EMPLOYMENT TRIBUNALS

Claimant: **Miss D Harding**

Respondent: **St George's University Hospital NHS Foundation Trust**

Heard at: **London South (Croydon)** **On: 11/9/2023 - 19/9/2023**

Before: **Employment Judge Wright**
Ms J Cook
Ms N Beeston

Representation:
Claimant: **In person**

Respondent: **Ms E Misra KC - counsel**

LIABILITY JUDGMENT

It is the unanimous Judgment of the Tribunal that the claimant's claims under the Equality Act 2010 (EQA) are not well founded, they therefore fail and are dismissed.

REASONS

1. The claimant presented a claim form on 6/5/2020 following a period of early conciliation which started on 6/3/2020 and ended on 6/4/2020. The claimant was employed by the respondent as a Senior Human Resources Advisor band 7.

2. A case management hearing took place on 17/11/2021 and that resulted in an agreed list of issues[1].

3. Under the Equality Act 2010 (EQA), the claimant claims the protected characteristics of race (she describes herself as of mixed race: black Caribbean and white) (s.9) and disability (s.6) (mental health problems, a skin condition and menopausal symptoms). The prohibited conduct upon which she relies is: direct discrimination (s.13) and victimisation (s.27) in respect of race and the duty to make reasonable adjustments for disability (s.20 and s.21). The complaint is detriment (s.39(2)(d)). The respondent accepted the claimant was disabled by reason of depression from 15/4/2019.

4. The Tribunal heard evidence from the claimant. In breach of the Tribunal's Order of 17/11/2021 the claimant had not produced a witness statement. She said she had been too unwell to do so. That is not accepted. It is particularly noted that the claimant obtained new employment in September 2021 and during the 3.5 years since she had presented her claim, she must have had periods of time in which she was not unwell. The claimant had one period of long-term sickness absence whilst employed by the respondent, however that was between 19/12/2018 and 15/4/2019.

5. In accordance with the case management Order of 7/9/2023, the claimant's detailed 38-page particulars of claim[2] was adopted as her evidence-in-chief. That was alongside her two-page schedule of loss and her three-page disability impact statement. At the emergency preliminary hearing on 7/9/2023 the claimant was told that she could provide a short supplementary witness statement if she wished to do so. She had not produced a statement prior to the hearing commencing and she did not seem to appreciate that at that late stage in the proceedings, any supplementary witness statement should be produced as soon as possible and certainly, in advance of the hearing commencing. As it was, the claimant's evidence commenced at 1.15pm on the first day.

6. The claimant also called evidence from Celia Oke, who had produced a 1.5 page witness statement on 24/2/2023 (in breach of the Tribunal's Order which was witness statements should have been exchanged on 31/10/2022). Ms

[1] The list of issues is appended to this Judgment.

[2] The claimant's particulars of claim appeared to be professionally drafted. The claimant said she had drafted it herself, with some input from her Trade Union representative. As she drafted it herself, this shows the contrast between her preparing and presenting that document and the breaches of the Order of the 17/11/2021.

Oke was employed by the respondent between April 2018 and May 2020 as a band 8a Workforce Diversity and Inclusion Manager.

7. The respondent called four witnesses. They were: Mr John Wall - Divisional HR Manager in the Surgery, Neurosciences, Cancer and Theatres Division and the claimant's line manager (Mr Wall left the respondent in April 2020); Ms Shilpi Sahai - Divisional HR Manager in the Medicine and Cardiovascular Division; Ms Jacqueline McCullough - Deputy Director of HR; and Mr Harbhajan Brar - Director of HR (Mr Brar left the respondent in June 2020).

8. In order to comply with the overriding objective and in the absence of a witness statement from the claimant; the respondent served its witness statements upon the claimant on the 4/9/2023. That was a week prior to the hearing commencing. On the 5/9/2023 the claimant was certified as unfit for work from 1/9/2023 to 22/9/2023 due to anxiety. The claimant said however that she had not 'got round to reading them all', in respect of the respondent's witness statements.

9. An electronic copy of the bundle was sent to the claimant in April 2023 and further to an Order that the claimant provide an address for service, the hard copy bundle was delivered to her on 8/9/2023.

10. The case had been listed for an eight-day final hearing at the preliminary hearing in November 2021. That was an extended listing to take account of a second claim which had been presented (but which was not considered at the November preliminary hearing). The second claim was subsequently struck out at a hearing on 4/4/2023. As it was considered the claimant may require more frequent breaks during the hearing, the listing remained.

11. The Tribunal expects that with such a long lead in time to the final hearing (almost two years), that the claimant would set aside time to comply with the Order for directions and produce a witness statement. Not only that, but to read the respondent's witness statements and to actively prepare for the final hearing. From July 2023 the claimant had sought to postpone this final hearing. The respondent had informed her that there was no guarantee the final hearing would be postponed and that she should continue her preparation for it; that included drafting her witness statement (although the claimant had originally been Ordered to serve her witness statement upon the respondent on the 31/10/2022 – the claimant said that she did not realise that included her own witness statement, however, the Order is perfectly clear in that regard). Due to the outstanding matters and the risk that the final hearing would be disrupted or derailed, an emergency preliminary hearing was listed on 25/8/2023 for the 7/9/2023 (two working days before the final hearing). By that time, the claimant had abandoned her postponement application.

12. The claimant's job description states a key result area is (page 1633):

> ‘To support the Divisional HR Managers in preparatory work related to Employment Tribunal claims, including preparation of Notices of Appearance and liaising with managers involved in the case to **produce draft witness statements for use at the Employment Tribunals.’**

[emphasis added]

The claimant also said (page 1658) that she drafts grounds of resistance for Employment Tribunal claims.

13. Notwithstanding the difficulties the claimant had caused herself, the hearing proceeded in accordance with the overriding objective.

14. The bundle was over 2000-pages. The Tribunal had a hard and electronic copy. The hard copy comprised of four lever arch files. As the claimant did not produce a witness statement in accordance with the Order of 17/11/2021, she did not refer the Tribunal to any documents via her evidence-in-chief. The parties were directed:

> ‘6.4. If a witness intends to refer to a document that is in the bundle, the page number in the bundle must be set out.’

15. Once the claimant’s particulars of claim were adopted as her evidence-in-chief, she did not, for example, annotate (even in manuscript) her particulars of claim to cross-refer to evidence in the bundle. Nor did she provide, a reading list.

16. Besides there being no reference to any documents in the bundle from the claimant, via her evidence-in-chief, she only took the Tribunal to a handful of documents during her cross-examination. The Tribunal believes that it was approximately 17 documents and the respondent’s witnesses had a far better grasp of the bundle and referred to more documents in their answers to the claimant’s questions.

17. At the outset of the hearing, adjustments were raised and it was agreed that if required, more frequent breaks would be taken. At the conclusion of the claimant’s evidence (at 1.40pm on day two), the hearing was adjourned for the remainder of the day in order that the claimant could refocus on the respondent’s evidence which began on day three. The claimant was accompanied by one of her sisters on each day of the hearing. More frequent breaks were taken, some sessions finished early and some instructions were put in writing.

18. Submissions were heard and considered. By agreement, they were given via CVP/video conferencing.

19. The following findings of fact were reached by the Tribunal, on the balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.

20. Only relevant findings of fact pertaining to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

21. Oral judgment was delivered and the claimant requested written reasons.

Observations

22. The claimant is a well-qualified, articulate and intelligent HR professional. She occupied a senior band 7 role. At the time of her appointment, her basic salary was £35,577.00. The claimant was initially employed by the respondent on a fixed term basis on 18/4/2017. After a successful application, her role was made permanent on 6/11/2017 (page 246). It was Mr Wall who had line managed her during the fixed-term contract and who appointed her to the role.

23. The claimant was ambitious. She had the reasonable intention to progress to the next band - 8a. What may have been unreasonable was how quickly she thought she could progress. There was evidence that she started to apply for band 8a posts in February 2018 (page 1400).

24. Despite her job description stating that (page 249):

> 'The principal duties of your post of Senior Human Resources Advisor are set out in the job description. Your job description provides guidance regarding the work that you are currently asked to perform and will be subject to change from time to time in order to meet the changing needs of the Trust. At times your contractual obligations may be wider than the particular duties upon which you are normally engaged.
>
> In addition you will perform such duties and exercise such powers as may from time to time lawfully and reasonably be assigned to you by the Trust. Any proposed permanent changes to your job description will be fully discussed with you.'

The claimant took exception to carrying out duties she perceived to be those of a band 6 HR advisor, or even lower.

25. It is fair to say, that the claimant was fixated with her band 7 status (page 627).

26. The nub of this case is that despite performing the role on a temporary basis the permanent band 7 role did not meet the claimant's expectations. She had started to apply for alternative roles in November 2017 (page 1399). When NB returned from maternity leave in January 2018, the focus of the claimant's work changed from project work (which the Tribunal finds is not time critical), which she was competent at, to Employee Relations (ER) work (by contrast the Tribunal finds that is time critical). It is also equally fair to say that from the respondent's point of view and despite its knowledge of the claimant's performance whilst on the fixed term contract; the claimant's lack of competency in the ER field was a disappointment to the respondent.

27. The claimant frequently quoted the respondent's values (page 1632):

> 'We expect all our staff to share the values that are important to the Trust, being Excellent, Kind, Responsible & Respectful, and behave in a way that reflects these.'

28. The claimant felt there was a lack of support and that she was prevented, as she saw it, from developing in her role. She felt that she was not performing band 7 duties and she resented covering for a band 6 colleague (NM) who was ill. She felt that she should be able to pursue every development opportunity she thought was relevant. She was not prepared to practise and to consolidate her band 7 skills. She was resentful if she perceived that others were given opportunities to 'act up' or to cover other duties; one example of this is the attendance at the Divisional Board Management (DMB) meeting (page 448). She also believed that she should be able to take up any secondment opportunity, notwithstanding the impact that would have on a small and understaffed department.

29. The result of that was that in the claimant's view, her managers were not being 'kind', or, in the alternative they were being harsh or unfair. Even if that were the case, unfortunately, those allegations do not come within the prohibited conduct to prove unlawful discrimination contrary to the EQA.

30. The Tribunal does not hold the claimant to a higher standard as a senior HR professional; it does however observe that with all her experience, she should have a greater insight than a litigant-in-person who is not a senior HR professional. In her CV the claimant said that she has 'a Postgraduate

Diploma in Personnel and Development' and that through that course, she 'gained extensive knowledge of a range of subjects including Employment Law'.

31. Ms Oke's written witness statement contained one paragraph in respect of the incident she witnessed on 27/6/2018 (allegation 1.1.3). As a witness called by the claimant, her evidence supported the claimant's version of events. Ms Oke said that Ms Sahai's behaviour was 'abrasive', 'hostile', 'agitated' and that she 'harassed' the claimant and 'harangued' her. Ms Oke also accompanied the claimant to a long term sickness review meeting on 13/3/2019 (page 722).

32. Ms Oke was a higher grade than the claimant, was newly appointed and reported directly to Mr Brar the Director of HR. When asked what she did as a result of this encounter, Ms Oke said she raised her concerns with Mr Brar. There was no evidence or documentation to support this and Mr Brar denied Ms Oke had reported any concerns to him. Ms Oke was aware of the claimant's formal complaint dated 25/11/2018 in which she raised the incident on 27/6/2018. She was also still employed by the respondent when the claimant presented her claim on 6/5/2020. Furthermore, Ms Oke in her answers to questions in cross-examination provided a great deal of additional evidence, such that Ms Misra was granted an adjournment to take instructions.

33. The Tribunal expected the witness statement to be prepared in accordance with the Order of 17/11/2021:

> '6.2. The witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the Tribunal, relevant to the claims as identified above. They must not include generalisations, argument, speculation or irrelevant material.'

34. Ms Oke said that she raised her concerns on 'several occasions', yet she said there were not addressed.

35. The Tribunal does not accept Ms Oke's evidence. She was aware of the claimant's formal complaint and later her claim as presented to to the Tribunal. Had she raised her concerns in the manner in which she said she did; and being aware of the claimant's allegations (she is referenced as a witness in the claimant's formal complaint of 25/11/2018), the Tribunal would expect to see the evidence she said existed. Furthermore, The Tribunal finds it incredible that a senior Workforce Diversity and Inclusion Manager, who had reported concerns to the Director of HR, on her own case of 'toxic bullying and an uncomfortable culture' and thinking that 'race played a part', would then take no further action and to say that things then fell by wayside.

Findings of fact

36. The claimant was employed as a band 7 Senior Human Resources Manager. This was a senior management position. Her employment commenced on a fixed-term contract on 18/4/2017 and the role was made permanent on 6/11/2017 (page 246).

37. Acas early conciliation took place between 6/3/2020 and 6/4/2020, such that any event prior to 7/12/2019 is out of time. The claim form was presented on 6/5/2020.

38. The claimant reported to Mr Wall and she also undertook work for Ms Sahai's Division.

39. The respondent was in special measures for Quality from November 2016 and for Finance from April 2017. It came out of special measures on 18/12/2019, but was in the 'needs improvement' category.

40. The first allegation (1.1.1) of direct discrimination the claimant made was dated December 2017 and referred to Mr Wall not performance managing a colleague KM (her race is described as white). The claimant had line managed KM during NM's maternity leave. There were some concerns with KM's performance and the claimant attempts to informally performance manage KM was unsuccessful and Mr Wall took over the line management of KM.

41. Mr Wall's evidence was that KM was responsive to and took on board his support and the issues were minor. Whereas, the claimant did not improve and was unreceptive to feedback. KM is not a comparator for the claimant as the claimant was a band 7 Senior HR professional and KM was a HR Administrator and the two scenarios were not the same. The Tribunal accepts the difference in treatment was due to the different responsibilities of the roles and the differing response to being performance managed.

42. The second allegation (1.1.2) is that in April 2018, Mr Wall asked the claimant to investigate DP who was a member of NB's team (NB is described as white). The claimant said this was less favourable treatment on the grounds of her race in that it gave her more work to do. The claimant also seems to think that such an investigation was below her as a band 7.

43. The fact is that DP's Trade Union representative had accused NB of being biased towards DP. DP had two previous disciplinary warnings, of which NB was aware and was at risk of being dismissed. It was a perfectly reasonable management instruction from Mr Wall to the claimant and it was within her job description for her to carry out an investigation. There was no complaint about this from the claimant at the time. Presumably, if she had said to Mr

Wall that she would rather not take on this task due to her own workload, if he agreed, he would have looked elsewhere for an employee to undertake the investigation. Mr Wall also said that if the situation were reversed, he would ask NB to investigate a member of the claimant's team if she was accused of bias.

44. The third allegation (1.1.3) is that on 27/6/2018 the claimant was criticised by Ms Sahai for not completing a job evaluation. The less favourable treatment is that in order to finish it, the claimant had to work beyond her 4pm finish time. The claimant compares herself to NM (described as white) who was allowed to finish on time.

45. The claimant was highly critical of NM. The task had started with NM on 24/1/2018. NM was then absent through illness from 23/1/2018 to 5/2/2018 followed by a phased return to work. There was a meeting on 20/4/2018 to reallocate some of NM's work and at that point, the responsibility for the job evaluation was transferred to the claimant. Irrespective of any mis-understanding between the claimant and NM over whether or not the job evaluation was outstanding, the matter was chased up by the owning manager. Ms Sahai emailed the claimant on 22/6/2018 to say that it needed to be completed at the earliest opportunity (it had now sat with HR for five months) and the claimant replied 'will do' (page 886). The claimant had committed to finish the job evaluation that day (the 27/6/2018). Ms Sahai had other commitments and so did not turn her attention to this until towards the end of the day.

46. The claimant's allegation is that Ms Sahai waited outside her door for her to finish the job evaluation. Ms Oke's evidence was that Ms Sahai was agitated and harangued the claimant. That evidence is rejected (see paragraph 35).

47. Ms Sahai was concerned that the claimant would not stick to her commitment to produce the job evaluation that day. Ms Sahai was asked by the claimant to visit her office to help her with a query the CAJE (a job evaluation system).

48. The claimant eventually completed the job evaluation at 17:01 and NM had consistency checked it at 17:11. NM also remained beyond her contractual finish time to complete her task. NM is a band 6 HR Advisor. She is not a comparator of the claimant. It is not accepted Ms Sahai behaved inappropriately. All she was concerned with was that the task was completed on that day as the claimant had undertaken to do.

49. The fourth allegation (1.1.4) is that on the 15/10/2018 the claimant was put on an informal action plan. She alleged this was less favourable treatment compared with NM. At the work allocation meeting on 20/4/2018 between the claimant, NM and Ms Sahai (NM's line manager), the claimant said NM

referred to a 'melt down'. She interpreted that to mean that NM was not performing in her role.

50. During the hearing, it was suggested that this was an allegation to put to Mr Wall, as her line manager. In fact Mr Wall's evidence (witness statement paragraph 19) was he took the decision to put the claimant on the informal action plan. The claimant said that it was an allegation she intended to put to Ms Sahai and therefore she did not put it to Mr Wall.

51. As previously stated, not only is NM not a comparator of the claimant, there was also no evidence, other than the claimant's say-so, that NM required performance management. There was no less favourable treatment compared with NM.

52. In any event, the claimant was placed on an informal action plan as she was underperforming in her role from October 2018 (page 454). Prior to that and in 1-2-1 meetings it had been indicated that her performance was not satisfactory. The action plan was discontinued on 20/6/2019 (page 790). Mr Wall said there were still concerns, but with focused 1-2-1 meetings it was achievable. He said it was a 'tight' decision.

53. The fifth allegation (1.1.5) is that in October 2018 the claimant said to Mr Wall that the scrutiny of her work amounted to race discrimination and he told her to prove it. The claimant also relies upon this conversation as a protected act (2.1.1) for the purposes of her victimisation claim.

54. In her particulars of claim, the claimant stated:

> 'I explained to John Wall that I felt that I was being racially discriminated against.'

55. That is the extent of the words used. It was submitted that it is inconceivable that Mr Wall, a Divisional HR Manager, would reply 'prove it' and would not ask the claimant for further information. Such as: who are you accusing; when did this happen; what was done or said?

56. Mr Wall said that if this had happened, he would have invited the claimant to put it in writing so that it could be investigated. Furthermore, in an email of the 12/10/2018 (page 528) Mr Wall said:

> '• Regarding your low morale, you have expressed this to me on numerous occasions over the past months. Shilpi was not aware of your low morale until you told her. I have been sympathetic, but I have explained that there is a limit to what I can do and the service we deliver has to be our priority

> • In terms of feeling bullied and harassed, I am sorry you feel this way. We discussed the Dignity at Work policy during our 1:1, which you confirmed you had read. You may find it useful to discuss the matter with Staff Support on x3XXX and / or [KRW] on x4XXX
>
> I am very happy to meet with you alone to discuss further or if you feel it would be useful then we can involve Shilpi in our discussions. However, I am not prepared to have an email discussion.'

57. In addition, the reason the Tribunal does not accept the claimant's version of events is that when she met with Mr Brar on 17/1/2020 he asked her about her comment to Ms McCullough that in or about May 2019, she had been treated less favourably on the grounds of race (she referred to the two hour 1-2-1 meetings and said that the result was she 'lost' two hours of work and that NB did not have such meetings) (page 759[3]); the claimant did not expand. Mr Brar's outcome letter of 28/1/2020 quoted that the claimant was (page 1069):

> ''not going to make an outright allegation', but that 'you believed a pattern of behaviour could 'infer discrimination' and that you believed you were the victim of a pattern of unfavourable treatment'.'

58. It is a feature of this case on the one occasion when the claimant expressly raised an allegation of race discrimination in respect of her 1-2-1 meetings, she did not then follow it up or provide details of why she believed being asked to attend the meetings was an act of direct discrimination.

59. The sixth allegation (1.1.6) is that Ms McCullough conducted an unreasonable and inadequate investigation into the claimant's formal complaint of 25/11/2018 and in particular, this complaint referenced the outcome letter of 16/8/2019. It is not clear who the comparator is. However the claimant then went on to reference NM and the fact that she (NM) was offered mediation with Ms Sahai by Ms McCullough in November 2018 when NM raised an issue she had with Ms Sahai. Notwithstanding that the claimant has not pleaded an allegation in respect of NM being offered mediation with Ms Sahai, the fact is that the investigation was not unreasonable or inadequate; the claimant simply disagreed with the outcome. There was a delay as Ms McCullough struggled to find someone to undertake the investigation and that was compounded by the claimant's own long-term sickness absence. The claimant does not however rely upon delay or state that it was a detriment.

60. Ms McCollough set out the process she had followed in her four-page outcome letter (page 803):

[3] It should also be noted that the claimant does not rely upon her comment to Ms McCollough to be a protected act for the purposes of s.27 (2) EQA.

> ‘I am writing to confirm the outcome of our meeting held on 4th July 2019 to consider your grievance as set out in your letter of 25th November 2018, and supplemented by your email of 8th May 2019 and an addendum dated 17th May 2019. After submitting your grievance you had a period of sickness absence, and returned to work on 15th April 2019. The hearing was held in accordance with the Trust's Grievance Procedure at stage 2 of the procedure. I was accompanied by [SJ] (Assistant Director of HR); you were accompanied by [EC] (Independent Democratic Union). Our policy and practice is that you may be accompanied by a trade union representative or work colleague. [Mr C] was from an organisation not recognised by the Trust or the NHS, but it was agreed that he could continue to accompany you at the hearing.
>
> After the hearing, I provided John Wall and Shilpi Sahai with your statements so that they could respond, and I met with them to hear their response. John and Shilpi provided written responses to your grievance which I forwarded to you for review and comment. You sent me your comments on Shilpi's responses on 22nd July 2019. I had access to all the information you provided along with arch lever files that John and Shilpi provided which contained mainly email correspondence that you had already seen. I met with you on 8th August 2019 to advise you of my decision in respect of your grievance.’

61. Ms McCullough’s explanation is that the claimant raised the possibility of mediation with Mr Wall and she asked Mr Wall if he agreed. He did and so she arranged for mediation to take place. Mediation as a means of resolving disputes is a feature of the respondent’s policy (pages 1729 and 1760). Had the claimant wished to engage in mediation with Ms Sahai, then all she had to do was to ask Ms McCullough, who would then have asked Ms Sahai if she was willing to mediate. The claimant as a Senior HR Advisor would have known this. Clearly, when there was an indication of mediation with Mr Wall, Ms McCullough pursued it. She was clear that both parties have to agree to mediate and that it will not take place if a party is unwilling. It can also be inferred that if Ms Sahai had mediated with another member of staff in the past; that she would have been willing to mediate with the claimant; had the claimant said as much. There was no detriment to the claimant.

62. The seventh allegation (1.1.7) repeats that on the 3/3/2020 NM informed the claimant that she (NM) had previously complained about Ms Sahai and that NM was offered mediation by Ms McCullough. Whereas, the claimant was not so offered mediation with Ms Sahai when she also made a complaint on 25/11/2018.

63. In so far as this is a separate allegation, it has been addressed above.

64. The eighth allegation (1.1.8) is that NM deputised for Ms Sahai and attended the Divisional Management Board (DMB) (that being senior level work) whereas the claimant was not offered the same development opportunity. This allegation is dated 3/3/2020 which is the date NM spoke to the claimant.

65. On the 25/9/2018 Ms Sahai informed her Divisional Director of Operations and Divisional Chair of the arrangements to cover meetings during her period of annual leave (page 448):

> 'I will be on annual leave next week and have asked Donna and [NM] cover DMB and the Performance meetings in my absence. [NM] will attend the DMB on 27th and am asking Donna to attend the performance meeting starting at 4pm on 24th . Donna will join you around 4.45pm in order to present the workforce slides.'

66. Ms Sahai said the reference to the claimant joining at around 4.45pm referred to the DMB meeting, so in fact the claimant did attend that meeting. Certainly it was Ms Sahai's intention that the claimant would attend, evidenced by her email.

67. The ninth allegation (1.1.9) is that in March 2020 MBO informed the claimant she had also raised concerns about Ms Sahai and she was also offered mediation with Ms Sahai by Ms McCullough, whereas the claimant was not.

68. This on the claimant's case is yet another employee with whom Ms Sahai mediated with. It again strengthens the Tribunal's view that had the claimant wished to mediate with Ms Sahai, all she had to do was to ask. The fact that she did not ask to do so and that she had raised the possibility of meditation with Mr Wall; led to the reasonable conclusion that she was not, at the relevant time, interested in mediation with Ms Sahai.

69. In respect of her complaint of victimisation, the claimant relies upon four protected acts.

70. The first protected act (2.1.1) the claimant claims in a meeting with Mr Wall in October 2018 she alleges she referred to being racially discriminated against. That has been dealt with above. The Tribunal finds the claimant did not make this statement.

71. The second protected act (2.1.2) is the complaint of the 25/11/2018 (page 627).

72. In that detailed eight-page document, there is no protected act. Furthermore, the claimant did not refer to the first alleged protected act (the meeting in October 2018), even though on her case, that took place the previous month. The majority of her complaint is a time-line and she referred to three incidents

in October 2018. This included a reference to raising her concerns with Mr Wall about the scrutiny of her work and a meeting on 12/10/2018 with Mr Wall and Ms Sahai, when she stated that she felt bullied and harassed. She did not mention any allegation of being racially discriminated against.

73. It was put to the claimant that she had raised this complaint on 25/11/2018 in retaliation for being placed on a a capability action plan on 15/10/2018 (page 573). The claimant denied this was the case; however the Tribunal finds the formal complaint was raised by the claimant to distract Mr Wall and Ms Sahai from the action plan.

74. The third protected act (2.1.3) is the stage 1 grievance which the claimant raised on the 5/12/2019 (page 895). The claimant did refer to the Equality and Diversity in Employment Policy and set out a paragraph regarding the same (page 896):

> 'Equality and Diversity in Employment Policy
>
> In terms of the Trust's Equality and Diversity in Employment Policy (see appendix 3). For example, within the Executive Summary it states: "The Trust has a duty to eliminate unlawful discrimination and promote equality..." The policy "sets out the responsibilities of the Trust to ensure that employees...are treated fairly..." In addition, section 3 refers to discrimination as a result of, for example, direct discrimination or victimisation.'

75. The statement the claimant made is not:

> bringing proceedings under the EQA (s.27(2)(a));
>
> giving evidence or information or connection with proceedings under the EQA (s.27(2)(b));
>
> doing any other thing for the purpose of or in connection with the EQA (s.27(2)(c)); or
>
> making an allegation (whether or not express) that A (the person who is accused of the victimisation) or another person has contravened the EQA (s.27(2)(d) and by reference to s.27(5)).

76. This was not a protected act.

77. The fourth and final protected act (2.1.4) is the stage 1 grievance which the claimant raised on the 20/1/2020 (page 892). Notwithstanding the date appears to be incorrect and the claimant's stage 1 grievance is dated 21/1/2020.

78. The Tribunal finds that this is a protected act under s.27(2)(d) EQA. The claimant has made an allegation that she made a formal request to Mr Wall on the 17/12/2019 (Mr Wall would be person A) that she had her weekly 1-2-1 meetings without Mr Wall and Ms Sahai both present in their shared office at the same time. She refers to this request being a reasonable adjustment and therefore, she is referencing (albeit not expressly) s.20 and s.21 EQA. She referenced the respondent's Policy on the Employment of Disabled People. Furthermore, the respondent has conceded the claimant was disabled by reason of depression since 15/4/2019.

79. It is noted the protected act the claimant relies upon concerned her protected characteristic of disability, whereas the detriments all related to her race.

80. The matter does not end there. The claimant then has to show that she was subjected to a detriment because of this protected act. Only allegations 2.3.10, 2.3.11, 2.3.12, 2.3.13 and 2.3.14 post-date the protected act.

81. In the alternative, the respondent suggested the claimant should be prevented from relying upon those allegations as they were false and raised in bad faith. It did not suggest why the Tribunal should come to that conclusion. The Tribunal does not accept the first three allegations were raised in bad faith. It finds they were not protected acts and it was misguided of the claimant to claim they were such.

82. The respondent submitted that if the various individuals who were aware of the stage 1 grievance the claimant raised on 21/1/2020 to Mr Brar did not consider it to have been a protected act; then they cannot have victimised the claimant or subjected her to a detriment because of it (the grievance). It is not clear how the fact of the grievance was communicated to Mr Wall, Ms Sahai and Ms McCullough (although it does not appear there are any detriments which post-date the 21/1/2020 against Ms Sahai or Ms McCullough), although it is accepted that at some point Mr Brar would have informed them of the grievance and shown the letter to them.

83. The claimant then relies upon 14 detriments. 2.3.1 to 2.3.9 predate the protected act on the 21/1/2020. They cannot therefore be acts of victimisation if they pre-date the protected act.

84. The first (2.3.1) of which is that Mr Wall and Ms Sahai refused the claimant's request to work from home one day per week. The claimant also referred to the meeting in October 2018 when she alleges Mr Wall said to her she had 'burnt her bridges'.

85. The Tribunal has already set out why it does not accept the claimant's version of events in respect of a meeting in October 2018. Any request to work from

home at the time was refused for appropriate reasons. No-one in HR worked from home and the department was not set up to do so. The refusal was not because of the claimant's race.

86. The second detriment (2.3.2) is that a request to work for one day per week from 10am to 6pm was refused on 15/4/2019. The respondent's explanation for this was that the service is busier in the morning, when the night shift finishes, followed by a hand-over and that this generates more HR queries at that point in the day; rather than in the late afternoon. The claimant's hours did change during the course of her employment and there was some flexibility.

87. The third detriment (2.3.3) is that the claimant asked to talk to Mr Wall about something 'urgent and private' in September 2019 and he replied 'I will tell you if it is private or urgent'.

88. There is no other evidence from the claimant to flesh out this allegation. For example, there is no precise date. The claimant does not say where the conversation took place and in what context. The claimant does not say what it was that was 'urgent and private' that she wished to discuss.

89. By contrast, the claimant disclosed an email dated 19/9/2018 when she emailed Mr Wall and said she was concerned that she was 'trying to write/complete x3 reports, do an outcome letter and attend a hearing tomorrow'. She asked at 12.05pm in light of that, if there was a particular reason she was being asked to 'job match for the HR General Office?'. Mr Wall responded, also at 12.05pm saying 'pop in'. The demonstrates Mr Wall's immediate response, concern and his wish to discuss matters face-to-face with the claimant. The Tribunal was told their offices were a few feet apart. The Tribunal prefers the evidence of Mr Wall that this simply did not happen.

90. The fourth detriment (2.3.4) is that on 2/12/2019 Mr Wall and Ms McCollough did not support a one-year secondment opportunity for the claimant.

91. The respondent gave unchallenged evidence that the HR team is a small department and that it is not only difficult to recruit to permanent posts, it is extremely difficult to recruit to fixed-term posts. Mr Wall also gave evidence that by the time the post is advertised and recruited to, it can be well into the period of the secondment (even six months into it), which makes it a less attractive fixed-term post. In any event, the claimant was not prevented for applying for the secondment. She was told that her post could not be held open for her and so it may not be available to her when she returned from the secondment.

92. The fifth detriment (2.3.5) is that on 9/12/2019 Mr Wall and Ms Sahai raised concerns about the claimant's behaviour without having raised the concerns

informally. The Tribunal finds that Mr Wall and Ms Sahai had attempted to address this in 1-2-1 meetings. Mr Wall was of the view that the claimant refused to accept constructive and supportive feedback. Ms Sahai considered the claimant's behaviour to be extreme and unacceptable. As a result they reported it to senior management. Mr Wall and the claimant had undergone mediation on 25/10/2019. Mr Wall said things improved for about a month and then the claimant's behaviour deteriorated. The claimant's behaviour had moved on from performance concerns to conduct concerns.

93. The sixth allegation (2.3.6) is that on 19/12/2019 Mr Wall did not support the claimant's expression of interest in applying to become a culture champion for the respondent.

94. Mr Wall did not consider the claimant was meeting deadlines and was not managing her workload sufficiently. He therefore did not consider the claimant had scope to take on an additional role which could take up to 3.5 to 7 hours per week. This was the reason he did not support the claimant.

95. The seventh allegation (2.3.7) is that on 24/12/2019 Mr Wall accused the claimant of 'playing games' in respect of a letter she had drafted and had emailed to him.

96. The background to this allegation is it was Christmas eve and the expectation is that staff would leave early, once all outstanding work had been done. The claimant was responsible for drafting a letter, which Mr Wall wished to approve before it was sent to the Manager who wanted to send it out during the Christmas break (the respondent is a 24 hour/7 day per week organisation). Mr Wall asked the claimant for the letter at 12.05pm and she responded at 12.15pm. Mr Wall said the draft letter she had sent was incorrect (it was a letter for another employee which had not been correctly amended). The claimant maintained it was the correct letter. Mr Wall went to speak to the claimant and he saw on her screen, that she had two or three copies of the letter open, which he thought had led to the claimant's confusion. By this time, it was about 1.30pm. The claimant left and Mr Wall corrected the letter and sent it to the manager. Factually, Mr Wall did not accept the claimant's explanation that she had emailed him the correct letter and the email system had somehow changed the version which was attached. The Tribunal accepts Mr Wall's version of events.

97. The eighth allegation (2.3.8) is that on 15/1/2020 Mr Wall criticised the claimant for not asking his permission to attend a BAME meeting, as she had emailed him to inform him she intended to attend it.

98. Mr Wall said in an email to the claimant on 15/1/2020 (page 1022):

'BAME/ Networks / meetings – I discussed the fact that your

> email to me on 07/01/20 at 14.08 about you wanting to attend the BAME that afternoon stated “Just to let you know, I am going to the BAME Staff Network Meeting this afternoon from 3pm-5pm”. I said that I have no issue with you attending these meetings as long as your work is under control (deadlines being met) and the service has to come first. However, it is usual practice and polite to ask permission from one’s manager to attend such things rather than making a statement. That is certainly my practice with my manager and is a reasonable professional expectation.’

99. This is nothing more than a reasonable management reminder to the claimant.

100. The ninth allegation (2.3.9) is that on 17/1/2020 Mr Brar was hostile to the claimant when she raised discrimination concerns.

101. There was no other evidence from the claimant as to how Mr Brar was hostile or what it was he said that was hostile. As such, it is too vague an allegation to be considered to be a detriment.

102. The tenth allegation (2.3.10) is undated, although from an email the Tribunal was taken to, from CL to Mr Brar, it appears to have taken place around 5/2/2020 (page 1090). It relates to errors in an Managing High Professional Standards (MHPS) report the claimant had drafted. The Medical HR Manager was dissatisfied with the claimant’s draft and referred to having spent several hours completing a grammar and spelling check on the third draft, as she did not want to send it back to the claimant for a fourth time. She was still not happy with the standard of the final report (page 1090). It is not clear how the claimant says this manager was aware of her grievance (protected act) of the 20/1/2020. Furthermore, the Divisional Director of Operations for Surgery, Cancer, Neurosciences and Theatres and the Case Manager no longer wanted the claimant to work on the case. She emailed Mr Brar to say the same on 16/1/2020 (page 1024). This decision pre-dated the protected act.

103. The claimant refers to seeking feedback from Mr Brar in respect of this incident. She does not give any particulars, such as any dates or refer to any emails where she requested feedback. Mr Brar said when being questioned that in the thousands of documents in the bundle, there was not one email to him from the claimant which he had not responded to. This is too vague an allegation to uphold. Furthermore, the claimant did not provide any evidence-in-chief that she was not responsible for the report, which was the position she took during the hearing.

104. Clearly there were complaints about the claimant's work. One pre-dated the grievance, so cannot have been motivated by it - the case manager wanting the claimant to be removed from the investigation. There was then a complaint about the standard of a report written by the claimant. There was no evidence of the claimant requesting feedback.

105. The eleventh allegation (2.3.11) is that on 14/2/2020 Mr Brar sent the claimant his terms of reference for an investigation into concerns raised by and about the claimant (pages 868 and 1081-1086).

106. In the main, although it is not stated, it is either possible or obvious what the detriment to the claimant is. For example, her Line Manager picking her up on her language and tone in respect of attending a BAME meeting (in effect, but perfectly professionally, telling her to ask to attend the meeting and not to simply state or tell him she is attending), could be detrimental. In respect of this allegation, ***not*** sending the claimant the terms of reference could potentially be argued to be a detriment. The Tribunal finds that it is not detrimental for the terms of reference ***to be sent*** to the claimant.

107. The twelfth allegation (2.3.12) is that Mr Wall criticised the claimant for wanted to attend a BAME meeting on 3/3/2020 (page 1236).

108. The claimant emailed Mr Wall to say that she had forgotten to tell him there was a meeting at 2pm that day and asked if she could go. Mr Wall replied two minutes later, asking the claimant to go and see him and said that she could not go to the meeting until they had spoken. There is no criticism; Mr Wall simply wanted to ensure the claimant's work was up-to-date. Mr Wall said it was a normal interaction and there was nothing untoward. The claimant did in fact go to the meeting. There was no criticism. This is another example of the claimant attempting to make serious allegations of unlawful discrimination; out of normal and acceptable line manager interaction.

109. The thirteenth allegation (2.3.13) is that on 16/3/2020 Mr Wall would not agree in principle that the claimant could take up a six month internal secondment if her application was successful and that he had said that Mr Brar would be on the appointing panel. The claimant says this was her not being supported developmentally.

110. The Tribunal repeats the point previously made in respect of the recruitment difficulties and the fact it would not be possible for the respondent to hold the claimant's substantive post open for her to return to.

111. Mr Wall had resigned on 7/1/2020 and his last day was 3/4/2020. He had Covid at that time and was serving out his notice. It is obvious that if the claimant needed approval and if her Line Manager was absent, she should go to a higher level of management. On 18/12/2019 the claimant put in an

application to MD saying that she did not want to miss the deadline, that Ms McCullough was on leave and Mr Wall wanted time to consider it (page 1388). This demonstrated she knew she could bypass Mr Wall as Mr Brar was copied into that email.

112. The fourteenth and final detriment (2.3.14) is that throughout 2019 and until April 2020, the quality of work allocated to the claimant by Mr Wall declined.

113. This was again a vague allegation which lacked any specific detail. It is not possible for the respondent to answer such an allegation.

114. The respondent did not concede the claimant was a disabled person for the purposes of s.6 EQA. In closing submissions however, the respondent accepted the claimant was disabled by reason of depression from the 15/4/2019 when she returned to work after long-term sickness absence. The claimant contends for adjustments from the same point of time. In light of the respondent's concession, it is not proportionate to consider the other conditions the claimant contends are disabilities. In fact she advanced no documentary evidence in respect of those conditions.

115. The claimant contends for three provisions, criterions or practices (PCPs) she says were applied to her:

> '3.2.1 A requirement to work full time on site rather than at home.
>
> 3.2.2 A requirement to work between the hours of 9.30 and 5.30 until January 2020.
>
> 3.2.3 A requirement to attend weekly 1-2-1 meetings of more than two hours duration with Mr Wall and Ms Sahai.

116. There was a requirement to work on site, rather than from at home. Due to the needs of the service provided by a small HR team, the respondent needed the team to be available for impromptu, face-to-face, drop-in sessions. The HR team were not provided with laptops or remote access. Mr Wall required the two band 7 Senior HR Advisors to be on site.

117. Occupational Health's email of 13/3/2019 in respect of this issue said (page 772):

> 'The option of working from home for a day was raised and as a coping strategy, due to the condition in the workplace not being helpful and please consider whether this is an option open to her.'

118. Although this comment is not entirely clear, it does not appear to relate to the claimant's health, rather than her being unhappy in the workplace. There was no evidence from the claimant that this related to her disability. The claimant also relies upon this allegation as a detriment as a result of her doing a protected act relying upon the protected characteristic of race. On the claimant's case therefore the refusal to work from home was motivated by wanting to disadvantage her due to her disability and also, wanting to punish her for raising concerns about race discrimination. The Tribunal finds the more likely and accepted explanation, is that the respondent could not accommodate the claimant working from home for operational and non-discriminatory reasons.

119. In those circumstances, the Tribunal does not accept this was a reasonable adjustment which the respondent was required to make.

120. The claimant's working hours had changed on numerous occasions. She had a phased return to work following long-term sickness absence in April 2019 (page 750).

121. Then on the 24/9/2018 the claimant's hours were changed to 10am and 6pm for that week (page 451).

122. On 12/10/2018 her hours were a continued trial of 9.30am to 5.30pm (page 526).

123. There was not a requirement that the claimant work the hours of 9.30am to 5.30pm from an unspecified date until January 2020. In fact the claimant's hours were changed following a flexible working request, by Mr Wall to 10am to 6pm on 23/12/2019 to start on the 6/1/2020 (page 988).

124. The standard office hours were 9am to 5pm. If that was a PCP it was varied for the claimant.

125. The claimant's particulars of claim at paragraph 6 states the weekly 1-2-1 meetings with Mr Wall, were going to be attended by Ms Sahai from 2/7/2018. The respondent's explanation for this was that they felt the claimant was playing them off against each other in their separate 1-2-1 meetings. This was a trial in 2018 and when the claimant complained, they reverted to individual 1-2-1 meetings.

126. On 2/10/2019 Mr Wall emailed the claimant to say that he was changing the date and time of the 1-2-1 meetings and that he had reduced them to 30 minutes (page 823). There was no evidence from the claimant, such as calendar entries, which showed meetings of more than two hours duration. (page 753).

127. The claimant's evidence was insufficient to transfer the burden of proof. She did no more than to refer to her protected characteristics and then to refer to a litany of management decision about which she was unhappy. The Tribunal does not accept there was any less favourable treatment of the claimant, or that she was subjected to any detriments because of or by reference to a protected characteristic.

128. Besides her actual comparators, the claimant relies upon a hypothetical comparator. In respect of the allegations of direct discrimination, the Tribunal accepts the respondent's non-discriminatory explanation. On each occasion the respondent's actions were reasonable management decisions taken in respect of the particular circumstances the claimant was in; which was that she was underperforming in her role.

129. In respect of extending time, the claimant said in paragraph 4 of her particulars of claim (page 35):

> 'I notified ACAS of my claim on 6 March 2020. It is my contention that any complaints pre-dating 7 December 2019 are in time on the basis that they are in part of a continuous course of conduct related to incidents that are plainly in time. That notwithstanding, in any event, it is my contention that it would nevertheless be just and equitable to hear my claims.'

130. The claimant could have sought to persuade the Tribunal that for example, some of the allegations were linked. There were several allegations against Mr Wall in relation to meetings. It would have been open for the claimant to suggest that in relation to meetings, those allegations formed conduct extending over a period of time. The claimant named four individuals and again, she made no attempt to suggest that either each individual was somehow linked so that the entirety of the conduct about which she complains was conduct extending over a period. Or, in the alternative to suggest that each individual's conduct was such.

131. The claimant has not suggested any reason at all, never mind a credible reason, why it would be just and equitable to extend time. The Tribunal is mindful of the recent authority of Owen v Network Rail Infrastructure Limited [2023] EAT 106. The time limits are short in the EQA. They are however well-known and would particularly be so to a HR professional who was supported by her Trade Union representative. To extend time in these circumstances, absent any persuasive factor that was either expressly raised or which could be inferred, would result in by-passing the time limits. That cannot be the purpose of s.123 EQA. The allegations are out of time.

The Law

132. S.13 EQA provides:

(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.

…

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

133. S.23 EQA provides:

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

(2) The circumstances relating to a case include a person's abilities if-

(a) on a comparison for the purposes of section 13, the protected characteristic is disability.
…

134. S.136 EQA provides:

(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 that the contravention occurred.

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

(6) A reference to the court includes a reference to-

(a) an employment tribunal;…

135. S. 123 EQA provides:

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.
…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

136. In Madarassy v Nomura International plc [2007] ICR 867, CA, Mummery LJ stated that: 'The bare facts of a difference in status and a difference in treatment only indicates a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent has committed an unlawful act of discrimination'.

137. If a claimant establishes a *prima facie* case of discrimination, then the second stage of the burden of proof test is reached, with the consequence that the burden of proof shifts onto the respondent. According to the Court of Appeal in Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases [2005] ICR 931, CA, the respondent must at this stage prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever based on the protected ground.

138. S.27 EQA Victimisation

(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.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

> (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

139. Ms Misra referred the Tribunal to Chalmers v Airpoint Ltd EAT 0031/19 in which the EAT upheld a decision that an employee's comment in her written grievance that her employer's actions 'may amount to discrimination' was not sufficient to amount to a protected act under S.27(2)(d). The Tribunal had been entitled to conclude that an allegation of sex discrimination had not been made, the word 'may' usually signifying doubt or uncertainty. Additionally, Ms Chalmers' background in HR qualified her to take an informed view on whether the events complained of were discriminatory on the ground of sex. The absence of a specific assertion of sex discrimination in her grievance undermined her position that she was making that allegation. Taking into account her background, and the fact that she was articulate and well educated, the Tribunal had been entitled to conclude that the absence of the word 'sex' and the use of the word 'may' were not due to lack of facility with words or a limited appreciation of the concept of sex discrimination. .

140. In respect of the vagueness of the allegations, it is important to establish that the treatment was because of a protected characteristic it must be shown that a named individual (or a number of individuals) who subjected the claimant to a detriment was consciously or subconsciously influenced by the protected characteristic. Unless the claimant identifies the alleged discriminator(s), that exercise cannot be conducted and the claim will fail Reynolds v CLFIS (UK) Ltd [2015] IRLR 562.

141. The claimant also asserts the respondent failed in its duty to make reasonable adjustments under s.20 and s.21 EQA:

> 20 Duty to make adjustments
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

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

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Conclusions

142. Notwithstanding the findings in respect of time, the burden of proof and for direct discrimination in respect of comparators, the Tribunal's conclusions follow:

1.1.1 The factual scenario is not comparable and there is a different reaction to the performance management. Other than to reference a difference in race, the claimant has not advanced any evidence to persuade the Tribunal that any difference in treatment was because of her race.

1.1.2 It appears the claimant is complaining about her workload, although she did not raise it at the time. The claimant has done nothing more than to reference a difference in race and in any event, the respondent's explanation is accepted.

1.1.3 Neither member of staff left work on time. The claimant had undertaken to produce the job evaluation by the end of the day and she failed to complete this task within her own working day. Ms Sahai attended to assist the claimant with a query. The Tribunal has rejected Ms Oke's evidence. There is no more to this than a difference in race.

1.1.4 The claimant was put on an informal action plan. This was Mr Wall's decision. The claimant did not put it to him that this was direct race discrimination; even though it was suggested to her she needed to do so. Mr Wall's explanation is accepted.

1.1.5 The Tribunal does not accept the claimant's version of event and the allegation is vague and lacks any detail.

1.1.6 Factually the allegation does not stand. Ms McCollough's investigation was reasonable and adequate. The allegation in respect of mediation was not pleaded and an application to amend was refused.

1.1.7 This allegation was not pleaded.

1.1.8 The claimant did attend the DMB.

1.1.9 This allegation was not pleaded.

2.1.1, 2.1.2 and 2.1.3 were not protected acts. 2.1.4 is accepted as a protected act, albeit it relates to the protected characteristic of disability and the detriment relates to race. That is somewhat conceptually difficult to process; that in retaliation for doing a protected act based upon disability, that the respondent then subjected the claimant to a detriment based upon her race.

2.3.1 to 2.3.9 these allegations all predate the protected act and therefore the claimant cannot have been subjected to these detriments.

2.3.10 This allegation is too vague to uphold.

2.3.11 Sending the terms of reference to the claimant is not a detriment.

2.3.12 Factually, this did not happen.

2.3.13 This was not the responsibility of Mr Wall as he was serving his notice.

2.3.14 This is not accepted. The level of work would reflect the abilities of the individuals. Again, it is a vague allegation and lacks detail.

3.2.1 There was a requirement the HR team work on site. The team was not set up for home working at the time. There was nothing to link the request to the claimant's disability.

3.2.2 This was not a PCP.

3.2.3 This was not a PCP.

143. As has already been observed, this claim was about mis-matched expectations. From the claimant how her role would develop and from the respondent, the level at which the claimant would perform.

144. The respondent took entirely reasonable steps to manage the situation as it was entitled to do. There is no criticism of the respondent's actions. Respondents should be able to manage staff, without facing unpleasant allegations. The respondent was entirely supportive and this is captured by Mr Wall's comment in his sickness absence monitoring meeting dated 13/3/2019 (page 724):

> 'I asked you and Celia Oke if you had any questions, required any further information from me or had anything else to say. You said no. Celia Oke explained that she had advised you to provide me with further details of your condition and the effects it has had on you. She said that if Shilpi Sahai and I had all the relevant information then it might help in us supporting you. I agreed and said that the more information you can provide then the more support we should be able to give.'

145. In all the correspondence the Tribunal was referred to, the respondent's support and treatment of the claimant was above reproach.

19/9/2023

Employment Judge Wright

IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL CASE NUMBER: 2301827/2020

B E T W E E N

DONNA HARDING

Claimant

- and -

ST GEORGE'S UNIVERSITY HOSPITALS NHS FOUNDATION TRUST

Respondent

[AGREED] LIST OF ISSUES

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1 Direct discrimination on the grounds of race

1.1 Has the Respondent treated the Claimant less favourably than it treated or would treat others? The Claimant alleges that the following acts or omissions of the Respondent constitute less favourable treatment of her on the grounds of race:

1.1.1 Allegation 13(a) – That in December 2017, John Wall failed to performance manage KM and this was less favourable treatment of the Claimant on the grounds of race in that the Claimant was put on capability for not performing whereas KM (who is white) was not).

This is denied by the Respondent. KM was informally performance managed. This did not amount to less favourable treatment of the Claimant on the grounds of her race or at all.

1.1.2 Allegation 13(b) – That in April 2018, John Wall asked the Claimant to investigate the misconduct of an employee in NB's team and this was less favourable treatment of the Claimant on the grounds of race in that this involved her being given more work that NB (who is white).

It is admitted by the Respondent that the Claimant was asked to carry out this misconduct investigation by John Wall. It is asserted that this was entirely appropriate; and that it was more fair and independent to ask the Claimant to do this rather than NB. It is denied by the Respondent that this amounted to less favourable treatment of the Claimant on the grounds of race.

1.1.3 Allegation 13(c) – That on 27 June 2018, the Claimant was criticised by Shilpi Sahai for not completing a job evaluation and this was less favourable treatment of the Claimant on the grounds of race in that the Claimant was expected to work beyond her 4pm finish time whereas NM (who is white) was allowed to leave on time.

The Respondent asserts that the Claimant had been tasked to complete the job evaluation from 23 April 2018 and had not done so. The Claimant was reminded that it was now urgently required. It is denied by the Respondent that the Claimant was criticised and it is denied that this amounted to less favourable treatment of the Claimant on the grounds of her race.

1.1.4 Allegation 13(d) – That on 15 October 2018, the Claimant was put on an informal action plan and this was less favourable treatment of the Claimant on the grounds of race in that NM (who is white) was not when she was not performing or coping.

It is admitted by the Respondent that the Claimant was put on an informal action plan. This was because of longstanding, repeated and genuine concerns about her performance. It is denied by the Respondent that this amounted to less favourable treatment of the Claimant on the grounds of race.

1.1.5 Allegation 13(e) – That in October 2018, the Claimant raised verbal allegations with John Wall that the scrutiny of her work in comparison to others amounted to race discrimination and was asked to prove this, and this was less favourable treatment of the Claimant on the grounds of race in that the same level of scrutiny and criticism were not being applied to NM and DB (who are both white) who wrote investigation reports, as it was to the Claimant's work.

The Respondent denies that the Claimant raised verbal allegations with John Wall of race discrimination, or that he replied as alleged. In any event, it is not clear why it would be unreasonable or less favourable treatment to ask the Claimant to prove a serious allegation such as race discrimination. It is denied by the Respondent that the allegation, if proven, could amount to race discrimination.

1.1.6 Allegation 13(f) – That Jacqueline McCullough conducted an unreasonable and inadequate investigation into the Claimant's formal complaint of 25 November 2018 and in providing the outcome letter of 16 August 2019. The Claimant contends that this was less favourable treatment of the Claimant on the grounds of race in that NM (who is white) was offered mediation with Shilpi Sahai by Jacqueline McCullough when she raised concerns in February/March 2019, but the Claimant was not offered mediation with Shilpi Sahai following her complaint in November 2018.

This is denied by the Respondent. It is asserted that the allegation as expressed could not amount to race discrimination. <u>The Claimant's allegation, that she was not offered mediation with Shilpi Sahai whereas NM was, does not appear in the claim form and no application to amend the claim has been made.</u>

1.1.7 Allegation 13(g) – That on 3 March 2020, NM informed the Claimant she had raised a complaint about Shipli Sahai's behaviour towards her and this was less favourable treatment of the Claimant on the grounds of race in that NM (who is white) was offered mediation with Shilpi Sahai by Jacqueline McCullough when she raised concerns in February/March 2019, but the Claimant was not offered mediation with Shilpi Sahai following her complaint in November 2018.

It is denied by the Respondent that the allegation as expressed could amount to race discrimination. In any event, it is asserted by the Respondent that the allegation as expressed concerns the treatment of a colleague, not of the Claimant. The Claimant's allegation that she was not offered mediation with Shilpi Sahai whereas NM was, does not appear in the claim form and no application to amend the claim has been made.

1.1.8 Allegation 13(h) – That on 3 March 2020, NM (who is white) informed the Claimant that she had deputised for Shilpi Sahai and attended Divisional Management Board meetings and this was less favourable treatment of the Claimant on the grounds of race in that NM was given senior level work (attend DMB meetings) whereas the Claimant was not offered the same opportunity and/or development.

It is denied by the Respondent that the allegation as expressed could amount to race discrimination. In any event, it is asserted by the Respondent that the allegation as expressed concerns the treatment of a colleague, not of the Claimant.

1.1.9 Allegation 13(i) – That in March 2020, MBO informed the Claimant that she had raised concerns about Shilpi Sahai. The Claimant contends that this was less favourable treatment of the Claimant on the grounds of race in that NM (who is white) was offered mediation with Shilpi Sahai by Jacqueline McCullough when she raised concerns in February/March 2019, but MBO

was not offered mediation with Shilpi Sahai following her complaint in November 2018.

It is denied by the Respondent that the allegation as expressed could amount to race discrimination. In any event, it is asserted by the Respondent that the allegation as expressed concerns the treatment of a colleague, not of the Claimant.

1.2 If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the Claimant's race? The Claimant is of mixed race and has black African and white heritage.

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

(The Respondent's position on the explanation the alleged treatment is set out above.)

2 Victimisation

2.1 Did the Claimant do a protected act? The Claimant alleges that the following were protected acts:

2.1.1 In October 2018, she told John Wall that she felt that she was being racially discriminated against (paragraph 14(a) of the Particulars of Claim).

It is denied by the Respondent that the Claimant told John Wall that she felt that she was being racially discriminated against in October 2018.

2.1.2 On 25 November 2018, she raised a formal complaint for unfair, differential treatment, bullying and harassment (paragraph 14(b) of the Particulars of Claim)

It is admitted by the Respondent that the Claimant made a complaint on this date. It is denied by the Respondent that this complaint constituted a protected act. The complaint did not

include an allegation of a contravention of the Equality Act or anything else that would constitute a protected act.

2.1.3 On 5 December 2019, she raised a stage 1 grievance and referred to unlawful discrimination and victimisation in relation to the (alleged) decision by John Wall and Jacqueline McCullough not to support an application (paragraph 14(c) of the Particulars of Claim)

It is admitted by the Respondent that the Claimant made a complaint on this date. It is denied by the Respondent that this complaint constituted a protected act. The complaint cited passages from the Respondent's policies and procedures, including the Respondent's Equality and Diversity policy. However, it did not include an allegation of a contravention of the Equality Act or anything else that would constitute a protected act.

2.1.4 On 20 January 2020, she raised a stage 1 grievance and referred to her disabilities and a request for reasonable adjustment being refused by John Wall and Jacqueline McCullough (paragraph 14(d) of the Particulars of Claim).

It is denied by the Respondent that the Claimant made such a complaint on this date. It is admitted by the Respondent that the Claimant made a similar complaint on 21 January 2020. It is denied that the Claimant referred to any disabilities in that complaint. It is denied that the complaint constituted a protected act, or that it was made in good faith.

2.2 Insofar as the protected act relied on constitutes allegations made by the Claimant, is the Claimant prevented from relying on those allegations because they were false and not made in good faith?

2.3 Has the Respondent subjected the Claimant to a detriment because she had done a protected act? The Claimant relies on the following alleged detriments:

2.3.1 Allegation 15(a) – That on 15 April 2019, John Wall and Shilpi Sahai refused the Claimant's request to work one day a week from home on the grounds that "HR Operational jobs require us to be present on site". The Claimant contends that this was because of the Claimant's complaint of October 2018 and 25 November 2018 because her job did not require her to be present on site; OH had recommended that she be supported; she had made complaints of discrimination; and John Wall told her in June 2019 that she had 'burnt all her bridges'.

It is admitted by the Respondent that the Claimant made a request to work from home and that it was denied. However, victimisation as alleged or at all is denied by the Respondent.

2.3.2 Allegation 15(b) – That on 15 April 2019, a request to work for two days a week from 10.00am to 6.00pm, instead of 9.30am to 5.30pm was declined on the grounds that "the service is busier in the morning rather than in the evening". This was because of the Claimant's complaint of October 2018 and 25 November 2018 because the service was not just busy in the mornings; OH had recommended that she be supported; she had made complaints of discrimination; and John Wall told her in June 2019 that she had 'burnt all her bridges'.

It is asserted that the Respondent did repeatedly seek to accommodate the Claimant's requests for changes to her hours during her employment, including in January 2018, September 2018 and January 2020. Victimisation as alleged or at all is denied by the Respondent.

2.3.3 Allegation 15(c) – That in September 2019, the Claimant asked to talk to John Wall about something "urgent and private" but John Wall told her "I will tell you if it is private or urgent". This was because of the Claimant's complaint of October 2018 and 25 November 2018, because she had just returned from annual leave; John Wall did not give an explanation for his unpleasant

tone and manner and she had made complaints of discrimination; and John Wall told her in June 2019 that she had 'burnt all her bridges'.

It is denied by the Respondent that the above constitutes a detriment or that John Wall victimised the Claimant as alleged or at all.

2.3.4 Allegation 15(d) – That on 2 December 2019, John Wall and Jacqueline McCullough did not support a one-year secondment opportunity for the Claimant. This was because of the Claimant's complaint of October 2018 and 25 November 2018, because she was told different things by John Wall and Jacqueline McCullough; she had made complaints of discrimination; and John Wall told her in June 2019 that she had 'burnt all her bridges.

This is denied by the Respondent. John Wall and Jacqueline McCullough were simply not able to confirm that the Claimant would be able to return to the same role at the end of this secondment due to an existing change management process which was in progress. This was for reasonable business reasons which had nothing to do with the Claimant's complaint of 25 November 2018 (or her October 2018 complaint). Victimisation as alleged or at all is denied by the Respondent.

2.3.5 Allegation 15(e) – That on 9 December 2019, John Wall and Shilpi Sahai raised concerns about the Claimant's behaviour towards them without having raised the concerns informally with the Claimant. This was because of the Claimant's complaint of October 2018, 25 November 2018, and 5 December 2019 because the reaction to alleged misconduct is usually to raise concerns with the employee concerned informally; and the Claimant had made complaints of discrimination.

The Respondent denies that the complaints raised by the Claimant's managers were because of any protected act. The

reasons for the complaints being raised were because the relationship between the Claimant and her managers had been deteriorating for many months, due to the Claimant's negative reaction to her managers' attempts to informally performance manage her. Mediation had been attempted and failed; and her managers continued to have concerns about her poor performance and behaviours.

2.3.6 Allegation 15(f) – That on 19 December 2019, John Wall did not support the Claimant's expression of interest in applying to become a Culture Champion for the Respondent. This was because of the Claimant's complaint of October 2018, 25 November 2018 and 5 December 2019 because she had made complaints of discrimination; and John Wall told her in June 2019 that she had 'burnt all her bridges'

It is accepted by the Respondent that John Wall did not support the Claimant's expression of interest to become Culture Champion. This was because of existing performance concerns relating to the Claimant. Victimisation as alleged or at all is denied by the Respondent.

2.3.7 Allegation 15(g) – That on 24 December 2019, John Wall showed the Claimant an outcome letter and said that the Claimant had left information in the outcome letter which caused it to be incorrect. John Wall accused the Claimant of "playing games" and said "it was obvious" that she had altered the document on the central 'j' drive after she emailed the document to him, and before going into his office. John Wall then told her to "just admit it", "that [she] had made a mistake" and that "this is going to be the death of me." John Wall did this because of the Claimant's complaint of October 2018, 25 November 2018 and 5 December 2019 because John Wall's behaviour towards her was becoming increasingly unpleasant; and she had made complaints of discrimination.

It is not admitted by the Respondent that John Wall used the words alleged by the Claimant in her further particulars. It is denied by the Respondent that John Wall behaved in any way inappropriately towards the Claimant. In any event, it is denied that the allegations constitute a detriment. Victimisation as alleged or at all is denied by the Respondent.

2.3.8 Allegation 15(h) – That on 15 January 2020, John Wall criticised the Claimant for not asking his permission to attend a BAME meeting on 7 January 2020, rather than simply telling him she would attend. This was because of the Claimant's complaint of October 2018, 25 November 2018, and 5 December 2019 because John Wall's behaviour towards her was becoming increasingly unpleasant; and she had made complaints of discrimination.

It is accepted by the Respondent that John Wall emailed the Claimant about attending the BAME meeting. He stated in the email that he had no issue with her attending, provided that her work was under control and that all deadlines had been met. He also pointed out that it was usual to ask a line manager for permission to attend rather than just presenting it as a statement that the Claimant would attend. It is denied by the Respondent that the above constitutes a detriment and victimisation is denied as alleged or at all.

2.3.9 Allegation 15(i) – That on 17 January 2020, Harbhajan Brar was hostile towards the Claimant when she raised discrimination concerns. This was because of the Claimant's complaint of October 2018, 25 November 2018, and 5 December 2019 because she was told different things by John Wall and Jacqueline McCullough; she had made complaints of discrimination; and John Wall told her in June 2019 that she had 'burnt all her bridges'.

The Respondent denies that Harbhajan Brar was hostile towards the Claimant in relation to concerns about discrimination. Victimisation as alleged or at all is denied by the Respondent.

2.3.10 Allegation 15(j) – That the Claimant was accused incorrectly of having made errors in an MHPS report she had completed, including mis-spelling an employee's name throughout the report. This was because of the Claimant's complaint of October 2018, 25 November 2018 and 5 December 2019 because the Claimant did not receive feedback from Harbhajan Brar despite requesting it on several occasions and was only told that AC did not want her to work on the case anymore; and she had made complaints of discrimination.

It is admitted by the Respondent that the Claimant was accused of having made these errors. It is asserted by the Respondent that the report was poorly drafted and had to be substantially rewritten by the Claimant's colleagues following a complaint by the manager that the Claimant was supposed to be assisting with the report. It is contended by the Respondent that this was a poor piece of work which further exemplified the Respondent's concerns about the Claimant's performance and capability. Victimisation as alleged or at all is denied by the Respondent.

2.3.11 Allegation 15(k) – That on 14 February 2020, Harbhajan Brar issued the Claimant with a document entitled "Terms of Reference for the Investigation into Concerns involving and raised by Donna Harding". This was because of the Claimant's complaints of October 201825 November 2018, 5 December 2019 and 20 January 2020.

It is admitted by the Respondent that the Claimant was provided with this document. It is asserted by the Respondent that it was entirely reasonable for the Respondent to wish to institute a bilateral investigation, in circumstances where concerns had

been raised by both the Claimant and her managers about each others' behaviours. Victimisation as alleged or at all is denied by the Respondent.

2.3.12 Allegation 15(l) – On 3 March 2020, John Wall criticised the Claimant for wanting to attend a BAME meeting. This was because of the Claimant's complaints of October 2018, 25 November 2018, 5 December 2019 and 20 January 2020 because practically everything that the Claimant tried to do, to support and develop herself was being blocked by John Wall; her work allocation from John Wall had also been declining and so this treatment could hardly be due to this.

This is denied by the Respondent. John Wall agreed that the Claimant could attend if she was on top of her work. The Claimant did attend the meeting. It is denied by the Respondent that anything John Wall did or said constitutes a detriment. Victimisation as alleged or at all is denied by the Respondent.

2.3.13 Allegation 15(m) – That on 16 March 2020, John Wall would not agree in principle that the Claimant could take up a six month internal secondment if successful. This was because of the Claimant's complaints of October 2018, 25 November 2018, 5 December 2019 and 20 January 2020 because John Wall had said that Harbhajan Brar would be on the panel and she was not be supported to have development opportunities; she had made allegations of being discriminated against.

This is denied by the Respondent. John Wall informed the Claimant that he could not make a decision as he was leaving the Trust and that if she wanted to apply, she could do so. It is denied by the Respondent that anything John Wall said constitutes a detriment. Victimisation as alleged or at all is denied by the Respondent.

2.3.14 Allegation 15(n) – That throughout 2019 and until April 2020, the senior level work allocated by John Wall to the Claimant declined. This was a detriment because of the Claimant's complaint of October 2018, 25 November 2018, 5 December 2019 and 20 January 2020 because John Wall was issuing work, that would have normally been given to the Claimant, to other and junior white colleagues such as PM and DB.

This is denied by the Respondent. John Wall was working out his notice period in early 2020 and was trying to tie things up and the Claimant was working on an MHPS matter which was time-consuming and given work by other managers. Victimisation as alleged or at all is denied by the Respondent.

3 Disability Discrimination – failure to make reasonable adjustments

3.1 Was the Claimant a disabled person within the meaning of s6 EqA 2010 at the relevant time(s)? The Claimant relies on:

3.1.1 Mental ill health.

3.1.2 A skin condition.

3.1.3 Menopausal symptoms

The Respondent does not admit that the Claimant was disabled at the time of the alleged discriminatory treatment in respect of any of the disabilities alleged.

3.2 Did the Respondent apply a provision, criterion or practice (PCP) to the Claimant, namely:

3.2.1 A requirement to work full time on site rather than at home

3.2.2 A requirement to work between the hours of 9.30 and 5.30 until January 2020; and

3.2.3 A requirement to attend weekly 1:1 meetings of more than two hours duration with two managers, John Wall and Shilpi Sahai.

The Respondent does not admit that it adopted the above PCPs and that these were PCPs applied to the Claimant.

3.3 If so, did the PCP put the Claimant at a substantial disadvantage compared to non-disabled persons because (as the Claimant contends):

3.3.1 She suffers with fatigue and reduced concentration (depression, anxiety, insomnia; was menopausal)

3.3.2 The requirement to attend weekly meetings, of two hours in duration, reduced the time available to her to complete her work

3.3.3 The provisions caused the claimant additional stress and fatigue which led in turn to an exacerbation of her symptoms such as poor sleep, negative thoughts, loss of hair and hot flushes.

If the PCPs are found to have applied to the Claimant, it is denied by the Respondent that they put the Claimant at a substantial disadvantage compared to non-disabled persons.

3.4 Did the Respondent know or ought it have been reasonably expected to know, at the relevant time, that the Claimant had a disability and was likely to be placed at a substantial disadvantage in the way set out above?

It is denied by the Respondent that it was aware, or ought to have been reasonably expected to know, that the Claimant was disabled; and that the Claimant was likely to be placed at a substantial disadvantage in the way set out above.

3.5 If so, and the duty to make reasonable adjustments arose, did the Respondent take reasonable steps to avoid the disadvantage? The Claimant suggests that a reasonable adjustment would have been to:

3.5.1 On 15 April 2019, to allow the Claimant to work one day a week from home due to sleep disturbances.

3.5.2 On 15 April 2019, to work for two days a week from 10am to 6pm, instead of 9.30am to 5.30pm, due to sleep disturbances.

3.5.3 On 17 December 2019, to have separate 1:1s or conduct these with John Wall with a) an impartial person present or b) to record them in the event of inconsistencies.

It is not admitted by the Respondent that it was under a duty to make reasonable adjustments or that it failed to make reasonable adjustments.

4 Time/limitation issues

4.1 In respect of each of the particular claims, does the Claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

The Respondent contends that any part of the Claimant's claim for discrimination occurring on or before 6 December 2019 is time-barred.

4.2 Was any complaint presented within such other period as the employment Tribunal considers just and equitable?

The Respondent contends that these are complaints over a period of several years, about disparate issues and different circumstances, many of which involve individuals who no longer work at the Respondent. The Claimant is a senior HR professional and would have been well aware of the applicable time limits and the importance of bringing her claims within those time limits.

5 Remedies

5.1 If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.

5.2 There may fall to be considered a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, and/or the award of interest.

Bevan Brittan LLP

27 May 2022