# EMPLOYMENT TRIBUNALS

**Claimant:** Miss A Viega

**Respondents:** (1) VPG Systems Limited
(2) Julia Jost
(3) Chris Beesley
(4) Ria Crabbe
(5) Craig Pearson

**Heard:** in Leeds

**On:** 19, 20, 23, 24, 25 October 2023

**Before**: Employment Judge Ayre
Mr W Roberts
Mr J Howarth

**Representation**

**Claimant:** Mr O Ogunyanwo, consultant
**Respondents:** Mr M Dulovic, counsel

**JUDGMENT** having been sent to the parties on 26 October 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

**Background**

1. On 2 January 2023 the claimant issued these proceedings in the Employment Tribunal following a period of early conciliation that started on 22 October 2022 and ended on 3 December 2022. Her claim form included complaints of race

discrimination, sexual harassment, victimisation and breach of contract

2. The claimant was employed by the First Respondent. The Second Respondent was the claimant's line manager. The Third Respondent was employed by the First Respondent as Divisional Controller Measurement Systems, the Fourth Respondent as Controller – OBW & PW Division, and the Fifth Respondent as Costs Analyst.

3. A Preliminary Hearing for case management took place on 29 March 2023 before Employment Judge Wade. At that hearing it was identified that the claimant is bringing claims for:

    1. Direct race discrimination;
    2. Harassment related to race;
    3. Harassment related to sex;
    4. Victimisation; and
    5. Breach of contract

4. The claimant was ordered to pay a Deposit of £200 as a condition of being allowed to pursue her complaint of breach of contract. The claimant did not pay the deposit. Her claim for breach of contract / wrongful dismissal is therefore struck out.

**Proceedings**

5. There was an agreed bundle of documents running to 479 pages. The claimant also produced a 'mitigation bundle' running to 40 pages. The respondents produced a list of Issues, a reading list and written submissions, for which we are grateful.

6. At the start of the third day of the hearing, after the claimant had given evidence and before we heard from her witnesses, the claimant applied to introduce into evidence copies of messages from June 2022 and March 2023 relating to alleged conversations about the claimant taking drugs. These messages appear to have been in the claimant's possession for months but had not been disclosed. The respondents had only received copies of the messages by email on the third day of the hearing and objected to their introduction into evidence.

7. Having heard and considered submissions from both parties on the admissibility of the messages, it was the unanimous decision of the Tribunal that they should not be admitted. The issues in this case were identified at a Preliminary Hearing in March 2023. The claimant did not disclose the messages until the third day of the hearing and provided no explanation for not having done so.

8. We heard evidence from the claimant and, on her behalf, from Ednaxio Xavier and Khurrum Iqbal, who was the subject of a witness order. The Second, Third, Fourth and Fifth respondents gave evidence, and we also heard, on behalf of the respondents, from Matthew Burridge, Operations Director and Jon Jackson Managing Director.

Application to admit audio recording of appeal hearing

9. The claimant applied on the first day of the hearing for permission to introduce into evidence a covert recording of three appeal meetings. The respondent objected to the introduction of this evidence and we invited both parties to address us on its admissibility.

10. Having considered the submission of both parties it was the unanimous decision of the Tribunal not to admit the covert recording into evidence. It did not appear to us to be relevant to the issues that we had to determine. There were no complaints before us about the appeal process. The last allegation of discrimination relates to the dismissal itself.

11. The claimant indicated that there were three meetings that had been recorded covertly by her trade union representative, despite assurances having been given at the time of the meetings that no recordings were being made. We were concerned that the respondents had not been provided with a copy of the recording or a transcript and would therefore be prejudiced if it were to be introduced into evidence.

12. The claimant has provided no valid explanation for the delay in seeking to introduce the recording. She told us that her union representative had only sent the recording to her 3 days ago, despite the fact that the hearings took place almost 12 months ago. She did not explain why this was the case.

13. The prejudice to the respondents in allowing the evidence outweighs significantly the potential probative value of the evidence. The audio recording was therefore not admitted into evidence.

Applications for witness orders

14. The claimant also applied for two witness orders in respect of witnesses who are still employed by the First Respondent. The claimant indicated that she had approached both The first was for a Mr Mark Mahomet. The claimant said that he would be able to give evidence about not allowing the claimant to leave an interview that he and she were attending which overran and caused the claimant to miss a meeting that she was due to attend with her line manager, the Second Respondent.

15. The respondents accept that the claimant had a valid reason for not attending the meeting with the Second Respondent. Their complaint is that the claimant did not contact the Second Respondent to let her know that she was unable to attend. The claimant and the Second Respondent can give evidence on that issue.

16. The evidence of Mr Mahomet was not, in the unanimous opinion of the Tribunal, going to assist it to decide any of the issues in this case. The claimant's application for a witness order for Mr Mahomet was refused.

17. The second witness order sought by the claimant was for a Mr Khurrum Iqbal. His evidence appears to be relevant to three of the allegations of discrimination that the

Tribunal has to determine. There is a conflict of evidence between the claimant and the respondents on these allegations, and Mr Iqbal's evidence may assist the Tribunal to resolve that conflict. It was therefore the unanimous decision of the Tribunal that a witness order should be issued for Mr Iqbal.

## Issues

18. At the start of the hearing we discussed the issues that would fall to be determined. The parties agreed that those were as identified by Employment Judge Wade at the Preliminary Hearing on 29 March 2023, subject to one minor amendment subsequently identified by the claimant. The issues can be summarised as follows:

Time limits

1. Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before **23 July 2022** may not have been brought in time.

2. Did the respondent do the following things:

    i. In May/June 2022 did Ms Crabbe exclude the claimant from recruitment of maternity cover? The claimant relies on a hypothetical comparator for this allegation.

    ii. In May/June 2022 did Ms Crabbe make jokes by email about the claimant's English?

    iii. On 16 June 2022 did Mr Pearson say to colleagues that the claimant was a drug addict and repeat the same remark to her directly?

    iv. On 16 June 2022 did Ms Padgett say mental health support needed to be provided by "an English born and not a foreigner"?

    v. On 16 June 2022 did Mr Pearson say, "nobody messes with Ms Padgett"?

    vi. On 16 June 2022 did Mr Pearson laugh about the comment of Ms Padgett?

    vii. On or after 16 June 2022 did Ms Jost / Mr Jackson do nothing about Ms Padgett's comment?

    viii. On 14 September 2022 did Mr Jackson dismiss the claimant?

3. Was that less favourable treatment?

4. If so, was it because of race?

Harassment related to race

5. Did the respondents do the following things:

    i. The matters identified at paragraph 7(2) (ii), (iii), (iv), (v), (v) and (vii) above?

6. If so, was that unwanted conduct?

7. Did it relate to age?

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

9. 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?

Harassment related to sex

10. On 15 June 2022 did Mr Pearson say to the clamant that a colleague, Mr Iqbal, could rub cream into her leg?

11. If so, was that unwanted conduct?

12. Did it relate to sex?

13. Alternatively, was it of a sexual nature?

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

15. 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?

Victimisation

16. The respondents admit that the claimant did a protected act when she complained of discrimination in a grievance meeting on 2 August 2022.

17. Did the respondents do the following things:

    1. On 14 September 2022 did Mr Jackson dismiss the claimant?

    2. On or before 14 September 2022 did Mr Beesley and/or Ms Jost orchestrate the claimant's grievance?

18. By doing so, did the respondents subject the claimant to detriment?

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

## Findings of fact

19. We make the following finding of facts on a unanimous basis.

Background

20. The claimant was employed by the First Respondent as a Human Resources Co-ordinator, based in the First Respondent's offices in Bradford. The First Respondent is an international business, and the claimant reported to Julia Jost, the Second Respondent.

21. Ms Jost is based in Germany and, at the time she worked with the claimant, did not have a good knowledge or understanding of UK employment law and HR practice. Until January 2022 Ms Jost was employed as HR Co-ordinator for Germany. In January 2022, following the departure of the previous Head of HR for Europe, Ms Jost was promoted into that role. Ms Jost reported to Inbal Dangur, the Global HR Head, who is based in Israel.

22. During the time the claimant was employed by the First Respondent she was the only HR professional based in the UK and was relied upon heavily by Ms Jost for her knowledge of UK employment law and practice.

23. The claimant was based in Bradford, where there are 56 employees, of whom 44 are white British and 12 are of another ethnic background. Prior to the claimant's appointment there had been no HR support based on site in Bradford. The First Respondent's group has another company in the UK based in Basingstoke. The two companies are independent of each other and managed separately, but they share some services such as HR, IT, finance and logistics. HR support had previously been provided to Bradford from Basingstoke but prior to the claimant's recruitment, the HR staff based in Basingstoke had left the business and not been replaced.

24. Although the claimant reported to Julia Jost she had good working relationships with the management team at Bradford, and in particular with Jon Jackson, the Managing Director, and Matthew Burridge, the Operations Director. The claimant spoke to Mr Jackson at length most days and also spoke to Matthew Burridge when he was in the office. Both thought highly of the claimant and were pleased with the work that she carried out. Mr Jackson was very supportive of the claimant and if the claimant told him she was struggling with something, would ask if there was anything he could do to help.

25. The claimant introduced her brother, Ednaxio Xavier to the business, and he remains employed by the First Respondent in the sales team. He is highly thought of by the

management and liked and respected by his colleagues. The claimant describes her race as black, of African descent. Her mother tongue is Portuguese, but she speaks fluent English. The claimant's brother is of the same race as the claimant.

26. The claimant began working for the First Respondent on 1 March 2022 in accordance with the terms of a contract of employment which contained a three month probationary period and the right for the First Respondent to make a payment of salary in lieu of notice on the termination of employment.

27. The claimant passed her probationary period, and initially there were no issues with her work or her working relationships.

28. Ria Crabbe, the Fourth Respondent, is employed by the First Respondent as Controller for the Onboard Weighing and Process Weighing Division. She joined the First Respondent in October 2011, and on 1 January 2022 was promoted into her current role, replacing Chris Beesley, the Third Respondent, when he moved into another role. Ms Crabbe is a management accountant who does a specialist role and reports to Zvika Fisher who is based in Israel.

<u>First Allegation</u>

29. In December 2021 Ms Crabbe found out that she was pregnant, with her baby being due on 10 August 2022. In January 2022 she notified the First Respondent of the pregnancy, and subsequently steps were taken to try and find maternity leave cover for her.

30. At the time recruitment of staff was managed and approved centrally outside of Bradford. Katarina Pavlovic, HR Co-ordinator based in Germany, joined the business in February 2022 and reported to Julia Jost. It was agreed that she would do all of the recruitment for Europe.

31. The recruitment process for Ms Crabbe's maternity leave cover began around March 2022, about the time that the claimant joined the company. Ms Crabbe contacted Julia Jost for advice on the recruitment process and was told to liaise with Ms Pavlovic. Ms Pavlovic was responsible for posting job adverts both internally and externally. Ms Crabbe followed the advice that she was given by Ms Jost in relation to the recruitment process.

32. Two candidates were initially identified and interviewed. The claimant sat in on those interviews. She was not excluded from the recruitment process by Ria Crabbe, but rather Ms Crabbe took her lead from Julia Jost, Head of HR for Europe, who told her to liaise with Ms Pavlovic.

33. There were difficulties finding someone to fill Ms Crabbe's role as it is a specialist one. It was therefore agreed that Chris Beesley and Craig Pearson would cover it whilst Ms Crabbe was on maternity leave, and that an approach would be made to a former employee who had recently left the business, Christina Gohar, to cover Mr Pearson's role.

34. Julia Jost gave Ms Crabbe permission to approach the former employee in an email sent to Ms Crabbe on 16 May 2022, which the claimant was copied in to. Ms Jost in that email asked Ms Crabbe to provide the claimant with contact information so that she could draft Ms Gohar's contract of employment.

35. On 15 June Ms Jost sent an email to Ms Crabbe, the claimant and others, confirming that Ms Gohar had agreed to join the company starting on 20 June 2022. On 20 June the claimant sent an email to Ms Crabbe asking for access to hard copy employment paperwork signed by Ms Jost so that she could finalise her induction.

36. There was a dispute between Ms Crabbe and the claimant in relation to Ms Gohar's induction process and employment paperwork. Ms Crabbe believed that the claimant had agreed to carry out the induction, whilst the claimant believed she had not agreed to do so.

37. The claimant sent an email to Ms Crabbe the following day in which she asked Ms Crabbe to "*please collaborate with HR processes*". She also wrote that "*It is becoming a constant to be challenged on how HR follows its processes and Company policies and procedures…. It is imperative that we manage to mutually respect each other's company processes, as such attitude will definitely facilitate how well we can work together as a team.*"

38. Ms Crabbe was upset by the tone and content of the claimant's email and replied explaining that she was very busy so had asked Mr Pearson to confirm what exactly was required from Ms Gohar. She also wrote:

    "*I do not understand what the issue is here, do we need to have some conflict resolution as I feel there is a serious issue between this department and HR and every question asked is seen as a combative move.*"

39. The claimant replied that "*Yesterday I have sent you an email explaining that we would prioritise your time with Christina over HR induction since she is on site for a week only. Did you read it?* "

40. Ms Crabbe replied on 22 June explaining that the claimant had agreed that an induction would be carried out by HR, and that the claimant had decided to cancel the induction. She also wrote that "*I hope this email is explanation enough of the situation. I do not wish to receive any more illogical, threatening and generalised emails regarding my attitude and that of my team.*"

41. In evidence to the Tribunal Ms Crabbe explained that the reason she had referred to the claimant's emails being illogical was because the claimant had said in one email that she was being constantly challenged on HR processes, but in another that Craig Pearson had not questioned the policies or procedures. Ms Crabbe also felt threatened by the tone of the claimant's emails and the suggestion that they may not be able to work together as a team. Ms Crabbe was at the time under a lot of pressure, having been promoted a few months earlier and being very busy trying to finish things off before maternity leave.

42. The claimant suggested that use of the word 'illogical' was racially offensive. She did not adduce any evidence in support of this assertion and we find that the comment was not racially offensive, nor was Ms Crabbe motivated by race when making it. It was instead a reference to the approach Ms Crabbe believed the claimant was taking to their email correspondence.

43. Shortly after receiving that email the claimant replied to Ms Crabbe in an email which included the following:-

"*I have sent you and Julia an email. …Please read it!*

*….you will have to explain your statement with regards to "I hope this email is explanation enough of the situation. I do not wish to receive any more illogical, threatening and generalised emails regarding my attitude and that of my team." This can officially be perceived as offensive and unprofessional!*

*Ria, yourself and your team just need to follow procedures. It's that simple….*

*It would be advisable to firstly familiarise yourself with basic HR on-boarding processes…*"

44. Shortly after sending this email to Ms Crabbe, the claimant sent an email to Julia Jost stating that she wanted to put in a formal grievance against Ria Crabbe and Craig Pearson.

45. Ms Crabbe was very busy in the run up to her maternity leave, and her managers wanted her to stay at work as long as possible. She had accrued holiday entitlement and they wanted her to be able to carry that forward to the end of her maternity leave, or be paid in lieu of it, as had been the case on other occasions.

46. Ms Crabbe approached the claimant and asked her about her accrued holiday. She followed up with an email on 13 April. On 19 April the claimant replied stating that she would have to use her holiday before her maternity leave started. That would mean her being out of the business from 5 July 2022, when Ms Crabbe's manager wanted her to work until the end of July.

**47.** Ms Crabbe raised the issue of holiday pay with her line manager Zvika Fisher who contacted the claimant directly for advice. On 10 May the claimant sent an email to Zvika Fisher stating that company policy did not allow for the carrying over of unused holiday or for payment in lieu of unused holiday. The claimant was insistent that Ms Crabbe use some or all of her holiday before she started her maternity leave and showed no flexibility or understanding of the business area.

**48.** On 16 May Chris Beesley called the claimant via Microsoft Teams to discuss the question of Ria Crabbe's holiday. He contacted the claimant because Julia Jost was out of the business that day. During the call Mr Beesley asked the claimant about the holiday position. He had previously been Ms Crabbe's line manager and knew that on two previous occasions Ms Crabbe had been allowed to carry forward holiday

or be paid for it due to business need.

**49.** He found the claimant to be inflexible in her approach, as she insisted that they stick to the company policy of not allowing carry forward or payment in lieu of holiday. The claimant alleged that during this meeting Mr Beesley used foul language, shouted at her, and intimidated her. Mr Beesley strongly denied this allegation.

**50.** On balance we prefer the evidence of Mr Beesley on this issue. We find that he was frustrated by the claimant's inflexibility and clear as to what he wanted, but that he remained professional during the call.

**51.** We also find that Ms Crabbe felt vulnerable and anxious as a result of the claimant's behaviour towards her. She was aware that a restructure was being considered in relation to the finance team and was fearful that her job would be affected. This was of particular concern as she was about to start a period of maternity leave.

Second allegation

**52.** The claimant alleged that in May / June 2022 Ms Crabbe made jokes by email about the claimant's English. There were however no such jokes in evidence before us. The claimant was unable to provide any evidence of emails in which Ms Crabbe joked about the claimant's use of English.

**53.** When it was put to the claimant that there were no emails containing jokes about her English, the claimant's response was that the jokes were made verbally. When pressed on this, she could only give one example, from 22 June 2022 when she said that she had overheard Ria Crabbe making a comment in her office that 'as it's difficult to understand HR she is now sending emails'.

*54.* The claimant has changed her position in relation to this allegation. At the Preliminary Hearing on 29 March this issue was referred to as being an allegation of jokes by email only. In further and better particulars the allegation was referred to as being one relating to jokes made both verbally and in writing. In evidence to the Tribunal she admitted she was referring to just one comment made orally.

*55.* This change in position, and the claimant's willingness to make allegations (about jokes being sent by email) without any evidence to support those allegations caused us to have concerns about the claimant's credibility.

*56.* The claimant also used very emotive language both in her witness statement and in her oral evidence. For example, in her witness statement she referred to 'becoming a target', to her dismissal being 'planned all along', to people being 'hostile and toxic', to being a 'victim of such ego', to an 'abuse of power' and to 'attacks' on her.

*57.* She accused Chris Beesley of 'shouting and using foul language towards her' and of ''disrespecting, intimidating and discriminating'' against her. She accused Ria Crabbe of trying to manipulate and intimidate her and of throwing paperwork at her. She accused Craig Pearson of targeting and harassing her. These are very serious

allegations to make and were not supported by any of the evidence before us.

*58.* Where there was a conflict between the evidence of the claimant and of the respondents' witnesses, we prefer the evidence of the respondents' witnesses who were consistent and presented as honest and truthful.

**59.** Ms Crabbe strongly denied making any jokes about the claimant's accent and her origins and we accept her evidence on this issue. We found Ms Crabbe to be a straightforward and honest witness who was clearly frustrated with the claimant and not afraid to express her frustration. Her relationship with the claimant had deteriorated by this point and the claimant was avoiding her when she saw her in the office. There was no evidence however to suggest that Ms Crabbe's attitude towards the claimant was motivated either consciously or subconsciously by race.

Third and fourth allegations

**60.** In June 2022 the claimant suffered an injury to her knee which caused her to limp at work. On 15 June Mr Pearson saw the claimant limping and he thought she appeared quiet and introverted. He was chatting to Khurrum Iqbal and Mohammed Aqbal and sought to bring the claimant into the conversation.

**61.** Mr Pearson asked the claimant how she was and how her leg was. She replied that Mr Iqbal had helped her with pain relief and recommended a cream for use on her leg. Mr Pearson, as a joke, made a comment to the effect of 'is he doing anything else for you'. The claimant laughed in response and said 'no, Khurrum's just my dealer'. The claimant did not appear at all distressed by the comment at the time.

**62.** There was a conflict of evidence on this issue. On balance we prefer the evidence of Mr Pearson. He appeared to us to be an honest and genuine witness, in contrast with the claimant about whose credibility we had some concerns, for the reasons set out above. It was an unfortunate comment for Mr Pearson to make, but we accept that he did not intend to offend the claimant.

**63.** The conversation then moved on to talk about drug use. The claimant said 'look, everyone's done at least one line', which halted the conversation momentarily, although it then resumed. Mr Pearson was very uncomfortable with the conversation about drugs. He has lost both a good friend and a cousin to drugs, and so is particularly sensitive to the issue, and opposed to drug taking. He left the conversation shortly afterwards because he did not want to be part of a discussion about drugs.

**64.** The claimant alleged that Mr Pearson had, on 16 June, commented to others in the team that the claimant was a drug addict, and had then repeated the comment to the claimant. Mr Pearson was adamant that he had not made such a comment. We prefer his evidence on this issue. It was clear from his evidence to the Tribunal that the question of drug taking is something that he is very sensitive to and we find it highly unlikely that he would have made a comment of the nature alleged by the claimant. He was also willing to accept that he may have made a comment about the

use of cream, which led us to the conclusion that had he made a comment about drug use he would have been willing to accept that.

**65.** It was not Mr Pearson who discussed drugs in the workplace, but rather the claimant and her work friends. There was in evidence before us emails between a group of colleagues, including the claimant, about the subject of drug taking. The email chain included photographs of drugs, and an email from the claimant dated 14 June (two days before she alleges that Mr Pearson made the comment about drugs) in which the claimant referred to taking three lines of cocaine a day.

Fifth, sixth and seventh allegations

**66.** The First Respondent had in place a system of Mental Health First Aiders at the Bradford site. The Mental Health First Aiders were Michelle Padgett and Craig Pearson. They had been doing the role, apparently successfully, for some time, and had received specific training. Michelle Padgett was described as passionate about mental health and as a strong character with forthright views.

**67.** The claimant formed the view that mental health issues were best dealt with by the HR team rather than by Mental Health First Aiders. She was concerned that Ms Padgett and Mr Pearson were not respecting confidentiality, although there was no evidence before us that this was in fact the case. The claimant spoke to Ms Jost about the issue and Ms Jost suggested that the claimant speak with Jon Jackson and Matthew Burridge about the possibility of HR taking over responsibility for managing mental health issues in Bradford.

**68.** A call was arranged between the claimant, Ms Jost and Mr Jackson, at which it was agreed that HR would take on responsibility for mental health on site, and Mr Jackson agreed to support this change.

**69.** The claimant arranged a meeting with Ms Padgett and Mr Pearson to discuss the issue. Before doing so however she arranged for someone to go round the office taking down the posters advertising the Mental Health First Aid service. Mr Pearson saw this and was concerned about how Ms Padgett would react.

**70.** Mr Pearson described Ms Padgett as a strong personality, blunt and to the point. He was aware that the claimant had experienced difficulties in her relationship with another strong woman, Ria Crabbe, and wanted to prepare her for the meeting with himself and Ms Padgett.

**71.** When Mr Pearson started working with Ms Padgett he had received a warning about her, and wanted, with the best of intentions, to warn the claimant that the meeting to discuss the removal of the Mental Health First Aid service could be a challenging one. He therefore made a comment to the claimant that “nobody messes with Michelle” and laughed about this. In making this comment he was not seeking in any way to intimidate the claimant, but rather to help her to prepare for what he thought may be a difficult meeting.

**72.** There was no evidence whatsoever to suggest that Mr Pearson's comment was linked to race. Quite the contrary in fact. Mr Pearson, who is white, had also received a similar comment in the past from another colleague.

**73.** The meeting to discuss the changes to the Mental Health First Aid service took place on 16 June 2022. The claimant did not take any minutes or notes during the meeting. The day after the meeting, the claimant wrote to Ms Padgett and Mr Pearson stating that, as she had not taken notes, she would prepare very general minutes of the meeting to highlight the main points discussed.

**74.** The claimant then produced minutes of the meeting in which she recorded that Mr Pearson and Ms Padgett had expressed concern about the decision to remove their responsibilities and transfer them to HR. She wrote that:

"*You stated that employees might not feel confident in approaching HR with such issues. As HR is new on site and in the case of the HR manager, cultural norms may not be compatible with the British ones.*"

**75.** Mr Pearson refused to sign the minutes because he did not consider them to be accurate. There was no evidence before us of Ms Padgett having signed them either.

**76.** The claimant alleged to the Tribunal that during the meeting Ms Padgett said that mental health support needed to be provided by "*an English born and not a foreigner*". This allegation is inconsistent with the claimant's own notes of the meeting.

**77.** Mr Pearson's evidence was that this comment was not made, but that during the meeting Ms Padgett stated that the German media were not reporting mental health issues in the same way as the UK media was, the implication being that she was concerned that these issues were not taken as seriously in Germany. Both Ms Padgett and Mr Pearson were concerned about their responsibilities being removed from them and passed to HR.

**78.** On balance we prefer the evidence of Mr Pearson on this issue. The claimant's version of events is not even consistent with her own minutes of the meeting. For the reasons set out above we found Mr Pearson to be a credible and truthful witness. Mr Pearson's account is also consistent with an email sent by the claimant to Ms Jost and Mr Jackson on 20 June in which she wrote that Ms Padgett:

"*believes and I quote "as British it is my responsibility to make my fellow friends and colleagues feel supported. I don't know if Julia for example, not knowing the British culture would be able to deal with mental aid here in the UK. We British have a long history in mental health and we are in front of the Germans or any other European countries as we pioneer mental health as an important topic….We are their friends and they trust us better"".*

79. The claimant also commented in that email that "*Michelle made a few comments which if not dealt with carefully could be taken as discriminatory*".

Allegation eight

**80.** Ten minutes after receiving the claimant's email about the Mental Health First Aid meeting, Ms Jost replied to it, copying in Jon Jackson. She commented that: "*This must have been a tough one. I agree and support you in every point.*" She asked Mr Jackson to support the claimant with this on site and said that Ms Padgett and Mr Pearson "*need to understand, that it's not HR who take away something from them. It's a managerial decision*".

**81.** A meeting was arranged between the claimant, Ms Jost and Mr Jackson to discuss how to improve culture and communication on site at Bradford. This meeting took place on 29 June.

**82.** Following the meeting Ms Jost sent an email to the claimant and Mr Jackson on 30 June confirming what had been discussed. She was very supportive of the claimant in that email and confirmed that mental health and training should be transferred to HR. She also wrote that '*we do not tolerate irrational comments that go into sexism or racism. Not at all!"*

**83.** Ms Jost sent a further email to Mr Jackson on 7 July in which she wrote that "*we must solve the situation of racist expressions made. I don't want Adriana to be the target of their inappropriate manners.*"

**84.** Ms Jost and Mr Jackson did therefore take prompt action after the claimant raised concerns about the meeting, expressing sympathy for how the claimant may have felt during the meeting, and backing her up 100%. Ms Jost also asked Jon Jackson, as the most senior director on the Bradford site, to ensure that he supported the claimant on this issue. It cannot therefore be said that nothing was done when the claimant raised the issue.

Grievance

85. On 22 June 2022 the claimant sent an email to Ms Jost stating that she wanted to raise a grievance about Ria Crabbe and Craig Pearson. Ms Jost was, at that stage, not familiar with grievance processes in the UK, or with the First Respondent's grievance procedure. She did not realise that use of the word 'grievance' may trigger a formal process. Instead, she wanted to focus on trying to resolve the problem.

86. She formed the view that the issues between the claimant and Ms Crabbe could be resolved through a meeting between them and spoke to both the claimant and Ms Crabbe on 22 June. Following those conversations she sent them an email in which she suggested separate meetings with each of them to get their perspective, and a moderated meeting the following week to find a solution.

87. The First Respondent's grievance procedure provides for an informal discussion to take place as the first part of the grievance process. This is what Ms Jost did when the claimant raised her grievance.

88. Ms Crabbe initially agreed to attend a joint meeting but subsequently changed her mind. In an email sent to Ms Jost on 13 July, Ms Crabbe asked for the meeting to be rearranged for when she returned from maternity leave because she was feeling very stressed and upset by the situation and wanted to concentrate on completing the handover of her work in her final 2 weeks before starting maternity leave.

89. Ms Jost agreed to postpone the meeting as she did not want to put extra stress on Ms Crabbe at this time.

90. Ms Jost told the claimant that Ms Crabbe would not be attending the meeting at this point because of her pregnancy, and the claimant told her that she needed to make a complaint now because of time limits. As an HR professional the claimant is familiar with UK employment law and with time limits for presenting claims to Employment Tribunals.

91. The claimant spoke to Mr Jackson, and subsequently, on 26 July 2022 sent him an email confirming that she did want to raise a formal grievance. Mr Jackson arranged a grievance meeting for the very next week, 2nd August. During this meeting the claimant, who had not provided any details of the grievance in her written emails of 22 June and 26 July, set out in some details the grounds of her complaint.

92. One of the allegations she made was that Craig Pearson had suggested that Khurram Iqbal was rubbing cream into her leg and that this had made her feel uncomfortable. She made no other complaints of discrimination during the grievance meeting.

93. Mr Johnson investigated the claimant's grievance and spoke to both Ria Crabbe and Craig Pearson. There was a little delay in him doing so due to time taken by the claimant in reviewing and giving feedback on the minutes of the grievance meeting, and to the fact that Ria Crabbe had just given birth and was on maternity leave.

94. Mr Johnson spoke to Craig Pearson on 6 September, and to Ria Crabbe on 7 September.

95. On 16 September 2022 Mr Johnson wrote to the claimant informing her of his decision in relation to her grievance. In summary he concluded that:

    1. There had been a genuine misunderstanding as to who was doing what in relation to the on-boarding of Ms Gohar and he recommended a review of the on-boarding procedures and re-training;

    2. Craig Pearson accepted that he may have caused offence with some office banter, for which he had volunteered to apologise, but there was no intentional harassment of the claimant by Mr Pearson; and

    3. Ms Crabbe and the claimant had become involved in a 'turf war' as to who was managing the on-boarding process.

96. Mr Johnson also informed the claimant that she had the right to appeal against his findings in relation to the grievance. He finished the outcome letter by stating that "*the reasons for your employment being terminated was in no way influenced by you bringing this grievance or my investigation of it*".

97. The claimant did not appeal against the grievance outcome, but rather she wrote to Mr Burridge (who by that time was dealing with her appeal against her dismissal) stating that she was in agreement with the outcome. In relation to Mr Pearson's offer to apologise for the comment about the leg cream that had offended her she wrote: "*I understand that such mistakes can happen…*"

98. Mr Jackson subsequently forwarded to the claimant an apology written by Mr Pearson, in which he stated that "*…nothing I said was made with any offence, nor of a malicious nature towards you. With this in mind I would like to offer you a sincere apology for any offence that the conversation may have inferred. This was never my intention…*"

Relationship between the claimant and Ms Jost

99. In March 2022 Ms Jost was informed that there was to be a restructuring of the Finance Department in the United Kingdom. There was a proposal to transfer all of the work carried out by the Basingstoke finance team to other sites, mainly Bradford. As a result three finance roles based in Basingstoke were at risk of redundancy. It was planned that the restructuring would take place in September 2022.

100. In May 2022 Ms Jost discussed the proposals with the claimant. She also, in June 2022, met with the First Respondent's legal advisors to obtain advice on the process to be followed. The claimant and Ms Jost, with input from the legal advisors, drew up a draft plan for implementing the redundancies, which was confirmed in an exchange of emails in early May.

101. The plan involved Ms Jost making the general announcement about the proposed redundancies and the claimant carrying out individual consultation meetings with each of the affected employees. In an email sent to the claimant on 6 May 2022 Ms Jost summarised the process that they had discussed, which included the claimant carrying out "*individual consultation meetings….to present redundancy package*". It was agreed that the claimant would carry out those meetings on site at Basingstoke.

102. Further discussions about the redundancies took place in early August 2022. On 11 August the claimant sent a detailed email to Ms Jost setting out the steps that needed to be followed in order to implement the proposed redundancies. These included individual consultation meetings. Ms Jost was dependent on the claimant and the external legal advisors for advice on the process to be followed as she is not an expert in UK employment law and practice.

103. Ms Jost and the claimant also discussed the redundancies in messages sent through Microsoft Teams. On 12 August Ms Jost sent a message to the claimant in which she referred to the plan and wrote:

"*I think we should stick to the plan me going there, informing management team…and you having the 1:1 and handing over letters. I think this is the best way to proceed what do you say?*

104. The claimant did not give any indication that she did not want to carry out the individual consultation meetings or did not understand what was involved, but merely asked Ms Jost if she wanted her to travel to Basingstoke at the same time as Ms Jost.

105. On 15 August Ms Jost sent an email, copying the claimant, in which she summarised the redundancy process to the director responsible for that area of the business. She wrote in the email that the claimant would conduct 1:1 meetings and check for alternative roles within the business for those at risk of redundancy.

106. The claimant and Ms Jost arranged a meeting via Microsoft Teams for 4pm UK time, 5pm German time, on 24 August 2022. The claimant did not attend the meeting. She was involved in an interview which had been arranged by Mark Mahomet, a manager in Bradford. The interview started at 3pm and did not finish until approximately 4.40pm. The claimant made no attempt, when she realised that the meeting was overrunning, to contact Ms Jost to let her know that she could not make the meeting. The claimant's evidence to the Tribunal was that Mr Mahomet would not let her leave even to give Ms Jost a quick call. We find this evidence unconvincing. Mr Mahomet was not the claimant's line manager whereas Ms Jost was.

107. Ms Jost was waiting for the claimant to join the meeting. At 17.08 German time Ms Jost sent a message to the claimant asking whether she was still at work. The claimant did not reply until more than two hours later, after she had left work, gone to pick up her child, and travelled home. She then sent a message to Ms Jost explaining that the interview had not finished until 4.40 pm UK time. She made no apology for missing the meeting or for not letting Ms Jost know.

108. Ms Jost sent the claimant a message the following day explaining that she had stayed in the office to talk to the claimant, and that it would have been nice to have had a message from the claimant indicating that she was not able to make the meeting.

109. The claimant replied that she had not been able to leave the meeting that she was in. Ms Jost's reply was that if the claimant accepted an appointment, she should cancel it if she was not able to attend. This was in our view an entirely reasonable approach for Ms Jost to take. She was the claimant's manager and she had been inconvenienced by the claimant's failure to show her the basic courtesy of letting her know she couldn't make the meeting.

110. The claimant's reply was "*…this time around I won't accept your attitude! This interview is a priority over any meetings You as HR Manager should have that priority clear*." Ms Jost responded, quite reasonably, "*let's take some time later to clarify*". The claimant immediately replied "*now that you only focus on your priorities and*

*disregards other people's I really can't do nothing about it. You talk to me like you are talking with a child. I'm sorry but I won't accept this attitude any longer. "*

111. Ms Jost replied in a reasonable tone asking the claimant to consider what she was saying and suggesting that the claimant was threatening her. The claimant replied:

"*No I am not threatening anything here*

*I am making you aware that I am no longer accepting your attitude*

*How is that threatening?*

*I am not prioritising over line managers*

*And that is where you are going wrong*

*Just because you are my manager doesn't mean you have priority over all the other tasks I have to do.*"

112. Both the tone and content of the claimant's messages to Ms Jost were blunt and rude. Her response was disproportionate to the approach that Ms Jost took. All Ms Jost was doing was quite reasonably rebuking the claimant mildly for not having told her she could not make the meeting. The claimant's response was excessive, disrespectful and unnecessary.

113. This was not the first time that the claimant had failed to turn up to meetings without any warning. In May Ms Jost had to remind the claimant not to miss meetings without letting people know. On that occasion the claimant accused Ms Jost of being 'unfair and unreasonable'.

114. The claimant had also chosen on one occasion to attend a leaving presentation for a colleague Pauline Mannion, rather than a meeting with Ms Jost. The claimant demonstrated through her behaviour that she had no respect for Ms Jost or her position as her line manager.

115. Issues also arose with the claimant acting outside the scope of her authority. For example, on 12 August 2022 Ms Jost found out that the claimant had extended the contract for a temporary employee without the necessary approval from senior management. She had told the employee in question that his employment was being extended without having the necessary approvals in place. Ms Jost raised this with the claimant at the time.

116. Matters came to a head in early September 2022. Ms Jost had planned to travel to the UK to implement the redundancy process along with the claimant and had booked travel and accommodation for that purpose. There was an exchange of emails and messages between the claimant and Ms Jost in early September about the redundancy process and timings.

117. On 1 September there was an exchange of messages between the claimant and Ms Jost on Microsoft Teams. Ms Jost referred to consultation meeting letters that the claimant was preparing for 1:1 meetings that would take place when the claimant was on site the following week. The claimant replied that Ms Jost should be having the consultation meetings because she was the HR Manager. Ms Jost replied: "*I don't understand. We have been speaking a while about it. You remember the tactic from summer? Me informing the team, you having the 1:1 individually.*"

118. The claimant then wrote that she had understood 1:1 meetings to refer to annual 1:1s rather than redundancy consultation meetings. The claimant repeated that evidence at the hearing. We find that suggestion unbelievable. It was clear from the context of the discussions about the 1:1s that it was individual redundancy consultation meeting that were being discussed and it is disingenuous of the claimant to suggest otherwise. There was no need for annual 1:1 meetings with the staff at risk of redundancy as it was envisaged that they would shortly be leaving the business.

119. Ms Jost made clear to the claimant in the Teams chat that she wanted the claimant to lead the individual redundancy consultation meetings, to which the claimant replied, "*This idea is not the right one*".

120. On 2 September the claimant wrote to Ms Jost that she would not be leading the individual consultation meetings but would be there to take notes and support the director responsible for the finance team. Ms Jost replied that she would prefer for the claimant to do the talking and the director to take the notes and the claimant replied that she would lead the meeting.

121. Ms Jost sent the claimant a message on Teams at 12.56 on 2 September asking her to confirm that she would do the individual consultation meetings. The claimant did not reply.

122. Ms Jost became concerned that the claimant was now suggesting a different approach to the one previously agreed and she flagged this to the relevant director. The claimant was copied into this email and took offence to it. She sent another angry and disrespectful email to Ms Jost in which she wrote, amongst other things:

"*We have never discussed who would be doing what, as I believe with you being an experienced HR personnel and being the manager you would know your responsibilities…*

*We have never previously discussed who will be leading the redundancy meetings as with you coming to the UK, it was assuming you are coming to lead the process.*

*Now that you have decided not to be part of the important steps in it, you cannot throw me under the bus and start wrongly claiming that Adriana is now saying different things.*

*This process is clear to me. You are the one not following it as per the UK law….*

*With this said, please follow the process that most suits you. However, do not hinder my person along the way. "*

123. We find this an extraordinary way for any employee to write to her manager.

Dismissal

**124.** As a result of the claimant's behaviour, Ms Jost had to postpone the redundancy process and cancel her trip to the UK which had already been booked and paid for. Ms Jost did not feel comfortable proceeding with the redundancies in light of the attitude taken by the claimant. Ms Jost spoke to her line manager, and it was agreed that, in the circumstances, the redundancy process would have to be postponed.

**125.** Ms Jost was very concerned that the claimant had denied knowing what had been agreed about the redundancy process, had not wanted to take responsibility for carrying out the individual consultation meetings, and by the claimant's attitude.

**126.** She formed the view that she could no longer trust the claimant and that the relationship between her and the claimant had broken down. She was also concerned that the claimant was not observing confidentiality, as she had shared some highly confidential information about potential redundancy packages with the finance team, despite having been told not to share the information.

**127.** On 4 September 2022 Ms Jost sent an email to her line manager setting out her concerns.

**128.** Ms Jost was aware that the claimant had an outstanding grievance and took advice as to whether she could proceed with the dismissal in these circumstances. Having taken that advice, she and Inbal Dangur agreed that the appropriate step to take was to dismiss the claimant.

**129.** Ms Jost prepared a letter informing the claimant of her dismissal. She signed the letter and asked Mr Johnson to co-sign it. The reason for that is that Ms Jost is not an employee or director of the First Respondent and believed that in order for the letter to be effective in terminating the claimant's employment, it had to be signed by one of the First Respondent's directors, which Mr Johnson is.

**130.** In the letter Ms Jost set out the reasons for dismissal. She included the following:

"*Over recent weeks our working relationship has progressively deteriorated; tasks have been delivered too late; plus you started and communicated processes without approval. You did not reply to my questions and my request for regular video meetings and there have been occasions when you have not appeared. We have recently come to rely on email communication. This has reached the point where you have openly accused me of being rude to you, when I have not been. Also, at times when we needed to take action to deal with important cases such as the relocation of a division team you have, I feel, not been cooperative in our discussions to achieve this.*

*As an outcome, the situation has reached the stage where I have been left to deal with UK matters myself. This is not a good place to be.*

*I had hoped that we could work effectively together, and I had hopes that we would fix whatever stands in between us to perform and cooperate for the needs of the business. However, our recent communication has been strained and our relationship has become fractured. I have tried on several occasions to improve this. You have not shown any reaction at all to this but instead have chosen to accuse me of not being able to manage my job. With this said, I do not see how our work relationship can be repaired…"*

**131.** The letter also informed the claimant that she would be paid in lieu of her notice period and for her outstanding holiday, and that she had the right to appeal the decision.

**132.** As Ms Jost is based in Germany, she asked Mr Jackson who is based in Bradford, to inform the claimant of her dismissal. She rang him on the morning of 14 September and asked if he could meet the claimant later that day to give her the letter of dismissal. Until the morning of 14 September Mr Jackson did not know that the claimant was going to be dismissed. He was not involved in making that decision, but merely in informing the claimant.

**133.** The claimant alleged that she was dismissed because of her race or because she had done a protected act when she raised a grievance. There was no evidence before us to suggest that race played any part in the decision to dismiss. Similarly, there was no evidence to suggest that the fact that the claimant had raised a grievance complaining of discrimination was a factor. We accept Ms Jost's evidence that the reason she dismissed the claimant was because the working relationship between the two of them had broken down irretrievably.

**134.** There was no evidence before us to suggest that Ms Jost was concerned at all that the claimant had raised a grievance alleging discrimination. To the contrary, when the claimant told Ms Jost that she felt she had been discriminated against, Ms Jost was supportive of her. In an email sent to the claimant on 8 July 2022, Ms Jost wrote that "*…we won't tolerate any discrimination or disrespectful behaviour in our company. Mainly, not against you! Matthew, Jon and I are always here to support you!!!"*

**135.** The claimant alleged that Mr Jackson dismissed her because of her race and/or because she had raised a grievance. We find that was not the case. Although Mr Jackson informed the claimant of her dismissal, he did not make the decision to dismiss her.

**136.** There was no evidence whatsoever to suggest that the dismissal of the claimant was linked either to race or to the fact that the claimant had raised a grievance complaining of discrimination.

**137.** The claimant also alleged that Mr Beesley and Ms Jost orchestrated the

claimant's dismissal because she had raised a grievance. There was no evidence whatsoever of Mr Beesley playing any role in the decision to dismiss the claimant. That was taken by Ms Jost and her line manager. The decision was taken in early September because of the breakdown in working relationship between the claimant and Ms Jost and the loss of trust. There was no prior plan to dismiss the claimant – up until the beginning of September Ms Jost was involving the claimant in a highly sensitive redundancy project. These are not the actions of someone planning to dismiss her.

Appeal

**138.** The claimant appealed against the decision to dismiss her. The grounds of her appeal, in summary, were that she did not know why she had been dismissed, and that she did not believe there were grounds for summary dismissal. She also alleged that she had been targeted, discriminated against and victimised for "*simply doing my job*".

**139.** Mr Burridge arranged three separate meetings with the claimant to discuss her appeal. The first took place on 20 October 2022, the second on 3 November and the last one on 10 November. The claimant produced a lengthy statement in support of her appeal, which ran to 22 pages.

**140.** Mr Burridge spent a considerable amount of time investigating and considering the claimant's appeal. He spoke with Julia Jost and asked her a number of questions about the dismissal. Ms Jost produced a detailed written document in answer to the questions raised by Mr Burridge and setting out her reasons for dismissing the claimant.

**141.** On 9 December 2022 Mr Burridge wrote to the claimant informing her of his decision on her appeal. He explained that the appeal had been a lengthy process due to the number of appeal meetings and the considerable number of issues that he had to consider. He did not uphold the claimant's appeal and concluded that:

**1.** Ms Jost's decision to dismiss the claimant was based primarily on the claimant's handling of the Basingstoke redundancy process, and the lack of support provided by the claimant in relation to that process;

**2.** As a result, Ms Jost felt that she could no longer trust the claimant to handle what should have been a straightforward redundancy process;

**3.** The relationship between the two of them was fractured and trust had broken down;

**4.** Ms Jost had not tried to prevent the claimant from raising a grievance. Rather she had tried to set up mediation sessions to resolve the issues the claimant raised; and

**5.** There was no evidence that the claimant had been discriminated against.

## The law

Time limits in discrimination claims

142. Section 123(1) of the Equality Act 2010 provides that complaints of discrimination 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…*
> *(a) Such other period as the employment tribunal thinks just and equitable.*

143. Section 123 (3) states that:

> "*(a) conduct extending over a period is to be treated as done at the end of the period;*
> *(a) Failure to do something is to be treated as occurring when the person in question decided on it.*"

***144.*** In discrimination cases therefore, the Tribunal has to consider whether the respondent did unlawfully discriminate against the claimant and, if so, the dates of the unlawful acts of discrimination. If some of those acts occurred more than three months before the claimant started early conciliation the Tribunal must consider whether there was discriminatory conduct extending over a period of time (i.e., an ongoing act of discrimination) and / or whether it is just and equitable to extend time. Tribunals have a discretion as to whether to extend time but exercising that discretion should still not be the general rule. There is no presumption that the Tribunal should exercise its discretion to extend time: ***Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434.***

145. Factors that are relevant when considering whether to extend time include:

1. The length of and reasons for the delay in presenting the claim;
2. The extent to which the cogency of the evidence is likely to be affected by the delay;
3. The extent to which the respondent cooperated with any requests for information;
4. How quickly the claimant acted when he knew of the facts giving rise to the claim; and
5. The steps taken by the claimant to obtain professional advice once he knew of the possibility of taking action.

146. In ***Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686*** the court held that in order to prove that there was a continuing act of discrimination which extended over a period of time, the claimant has to prove

firstly that the acts of discrimination are linked to each other and secondly that they are evidence of a continuing discriminatory state of affairs.

Direct discrimination

147. Section 13 of the Equality Act provides that:

"*(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"*

148. Section 23 of the Equality Act deals with comparators and states that: "*there must be no material difference between the circumstances relating to each case."* ***Shamoon v chief Constable of the Royal Ulster Constabulary [2003] ICR*** is authority for the principle that it must be the relevant circumstances that must not be materially different between the claimant and the comparators.

149. When determining questions of direct discrimination there are, in essence, three questions that a Tribunal must consider:

a. Was there less favourable treatment?
b. The comparator question; and
c. Was the treatment 'because of ' a protected characteristic?

Harassment

150. Harassment is defined in section 26 of the Equality Act as follows:

"*(1) A person (A) harasses another (B) if –*

*(b) A engages in unwanted conduct related to a relevant protected characteristic, and*
*(c) The conduct has the purpose or effect of –*
*1. Violating B's dignity, or*
*2. Creating an intimidating, hostile, degrading, humiliating or offensive environment for B…*

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

151. In deciding whether the claimant has been harassed contrary to section 26 of the Equality Act, the Tribunal must consider three questions:

1. Was the conduct complained of unwanted:
2. Was it related to race / sex; and
3. Did it have the purpose or effect set out in section 26(1)(b).

*(**Richmond Pharmacology v Dhaliwal [2009] ICR 724**).*

152. The two stage burden of proof set out in section 136 Equality Act (see below) applies equally to claims of harassment. It is for the claimant to establish facts from which the Tribunal could conclude that harassment had taken place.

153. In ***Hartley v Foreign and Commonwealth Office Services [2016] ICR D17*** the EAT held that the words 'related to' have a wide meaning, and that conduct which cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it. The Tribunal should evaluate the evidence in the round, recognising that witnesses will not readily accept that behaviour was related to a protected characteristic. The context in which unwanted conduct takes place is an important factor in deciding whether it is related to a protected characteristic (***Warby v Wunda Group plc EAT 0434/11***).

Victimisation

154. Section 27 of the Equality Act states as follows:

"*(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*

*(b) B does a protected act, or*

*(c) 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…"*

155. Although Tribunals must not make too much of the burden of proof provisions (***Martin v Devonshires Solicitors [2011] ICR 352)***, in a victimisation claim it is for the claimant to establish that she has done a protected act and has suffered a detriment. There needs to be some evidence from which the Tribunal could infer a causal link between the protected act and the detriment, for example, the detriment occurs soon after the protected act, or others were not treated in the same way.

156. It has been suggested by commentators that the three-stage test for establishing victimisation under the pre-Equality Act legislation, endorsed by Baroness Hale in **Derbyshire and ors v St Helens Metropolitan Borough Council and ors [2007] ICR 841** can be adapted for the Equality Act so that it involves the following questions:

1. Did the alleged victimisation arise in any of the prohibited circumstances set out in section 27?
2. If so, did the respondent subject the claimant to the alleged detriment(s)?
3. If so, was the reason the claimant was subjected to the detriments that the claimant had done, or might do, a protected act?

157. It is not necessary in a victimisation case for the employer's actions to be consciously motivated by a protected act (***Nagarajan v London Regional Transport [1999] ICR 877.*** Victimisation may occur if the discriminator was subconsciously affected by the protected act, and it had a 'significant influence' on his or her treatment of the claimant. An employer can be liable for an act of victimisation even where the motives for the treatment of the claimant are benign.

Burden of proof

158. Section 136(2) of the Equality Act 2010 sets out the burden of proof in discrimination claims, with the key provision being the following:

> "*(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…"*

159. There is therefore, in discrimination cases, a two-stage burden of proof (see ***Igen Ltd (formerly Leeds Careers Guidance and others v Wong [2005] ICR 931*** and ***Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205*** which is generally more favourable to claimants, in recognition of the fact that discrimination is often covert and rarely admitted to.

160. In the first stage, the claimant has to prove facts from which the tribunal could decide that discrimination has taken place. If the claimant does this, then the second stage of the burden of proof comes into play and the respondent must prove, on the balance of probabilities, that there was a non-discriminatory reason for the treatment. This two-stage burden applies to all of the types of discrimination complaint made by the claimant.

161. In ***Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913*** the Court of Appeal held that "*there is nothing unfair about requiring that a claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the respondent's act was a discriminatory one) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage."*

162. The Supreme Court has more recently confirmed, in ***Royal Mail Group Ltd v Efobi [2021] ICR 1263****,* that a claimant is required to establish a prima facie case of discrimination in order to satisfy stage one of the burden of proof provisions in section 136 of the Equality Act. So, a claimant must prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination.

163. In ***Glasgow City Council v Zafar [1998] ICR 120***, Lorde Browne-Wilkinson recognised that discriminators 'do not in general advertise their prejudices: indeed, they may not even be aware of them'.

164. The Tribunal has the power to draw inferences of discrimination where appropriate. Inferences must be based on clear findings of fact and can be drawn not just from the details of the claimant's evidence but also from the full factual background to the case.

165. It is not sufficient for a claimant merely to say, 'I was badly treated' or 'I was treated differently'. There must be some link to the protected characteristic or something from which a Tribunal could draw an inference. In ***Madarassy v Nomura International plc [2007] ICR 867*** Lord Justice Mummery commented that: "*the bare facts of a difference in status and a difference in treatment only indicate 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 had committed an unlawful act of discrimination."*

166. In ***Deman v Commission for Equality and Human Rights and others [2010] EWCA Civ 1276***, Lord Justice Sedley adopted the approach set out in ***Madarassy v Nomura*** that 'something more' than a mere finding of less favourable treatment is required before the burden of proof shifts from the claimant to the respondent. He made clear, however that the 'something more' that is needed to shift the burden need not be a great deal. Examples of behaviour that has shifted the burden of proof include a non-response or evasive answer to a statutory questionnaire, or a false explanation for less favourable treatment.

167. Unreasonable behaviour is not, in itself, evidence of discrimination (***Bahl v The Law Society [2004] IRLR 799***) although, in the absence of an alternative explanation, could support an inference of discrimination (***Anya v University of Oxford & anor [2001] ICR 847****).*

168. In harassment cases the shifting burden of proof rules will apply in particular where the conduct complained of is not obviously discriminatory, and the Tribunal has to consider whether the reason for the conduct is related to the protected characteristic relied upon by the claimant – in this case her race.

**Conclusions**

169. The following conclusions are reached on a unanimous basis, having considered carefully the evidence, the submissions of both parties and the relevant legal principles.

Time limits

170. The claimant began Early Conciliation on 22 October 2022, so any complaints about matters occurring on or before 22 July 2022 are out of time unless:

1. They form part of a continuing act of discrimination which continued until after 22 July; or

2. It would be just and equitable to extend time in the circumstances.

171. The first eight allegations of discrimination relate to events in May and June 2022. It is only the allegations about the dismissal (allegations 1.9 and 1.10 in the list of issues identified at the Preliminary Hearing on 29 March 2023) that are in time.

172. We have considered first whether the earlier allegations form part of a continuing act of discrimination. For the reasons that we set out below, we find that they do not. It cannot be said therefore that there was a continuing act of discrimination which continued after 22 July 2022. There was no continuing act of discrimination.

173. We have then gone on to consider whether it would be just and equitable to extend time in the circumstances. The claimant has adduced no evidence as to why she did not present her claim earlier, or why it would be just and equitable to extend time. She did however give evidence that she knew about the time limit applicable to Employment Tribunal claims. The claimant is an experienced HR professional with a knowledge of employment law, of the right to bring a claim in an Employment Tribunal and of the relevant time limits.

174. Time limits go to the jurisdiction of the Tribunal to hear a claim. They cannot be waived, even by consent. The burden of persuading a Tribunal to extend time rests with the claimant. She has not provided any explanation as to why she did not bring her claim earlier and has not discharged the burden of showing either that there was a continuing act of discrimination or that it would be just and equitable to extend time in this case.

175. We therefore find that the allegations relating to May and June 2022 are out of time. The claimant has provided no explanation for the delay in presenting her claim. She was aware of the existence of time limits and of her right to go to Tribunal.

176. This is not a case in which information was concealed by the respondent, or in which new information came to light. The claimant was in possession of the necessary information to present her claim about matters in May and June 2022 within the time limits set out in the Equality Act 2010. Time limits exist for an important public policy reason, namely the need for finality in litigation.

177. For the above reasons we find that it would not be just and equitable to extend time in relation to allegations made more than three months before the claimant started early conciliation.

Direct race discrimination

178. In her further particulars and at the start of the hearing the claimant identified two actual comparators, who she says were treated more favourably than she was: Josh Isaacs and Darren Lodge. She also relied upon a hypothetical comparator.

179. No evidence was adduced by either party in relation to the actual comparators. In his written submissions on behalf of the respondents Mr Dulovic indicated that both the comparators had been dismissed for poor performance having failed performance improvement plans, but there was no evidence to support that assertion.

180. The claimant has not discharged the burden of establishing that the comparators relied upon were appropriate comparators. From Mr Dulovic's submissions it appears that they were in very different situations, in that the issue there was performance rather than a breakdown in working relationship and trust.

181. In reaching our conclusions in this case we have reminded ourselves that discriminators rarely advertise their intentions, and of our power to draw inferences as to the real reason for the claimant's treatment. In this case there are however no primary facts from which we could draw an adverse inference against the respondents.

182. It is clear that the claimant received considerable support both from her line manager and from the senior management team on site in Bradford. It is also clear that the claimant's brother, who is of the same race as the claimant is thriving in his employment with the First Respondent. There was no evidence before us to suggest any underlying racial prejudice.

*Allegation One: May/June 2022 – alleged exclusion from the recruitment process for Ria Crabbe's replacement*

183. We find on the facts before us that the claimant was involved in the recruitment process. She sat in on two interviews, was copied into relevant emails about the recruitment, and was asked to draw up a contract of employment for Ms Gohar and carry out an induction. She was not excluded from the process.

184. It was not Ms Crabbe's decision that recruitment should be led by Ms Pavlovic – that was Ms Jost's decision. There is no evidence whatsoever to suggest that the decisions made in relation to the recruitment process were either because of or related to race.

185. This allegation therefore is not well founded.

*Allegation Two: May/June 2022 – alleged jokes by Ria Crabbe about the claimant's English*

186. We find that Ms Crabbe did not make any jokes about the claimant's accent, her use of English or her origins. The claimant's position in relation to this allegation has changed during the course of the litigation and was inconsistent. At the hearing she could only recall one alleged comment that she said she overheard Ria Crabbe making.

187. Her evidence in relation to this allegation is not persuasive, and she has not got over the first stage in the burden of proof test. This allegation is not well founded.

*Allegation Three: 15 June 2022 – alleged comment by Craig Pearson about rubbing cream*

188. We find that Mr Pearson did make a comment about Mr Iqbal rubbing cream into the claimant's leg on 15 June 2022 and we also find that this could be related to sex. There was no evidence before us to suggest that Mr Pearson's purpose, when making the comment, was to violate the claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for her. He was, in our view, attempting to make a joke, albeit a misplaced joke that should not have been made.

189. We also find, on the evidence before us, that the comment did not have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. It was a one off, isolated incident, and whereas such incidents can amount to harassment, we find that in this case it did not. The claimant laughed the comment off at the time and continued with the conversation – it was Mr Pearson who walked away because he was uncomfortable when the conversation then turned to drug taking.

190. In any event, this incident occurred in June 2022, more than three months before the claimant began early conciliation. It did not form part of a continuing act of discrimination and, for the reasons set out above, it would not be just and equitable to extend time.

191. This allegation is not well founded.

*Allegation Four: 16 June 2022 – alleged comments by Craig Pearson to the claimant and colleagues that the claimant was a drug addict*

192. We find for the reasons set out earlier in this judgment that Mr Pearson did not make these comments. This allegation therefore is not well founded.

*Allegation Five: 16 June 2022 – that Ms Padgett said mental health support needed to be provided by 'an English born and not a foreigner'*

193. We find that Ms Padgett did not in fact make that comment, and the claimant's notes of the meeting on that day do not even suggest that she did. Moreover, this

issue was not raised in the grievance.

194. We find that Ms Padgett did make a comment about the differences in approach to mental health in the UK and Germany, but that did not amount to less favourable treatment of the claimant because of race, nor was it harassment related to race. This allegation is therefore not well founded.

195. In any event, this allegation is an isolated one which is out of time.

*Allegation Six: 16 June 2022 – alleged comment by Craig Pearson that "nobody messes with Michelle / Ms Padgett"*

196. We find that Mr Pearson did make this comment a few days before the meeting on 16 June. It was a comment that had been made to him previously by Ms Padgett. Craig Pearson is white and the comment had been made to him. There was no evidence before us to suggest that the repetition of a comment that had been made to a white employee by that white employee was linked in any way to race.

197. This allegation is therefore not well founded.

*Allegation Seven: 16 June 2022 – that Craig Pearson laughed about the comment*

198. Mr Pearson accepted that, when making the comment about no one messing with Michelle, he had laughed. This was because he made the comment light heartedly. The laughter was not less favourable treatment of the claimant because of race, nor was it harassment related to race. His behaviour on that day had nothing whatsoever to do with race.

199. This allegation is not well founded.

*Allegation eight: 16 June, Ms Jost / Mr Jackson did nothing about Ms Padgett's comment*

200. The evidence before us indicates that far from doing nothing about Ms Padgett's alleged comment, Ms Jost and Mr Jackson took the claimant's report of it very seriously and at face value and provided considerable support to the claimant.

201. This allegation is not well founded.

*Allegation nine: 14 September 2022 Mr Jackson dismissed the claimant because of race and/or because of the protected act in the grievance*

202. Mr Jackson did not take the decision to dismiss the claimant. That decision was taken by Ms Jost, and merely communicated to the claimant by Mr Jackson. The decision to dismiss the claimant was taken because of the breakdown in the relationship between Ms Jost and the claimant, for which in our view, the claimant was largely responsible.

203. There was no evidence whatsoever to suggest that Ms Jost's decision to dismiss the claimant was motivated either consciously or subconsciously by race or by the

fact that the claimant had, during the grievance meeting on 2 August, made an allegation of discrimination. On the contrary, there was ample evidence before us of a deterioration in the relationship between Ms Jost and the claimant in the weeks leading up to the claimant's dismissal, and in particular of a deterioration in the claimant's attitude towards Ms Jost.

204. Similarly, there was no evidence that when delivering the news of the dismissal on 14 September Mr Jackson was motivated by race. It was clear from his evidence to the Tribunal that he thought highly of the claimant and had previously had a good working relationship with her, spending time regularly chatting to her when they were both in the office. The reason he told the claimant that she was being dismissed was because Ms Jost asked him to. It was nothing to do with race.

205. This allegation is therefore not well founded.

*Allegation ten: on or before 14 September 2022 Mr Beesley and/or Ms Jost orchestrated the claimant's dismissal because of the protected act*

206. We find on the evidence before us that Mr Beesley had no involvement whatsoever in the decision to dismiss the claimant. That was taken by Ms Jost for the reasons set out above. The dismissal was nothing to do with the fact that the claimant did a protected act.

207. This allegation is therefore also not well founded.

Employment Judge Ayre

Date: 23rd November 2023

JUDGMENT SENT TO THE PARTIES ON

Date: 24th November 2023

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FOR THE TRIBUNAL OFFICE

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