EMPLOYMENT TRIBUNALS

Claimant: Miss D Oyewusi

Respondent: Orchard & Shipman Group Ltd

Heard at: Reading **On:** 19, 20, 21, 22, 23 June 2023 (31 July, 1 & 22 August Tribunal in Chambers)

Before: Employment Judge Shastri-Hurst, Ms A Brown and Mr J Appleton

Representation
Claimant: in person (assisted by friend, Ms Jesuwemimo)
Respondent: Ms A Rokad (counsel)

RESERVED JUDGMENT

1. The claimant's claim of harassment succeeds in relation to **Allegation 2.1.2**, the sending of a monkey emoji image to the claimant, on 1 December 2021;

2. The remaining claims of harassment are not well-founded and fail;

3. The claimant's claims of direct race discrimination are not well-founded and fail;

4. The claimant's claims of victimisation are not well-founded and fail.

REASONS

Introduction

1. The claimant worked for the respondent, a residential lettings and property management company, from 2 November 2021 through to her resignation with immediate effect on 29 April 2022. The claimant held the position of Customer Support Co-ordinator with the respondent.

2. The claimant brings claims of direct race discrimination, harassment related to race, and victimisation, pursuant to the Equality Act 2010 ("EqA")

3. The ACAS early conciliation process started and ended on 19 April 2022, prior to the claimant's resignation; the claim form was presented to the Tribunal on 30 April 2022. The claim relates to events which started on 12 November 2021 with the sending of an emoji by her colleague, Vicky O'Brien, to the claimant – [237]. Another emoji was sent by Miss O'Brien on 1 December 2021. The claimant took offence to this emoji, being the image of a monkey giving a thumbs up, and complained to Abbie-Jay Cronin on 2 December 2021. It is this conversation that the claimant relies upon as being the protected act for the purposes of her victimisation claim. From that time onwards the claimant complains about various acts committed by several of her colleagues, particularly Ms Cronin, that she says were either because of or connected to her race, or because of the protected act.

4. The respondent defends all claims, asserting that, if any of the allegations are found to have occurred as a fact, they were not because of or related to the claimant's race nor were they because of any protected act done by the claimant.

5. The respondent was represented by Miss A Rokad of counsel. The claimant represented herself with some assistance from her friend Ms Jesuwemimo (retired solicitor).

6. We have had the benefit of reading statements and hearing evidence from the claimant, and for the respondent we heard from:

   6.1. Amy Lennon – Group HR Advisor;
   6.2. Vicky O'Brien (now Mrs Deacon) – Customer Support Co-Ordinator;
   6.3. Bethany Baker – Customer Support Co-Ordinator at the relevant time (now Voids Co-Ordinator);
   6.4. Abbie-Jay Cronin – Customer Service Team Leader, the claimant's line manager; and
   6.5. Samantha Mott – HR Manager employee of Pinnacle, which acquired the respondent company on 11 October 2021.

7. We started the hearing with a bundle of 420 pages. By the time various additions had been made the bundle length was 525 pages. We also had the benefit of an agreed chronology, an agreed cast list and a "key documents" list from the respondent.

Preliminary issue – amending the claim

8. At the beginning of this hearing, the tribunal raised the issue of a discriminatory constructive dismissal claim. A preliminary hearing had taken place on 17 January 2023. I set out below paragraph 40 of the case summary from that preliminary hearing:

> "The claimant had contacted the Tribunal on 10 August 2022 to request to add a claim for constructive unfair dismissal. We discussed the requirement for an employee to have two years' service to bring a claim for unfair dismissal (including constructive unfair dismissal) under section 108 of the Employment Rights Act 1996. I clarified with the claimant that, whilst there were certain exceptions to this requirement (for example in relation to whistleblowing), they were limited and did not apply to a claim for a discriminatory dismissal. I explained to the claimant however that she was able to include losses flowing from the termination of her employment within her claim for compensation, if she was

> asserting that the reason she resigned was because of the discrimination. The claimant confirmed that on that basis she agreed she would no longer seek to add constructive unfair dismissal to her claim.

9. The Tribunal at this final hearing raised with the claimant that this explanation from the Judge had been incorrect, and that it is possible for a discriminatory constructive dismissal claim to be presented without a minimum two years' service. To set out the legal framework briefly, section 39 EqA prohibits discrimination: s39(2)(c) provides that an employer must not discriminate against an employee by dismissing that employee. Then, s39(7)(b) provides that dismissing the employee will include termination of employment:

> …by an act of [the employee's] (including giving notice) in circumstances such that [the employee] is entitled, because of [the employer's] conduct, to termination the employment without notice.

10. On the basis that the claimant had originally been given incorrect guidance, we asked whether she sought now to make an application to amend her claim to include a claim of discriminatory constructive unfair dismissal. The claimant said that she would wish to make such an application.

11. The Tribunal therefore heard submissions from both sides as to whether a constructive discriminatory dismissal claim should be permitted at this stage. It was the respondent's position that they would be prejudiced, as they would require new, or supplementary, evidence to deal with that issue if it was to be proceeded with, and that it was not the claim for which they had attended to defend.

12. Having considered the balance of hardship and injustice to the claimant in not allowing the amendment, and to the respondent in allowing the amendment, we determined that we would not allow the amendment. This was because, from the time of the preliminary hearing, it was understood by both parties that, should the claimant be successful in her claims, then an issue for remedy would be whether her resignation flowed from any discriminatory act. Therefore, the claimant practically still has a route for claiming losses arising from her resignation without the need to pursue a constructive discriminatory dismissal claim.

13. We made it abundantly clear that, should the claimant win on any of her claims, a remedy hearing will need to deal with why the claimant resigned and whether it was because of the discriminatory treatment she suffered.

Preliminary issue – validity of documents

14. Partway through the hearing, an issue arose as to the validity of works orders that we have within the bundle. The relevance of these orders, is that the respondent relied on them to demonstrate that the claimant's performance was poor: this formed the basis of her probationary review in February 2022. The claimant claims that elements of that performance review are examples of victimisation she suffered at the hands of the respondent's employees.

15. The claimant refutes the assertion that her performance was poor, and asserted at the hearing, for the first time, that the works orders had been tampered with in order to manufacture a case against her which was intended

to lead to her dismissal. She said that this was done because she was by this stage deemed to be a troublemaker by the respondent, having raised her protected act.

16. It was explained to the claimant that there were two ways to proceed. Either this point could be treated as background to support her current victimisation claim, or she could seek to amend her claim to include this as a specific point of victimisation. It was pointed out to her that if she chose to apply to amend, the respondent would inevitably seek to postpone the current hearing in order to obtain further evidence on this point, and that this may lead to a delay in concluding the case. Currently, Reading Tribunal is listing 5 day cases in 2025.

17. The claimant was content to proceed on the basis that the Tribunal considers this issue as background to her existing victimisation claim.

18. This point as to the validity of the works orders relied upon by the respondent during the claimant's probationary review process did lead to us obtaining unredacted versions of those works orders, which were not included within the bundle.

Preliminary issue - disclosure

19. Following on from the claimant's concerns as to the validity of the works orders, at the beginning of day 2 (and part way through the claimant's cross-examination) the claimant asked for evidence as to when the screenshots of the works orders that were used for the probationary review were taken.

20. The respondent's position was that this was the first time during the litigation that the issue of the validity of any works orders had been raised, and that their case had been prepared on the basis that it was accepted that they were accurate and valid.

21. The Tribunal took time to deliberate as to whether any further disclosure from the respondent was necessary, in light of the claimant's position that the works orders had been tampered with.

22. It seemed to us that evidence of when the screenshots in the bundle had been taken would not in fact satisfy the claimant's concern, which was that works orders had been tampered with prior to screenshots being taken. That could only be dealt with by exploring the meta-data.

23. We determined that, if the claimant could pinpoint specific works orders that she said had been changed, we may be able to make an order for disclosure, or for the respondent to take reasonable steps to produce the metadata of those specific pages.

24. We were however concerned about the proportionality of this exploration, particularly that this only arose as an issue on Day 2 of the hearing. It would be more proportionate for this matter to be dealt with in the cross-examination of the respondent's witnesses.

25. We asked the claimant if she was, at this point, able to identify which of the works orders in the bundle she said had been altered. She was unable to do

so at that point, stating that she just was not sure that they had not been altered. It seemed to us therefore that, in light of this indication, it would be disproportionate to send the respondent on a mission to uncover the metadata for all the works orders in the bundle, and therefore we were not minded to order any further disclosure.

26. Ms Rokad was however concerned about how this matter would expand in cross-examination of the respondent's witnesses. The Tribunal at this point set out that we were perfectly able to make findings of fact on the evidence we would have before us by the conclusion of the case. It could be suggested to the respondent's witnesses that works orders had been altered to make the claimant's performance look worse than it was. We would then have to make a finding of fact on this point, based on the evidence given by the relevant witnesses.

27. Ms Rokad was concerned that the respondent may have further computer evidence that would support them on this point, and she was given time to make some enquiries as to the practicality of obtaining metadata. Those enquiries led to the conclusion that it would take a significant period of time for the respondent to trace back the metadata from documents created one to one and a half years' ago. Ms Rokad therefore stated that she was therefore content for us to deal with this matter of the validity of works orders on the evidence we currently had, including oral evidence that would arise during the course of the hearing.

Issues

28. The issues for the Tribunal to determine were set out and agreed at the preliminary hearing on this matter, on 17 January 2023, and are repeated below.

1. Direct discrimination

1.1. The claimant describes herself as being Black British.

1.2. Did the respondent do the following things:

1.2.1. send an animated moving hand gif image which the claimant considers resembles minstrels or piccaninnies. the gif image was sent by the claimant's former colleague, Ms O'Brien, at the end of November 2021 on Microsoft teams;

1.2.2. send a monkey emoji image to the claimant from the claimant's former colleague, Ms O'Brien, on 1 December 2021 on Microsoft Teams;

1.2.3. on 10 December 2021 the claimant alleges that her former colleague, Sharon McPherson, questioned whether the claimant had done a piece of work, and changed the name on the works order raised from the claimant's name to her own, neither of which she would have done to the claimant's white colleagues;

1.2.4. Make assumptions about the claimant's performance, specifically that she had not completed tasks and/or not completed tasks to the required standard. The claimant specifically relies on:

1.2.4.1. on or around January 2022, Miss Baker, a former colleague, presumed the claimant had been the person in the team who had not chased up a client query through WhatsApp messages in the team chat

1.2.4.2. Repeated concerns raised about the claimant's performance by her line manager, Ms Cronin:

1.2.4.2.1. on 21 January 2022, emailing the claimant to request a productivity check, but not making the same request of the claimant's colleagues;

1.2.4.2.2. on 26 January 2022, in a team video meeting, Ms Cronin stated that everyone needed to improve how they left notes however only using the claimant as an example;

1.2.4.2.3. on 26 January 2022, the claimant alleges she received a WhatsApp message from her manager, Ms Cronin, asking if she had followed up a repair, when she had, and it was just an assumption that she had not;

1.2.4.2.4. on or around January 2022, the claimant asked Ms Cronin for instructions to pass onto a client the details were not given to the claimant but were given to her colleague, Ms Baker, when she made the same request;

1.2.5. Following a telephone call on 27 January 2022, in a meeting on 2 February 2022 to discuss the claimant's concerns, Ms Cronin accused the claimant of being angry on the phone. The claimant alleges that Miss Cronin terminated the call on her and that it was not the claimant who did so;

1.2.6. on 14 February 2022, Ms O'Brien, the claimant's former colleague, did not help her with settling a client query whereas colleagues would normally help each other. This was through communications on WhatsApp, Horizon, and ReapIt.

1.3. Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

The claimant says she was treated worse than Ms Baker who was the colleague with the closest level of experience to herself in respect of subsections 1.2.3 to 1.2.6 above. The claimant has not named anyone in particular who she says was treated

1.4. If so, was it because of the claimant's race?

1.5. Did the respondent's treatment amount to a detriment?

2. Harassment related to race

2.1. Did the respondent do the following things:

2.1.1. send an animated moving hand gif image which the claimant considers resembles minstrels or piccaninnies. the gif image was sent by the claimant's former colleague, Ms O'Brien, at the end of November 2021 on Microsoft teams;

2.1.2. send a monkey emoji image to the claimant from the claimant's former colleague, Ms O'Brien, on 1 December 2021 on Microsoft Teams;

2.1.3. the claimant alleges that without any prior warning of training the claimant had to start work on the phones. The claimant considers she was instructed to do so by the claimant's former colleague, Miss O Brien, on 7 December 2021. Communications were over WhatsApp;

2.1.4. on 26 January 2022, in a team video meeting, Ms Cronin stated that everyone needed to improve how they left notes however only using the claimant as an example.

2.2. If so, was that unwanted conduct?

2.3. Did it relate to race?

2.4. 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?

2.5. If not, did it have 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.

3. Victimisation

3.1. Did the claimant do a protected act as follows:

3.1.1. The claimant raised a concern with her manager, Ms Cronin, on or around 2 December 2021 about a monkey emoji image that had been sent to her through Teams by colleagues? The claimant sent a picture of it to her manager and then had a Teams call to discuss it.

3.2. Did the respondent do the following things:

3.2.1. On 10 December 2021, the claimant asked Ms Cronin for help with the query she was dealing with for the first time. The claimant alleges that her manager read the message but did not reply. The claimant alleges that she re-raised the question but her manager did not provide the advice sought;

3.2.2. On 17 December 2021 the claimant received email correspondence from Ms Cronin which the claimant alleges was not constructive feedback but was fault finding about the claimant's work on the phones;

3.2.3. on or around January 2022, the claimant alleges she requested the necessary approval via email from Ms Cronin to complete a job. The claimant alleges that her manager provided approval to others in this way but did not to the claimant;

3.2.4. on 15 January 2022 the claimant alleges that in her 121 with Ms Cronin, she explained that she felt the term "no worries" is rude to use in a work setting. The claimant alleges that from that point onwards Ms Cronin responded to the claimant with "no worries" every time they spoke over the phone;

3.2.5. on or around January 2022 the claimant alleges she called Ms Cronin as she needed help. The claimant alleges that her manager waited to call her back until the claimant went on lunch and put her phone status on "away" before trying to call her back;

3.2.6. on 20 January 2022 the claimant alleges she was falsely accused by Ms Cronin of speaking to a tenant who called in distress saying that they had spoken with the claimant. The claimant alleges she responded by email to explain her case but that her manager ignored the claimant's response;

3.2.7. on 25 January 2022 the claimant alleges that Ms Cronin ignored her requests via WhatsApp for advice on how to carry out a gas safety check;

3.2.8. on 26 January 2022 the claimant alleges she was criticised by her manager, Ms Cronin, for the way she dealt

with an issue relating to broken gas oven. The claimant alleges she asked for advice from her manager head of dealing with the issue but that her manager did not provide any guidance. The claimant alleges her request for guidance was ignored and instead her manager took over dealing with the issue;

3.2.9. On 27 January 2022 the claimant alleges she asked her manager, Mr Cronin, to stay on after team call as other colleagues have done in the past. The claimant alleges her manager refused and said she would call the claimant back the claimant alleges that her manager called her back via horizon and that as the claimant tried to talk, her manager cut her off and said "just put it in an email to HR" and terminated the call;

3.2.10. on 11 February 2022 the claimant alleges she received an email from Ms Lennon which attached 32 screenshots and invited her to a probationary review meeting only one week after she had an informal meeting about the issues she was having with her manager, and only two weeks after her formal 121 meeting with her manager. The claimant alleges that the issues detailed in the email to discuss were issues that had not been raised previously with the claimant at the 121 meeting on 15 January 2022, or the meetings on 26 and 27 January 2022 (which were the days the claimant had a mental breakdown) and 3 February 2022 (which was a meeting to discuss the issues that the claimant raised on 26 and 27 January 2022). The claimant also alleges that some of the issues that were raised were above days when the claimant was suffering a mental breakdown;

3.2.11. on 15 February 2022 the claimant alleges she attended a probationary review meeting on Microsoft Teams with Ms Cronin where she was questioned about alleged mistakes. The claimant alleges she had not received training on the points she was questioned on. The claimant alleges she received no advisory actions or plans of training for improvement after the meeting. The claimant alleges the meeting was an accusatory exercise with no plans for progression;

3.2.12. on 15 February 2022 the claimant alleges she received an email from Ms Lennon advising her that Ms Lennon had taken notes of what was said at the probationary review meeting. The claimant alleges that the notes were exaggerated and wrongly quoted issues that had been discussed and failed to mention the fact the claimant had not received training on the majority of the issues raised. It also did not include any plan of action for progress. The claimant alleges she was not previously advised that notes would be taken;

3.2.13. on 16 February 2022 the claimant alleges that the claimant was accused of not following instructions from Ms Cronin when the claimant had followed instructions;

3.2.14. on 17 February 2022 the claimant alleges she asked for help via Teams. The claimant alleges Ms Cronin responded quickly and gave the claimant the help she needed. The claimant alleges that her manager then copied and pasted the conversation into the notes on the property as evidence the manager had helped the claimant. The claimant alleges this is something the manager did not do with other colleagues;

3.2.15. on 22 February 2022 the claimant alleges she sent a message in the work WhatsApp group asking for the relevant procedure to carry out a work task. The claimant alleges that Ms Cronin delayed giving her the answer, until Ms Cronin must have looked up the property and noted the client was "sensitive" as he had leukemia, then Ms Cronin answered the question without any further information being needed;

3.2.16. on 23 February 2022 the claimant alleges she asked a question in the works WhatsApp group whether a works order was needed. The claimant alleges Ms Cronin read the message within 10 minutes of it being sent but did not respond to the claimant for over 4 hours;

3.2.17. the claimant alleges she received an email on 23 February 2022 from Ms Lennon inviting her to a second probationary hearing seven days after the first probationary meeting. The claimant considers this did not allow her time to improve;

3.2.18. the claimant alleges she emailed Ms Lennon on 20 March 2022 asking for the second probationary hearing to be heard by an impartial third party. The claimant alleges her request was not acknowledged and the respondent proceeded to attempt to carry out the probationary review with Ms Cronin;

3.2.19. the claimant alleges her request for her probationary hearing to be heard by a third party was ignored. She further alleges that after this, she did not receive further communication from the respondent's HR team. The claimant alleges she was locked out of her work laptop so she could not work. The claimant alleges she requested access to the laptop to gain access to her personal documents, such as pay slips, but the request was ignored by Ms Lennon in March 2022;

3.2.20. the claimant alleges she asked for an agreed exit and nobody made any contact with the claimant for four weeks. The claimant alleges she could not claim government

aid or start any new job and was locked out of her work laptop, so she could not work. The claimant alleges she was then accused of an unauthorised absence by Ms Lennon in April 2022;

3.2.21. the claimant alleges that Ms Mott accused the claimant of raising a grievance against Ms Cronin only after the respondent raised performance concerns. The claimant alleges performance concerns were raised two weeks after the claimant raised a detailed grievance about her manager. The claimant alleges the communications took place via email in April 2022;

3.2.22. the claimant alleges she was told by Ms Mott the collection of the claimant's work laptop would be arranged between April-September 2021. Communications took place via email. The claimant considers she was burdened with having to keep the laptop whilst awaiting collection by the respondent.

3.3. By doing so, did it subject the claimant to detriment?

3.4. If so, was it because the claimant did a protected act?

3.5. Was it because the respondent believed the claimant had done, or might do, a protected act?

4. Remedy for discrimination and victimisation

4.1. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

4.2. What financial losses has the discrimination caused the claimant? The claimant alleges that the reason for her resignation was due to the discrimination she had suffered.

4.3. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

4.4. If not, for what period of loss should the claimant be compensated?

4.5. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

4.6. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

4.7. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

4.8. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

4.9. Did the respondent or the claimant unreasonably fail to comply with it by the claimant allegedly not giving the respondent the opportunity to address her concerns before resigning, and/or by the respondent not following procedures in relation to how they dealt with the claimant's complaints and/or in respect of any disciplinary procedures?

4.10. If so, is it just and equitable to increase or decrease any award payable to the claimant?

4.11. By what proportion, up to 25%?

4.12. Should interest be awarded? How much?

Law

Time limits

29. The time limit in which a claimant is to present a claim for discrimination is set out in s123 of the **Equality Act 2010**:

> 1. Subject to s140B, proceedings on a complaint within s120 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.

30. The issue as to whether a claim is brought within such time as is just and equitable has been established to be one of fact for the first instance tribunal.

31. The tribunals have been advised that s33 of the **Limitation Act 1980** does not provide a mandatory checklist, but can offer guidance in the exercise of discretion. Two important factors for consideration will be the length of, and reasons for, delay in presenting the claim, as well as whether the respondent is prejudiced by the delay – Southwark London Borough Council v Afolabi [2003] ICR 800. The accepted approach now is to take into account all the factors in a particular case that the tribunal considers are relevant, including the length of and reasons for delay – Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23. The strengths and weaknesses of the claim may also be relevant (but not definitive) to a decision on extending time – Lupetti v Wrens Old House Ltd 1984 ICR 348.

32. The tribunal must also consider the balance of prejudice to the parties if the extension is granted or refused – Rathakrishnan v Pizza Express (Restaurants) Ltd 2016 ICR 283.

33. In terms of ignorance of rights as reason for delay, this will only to lead to an extension of time being granted where the ignorance is reasonable. This requires the tribunal to consider not whether the claimant in fact knew about his rights, but whether the claimant *ought to have known* about his rights (and associated time limits) – Porter v Bandridge Ltd 1978 ICR 943.

Direct race discrimination

34. Employees are protected from discrimination by s39 EqA:

> (2) An employer (A) must not discriminate against an employee of A's (B) -
> …
> (d) by subjecting B to any other detriment.

35. Direct discrimination is set out in s13 EqA:

> (1) a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

36. There are two parts of direct discrimination: (a) the less favourable treatment and (b) the reason for that treatment. Sometimes however it is difficult to separate these two issues so neatly. The Tribunal can decide what the reason for any treatment was first: if the reason is the protected characteristic, then it is likely that the claim will succeed – Shamoon v Constable of the Royal Ulster Constabulary [2003] UKHL 11.

"Because of": reason for less favourable treatment

37. In terms of the required link between the claimant's race and the less favourable treatment she alleges, the two must be "inextricably linked" - Jyske Finands A/S v Ligebehandlingsnaevnet acting on behalf of Huskic: ECLI:EU:C:2017:278.

38. The test is not the "but for" test, in other words it is not sufficient that, but for the protected characteristic, the treatment would not have occurred – James v Eastleigh Borough Council [1990] IRLR 288.

39. The correct approach is to determine whether the protected characteristic, here race, had a "significant influence" on the treatment – Nagarajan v London Regional Transport [1999] IRLR 572. The ultimate question to ask is "what was the reason why the alleged perpetrator acted as they did? What, consciously or unconsciously, was the reason?" - Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48. This is a question of fact for the Tribunal to determine, and is a different question to the question of motivation, which is irrelevant. The Tribunal can draw inferences from the behaviour of the alleged perpetrator as well as taking surrounding circumstances into account.

40. if there is more than one reason for the treatment complained of, the question is whether the protected characteristic (in this case, race) was an effective

cause of the treatment – O'Neill v Governors of ST Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372.

Harassment

41. The definition of harassment is set out at s26 EqA:

> (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, mediating or offensive environment for B.
>
> …
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
>
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable to have had the effect.

Unwanted conduct

42. In terms of what amounts to unwanted conduct it is for the alleged victim to determine what is acceptable or offensive. However, the claimant must actually consider the conduct to be unwanted or unwelcome – Whitley v Thompson EAT/1167/97 (14 May 1998, unreported). There may be times when the allegedly harassing conduct would not, to the average person, be objectionable. However, it is for the claimant to set the boundaries of what is and is not acceptable. The issue then becomes whether the claimant made it clear that they considered the conduct unacceptable.

Purpose or effect

43. S26 makes it clear that it is sufficient for the unwanted conduct to have the effect set out in s26(1)(b): it is not necessary for that to be the purpose of the alleged perpetrator. Harassment may still be made out where there is teasing, also called banter, without any malicious intent.

44. In terms of effect, the alleged perpetrator's motive is again irrelevant. The test is both subjective and objective. First, it is necessary to consider what the effect of the conduct was from the claimant's perspective (subjective element). If it is found that the claimant did suffer the necessary effect set out in s26(1)(b), the next stage is to consider whether it was reasonable for the claimant to feel that way.

45. Furthermore, it is not necessary for the conduct to be aimed directly at the claimant. A claim can succeed if it was reasonable for the claimant to feel that their environment had been made intimidating, hostile, degrading, humiliating or offensive, whether or not any language or conduct is specifically aimed at them.

Related to the protected characteristic

46. The causal link required for harassment is much broader than that for direct discrimination. The requirement is that the conduct must be related to the protected characteristic, in this case race. There is no protection from general bullying within the EqA; harassment will not be proven where someone is picked on or singled out, unless that treatment is related to a protected characteristic.

47. There is limited guidance from the higher courts as to what is meant by "related to". Some guidance has been given by the Court of Appeal in the case of UNITE the Union v Nailard [2018] EWCA Civ 1203. The facts of this case were that the respondent had failed to deal with the claimant's sexual harassment complaint. The Employment Tribunal found that, because the failure related to a grievance regarding harassment, that was sufficient to find that the failure was itself an act of sexual harassment. The Court of Appeal found the Tribunal had got it wrong. The Tribunal had not made findings as to the thought processes of the individuals who failed to deal with the grievance; therefore, it could not be found that the failure itself was an act of sexual harassment. A finding would have to be made that those who failed to deal with the grievance were guilty of sexual harassment. The tribunal had, in effect, used the "but for" test; in other words, they found liability on the basis that, but for the grievance, there would have been no failure. This is not the correct legal test under section 26.

Victimisation

48. S27 EqA sets out:

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because:
>
> (a) B does a protected act; or
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act –
>
> (a) Bringing proceedings under this Act;
> (b) Giving evidence or information in connection with proceedings under this Act;
> (c) Doing any other thing for the purposes of or in connection with this Act;
> (d) Making an allegation (whether or not express) that A or another person has contravened this Act.

49. The relevant subsections in the present claim are ss27(2)(c) & (d).

50. Regarding "*doing any other thing for the purposes or in connection with this Act*", this is the catch-all provision. Under pre-Equality Act legislation, it was held that the requirement that something be done "*in reference to*" the Race Relations Act would be met if it was done by reference to that Act "*in the broad sense, even though the doer does not focus his mind specifically on any provision of the Act*" – Aziz v Trinity Street Taxis Ltd and ors [1988] ICR 534∫.

51. In terms of "*making an allegation...*", although it is not necessary for the **Equality Act** to be mentioned, it is vital that the facts as set out by the claimant would be capable of amounting to a breach of that Act.

52. Detriment has been held to exist "*if a reasonable worker would take the view that the treatment was to his detriment*" - MOD v Jeremiah [1979] IRLR 436.

53. For a detriment to be *because of* a protected act, it is necessary that it had a significant influence on the perpetrator, where significant simply means "more than trivial" – Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases [2005] ICR 931. There is no need to show that the alleged perpetrator was motivated by a desire to treat a claimant badly because of a protected act: intention/conscious motivation is not a requirement under s27 EqA. All that is required is that there is the necessary link in the mind of the discriminator between the protected act and the detriment – Nagarajan v London Regional Transport [1999] IRLR 572 and Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830.

54. There are cases in which the respondent will be able to separate the protected act from some characteristic of it as being the reason for the detriment. In Martin v Devonshires Solicitors [2011] ICR 352, Underhill P held that:

> "there would in principle be cases where an employer had dismissed an employee in response to a protected act but could say that the reason for dismissal was not the act but some feature of it which could properly be treated as separable"

Burden of proof

55. The burden of proof for discrimination claims is set out in s 136 EqA:

> (1) This section applies to any proceedings relating to a contravention of this Act.
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
> ...

56. There are two stages to the burden of proof. The initial stage is for the Tribunal to decide whether there are facts proven which *could* lead them to find discrimination, if there were to be an absence of any other explanation.

57. If this first limb is met, then the Tribunal *must* find that discrimination has occurred, unless the respondent can then prove a non-discriminatory reason for its conduct.

58. It is not enough for a claimant to show that they suffered a detriment/unwanted conduct/less favourable treatment, and that they have a protected characteristic, or did a protected act: there must be something more to draw the causal link between the two – Madarassy v Nomura International plc [2007] ICR 867.

Findings of fact

59. The respondent is a residential lettings and property management company. It manages properties on behalf of landlords. The Repairs and Maintenance team deal with landlords and tenants who call in to report any issues with the properties managed by the respondent.

60. The claimant commenced work on 2 November 2021, along with Ms O'Brien: both held the position of Customer Support Co-Ordinator. Both women underwent training at the beginning of their employment. The training schedule is at [114/115] for weeks one and two respectively.

61. The team was a small one: there were five members of the team. The claimant was the only black person on the team; she identifies as a British African black woman. Sharon McPherson, Karen Doig, Bethany Baker, Abbie Jay Cronin and Vicky O'Brien were all white.

62. Ms Cronin led the team at the relevant time, as the Repairs and Maintenance Manager. Each morning, between 0830hrs and 0900hrs, there would be a team meeting via WhatsApp. Ms Cronin was frequently in and out of different meetings or training, and in and out of multiple WhatsApp groups. We accept that, although WhatsApp may say a message has been read by Ms Cronin, this simply means she has the chat group open; it does not necessarily mean that she has absorbed the content of a particular message. This is why the team were told to rely on each other and try to help each other out instead of relying solely on Ms Cronin.

63. The way of working within the claimant's team was that all members of the team worked from home, and there was heavy reliance on the team's WhatsApp group. In the bundle, we have reams of WhatsApp messages and conversations from the claimant's team, which demonstrates that this was their main source of communication, and their main way of keeping up with what was happening on various accounts. Landlords and tenants would ring into the team to make enquiries: whichever member of the team answered the phone would routinely need to ask the rest of the team a question as to any update or action on that particular account. These questions to colleagues tended to be asked mainly on WhatsApp, supplemented by email and telephone calls.

64. The respondent's computer system has a "notes" section for each property/account; the particular system on which notes are stored is called "ReapIt". It is imperative that the notes are kept up to date: the theory being that any member of the team could drop into ReapIt, read the notes, and understand exactly what was happening with that property at any given time.

65. When a repair or maintenance job needed to be done, a member of the team would raise a works order for that job. The name of the team member who had raised the order would appear on it, unless Ms Cronin altered the name for a number of reasons (such as an employee had left the team and their orders needed to be reallocated).

66. When the claimant and Ms O'Brien initially started their employment, they were subject to a probationary period. They both had a few hours' training with Ms Lennon (HR Advisor) and Ms Cronin. For the rest of the first week their colleague, Ms Doig, trained them. The claimant states in her witness statement (page 1 para 2) that they completed their training and that the claimant felt comfortable with her understanding and with working from home. During the first week the claimant and Ms O'Brien's training covered the material we see at [114]. this training included works orders and contracts, ReapIt training, and compliance and contracts.

67. In their second week of employment, the new starters received the training set out at [115]. They also spent some time each day uploading compliance certificates that had been received in relation to various properties, but had not been logged onto the system (for example, gas or electrical compliance certificates).

68. The importance of these certificates being uploaded is that this enables any member of the team to confirm whether there is a valid certificate of compliance for any property for which the respondent is responsible. If there is no valid compliance certificate, the respondent could be liable if, for example, there were a gas leak at one of those properties.

69. As well as uploading compliance certificates, part of the claimant's job was to ensure that those certificates were up to date. There needed to be a valid electrical installation condition report ("EICR"), which needs renewal every five years, and a valid gas safety check ("GSC"), which requires renewal annually. By the end of the first two weeks of employment the claimant was able to read both an EICR and GSC certificate.

70. It is the claimant's evidence that she was not trained on how to call service providers for certificates, in her initial training period: this training occurred in January 2022.

71. The claimant and Ms O'Brien's task at the beginning of their employment was to raise gas safety certificates on properties owned by the Ministry of Defence ("the MOD Project"). They were also given gas safety checks to complete. The claimant and Ms O'Brien were shown how to upload certificates, and were given the responsibility of clearing the backlog of compliance certificates that had not been uploaded to date.

72. As a general point, it is common ground that most training occurred "on the job".

73. Various modules were to be completed by new recruits:

    73.1. Module 1 – [259];
    73.2. Module 2 – [423];
    73.3. Module 3 – [424].

74. In relation to Module 1, the claimant did not sign off this training plan at [259], as she felt that more training was required on the following three points:

    74.1. Point 1 – compliance knowledge;
    74.2. Point 7 – How to read a Legionella certificate;
    74.3. Point 8 – How to read an EPC certificate.

November 2021

<u>Issue 1.2.1 and 2.1.1 - send an animated moving hand gif image which the claimant considers resembles minstrels or piccaninnies. the gif image was sent by the claimant's former colleague, Ms O'Brien, at the end of November 2021 on Microsoft teams - direct discrimination and harassment</u>

75. On 12 November 2021, a Friday, the claimant and Ms O'Brien were in conversation on Microsoft Teams, the conversation being around the MOD project.

76. At 1135hrs, Ms O'Brien sent a gif to the claimant, of an animated hand with big eyes and big lips - [237]. This is the subject of **Issues 1.2.1 and 2.1.1**. It is common ground that the claimant had taught Ms O'Brien how to send gifs previous to this exchange.

77. Ms O'Brien's evidence as to why she sent this was that she wanted to congratulate the claimant and herself for completing the MOD project. She said she thought she was sending a "high five".

78. In response to this gif, the claimant "liked" the image, and wrote "lool", which was intended to be "lol", (laugh out loud). It was the claimant's evidence that, at the time she received this image, she did not take offence to it. It was latterly, after she had watched a television programme in mid to late January 2022, which featured the use of golliwogs to harass a family, that she said the resemblance between the gif and a golliwog struck her - page 14 paragraph 36 of her witness statement. At that point, the claimant understood that Ms O'Brien had been intending the gif to mean "hello or goodbye black person".

79. We find that Ms O'Brien did not understand the hand emoji to have any relevance to the claimant's race. We accept that she had no intention other than trying to find a gif that looked friendly, so that she could show the claimant that she had learnt how to send them. Furthermore, we find that the gif is not obviously a golliwog or linked to any particular race.

80. The claimant asserted that Ms O'Brien's following message of "Yes, I think it will be a slow one today" was reference to Ms O'Brien having made a racist slur, and the claimant having not "got it". Ms O'Brien's evidence was that she was simply referring to it being Friday. We find that the claimant's understanding of Ms O'Brien's words is convoluted. We found Ms O'Brien a straight-forward, credible witness: we accept her evidence that she was simply referring to it being a slow day because it was Friday.

81. On 17 November 2021, Ms Cronin emailed the claimant to ask her for details of her productivity - [238]. Ms Cronin wrote as follows:

> "Hi,
>
> I have checked the system this morning to ensure everyone is making use of there [sic] time and no one is struggling.
>
> I can see that you have sent 1 email at 10:30am and raised 1 works order. Can you tell me what else you have done today please? How are you finding everything? Is there anything you need help with or stuck with at all?
>
> Can you let me know if you have any issues, or struggling at all?"

82. The claimant responded to this "spot check" (as it has been referred to), stating that she had been working through her emails to make sure that they had all

been actioned. She also said that she had sent messages to tenants regarding dates for appointments. She stated that she did have a few questions but that she would raise them once she had finished clearly her email inbox.

83. On 24 November 2021, Ms Cronin emailed Amy Lennon in order to chase the setting up of the claimant and Ms O'Brien onto the respondent's telephone system. The following day, Ms Lennon confirmed that the claimant and Ms O'Brien had now received their new passwords, and that those passwords were working - [242]. This meant that those two employees were from this point able to use the respondent's telephone system. They had, at this point, not received any training on the use of the telephones, but had observed others using the telephones and answering enquiries during their training period.

December 2021

Issue 1.2.2 and 2.1.2 - send a monkey emoji image to the claimant from the claimant's former colleague, Ms O'Brien, on 1 December 2021 on Microsoft Teams - direct discrimination and harassment

84. On 1 December 2021, Ms O'Brien and the claimant again had a Microsoft Teams conversation, regarding the division of their work. Ms O'Brien asked:

> Hi diana [sic], hope you are ok. ive [sic] started the spreadsheet – shall I carry on with England and you can do Scotland as Im [sic] halfway.

85. The claimant replied:

> Okay that's fine, Im [sic] ok, by Gods [sic] grace. Thanks will do that.

86. In response to that message, Ms O'Brien sent the claimant an emoji image of a monkey doing a "thumbs up" gesture - [248]. This image is the basis of **Issues 1.2.2 and 2.1.2**. In response to that image, the claimant sent an emoji of an upside-down smiley face: her evidence was that she was at a loss as to how to respond.

87. We find that the reason for Ms O'Brien sending this emoji was just to send the claimant a thumbs up emoji; the fact it was a monkey was, in her mind, incidental. Ms O'Brien was naïve as to the use of the monkey emoji. It was only when the racial connotation was pointed out to her that she told us she now understood the implications of that emoji being sent to a Black colleague.

88. The claimant alleges that Ms O'Brien deliberately sought out this emoji in order to cause the claimant offence. We do not accept this. There is nothing in the evidence to suggest that this was a deliberate malicious act from Ms O'Brien. Looking at the claimant's response to Ms O'Brien at the time, in the messages at [249], we find that, had the claimant considered that Ms O'Brien had deliberately caused offence, she (the claimant) would not have responded in such an amicable way to Ms O'Brien's apology.

89. On 2 December 2021, the claimant raised Ms O'Brien's sending of this monkey emoji with Ms Cronin. This conversation is relied upon by the claimant as being the protected act for the purposes of her victimisation claim **(Issue 3.1.1).** It is accepted by the respondent that this conversation amounts to a protected act.

90. The claimant telephoned Ms Cronin following the morning team meeting. The claimant explained that she had been sent a monkey emoji by Ms O'Brien which had upset her, as it had racial connotations. The claimant did not mention the hand waving gif from November at any stage during this conversation.

91. Ms Cronin was uncertain how to handle this matter, as she had not dealt with such a situation before. She therefore sought advice from Amy Lennon (HR Advisor), via Microsoft Teams. Ms Lennon advised that this could be treated either formally or informally. This was relayed back to the claimant, who stated that she did not wish to raise it formally. The claimant did agree to a call with both Ms Cronin and Ms O'Brien: this took place on 3 December 2021.

92. In that meeting, both the claimant and Ms O'Brien said their piece, and by the end of the meeting seemed, on the face of it, to have resolved the matter. Ms Cronin checked with both parties individually after that meeting, and both appeared satisfied that the matter had been resolved. We note that the claimant could not remember a discussion with Ms Cronin following the meeting, but accepted that one could have occurred. In light of this, no further action was taken. The claimant's evidence to us was that she did not in fact accept that there was a resolution reached at the end of the meeting.

93. Following that three-way meeting, the claimant and Ms O'Brien had another Microsoft Teams chat, as follows - [249]:

> The claimant: "Really appreciate our talk, thank you again for hearing me and understanding!"
>
> Ms O'Brien: "That's totally fine, I [sic – she meant "it"] was horrid to think I had offended you, it really is not in my make up x"
>
> The claimant: "I believe you, the world we are in is full of a lot of crazy ppl, I'm happy we could clear the air and understand each other more".
>
> Ms O'Brien: "Yes, me too. Life is far too short we just must all make the most of it [emoji smiley face]"
>
> The claimant: "exactly"
>
> Ms O'Brien: "Have a lovely birthday"

94. The claimant's evidence to us remained that she did not in fact feel that there had been a resolution to this issue. We are satisfied that, even if the claimant did not feel there had been a resolution, the manner in which she communicated with Ms O'Brien and Ms Cronin during and after the 2 December 2021 meeting reasonably indicated to them that the matter had been resolved, and that all parties could move on.

<u>Issue 2.1.3 - the claimant alleges that without any prior warning of training the claimant had to start work on the phones. The claimant considers she was instructed to do so by the claimant's former colleague, Miss O Brien, on 7 December 2021. Communications were over WhatsApp – harassment</u>

95. The claimant alleges that, without any prior warning, or training the claimant had to start work on the phones on 7 December 2021. This allegation springs

from the text message found at [252], In which Ms O'Brien sent a group message saying "Go Sharon, myself and Diana can pick up the phones".

96. In terms of responsibility for answering calls, as mentioned above, on 25 November 2021, the claimant had received her password for the respondent's telephone system. We take from this that, from this time, the claimant was expected to use the telephone. This is supported by the evidence we heard from Ms Baker, that she and the claimant had had a conversation with Ms Cronin around that time, in which Ms Cronin said that they could pick up the phones. If they did pick up the phones, Ms Cronin told them to write down any information, and if the job needed something actioned, to make a note in the "repairs box". We find that there is a difference between employees being expected to use the telephone, and the expectation that they can deal with the enquiries that come in via telephone.

97. Further, in terms of what was expected of the claimant at the end of 2021, on 17 December, the claimant was told by Ms Cronin that - [256]:

> "[a]nswering incoming calls is a core part of the role therefore I do require you to continue completing this task. If you are unable to provide resolution or unclear on what is required, then please take a message and email this to the repairs inbox. This activity will assist in identifying what further training you may require in addition to what has been provided so far and aid our discussions going forward."

98. We conclude that from the time the claimant had her telephone password, she was expected to answer the telephone. She was not expected to be able to answer all enquiries and was in fact told that she could just take a message if she was unsure how to deal with the enquiry.

99. This allegation is that Ms O'Brien "instructed" the claimant to answer the phones. We do not accept that Ms O'Brien was able to give instructions to the claimant: neither do we consider that this text message amounts to an instruction. We also note that the text refers to picking up phones, not to dealing with enquiries in those phone calls.

100. Ms O'Brien explained to us the reason why she volunteered the claimant as well as herself. She told us that, because the claimant and she had started at the respondent at the same time, she automatically put both their names down. We accept that this was the reason why Ms O'Brien included the claimant's name in her text message. Ms O'Brien, as we have already stated, was a straightforward credible witness.

<u>Issue 3.2.1 - On 10 December 2021, the claimant asked Ms Cronin for help with the query she was dealing with for the first time. The claimant alleges that her manager read the message but did not reply. The claimant alleges that she re-raised the question but her manager did not provide the advice sought - victimisation</u>

101. The claimant relies upon the text message at [253], numbered 13: "He has said we can send someone else out, how would I arrange that". This message was sent at 1427 hrs, and marked as read by Ms Cronin at the same time. Within the same minute, Ms Cronin replied to say "can you make sure you note every call you have had with him diana please".

102. The claimant refers to [313] by way of comparison: on that page are two examples of when Ms McPherson and Ms Doig had asked Ms Cronin for a call, and she has said yes or that she will call once available. We have no evidence as to whether Ms Cronin did or did not respond and call Ms Doig and Ms McPherson on those dates. In terms of dates, the request from Ms Doig is dated 18 February 2022 and the request from Ms McPherson is dated 11 November 2021.

103. We have seen evidence in the bundle, for example [250], of the claimant's queries being answered by Ms Cronin within 14 minutes of the question being asked.

104. We find that the reason for Ms Cronin's action or inaction in relation to the claimant's query at [253] was simply due to her management style and the pressures on her time.

Allegation 1.2.3 - on 10 December 2021 the claimant alleges that her former colleague, Sharon McPherson, questioned whether the claimant had done a piece of work, and changed the name on the works order raised from the claimant's name to her own, neither of which she would have done to the claimant's white colleagues – direct discrimination

105. Also on 10 December 2021, the claimant alleges that Ms McPherson discriminated against her (**Issue 1.2.3**). The relevant messages are at [254], item 4:

> Ms McPherson: "Diana - have you done anything with Hawksworth?"
>
> Claimant: "Ohh hi, ..." "thought I left notes sorry"
>
> Ms McPherson "there's no order - I'll raise it now with the landlord - ..."
>
> Claimant "Really? That's so strange."
>
> …
>
> Claimant "yes weird my note is still there but now its your name so weird, maybe I'm going cray [sic]"
>
> Ms McPherson: "no I put it in my name LOL x"

106. Factually, Ms McPherson did question whether the claimant had done a piece of work, and factually, she did change the works into her name. The reason behind this was that Ms McPherson needed to know what was happening on that particular property account. The question was a legitimate question. The reason why the name on the account changed to Ms McPherson's was that she took the case over, and therefore her name was the appropriate name to appear on the file. This was Ms McPherson's evidence and, other than the claimant's baseless assertion, there was no evidence to suggest that the reason behind Ms McPherson's conduct was anything other than as Ms McPherson explained.

Issue 3.2.2 - On 17 December 2021 the claimant received email correspondence from Ms Cronin which the claimant alleges was not constructive feedback but was fault finding about the claimant's work on the phones – victimisation

107. The email conversation between the claimant and Ms Cronin on this issue is at [315] and [256]. The conversation starts with Ms Cronin sending an email entitled "Missing or wrong information on properties" - [315]. Looking at this email chain, we are not satisfied that this amounts to deliberate fault finding. We find that this was a manager setting standards and asserting management control in maintaining those standards, as well as offering the claimant support. Given the way in which this team operates, remotely and at a fast pace, we accept that Ms Cronin needed to be able to manage people effectively and efficiently: this did not necessarily always leave room for niceties. Nothing in the emails at [315] and [256] amounts to fault finding in the way alleged by the claimant.

108. On 21 December 2021, the claimant and Ms Cronin had a catch-up meeting. The follow-up email from Ms Cronin sets out what training the claimant would be having in the new year - [251]. We have no evidence that the claimant disagreed with that list of three items, and so accept that the agreement as of 21 December 2021 was that the claimant would have training in "landlord repairs, tenant charges and letters". Ms Cronin made it clear that "there will be certain elements that we will be unable to train you on, and it will take time and experience to develop".

January 2022

Issue 3.2.5 - on or around January 2022 the claimant alleges she called Ms Cronin as she needed help. The claimant alleges that her manager waited to call her back until the claimant went on lunch and put her phone status on "away" before trying to call her back – victimisation

109. On 2 January 2022, the claimant texted the group to ask Ms Cronin to call her - [310]. Ms Cronin replied that she was on the phone, to which the claimant asked her to call when she was free. At 1145hrs, the claimant texted the group to say she was going for a drink. At 1146hrs, Ms Cronin sent a text message stating:

> "diana I have called you back, can you call me when you are back please"

110. The claimant alleges that Ms Cronin deliberately waited to return the claimant's call at a point when she knew the claimant would not be manning her phone.

111. We find that this allegation is too convoluted. If Ms Cronin was motivated by a desire to cause the claimant a detriment, or upset of some description, this would seem a convoluted way to do it. It does not make sense to us that Ms Cronin would consider calling the claimant back when she was not there to be an action that would have sufficient effect, if this was her motivation.

112. On balance we find it unlikely that Ms Cronin was motivated as the claimant alleges, and find it more likely on the balance of probabilities that Ms Cronin called without having absorbed the fact that the claimant had gone for a drink. Other than the claimant's assertion, there is no evidence to suggest that Ms Cronin's motive was to subversively upset the claimant.

Issue 3.2.3 - on or around January 2022, the claimant alleges she requested the necessary approval via email from Ms Cronin to complete a job. The claimant alleges that her manager provided approval to others in this way but did not to the claimant - victimisation

113. On 10 January 2022, the claimant emailed Ms Cronin to ask her - [264] item 28:

> "Can I proceed with this works order for the washing machine seal, and let me know if my works order is correct title etc?"

114. Ms Cronin replied:

> "I am in training; please can you ask someone else in the team?"

115. The claimant alleges that she was not given approval, whereas others were provided with approval via email. Specifically, on this occasion, the claimant stated to us that, having received this email from Ms Cronin, she telephoned Ms Doig. Ms Doig then advised her that only Ms Cronin could give the necessary approval.

116. It must be the case that approval was given to the claimant at some point, by someone, in order for this job to be concluded. The claimant was not able to tell us how she eventually gained approval, nor from whom.

117. We accept that it is possible for someone other than Ms Cronin to grant approval where approval is needed, and Ms Cronin is not available. Otherwise, the group and its work would not function if Ms Cronin was otherwise engaged or, for example, on holiday or off sick. It may be the case that the claimant and Ms Doig did not understand this, however we accept as fact that authorisation to instruct works could be given by others. We note Ms Cronin's statement in her email to the claimant on [268], that:

> "I understand I was on leave on the 18th; however, we do have team and Karen, Sharon or Beth could have been contacted to ask for assistance with what to do if you are unsure or need authorisation to instruct works."

118. Ms Cronin's response to the claimant at [264] was reasonable; there is no evidence to suggest that Ms Cronin was not in fact in training, and she instructed the claimant to ask someone else.

119. We can understand why, on being told by Ms Doig that the claimant needed Ms Cronin's approval, the claimant was frustrated. However, this does not impact our finding that Ms Cronin's response to the claimant's request was reasonable and that in fact the claimant could have got authorisation from another member of the team. The claimant and Ms Doig's lack of understanding on this point of authorisation may point to a need for further training. However, it does not shed light on Ms Cronin's actions or motivations.

120. On 13 January 2022, the claimant concluded Module 1 – [259].

Issue 3.2.4 - on 15 January 2022 the claimant alleges that in her 121 with Ms Cronin, she explained that she felt the term "no worries" is rude to use in a work

setting. The claimant alleges that from that point onwards Ms Cronin responded to the claimant with "no worries" every time they spoke over the phone – victimisation

121. On 15 January 2022, the claimant reported to Ms Cronin that she did not like the phrase "no worries", and found it offensive. The claimant alleges that, following this conversation, Ms Cronin then used that phrase every time they spoke on the telephone (**Issue 3.2.4**). Ms Cronin told us that, from the point of the claimant telling her she found that phrase offensive, Ms Cronin made an effort not to use it. She gave evidence that she googled alternative phrases and stuck a list of them to her computer: this evidence was not challenged.

122. We accept Miss Cronin's evidence on this point. We consider it unlikely that such detail has been manufactured. We note that we have no examples within the bundle of Miss Cronin using the phrase "no worries". We note that the claimant's case is that this phrase was used on the telephone to her, and therefore there would not necessarily be documentary evidence of the use of that phrase. However, the claimant has given us no details, such as dates and times or occasions, when Ms Cronin is said to have used that phrase. Therefore, we are not satisfied that factually this allegation occurred. We find that Ms Cronin did not use the phrase no worries when talking to the claimant from the time at which the claimant told her she found it offensive.

123. Ms Cronin initially spoke to Ms Lennon about her concerns with the claimant's performance, in light of her review of the claimant's work, towards the middle of January 2022, and before the claimant's 121 on 17 January 2022. Ms Cronin explained that she had not finished her review of the claimant's work by 27 January, or indeed by 2 February 2022 (dates explained below).

124. On 17 January 2022, the claimant and Ms Cronin had a 121 meeting: the follow up email is at [261], which attached the Module 1 sign off document for the claimant to sign.

Issue 3.2.6 - on 20 January 2022 the claimant alleges she was falsely accused by Ms Cronin of speaking to a tenant who called in distress saying that they had spoken with the claimant. The claimant alleges she responded by email to explain her case but that her manager ignored the claimant's response – victimisation

125. On the morning of 20 January, the claimant sent an email to Ms Cronin, asking for authorisation for some works - [264]. Ms Cronin replied that she was in a meeting, and advised the claimant to ask another member of the team.

126. Later that day, Ms Cronin received a call from the tenant at that property: the tenant was upset, saying that they had spoken to the claimant but had not received a response. Ms Cronin ensured that the necessary action was taken, but emailed the claimant asking why there were no notes from the claimant on the system – [264]. The claimant replied later on the afternoon of 20 January 2022, asking for more information: Ms Cronin did not reply - [264].

127. In terms of the allegation that the claimant was falsely accused, we find that Ms Cronin was simply relaying to the claimant the client's telephone call: we note that the relevant sentence is "She has advised she spoke to you yesterday and you were to give her a call back" - [264]. Although it may have been the

case that the client was confused, or inaccurate in her recollection, it was reasonable for Ms Cronin to mention the client's call to the claimant.

128. Regarding the allegation that the claimant was ignored, we accept that no reply was sent to the claimant's email of 20 January 2022 at 1453hrs - [264]. We also accept that, from the claimant's point of view, a complaint had been made about her to her manager, and that it was unsatisfactory that Ms Cronin did not reply to that message, in order to put the claimant's mind at rest that there was no actual complaint against her.

Issue 1.2.4.2.1 - on 21 January 2022, Ms Cronin emailing the claimant to request a productivity check, but not making the same request of the claimant's colleagues – direct discrimination

129. On 21 January 2022, Ms Cronin did another spot check, asking the claimant for detail about what work she had done that day - [271] **(Issue 1.2.4.2.1).** Ms Cronin and Ms O'Brien's evidence was that Ms Cronin made a similar productivity check request of Ms O'Brien, although we have not seen an email to that effect. We accept this evidence from Ms Cronin and Ms O'Brien. Firstly, we have already found that Ms O'Brien is a straight-forward, credible witness. Secondly, these two witnesses corroborate each other's evidence.

130. We therefore find that the same request for a productivity check that was sent to the claimant on 21 January 2022 was also sent to Ms O'Brien.

Issue 1.2.4.2.4 - on or around January 2022, the claimant asked Ms Cronin for instructions to pass onto a client the details were not given to the claimant but were given to her colleague, Ms Baker, when she made the same request – direct discrimination

131. On 24 January 2022, the claimant picked up a call from the tenant at an address starting "107" - [431]. She reported this call on the WhatsApp group, stating that she saw from the notes that Ms Cronin had tried to call the person in question. Miss Cronin replied "I'll call her back".

132. The following day, Ms Baker sent a group message saying that the same tenant was currently on the phone, and ask Ms Cronin was free. In response Cronin stated:

> "On the phone, can you ask her if she has been contacted by Jake as the work have [sic] been instructed?"

133. We understand that the last day for the complaint to be dealt with was 25 January 2022, i.e. the day that Ms Baker picked up the phone to the tenant.

134. The claimant complains that Ms Cronin gave instructions to Ms Baker, not the claimant, to take forward the tenant's enquiry. We find that the reason for this, as explained to us by Ms Cronin, was that when Ms Baker texted the group the tenant was actually on the telephone at that time; when the claimant had texted, it was to report a call that had happened. Ms Cronin explained that, since the tenant was actually on the phone when Ms Baker texted, Ms Cronin took the opportunity of the tenant being available to ask the relevant question via Ms Baker. We accept also that there was more urgency on the day when

Ms Baker texted, given that it was the last day for the complaint in question to be dealt with.

Issue 3.2.7 - on 25 January 2022 the claimant alleges that Ms Cronin ignored her requests via WhatsApp for advice on how to carry out a gas safety check – victimisation

135. This allegation relates to the text messages at [275], as follows:

> 25 January 2022:
>
> "Claimant: Hiya Just wanted to check the procedure for GSC and [BLANK] to be specific.
>
> Ms Cronin: Has this been instructed
>
> Claimant: Not sure what you mean
>
> Ms Cronin: What have you done with it?
>
> Claimant: Nothing yet Abbie, I wanted to check the procedure for GSC and [BLANK]
>
> 27 January 2022:
>
> Ms Cronin: ladies im [sic] just updating notes for new properties…Real Housing – James Murray is the day to day contact for the contract."

136. The claimant's allegation is that Ms Cronin ignored her request for help, and then only answered two days later, to the whole group instead of a direct answer to the claimant.

137. Ms Cronin's evidence on this point was that she was waiting for information from the directors in order to advise the claimant and others about who the correct contacts were for some new properties. The property that the claimant was asking about was covered by the Real Housing information that Ms Cronin sent on 27 January 2022.

138. We accept that Ms Cronin did delay in providing the claimant with assistance, and could at least have told the claimant that she was waiting on information from the directors, rather than just not answering the query. However, we are satisfied that the reason for this was the hectic nature of Ms Cronin's management role.

139. We note that the claimant did not appear at the time to be too concerned about Ms Cronin's failure to respond, as the claimant did not chase her for an answer in the two days between her initial enquiry and Ms Cronin's answer.

Issue 1.2.4.2.2 and 2.1.4 - on 26 January 2022, in a team video meeting, Ms Cronin stated that everyone needed to improve how they left notes however only using the claimant as an example – direct discrimination and harassment

140. On 26 January 2022, in the morning team meeting, Ms Cronin raised an issue that had arisen on an account with which the claimant had had some involvement, using it as an example of a mistake, from which the whole team could learn. Specifically, Ms Cronin told the team that it is not sufficient to write "contacted all contractors" in the notes on ReapIt, as the contractors need to be listed individually, so that in an emergency the team would know who to contact. This is the point that Ms Cronin raised with the claimant in her email on this topic on [263]. The claimant alleges that, in highlighting a mistake made by the claimant, Ms Cronin was discriminating against and harassing her (**Issue 1.2.4.2.2 and 2.1.4**).

141. The issue related to an emergency call out on a property on 25 January 2022, the notes for which Ms Cronin had been reviewing at the end of that day, to ensure that the emergency had been acted upon. There had been some email discussion on this matter previously between Ms Cronin and the claimant on 19 January 2022, in which Ms Cronin was pointing out to the claimant that she (the claimant) had not updated the notes on ReapIt with sufficient detail – [263]. We then have a series of messages from 25 January 2022 at [275], which relate to this property. In those text messages, the claimant was asking to check the procedure for a gas safety certificate (as referred to in **Issue 3.2.7** above).

142. We accept that this was discussed at the morning meeting on 26 January, the reason being it was a useful learning point for everyone in the team. We consider it is a legitimate management technique to draw upon examples from individual staff members that could benefit the full team's learning.

143. Ms Cronin told us in her evidence that "I used multiple examples in Teams chats about things that haven't been done". We understood from this that Ms Cronin used examples from other members of the team, not just the claimant, as learning points for the team. We accept this evidence, and find it to be consistent with the concept of the team learning together and learning points being shared to benefit the team as a whole.

<u>Issue 1.2.4.2.3 - on 26 January 2022, the claimant alleges she received a WhatsApp message from her manager, Ms Cronin, asking if she had followed up a repair, when she had, and it was just an assumption that she had not – direct discrimination</u>

<u>Issue 3.2.8 - on 26 January 2022 the claimant alleges she was criticised by her manager, Ms Cronin, for the way she dealt with an issue relating to broken gas oven. The claimant alleges she asked for advice from her manager head of dealing with the issue but that her manager did not provide any guidance. The claimant alleges her request for guidance was ignored and instead her manager took over dealing with the issue – victimisation</u>

144. On 26 January 2022, at 1406hrs, the claimant asked a question on the WhatsApp group - [276] item 20:

> "If someone has no Gas, no heating and hot water but their child has covid."

145. Ms McPherson responded with some advice within 30 minutes of the claimant's text, suggesting the tenant call the gas provider.

146. At 1700 that evening, Ms Cronin texted the group as follows:

> "diana, ive just seen you last not on [BLANK]? Have you done anything with this as the tenant stated she could smell gas"

147. Ms Cronin had answered a call from that tenant, who said that she had spoken to the claimant previously, and had been told that the claimant would call her back, but had received no such call.

148. This exchange gives rise to two of the claimant's allegations, **Issue 1.2.4.2.3 and 3.2.8**.

149. In terms of advice given in response to the claimant's initial enquiry, the claimant was provided with some advice from Ms McPherson, as mentioned above. Therefore, on the face of it, the claimant's enquiry was answered by Ms McPherson's response. Ms McPherson's response came within 30 minutes of the claimant's initial query. So, the claimant's criticism of Ms Cronin must then be that she did not give advice within that 30-minute window, before Ms McPherson provided advice.

150. We consider that it is unrealistic to expect the manager to always be able to reply immediately, or within 30 minutes. In any event, Ms Cronin did provide some advice, at 1701hrs, by saying "but it's a gas leak it still needs to be reported to amey" - [276]. It is therefore incorrect to say that Ms Cronin did not provide any guidance, as is alleged in **Issue 3.2.8**. The claimant alleged that this instruction from Ms Cronin was a criticism. We do not accept that: we consider it an instruction. We consider the fast-paced nature of the team's work required communication to be short and to the point; there was not always time for niceties. This is the reason for the manner in which Ms Cronin dealt with this point.

151. In relation to **Issue 1.2.4.2.3**, the claimant's evidence was that the tenant had not reported smelling gas to her (the claimant) when they spoke; the tenant had instead reported that her oven was not working. However, we note that the claimant expressed no surprise when Ms Cronin texted to say "but it's a gas leak...": the claimant did not say "that is not what she told me", for example.

152. The claimant's evidence to us was that she had made clear notes regarding her dealings with this tenant, however she told us that she left the notes on the wrong property's note page. Therefore, they would not have been visible to Ms Cronin when she checked the correct property's note page.

153. The allegation here is that Ms Cronin had made an assumption that the claimant had not done a task, when in fact the claimant had done it. We find that Ms Cronin's actions in the above cited texts were perfectly reasonable. She had had a call from a distressed tenant, had checked the notes, found that the claimant was responsible for the last notes left, and had asked for an update. The claimant had not put the latest notes on the correct property, so it was only reasonable for Ms Cronin to ask for an update. This is particularly the case given that the tenant in question had said that she was expecting to hear back from the claimant.

Issue 3.2.9 - On 27 January 2022 the claimant alleges she asked her manager, Ms Cronin, to stay on after team call as other colleagues have done in the past.

The claimant alleges her manager refused and said she would call the claimant back the claimant alleges that her manager called her back via horizon and that as the claimant tried to talk, her manager cut her off and said "just put it in an email to HR" and terminated the call - victimisation

Issue 1.2.5 - Following a telephone call on 27 January 2022, in a meeting on 2 February 2022 to discuss the claimant's concerns, Ms Cronin accused the claimant of being angry on the phone. The claimant alleges that Miss Cronin terminated the call on her and that it was not the claimant who did so – direct discrimination

154. On 27 January 2022, following the morning team meeting, the claimant asked Ms Cronin if she could speak with her. Ms Cronin explained that another colleague had already asked to speak with her first, and so Ms Cronin would have to call the claimant back. The claimant alleges that Ms Cronin refused to stay on after the team call, but instead refused and said that she would ring the claimant back (**Issue 3.2.9**).

155. We accept that Ms Cronin did refuse to stay on the team call to talk to the claimant and said she would need to call her back. This was because Ms Cronin had already promised to speak to another colleague immediately after the team meeting. At this point, Ms Cronin was not aware of why the claimant wanted to speak to her. Without this knowledge, we accept that it was appropriate that she speak to her team members in the order in which they had asked: first come, first served.

156. Ms Cronin did call the claimant back. During the conversation, the claimant was complaining, and was upset, angry and emotional. The claimant said that Ms Cronin was making her anxiety worse. When Ms Cronin tried to offer an explanation, the claimant did not want to hear it, but just wanted to convey her complaints to Ms Cronin. Ms Cronin did tell the claimant to put her concerns in an email, but did not tell her to send it to HR (as the claimant alleges in **Issue 3.2.9**). Ms Cronin mentioned HR in the context that HR could be brought it to help if that would be useful.

157. In this telephone call, we note that the claimant had not communicated to Ms Cronin that she considered she was being discriminated against or victimised. We find that Ms Cronin felt somewhat exasperated that she was not given the opportunity to explain or justify the actions that the claimant was complaining about. She also told us that she had been trained that, in such a situation, the best way forward was to get a complainant to set out their concerns in writing.

158. The telephone call was ended, however there is a dispute between the parties as to who ended the call. The claimant alleges that Ms Cronin cut her off, told her to "just put it in an email to HR" and hung up on her (**Issue 1.2.5 and 3.2.10**). However, it is the respondent's case that it was in fact the claimant who hung up.

159. We find it more likely on the balance of probabilities that the claimant hung up on Ms Cronin. Looking at the documentation, the nearest to a contemporaneous note we have about this telephone conversation is Ms Cronin's internal email to Human Resources on the same morning, at [282],

stating the claimant "hung up". At that stage, there was no reason for Ms Cronin to say that it was the claimant who hung up if it was in fact Ms Cronin.

160. We understand that the claimant argues that it would make little sense for her to have hung up halfway through making complaints. However, we note that Ms Cronin's email states that the claimant said "fine, I just wanted you for my mental health thought we could talk" and then hung up. We accept that this is what in fact happened.

161. Therefore, we do not find that it was Ms Cronin who terminated the call, as alleged in **Issue 1.2.5**.

162. On this point, we note that the claimant seemed to suggest in her evidence that a lot of the alleged subsequent treatment happened because of this conversation. We note at this stage that this conversation is not alleged to have been a protected act (nor, do we find, it could amount to such).

163. Following this conversation, Ms Cronin emailed Ms Lennon and Claire Chester - [281]. She set out her contemporaneous recollection of the conversation with the claimant. Ms Lennon suggested that mediation may be a way forward for the claimant and Ms Cronin.

164. Towards the end of January 2022, Ms Cronin was undertaking the exercise of getting the key performance indicators ("KPIs") ready for the council. She noticed that the KPIs showed that the respondent's percentages on compliance was down. In other words, they were not hitting their compliance targets. In light of this, Ms Cronin had to review all compliance, which led in turn to a review of the claimant's notes, as there was a lack of notes on some of the claimant's works orders.

165. Ms Lennon sent the claimant an email, suggesting an informal (mediation) meeting with Ms Cronin the following day, 28 January 2022 - [284].

166. Later, on 27 January 2022, the claimant sent to Ms Lennon, putting her concerns in writing – [286]. It is notable that she did not mention race discrimination in this email.

February 2022

Issue 1.2.4.1 - on or around January 2022 (should be February 2022), Miss Baker, a former colleague, presumes the claimant had been the person in the team who had not chased up a client query through WhatsApp messages in the team chat – direct discrimination

167. On 9 February 2022, Ms Baker sent a text message to the group asking who had spoken to "18 Talbot" - [329]. Ms McPherson replied within two minutes, stating it was not her, and then four minutes after the original message Ms Baker sent another follow-up asking "Diana did you speak with her? xx".

168. The claimant replied instantly, stating it was not her. Within another minute Ms O'Brien had also replied stating it was not her either.

169. The claimant alleges that it was an act of direct discrimination that Ms Baker presumed the claimant had been one to speak to 18 Talbot.

170. At the time these messages were sent, it was Ms Baker's evidence that the only staff working were Ms McPherson, Ms O'Brien, the claimant and herself, And that at this specific point Ms O'Brien was on lunch. The claimant stated that Ms Doig was also working and had also replied to this chain. We however then had evidence presented to us to demonstrate that Ms Doig had gone on holiday on 4 February 2022, and that there were no text messages from Ms Doig on 9 February 2022, contrary to what the claimant had said - [500]-[525].

171. We find that Ms Doig was on holiday on 9 February, and so did not reply to Ms Baker's enquiry. We also accept that Ms O'Brien was on lunch, and note that this was not challenged by the claimant. Ms Baker told us that, with her knowledge of who was on duty at the time, Once Ms McPherson had replied to say it had not been her who had spoken to 18 Talbot, the only person left was the claimant. This is why Ms Baker addressed her second question directly to the claimant. We find that this was the reason for Ms Baker's query to the claimant. It was not an assumption that the claimant had failed to do something, as appears to be suggested by this allegation. It was simply an enquiry in any event.

Issue 1.2.6 - on 14 February 2022, Ms O'Brien, the claimant's former colleague, did not help her with settling a client query whereas colleagues would normally help each other. This was through communications on WhatsApp, Horizon, and ReapIt - direct discrimination

172. This allegation relates to a text message at [311], item 19, in which Ms O'Brien states "Diana [REDACTED] back on phone stating tap not working and no heating or hot water. Have you raised a works order?". The claimant answered "yes", to which Ms O'Brien said "ok". The claimant then asked whether she should call the client back to which Ms O'Brien said yes.

173. The allegation in short is that Ms O'Brien was being obstructive and unhelpful. Firstly, the claimant says that Ms O'Brien should have checked the notes instead of having to ask her as to whether there was a works order. Secondly, the claimant alleges that Ms O'Brien did nothing to help the client, and instead left it to the claimant to ask whether she should call back. The claimant alleges that Ms O'Brien took this approach as both she and the tenant in question were black.

174. In the bundle we have examples of where Ms O'Brien has engaged and given help to the claimant, for example [252].

175. We are not satisfied that the exchange at [311] demonstrates deliberate obstruction by Ms O'Brien. It may be that she could have done more to further the enquiry, however there is no evidence on which we could draw the conclusion that this was a deliberate refusal to provide help. The claimant did not mention this interaction with Ms O'Brien in the meeting she had with Ms Lennon and Ms Cronin on 15 February 2022 - [369]. We find that it was not an issue that troubled the claimant at the time.

February 2022 – probationary review

176. It is the respondent's case that, from early on in the claimant's employment, there were errors in her work. For example:

176.1. on 10 November 2021, the claimant left out some important information (namely the tenant's details) when raising a request for repairs at a property – [235];
176.2. on 18 November 2021, the claimant provided the wrong costing to a landlord - [241];
176.3. on 29 November 2021, Ms Cronin picked the claimant up for not replying to WhatsApp messages – [246]
176.4. On 19 January 2022, Ms Cronin queried why the claimant had not put sufficient detailed notes on the system - [263].

177. We accept that these issues raised with the claimant were genuine concerns the respondent had regarding her performance. We find this, as several of them arose prior to the protected act, and there is no goof evidence to suggest an ulterior motive in manufacturing false negative feedback regarding the claimant.

178. As set out above, Ms Cronin started compiling her KPI information for the council in January 2022. This led in turn to her finding that there were further issues with the claimant's note-taking. Ms Cronin spoke to Ms Lennon about those issues in January and on 7 February 2022.

Issue 3.2.10 - on 11 February 2022 the claimant alleges she received an email from Ms Lennon which attached 32 screenshots and invited her to a probationary review meeting only one week after she had an informal meeting about the issues she was having with her manager, and only two weeks after her formal 121 meeting with her manager. The claimant alleges that the issues detailed in the email to discuss were issues that had not been raised previously with the claimant at the 121 meeting on 15 January 2022, or the meetings on 26 and 27 January 2022 (which were the days the claimant had a mental breakdown) and 3 February 2022 (which was a meeting to discuss the issues that the claimant raised on 26 and 27 January 2022). The claimant also alleges that some of the issues that were raised were above days when the claimant was suffering a mental breakdown – victimisation

179. On 11 February 2022, Ms Cronin sent Ms Lennon an email entitled "summary of issues" - [335]. This email set out four areas of concern that Ms Cronin had highlighted regarding the claimant's work.

180. Later that day, the claimant was sent notification of a performance capability investigation meeting, in which those same four specific concerns were raised - [333]. Within that letter, the claimant was advised that a meeting would take place on 15 February 2022, and that Ms Lennon would be in attendance to take notes.

181. The claimant alleges (**Issue 3.2.10**) that the respondent raised concerns in that email notification that had not been raised with her previously during the course of the meetings on 15 (meaning 17), 26 or 27 January or 3 (meaning 2)

February 2022. The claimant also says that some of the issues that were raised were about days when the claimant was suffering a mental breakdown.

182. It was Ms Cronin's evidence that, at the stage of the January meetings, and the 2 February meeting, she had not finished compiling all the relevant information. It would therefore have been premature to raise any issues before Ms Cronin had completed that exercise.

183. In terms of the 17 January 121 meeting, we have a summary of what was discussed at [262]. We find that it would have been helpful, and appropriate, at a 121 meeting, for the claimant's manager to raise any concerns, or even the possibility of concerns, at this meeting. Ms Cronin did not do so. However, we accept that Ms Cronin had not finished compiling all the information by this date, and so thought that it was better not to raise any performance issues at this point.

184. We find that it was reasonable not to discuss performance issues at the meetings of 27 January and 2 February, particularly given that Ms Cronin had not completed her review at this stage. These meetings arose in order to address the claimant's concerns, and so it would have been inappropriate to discuss performance issues. There was no meeting on 26 January (other than the morning team meeting); therefore, there was no meeting at which it would have been appropriate to raise Ms Cronin's concerns.

185. The claimant alleges that some of the issues raised with her performance were due to her mental breakdown. We have seen no medical evidence relating to a mental breakdown, but we accept that she was struggling with her mental health at around this time.

186. We consider that the appropriate forum for raising these performance issues would have been at a probation meeting. The meeting to which the claimant was invited on [333] was not called a probation meeting, but a "performance capability investigation". We find that this title could quite easily have led the claimant to understand that this was some kind of disciplinary process, or at least that the proposed meeting was more formal than a probation review.

187. Clearly, there was some internal confusion as to the nomenclature for meetings within the respondent. However, we understand that the respondent intended the meeting scheduled for 15 February 2022 to be a probation meeting. This was therefore the appropriate forum for raising the concerns set out on [333].

188. We accept that the specific concerns set out on [333] may not have been raised with the claimant before this probationary review process commenced. However, it is clear to us that, by February 2022, the claimant had been made aware of certain performance issues. We also note that the claimant has admitted to us in her evidence that she had made some mistakes in the course of her work.

189. On 14 February 2022, the claimant was sent an email that shared with her a folder containing 32 "Workload Review Examples" as compiled by Ms Cronin: those examples follow at [337-364].

Issue 3.2.11 - on 15 February 2022 the claimant alleges she attended a probationary review meeting on Microsoft Teams with Ms Cronin where she was questioned about alleged mistakes. The claimant alleges she had not received training on the points she was questioned on. The claimant alleges she received no advisory actions or plans of training for improvement after the meeting. The claimant alleges the meeting was an accusatory exercise with no plans for progression – victimisation

190. The claimant attended a meeting on 15 February 2022; the meeting was wrongly referred to as a "performance capability investigation meeting". It is the claimant's case that this was purely an "accusatory exercise", with no plan to progress the claimant, and no actions or plans for training put in place.

191. We are not satisfied that this was the case. Firstly, we find that most of the issues with the claimant's work (such as correct note recording) were not an issue of training. She was able to complete the tasks correctly, however the issue was one of consistency. The claimant could do her tasks correctly, she just did not always do so. The claimant admitted in the 15 February meeting that she needed to pay more attention to detail and that one specific example that was addressed was a mistake – [371].

192. Secondly, there was a plan following this meeting - [366-367]. The plan was that the claimant was to go through the 32 examples that had been sent to her and correct/update the works orders by the end of the week. There was then to be a follow up meeting in two weeks' time. Further, the claimant was informed of support available to her: she was told she could "seek assistance from [her] support team below", that being Ms Doig, Ms Baker or Ms McPherson, as well as Ms Cronin - [367].

Issue 3.2.12 - on 15 February 2022 the claimant alleges she received an email from Ms Lennon advising her that Ms Lennon had taken notes of what was said at the probationary review meeting. The claimant alleges that the notes were exaggerated and wrongly quoted issues that had been discussed and failed to mention the fact the claimant had not received training on the majority of the issues raised. It also did not include any plan of action for progress. The claimant alleges she was not previously advised that notes would be taken – victimisation

193. Following the meeting on 15 February 2022, the claimant was sent notes of that meeting. She responded stating that there were "mis-quotes" within the notes - [365]. Ms Lennon responded to say "I'll review and adjust the notes as below if we agree that's how it should be worded, apologies if misworded slightly" - [365].

194. The claimant alleges (**Issue 3.2.12**) that:

194.1. The notes of the 15 February meeting were exaggerated and wrongly quoted;

194.2. The notes failed to mention that the claimant had not received training on the majority of the issues raised;

194.3. The notes failed to set out any plan of action for progress; and

194.4. The claimant had not been told previously that notes would be taken at this meeting.

195. In terms of those specific allegations raised:

195.1. The claimant has not set out to us what she says the exaggerations or wrong quotes are within the notes. To the extent that she raised specific inaccuracies in the notes with the respondent, they were adopted by Ms Lennon;

195.2. There is mention within the notes that the claimant made a point about her training, for example:

195.2.1. At [371], "I would not have even known how to chase compliance as still within period of training as new to the company at this time";

195.2.2. At [372], "timescale on chasing, should be included on the training document as you can't assume that I am just going to know this information";

195.2.3. At [372], "would like you to appreciate how much there was to take on and this is within the first month of me taking on the role and starting on the phones earlier when hadn't completed all the training yet. Was not aware of how to use the organiser, until I asked Karen to go through it with me".

195.3. At [373], the notes record:

> Ms Cronin: "What would help you to succeed in moving your role forward?";
>
> The claimant: "I do need assistance, action somebody to go to for help";
>
> Ms Cronin: "I can't have you sit on things, in the meantime email me if you need help - don't sit on things until the end of the week. You need to ask me immediately, I apologies [sic] I haven't put a person in. I apologise but we have 4 members of staff that you can go to for Teams, chat, it doesn't always have to be me, I only call when it's an emergency".

The plan for progressing the matter on from the 15 February meeting is contained in the email at [367], as set out above.

195.4. The claimant was informed in advance of the meeting that minutes would be taken by Ms Lennon - [334].

196. We find that the note of the meeting at [369] may not be entirely accurate; however, we understand that this was intended to be a note and not a verbatim minute of the meeting. In any event, the claimant was given the opportunity to correct the notes and set out the specific issues she raised with the notes at [365]. None of her specific complaints are made out on the facts.

Issue 3.2.13 - on 16 February 2022 the claimant alleges that the claimant was accused of not following instructions from Ms Cronin when the claimant had followed instructions – victimisation

197. On 16 February 2023, Ms Cronin emailed the claimant at item 31 on [267], stating:

> "I've just gone to compose my email to the landlord, please can you advise why you have not informed the landlord you have passed this on to me to action as I originally sent the default notification as asked in this morning's meeting?"

198. The claimant alleges that this email is an act of victimisation, in that she was accused of not following instructions from her manager, when the claimant had in fact followed those instructions and left notes.

199. We find that Ms Cronin was asking about the claimant's communication as she had received an email from the landlord, looked on the notes, but could not see that the claimant had done anything.

200. By this stage in the claimant's employment, the lack of complete notes on ReapIt was an issue that had been mentioned several times to the claimant. We also note that, in the claimant's response to the above email, she did not state that the answer to Ms Cronin's enquiry was on her notes on the system. Therefore, on balance, we find it more likely than not that the claimant had not put the most up to date notes on the system.

201. We accept that Ms Cronin's email was an accusation, however the reason for that accusation was that the claimant had failed to put up to date notes on the system. Therefore, Ms Cronin had to seek clarification direct from the claimant.

Issue 3.2.14 - on 17 February 2022 the claimant alleges she asked for help via Teams. The claimant alleges Ms Cronin responded quickly and gave the claimant the help she needed. The claimant alleges that her manager then copied and pasted the conversation into the notes on the property as evidence the manager had helped the claimant. The claimant alleges this is something the manager did not do with other colleagues – victimisation

202. On 17 February 2022, the claimant messaged Ms Cronin on Microsoft Teams to ask her for some advice on a property. Ms Cronin gave her that advice. Ms Cronin then copied and pasted their Teams conversation into the "property page" of the system, which everyone involved to any extent with the property could see.

203. The claimant alleges that this was done in order to show her up, and that Ms Cronin did not post conversations she had with other colleagues to the property page (**Issue 3.2.14**).

204. It was Ms Cronin's evidence that she did in fact post up conversations with other colleagues to the property page – [AJC/WS/39].

205. The claimant accepted that there were no works orders on the property in question here, meaning that the property page would be the only place where notes should be stored – [C/WS/para 5 page 16].

206. There is no way for the claimant to know that the posting of conversations never happened on any other property page, as she did not give evidence that she had searched every other property page held by the respondent.

207. Although we find that, on this occasion the claimant's conversation was posted to the property page, we are not satisfied that this was unusual. We find that Ms Cronin did not post the conversation for any underhand motive, but simply so that the answer to the claimant's enquiry was recorded for others to see in case they had the same enquiry.

Issue 3.2.15 - on 22 February 2022 the claimant alleges she sent a message in the work WhatsApp group asking for the relevant procedure to carry out a work task. The claimant alleges that Ms Cronin delayed giving her the answer, until Ms Cronin must have looked up the property and noted the client was "sensitive" as he had leukaemia, then Ms Cronin answered the question without any further information being needed – victimisation

208. On 22 February 2022, the claimant and Ms Cronin had an exchange on the team's WhatsApp group:

> Claimant: How do I raise a no heating no hot water emergency for a beehive property
>
> Claimant: [BLANK] TT [tenant] has just moved in but has no heating or hot water.
>
> Cronin: as I know a move in is being done
>
> Cronin: did the pm check the meters that there was credit on?
>
> Cronin: this property has been empty for over 6 months
>
> Claimant: says there is an error code of F22 on boiler which means not enough water or something, days [sic - says] turning the valve should fix it but the valve is locked away or something
>
> Cronin: but have the meters been checked for credit?
>
> Claimant: didn't ask, let me check with him
>
> Cronin: never mind Diana
>
> Cronin: ive checked when he moved in, it was 2 weeks ago
>
> Cronin: can you raise a works stating recharge – No heating and hot water. You will have to either call we fix or bray first to see who can attend. Once you know you can issue the works order?
>
> Claimant: Okay I get, thank you

209. This conversation lasted 6 minutes, and is the subject of **issue 3.2.15**. In short, the claimant alleges that Ms Cronin should have checked the property notes first, rather than questioning the claimant.

210. Ms Cronin's evidence on this point was that she thought it related to a vulnerable tenant, and she then checked the property notes and passed the

advice on to the claimant to action – [AJC/WS/40]. This evidence was not challenged. We understand that Ms Cronin was multi-tasking; asking the claimant a question, whilst looking up the property on the respondent's system. We find that this was a perfectly sensible step for Ms Cronin to take in attempting to answer the claimant's question.

Issue 3.2.16 - on 23 February 2022 the claimant alleges she asked a question in the works WhatsApp group whether a works order was needed. The claimant alleges Ms Cronin read the message within 10 minutes of it being sent but did not respond to the claimant for over 4 hours - victimisation

211. We have not seen the documentary evidence of this exchange that allegedly took place on 23 February 2022.

212. The claimant accepted in cross-examination that Ms Cronin could have been in a meeting at the time of the claimant's message. However, the claimant did not accept that this means that the claimant was not deliberately ignored.

213. We heard from Ms Cronin that, just because a message is marked as read by her, does not mean that she has actually absorbed its contents and is in a position to reply. She told us, and we accept, that she often has meetings, and other WhatsApp chats going on, which mean she is not in a position to reply straight away.

214. We accept that, as manager, Ms Cronin would have different pressures on her time, which may mean there is a delay in responding to any questions. We find that the failure by Ms Cronin to reply earlier than 4 hours was not deliberate (we have no evidence that it was deliberate).

Issue 3.2.17 - the claimant alleges she received an email on 23 February 2022 from Ms Lennon inviting her to a second probationary hearing seven days after the first probationary meeting. The claimant considers this did not allow her time to improve – victimisation

215. On 23 February 2022, the claimant was sent an invitation to a further review meeting. This invitation states that the meeting is scheduled for 25 February 2022 and is a "formal probationary review meeting" - [374-376].

216. At the time of the claimant being sent this invitation, she was also sent a hyperlink to screenshots of the works orders that were discussed at the 15 February 2022 meeting. These works orders appear at [336]-[364].

217. The claimant alleges that she was not given the promised two-week period to improve her performance (**Issue 3.2.17**). In terms of the probationary process, following the 15 February 2022 meeting, Ms Lennon had informed the claimant that she would schedule another meeting in 2 weeks' time, around 1 March 2022 - [367]. In the event, the respondent sent an invitation to a probationary review meeting on 23 February 2022; the meeting was scheduled for 25 February 2022 - [375]. This was only 10 days after the first meeting, and four days short of the rough date she was given to expect from the communication at [367].

218. Ms Cronin told us that the reason for the earlier meeting was that the claimant was simply not improving, and that the respondent had seen no difference in her performance.

219. We find that it was unfair to shorten the period of time that the claimant had originally been given to improve. There was nothing to be gained by reducing the period of 2 weeks by 4 days.

220. We accept that the reason for bringing forward the meeting was that the claimant was not demonstrating signs of improvement. However, it is also clear to us by this point that Ms Cronin had given up on the claimant, and did not expect her to improve. Ms Cronin, in short, decided that there was no longer any point in giving the claimant time to improve.

221. We find that it had become apparent to the respondent (particularly Ms Cronin and Ms Lennon), that the claimant was not achieving in her role with the respondent. As set out above, this was not a training issue, as the problems with the claimant's work (such as note-taking) were inconsistent: for example, sometimes she would complete her notes correctly, sometimes she would not. As the claimant admitted in the meeting of 15 February, it was a matter of attention to detail.

222. The respondent therefore had come to the conclusion that the claimant was not a good performer. We also find that Ms Cronin, and Ms Lennon, by this stage, found the claimant difficult to deal with. The claimant had raised complaints, including falling out with her manager on 27 January 2022. The chronology of raising complaints, whether informally or not, stems back to the 2 December 2021 discussion the claimant had with Ms Cronin about the emoji incident.

223. However, we consider that it was the later issues with Ms Cronin from 27 January 2022 onwards, through the probation process, that were the major factor in the respondent's view that the claimant was difficult to deal with. We consider that, if this conversation was in the mind of Ms Lennon or Ms Cronin at all by the time of February 2022, it was very much in a trivial way. Furthermore, we find that Ms Cronin (and indeed Ms O'Brien and anyone else at the respondent) held no animosity towards the claimant for her protected act; as far as they were concerned, the matter had been resolved at the time in early December 2021.

224. We find, taken as a whole, the probationary review process was a shambles; with unnecessary confusion and upset caused by the change in terminology throughout the process from first meeting, labelled as a "performance capability investigation meeting" - [333].

March 2022

<u>Issue 3.2.18 - the claimant alleges she emailed Ms Lennon on 20 March 2022 asking for the second probationary hearing to be heard by an impartial third party. The claimant alleges her request was not acknowledged and the respondent proceeded to attempt to carry out the probationary review with Ms Cronin – victimisation</u>

225. The claimant was absent from work, on pre-booked annual leave, between 4 and 18 March 2022. She was in Nigeria, attending her grandfather's funeral.

226. On 20 March 2022, the claimant asked whether her probationary meeting could be dealt with by an impartial third party:

> [395] 20 March 2022 – "The lack of sensitivity and disregard for what I have been going through is one reason why I would request this meeting is carried out by an impartial third party preferably pinnacles HR..."
>
> [393] 20 March 2022 - "I did request [it be] dealt with by an impartial HR in my last email for the reasons I detailed below, is that possible or not?"

227. Ms Lennon responded in between these two emails, with no specific response to that request. She did however state that:

> Just to comment on your other statements below we are following all the correct procedures in relation to the probationary period process...

228. Ms Lennon, in her statement ([AL/WS/6]), told us that Ms Cronin was the correct person to be dealing with the claimant's probationary review, given that she was the one who had the necessary knowledge of the claimant's performance, as her manager. We accept that this was the reason why a third party impartial individual was not appointed.

229. The claimant's allegation regarding **Issue 3.2.18** is that her request for an impartial third party was ignored, and that the respondent continued with the probationary process with Ms Cronin dealing with it.

230. Factually, it appears that the claimant's request was ignored, or at least not dealt with expressly. Further, clearly at this point the respondent had no intention of enlisting the help of a third party to conclude the probationary process.

231. The reason for this conduct by the respondent was that Ms Lennon genuinely believed that (a) she was following the respondent's procedures, and (b) that Ms Cronin was best placed to deal with the claimant's probationary review.

232. On this point, we note that there is no probation policy or process in the bundle, other than the reference to a probationary period in the Employee Handbook:

> [101] "Your formal induction programme is likely to last for your first month with the business. After this, you will continue to undertake role-specific functional training which will continue until your probationary review at the end of your first three months. At this time, your Line Manager will invite you to a meeting to formally review your performance, conduct and behaviours against our Company Values. If you have successfully demonstrated your competence within the role during this period then your Line Manager will confirm your employment and you will have an initial "PDP" to set some objectives for the rest of the year, as well as revisit your induction programme to ensure that all of the important areas have been covered."
>
> [137] "Your contract of employment states your probation period, if application.

> The purpose of the probation period is to assess your suitability for the role that you have been employed to perform.
>
> During your probation period your conduct, performance and attendance with [sic] be monitored to ensure that it is satisfactory. You will also be required to demonstrate that you have the necessary skills, experience and ability expected of you to allow you to undertake the role.
>
> The Company reserves the right to extend your probation period by up to a further three [months] at its discretion.
>
> The company reserves the right to make a decision on your suitability for continued employment before the end of your probation period if this is deemed appropriate in the circumstances."

233. As previously mentioned, the respondent adopted inconsistent and incorrect terminology for the various meetings to which it invited the claimant. We find that the probation process of the respondent was flawed, and unclear, particularly as applied to the claimant in this case. The respondent and its employees are hindered by the fact that there is no clear probation policy implemented by the respondent. It was clear from Ms Lennon's evidence that there was no follow up by HR to ensure that line managers were holding probation meetings, or to ensure consistency in approach to probation periods and processes.

Issue 3.2.19 - the claimant alleges her request for her probationary hearing to be heard by a third party was ignored. She further alleges that after this, she did not receive further communication from the respondent's HR team. The claimant alleges she was locked out of her work laptop so she could not work. The claimant alleges she requested access to the laptop to gain access to her personal documents, such as payslips, but the request was ignored by Ms Lennon in March 2022 – victimisation

234. On 28 March 2022, the claimant returned to work - [397]. However, Ms Lennon emailed her later that day to suggest the claimant wait until Ms Cronin return from holiday, in order that a proper return to work interview could be conducted. The plan from Ms Lennon at that stage was for the claimant to attend the office on Thursday 31 March 2022, for both a return to work meeting, and the probation meeting.

235. On 30 March 2020, Ms Lennon sent to the claimant an email informing her that the two meetings scheduled for the following day would take place via Microsoft Teams - [403]. Ms Lennon also informed the claimant that it would be necessary to discuss an alleged "serious breach of the Data Protection Policy" that had come to the respondent's attention – [404]. It appeared from information received from the IT Department that day, that the claimant had been sending work emails to her personal email account, containing client information.

236. From 30 March 2023, the claimant was denied access to her work email account and was locked out of her laptop. This forms the basis of **Issue 3.2.19**, as does the allegation that Ms Lennon ignored the claimant's request for access to obtain information such as payslips. We note that **Issue 3.2.19** also repeats

allegations that are covered in **Issue 3.2.18**. Those points are covered within that allegation above.

237. Again, factually, the claimant was denied access to her laptop, and her requests were denied.

238. We find that this was because the respondent was acting upon the concerns raised by the IT Department.

239. In reply to the respondent's email of 30 March 2022, the claimant declined the invitation to a meeting on 31 March 2022 and said that "my lawyer will be in touch" - [403].

April/May 2022

Issue 3.2.20 - the claimant alleges she asked for an agreed exit and nobody made any contact with the claimant for four weeks. The claimant alleges she could not claim government aid or start any new job and was locked out of her work laptop, so she could not work. The claimant alleges she was then accused of an unauthorised absence by Ms Lennon in April 2022 - victimisation

240. Following the claimant's email of 31 March 2022, the claimant proposed an agreed exit to the respondent. We, quite rightly, do not know the details of such discussions between the parties and/or lawyers, as these communications would be without prejudice.

241. The claimant alleges that nobody contacted her after her proposal, and that she was then accused of unauthorised absence from work (**Issue 3.2.20**).

242. The claimant resigned on 29 April 2022 – [388-389]. Ms Mott responded on 12 May 2023 at [386].

243. Factually, once more, we find that **issue 3.2.20** is correct on the facts. It took several weeks for the respondent, via Ms Mott, to contact the claimant following her proposal. Ms Mott told us that this was because there were discussions happening between the respondent and the claimant's lawyers. This was not challenged and we accept Ms Mott's evidence on this point.

244. Turning to the accusation of unauthorised absences, this is at [387]. The absence referenced in Ms Mott's email related to the period immediately after the claimant returned from Nigeria:

> "Following the invite to your formal probation review which was due to take place on Friday 25th February 2022 you went absent from work, you then had a 2 week holiday and when contacted by Amy in HR following this you did not want to return to work following your annual leave due to the pending probation review meeting that needed to be rescheduled. Unfortunately, you did not follow the correct absence reporting procedure on the following days of your absence which is clearly stated in the sickness reporting procedure"

245. We know that the claimant attempted to return to work on 28 March 2022. There was therefore a period of one week, from 21 to 25 March 2022 during which the claimant was absent, without a sick note, or explanation. This was the period prior to the claimant being locked out of her laptop, which occurred

on 30 March 2022. Ms Mott's point in her communication is that the claimant had not followed the sickness absence policy, if she was indeed unwell during the week commencing 21 March 2022. We find that this was correct, the claimant had not reported any illness in line with the sickness absence policy. This was the reason for Ms Mott's communication to the claimant.

Issue 3.2.21 - the claimant alleges that Ms Mott accused the claimant of raising a grievance against Ms Cronin only after the respondent raised performance concerns. The claimant alleges performance concerns were raised two weeks after the claimant raised a detailed grievance about her manager. The claimant alleges the communications took place via email in April 2022 – victimisation

246. It is the claimant's case that Ms Mott accused the claimant of raising a grievance against Ms Cronin only after the respondent had raised performance concerns against the claimant. The claimant alleges that these communications took place via email.

247. Within the bundle, there is no communication from Ms Mott, by email or otherwise, in which Ms Mott makes the above accusation. Evidently, if that communication existed in documentary form, it would be disclosable, and would have been in the bundle. The claimant, in her evidence, was unable to provide any further detail about this alleged statement, or when it was allegedly made.

248. Ms Mott denied making any such statement.

249. Given the lack of documentary evidence, in a case which has been fairly document heavy with emails and WhatsApp messages, we find that, had this accusation been made by Ms Mott, we would have the evidence in the bundle. We accept Ms Mott's evidence, and find that no such accusation was made.

Issue 3.2.22 - the claimant alleges she was told by Ms Mott the collection of the claimant's work laptop would be arranged between April-September 2021. Communications took place via email. The claimant considers she was burdened with having to keep the laptop whilst awaiting collection by the respondent – victimisation

250. The claimant alleges that, following her resignation, she was put to the burden of retaining the respondent's laptop. She says that the respondent promised that her laptop would be collected from her, but this did not occur. In fact, the claimant attended the Tribunal in possession of the laptop, in order to hand it back to the respondent.

251. In her email of 12 May 2022, Ms Mott stated that Ms Lennon would be in touch to arrange collection of the respondent's laptop - [388]. This email was copied to Ms Lennon, however she was on holiday at this point in time - [AL/WS/10]. There is no further evidence in the bundle relating to the respondent's arrangements for the laptop's collection, from either party. Similarly, there is nothing from the claimant chasing the respondent to collect the laptop.

252. We find that, between Ms Mott and Ms Lennon, and the fact that Ms Lennon was on holiday at the time of Ms Mott's email, this matter simply fell through

the net. It was not a deliberate act by the respondent to burden the claimant with the respondent's laptop.

Time limits

253. The claimant spoke to a lawyer at the end of March 2022; clearly this was must have been before 31 March 2022, in order for her to have sent the email at [403]. At this point, her lawyer advised her about the three-month time limit for bringing a claim.

254. The claimant did not seek advice from a lawyer prior to this time for several reasons:

254.1. She hoped to be able to resolve matters at work;
254.2. She thought, to the extent that Ms O'Brien was the problem, she could simply avoid her, as the claimant worked from home;
254.3. Her mental health was suffering towards the end of January and into February 2022;
254.4. The claimant experienced an exacerbation in her mental health issues following the first probation meeting on 15 February 2022 - [395];
254.5. In February 2022, the claimant was involved in the organisation of her grandfather's funeral;
254.6. From 4 – 20 March 2022, the claimant was in Nigeria, for her grandfather's funeral;
254.7. Prior to that annual leave, the claimant had had 5 days off sick because of her mental health - [393];
254.8. On her return to the UK, the claimant did not return to work until 28 March 2022;
254.9. By the end of March 2022, the claimant told us she felt a bit better, mentally and physically, and felt more able to deal with the work issue.

255. The claimant told us, and we accept, that she was ignorant of the issue of time limits in the Tribunal prior to instructing a lawyer. Although she had done some research on the internet, this was more focused on an employer's duty of care to its employees, rather than research about discrimination.

256. In light of the above circumstances, we consider that the claimant's ignorance of time limits prior to the end of March, when she spoke to her lawyer, was reasonable.

257. There was then a period during which we are aware that the parties were in discussions to try to agree an exit. This was not fruitful and, having gone to ACAS on 19 April 2022, the claimant resigned on 29 April 2022, and presented her claim the following day. The reason for the delay from the claimant's knowledge of time limits (end of March 2022) to the end of April 2022, was because she was trying to resolve matters amicably, or at least without escalating them.

Conclusions

Issue 1.2.1 and 2.1.1 - send an animated moving hand gif image which the claimant considers resembles minstrels or piccaninnies. the gif image was

sent by the claimant's former colleague, Ms O'Brien, at the end of November 2021 on Microsoft teams - direct discrimination and harassment

258. We have found that Ms O'Brien meant only to send a friendly gif. We do not accept that, in choosing and sending this particular gif, she was significantly influenced by the claimant's race.

259. The only link with the claimant's race is said to be the gif's big eyes and big lips. We find that it is not reasonable, on an objective view, for someone to draw the inference that there is a resemblance to a golliwog within this image. The image in and of itself has no racial connotations.

260. We are not satisfied that there is evidence from which we could conclude that the sending of this image was discriminatory. The claimant appears to rely on the fact that she is the only black person on the team. However, a difference in race, and difference in treatment is not enough for us to draw an inference, without something more. Therefore, the first limb of the burden of proof is not reached.

261. In any event, we have accepted Ms O'Brien's evidence that the reason she sent that particular gif was because she thought it looked friendly. We note that Ms O'Brien was new to gifs; we find it unlikely that she would have specifically searched the internet for a "golliwog gif" or a "racist gif" or some similar search. Equally, we find it unlikely that the gif in question would come up following any such search.

262. There is no evidence before us to suggest that Ms O'Brien would not have sent this image to a white colleague.

263. We therefore reject the claim for race discrimination at issue 1.2.1.

264. Regarding the claim of harassment, again, this claim fails at the first hurdle of the burden of proof: there is no evidence from which we can find that the sending of the gif is connected to the claimant's race and therefore discriminatory.

265. In any event, we are not satisfied that the sending of this gif violated the claimant's dignity, or created the environment required by s26 EqA. The claimant evidently found the image offensive, albeit belatedly so. However, we are not satisfied that this reaction was a reasonable one.

266. These allegations therefore fail.

Issue 1.2.2 and 2.1.2 - send a monkey emoji image to the claimant from the claimant's former colleague, Ms O'Brien, on 1 December 2021 on Microsoft teams - direct discrimination and harassment

267. We have found that Ms O'Brien sent the monkey emoji at [249] due to her naivety, without realising the racial connotations of it.

268. Regarding the direct discrimination claim, the claimant relies on a hypothetical comparator. We have no evidence that suggests to us that Ms O'Brien would not have sent this emoji to a white colleague.

269. The initial burden of proof under s136 EqA is not met. In any event, considering Ms O'Brien's reason for sending the emoji, we are satisfied that the claimant's race was not a significant influence on her decision to send this emoji.

270. The allegation of direct discrimination (**Issue 1.2.2**) therefore fails.

271. In terms of the harassment claim, we conclude that the sending of the emoji was unwanted conduct. This is clear, given that the claimant complained to her manager about the emoji the following day.

272. We take note that the derogatory link between monkeys and racist slurs against Black people is recognised widely in today's society: we therefore accept that the unwanted conduct was in relation to race. We remind ourselves that Ms O'Brien's intent under s26 EqA is irrelevant.

273. The next question is whether that emoji led to the claimant reasonably experiencing the environment set out in s26(1)(b) EqA. We accept that the claimant, subjectively, experienced a harassing environment in response to this emoji; again, we point out that she raised a complaint the following day. Was that feeling of harassment reasonable? We conclude that it was. Given the well-known derogatory link that is sometimes made as a racist slur between monkeys and Black people, we accept that, to be sent an emoji of a monkey would have been sufficiently offensive to the claimant to reach the threshold in s26(1)(b) EqA.

274. We reiterate that we do not consider that Ms O'Brien had any intention to offend, or act in any way that could be construed as racist. We consider her apology and her feelings of mortification to have been genuine. However, for s26, it is the effect of the conduct that is relevant, not the intention.

275. The allegation of harassment in relation to the monkey emoji is therefore upheld.

Issue 1.2.3 - on 10 December 2021 the claimant alleges that her former colleague, Sharon MacPherson, questioned whether the claimant has done a piece of work, and changed the name on the works order raised from the claimant's name to her own, neither of which she would have done to the claimant's white colleagues – direct discrimination

276. In relation to Ms McPherson's conduct, we conclude that there is no evidence in front of us from which we could conclude that her actions were because of the claimant's race. It is not sufficient that the claimant was the only black member of the team.

277. Here, the claimant relies on Ms Baker as being a comparator. However, we have no evidence of how Ms McPherson would have treated Ms Baker in this same situation. Further, in relation to a hypothetical comparator, there must be something more than a difference in race and treatment in order for the claimant to get over the initial burden of proof.

278. The burden of proof does not therefore shift to the respondent to prove that Ms McPherson's actions were non-discriminatory.

279. We are not in any event satisfied that the actions by Ms McPherson constitute less favourable treatment. Ms McPherson's initial enquiry appears to be innocuous; it was one of many questions that were asked across the team day in day out. In terms of the replacement of Ms McPherson s name, we are also not satisfied that this amounts to less favourable treatment.

280. This allegation fails.

Issue 1.2.4.1 - on or around January 2022, Mss Baker, a former colleague, presumes the claimant had been the person in the team who had not chased up a client query through WhatsApp messages in the team chat – direct discrimination

281. We have already found that the reason why Ms Baker asked the claimant directly this question, was because she had deduced that the claimant was the only person currently on duty who have not replied to the general question that Miss Baker had posed.

282. There is no evidence before us from which we could conclude that Miss Baker had been significantly influenced in her actions by the claimant's race. There is nothing more than the fact that the claimant was the only black person on the team, from which we could draw any inferences.

283. We note that Ms Baker is said to be the comparator for this allegation. Evidently she cannot be the alleged perpetrator and the alleged comparator. Considering a hypothetical comparator, there is no evidence to suggest that a white person would have been treated any differently by Ms Baker in the same circumstances.

284. We therefore conclude that the burden of proof has not shifted to the respondent. In any event, we accept that the reason for the enquiry was as we have found above, and not the claimant's race.

285. This claim therefore fails.

Issue 1.2.4.2.1 - on 21 January 2022, emailing the claimant to request a productivity check, but not making the same request of the claimant's colleagues – direct discrimination

286. We have found that there was no difference in treatment between the claimant and Ms O'Brien on this occasion. Both were sent a productivity check on or around 21 January 2022.

287. Therefore, this allegation fails as there was no less favourable treatment.

Issue 1.2.4.2.2 and 2.1.4 - one 26 January 2022, in a team video meeting, Ms Cronin stated that everyone needed to improve how they left notes however only using the claimant as an example – direct discrimination and harassment

288. The claimant's case is that Ms Cronan did not single out other people by way of example in team meetings. We have found that this was not the case, and that Ms Cronin did on occasion take specific examples from team members to discuss at team meetings. We therefore find that there was no difference in treatment between the claimant and other members of her team.

289. Furthermore, we have found that the reason for this conduct by Ms Cronan was that the point raised was a useful learning point for the whole team.

290. There is no evidence from which we could conclude that Ms Cronan's conduct on this day was because of or related to the claimant's race.

291. In terms of the direct discrimination claim, Ms Baker is relied upon as being the actual comparator. Again, she is not an appropriate comparator, as she did not make the same mistake as the claimant in the lead up to the 26 January meeting. In other words, the claimant and Ms Baker were not in materially the same circumstances to enable the Tribunal to compare Ms Cronin's treatment of them both.

292. In any event, and considering a hypothetcial comparator, a difference in treatment and a difference in race is not sufficient to get over the initial burden of proof for direct discrimination, unless there is something more on the evidence we have before us. We find that the there is no such "something more" in this case. The burden of proof has therefore not shifted to the respondent in relation to this allegation.

293. This allegation of direct discrimination and harassment therefore fails.

Issue 1.2.4.2.3 - on 26 January 2022, the claimant alleges she received a WhatsApp message from her manager, Ms Cronin, asking if she had followed up a repair, when she had, and it was just an assumption that she had not – direct discrimination

Issue 3.2.8 - on 26 January 2022 the claimant alleges she was criticised by her manager, Ms Cronin, for the way she dealt with an issue relating to broken gas oven. The claimant alleges she asked for advice from her manager head of dealing with the issue but that her manager did not provide any guidance. The claimant alleges her request for guidance was ignored and instead her manager took over dealing with the issue – victimisation

294. There is no evidence from which we could conclude that Ms Cronin's conduct on 26 January was significantly influenced by the claimant's race. We have found that Ms Cronin's questioning of the claimant in relation to this repair was reasonable, was done in order to understand the situation in light of a potential gas leak, driven by a phone call from a distressed tenant.

295. Again, Ms Baker is not an appropriate comparator, as there is no example of her having been in materially the same circumstances as the claimant, and Ms Cronin having treated them differently.

296. Considering a hypothetical comparator, there is no evidence from which we could conclude that such a comparator would be treated differently because of their race. Again, a difference in race and treatment is not enough, and in this

case there is nothing more from which we can draw an inference of discriminatory conduct.

297. We therefore conclude that the burden of proof has not shifted in relation to Issue 1.2.4.2.3.

298. Regarding Issue 3.2.8, we have found that Ms Cronin was not criticising the claimant, but was providing her with instructions on how to deal with the case. We have also found that Ms Cronin did provide advice to the claimant, albeit later than the claimant would have liked. We therefore conclude that no detriment occurred.

299. In any event, this is no evidence on which we could include that Ms Cronin's action was significantly influenced by the protected act. The reason for Ms Cronin's communication was because there had been a gas leak that had not been dealt with as it should have been.

300. Furthermore, we find that there was no reason why the protected act would have been playing on Ms Cronin's mind at this point. As far as she was concerned, the monkey emoji incident had been dealt with and concluded amicably with a resolution.

Issue 1.2.4.2.4 - on or around January 2022, the claimant asked Ms Cronin for instructions to pass onto a client the details were not given to the claimant but were given to her colleague, Ms Baker, when she made the same request – direct discrimination

301. We have found that the reason for the difference in the way in which Ms Cronin dealt with the claimant and Ms Baker at this time was due to 2 factors:

301.1. when Ms Baker contacted Ms Cronin, the client to whom the query related was actually on the telephone. When the claimant contacted Ms Cronan, it was to report phone call that had already taken place;

301.2. the day on which Ms Baker contacted Ms Cronin was the last day for the complaint of the client to be dealt with.

302. Therefore, the two responses by Ms Cronin, to Ms Baker and the claimant, are not directly comparable.

303. In any event, other than there being a difference in race between the claimant and Ms Baker (or indeed a hypothetical comparator), and a difference in treatment by Ms Cronin, there is no evidence to provide us with the "something more" required to satisfy the initial burden of proof. There is therefore no evidence from which we could conclude that Ms Cronin's conduct was because of the claimant's race.

304. This allegation therefore fails.

Issue 3.2.9 - On 27 January 2022 the claimant alleges she asked her manager, Ms Cronin, to stay on after a team call as other colleagues have done in the past. The claimant alleges her manager refused and said she would call the claimant back the claimant alleges that her manager called her back via

horizon and that as the claimant tried to talk, her manager cut her off and said "just put it in an email to HR" and terminated the call - victimisation

Issue 1.2.5 - Following a telephone call on 27 January 2022, in a meeting on 2 February 2022 to discuss the claimant's concerns, Ms Cronin accused the claimant of being angry on the phone. The claimant alleges that Miss Cronin terminated the call on her and that it was not the claimant who did so – direct discrimination

305. As we have found above, the reason why Ms Cronin refused the claimant's request to stay on the team call was that she had promised another colleague that she would speak to her first.

306. We have found that Ms Cronin did tell the claimant to put her concerns in an email, but did not terminate the call. We find that Ms Cronin advised the claimant to write an email because the claimant was evidently upset and angry in this call, and Ms Cronin was not able to allay the claimant's concerns. Ms Cronin told us that she had been trained that this was the way to deal with such a situation. We find that this was the reason for Ms Cronin taking the approach she did when faced with the claimant's call. The protected act in December 2021 we find had no significant influence on the way Ms Cronin acted on this day.

307. Therefore the claim of victimisation fails.

308. In terms of the direct discrimination claim, we have found that Ms Cronin did accuse the claimant of being angry on the telephone at the meeting on 2 February 2022. In short the reason for this was that the claimant was angry in that telephone call.

309. The claimant alleges that Ms Cronin wrongly stereotyped her as an angry Black woman, when all she was doing was expressing herself. We are not satisfied that there is sufficient evidence from which we could say that Ms Cronin calling the claimant angry was because of the claimant's race. When considering the claimant's actual comparator of Ms Baker, we do not consider her to be an appropriate comparator, given that Ms Baker did not have a conversation with Ms Cronin like the one the claimant had on 27 January.

310. Considering a hypothetical comparator, we have no evidence from which we could conclude that Ms Cronin would have treated a white colleague differently in the same material circumstances.

311. This allegation of direct discrimination therefore fails.

Issue 1.2.6 - on 14 February 2022, Ms O'Brien, the claimant's former colleague, did not help her with settling a client query whereas colleagues would normally help each other. This was through communications on WhatsApp, Horizon, and ReapIt - direct discrimination

312. We have found that Ms O'Brien was not being deliberately obstructive in relation to this matter.

313. We are also not satisfied that Ms O'Brien's actions on this day equate to less favourable treatment. Ms O'Brien's communications appear to be innocuous.

314. We are not satisfied that there is evidence from which we could conclude that Ms O'Brien's actions in relation to this allegation were because of the claimant's race. Although we have found that Ms O'Brien harassed the claimant in December 2022, we have found that this was unintentional on her part. We therefore conclude that there is no evidence from which we could draw the conclusion that the claimant's race was an effective cause of Ms O'Brien's actions on 14 February 2022.

315. In relation to this allegation, Ms Baker is said to be an actual comparator. We are not satisfied that Ms Baker is an appropriate comparator, we have not been taken to specific examples of where Ms O'Brien, in similar circumstances, treated Ms Baker more favourably than she treated the claimant.

316. Considering a hypothetical comparator, we have no evidence to suggest that such a comparator would be treated any differently by Ms O'Brien.

317. This claim for direct discrimination therefore fails.

Issue 2.1.3 - the claimant alleges that without any prior warning of training the claimant had to start work on the phones. The claimant considers she was instructed to do so by the claimant's former colleague, Miss O Brien, on 7 December 2021. Communications were over WhatsApp – harassment

318. We can understand that the claimant may have been irked at being volunteered for a task without her permission or agreement being sought in advance. We therefore accept that Ms O'Brien's text equates to unwanted conduct.

319. We then turn to the reason behind Ms O'Brien's conduct in volunteering the claimant to be on phones. We have accepted Ms O'Brien's evidence that she automatically volunteered the claimant along with herself, as they had started working for the respondent at the same time.

320. We recognise the proximity in time between this allegation and our finding of harassment by Ms O'Brien in terms of the emoji incident. However, the emoji incident was an act that was unintentional on the part of Ms O'Brien: it was not her purpose in sending that emoji to harass the claimant, however it was the effect.

321. In this scenario, in relation to **issue 2.1.3**, there is nothing inherently within this allegation that connects Ms O'Brien's actions to the claimant's race (unlike the monkey emoji).

322. We are not satisfied that there is evidence from which we could conclude that Ms O'Brien's action here was related to the claimant's race. We accept her reason as set out above as to why she included the claimant's name in her text message.

323. This allegation of harassment therefore fails.

Issue 3.2.1 - On 10 December 2021, the claimant asked Ms Cronin for help with the query she was dealing with for the first time. The claimant alleges that her manager read the message but did not reply. The claimant alleges that she re-raised the question but her manager did not provide the advice sought - victimisation

324. We do not accept that Ms Cronin's manner of dealing with the claimant's text message at [253] amounts to a detriment. No reasonable worker would consider that they had suffered a detriment in these circumstances. This was simply the way in which Ms Cronin managed the staff in light of the mechanism of the team WhatsApp group.

325. If we are wrong, and this incident does amount to a detriment, we conclude that Ms Cronin's behaviour on this day was not because of the claimants protected act on 2 December 2021. As we have already found, as far as Ms Cronin was concerned the emoji incident had been concluded and all parties considered the matter resolved. There was therefore no reason for Ms Cronin to hold that against the claimant. Neither do we have any evidence that she did in fact do so.

326. This allegation of victimisation therefore fails.

Issue 3.2.2 - On 17 December 2021 the claimant received email correspondence from Ms Cronin which the claimant alleges was not constructive feedback but was fault finding about the claimant's work on the phones – victimisation

327. We have found that Ms Cronin's communications on 17 December 2021 were not fault finding but were constructive feedback. We therefore conclude that there was no detriment here.

328. This allegation of victimisation therefore fails on this point.

329. However, if we are wrong, and there is a detriment, we find it was not due to the claimant's protected act. By this time in the claimant's employment, issues regarding notetaking and raising works orders had been the subject of informal discussions and communications with the claimant. We find that the reason for the feedback is that the feedback was legitimate.

330. We have no evidence before us to suggest that Ms Cronin was, in sending these emails, significantly influenced by the protected act. As we have already stated, Ms Cronin's view was that the emoji incident had been resolved and was therefore no longer an issue.

Issue 3.2.3 - on or around January 2022, the claimant alleges she requested the necessary approval via email from Ms Cronin to complete a job. The claimant alleges that her manager provided approval to others in this way but did not to the claimant - victimisation

331. As a fact, Ms Cronin did not provide the necessary approval to the claimant (at least initially) that was needed for the claimant's works request to be actioned – [264]. However, we have accepted that Ms Cronin's response was

genuine, that she was in a meeting and that the claimant could obtain authorisation from another member of the team.

332. Firstly, we are not satisfied that this interaction from Ms Cronin amounts to a detriment.

333. In any event, there is nothing to suggest that Ms Cronin refused to provide the authorisation in the email on [264] because of the protected act.

334. This allegation of victimisation therefore fails.

Issue 3.2.4 - on 15 January 2022 the claimant alleges that in her 121 with Ms Cronin, she explained that she felt the term "no worries" is rude to use in a work setting. The claimant alleges that from that point onwards Ms Cronin responded to the claimant with "no worries" every time they spoke over the phone – victimisation

335. We have found as a fact that this detriment did not happen.

336. Therefore, this allegation of victimisation fails.

Issue 3.2.5 - on or around January 2022 the claimant alleges she called Ms Cronin as she needed help. The claimant alleges that her manager waited to call her back until the claimant went on lunch and put her phone status on "away" before trying to call her back – victimisation

337. We conclude that this detriment is not made out on the facts, in that, although Ms Cronin did call the claimant when she was away from her phone, this was not done deliberately by Ms Cronin, nor was it done with any malevolent intent.

338. In any event, there is no evidence from which we could conclude that Ms Cronin's actions were because of the protected act. As already set out, Ms Cronin's view was that the emoji incident (incorporating the protected act) had been resolved back in December. There is no evidence to suggest that the protected act significantly influenced the way in which Ms Cronin acted in this communication with the claimant.

339. This allegation of victimisation therefore fails.

Issue 3.2.6 - on 20 January 2022 the claimant alleges she was falsely accused by Ms Cronin of speaking to a tenant who called in distress saying that they had spoken with the claimant. The claimant alleges she responded by email to explain her case but that her manager ignored the claimant's response – victimisation

340. We have found that the claimant's email on [264] at item 29 was ignored by Ms Cronin. We find that, having been told that a client had raised a complaint that the claimant had not returned a phone call, having no answer to an email asking for more information amounts to a detriment. It understandably left the claimant not knowing whether there was in fact an actual live complaint against her or not.

341. However, there is no evidence from which we could conclude that Ms Cronin's failure to respond to the claimant's email was because of the protected act. As we go on in the chronology, more time passes between the protected act and any detriment suffered by the claimant. At this stage in the chronology, approximately 6 weeks have passed. Further, Ms Cronin's understanding is that the protected act and emoji incident was resolved, and all parties had moved on.

342. This allegation of victimisation therefore fails.

Issue 3.2.7 - on 25 January 2022 the claimant alleges that Ms Cronin ignored her requests via WhatsApp for advice on how to carry out a gas safety check – victimisation

343. We have found that the claimant's request was ignored by Ms Cronin for 2 days. The reason behind this was that Ms Cronin was waiting for information from the directors in order to answer the claimant's question.

344. We accept that to wait two days before responding is not an ideal way to manage the claimant and assist her in performing her role. However, this is a claim of victimisation, and therefore Ms Cronin's inaction must be because of the protected act in order to succeed.

345. Although we consider that Ms Cronin could have dealt with the claimant's question in a more proactive way, this is not the same as being satisfied that the reason for Ms Cronin's inaction was the protected act.

346. There is no evidence from which we could conclude that Ms Cronin's failure to respond to the claimant's enquiry more immediately was significantly influenced by the claimant's protected act. We also note that, as above, Ms Cronin's view was that there was no animosity left between the parties involved in the emoji incident. There is therefore no reason why she would continue to act in response to the protected act.

347. This allegation therefore fails.

Issue 3.2.10 - on 11 February 2022 the claimant alleges she received an email from Ms Lennon which attached 32 screenshots and invited her to a probationary review meeting only one week after she had an informal meeting about the issues she was having with her manager, and only two weeks after her formal 121 meeting with her manager. The claimant alleges that the issues detailed in the email to discuss were issues that had not been raised previously with the claimant at the 121 meeting on 15 January 2022, or the meetings on 26 and 27 January 2022 (which were the days the claimant had a mental breakdown) and 3 February 2022 (which was a meeting to discuss the issues that the claimant raised on 26 and 27 January 2022). The claimant also alleges that some of the issues that were raised were above days when the claimant was suffering a mental breakdown – victimisation

348. We have found that the issues raised with the claimant in the email of 11 February 2022 could have been raised in the meeting of 17 January 2022,

although the respondent was not obligated to raise them at that meeting, given that Ms Cronin had not completed her review at that stage.

349. We have found that it would not have been appropriate to raise the performance issues with the claimant at either 27 January or 2 February 2022 meetings.

350. The appropriate forum at which to raise these issues was at a probationary review meeting, which was, in substance if not name, the purpose of the meeting on 15 February 2023.

351. We therefore find that there was no detriment here. Although the respondent could have raised issues earlier than the probationary review, there was no need for them to do so.

352. In any event, we conclude that the reason issues were not raised before the invitation email of 11 February 2022 was that Ms Cronin had not finished her review. There is no evidence from which we could conclude that the respondent's actions in relation to the timing of raising issues with the claimant were significantly influenced by the protected act on 2 December 2021.

353. This allegation of victimisation therefore fails.

Issue 3.2.11 - on 15 February 2022 the claimant alleges she attended a probationary review meeting on Microsoft Teams with Ms Cronin where she was questioned about alleged mistakes. The claimant alleges she had not received training on the points she was questioned on. The claimant alleges she received no advisory actions or plans of training for improvement after the meeting. The claimant alleges the meeting was an accusatory exercise with no plans for progression – victimisation

354. On the facts as we have found them to me, we find that there was no detriment here. It is not the case that the claimant had not received training on the points raised with her at the 15 February 2022 meeting. Nor was it the case that there was no action or plan for improvement. The meeting was not an accusatory exercise, but a probationary review of matters that needed to be worked on by the claimant.

355. In any event, we are not satisfied that there is any evidence from which we could conclude that the way in which the meeting was conducted, and its outcomes, were because of the protected act.

356. Therefore, this allegation of victimisation fails.

Issue 3.2.12 - on 15 February 2022 the claimant alleges she received an email from Ms Lennon advising her that Ms Lennon had taken notes of what was said at the probationary review meeting. The claimant alleges that the notes were exaggerated and wrongly quoted issues that had been discussed and failed to mention the fact the claimant had not received training on the majority of the issues raised. It also did not include any plan of action for progress. The claimant alleges she was not previously advised that notes would be taken – victimisation

357. We have found that none of the claimant's specific complaints under this issue are made out on the facts.

358. This allegation of victimisation therefore fails.

359. In any event, there is no evidence from which we could conclude that Ms Lennon's actions in relation to the notes were because of the protected act.

Issue 3.2.13 - on 16 February 2022 the claimant alleges that the claimant was accused of not following instructions from Ms Cronin when the claimant had followed instructions and left notes. Communications tool place via email – victimisation

360. We have found that the reason behind Ms Cronin's email to the claimant asking why the claimant had not informed the landlord that the matter had been passed to Ms Cronin was that the claimant had not put updated notes on the system to explain she had done this.

361. Ms Cronin therefore had to ask the question in order to understand and find out the answer. In other words, this was a legitimate question from Ms Cronin. Had the claimant updated the notes correctly, Ms Cronin would not have needed to ask the question.

362. There is no evidence from which we could conclude that Ms Cronin's communication on 16 February was because of the claimant's protected act.

363. This allegation of victimisation therefore fails.

Issue 3.2.14 - on 17 February 2022 the claimant alleges she asked for help via Teams. The claimant alleges Ms Cronin responded quickly and gave the claimant the help she needed. The claimant alleges that her manager then copied and pasted the conversation into the notes on the property as evidence the manager had helped the claimant. The claimant alleges this is something the manager did not do with other colleagues – victimisation

364. We have found that Ms Cronin did post up this conversation to the property page, but that this was not unusual, and was something Ms Cronin had done with other members of the team. We have also found that Ms Cronin had no malevolent motive in posting this conversation.

365. We therefore find that there is no detriment here.

366. In any event, there is no evidence from which we could conclude that Ms Cronin's actions in posting the conversation were because of the protected act.

367. This allegation of victimisation therefore fails.

Issue 3.2.15 - on 22 February 2022 the claimant alleges she sent a message in the work WhatsApp group asking for the relevant procedure to carry out a work task. The claimant alleges that Ms Cronin delayed giving her the answer, until Ms Cronin must have looked up the property and noted the client was "sensitive" as he had leukaemia, then Ms Cronin answered the question without any further information being needed – victimisation

368. We have found that Ms Cronin's actions were not in any way malevolent, deliberate or underhand. We do not find that Ms Cronin's actions in the conversation on [258] amount to a detriment. The entire conversation lasted 6 minutes: for the claimant to suggest that this conversation should have been shorter and that there was a delay is to have unrealistic expectations.

369. In any event, we have no evidence to suggest that Ms Cronin's communications on [258] were because of the protected act.

370. Therefore, this allegation of victimisation fails.

Issue 3.2.16 - on 23 February 2022 the claimant alleges she asked a question in the works WhatsApp group whether a works order was needed. The claimant alleges Ms Cronin read the message within 10 minutes of it being sent but did not respond to the claimant for over 4 hours - victimisation.

371. We have found that any failure to reply within 4 hours was not a deliberate act by Ms Cronin. Any delay in replying was due to other managerial responses she was undertaking on 23 February 2022.

372. We are not satisfied that there is any evidence from which we could conclude that Ms Cronin's actions on 23 February 2022 were because of the protected act.

373. As such, this allegation of victimisation fails.

Issue 3.2.17 - the claimant alleges she received an email on 23 February 2022 from Ms Lennon inviting her to a second probationary hearing seven days after the first probationary meeting. The claimant considers this did not allow her time to improve – victimisation

374. We have found that the period between the probationary review meetings was unfairly shortened, and did not give the claimant the promised period of time to improve.

375. In terms of the reason for the shortening of the time between meetings, we have found that this was because Ms Cronin was of the view that the claimant would not improve, and had not shown signs of improvement. Furthermore, Ms Cronin found the claimant difficult to deal with.

376. Although we consider the respondent's actions here as being unfair, this victimisation claim does not require us to consider fairness. The question is whether the shortening of the review period was because of the claimant's protected act. We have found that the view that the claimant was difficult to deal with was, in nothing more than a trivial, connected to the claimant's complaint of 2 December 2021 (the protected act). The conclusion that the claimant was difficult was not significantly influenced by the protected act, and therefore the respondent's actions in shortening the review period were also not significantly influenced by that protected act.

377. This allegation of victimisation therefore fails.

Issue 3.2.18 - the claimant alleges she emailed Ms Lennon on 20 March 2022 asking for the second probationary hearing to be heard by an impartial third party. The claimant alleges her request was not acknowledged and the respondent proceeded to attempt to carry out the probationary review with Ms Cronin – victimisation

378. We have found that the claimant's request for a third-party person to be involved was ignored, and that the process continued with Ms Cronin as the manager in charge of the probationary review. We have found that the reason for this was that Ms Lennon genuinely thought that proceeding in this way was in line with the probationary policy (such as it was) and that Ms Cronin was best placed to deal with the probationary review.

379. There is no evidence from which we could conclude that Ms Lennon's actions here were because of the claimant's protected act.

380. This allegation of victimisation therefore fails.

Issue 3.2.19 - the claimant alleges her request for her probationary hearing to be heard by a third party was ignored. She further alleges that after this, she did not receive further communication from the respondent's HR team. The claimant alleges she was locked out of her work laptop so she could not work. The claimant alleges she requested access to the laptop to gain access to her personal documents, such as payslips, but the request was ignored by Ms Lennon in March 2022 – victimisation

381. We have found that the claimant was denied access to her laptop, and her requests for her pay slips ignored. This was because of the information that Ms Lennon had been sent from the IT Department, alleging that the claimant had sent emails to her personal account containing confidential information.

382. The reason for the respondent's actions under **issue 3.2.19** was therefore not because of the claimant's protected act. We are not satisfied that there is evidence from which we could conclude that this action was because of the protected act.

383. This allegation therefore fails.

Issue 3.2.20 - the claimant alleges she asked for an agreed exit and nobody made any contact with the claimant for four weeks. The claimant alleges she could not claim government aid or start any new job and was locked out of her work laptop, so she could not work. The claimant alleges she was then accused of an unauthorised absence by Ms Lennon in April 2022 - victimisation

384. We have found that Ms Mott's statement that the claimant had not followed the absence reporting procedure for a period in March 2022 was accurate. That was the reason for Ms Mott making the statement regarding unauthorised absence on [387].

385. Although Ms Mott knew about the protected act, there is no evidence from which we could conclude that her reference to the claimant not following the absence procedure was because of that protected act.

386. The allegation of victimisation therefore fails.

Issue 3.2.21 - the claimant alleges that Ms Mott accused the claimant of raising a grievance against Ms Cronin only after the respondent raised performance concerns. The claimant alleges performance concerns were raised two weeks after the claimant raised a detailed grievance about her manager. The claimant alleges the communications took place via email in April 2022 – victimisation

387. We have found as a fact that this allegation did not in fact happen. Ms Mott did not make the accusation alleged in **Issue 3.2.21**.

388. As such, this allegation of victimisation fails.

Issue 3.2.22 - the claimant alleges she was told by Ms Mott the collection of the claimant's work laptop would be arranged between April-September 2021. Communications took place via email. The claimant considers she was burdened with having to keep the laptop whilst awaiting collection by the respondent – victimisation

389. Although it is a fact that the claimant was left in possession of the respondent's laptop until this final hearing, we do not consider this to amount to a detriment in the eyes of a reasonable employee.

390. In any event, we have found that the failure to arrange collection of the laptop was not a deliberate omission by the respondent. It was simply a mistake, and as such was not because of the claimant's protected act. We have no evidence from which we could conclude that the protected act was the reason for this failure.

391. This allegation of victimisation therefore fails.

Time limits

392. The only claim that we have upheld is **Allegation 2.1.2**, the sending of a monkey emoji by Ms O'Brien on 1 December 2021.

393. This claim, presented to the Tribunal by the claim form dated 30 April 2022, is on the face of it out of time. We therefore need to consider whether the claim was presented within such time as was just and equitable.

394. The length of the delay is 2 months: the claim should have been presented by 28 February 2022, and was in fact presented on 30 April 2022. The extension normally provided by the ACAS early conciliation process does not assist the claimant here, as she only went through that process after the primary 3 month time limit had expired.

395. In terms of the reason for delay, there are two stages of delay in bringing the claim:

395.1. The period before the claimant knew of Tribunal time limits (up to the end of March 2022); and

395.2. The period after she gained this knowledge (end of March to 30 April 2022).

396. We have accepted that, in relation to the first period, the claimant's initial lack of knowledge was reasonable.

397. The reason for the second period of delay was, as we have accepted above, the claimant's attempts to resolve matters amicable and internally.

398. We turn to consider the balance of prejudice.

399. If we do not exercise our discretion to extend time, the claimant will not succeed on her claim. She will therefore lose the right to an award, given that one aspect of her claim has succeeded on the merits. The loss of a favourable judgment and award would be solely on the basis that she presented her claim late.

400. If we do exercise our discretion to extend time, the respondent will have a judgment against them, and will be liable for an award. They have already expended time and money on defending the claim in its entirety.

401. Balancing all the relevant factors, and the balance of prejudice, we conclude that the claim was presented in such a time as was just and equitable. Overall, we conclude that it would be unjust to deprive the claimant of a judgment and award when a part of her claim has succeeded on its merits.

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Employment Judge Shastri-Hurst

_____

Date 1 September 2023

REASONS SENT TO THE PARTIES ON

.....6 September 2023.....

…….....

FOR THE TRIBUNAL OFFICE