Mr Adam to Mr Kirkham. Having reviewed some of the claimant's files and noting detriments, and therefore

scoring them at 0%, Mr Kirkham decided that the claimant should stop seeing new clients unless and until her recording improved. That was a reasonable management decision in the circumstances.

53. On 1 March 2021 Mr Kirkham emailed Ms Bakirci, then DFA Head of Quality and Compliance and told her that he had spoken to the claimant about case structure and although her knowledge was good "she often misses whole areas of advice". He also said that he and the claimant had agreed that the claimant would use the templates provided and reduce the amount of casework she takes on, which we understand to be a reference to the claimant not seeing any new clients for a period of time.

54. The claimant was on leave between 18 and 24 August 2021. The claimant was on sick leave from 25 August 2021 to 24 October 2021. She returned to work for two days and then was off sick from 27 October 2021 to 24 November 2021.

55. Mr Kirkham contacted Ms Bakirci in August 2021 again saying that he was concerned about the claimant's performance. Mr Kirkham said he had reviewed some of the claimant's open files twice, each time offering support but noting that the claimant's corrective action was not sufficient to improve the quality of advice she had given and in some cases detriment remained an issue on the file. Mr Kirkham said that he wanted to give the claimant a further opportunity and review the claimant's files for a third time. Ms Bakirci advised Mr Kirkham that it was the respondent's policy only to assess files twice, the first time was as an open file and the second time was after action had been taken to remedy any default and the file closed. It was unusual to assess files for a third time and, in the circumstances, she advised Mr Kirkham that she would ensure that the claimant's case files were anonymised and sent to two different quality team members for independent reviews. In her evidence under cross examination the claimant stated that she did not believe these anonymised reviews or assessments had taken place. When Mr Brown cross examined Ms Bakirci he did not challenge her evidence that she had organised the anonymisation and the further reviews and we find as a fact that this is exactly what she did. Ms Bakirci told us that she had an assistant who regularly undertook this task and was very familiar with how to do it. We found Ms Bakirci's evidence compelling.

56. The independent reviews were done, and significant issues were noted with the case files, with both assessors returning scores of 0% on 5 of the 8 files sent for review.

57. On 13 September 2021 the claimant submitted a grievance about Mr Kirkham [122 – 126]. Amongst other things the claimant complained that she was told by Mr Kirkham that she would have to undergo letter writing training, that Mr Kirkham discredited her work, that he did not guide or support her, and she alleged that Mr Kirkham along with Mr Adam discriminated against her because of her race and because of her age. She concluded that she had suffered race discrimination "because two other colleagues, Bernadette Nwosu and Ade Animashaun suffered the same problems as me…" [126].

58. The Tribunal was given no information about Ms Nwosu, but we were given evidence, which we accept about, Ms Animashaun. Her situation was that she had been dismissed, she lodged an appeal in the form of a grievance at least part of which related to race discrimination. The outcome was that although no discrimination was found, it was accepted that she had not been supported adequately as a result of which she was reinstated and was placed under the supervision of Mr Kirkham following which she thrived and has since been nominated for an award. She remains employed by the respondent.

59. The claimant was invited to a grievance meeting to take place via teams on 30 September 2021.

60. The grievance hearing duly took place and an outcome letter was sent to the claimant dated 12 November 2021 [136 – 140].

61. The grievance against Mr Kirkham raised a number of matters and these, and the outcomes, were as follows:

    a. Failure to provide templates or guidance - this was not upheld. It was noted that in fact Mr Kirkham having told the claimant that she would be sent on letter writing training is evidence that she was provided with training. The standard letters and paragraphs were cascaded to all debt advisers and it was concluded that Mr Kirkham had made efforts to guide and support the claimant.

    b. No 1:1 meeting with Mr Kirkham until February or March 2021, two to three months after he began managing the claimant. There was also a complaint that the claimant did not understand how she could score 0% and that Mr Kirkham did not discuss his concerns with the claimant – These were not upheld. It was pointed out that Mr Kirkham began managing the claimant in February 2021 and there was a 1:1 meeting in February 2021. There were weekly conversations between Mr Kirkham and the claimant about her work which is evidence of the support offered to her. The score of 0% and the need to achieve 75% had been explained to the claimant and it was also pointed out that the action of stopping the claimant seeing new clients was put in place so that the claimant would have time to concentrate on remedial actions on her open files which did not meet the required standard. The grievance panel also noted the results of the independent anonymised reviews which suggested that Mr Kirkham's concerns were genuine and not part of any discriminatory action by him or as part of a conspiracy with Mr Adam.

    c. Mr Kirkham held a 1:1 meeting with the claimant which was not in private - this concerned a meeting which took place by video during which the claimant says she could see somebody else present. Mr Kirkham could not particularly recollect this meeting and no finding could be made about whether it was in private or not however Mr Kirkham was given advice about how those meetings should be conducted. The panel did find that even if Mr Kirkham had done what the claimant said, it was not discriminatory. We note that as part of the grievance the claimant said that this was a matter of less favourable treatment because of disability and

there is no reference in her complaint about this having been age or race discrimination.

d. There is a general complaint of discrimination - the panel found no evidence that the claimant had been discriminated against because of either age or race.

62. The claimant appealed the grievance outcome by letter of 15 November 2021 [141].

63. On 26 November 2021 the claimant commenced early conciliation.

64. The claimant wrote to the respondent on 27 November 2021 to chase up the date of the appeal hearing and also to discuss returning to work after an absence for sick leave and holiday [143 – 144].

65. The claimant received her early conciliation certificate on 29 November 2021.

66. Ms Smith responded to the claimant's letter on 7 December 2021 [145 – 147]. She confirmed that the grievance appeal hearing would be arranged shortly, she confirmed there were, and provided links to, various online resources to assist the claimant to understand and meet the standards required by the funder but she also stated that given that the claimant could not meet the standards required by MAPS, she could not continue to give debt advice at least until she was capable of meeting the required standards. Ms Smith said, "we agree that you have performed diligently over the past 13 years and have no desire to devalue your experience or demote you but want you to use your skills in ways that work for you and the service while you recover from a period of absence and some challenges you have felt in your day-to-day work". It was in this context that the claimant was offered the opportunity to return to work as a debt advice assistant and she was asked to consider that. It was agreed that that job could be done three days from home and two days in the office and the claimant was sent a job description. It was confirmed that although the job was on a lower salary, the claimant would retain her debt advisor salary. Ms Smith went on to say that "there may be other alternatives, and if these come up we will update you. But this is an immediate possibility and one which we hope you would consider positively, and we hope you agree that it would be good to resolve things as quickly as we can, so you can be confident in your return to work… Please let us know if you want to meet to discuss this in more detail before you decide, or indeed if you have alternatives yourself that you would want to put forward…".

67. In response, on the same day, 7 December 2021, the claimant raised a grievance against the respondent for breach of contract based on the fact that she said she had been demoted which she says was victimisation for "making a protected act" and for a "reason arising from her disability" [148].

68. In the grievance itself, the claimant said that "I have never been informed by any manager that my performance in my duties was below standard or not up to the standard expected of me" which, given the foregoing, is a very curious allegation. It is quite clear that the claimant was told on a number of occasions that her performance was substandard because she was scoring 0% on file reviews so it is difficult to see how she could then allege that she had not been informed the

performance was below the required standard. We find as a fact that the claimant was told both by Mr Adam and by Mr Kirkham that her performance did not meet the standards required by MAPS.

69. In response to receipt of the grievance letter, Ms Smith wrote to the claimant, again on 7 December 2021 to say, amongst other things, that she was sorry that the claimant was upset by her original letter, and she invited the claimant to an informal discussion with the Director of Policy and Innovation [150]. Ms Smith acknowledged the grievance, took issue with some of the things the claimant was saying and confirmed that she had not been demoted, she was merely being offered the opportunity to return to a meaningful role given that she had been unable to meet the required standard for the debt adviser role for over a year despite being supported to do so.

70. The claimant presented her claim form on 8 December 2021.

71. Between 25 November 2021 and 14 April 2022, the claimant was on extended paid leave which the claimant says was tantamount to being suspended from work.

72. On 5 January 2022 the claimant emailed Ms Smith to confirm that she would return to work as a debt advice assistant under her then current salary although she did so under protest. The date of return to work was to be 10 January 2022.

73. We find as a fact that the claimant was not demoted. We find as a fact that the claimant was not suspended from work.

74. The position was that the claimant was not capable of performing the debt advisor role; the role for which she was employed, because despite support she had been unable to meet the new funder's recording standards for over 12 months and we accept the respondent's argument that to have placed her back in the debt advisor role would have been to jeopardise their accreditation given that they would not be meeting regulatory requirements. That is the reason the claimant was given extended leave. The alternative would have been to formally performance manage her, but the respondent was endeavouring to find a solution agreeable to the claimant, but which also met the respondent's needs.

75. The issue of demotion might have arisen had the respondent imposed upon the claimant the role of assistant advisor, but they did not. They simply offered the claimant the opportunity to return in that role as an alternative to not returning and inevitably having to be taken down a formal performance management route. The fact that this was an offer which it was open for the claimant to accept or not is evidenced by the document at [156] which is the claimant's acceptance of, as she puts it "your offer", albeit stated to be acceptance under protest.

**Discussion and conclusions**

76. We now turn to our conclusions on the issues. We note that a number of the individual allegations are, on the face of it, out of time, and although Mr. Brown did not expressly state it we have proceeded on the basis that there is an argument that the issues taken together constitute an act extending over a period

of time or what is commonly called a continuing act, and therefore we have provided conclusions on all of the allegations whether or not in time.

**Direct race discrimination**

77. The first issue was the allegation that the claimant was required to have a 1:1 meeting on 18 August 2021 in front of colleagues.

78. As the evidence unfolded it became clear that this allegation is that during a zoom meeting which was intended to be a 1:1 meeting between the claimant and Mr Kirkham, the claimant could see that there was another member of staff in the same room as Mr Kirkham.

79. The claimant provided no evidence to substantiate her allegation that she was "required" to have a 1:1 meeting with a colleague being present. It may be that a colleague was present in the room where Mr Kirkham took the video meeting with her but that does not amount to a requirement imposed on her by the respondent. Whilst it is good practice that 1:1 meetings take place in private, the claimant provided no evidence to substantiate the allegation that this did not take place on this occasion because of her race.

80. There is arguably evidence from which we could draw inferences about Mr Kirkham.

81. In February 2021 Mr Kirkham agreed that the claimant's caseload should be reduced, and he shared templates with her. In May 2021 templates were shared again by Mr Kirkham and he agreed to review the claimant's letters while she took time to adapt to the new templates. In July 2021 Mr Kirkham agreed with the claimant that she would not be given further appointments until case reviews showed that she was compliant with the then current requirements for recording advice. The claimant 's files were independently and anonymously reviewed, and the scoring was shared with the claimant. Mr Kirkham offered to discuss the scoring and provide feedback as well as extra support if required. There were also a number other 1:1 meetings between the claimant and Mr Kirkham. Mr Kirkham offered the claimant the chance to undertake a letter writing course.

82. We also note that the claimant seems to rely on the fact that she says four black African colleagues suffered in the same way that she did which is what led her to conclude that her treatment was based on race. Two of those colleagues, TS and HM, have left the respondent and there is no record of them making any allegations of race discrimination [192]. A third employee, BN left the respondent having failed to pass her probation. The last one, Ms Animashaun was having difficulties at work as we have described above. Since coming under the supervision of Mr Kirkham she has been successful at the respondent to such a degree that she has been put forward for an award.

83. In relation to this allegation, we find that the claimant has failed to prove facts from which we could conclude she had been discriminated against as alleged and thus has failed to shift the burden of proof. However, even if we are wrong about that, the inference we draw from the foregoing findings is that Mr Kirkham

was not motivated by the claimant's race to treat her detrimentally even if this 1:1 meeting took place exactly as the claimant alleges.

84. For those reasons this allegation fails and is dismissed.

85. The second allegation is that Mr Kirkham did not praise the claimant but did praise "Caucasian colleagues".

86. The claimant led no evidence on this allegation which is at best somewhat vague. In any event if we consider the written documentation in the bundle, we can see that throughout his interactions with the claimant Mr Kirkham was keen to express that she was a valued member of the debt advisor team and the only issue he had with her related to her apparent inability to meet the changed requirements following the introduction of the new funder. We note, as we set out above, that Mr Kirkham pressed to allow for the claimant's files to be reviewed three times instead of two, which was unusual, and from this and the matters we have set out under the first allegation the inference we draw is that it is not correct that the claimant was not praised by Mr Kirkham.

87. In our judgment the claimant has not proved facts from which we could conclude that the discrimination took place as alleged. For this reason, this allegation fails and is dismissed.

88. The third allegation is that Mr Adam asked Nick Webster to oversee the team when he was out of office.

89. Other than the claimant's assertion that this took place, there is no evidence that Mr Adam did ask Mr Webster to oversee the team when he was out of the office. But even if we accept this did take place, there is no evidence that the reason for that was the claimant's race and no evidence from which we could draw an adverse inference enabling us to conclude that it was the case at least on a prima facie basis.

90. In fact, the claimant's evidence about her relationship with Mr Adam was somewhat contradictory. During cross examination she alleged that Mr Adam was discriminatory and that he was picking on the claimant. She alleged that he failed to support her or to provide her with information so that she could do her job, however she also agreed with Mr Buckle that as at December 2020 when the claimant had been provided with training, Mr Adam was supportive and friendly. She went on to say that when she and Mr Adam had a fallout, he would hand over the reins of the office to a junior colleague, but this was only in the period late 2020 early 2021 and of course by February 2021 Mr Adam was no longer the claimant's manager.

91. We find that the claimant has somewhat overstated her case in this allegation and the evidence considered in the round at best suggests that towards the end of the period during which Mr Adam managed the claimant, if they had a falling out and somebody had to be left in charge of the office by Mr Adam, he chose someone the claimant refers to as a junior colleague.

92. For these reasons we do not consider that the claimant has proved facts from which we could conclude that the discrimination took place as alleged, but even

if she had, we are satisfied from the facts we have found and the inferences we can draw that, even if a junior colleague was left in charge of the office when Mr Adam was out, this was not because of the claimant's race.

93. For those reasons this allegation fails and is dismissed.

94. The fourth allegation is that the claimant was not given information about new funder requirements and was not given support when the new funder took over.

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95. We were particularly impressed with the evidence of Ms Bakirci on this point. She explained that there is a large amount of information available for the debt advisors dealing with, for example, what detriments are and what the regulatory and funder requirements are. There are template letters and standard paragraphs available to use and which were and continue to be cascaded to all debt advisers by e-mail and which are updated from time to time. There is information available on the respondent's intranet as well as on the FCA website. The claimant worked alongside technical staff as well as quality assurance staff all of whom were available to provide advice should she require it. We also noted her evidence that all debt advisers had to be Money Advice Institute registered and information was available through that process. Finally, we note that there were a number of so-called town hall meetings at which information was cascaded to all staff regarding the new ways of working.

96. We also note the evidence in relation to specific file reviews and the analysis done on that which can be seen at [191]. As Ms Bakirci explained, on a first review of an open file if, for example, a detriment is noted, the file is scored 0% but the adviser has an opportunity to either give the advice which should have been given or record that it has been given as required by the funder. The file can then be reassessed. It is in the interests of the respondent to make sure that all the files are compliant for the reasons we have set out above.

97. Some 8 file reviews were done on the claimant's files. The results show that on first review five of those scored 0% and the remaining three scored less than the required 75%. On second review one of the files went from 0% to 94% and all three files which had not scored 0% had increased scores. Furthermore, four of these files were subject to the third anonymised reviews which we have discussed above and although two were still under review at the time of the grievance appeal, two others went from 0% to 58% and 69% respectively. It is entirely clear from this that the claimant must have been given information about what was missing from the recorded files and what needed to rectify the problems otherwise her scores could not have increased.

98. From all of this evidence we find that the claimant has not proved facts from which we could conclude that she was not given information about new funder requirements or that she was not given support, and in fact we find that she was given such information and she was given considerable support including support above and beyond that which was given to other colleagues including colleagues not of her race.

99. For those reasons this allegation fails and is dismissed.

100. The fifth allegation is that the claimant was demoted from the role of debt adviser to debt advice assistant. We have set out in our findings of fact about this above and our conclusion is that the claimant was not demoted. This is a moot point because in any event Mr. Brown confirmed in his submissions that this allegation was no longer being pursued as an allegation of direct race discrimination and therefore this allegation is dismissed.

101. The final allegation under this heading is that the claimant was effectively suspended from work during the period December 2021 to March 2022. We have set out our findings of fact about the extended leave above and we have concluded that the claimant was not suspended from work notwithstanding that she was not working and was on extended leave. We are satisfied that even if the allegation was that the extended leave was imposed upon her because of her race, that was not the case. The extended leave was imposed because the claimant was unable to meet the requirements of the job she was doing, because those requirements had changed, she had not been able to adapt to the new ways of working and to put her back as a debt adviser before she was ready would have jeopardised both her future and the respondent's business and in the circumstances this was considered to be a proportionate way of keeping the claimant employed whilst she either got up to speed with her role or was found some other work to do.

102. We find that the claimant has not proved facts from which we could conclude that the extended leave was a detriment, or if it was a detriment that it was done because of the claimant's race, and she has not shifted the burden of proof. However even if we are wrong about that, we are satisfied that the respondent's explanation as to the reason for that leave is not tainted by race discrimination.

103. For those reasons this allegation fails and is dismissed.

**Direct age discrimination**

104. The first allegation of direct age discrimination is that new young and less experienced colleagues were given much more attention and support.

105. Other than the evidence above in relation to Mr Webster the claimant provided no evidence beyond mere assertion that new younger less experienced colleagues were given much more attention than she was.

106. If we leave that aside for a moment, we can consider whether, if what the claimant said is true, does it amount to age discrimination? We find that a much more plausible explanation than direct age discrimination is that given that the claimant was at the relevant time 63 years old and had been doing the job since 2008, it is highly likely that new staff would be younger and less experienced than the claimant and would therefore require more attention and support than she did. It does not seem to the Tribunal to be obviously detrimental or discriminatory that less experienced, and by definition younger, staff were given more attention and support than the claimant was given.

107. There is no basis on which we could conclude, and the claimant provided no evidence beyond her assertion, that new, younger staff were given much more attention and support than the claimant, or that if they were, that this was a

detriment or, if it was a detriment, that the reason was age. In the Tribunal's experience the much more likely reason would be that they required more support for reasons which we trust are obvious.

108. We find that the claimant has failed to shift the burden of proof in relation to this allegation because she did not prove facts from which we could conclude either that what she alleges occurred or if it did occur, it was because of age. For this reason, this allegation fails and is dismissed.

109. The second allegation is that the claimant had less help with mental health problems than Mr Webster.

110. The Tribunal was somewhat unclear about what this allegation was referring to and the claimant provided no evidence that she was given less assistance than Mr Webster with any mental health problems. The health problems we were asked to consider in this case related to the claimant's disability which is a back issue and not a mental health issue.

111. The general allegation appears to be broken down into several small allegations about which there was some evidence.

112. The claimant asserted that she had to take annual leave for her hospital appointments. There was no evidence that this was the case. We accept the evidence of Ms Bakirci that the respondent's policy is that seven hours paid leave is given to each employee specifically for them to attend medical appointments. Anything beyond the seven hours may be taken as authorised unpaid leave or annual leave may be used if it is available. There is no evidence that this policy was not applied to everyone.

113. The claimant also asserted that when she was off sick for five days she was reported to HR by Mr Adam and that he said to her that her sickness absence had to be addressed. There was again no evidence about this in the bundle, but we can readily understand that given the claimant did have a significant amount of time off sick, Mr Adam could well have said at some point that the question of the amount of the claimant's sickness absence would have to be addressed. We do not understand how the claimant connects those matters with age discrimination.

114. The claimant further asserted that Mr Adam called her at home to ask her for sick notes. Whilst practise may vary amongst employers about whether to contact people who are off sick, even if Mr Adam did contact the claimant to ask for a sick note, we do not see how that amounts to age discrimination.

115. The final assertion about the claimant's treatment under this general heading is that Mr Adam failed to ask the claimant about her "condition". The difficulty with this is that we are unclear as to what condition she means. As we have said, the only condition of which we are aware is the spondylitis, which is the disability relied on by the claimant, but under the age discrimination allegations the reference to a condition is to an undetailed mental health problem and we are not aware that the claimant suffered mental health problems. If she is alleging that Mr Adam did not ask her about her spondylitis that would appear to run counter to the immediately previous allegation that he asked her for sick notes which

would have set out information about her condition but in any event none of this appears to the Tribunal to relate in any way to age or to be because of age.

116. There is another assertion under this general allegation which relates to Mr Webster, and it is that he was absent for, as the claimant puts it, most of the time and she says that Mr Adam “never said anything about it”. If the claimant intended to compare her treatment with the way she believes Mr Webster was treated such that she seeks to say that she was less favourably treated because she had to take annual leave for hospital appointments, she was reported to HR and had a conversation about addressing her absence, she was called at home to ask for her sick notes and Mr Adam did not ask her about her condition, whereas in respect of Mr Webster he did not have to take annual leave for holiday appointments, he was not reported to HR, he was not called at home for sick notes and Mr Adam did ask him about his condition, there is no evidence about any of those matters. The most the claimant says is that Mr Adam never said anything about Mr Webster's absence.

117. There is therefore no evidence of a difference in treatment between the way Mr Adam treated the claimant as asserted by the claimant and the way he treated Mr Webster because the most the claimant says is that Mr Adam never said anything about Mr Webster's absence which does not mean he did not speak to Mr Webster and express concerns about how long he had been off and report him to HR and so on.

118. In short, the claimant has not proved facts from which we could conclude that there was age discrimination in respect to this allegation and she has not shifted the burden of proof to the respondent and for those reasons this allegation fails and is dismissed.

119. The third allegation of age discrimination is that when Mr Webster was about to be made redundant, he was sent on a course and given attention and support which the claimant was not.

120. To be blunt, this allegation makes no sense, because at no point was the claimant at risk of redundancy and therefore, she cannot compare the way she was treated outside of a redundancy situation with the way Mr Webster was treated in the context of a potential redundancy. Simply put, the claimant is not comparing like with like.

121. For those reasons this allegation fails and is dismissed.

122. The fourth allegation is that the claimant was removed from the rota for training and mentoring others.

123. There is no evidence in the documentation that the claimant was removed from the rota for training and mentoring others. This allegation did also not appear in either of the claimant's grievances.

124. We can find no evidence to show that the claimant was in fact removed from this rota nor if she was that it was because of her age. In the circumstances there was no evidence from which we could conclude that the claimant was

discriminated against because of age, and she has failed to shift the burden of proof to the respondent. Therefore, this allegation fails and is dismissed.

125. The final allegation relates to the purported demotion. We do not need to deal with this because in his submissions Mr Brown confirmed that the claimant was no longer alleging that her demotion was age discrimination, and of course we have found that she was not demoted so either way this claim fails and is dismissed.

**Failure to make reasonable adjustments**

126. Whilst the Tribunal did its best to understand what this allegation was, we do note that there was no PCP pleaded nor was it clear what the substantial disadvantage was which engaged the duty to make reasonable adjustments.

127. That said, this was dealt with in cross examination by Mr Buckle in some detail and at the end of that cross examination, which included the fact that auxiliary aids were provided, and that the claimant was allowed to work at home for three days a week, the claimant conceded that reasonable adjustments had been made and therefore she effectively abandoned this part of her claim. We do accept that in his submissions Mr Brown resurrected the allegation by stating that there was a period of four weeks when the claimant did not have her chair, but he did not explain why he says that was a failure to make reasonable adjustments as opposed to a delay in providing a chair.

128. In the circumstances we are not persuaded that the respondent failed to make reasonable adjustments and for those reasons this claim fails and is dismissed.

**Victimisation**

129. We can deal with the two allegations of victimisation quite shortly.

130. The first allegation is a wholly unsubstantiated assertion that the claimant was harassed, and therefore victimised because she raised her grievance against Mr Kirkham which, it is agreed, was a protected act. Notwithstanding that it is accepted that the grievance was a protected act the allegation of harassment is wholly unparticularised. No evidence was led on what this alleged harassment amounted to.

131. Having said that, the Tribunal is prepared to accept that the word used by the claimant - “harassed” - was intended to be a catch all word to incorporate the other matters she complains about in respect of her treatment compared to those not of her race and who are younger than her. If that is right then we have dealt with those matters above and we have found that either they did not occur, did not occur in the way the claimant said, or if they did occur there are non-discriminatory reasons provided by the respondent for the treatment.

132. But the real difficulty with this approach is that it would require us to find that the allegations of race discrimination and age discrimination were not done because of either race or age but were done because the claimant made a protected act which is not in fact the claimant’s case. The claimant’s case is quite clearly that the matters she complains about under the race and age discrimination heads

were race and age discrimination and not victimisation. In other words they were not caused by the fact that she did the protected act, but were done because of her race or because of her age.

133. For these reasons we find that this allegation of victimisation fails and is dismissed.

134. The final allegation of victimisation and indeed the final allegation in this case is that the claimant was demoted to the role of debt advice assistant as an act of victimisation.

135. We have found and repeat that the claimant was not demoted, there was no act of victimisation and therefore this allegation fails and is dismissed.

136. Having heard the evidence and considered it in detail, we believe we understand how the claimant's concerns arose. On the face of it she had worked perfectly well for a number of years without criticism or complaint. She then found herself to be the subject of criticism by her next group of managers, Mr Adam, Mr Kirkham and most recently Ms Nkumbuna (notably a black African woman) and she has raised complaints about all three of them. The Tribunal's perspective is that the criticisms of the claimant related to her failure to grapple with the new funder recording requirements which meant that she had to be more pro-actively managed than previously, which coincided with a change in manager, initially Mr Adam. Whilst we have some sympathy for the claimant finding herself in this position, we are clear that her treatment did not amount to any form of impermissible discrimination. We note that she remains employed and hope that she can put this behind her and move forward positively.

137. For the avoidance of doubt all of the allegations of direct race discrimination, direct age discrimination, failure to make reasonable adjustments and victimisation fail and are dismissed.

**Employment Judge Brewer**
**Dated: 24 August 2023**