

2. The Tribunal had a hearing bundle consisting of 547 pages and a witness statement bundle consisting of 34 pages. The panel heard evidence from the claimant herself and for the respondent heard from Professor Anagnostopoulou, Dr Bates, Dr Schaaf and Professor Rigby.

Preliminary matters

3. The case had been listed for 4 days between 11 to 14 December 2023. Unfortunately, due to judicial unavailability the convened panel were only able to sit for 3 days between 11 to 13 December 2023. The parties considered their position in relation to a request for a postponement to a later date for the hearing to take place over 4 full days, and having done so made no such application. The case instead proceeded on liability only with all evidence having been heard between 11 to 13 December 2023. The panel subsequently re-convened on 9 January 2024 for deliberations and this Judgment follows.

The issues

4. A case management hearing took place on 28 February 2023 during which a list of issues was prepared. By agreement, the parties amended the same with a view to narrowing the issues and these are set out at page 41 to 43 of the hearing bundle (incorrectly numbered as pages 141 to 143 within the bundle.) The issues to be determined in relation to liability are as follows:

1. Victimisation (Equality Act 2010 section 27)

1.1. Did the Claimant do a protected act by making an allegation that the Respondent has contravened the Equality Act 2010, in that she:.

1.1.1. On or around 31 October 2021, alleged race discrimination during a return to work meeting;

1.1.2. On or around 04 January 2022, alleged race discrimination in a written grievance

1.2. The Respondent accepts the Claimant did the protected acts.

1.3. Did the Respondent do the following acts or omissions:

1.3.1. Fail to consider an extension of her probation period;

1.3.2. Fail to grant an extension of her probation period;

1.3.3. Refuse to pause the dismissal;

1.3.4. Refuse to pause the probation period;

1.3.5. <>

1.3.6. Fail to provide support to enable her to pass her probation as follows;

1.3.6.1. R Prof Kyriaki Anagnostopoulou (Head of School) failed to promptly change C's line manager [despite C's complaints about her LM Wendy Hanrahan] on 17 December 2021, 10 January 2022 and 26 January 2022.

1.3.6.2. R Prof Kyriaki Anagnostopolou failed to change C's line manager, instead merely changing her in name to Dr Agnieszka Bates [whereas the old line mgr Wendy Hanarahan still effectively managed C] on 17 December 2021, 10 January 2022 and 26 January 2022

1.3.6.3. R Wendy Hanrahan failed to take into account that C had been hindered/prevented by the Teach First Development Lead Jemma Naish-Williams [a partner of the Uni] from visiting trainees in schools - instead relying upon C not having contact with trainees to justify dismissal on 6 December 2021 and 17 December 2021

1.3.6.4. R Wendy Hanrahan failed to take action to prevent Teach First from hindering C on 6 December 2021 and 17 December 2021

1.3.6.5. R Wendy Hanrahan failed to provide C with copies of subject-specific marking criteria [to help C with marking of trainees' work] (instead providing C only with the generic marking criteria) on 26 January 2022

1.3.6.6. R [Wendy Hanrahan] failed to give C an extension which C had asked for, to mark 16 assignments, due to her having been off sick (with work-related stress) on 26 January 2022.

1.3.6.7. R {Prof Kyriaki Anagnostopoulou and Michelle Sell - HR Business Partner} failed to provide C with a Sponsor [following her request at a meeting in November 2021]

1.3.7. Dismiss the Claimant.

1.4. By doing so, did it subject the Claimant to detriment?

1.5. If so, was it because the Claimant did a protected act?

1.6. Was it because the Respondent believed the Claimant had done, or might do, a protected act?

Fact finding

Background and general findings

5. Bath Spa University is a higher education facility offering a wide range of courses across the arts, sciences, education, social science and business to over 7,500 trainees. The claimant commenced employment with the respondent on 01 September 2021 as a Lecturer in modern languages. The claimant was employed

on a 0.9FTE 10 months fixed term contract, with the role being subject to a six month probationary period.

6. On or around 27 September 2021, the claimant attended a 1-week Probationary Review Meeting. The meeting was conducted by her line manager, Francine McMahon, (FM) Secondary Lecturer and her manager, Wendy Hanrahan (WH), Reader in Education.
7. The claimant described FM and WH as being highly critical of her in this meeting, making negative assumptions and judgments about her based on stereotypes and assumptions. The claimant considered this was due to her race namely based on negative stereotypes held by white managers about black employees. The claimant does not pursue a direct race discrimination claim and the panel therefore make no findings in relation to this.
8. Following this meeting the claimant describes having felt extremely distressed and as a result she was signed off of work by her GP until 31 October 2021. Her GP subsequently recommended a phased return to work.
9. During a return to work meeting (which the claimant states was on 1 November 2021 however the first protected act is pleaded to have taken place on or around 31 October 2021) the claimant made an allegation of race discrimination. This is the first protected act, and the respondent accepts that this was a protected act.
10. Following that disclosure, the respondent launched an informal investigation into the allegations raised which was led by Professor Kyriaki Anagnostopoulou (KA). On 12 November 2021, KA held a meeting with the claimant, Mike Hannis (Senior Lecturer in Ethics, Politics and Environment and Union Representative for Elaine), and Lynda Wilkins (HR Administrator and note taker).
11. As part of the investigation KA also met with WH Francine McMahon and Charlie Berney. KA also met with the claimant a second time on 18 November 2021. On 26 November KA held a meeting with the claimant to deliver the outcome of her investigation. A written outcome to the informal investigation was also provided and appears at page 168. KA's conclusion was that there was no evidence of bias based on the grounds of race. KA did however consider that there may have been a level of unconscious bias, however this stemmed from misconceptions surrounding the claimant's potential capability which related to the fact that the claimant was the panel's third choice for the role. Although not raised as a formal grievance the claimant challenged this outcome by email on 13 December at page 174-175 of the bundle.
12. On 17 December 2021, the claimant attended her 1-month probationary review meeting, which was led by WH. The performance review report created as a result of that meeting appears at pages 176 to 180 of the bundle and was sent to the claimant on 21 December 2021. The claimant refused to sign this as she did not consider this to be a true reflection of the meeting because 'it failed to record the

concerns that I had raised about other employees of the respondent' (paragraph 24 of witness statement). The claimant submitted an Appendix to the report on or around 1 February 2022 (page 210 of the hearing bundle).

13. On 4 January 2022, the claimant submitted a formal Grievance letter to KA (pages 182-183 of the hearing bundle). The respondent accepts that this is the second protected act. The grievance was acknowledged on 17 January 2022 (pages 192-193 of the hearing bundle). The grievance hearing took place on 10/2/2022 and was chaired by Professor Neil Sammells. A second grievance meeting took place on 21/2/22.
14. A further probation review meeting was scheduled for 20 January 2022. On 18 January 2022 the claimant emailed the respondent stating she did not consider it was appropriate for that to take place whilst her grievance was outstanding (page 188). On 26 January the respondent replied acknowledging the concerns and indicating that Dr Agnieszka Bates (AB) would take over conduct of the probationary review meetings.
15. The second probationary review meeting was re-scheduled for 03 February. The claimant was invited to attend and advised that should she wish not to attend, the meeting would continue as planned and that she could make written representations to be considered at the meeting (email dated 28 January, pages 189-190.)
16. The claimant did not attend the meeting on 3 February and AB proceeded with the review in her absence. The performance review report (pages 213-216) was sent to the claimant on 7 February 2022. The claimant was subsequently invited to a further review meeting scheduled to take place on 15 February 2022.
17. The claimant did not attend the meeting on 15 February and AB again proceeded in her absence. AB states that because the claimant did not attend she reviewed all the information available to her, following which she decided to terminate the claimant's contract of employment based on her performance.
18. The dismissal letter sent to the claimant appears at pages 287-290 of the bundle. At pages 291 and 331 of the bundle is a more detailed report prepared by AB she states during the course of her review and completed on or around 15 February 2022 or shortly thereafter. It was suggested by the claimant that this report had been completed for the purposes of litigation only. The panel consider that this document may not have been completed in its entirety by AB at the time of her decision but do consider that she did collate a report at the time of her review for the reasons she stated in oral evidence namely to get a clear picture in her mind. The panel note that pages 291 to 331 were not included in the dismissal letter to the claimant but do not consider that means it was not in existence. The panel note that the substance of that report is contained within the dismissal letter report at pages 287 to 290 and whether or not the full report at pages 291 to 331 was

completed afterwards does not dilute the fact that she decided on the matter based on the information before her. The panel are satisfied that the evidence referred to at pages 291 to 331 were available to AB at the time of her decision because it is reflected in the dismissal letter.

19. Throughout the course of proceedings criticism was placed on the respondent for continuing the probation process whilst the claimant's grievance was being investigated. In that regard AB's evidence was that the two processes run separately. AB was also very clear that the probation process was supportive in nature. This is supported by the content of the probationary procedure at page 79 of the bundle together with the review forms themselves which refer to measures to support targets and the reviews being an opportunity for discussion.
20. The Tribunal notes the grievance policy at page 67 of the bundle. Although this does not expressly state whether or not the probation process would continue when a grievance is raised, it does refer to maintaining the status quo. The claimant stated that this suggests maintaining status quo of keeping employment as opposed to dismissal. AB's response in cross examination was that she reads this that other practices should continue. In resolving the issue, the Tribunal agree with the respondent. Although not specifically addressed, the policy at page 67 supports the fact that status quo would be maintained which would support the assertion that the two practices are separate, and the probationary reviews would continue. Indeed, the Tribunal's own knowledge and experience was that it is not uncommon for such processes to run separately within an employment context.
21. The Tribunal sympathise with the position that the claimant found herself in, however consider that she could have quite properly attended the probationary review meetings despite the complaints she had raised. This would have given her the opportunity to raise with the reviewing manager the issues she had been experiencing and offer mitigation/explanation in relation to the identified performance issues.
22. The outcome to the claimant's grievance was provided on 7/3/22 following her dismissal. The outcome was appealed by the claimant and a hearing dealing with the appeal took place on 29/3/22 and was chaired by Professor Rebecca Bates. This was further appealed and dealt with at a hearing chaired by Professor Sue Rigby on 26/5/22.

Detriments

23. The Tribunal make the following findings of fact in relation to each alleged detriment and adopt the numbering as per the list of issues.

1.3.1 Fail to consider an extension of extension of the claimant's probation

24. The Tribunal note that no express request was made by the claimant to consider an extension of her probation, her position being that the respondent should have automatically considered this given the particular circumstances.
25. AB's evidence was that she did consider an extension (paragraph 33 of witness statement) however decided that her performance was unlikely to improve given extra time. The panel do not accept AB's evidence on this point and find that AB did not give consideration to an extension because she dismissed before even allowing the full 6 month probationary period. Further, although it is addressed in her witness statement the dismissal letter at pages 287 to 290 and report at 291 to 331 simply states 'a lack of evidence to indicate that performance would improve given extra time, the probation cannot be confirmed.' This is not supportive of the fact that an extension was considered in circumstances where in fact it was terminated early.
26. The Tribunal also consider that whilst the claimant did not attend the review meetings, if AB was considering an extension, she could have invited representations from the claimant in this regard and did not do so.
27. The Tribunal find that there was a failure to consider an extension of the claimant's probation period. This is a detriment because the claimant was dismissed as a result.

1.3.2 Failure to grant an extension to the claimant's probation period

28. The respondent accepts that there was a failure to grant an extension to the claimant's probation period. That is a matter of fact. The respondent also accepts that this was a detriment.

1.3.3 Refusal to pause the dismissal

29. The claimant did not expressly request a pause of her dismissal however the panel accept her assertion that she did not need to and it was for the respondent to decide at what point to take the decision. The respondent accepts that this was a detriment.

1.3.4 Refusal to pause the probation period

30. The respondent accepts that they did not pause the probation period and that this was a detriment.

1.3.5 withdrawn

1.3.6 Failed to provide support to enable the claimant to pass her probation as follows:

1.3.6.1 R Prof Kyriaki Anagnostopoulou (Head of School) failed to promptly change C's line manager [despite C's complaints about her LM Wendy Hanrahan] on 17 December 2021, 10 January 2022 and 26 January 2022

31. The Tribunal find that KA did fail to change the claimant's line manager. Issue was taken with the pleaded dates for this issue, the respondent stating that no request to change the line manager was made on 17 December or 10 January. In that regard the panel note that in the grievance dated 4 January 2022 the claimant requests a change of line manager which would encompass the pleaded dates.
32. KA's evidence was that she did not change the line manager because she found no discrimination based on race and hoped that the parties could move forward with their relationship.
33. This is supported by an email at page 189 of the bundle dated 26 January 2022 from Michelle Sell (Human Resources) to the claimant which states that WH will remain her line manager.
34. It is also supported by the evidence of AB where she states she understood she had taken over in terms of the probationary review, but that WH remained her manager (paragraph 5 of witness statement). This is further supported by the fact that AB still consulted with WH about previous targets, how they had been met and the role going forward (paragraph 6.)
35. The respondent suggested in closing submissions that KA's evidence was that she would not necessarily have the final say over a change in line manager. The panel do not accept this. Whilst KA stated she would not necessarily have the final say, this was in the context that the decision would be a collaborative one involving others. Her evidence at paragraphs 37 and 41 of her statement clearly states that the power to change the line manager was within her hands but she decided not to for the reasons explained.
36. The Tribunal therefore find that KA did not change the claimants line manager. This was a detriment to her because WH remained her line manager in circumstances where the claimant has made complaints against her. WH continued to set her targets and the panel consider that the claimant would not have felt that she could have gone to her line manager for support in the circumstances. This would have had a direct link to her ability to pass probation because it was linked to the targets being set.

1.3.6.2. R Prof Kyriaki Anagnostopolou failed to change C's line manager, instead merely changing her in name to Dr Agnieszka Bates [whereas the old line mgr Wendy Hanarahan still effectively managed C] on 17 December 2021, 10 January 2022 and 26 January 2022

37. The Tribunal find that KA failed to change the claimant's line manager, instead merely changing her in name to Dr Bates. The panel make this finding for the same reasons as stated above under heading 1.3.6.1. The claimant's line manager remained WH. Dr Bates took over the probationary review only and Dr

Bates in her own evidence confirmed that she still consulted WH as to the targets. This was a detriment to the claimant because it impacted on her ability to pass probation and lead to her dismissal.

1.3.6.3. R Wendy Hanrahan failed to take into account that C had been hindered/prevented by the Teach First Development Lead Jemma Naish-Williams [a partner of the Uni] from visiting trainees in schools - instead relying upon C not having contact with trainees to justify dismissal on 6 December 2021 and 17 December 2021

38. The Tribunal do not consider that WH failed to take into account that the claimant had been hindered by Teach First Development lead Jemma Nash-Williams (JNW) from visiting trainees in school.
39. Page 170 of the bundle is the email to the claimant from JNW in relation to this. The suggestion that WH failed to consider this is entirely disproven by the evidence at page 176 (being the notes from the first probationary review meeting) in which WH specifically addresses this, states her disapproval and states she has given feedback to them about this. Although WH was not called as a witness because she no longer works for the respondent, the tribunal notes the documentary evidence.
40. The claimant has not proved her case on this point and the Tribunal find that WH did not fail to take this into account.

1.3.6.4. R Wendy Hanrahan failed to take action to prevent Teach First from hindering C on 6 December 2021 and 17 December 2021

41. The Tribunal find that WH did not fail to take action to prevent Teach First from hindering the claimant. The claimant's submissions were that in absence of WH being called to the Tribunal it is impossible to determine the reason why WH acted as she did. At this stage the Tribunal is not looking at the reason why. WH was not called because she no longer works for the respondent. Although the tribunal did not have WH's evidence the tribunal can look at the documentary evidence. In that regard, the email at page 170 in which JNW asks the claimant to delay the meetings is sent to the claimant alone and there is no evidence that WH was aware of this at that time.
42. The claimant did not advance any positive evidence as to the date on which WH was aware of this. On the available evidence before the Tribunal, it appears that this first came to WH attention at the first probationary review meeting as documented at page 176.

43. Whilst the Tribunal did not hear from WH on the issue, it is implausible for WH to have failed to prevent Teach First from doing something that she was not aware they were doing, and the claimant has not provided any evidence that she was aware prior to the documented evidence at page 176. When WH does become aware at the probationary meeting the documentary evidence indicates that she takes acts on this and therefore she does not fail to take action.

1.3.6.5. R Wendy Hanrahan failed to provide C with copies of subject-specific marking criteria [to help C with marking of trainees' work] (instead providing C only with the generic marking criteria) on 26 January 2022

44. The claimant's evidence on this point was not clear with her referring to both a subject specific marking criteria and subject specific statement bank. Her evidence ultimately however is that there was a subject specific marking criteria which her colleagues had access to and she did not.

45. The Tribunal were not taken to any specific evidence in relation to why the claimant believed others had this document. She does not assert that she had spoken to a particular colleague who did have access to it and rather it appears to be an assumption that she held.

46. The respondent's evidence on this point was very clear. This is documented at pages 197 and 201. At page 197 WH replies to a request by the claimant for the document and confirms that there is no subject specific marking criteria. She confirms that there is a standardised generic statement bank which the claimant is asked to use and confirms that any subject specific criteria has not been produced by the university and has instead been produced by individuals as their own point of reference. The email confirms that the claimant has already been provided with the document required to mark the assignments.

47. KA confirms this in her response to the claimant at page 201, namely that the claimant is asked to use the standardised generic statement bank.

48. The evidence before the Tribunal was therefore that there was no subject specific marking criteria. If such a document did exist, it is understood that this was a document prepared by an individual as part of their own resources rather than being within the respondent's possession. The Tribunal considers that there can be no failure by WH to provide a document which is not hers to give.

49. In any event this allegation is linked to the claimant failing to pass her probation because she was not provided with the subject specific marking criteria. There is no evidence that the claimant was assessed as part of the probation review based on any subject specific marking. Her performance in relation to marking was

criticized on the basis of her failing to meet the deadline which on the claimant's evidence was due to a period of sick leave and not because she did not have the criteria. There is no evidence that she was assessed based on a failure to meet subject specific marking criteria which she did not have.

50. The Tribunal therefore finds that there was no failure to provide the subject specific marking criteria to the claimant and there was no detriment in this regard.

1.3.6.6. R [Wendy Hanrahan} failed to give C an extension which C had asked for, to mark 16 assignments, due to her having been off sick (with work-related stress) on 26 January 2022.

51. It is a matter of fact that the respondent failed to grant an extension requested by the claimant to mark 16 assignments. At page 199 the claimant requests this and states the reason she is requesting the extension is because she has been on sick leave. The panel do consider this was a detriment to the claimant because the issue of marking was considered as part of her probationary review which led to her dismissal and ultimately the claimant had been off sick.

1.3.6.7. R {Prof Kyriaki Anagnostopoulou and Michelle Sell - HR Business Partner} failed to provide C with a Sponsor [following her request at a meeting in November 2021]

52. There was a difference of view between the parties in relation to a mentor and a sponsor, with the claimant's position being that a sponsor is someone who can advocate for her. The Tribunal notes the evidence at page 156 of the bundle in which the claimant refers to being provided with a mentor or a sponsor and does not make a specific request for a sponsor during that meeting, nor does she state what a sponsor is. At page 167, the claimant does appear to make a distinction between the two roles although stresses the identify of a 'mentor' is crucial. In evidence the claimant did not dispute that the respondent offered her a mentor namely a Ms Bambo Soyinka however it was the claimant's position that this was not a sponsor.

53. In resolving the dispute, the Tribunal finds that the claimant was offered a sponsor by the respondent within the claimant's definition of such. The evidence before the Tribunal was that Ms Soyinka was from a minority ethnic background and had an Equality and Diversity background, having taught in that area. At page 514 of the bundle Michelle Sell writes to the claimant with Ms Soyinka's details and suggests she make contact directly. This is acknowledged by the claimant at page 513 in which she does not raise any objection to Ms Soyinka and states that she has reached out to her and hopes to meet with her in the New Year.

54. The claimant's assertion that Ms Soyinka was not a sponsor appears to be solely on the basis that she was offered to her under the heading mentor. The claimant did not provide any evidence to the Tribunal that she had met with Ms Soyinka and that she would not have been an appropriate advocate for her, such as to fall within her definition of sponsor. There was no evidence before the Tribunal that the claimant had met with Ms Soyinka and had then returned to the respondent to say she was not suitable, and that the respondent then failed to follow up on this.
55. The Tribunal are of the view that it would not be for the respondent to have been prescriptive in relation to the role or the relationship and it would have been a matter of mutual agreement between the parties as to the extent of that relationship and what Ms Soyinka was able to provide to the claimant by way of support. Based on her qualifications and background the Tribunal consider that she is likely to have been an entirely appropriate sponsor, however this was not explored by the claimant.

1.3.7 Dismiss the claimant

56. It is a matter of fact that the claimant was dismissed. This is clearly a detriment because she lost her employment.

The law

S136 Equality Act 2010 – Burden of Proof

57. Section 136(2) Equality Act 2010 provides that if there are facts from which the court or tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of the EqA, the court must hold that the contravention occurred; and S.136(3) provides that S.136(2) does not apply if A shows that he or she did not contravene the relevant provision.
58. We have taken into account the well-known guidance given by the Court of Appeal in Igen Ltd v Wong [2005] ICR 931 which although concerned with predecessor legislation remains good law. It was approved by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054. Ayodele v Citylink Ltd [2018] ICR 748, CA confirmed that differences in the wording of the Equality Act 2010 have not changed the test or undermined the guidance in Igen Ltd.
59. In the case of Igen, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place (on the balance of probabilities). If so proven, the second stage is engaged, whereby the burden then 'shifts' to the respondent to prove on the balance of probabilities, that the treatment in question was 'in no sense whatsoever' on the protected ground. The consequence is that the claimant will necessarily succeed unless the respondent can discharge the burden of proof

at the second stage. However, if the claimant fails to prove a “prima facie” case in the first place then there is nothing for the respondent to address and nothing for the Tribunal to assess Ayodele and Hewage.

60. At the first stage of the test, when determining whether the burden of proof has shifted to the respondent, the question for the Tribunal is not whether, on the basis of the facts found, it would determine that there has been discrimination, but rather whether it could properly do so.
61. The following principles can be derived from Igen Ltd v Wong (above), Laing v Manchester City Council [2006] ICR 1519 EAT, Madarassy v Nomura International p/c [2007] ICR 867, and Ayodele v City link Ltd (above); which reviewed and analysed many other authorities.
62. At the first stage a Tribunal should consider all the evidence, from whatever source it has come. It is not confined to the evidence adduced by the claimant and it may also properly take into account evidence adduced by the respondent when deciding whether the claimant has established a prima facie case. A respondent may, for example, adduce evidence that the allegedly discriminatory acts did not occur at all, or that they did not amount to less favourable treatment, in which case the Tribunal is entitled to have regard to that evidence.
63. It is insufficient to pass the burden of proof to the respondent for the claimant to prove no more than the relevant protected characteristic and a difference in treatment. That would only indicate the possibility of discrimination and a mere possibility is not enough. Something more is required, see Madarassy (above).
64. The burden of proof provisions require 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.)

Detriment

65. The tribunal must look at the alleged detriment from the employee’s point of view. Did the employee reasonably understand that they had been disadvantaged? This is a low threshold, but it nonetheless needs to be crossed. An unjustified sense of grievance is not sufficient: Shamoon v Royal Ulster Constabulary [2003] UKHL 11.

Section 27 Equality Act 2010.

S27 states (1)A person (A) victimises another person (B) if A subjects B to a detriment because—

- (a) B does a protected act, or
- (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

- (a) bringing proceedings under this Act;
- (b) giving evidence or information in connection with proceedings under this Act;
- (c) doing any other thing for the purposes of or in connection with this Act;
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.

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

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

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

66. If it is established that (a) the employee did a protected act and (b) the employer subjected the employee to a detriment, the critical question will be: Why did the employer subject the employee to that detriment? Was it because they had done (or might do) the protected act? Or was it wholly for other reasons? (Chief Constable of West Yorkshire Police v. Khan [2001] ICR 1065)

Submissions

67. The claimant provided written submissions and responded to the respondent's submissions orally. The respondent gave oral submissions. We carefully considered the submissions of both parties during our deliberations and have dealt with the points made in submissions, where relevant, when setting out the facts, the law and the application of the law to those facts. It should not be taken that a submission was not considered because it is not part of the discussion and decision recorded.

Conclusions

Burden of proof

68. The Tribunal are satisfied that the claimant has proved primary facts from which the tribunal could decide, in absence of an explanation that victimisation took place. The claimant does not bring a claim for direct discrimination, however her claim for victimisation is brought in the context that she considered there was discrimination

by her white managers due to stereotypes held about black employees. In that regard, an investigation was carried out by KA in which she found evidence of unconscious bias, albeit linked to capability rather than race.

69. This is not a direct discrimination claim and the claimant did not call a comparator, however her grievance makes reference to Emily Thornton, a white employee, who started at the same time as her and did not experience the same treatment as the claimant.
70. The Tribunal have found that the claimant's probation period was terminated earlier than its usual course of 6 months, in circumstances where she had also had a period of absence due to sickness. The Tribunal also have regard to the particular timing of this decision in circumstances where the claimant's grievance was still under investigation.
71. All those factors persuade us that the additional factor required by **Madarassey** is potentially present. We make that general point at this point at this stage and if, as we consider each allegation, we do not specifically refer to that additional factor, we rely on the matters set out in these paragraphs to fulfil that requirement.

The reason why

72. The Tribunal now look at the respondent's explanation in relation to each of the proven detriments. Where we have found that the alleged act did not occur, we do not address the respondent's explanation. The tribunal are mindful that only the respondent can know what was in their mind at the time of the decision maker and that few employers are likely to admit that the proven detriments were a result of a protected act. Having found that the burden shifts to the respondent, the employer must prove that the detriments were in no sense whatsoever because of the protected act.
73. The panel use the same numbering from the list of issues in its reasons below. There is a degree of overlap in the reasons for each issue and where not expressly stated the panel rely on all of the reasons cited as to the respondent's explanation.

1.3.1. Fail to consider an extension of her probation period.

74. The evidence of Dr Bates was clear on this point that she did not consider that the claimant's performance would improve if given additional time. The Tribunal consider that this explanation is supported by the evidence contained within the bundle as follows.
75. At pages 308 to 309 is an email from a student in which she raises concerns about the lack of tutor support and quality of the support that had been received. Page 309 to 310 contains an email from another student raising concerns. JNW, the

development lead at page 311 to 312 provides an email from another student in which concerns were raised about tutor contact. JNW then provides this to the respondent and asks for escalation. While the Tribunal accept that JNW did previously request that meetings were delayed until the new year the date of this evidence is 2 February and therefore there has been further time in which contact could have been made with the trainees since the request in December.

76. Where trainees had been visited the central records as documented at page 321 had not been updated to show the progress made.
77. There had also been a failure by the claimant to mark 16 assignments by 7 February with her having only marked 4. The claimant had sought an extension to this due to previous sick leave which was not granted. However, the claimant's sick leave was 27/9/21 to 31/10/21. The evidence before the Tribunal was that there was therefore sufficient remaining time before the deadline for the claimant to complete this marking despite her sick leave and the Tribunal accept this. This is evidenced at page 197 of the bundle which includes a breakdown of the hours available to the claimant in which to complete the marking. This further supports capability issues and the explanation by AB that that was the reason for her decision.
78. This all supports that AB's decision was based on capability of the claimant rather than as a result of the protected acts.
79. As to AB considering that there would not be an improvement in performance given additional time, the panel do note and accept that the probation process was meant to be supportive. Whilst the claimant had made disclosures of discrimination, the panel do not consider that she could not engage with the probation process as a result. In circumstances where the claimant is not willing to engage with that process, the panel accept that AB would have considered that the claimant's performance would not have improved given further time, in light of her non-engagement and the concerns raised.
80. The panel therefore accept the respondent's explanation in this regard that the decision not to extend the probation period was down to the claimant's performance and not the protected act.
81. In relation to all aspects of AB's involvement it is noted that her evidence was that she was aware a complaint had been made by the claimant however had not seen the grievance itself. The panel accept this evidence. AB did not elaborate on what she did or did not know specifically however in this regard the panel do consider that it is a matter of human nature to discuss issues and whilst she made not have seen the grievance itself do consider that AB was likely aware of the nature of the complaint.
82. Criticism was also raised in relation to the non-attendance of Michelle Sell at trial and the claimant invites the panel to find that in absence of an explanation from

her, the respondent has not proved the reason why was not the protected act. The tribunal do not accept this assertion. Although Michelle Sell was heavily involved in dealings with the claimant and the decision makers, the tribunal consider that this naturally would have been the case given her role in human resources. Human resources are there to deal with such matters. The list of issues were carefully explored with the claimant at the case management hearing and perfected between the parties subsequently. Michelle Sell is named specifically in relation to just one of those issues namely the failure to provide the sponsor. The claimant's ET1 does not read that Michelle Sell was the decision maker and actually behind the detriments experienced and the tribunal therefore draw no inference from the fact that she was not called by the respondent as a witness. The tribunal also considers that AB was the decision maker and not Michelle Sell because AB confirms this and this is supported by the documentary evidence in reaching her decision.

1.3.2. Fail to grant an extension of her probation period.

83. The evidence of AB in relation to her failure to grant an extension was the same as the reason given above in relation to whether she considered granting an extension. Her evidence was that she failed to grant this because she did not consider that the claimant's performance would improve. The tribunal relies on the reasons stated under issue 1.3.1 above in relation to why they accept AB's explanation in this regard. The tribunal considers that AB's explanation is supported by the documentary evidence in relation to the claimant's performance.
84. The tribunal therefore finds that the failure to grant the extension of the claimant's probation was not because she had done the protected acts and accept the respondent's explanation. The respondent has discharged the burden of proof because AB's explanation is supported by documentary evidence in relation to the claimant's performance and finds that was the real reason for AB's decisions.
85. The tribunal also notes the respondent had to meet service delivery targets with third partners as well as looking after the interest of their organization as a whole in relation to the claimant's performance which again supports that performance was the real reason for the decisions made by AB. This was confirmed in evidence by KA.

1.3.3. Refuse to pause the dismissal

86. The claimant suggested that the respondent had not given a reason as to why they refused to pause the dismissal, however the tribunal do not accept this. AB was very clear that the grievance process and probation process ran separately

and the tribunal have already made findings of fact in that regard that the policies would support that this is the case, despite any objections by the claimant. The dismissal was not paused due to the concerns in relation to the claimant's performance and AB's belief that her performance would not improve. The tribunal again rely on the reasons cited above in relation to why they accept that explanation.

87. AB's evidence was also that the claimant was not engaging in the probation process. This supports the contention that pausing or delaying the same would unlikely achieve anything, given the claimant was not engaging in an attempt to address the performance concerns.
88. As to the timing of the decision AB's evidence was that the final probationary review meeting was organised simply based on diary convenience. The claimant's suggestion was that the decision to dismiss was to rush the process through so as to 'get rid' of a problem employee as soon as possible. In that regard however, it is noted that the respondent continued to investigate the claimant's grievance with the second grievance meeting taking place on 21 February after the claimant's dismissal. This did not go away simply because they had dismissed the claimant.
89. The tribunal again rely on the reasons cited above in relation to the explanation by AB in relation to the claimant's performance.
90. The panel accept the respondent's explanation and find that the failure to pause the claimant's dismissal was in no way linked to her protected acts and consider the shifted burden of proof is discharged based on AB's evidence which is supported by the documentary evidence outlined above.

1.3.4. Refuse to pause the probation period.

91. In relation to the refusal to pause the probation period, the Tribunal repeat the findings at paragraphs 19-20 above. AB's evidence was that the two processes run separately. AB was also very clear that the probation process was supportive in nature. This is supported by the content of the probationary procedure at page 79 of the bundle together with the review forms themselves which refer to measures to support targets and the reviews being an opportunity for discussion.
92. The Tribunal notes the grievance policy at page 67 of the bundle. Although this does not expressly state whether or not the probation process would continue when a grievance is raised, it does refer to maintaining the status quo. The claimant stated that this suggests maintaining status quo of keeping employment as opposed to dismissal. AB's response in cross examination was that she reads this that other practices should continue. In resolving the issue, the Tribunal agree with the respondent. Although not specifically addressed, the policy at page 67

supports the fact that status quo would be maintained which would support the assertion that the two practices are separate and the probationary reviews would continue, despite the grievance.

93. The documentary evidence therefore supports the respondent's explanation in relation to why the probation was not paused. The tribunal consider that the respondent has discharged its burden of proof and accept the respondents explanation that the failure to pause the probation was not because of the protected acts.

94. The Tribunal was reminded in the respondent's closing submissions that this was not an unfair dismissal claim. Fairness may have meant that the probation could have been paused in the particular circumstances but that does not mean that the explanation as to why it was not, is not accepted by the Tribunal.

1.3.6. Fail to provide support to enable her to pass her probation as follows:

1.3.6.1. R Prof Kyriaki Anagnostopoulou (Head of School) failed to promptly change C's line manager [despite C's complaints about her LM Wendy Hanrahan] on 17 December 2021, 10 January 2022 and 26 January 2022.

95. KA's explanation in relation to why she failed to change the claimants line manager was that she considered that and hoped that the relationship could be re-built. This was in the context of her informal investigation finding that there was no race discrimination, but unconscious bias linked to capability. She therefore acknowledged that there was some wrongdoing on the respondent's behalf and did not seek to hide from that. Her explanation in relation to the line manager is clearly outlined in paragraphs 37 and 41 of her witness statement.

96. This complaint is in the context that the failure meant that the claimant was not supported in passing her probation. In that regard, the probation review officer was changed to AB and WH did not continue the reviews.

97. The tribunal notes that although objectives continued to be set by WH and WH continued to be her line manager, AB had experience of the objectives that someone in the claimant's role were expected to achieve. The objectives applied were as per that role rather than individually set for the claimant. Of course, WH had set areas that the claimant was due to work on but again these were in line with the standards required of all staff. The tribunal have regard to the job description set out at page 325 in that regard.

98. The Tribunal also notes the evidence of AB in that she supported the decision of KA not to change the line manager for the reasons stated by KA. Ultimately the allegations raised by the claimant were not upheld and on that basis the respondent saw no need to change the line manager. This was not a deliberate

act because the claimant had made a protected disclosure.

99. The Tribunal therefore accepts the explanation provided by KA and find that the failure to change the line manager was not due to the protected acts.

1.3.6.2. R Prof Kyriaki Anagnostopolou failed to change C's line manager, instead merely changing her in name to Dr Agnieszka Bates [whereas the old line mgr Wendy Hanrahan still effectively managed C] on 17 December 2021, 10 January 2022 and 26 January 2022

100. The complaint in this regard is not that AB took over as line manager but that it was changed in name only with WH continuing to act in the background and this did not support her in passing probation. The tribunal accept the explanation given by the respondent in this regard. WH did not remain the line manager because of the protected acts but because the investigation into the allegations raised were not upheld and the respondent hoped the parties could move forward with the relationship. The tribunal relies on the reasons set out under heading 1.3.6.1 in that regard.

101. The tribunal notes that although objectives continued to be set by WH and WH continued to be her line manager, AB had experience of the objectives that someone in the claimant's role were expected to achieve. The objectives applied were as per that role rather than individually set for the claimant. The tribunal have regard to the job description set out at page 325 in that regard as well as the evidence of AB herself. AB's evidence was that whilst she looked at specific targets set by WH there were other independent targets which all teaching staff would be subject to and for which she was familiar and applied. The evidence before the tribunal does not support the fact that any targets set by WH were the sole reason for dismissal. It was the claimant's performance marked against the respondent's objectives applicable to all staff and to meet its own separate contracts with external agents (for example the marking deadline of 3 weeks.)

102. Ultimately, the tribunal are satisfied that in all of the circumstances changing the review manager to AB in name only was not because of the protected acts.

1.3.6.6. R [Wendy Hanrahan} failed to give C an extension which C had asked for, to mark 16 assignments, due to her having been off sick (with work-related stress) on 26 January 2022.

103. The Tribunal accept the explanation provided at page 197 in relation to the reason why the claimant was not given an extension to mark the assignments.

This explanation was provided to the claimant at the time of her request and is maintained by the respondent now.

104. The explanation is twofold. Firstly the respondent had a 3 week marking deadline agreed with the external providers. It was a contractual obligation with financial penalties if not met. Secondly, it was considered that the remaining time available before the deadline was sufficient to enable the claimant to complete the marking. Both of these explanations are also given to the claimant by AK at page 201 which supports that it was the true reason why the claimant was not granted the extension.
105. The time available to the claimant to complete the marking was also considered by AB who with reference to the claimant's diary, who considered that despite her period of sick leave sufficient remaining time remained given her existing commitments.
106. The Tribunal considers that this explanation is supported by the fact that the marking was ultimately re-assigned to other individuals to complete by the deadline which supports that it was a legitimate reason to meet the contractual requirement. The Tribunal therefore does not find that the respondent has discharged its burden of proof and accept the explanation provided. The failure to grant the extension to the marking which in turn failed to support the claimant in passing her probation was not because of the protected acts.

1.3.7. Dismiss the Claimant.

107. The reason for the dismissal as provided by AB was the claimant's performance. The Tribunal consider that this explanation is supported by the evidence contained within the bundle and repeat its reasons above as follows.
108. At pages 308 to 309 is an email from a student in which she raises concerns about the lack of tutor support and quality of the support that had been received. Page 309 to 310 contains an email from another student raising concerns. JNW, the development lead at page 311 to 312 provides an email from another student in which concerns were raised about tutor contact. JNW then provides this to the respondent and asks for escalation. While the Tribunal accept that JNW did previously request that meetings were delayed until the new year the date of this evidence is 2 February and therefore there has been further time in which contact could have been made since the request in December.
109. Where trainees had been visited the central records as documented at page 321 had not been updated to show the progress made.
110. There had also been a failure by the claimant to mark 16 assignments by 7 February with her having only marked 4. The claimant had sought an extension to this due to previous sick leave which was not granted. However, the claimants

sick leave was 27/9/21 to 31/10/21. The evidence before the Tribunal was that there was therefore sufficient remaining time before the deadline for the claimant to complete this marking despite her sick leave and the Tribunal accept this. This is evidenced at page 197 of the bundle which includes a breakdown of the hours available to the claimant in which to complete the marking. This further supports capability issues and the explanation by AB that that was the reason for her decision.

111. This all supports that AB's decision was based on capability of the claimant rather than as a result of the protected acts.
112. The respondent's submissions in relation to the dismissal was that the Tribunal would have to find that AB was lying. The tribunal have already stated that they accept the evidence of AB that she had not seen the grievance itself. In that regard however AB own evidence was that she was aware of a complaint. In that regard, however the claimant's position was that the tribunal would not need to find AB was lying in any event.
113. The claimant's position was that the case has to be looked at as whole and the lack of explanation provided by Michelle Sell. In that regard the tribunal repeats its reasons provided in paragraph 82. The claimant's case in relation to issue 1.3.7 is that the respondent dismissed the claimant which would automatically include Michelle Sell. The tribunal re-reiterates that the claimant's pleaded case does not read that Michelle Sell was the ultimate decision maker.
114. In terms of the dismissal itself, the tribunal also considers that AB was the decision maker and not Michelle Sell because AB confirms this, and this is supported by the documentary evidence in reaching her decision. There is no evidence that she was told by Michelle Sell to dismiss. The claimant suggested that the documents at pages 291 to 331 were generated for the purposes of litigation, however the panel consider that her reasons are clearly identified in the dismissal letter itself at pages 287 to 290.
115. As to the date of the dismissal, the tribunal repeats the reasons given in paragraph 88 above. The grievance did not go away simply because the claimant had been dismissed.
116. The claimant suggests that there was no reason why the dismissal could not be paused until the conclusion of the grievance but there is a clear reason in that the respondent needed to look at the wider interests of the company which included meeting its external contractual objectives and which the claimant currently was not. This is in the context of the claimant not engaging with the probation review process to work towards improvement. This supports the explanation that the dismissal was in relation to performance and not the protected acts.
117. The tribunal therefore accepts that the reason for the dismissal was

capability and not the protected acts.

118. For the above reasons, the unanimous decision of the tribunal, is that the respondent has discharged the shifted burden of proof in relation to the detriments established and accept the explanation that the reason why the respondent behaved as it did was in no way because of the protected acts. The claim is therefore dismissed.

Employment Judge French

29 January 2024

Sent to the parties on:
2 February 2024

For the Tribunal Office: