EMPLOYMENT TRIBUNALS

Claimant: Miss. V Mbida

First Respondent: Ms. Hannah Peachey-Thacker
Second Respondent: Neptune Payment Solutions Ltd
Third Respondent: Bella & Frank Ltd

Heard at: London South (by video)

On: 22 November 2023

Before: Employment Judge Cawthray

Representation

Claimant: In person, not legally qualified
First Respondent: Ms. Hannah Peachey-Thacker, not legally qualified
Second Respondent: Did not attend
Third Respondent: Ms. Hannah Peachey-Thacker, not legally qualified

RESERVED JUDGMENT

1. The complaint of unfair dismissal is well-founded. The Claimant was unfairly dismissed.

2. The complaint of direct race discrimination is not well founded and is dismissed.

3. The complaint of harassment related to race is not well founded and is dismissed.

REASONS

Evidence and Procedure

1. The claim was presented on 5 September 2022 following ACAS Early Conciliation taking place between 28 June and 8 August 2022. A Case Management Preliminary Hearing took place on 15 August 2023 before Employment Judge Clarke.

2. None of the respondents had filed a response in time. A response was received from the First and/or Third Respondent approximately 3 months

out of time. An application was made by the respondents for an extension of time, but this was refused. The Tribunal confirmed in a letter dated 11 May 2023 that no judgment had been issued despite the lack of an accepted response as it was not appropriate to do so under Rule 21 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 in a case for unfair dismissal and race discrimination.

3. Accordingly, as set out by Employment Judge Clarke in the Order dated 15 August 2023, the claim is undefended and the respondents will only be entitled to participate in the hearing to the extent permitted by me, the Employment Judge hearing claim.

4. The Claimant had provided a number of documents via email attachments but had produced a bundle and a witness statement. I explained I would not have time to go through the attachments and read all the documents and bundle and I asked the Claimant what the documents she wished me to read were, and she said that it was the documents referenced in her witness statement.

5. Ms. Peachey-Thacker had not provided any documentation, but stated that she wished to correct some of the information about titles, dates and pay slips. In the context of this claim being undefended, the lack of provision of any documentation in advance by any respondent and the hearing being conducted in accordance with Rule 21 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, I did not permit Ms. Peachey-Thacker to participate.

6. I reminded the Claimant of the issues in the claim, explained what she needed to demonstrate and I explained that I would read the witness statement and the documents referenced within it. The Claimant swore an oath, was given an opportunity to give any further evidence and I asked the Claimant some clarification questions. I also gave the Claimant time to prepare submissions, and she summed up her case orally, again after being reminded of the issues.

7. The hearing today only considered liability.

The Issues

8. The issues as set out in the Case Management Order and Summary are provided below. I discussed the issues with the Claimant, explaining that I would need to make findings of fact, apply the law and reach a conclusion against each issue.

Employer Identity

9. Who was the Claimant's employer at the date of dismissal?

10. Who was the Claimant's employer at the time of the various acts relied on in respect of the claims for direct race discrimination and harassment on grounds of race?

Time limits

11. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 29th March 2022 may not have been brought in time.

12. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

13. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

14. If not, was there conduct extending over a period?

15. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

16. If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

17. The Tribunal will decide:

18. Why were the complaints not made to the Tribunal in time?

19. In any event, is it just and equitable in all the circumstances to extend time?

Unfair dismissal

20. Was the Claimant dismissed?

21. What was the reason or principal reason for dismissal? The respondent told the Claimant that the reason was redundancy.

22. If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. The Tribunal will usually decide, in particular, whether:
    -The respondent adequately warned and consulted the Claimant;
    -The respondent adopted a reasonable selection decision, including its approach to a selection pool;
    -The respondent took reasonable steps to find the Claimant suitable alternative employment;
    -Dismissal was within the range of reasonable responses.

Direct race discrimination (Equality Act 2010 section 13)

23. The Claimant identifies as identifies as Black, African, French and non-British. She compares herself with people who are British and/or white British.

24. Did the respondent/s do the following things:

(1) The Claimant was hired on a fixed term contract and at lower remuneration than her predecessor, James Buckley-Thorp, despite undertaking the same role as him and additional duties. At the hearing today the Claimant clarified that she was engaged in a fixed term contract continuously throughout her employment.
(2) The Claimant's employer did not follow the correct procedure for a redundancy dismissal and failed to fairly select, consult, inform, or consider alternatives to redundancy
(3) The Claimant's employer did not afford her an appeal against her dismissal.
(4) On 23rd May 2022, 24th May 2022 and 22nd June 2022 the Claimant received intimidating calls via whatsapp from Roger Butland on behalf of her employer.
(5) During the call on 22nd June 2022 between the Claimant, Roger Butland and an unidentified other person, the Claimant she was questioned intently how she knew about various matters that she raised.
(6) The call on 22nd June 2022 was recorded without her consent.
(7) A purported transcript of the call on 22nd June 2022 subsequently provided to the Claimant by her employer was inaccurate.

25. Was that less favourable treatment?

26. The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated. The Claimant says she was treated worse than James Buckley-Thorp. In the alternative, the Claimant relies on a hypothetical white British comparator if James Buckley-Thorp's circumstances were materially different to the Claimant's.

27. If so, was it because of race?

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

<u>Harassment related to race (Equality Act 2010 section 26)</u>

29. Did the respondent/s do the following things:

30. The Claimant relies on the conduct described at paragraph 24(1) – (7) above.

31. If so, was that unwanted conduct?

32. Did it relate to race?

33. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?6

34. 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.

Facts

Background to the claim

35. Early conciliation for each of the respondents started on 28th June 2022 and ended on 8th August 2022. The claim form was presented on 5th September 2022.

36. No response was submitted on time, but it was determined that it was not appropriate for a Rule 21 Judgment to be issued.

Claimant's employment

37. The Claimant started employment as a Brand Manager with a company called Bella & Frank Limited on 27th August 2019.

38. The Claimant's main point of contact was the First Respondent - Hannah Peachey-Thacker, Director. Ms. Peachey-Thacker's family own a number of businesses. Ms. Peachey-Thacker was at all material times a director of the Third Respondent, a company previously named Peachey Boo Ltd.

39. Ms. Peachey-Thacker gave the Claimant intermittent praise.

40. She was engaged on a six-month fixed term contract, with a view to extending by a further six months. The Claimant signed the contract on 27 August 2019.

41. The Claimant was issued a further six-month contract on 27 February 2020, which she signed on 27 February 2020.

42. The Claimant was issued a 12-month contract on 28 July 2020, which referenced a view to extend for a further 12 months. The Claimant signed the contract on 16 August 2020.

43. On 22 June 2021 the Claimant messaged Ms. Peachey-Thacker stating she had been informed by a third party that there was a proposal to strike off Bella & Frank on companies house. Ms. Peachey-Thacker replied the same day stating *"Yes don't worry that's been sort" "Was an accounting cock up".*

44. Bella & Frank Limited – company number 11716498 – was, according to the Final Gazette Notice, struck off on 20 July 2021 and dissolved on 27 July 2021.

45. The Claimant was issued with a 12-month contract on 28 July 2021. The contract was Bella & Frank Limited, and it is noted this was issued to the Claimant the day after the company was dissolved. The Claimant signed it on 6 August 2021.

46. The Claimant continued to work and undertake her role.

47. All the Claimant's contracts of employment were with Bella & Frank Limited, registered office 4th Floor Park Gate, 161 – 163 Preston Road, Brighton BN1 6AF - company number 11716498.

48. On 18 August 2021 the Claimant was sent an email from Nestpensions informing her that she was no longer contributing to Nest through her employer. Following this email the Claimant contacted Roger Butland. She understood him to be a family friend that assisted Ms. Peachey-Thacker's family with a number of businesses. The Claimant queried the pension matter and asked if this related to the dissolution of Bella & Frank, and asked for information regarding the situation with Bella & Frank.

49. Mr. Butland replied the following day, 19 August 2021. In short, he apologized for the lack of communication regarding the dissolution of Bella & Frank and said it was an error at Companies House that they were seeking to rectify. He stated he did not envisage the company being reinstated for a number of weeks but reassured the Claimant she would be paid and receive pension contributions as normal via a sister company – Neptune Payment Solutions Ltd until Bella & Frank was fully functional again. The email also made reference to transferring direct debits etc to Peacheyboo.

50. Frank & Bella effectively continued operating via Peacheyboo Ltd.

51. On 26 November 2021 Mr. Butland messaged the Claimant and stated a meeting was needed with Ms. Peachey-Thacker and her mother to discuss the merits of re-opening Bella & Frank or how best to run Peacheyboo trading as Bella & Frank.

52. On 31 January 2022 Ms. Peachey-Thacker messaged the Claimant stating the company, which I considered to mean to refer to Bella & Frank, would be reinstated. On the same day she said *"I will sort your contract this week with peacheyboo for the time being as you were TUPED across".* The Claimant did not, and still does not, understand what TUPED means. Around this date there were several messages where the Claimant was seeking to obtain information about the business situation.

53. On 5th April 2022 (not a typing error) the Claimant found an unstamped letter on her door step. The letter was from Sophie Goudman-Peachey. Ms. Goudman-Peachey is Ms. Peachey-Thacker's sister. The Claimant has never met Ms. Goudman-Peachey and has never corresponded with her. The Claimant photographed the letter and sent the photo to Ms. Peachey-Thacker. She did not receive a reply.

54. The letter stated:
"As you are aware, Bella & Frank Limited has formally transferred the services Bella & Frank Limited in which you were employed to Neptune Payment Solutions Ltd with effect from 26 July 2021. I am writing to

confirm that your employment transferred from Bella & Frank to Neptune Payment Solutions Ltd, with effect from that date.
As the transfer of your employment to Neptune Payment Solutions Ltd is subject to TUPE, your period of continuous employment with Bella & Frank Limited counts as part of your continuous period of employment with Neptune Payment Solutions Ltd your terms of employment also remain exactly the same."

55. On 19 April 2022 Ms. Peachey-Thacker emailed the Claimant, and within the email stated:
"It is with deep regret we are going to have to make your role redundant… With continued uncertainty over our financial situation with probate sadly taking forever, and with the ongoing HMRC disputes against my Dad, and in turn the estate, we just cannot continue to run the company as we used to, and continue to employ staff. We are hoping in a few months/a-years time we are in a better situation and with the partnerships we have in place, we are able to rely on them financially to build the business back up again. We would like to look at potentially bringing you back into the business in time if feasible, into a different role. I am so sorry about this but we really have no option and have tried to look at every option possible with the accountants.
I know this will come as difficult news so please know that I do understand and I'm sorry that this has had to happen, but your role is just no longer there.
I will ask Roger to help us sort out your notice, redundancy and any holiday owed. Please let me know if you have any questions."

56. There were no concerns raised about the Claimant's performance at any time during the Claimant's employment, and she was thanked by Ms. Peachey-Thacker for her work and loyalty.

57. The Claimant emailed Ms. Peachey-Thacker in response, noting she felt it would have been fair to be consulted. The Claimant continued to work as usual.

58. The Claimant did not hear further until 5 May 2022, when Ms. Peachey-Thacker emailed the Claimant asking her to put together a handover document. The Claimant replied stating she had not heard from Mr. Butland.

59. On 23 May 2023 Mr. Butland sent the Claimant a text message asking him to call her regarding her final salary payment and attempted to call the Claimant. The Claimant spoke with Mr. Butland and said that she was confused and concerned about the process. Mr. Butland told the Claimant that she would receive her final salary in five days' time. The Claimant describes Mr. Butland as agitated and irascible during the call. The Claimant ended the call and Mr. Butland tried to call her three more times, but she did not answer. The Claimant replied asking him to communicate via email to avoid any further miscommunication. The Claimant did not feel comfortable to speak with Mr. Butland as she was uncertain of the situation. The messages within the Bundle were polite and do not indicate any conversation to have been acrimonious.

60. On 24 May 2023 Ms. Peachey-Thacker emailed the Claimant. She acknowledged her email dated 19 April 2022 was ambiguous in relation to providing a termination date and stated that Mr. Butland was working on a date of 31 May 2022 to allow a one-month notice period. Ms. Peachey-Thacker stated termination would be moved back to 24 June 2022 and attached a letter. The email also stated *"Once again I regret that it has been necessary to terminate your employment since it has become no longer economically viable for the company to continue, on the advice of our accountants the company will now commence wind-down activities".*

61. The letter attached was dated 26 April 2022, but this had not been provided to the Claimant until 24 May 2022. The letter is headed as being from Peacheyboo Limited and is written by Ms. Peachey-Thacker in her capacity as Director of Peacheyboo Limited. It refers to a period of consultation. It also states: *" As Peacheyboo Limited, is unable to offer you any suitable alternative employment, we are hereby giving you notice that your employment with the Company will* ***Terminate on 24 June 2022****… You are entitled to 1 months' notice to end your employment with Peacheyboo Limited based on your contract of employment."* The letter refers holiday and a statutory redundancy payment, it also references a right to appeal.

62. On 7 June 2022 the Claimant emailed Ms. Peachey-Thacker and Mr. Butland stating she was willing to appeal as she felt she was being unfairly dismissed and that a fair process had not been followed.

63. Subsequently the Claimant and Ms. Peachey-Thacker exchanged without prejudice emails.

64. On 22 June 2022 the Claimant met with Ms. Peachey-Thacker, Ms. Lesley Goudman-Peachey and Mr. Butland via Zoom. Only Mr. Butland engaged with the Claimant, the other attendees had their cameras turned off. Mr. Butland read out a written text and the Claimant felt she was not permitted to speak and that Mr. Butland spoke in a very patronizing and authoritative and direct manner. At the meeting there was some discussion about settlement, although on the evidence provided I am unable to make clear findings on what was said and what was discussed at the meeting but it appears there was settlement discussions. This was not an appeal meeting.

65. On 24 June 2022 the Claimant emailed Mr. Butland and Ms. Peachey-Thacker and references a transcript and sets out how she does not agree with the content and did not give permission for the meeting to be recorded. The Claimant sets out that she considered the call to be a without prejudice discussion.

66. The Claimant's employment ended on 24 June 2022.

Pay slips and payments

67. The Claimant received her pay directly into her bank account by bank transfer. The Claimant's payslips and bank statements as in the Bundle show the following, as summarised below:

From September 2019 - Bella & Frank Ltd was named as the payer.

23 July 2021 - payment from Bella & Frank Limited - £2,418.40
24 August 2021 - payment from Neptune Payment Solutions Limited - £2,418.20
24 September 2021 - payment from Neptune Payment Solutions Limited - £2,418.20
25 October 2021 - payment from Peacheyboo Limited - £2,418.20
25 November 2021 - payment from Peacheyboo Limited - £2,418.40
23 December 2021 - payment from Peacheyboo Limited - £2,342.02
25 January 2022 - payment from Peacheyboo Limited - £2,418.20
25 February 2022 - payment from Peacheyboo Limited - £2,418.20
25 March 2022 – payment from Peacheyboo Limited - £2,418.40
25 April 2022 – payment from Peacheyboo Limited - £2,390.95
25 May 2022 – payment from Bella & Frank Limited - £2,390.75
27 June 2022 – payment from Bella & Frank Limited - £5,257.50

The Claimant did not receive P60s for 2020, 2021 and 2022.

Company details

68. Neptune Payment Solutions Ltd – company number 06991905 – registered office – 4th Floor, Park Gate 161 – 163 Preston Road, Brighton, East Sussex BN1 6AF – directors – Sophie Goudman-Peachy and Gianni Crucini. Previously Peter Peachey was a director also.

69. Bella & Frank Limited – company number 11716498 - registered office – 4th Floor, Park Gate Preston Road, Brighton, East Sussex BN1 6AF – directors Lesley Goudman-Peachey and Ms. Peachey-Thacker. This company, the Claimant's original employer, was struck off and dissolved 20 July 2021 and 27 July 2021 respectively.

70. Bella & Frank Limited – company number 09274848 - registered office – 4th Floor, Park Gate 161 – 163 Preston Road, Brighton, East Sussex BN1 6AF – directors Lesley Goudman-Peachey and Ms. Peachey-Thacker. Incorporated on 22 October 2014. Previous company name Peacheyboo Limited – from 22 October 2014 to 29 April 2022.

71. It is the case that Peacheyboo Limited changed its name to Bella and Frank Ltd on 29 April 2022, a few days after Ms. Peachey-Thacker emailed the Claimant telling her that her role was redundant.

72. Companies house shows the Directors of Neptune Payment Solutions to be different to those of PeacheyBoo Ltd/Bella & Frank Ltd, albeit the directors of each share some of the same family names.

Comparator

73. Within the Bundle there is a Consulting Agreement between Onestopmoneymanager Ltd and BT Enterprises Ltd dated 15 November 2018. The document sets out the services to be provided. The agreement is signed by James Buckley-Thorp on behalf of BT Enterprises Ltd. Onestopmoneymanager Ltd's registered address was ADD and the agreement was signed by Lesley The agreement was for a six month duration and the retainer fees were £2,400 per week and £9,600 per month. Onestopmoneymanager Ltd was put into members voluntary liquidation on 23 October 2020.

Law

74. Section 95 (1) Employment Rights Act 1996 (ERA) sets out when an employee is dismissed:

95 Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—

(a) the employer gives notice to the employee to terminate his contract of employment, and

(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

75. Section 98 ERA states:

98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(ba). . . . . .
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
(3) In subsection (2)(a)—
(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

76. Under section 98(1) ERA, the potentially fair reasons for dismissal include redundancy.

77. In *Williams v Compair Maxam Ltd [1982] ICR 156,* the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. The EAT stated that it was not for the tribunal to impose its own standards and decide whether the employer should have acted differently. Instead, it should ask whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The factors which a reasonable employer might be expected to consider were:

    - Whether the selection criteria were objectively chosen and fairly applied.
    - Whether employees were warned and consulted about the redundancy

- Whether, if there was a union, the union's view was sought
- Whether any alternative work was available

78. In *Polkey v AE Dayton Services Ltd 1988 ICR 142*, their lordships decided that a failure to follow correct procedures was likely to make the ensuing dismissal unfair unless the employer could reasonably have concluded that doing so would be futile. This meant that the employer would not normally act reasonably unless he warns and consults any employees affected, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment. Further, on the issue of quantum, the decision holds that whether procedural irregularities actually made any difference to the decision can be taken into account when calculating compensation.

79. Section 139 ERA defines redundancy as set out below:

139 Redundancy

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

(3) For the purposes of subsection (1) the activities carried on by a local authority with respect to the schools maintained by it, and the activities carried on by the governing bodies of those schools, shall be treated as one business (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

(4) Where—

(a) the contract under which a person is employed is treated by section 136(5) as terminated by his employer by reason of an act or event, and

(b) the employee's contract is not renewed and he is not re-engaged under a new contract of employment,

he shall be taken for the purposes of this Act to be dismissed by reason of redundancy if the circumstances in which his contract is not renewed, and he is not re-engaged, are wholly or mainly attributable to either of the facts stated in paragraphs (a) and (b) of subsection (1).
(5) In its application to a case within subsection (4), paragraph (a)(i) of subsection (1) has effect as if the reference in that subsection to the employer included a reference to any person to whom, in consequence of the act or event, power to dispose of the business has passed.
(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.
(*7) In subsection (3) " local authority " has the meaning given by section 579(1) of the Education Act 1996.*

Section 13 Equality Act 2010

13 Direct discrimination
(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.
(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
(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.
(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.
(6) If the protected characteristic is sex—
(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;
(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.
(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).
(8) This section is subject to sections 17(6) and 18(7).

Section 26 Equality Act 2010

26 Harassment
(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
(2) A also harasses B if—
(a)A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).
(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
(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.
(5) The relevant protected characteristics are—

- *age;*
- *disability;*
- *gender reassignment;*
- *race;*
- *religion or belief;*
- *sex;*
- *sexual orientation.*

80. **Section 36 – Equality Act 2010**

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

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

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

(a) an employment tribunal;

(b) the Asylum and Immigration Tribunal;

(c) the Special Immigration Appeals Commission;

(d) the First-tier Tribunal;

(e) the Education Tribunal for Wales;

(f) the First-tier Tribunal for Scotland Health and Education Chamber.

81. Under section 13(1) of the Equality Act 2010 direct discrimination takes place where a person treats the Claimant less favourably because of race than that person treats or would treat others.

82. Under section 23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

83. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the Claimant was treated as she was. (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285).*

84. Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out. (*Nagarajan v London Regional Transport [1999] IRLR 572, HL*).

85. The case law recognises that very little discrimination today is overt or even deliberate. Witnesses can even be unconsciously prejudiced.

86. There are two stages to the burden of proof test as set out in section 136 of the Equality Act 2010.

87. Stage 1: There must be primary facts from which the tribunal could decide – in the absence of any other explanation, that discrimination took place. The burden of proof is on the Claimant (*Ayodele v (1) Citylink Ltd (2) Napier [2018] IRLR 114, CA; Royal Mail Group Ltd v Efobi [2021] UKSC 22*). This is sometimes referred to as proving a prima facie case. If this happens, the burden of proof shifts to the respondent.

88. Stage 2: The respondent must then prove that it did not discriminate against the Claimant.

89. In other words, where the Claimant has proved facts from which conclusions could be drawn that the respondent has treated the Claimant less favourably on the ground of race, then the burden of proof moves to the respondent. It is then for the respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act.

90. The burden of proof provisions requires careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another. (*Hewage v Grampian Health Board [2012] IRLR 870, SC.)*

91. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258.* Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

92. The Court of Appeal in *Madarassy*, a case brought under the then Sex Discrimination Act 1975, states: *'The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts 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.*

93. A false explanation for the less favourable treatment added to a difference in treatment and a difference in sex can constitute the 'something more' required to shift the burden of proof*. (The Solicitors Regulation Authority v Mitchell UKEAT/0497/12.)*

94. In *Glasgow City Council v Zafar 1998 ICR 120, HL*, Lord Browne-Wilkinson said that in the context of a discrimination claim *'the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably".'* He approved the words of Lord Morison, who delivered the judgment of the Court of Session, that *'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances'.* It follows that mere unreasonableness may not be enough to found an inference of discrimination. Unfair treatment itself is not discriminatory.

95. In *Amnesty International v Ahmed UKEAT/0447/08/ZT* the EAT stated, paragraph 36, *"…the ultimate question – is – necessarily – what was the ground of the treatment complained of (or – if you prefer – the reason why it occurred)…".*

96. Evidence of discriminatory conduct and attitudes in an organization may be probative in deciding whether alleged discrimination occurred: *Chief Constable of Greater Manchester Police v Bailey [2017] EWCA Civ 425.*

97. Although harassment is similar to direct discrimination it covers actions "related to" a protected characteristic, which goes further than "because of".

98. When considering whether a Claimant's dignity has been violated or an intimidating, hostile, degrading humiliating or offensive environment has been created, it must be kept in mind that it is not enough that the conduct was simply upsetting.

99. When considering effect it must be considered whether it was reasonable for the conduct to have had the effect taking in to account both a Claimant's perception and the overall circumstances

Conclusions

100. I have applied the relevant law to the findings of fact and reached the conclusions set out below.

Issue 1 - Employer Identity

101. The first issues to determine were:
   a) Who was the Claimant's employer at the date of dismissal? And;
   b) Who was the Claimant's employer at the time of the various acts relied on in respect of the claims for direct race discrimination and harassment on grounds of race?

102. The findings of fact set out above demonstrate a confusing picture in which the Claimant was not given any clear information about her employer from July 2021 onwards.

103. I conclude that the Claimant was employed by Bella & Frank Limited – company number 11716498 - from the start of her employment until the company was struck off and dissolved, 20 July 2021 and 27 July 2021 respectively.

104. The Claimant was told that the striking off and dissolution was a mistake and that steps were being taken to reinstate that company.

105. The Claimant continued to do her role. She was undertaking Bella & Frank work via Peachyboo Ltd. She did the work she was told to do. The information given to the Claimant by Ms. Peachey-Thacker, Mr. Butland and Ms. Goudman-Peachey was wholly inadequate.

106. There was conflicting information given to the Claimant. On the one had Ms. Peachey-Thacker references, in passing in a text message, a transfer to Peacheyboo Ltd in January 2022 and the correspondence regarding her termination references Peachyboo Ltd.

107. On the other hand, Mr. Butland told the Claimant she would be paid via a sister company Neptune Payment Solutions Ltd whilst seeking to resolve matters and Ms. Goudman-Thacker wrote to the Claimant stating her employment transferred via TUPE to Neptune Payment Solutions Ltd on 26 July 2021. However, it is significant that this letter was hand delivered on 5 April 2022, many months after the dissolution of Bella & Frank Limited and shortly before her employment was ended.

108. From August 2021, following the dissolution of Bella & Frank Limited – company number 11716498 – the Claimant was paid by Neptune Payment Solutions Ltd in August 2021 and September 2021 but from October 2021 until April 2022 she was paid by Peachyboo Ltd.

109. It is notable that Peachyboo Ltd changed its name on 29 April 2022 to Bella & Frank Limited – and that in May and July 2022 the payments made to the Claimant were from Bella & Frank Ltd (previously named Peachyboo Ltd).

110. On the findings of fact set out above, I do not consider the Claimant's employment transferred to Neptune Payment Solutions Ltd at any time despite the undated letter received by the Claimant on 5 April 2022.

111. I conclude that following the dissolution of Bella & Frank Limited – company number 11716498 in July 2021 the Claimant's employment was transferred to Peachboo Ltd, and she continued to undertake the work she had for Bella & Frank Limited prior to the dissolution.

112. I conclude that the payments made by Neptune Payment Solutions Ltd do not infer any transfer in employment to that company, but that company was simply used as a vehicle to pay the Claimant's wages for a short period when in reality Peacheyboo Ltd took over the operations of Bella & Frank Limited.

113. In summary I conclude the Claimant was employed as set out below:

114. By Bella & Frank Limited – company number 11716498 - from the start of her employment until the company was struck off and dissolved, 20 July 2021 and 27 July 2021 respectively.

115. By Peachyboo Limited – now named Bella & Frank Ltd - company number 09274848 - from 26 July 2021 until the termination of her employment on 24 June 2022.

Issue 2 - Time limits

116. The next issue for determination in the list of issues relates to time.

117. Although I reminded the Claimant of this, this was not addressed in evidence or submissions and I have little information.

118. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 29th March 2022 may not have been brought in time. The potentially out of date allegation was whether the Claimant was hired on a fixed term contract and at lower remuneration than her predecessor, James Buckley-Thorp, despite undertaking the same role as him and additional duties. At the outset of the hearing the Claimant clarified that her allegation is this this was a discriminatory act that lasted her entire employment. It is noted that events relating to her last date of employment are in time.

Issue 3 - Unfair dismissal

119. The next substantive issue for consideration was the whether or not the Claimant was fairly dismissed, and this involves consideration of a number of issues.

120. Firstly, I conclude that the Claimant was dismissed. The respondent/s told the Claimant that the reason was redundancy. Having reviewed the contemporaneous emails and the information given to the Claimant at the time I consider the reason for dismissal was redundancy, namely, that the respondents wanted to reduce expenditure and not employ staff to perform Bella & Frank work. The work was scaled back and changes to company structures were made, seemingly in an attempt to save costs. I consider there to be a reduction in work falling under section 139(1) of the Employment Rights Act 1996.

121. I must next consider if the employer acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant.

122. Dealing firstly with whether the employer adequately warned and consulted the Claimant.

123. I do not consider that were was any adequate warning or consultation.

124. Although there was vague reference to financial difficulties made by Ms. Peachey-Thacker in her email in April 2022 the Claimant was not warned that she was at risk of redundancy. Despite requesting clarity about her situation, she was given no clear information about the changes following the dissolution of Bella & Frank Limited. She was not warned that her role was at risk, but rather on 19 April 2022 she was simply told, via email, that she was being made redundant.

125. No consultation meetings took place.

126. The next matter to consider is whether the employer adopted a reasonable selection decision, including its approach to a selection pool.

127. In the context of this hearing, noting no response has been submitted, and on the evidence available it is difficult to reach clear conclusions in this respect.

128. There is no evidence that the respondent took any steps to find the Claimant suitable alternative employment. Although Ms. Peachey-Thacker's family appear to be involved in a number of businesses, it is not clear what other roles may have been available in Peacheyboo Ltd (renamed as Bella & Frank) at the point of the Claimant's dismissal.

129. Considering all of the above, I conclude that a fair dismissal process did not take place. There was no warning, no consultation and no proper appeal.

Direct race discrimination (Equality Act 2010 section 13)

130. The Claimant identifies as identifies as Black, African, French and non-British. She compares herself with people who are British and/or white British.

131. As set out in the List of Issues above, the Claimant has made seven allegations of direct race discrimination. I have considered each allegation separately and together as a whole.

132. I considered whether the Claimant had discharged the burden on her to show evidence from which the Tribunal could reasonably conclude that the reason for the alleged treatment was 'because of' race.

133. In general, I concluded that there was no evidence, or anything or infer, that the Claimant's race, had anything to do with the respondents treatment of the claimant.

134. I concluded that there was no evidence sufficient to discharge the burden on the Claimant. There was no evidence from which I could reasonably conclude that race played any part in the reason for the seven allegations. There is no prima facie case of race discrimination.

135. The Claimant failed to show that the respondent treated her less favorably than any actual or hypothetical comparator.

136. There was simply no evidence that the respondents would have treated someone of a different race any differently.

137. Accordingly, the direct race discrimination complaint in relation to dismissal fails.

138. For completeness, in addition to my general conclusions above, I have set out conclusions in relation to each allegation as far as I was able on the evidence presented to me.

(1) The Claimant was hired on a fixed term contract and at lower remuneration than her predecessor, James Buckley-Thorp, despite undertaking the same role as him and additional duties.

139. It is noted that the Claimant had provided a consultancy agreement as set out in paragraph 73 above. The Claimant summarised her role and duties in her witness statement and sets out her views on the role of James Buckley-Thorp. However, there was no other evidence put forward by the claimant in this respect.

140. Even taking into account the Claimant's comments in her witness statement, James Buckley-Thorp, there is no clear evidence that can be relied on to support a conclusion that that the Claimant had been undertaking the same role or duties or that she was employed on a fixed term contract and at a lower rate of pay than her predecessor because of her race.

(2) The Claimant's employer did not follow the correct procedure for a redundancy dismissal and failed to fairly select, consult, inform, or consider alternatives to redundancy

141. As set out in my conclusions relating to the unfair dismissal complaint above, there was no proper redundancy procedure. However, there is no evidence to conclude that there was any link at all to the Claimant's race.

The findings of fact demonstrate a poorly run set of businesses, where there is a lack of regard and/or awareness for proper process and administration. But this does not indicate or infer discrimination, indeed I have kept in mind that somebody can be unfairly treated, but that such unfair treatment may not be discriminatory. I consider the poor treatment of the Claimant to be due to poor business management.

(3) The Claimant's employer did not afford her an appeal against her dismissal.

142. Again, as per my conclusions at paragraph 141 above, the findings of fact demonstrate there was no proper redundancy procedure. However, there is no evidence to conclude that there was any link at all to the Claimant's race. I do not consider the reason why she was not given an appeal was because of her race.

(4) On 23rd May 2022, 24th May 2022 and 22nd June 2022 the Claimant received intimidating calls via whatsapp from Roger Butland on behalf of her employer.

143. My findings of fact in relation to the calls on 23 May 2022 are set out at paragraph 59 above. There is no evidence of any call taking place on 24 May 2022.

144. As set out in paragraph 64 in the findings of fact above, on 22 June 2022, the Claimant attended a zoom call, and although only Mr. Butland engaged, Ms. Peachey-Thacker and Ms. Lesley Goudman-Peachey also attended.

145. The Claimant's own evidence was that on 23 May 2022 Mr. Butland was agitated and irascible and on 22 June 2022 she felt she was not permitted to talk and that Mr. Butland spoke in a very patronizing and authoritative and direct manner. However, the Claimant's own evidence does not indicate or infer that she felt intimidated at the time, but rather and in particular on 23 May 2022 the reason for not wishing to speak was because she wanted matters set out in writing to avoid miscommunication.

146. Further, there was no evidence to indicate or infer that Mr. Butlands calls or his approach in the calls, which I have decided were not intimidating, were because of the Claimant's race. The discussions were about arrangements for the ending of the Claimant's employment.

(5) During the call on 22nd June 2022 between the Claimant, Roger Butland and an unidentified other person, the Claimant she was questioned intently how she knew about various matters that she raised.

147. The Claimant's witness statement, at paragraph 23 sets out the Claimant's account of the meeting on 22 June 2022 and identifies the attendees present. There is no mention of an unidentified person. The Claimant explains that Mr. Butland read from a written text. The Claimant also states in her witness statement that she felt the meeting was not a conversation but a pretext to interrogate her and goes on to reference settlement amounts. The Claimant has not set out any other evidence about the call on 22 June 2022 and what she says she was questioned intently about and by whom.

148. Further, I have concluded that there is no evidence showing that any questioning at the meeting was because of the Claimant's race.

(6) The call on 22nd June 2022 was recorded without her consent

The Claimant's witness statement makes no reference to the zoom call being recorded. I was not directed to any transcript by the Claimant. The Claimant made no reference to this issue in submissions.

149. However, on my own review of the Bundle I noted an email dated 24 June 2022 at page 66, in which, as set out in the findings of fact above, the Claimant emailed Mr. Butland and Ms. Peachey-Thacker and referenced a transcript and set out how she does not agree with the content and did not give permission for the meeting to be recorded.

150. On the evidence available, it is difficult to reach clear conclusions but based on the content of the contemporaneous email I conclude that the meeting was recorded and the Claimant was not told it was being recorded.

151. However, I cannot see or infer a link between any decision to record the zoom meeting being because of her race.

(7) A purported transcript of the call on 22nd June 2022 subsequently provided to the Claimant by her employer was inaccurate.

152. As set out above, the Claimant's witness statement makes no reference to this issue and I was not directed to any transcript by the Claimant. The Claimant made no reference to this issue in submissions. Accordingly, I have been unable to make any detailed findings of fact on the content of the transcript and how this may have differed from the discussions that took place on 22 June 2022.

153. As in relation to issue 6 above, on the evidence available, it is difficult to reach clear conclusions on whether or not the transcript provided was accurate or not, but I do conclude that the Claimant believed the transcript to be inaccurate.

154. However, again, I cannot see any link between any inaccuracies in a transcript and the Claimant's race and do not consider that any transcript provided was inaccurate because of the Claimant's race.

Harassment related to race (Equality Act 2010 section 26)

155. The Claimant relies on the allegations of direct race discrimination as allegations of harassment related to race.

156. I do not conclude that the Claimant was harassed related to race, and have set out conclusions in relation to each allegation below. In general, when reaching this conclusion I have considered the requisite stages of the legal test: whether the conduct was unwanted, whether it related to race and whether it had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant and in relation to effect I took into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

(1) The Claimant was hired on a fixed term contract and at lower remuneration than her predecessor, James Buckley-Thorp, despite undertaking the same role as him and additional duties.

157. It is noted that the Claimant had provided a consultancy agreement as set out in paragraph 73 above. The Claimant summarised her role and duties in her witness statement and sets out her views on the role of James Buckley-Thorp. However, there was no other evidence put forward by the Claimant in this respect.

158. Even taking into account the Claimant's comments in her witness statement, James Buckley-Thorp, there is no clear evidence that can be relied on to support a conclusion that that the Claimant had been undertaking the same role or duties or that she was employed on a fixed term contract and at a lower rate of pay than her predecessor.

159. However, if the Claimant was undertaking the same work and was paid less and on a series of fixed term contracts I considered whether this was unwanted conduct. The Claimant was engaged on a series of fixed

term contracts. Until there were some concerns about the status of Bella & Frank Limited the Claimant did not appear to be concerned about the form of her employment. I do not consider that the engagement of Mr. Buckley-Thorp via a consultancy agreement prior to the Claimant's employment with Bella & Frank Limited to amount to unwanted conduct.

160. If I am wrong on this, I have gone on to consider whether it related to race, noting that related to is a wider concept. On the evidence available I do not see any link to the Claimant being engaged on fixed terms and race. I have formed the view that the respondents, in particular Ms. Peachey-Thacker were unorganised employers and did not manage business matters effectively, but can see no link this and race.

161. Again, for completeness, if I am wrong in relation to my first two conclusions, I have considered whether:

(1) the conduct had the purpose of violating the claimant's dignity or creating in intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
(2) Or, 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.

162. I have not heard any evidence from the respondents, and therefore cannot reach any safe conclusion on the purpose of the use of fixed term contracts. However, based on the evidence provided by the Claimant I do not consider the fact she was engaged on a series of fixed term contracts and paid less than Mr. Buckley-Thorp had the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading or offence environment for the Claimant. It is not clear when the Claimant became aware of Mr. Buckely-Thorp's form of engagement with any of the respondents, and although she may be unhappy about the matter, I do not consider this amounts to an act of harassment related to race within the legal definition.

(2) The Claimant's employer did not follow the correct procedure for a redundancy dismissal and failed to fairly select, consult, inform, or consider alternatives to redundancy

163. As set out in my conclusions relating to the unfair dismissal and direct race discrimination complaint above, there was no proper redundancy procedure.

164. I have considered whether this was unwanted conduct. I conclude that it was. Plainly the Claimant did not wish for the respondents to make such failures in relation to managing a redundancy process and did not wish for them to behave as they did in dismissing her.

165. I have gone on to consider whether that unwanted conduct related to race. On the evidence available I do not see any link to the failure to follow a correct redundancy dismissal process and race. As set out elsewhere in these reasons, I have formed the view that the respondents,

in particular Ms. Peachey-Thacker were unorganised employers and did not manage business matters effectively. Further I note reference to the family's financial situation but can see no link to the failure to conduct a fair and proper process and race.

166. Again, for completeness, if I am wrong in relation to my first two conclusions, I have considered whether:

(1) the conduct had the purpose of violating the claimant's dignity or creating in intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
(2) Or, 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.

167. I have not heard any evidence from the respondents, and therefore cannot reach any safe conclusion on the purpose of not conducting a proper process, however, it appears that the purpose of the unwanted conduct was to reduce costs and no longer employ the Claimant, and staff generally.

168. In considering effect, I conclude that the respondents' treatment of the Claimant did have the effect of creating an intimidating, hostile and offensive environment for the Claimant. It is evident she was extremely upset by the treatment of her after she had worked hard for the respondents and this made the final weeks of employment difficult for the Claimant. However, as above, although I consider the effect of the conduct to be this, I concluded there was no link to race.

(3) The Claimant's employer did not afford her an appeal against her dismissal.

169. Again, as per my conclusions above, the findings of fact demonstrate there was no proper redundancy procedure.

170. I have considered whether this was unwanted conduct. I conclude that it was. Plainly the Claimant wished for the respondents to undertake a proper redundancy process including an appeal.

171. I have gone on to consider whether that unwanted conduct related to race. On the evidence available I do not see any link to the failure to undertake an appeal process and race. I note that a meeting took place on 22 June 2022 and although the precise detail of the discussions is not clear, it appears that discussion seeking to resolve/settle matters may have taken place.

172. Again, for completeness, if I am wrong in relation to my first two conclusions, I have considered whether:

(1) the conduct had the purpose of violating the claimant's dignity or creating in intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

(2) Or, 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.

173. I have not heard any evidence from the respondents, and therefore cannot reach any safe conclusion on the purpose of not conducting an appeal meeting, however, noting Ms. Peachey-Thacker did not engage at the meeting on 22 June 2022 I consider this indicates poor management, and not any purpose to harass.

174. In considering effect, I conclude that the respondents' actions of not giving the Claimant an appeal would have been upsetting for the Claimant, however, on the evidence I do not consider the lack of an appeal went beyond general upset to have had the effect of creating an intimidating, hostile and offensive environment for the Claimant.

(4)<u>On 23rd May 2022, 24th May 2022 and 22nd June 2022 the Claimant received intimidating calls via whatsapp from Roger Butland on behalf of her employer.</u>

175. My findings of fact in relation to the calls are set out above and as summarised in the direct race discrimination complaint, but I repeat here that there is no evidence of any call taking place on 24 May 2022.

176. In order to conclude whether or not the calls on 23 May 2022 and 22 June 2022 were unwanted conduct, as framed by the Claimant, I have had to consider if they were intimidating. My conclusions in relation to the direct race discrimination complaint are relevant here.

177. The Claimant's own evidence was that on 23 May 2022 Mr. Butland was agitated and irascible and on 22 June 2022 she felt she was not permitted to talk and that Mr. Butland spoke in a very patronizing and authoritative and direct manner. However, the Claimant's own evidence does not indicate or infer that she felt intimidated at the time, but rather on 23 May 2022 the reason for not wishing to speak was because she wanted matters set out in writing to avoid miscommunication.

178. In relation to the call on 22 June 2022, there was no evidence to indicate or infer that Mr. Butlands calls, which I have decided were not intimidating, were because race. The discussions were about arrangements for the ending of the Claimant's employment/resolving matters.

179. Accordingly, I do not consider the calls, or the content to have been intimidating. In terms of unwanted conduct, I have considered that discussions are required when an employee is ending employment and also I note the Claimant wished for an appeal, and that conversations were required. Although the Claimant may have been upset by Ms. Peachey-Thacker's lack of engagement I do not consider the calls by Mr. Butland to amount to unwanted conduct.

180. In case I am wrong, I have gone on to consider whether any calls that could constitute unwanted conduct related to race. On the evidence available I do not see any link to the calls in 23 May and 22 June 2022 and the Claimant's race.

181. Again, for completeness, if I am wrong in relation to my first two conclusions, I have considered whether:
   (1) the conduct had the purpose of violating the claimant's dignity or creating in intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
   (2) Or, 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.

182. On the evidence I am not able to make precise findings on the details of the calls or the purpose. However, I consider the purpose generally to have been to discuss leaving arrangements on 23 May 2022 and the Claimant's concerns/position on 22 June 2022.

183. In considering effect, I conclude that although the Claimant may have not been happy with the content of the calls, the contemporaneous evidence does not support a conclusion that the calls had the effect of creating an intimidating, hostile and offensive environment for the Claimant. I have kept in mind that it is not enough to simply be upset.

(5) During the call on 22nd June 2022 between the Claimant, Roger Butland and an unidentified other person, the Claimant she was questioned intently how she knew about various matters that she raised.

184. My findings of fact in relation to the call on 22 June 2022 are set out above and as summarised in the direct race discrimination complaint. I found that in relation to the meeting there was no mention of an unidentified person. The Claimant explained that Mr. Butland read from a written text. The Claimant also states in her witness statement that she felt the meeting was not a conversation but a pretext to interrogate her and goes on to reference settlement amounts. The Claimant has not set out any other evidence about the call on 22 June 2022 and what she says she was questioned intently about and by whom.

185. In order to conclude whether or not the questioning during the call on 22 June 2022 was unwanted conduct, as framed by the Claimant, I have had to consider if she was questioned intently how she knew about the various matters that she raised. The Claimant has not provided an detailed account of what she says she was questioned on. Accordingly, on the evidence available, I cannot conclude that there was any unwanted conduct.

186. In case I am wrong, I have gone on to consider whether any questioning at the meeting on 22 June 2022 that could constitute unwanted conduct related to race. On the evidence available I do not see any link to what was said on 22 June 2022 and race.

187. Again, for completeness, if I am wrong in relation to my first two conclusions, I have considered whether:
   (1) the conduct had the purpose of violating the claimant's dignity or creating in intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
   (2) Or, 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.

188. On the evidence I am not able to make precise findings on the details of the calls or the purpose. However, I consider the purpose generally to have been to discuss the Claimant's concerns/position on 22 June 2022.

189. In considering effect, I conclude that although the Claimant may have not been happy with the content of the call, the contemporaneous evidence does not support a conclusion that the calls had the effect of creating an intimidating, hostile and offensive environment for the Claimant. I have kept in mind that it is not enough to simply be upset.

(6) The call on 22nd June 2022 was recorded without her consent

190. As set out above, I concluded that the meeting on 22 June 2022 was recorded and the Claimant was not told it was being recorded. I considered whether this was unwanted conduct. I conclude that recording a call without asking for consent or informing the Claimant does amount to unwanted conduct.

191. I have gone on to consider whether it related to race. On the evidence available I do not see any link to the call being recorded and race.

192. Again, for completeness, if I am wrong in relation to my first two conclusions, I have considered whether:
   (1) the conduct had the purpose of violating the claimant's dignity or creating in intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
   (2) Or, 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.

193. I have not heard any evidence from the respondents, and therefore cannot reach any safe conclusion on the purpose of recording the call. It is not known whether or not there was a deliberate decision to record the call or not.

194. However, based on the evidence provided by the Claimant I do not consider the fact the call was recorded had the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading or offence environment for the Claimant and although she may be unhappy about the matter, it is not enough the conduct was simply upsetting. I do not

consider this amounts to an act of harassment related to race within the legal definition.

(7) A purported transcript of the call on 22nd June 2022 subsequently provided to the Claimant by her employer was inaccurate.

195. My conclusions in relation to the direct race discrimination complaint are relevant here, in particular the fact that I have been unable, on the evidence, to make a clear finding that the transcript was inaccurate but rather concluded that the Claimant believed the transcript to be inaccurate.

196. I have had to consider the allegation as put by the Claimant amounted to unwanted conduct. As I have not been able to conclude that the transcript was inaccurate, I cannot conclude that the conduct was unwanted.

197. If I am wrong, I have gone to consider whether any such unwanted conduct was related to race. I do not consider there to be any evidence to support a conclusion that the provision of an inaccurate transcript was related to race.

198. Again, for completeness, if I am wrong in relation to my first two conclusions, I have considered whether:
(a) the conduct had the purpose of violating the claimant's dignity or creating in intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
b)Or, 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.

199. I have not heard any evidence from the respondents, and therefore cannot reach any safe conclusion on the purpose of creating any transcript, accurate or otherwise. It is not known whether or not there was a deliberate decision made in relation to the transcript production or not.

200. However, based on the evidence provided by the Claimant I do not consider the fact that a transcript, possibly an inaccurate one, was provided had the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading or offence environment for the Claimant and although she may be unhappy about the matter, it is not enough the conduct was simply upsetting. I do not consider this amounts to an act of harassment related to race within the legal definition.

201. As the Claimant is successful in relation to her unfair dismissal complaint only, a separate remedy hearing will be listed.

_____
Employment Judge Cawthray
Date: 31 December 2023

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/