EMPLOYMENT TRIBUNALS

Claimant:	**Ms J Campbell**
Respondents:	**(1) London Borough of Waltham Forest** **(2) Alexandra Jacobs** **(4) Danbro Employment Umbrella Ltd**
Heard at:	**East London Hearing Centre (by CVP)**
On:	**11, 12, 15 - 18 May 2023 and 20 - 22 and 25 September 2023, 26 and 28 September 2023 (in chambers) and 2 October 2023**
Before:	**Employment Judge S Park**
Members:	**Mrs M Legg** **Mr M Rowe**

Representation

For the Claimant:	**In person**
For the First and Second Respondent:	**Mr S Brochwicz-Lewinski (counsel)**
For the Fourth Respondent:	**Mr D Campion (counsel)**

JUDGMENT having been sent to the parties on 26 October 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Claims and issues

1. The claimant's claim was started in November 2020. She initially named 4 respondents. These were the London Borough of Waltham Forest, Alexandra Jacobs, the Sellick Partnership Limited and Danbro Employment Umbrella Ltd. She brought claims of race discrimination. Initially these were described as direct discrimination, indirect discrimination, harassment and victimisation.

2. Before this hearing there were several preliminary hearings. On 3 February 2021 and 1 April 2021 hearings were held for case management purposes. Following an open preliminary hearing on 4 November 2021 the claims against the third respondent were struck out. A claim against the fourth respondent based on it

being the third respondent's agent was also struck out. The claim against the fourth respondent based on it being the claimant's and the second respondent's employer was allowed to proceed.

3. A further closed preliminary hearing was held on 4 April 2022. The parties were unable to finalise the issues following that hearing. Another preliminary hearing was held on 21 November 2022. By this point a final list of issues had still not been agreed by the parties. At this hearing a list of issues was compiled. This was subject to an application by the claimant to amend her claim.

4. The issues as identified at that hearing (and subsequently amended) are as follows:

   4.1. The claimant alleges the following occurred:

   a) In or around August 2019 the second respondent said that the claimant 'was not vanilla enough'.

   b) In or around November/December 2019 the claimant was introduced by the second respondent to a new member of the Commercial Team, Lorraine Clarke, as the 'Glamour corner' with said comments being heard by the claimant's colleagues.

   c) The second respondent spoke to the claimant in a humiliating and public manner on two occasions between December 2019 and February 2020 in the presence of the claimant's colleagues.

   d) There was public criticism of the claimant's work and legal advice and/or the manner in which the claimant's work was criticized on two occasions, in relation to two pieces of client work:

   - The DCS Print and Design Contract (CSD.14); and
   - The Hawkswood Group Contract termination (SWG13).

   e) The second respondent intentionally disregarded the claimant's existing diarized work commitments when she attempted to bring forward the 1:1 already diarized for 21 July 2020 without having regard to the urgent reviews diarised in the claimant's diary.

   f) A failure to investigate a complaint concerning the second respondent's treatment of the claimant made by the claimant to Mr Walling on 14 July 2020. (The claimant contends this was done as part of a general practice of not dealing with complaints raised by non-white workers.)

   g) The claimant's placement with the first respondent was terminated on 15 July 2020 without giving the claimant any reason.

   h) The provision of one week's notice to the claimant of termination.

   i) The claimant was not offered the security of a permanent post.

   j) The claimant was not permitted to appeal against the termination of her position as an agency worker.

5. The claimant has alleged all the above amounted to less favourable treatment because of her race, so direct discrimination.

6. The issues for the Tribunal to determine are:

   6.1. As a matter of fact did the first respondent and/or the second respondent treat the claimant less favourably than it would treat a comparator in material circumstances.

   6.2. The claimant relies on a hypothetical comparator for all allegations. In addition she has named actual comparators for allegations g, h and i. These are:

      a) Alexandra Jacobs, Tuba Kara, Monica Celorico, Ernesto Meskauskaite and Jane Davidson in respect of (g) and (i)

      b) Sheila Teli and Shirley James in respect of (h)

7. The claimant relies on the same allegations set out above as the basis of her claims for harassment on the grounds of race. The issues are:

   7.1. did the conduct take place;

   7.2. was it related to her race; and

   7.3. did it have the proscribed purpose or effect as set out in section 26 Equality Act 2010.

8. In respect of her victimisation claim, the claimant has relied on 7 acts which she says are protected acts. These are:

   8.1. the claimant's email to the first respondent of 13 July 2020 at 11:34 (re-sent at 11:51);

   8.2. the claimant's email to Jeremy Walling on 14 July 2020 at 07:54;

   8.3. the claimant's email of 15 July 2020 at 15:31 to the second respondent;

   8.4. the claimant's email of 15 July 2020 at 15:33 sent to Sellick Partnership (formerly third respondent and no longer a party to these proceedings further to a determination that they are not an agent of a principal in this matter);

   8.5. the claimant's email to the first respondent on 15 July 2020 16:59;

   8.6. the claimant's email of 16 July 2020 at 11:01 to Sellick Partnership;

   8.7. the contents of the claimant's appeal dated 19th July 2020 sent to the first respondent attached in the claimant's email dated 20th July 2020.

9. The claimant says the following are detriments because of those acts:

   9.1. termination of her engagement by the first respondent; and

   9.2. refusal of an appeal by the first respondent.

10. The claimant had withdrawn her claims for indirect discrimination.

11. The claimant started Early Conciliation on 22 September 2020. The respondents argued that the Tribunal did not have jurisdiction to hear any claims that arose before 23 June 2023.

12. At all material times the second respondent worked for the first respondent. She was not an employee but an agency worker. The second respondent managed the claimant and the first respondent accepted liability for the second respondent. The fourth respondent is an agency and both the first and second respondent had contracts of employment with the fourth respondent. The Tribunal will need to determine any liability of the fourth respondent.

Procedure, documents and evidence heard

13. The claimant appeared in person. The respondents were all represented by counsel. The first and second respondent were represented together as the first respondent accepted liability for the second respondent. The third respondent was separately represented.

14. During the course of proceedings there had been lengthy disputes between the parties regarding disclosure of documents, redaction and the preparation of the bundle. We are not going to set those out in detail in this judgment. Of relevance to this hearing were the directions given by EJ Gardiner on 7 March 2023 relating to the preparation of the bundle. EJ Gardiner ordered a single bundle should be agreed by the parties. He also stated that any documents that were arguably relevant should be included but they must be referred to in witness statements or cross examination.

15. The parties had not been able to agree a single joint bundle. We were provided with two bundles. The respondents' bundle ran to 5255 pages. The claimant's bundle ran to 3671 pages. A final preliminary hearing was held on 10 May 2023, the day before this final hearing was due to start. At this it was decided that both bundles would be considered as it would be impossible for the parties to agree a single bundle at such a late stage.

16. Much of the content of the bundles were the same. There was also a lot of duplication of documents or different versions of the same documents. There were two versions of an email sent by the claimant's witness, Althea Bryan. Initially both parties had relied on a shorter version but a longer version had been provided by the claimant for the hearing. We agreed both versions would be considered.

17. The claimant had prepared a witness statement. This was over 150 pages long. Initially this was longer as she had embedded images of documents within it. At the preliminary hearing the day before I had asked the claimant to provide an updated version referring to the documents in the bundle rather than embedding images. The claimant did this but the statement remained over 150 pages long.

18. The claimant called Althea Bryan as a witness. Ms Bryan had provided a statement in 2021, when statements were initially due to be exchanged. The claimant had provided an updated statement by Althea Bryan shortly before the

hearing. Whether to allow this had been considered at the preliminary hearing on 10 May. The respondents objected to the updated statement being relied on by the claimant. The respondents argued that it brought in new evidence on unrelated matters which the respondents, and in particular the second respondent, had not had an opportunity to address. At the preliminary hearing the claimant confirmed she was not seeking to establish the truth of any other allegations made by Ms Bryan and she was only relying on the allegation that other complaints had been made. The claimant agreed that she would only be relying on Ms Bryan's first statement and the additional documents that had been appended to the second statement.

19. The first respondent called six witnesses. These were Sue Sheret, Sheila Saunders, Stephen Ruggles, Mark Hynes, Jeremy Walling and Jade McKenzie-Benjamin. The second respondent gave evidence and also called Jason Charles as a witness. The Fourth respondent initially called three witnesses, Colin Thompson, Helen Broughton and Sharon Fenton. Following discussions about the scope of the case against the fourth respondent, and the extent to which its evidence was not in dispute, the claimant confirmed that she did not need to cross-examine the fourth respondent's witnesses and their statements were taken as read. The claimant also confirmed she did not need to cross-examine Mr Charles so he appeared just to confirm his evidence.

20. The hearing was held by video. This had been agreed at an earlier preliminary hearing as a reasonable adjustment for the claimant. The claimant had asked for other adjustments, such as being provided with questions in advance and being able to turn off her video. The majority of the adjustments were not permitted. The claimant was able to turn off her camera when not actively participating in the hearing but needed to keep it on when giving evidence. During the hearing additional breaks were provided when the claimant required them.

21. The witness evidence took longer to conclude than initially anticipated. It could not all be heard in the time originally allocated. The hearing was adjourned and restarted on 20 September 2023, again by video. There were three further days of evidence. We then received written submissions from all parties and oral submissions on behalf of the respondents. The claimant advised she did not wish to add to her submissions orally.

Findings of Fact

Background

22. The claimant is a qualified barrister. The first respondent is a local authority.

23. The claimant secured a role with the first respondent via the Sellick Partnership Limited, an agency who were originally the third respondent. Sellick informed the claimant about different arrangements for being paid. One option was via an umbrella company. Sellick recommended a few different umbrella companies, of which the fourth respondent was one. The claimant went for this option. She entered into a contract of employment with the fourth respondent. There was no direct contractual relationship between the claimant and the first respondent.

24. Even though the claimant had a contract of employment with the fourth respondent her dealings with them were very limited. Their role was purely administrative, mainly limited to processing payroll.

25. The claimant started to work for the first respondent in December 2018 as a contract lawyer. On a day-to-day basis the claimant worked alongside permanent employees of the first respondent in the commercial team. Initially the claimant was supervised by Sheila Sunders, the Senior Lawyer in the first respondent's Contracts and Procurement Team. Ms Saunders was supervised by Jeremy Walling, Assistant Director Commercial Law within the Legal Services function. Both Ms Saunders and Mr Walling were permanent employees of the first respondent.

26. The claimant was engaged to work on a full-time basis of 36 hours per week but she intended to also continue to practice as a barrister. At some point the claimant changed her working hours so she worked 36 hours a week over 4 days. This arrangement was agreed with Ms Saunders.

27. At some time around April 2019 an issue arose between the claimant and Althea Bryan. Ms Bryan was a paralegal within the contracts and procurement team and a permanent employee of the first respondent. Ms Saunders spoke with both the claimant and Ms Bryan. There was a discussion about the claimant's engagement with the first respondent ending then. We saw Ms Saunders' note from the time that indicated that the claimant indicated she wanted to leave immediately rather than give a week's notice. According to Ms Saunders she discussed with the claimant that she would continue to work until a period of planned leave in June or July 2019 and then she would leave at that point.

28. In May 2019 Ms Saunders left. She was not replaced immediately so there were a few months with no team leader in the contract and procurement team.

29. The claimant did not leave the first respondent at that point. She returned from holiday at the end of July 2019. The relationship between the claimant and Ms Bryan remained poor and we heard from a number of witnesses that their interaction in the office was minimal from then on.

30. According to the claimant, when she returned from her holiday, she reached an agreement with Mr Walling that she would work for the respondent three days a week. This was disputed by Mr Walling. We saw the claimant's email asking for different working arrangements and her note to herself at the time indicating this was agreed. Mr Walling's evidence was that this was not agreed. However, a compromise was reached with the claimant working 3 days a week in the office and then she would work her remaining hours remotely on a Thursday or Friday. We accepted Mr Walling's evidence on this issue. This arrangement was corroborated by an email from the claimant to the second respondent dated 15 August 2019. We concluded that there was no agreement for the claimant to reduce her hours to only three days a week. There was an arrangement that allowed the claimant to work flexibly and only be in the office three days a week but she was still expected to do some work on the other days remotely.

31. In August 2019 the second respondent, Alexandra Jacobs, was appointed to the role of senior lawyer in the contracts and procurement team. Ms Jacobs was also engaged as a locum via Sellick and used the fourth respondent as an umbrella company. Ms Jacobs started working for the first respondent on 12 August 2019. From then on, she managed the claimant.

Initial dealings with Ms Jacobs (second respondent) – the 'vanilla' incident

32. When Ms Jacobs started, she was made aware of the difficulties between the claimant and Althea Bryan. We heard from Ms Bryan how shortly after Ms Jacobs started, they met. Ms Bryan alleged that Ms Jacobs told her that she would be dealing with the claimant. This was not documented in Ms Jacob's notes of the 1:1. In oral evidence Ms Jacobs explained that she would have told Ms Jacobs that if she had any difficulties with the claimant, she should inform her and she would then deal with those issues. We accept that there was probably a conversation along these lines. It was also appropriate for Ms Jacobs to seek to reassure Ms Bryan in this way, given the history. Ms Bryan was a more junior team member and Ms Jacobs was the claimant's line manager. It was appropriate for Ms Bryan to escalate any further problems to Ms Jacobs.

33. On 14 August 2019 Jeremy Walling made Ms Jacobs aware of an email the claimant had sent on 12 July 2019. This email was described by both Mr Walling and Ms Jacobs as being abrasive and abrupt. Mr Walling asked Ms Jacobs to speak to the claimant about the email. Ms Jacobs was given this task because she was the claimant's new manager.

34. Ms Jacobs had also been made aware of a complaint about the claimant by a third party. This was in an email dated 30 July 2019. Mr Walling had asked the claimant to provide her account of this event, which she did on 14 August 2019. Mr Walling forwarded this to Ms Jacobs and asked her to also discuss it with the claimant.

35. On 19 August 2019 Ms Jacobs sent the claimant an email about a new matter and asked the claimant to deal with it *"at some speed"*. The claimant did not include any particular complaint about this email as part of her claim. However, she relied on it as evidence in support of other allegations she made about Ms Jacobs. In evidence the claimant explained why she did not like this email. The claimant described it as condescending and 'different'. She particularly objected to the wording *"at some speed"* and suggested different wording should have been used. We accepted that the way that Ms Jacobs communicated may have been different in style than Ms Saunders. Nonetheless, as a matter of fact it was still an appropriate and professional email.

36. The claimant met with Ms Jacobs on 21 August 2019 to discuss the email of 12 July and the complaint of 30 July. The claimant in her evidence has suggested there were 2 separate discussions, one on 19 August and one on 21 August. It is not a significant point, but looking at the email correspondence from the time we concluded it was more likely that there was just a single meeting on 21 August.

37. It was agreed by the claimant and Ms Jacobs that during this meeting the email and complaint were discussed. It was during this meeting that the claimant alleged that Ms Jacobs said to the claimant that she was *'not vanilla enough'*.

This is disputed by Ms Jacobs. Ms Jacobs said that it was the claimant who used the term *'vanilla'* and that she used it in the context of a discussion about the claimant's writing style. Ms Jacobs said that the claimant suggested her writing should be more "*vanilla"*.

38. We were faced with two conflicting accounts of events in terms of who used the term '*vanilla'*. The claimant alleged it was Ms Jacobs who used the term and it was about the claimant as a person rather than about her writing style. Ms Jacobs said they were discussing the claimant's writing style and the claimant used the word "*vanilla"* in this context, i.e. that her writing should be safer and blander.

39. We found Ms Jacobs' account clear and persuasive. She explained that at the time she was not familiar with the word being used in this way, but found it a clever use of the term. Ms Jacobs also explained that English is her second language and although she speaks it well, she is not always familiar with idioms, such as this. The claimant insisted in evidence that she was unfamiliar with the term and continued to not understand the word being used as it was. We found that was at odds with the email the claimant sent immediately after the meeting using the term in exactly the same way as Ms Jacobs described. The claimant also alleged in evidence she had subsequently asked others in the department what the term meant, and suggested this showed she did not know the term before. The only witness who corroborated this was Ms Bryan. We did not accept Ms Bryan's evidence on this point. It was imprecise, as she just said it occurred at some point between August and December 2019. We also heard from multiple witnesses that the claimant and Ms Bryan's relationship was poor and they did not interact directly during this period. None of the other witnesses who we heard evidence from recalled such discussions with the claimant. The claimant also relied on text messages with another colleague, Moshina. However, these were the claimant messaging Moshina in July 2020, so not contemporaneous.

40. Having considered all this evidence we rejected the claimant's account and preferred that of Ms Jacobs, that it was the claimant who first used the term '*vanilla'* in the meeting on 21 August 2019.

41. The claimant has suggested now that she started to complain about Ms Jacobs to Sellick from around then onwards. We were provided with some correspondence with Sellick from August 2019. These do show that the claimant was not happy, but she did not complain about any particular harassment or discrimination by Ms Jacobs. The messages indicate that she did not like Ms Jacobs management style. This is consistent with how the claimant described the problem often in oral evidence. She said frequently that the way Ms Jacobs acted was '*different'* or '*unusual'*. It seemed clear to us that that the way Ms Jacobs managed the team was different in style to Sheila Saunders. This was corroborated by other witnesses who noted Ms Jacob's style. The claimant seemed to have struggled with this. However, the emails we have seen from Ms Jacobs to the claimant do not indicate any difficulties between them at the time. The emails from Ms Jacobs are cordial and at times the claimant thanked Ms Jacobs for being supportive.

Glamour corner complaint

42. The next incident that forms part of the claimant's case was in December 2019. A new member of staff joined the team, Lorraine Clark. She was a newly qualified solicitor and also agency staff.

43. On 2 December Ms Jacobs took Ms Clark around the department and introduced her to the team. The claimant alleged that Ms Jacobs did not introduce her by name but just as '*the glamour corner'*. Ms Jacobs said she introduced the claimant by name and then added she was the glamourous member of the team.

44. It was undisputed that at some point when Ms Jacobs introduced the claimant to Ms Clarke, she referred in some way to the claimant being glamourous. However, there were different accounts of exactly what was said. We considered carefully whether we needed to make a finding on the exact words used. We have concluded that this is not necessary for the purpose of the claim we need to determine. The incident was almost four years ago and witness evidence is unlikely to be completely reliable. The gist of what was said was undisputed. The context was that Ms Jacobs was introducing the claimant to a new member of the team and as she did so she described the claimant in some way as being glamourous. In her evidence the claimant also alleged that Ms Jacobs did not use her name at all. On this point we did make a finding of face. We did not accept this was the case and we preferred Ms Jacob's evidence that she introduced claimant by name. We find it unlikely that Ms Jacobs would introduce others by name but not the claimant. We have concluded that Ms Jacobs introduced the claimant with additional description of either the claimant being glamourous or using a more informal phrase, *"the glamour corner".*

45. The claimant was upset by what had happened. This is not disputed. The claimant told Ms Jacobs the same day that she found it offensive being introduced that way rather than as a barrister or lawyer. Ms Jacob's evidence was she was mortified and apologetic. The claimant said that Ms Jacobs did not apologise. We accepted Ms Jacob's evidence that she did apologise. We were provided with Ms Jacob's own note of this meeting which clearly recorded her apologising. We could not see any reason to doubt the veracity of the notes made at the time.

46. In terms of the background to the comment, we heard from a number of witnesses that the claimant took care with her appearance when in the office. Ms Jacobs described the claimant as being glamourous and that she had complimented the claimant previously on how she dressed. The claimant acknowledged this and that she had then bought Ms Jacobs a dress. Ms McKenzie-Benjamin explained in some detail how the claimant always appeared to take care about her appearance. This included that the claimant would do her hair and make-up every day for work and Ms McKenzie-Benjamin described the claimant's dress sense was glamourous. We find the comment made by Ms Jacobs was clearly to how the claimant presented herself. The evidence from a number of people about the claimant was consistent in this respect.

47. The claimant then went and complained about the incident to Stephen Copsey. Mr Copsey did not work in the first respondent's legal department, but in a different area. We make no further finding of fact, other than to note that this occurred.

CDS Print and Design Contract

48. In November and December 2019 the claimant was working on a particular matter referred to as the CDS Print and Design Contract. She had been allocated the matter in September 2019 and had provided advice to the client. In early November 2019 the claimant escalated some concerns to Ms Jacobs. Ms Jacobs replied by email dated 8 Nov 2019 informing the claimant she would take 'take it from there'. The claimant acknowledged this but also confirmed she would keep on working on other aspects of this matter.

49. The claimant has suggested that the matter was taken off her at this point. This was not shown by the documentary evidence that we saw. We were provided with a number of emails relating to this matter which show both the claimant and Ms Jacobs worked on this matter during November and December 2019 and they both continued to correspond with different people involved in the matter.

50. On 5 December 2019 one client wrote to Ms Jacobs directly, not copying in the claimant, asking for urgent advice about TUPE. Ms Jacobs asked the claimant if she had provided written advice about TUPE. The claimant informed Ms Jacobs she had not. Ms Jacobs then provided written advice to the client the same day. The claimant was not copied in to that advice.

51. The claimant was invited to a meeting with the client on 11 December 2019. The claimant has suggested that this was surprising as Ms Jacobs had taken over the matter. The emails we have seen make it clear they were both working on the matter at the time and Ms Jacobs had not fully taken over conduct.

52. The claimant attended the meeting. There had been some difficulties with the matter and a solution was needed. During the meeting the claimant advised that a letter of intent should be used to address the difficulties. After the meeting on 11 December 2019 Ms Jacobs came and asked the claimant how the meeting went. This was in the open plan office. The claimant has alleged that Ms Jacobs stood over her in the open plan office and shouted at her. This was denied by Ms Jacobs.

53. We did not accept the claimant's account about what happened after the meeting on 11 December 2023 and we find that Ms Jacobs did not shout at the claimant. The claimant suggested that this incident was overheard by others, being in an open plan office. There was no contemporaneous documentary evidence to support this, such as another employee reporting that Ms Jacobs had been shouting in the office. The only supporting evidence provided by the claimant was by Ms Bryan. She said she had witnessed 2 altercations between Ms Jacobs and the claimant. This evidence was very vague. Ms Bryan just stated it happened between September 2019 and February 2020, rather than being a clear account of an incident in December 2019. We did not consider Ms Bryan's evidence reliable and attached little weight to it. The other witnesses who gave evidence and who worked in the same office did not witness this incident. We also heard from several witnesses that this allegation was out of character for Ms Jacobs. We accepted this other evidence about how Ms Jacobs tended to act in the office. We found it clear and credible.

54. We also noted that the claimant accepted that it would be normal and acceptable for a manager to seek an update after a meeting. She says this expressly in her statement, but then goes on to say that the problem was the manner and tone in which it was done. This was a consistent theme throughout the claimant's evidence. She seemed unable to accept Ms Jacob's management style so was critical of very trivial differences between what Ms Jacobs did or said and what the claimant felt Ms Jacobs should have done. With regard to this incident, one of the claimant's complaint was that the discussion was in the open plan office rather than in a private room. However, there was no obvious reason why Ms Jacobs and the claimant needed to go into a private room for a discussion. It was an informal discussion so that Ms Jacob's could get an update from the claimant on the meeting. We find there is nothing in appropriate about this, given that they were both working on the same matter and Ms Jacob's was the claimant's manager.

55. Ms Jacobs did disagree with the advice the claimant had been given about a letter of intent and she did tell the claimant this. That is not disputed. Ms Jacobs proposed a different course of action. The claimant then sent an email to the clients, copying in Ms Jacob's, advising of the change of plan.

56. In relation to this matter, the claimant has complained that Ms Jacobs undermined her. There were 2 emails that the claimant seemed to be suggesting undermined her. One was the email of 5 December 2019 from Ms Jacobs providing TUPE advice to the client. On reading the email, we could not see how that email could be seen as undermining the claimant or critical of her in any way. Ms Jacobs simply provided more detailed advice on relevant area of law which the claimant had not previously provided full advice to the client. Ms Jacobs did not make any reference to the claimant's advice in her email or contradict what the claimant had said previously. It is entirely appropriate as a professional email from a lawyer to a client providing advice in response to a request.

57. The second is the email the claimant sent on 11 December 2019 after the meeting. This is an email from the claimant to the client but in this she explains that she has discussed the situation with Ms Jacobs and that the advice on how to proceed is now different. The following day the claimant sent a second email reiterating the change in position, again saying this was decided by Ms Jacobs.

58. The claimant relied on these in support of her allegation that her work was publicly criticised by Ms Jacobs. We find as a matter of fact that these emails are neither critical or undermining the claimant. It is not reasonable to interpret them in such a way. The emails are all professional and provide legal advice to a client on a matter which was difficult and that needed to be resolved urgently. The claimant and Ms Jacobs were both experienced lawyers and had different opinions on the best way to handle the situation. This is not unusual. As the senior lawyer in the team, so ultimately the person with responsibility, it was appropriate for Ms Jacobs to make a decision on what she thought was best and instruct the claimant to proceed in that manner. This was not critical of the claimant and did not undermine her. It is also not credible to suggest that the reason that Ms Jacobs did this was solely to undermine the claimant. This would be contrary to Ms Jacob's responsibility to act in her client's best interest and advise them accordingly.

59. We were also provided with other documents including correspondence on this matter between the claimant, Ms Jacobs and others. We could not identify anything within this correspondence is unduly critical of the claimant. As noted, before, this was a difficult matter and Ms Jacobs was the manager providing advice, support and supervision to the claimant.

60. The claimant then was on leave from 18 December 2019 and Ms Jacobs took over conduct of this matter during her absence.

Sensory Services

61. This was another matter claimant was dealing with around the same time. On 16 January 2020 the client escalated some concerns to Ms Jacobs. Ms Jacobs then raised these concerns with the claimant. We have seen various pieces of correspondence from the time related to this matter.

62. This matter just forms the background to some allegations made by the claimant. What the claimant alleged is that there was another occasion where Ms Jacob spoke to her about this matter in the office, in front of colleagues, in a public and humiliating manner. The Sensory Services contract, and the problems that had arisen, just provide the context

63. The claimant described an occasion where she says that Ms Jacobs came to speak to her in the open plan office and asked whether there was a solution to the problems that had arisen with this contract. The claimant again accepted that this would usually be acceptable by a manager. She then goes on to allege that it was the manner Ms Jacobs did this was not acceptable to her and she says Ms Jacobs raised her voice. Again, this was an instance where the claimant has described how Ms Jacobs acted as being '*different'*.

64. We found the claimant's account of this alleged incident unclear and vague. No date given and she did not provide any corroborating evidence. As before, we found the evidence of Ms Jacobs and the first respondent's other witnesses more persuasive. We accepted that evidence that Ms Jacobs did not raise her voice in the office and that had she done so someone would have noticed. Again, we find that it seems more likely that the claimant was not comfortable with Ms Jacob's management style. We concluded that the claimant generally objected to Ms Jacob managing her in an appropriate way complained if there were trivial differences between what the claimant's expectations and what Ms Jacobs actually did.

Hawskswood Group Contract Termination

65. In March 2020 the national lockdown commenced and from then the claimant and Ms Jacobs were working remotely.

66. On 25 March 2022 Ms Jacobs allocated to the claimant a new matter, known as Hawkswood. The claimant sent her legal opinion to the client on 26 March 2020. On the 2 April 2020 the claimant forwarded the advice to Ms Jacobs, Mr Walling and also Kim Travis, the first respondent's head of litigation. The claimant said in the email "*I welcome your inputs in respect of my advice, thanking you in advance".*

67. Shortly after, on the same day, the claimant wrote to the client and copied in Ms Jacobs, Mr Walling and Ms Travis. At 18.13 Ms Travis wrote to the claimant and said she should not be a party to the correspondence providing advice to the client due to a Chinese wall that was in place. The claimant acknowledged this email.

68. Ms Jacobs responded to Ms Travis' email and confirmed that Ms Travis should not be copied into advice. Ms Jacobs then said in her email to the claimant that "*It would be better practice on matters where you are unsure about contractual interpretation, that you arrange a discussion with me first before we finalise our advice and indeed issue it to clients".* Ms Jacobs sent a further email to just the claimant and Mr Walling with more detailed comments on the advice that the claimant had provided. Ms Jacobs suggested that the advice could have been "better tailored and covered wider contractual terms". She gave her views on the issues. She also included in this email a similar comment about discussing contractual interpretation before any advice was sent to the clients.

69. The claimant's complaint is about those two emails from Ms Jacobs which she says were critical and undermined her publicly. We have seen the emails and heard from the claimant that she was upset about the perceived criticism, particularly when Ms Travis and Mr Walling were copied in. We can understand that the claimant may have not welcomed the feedback or suggestion she seek assistance from Ms Jacobs that was copied to others. However, we do not accept that these emails can be read as undermining the claimant. The claimant has alleged that this was a premeditated attack. This is at odds with the emails we read. The claimant had expressly said in her email she welcomed input, and Ms Jacobs responded to this. Again, Ms Jacobs was the claimant's manager and providing appropriate feedback. There was no evidence at all to suggest that there was any ill intent on Ms Jacob's behalf.

<u>Events of July 2020</u>

70. At this time there were three lawyers in the contracts team who were agency workers. There was another permanent employee, Moshina Saleem, who was on maternity leave. She was due to return in June 2020. On 4 June 2020 Ms Jacobs and Mr Walling met to discuss Ms Saleem's return to work and the resourcing of the department. They decided that once Ms Saleem returned the department would not need all three agency lawyers. They decided that one of the agency lawyers would need to be let go. We heard from Ms Jacobs that there was an initial discussion at that meeting and Mr Walling and her agreed that Jane Davidson and Shirley James were good at the job and integrated well into the department. They also agreed the claimant had not integrated well. There had also been some complaints from clients and colleagues. We accepted it was likely this discussion took place at that time but we accepted that this was an initial discussion and no definite decision had been made.

71. At this point it was a few months into the national lock down and the whole department was working remotely. Ms Jacobs explained that there were fortnightly virtual team meetings to allow the whole team to meet and discuss anything necessary. During June 2020 the claimant did not attend all of these meetings, stating she had pressing deadlines.

72. On 8 July 2020 the claimant sent an email to Ms Jacobs at 13.11 stating she had completed her hours for that week and would not be working on Thursday or Friday because she would not be paid for this. We have already concluded that Mr Walling had agreed with the claimant a working pattern that entailed three days in the office and additional work remotely on Thursday and Friday. Due to the lockdown all work was undertaken remotely, but the underlying agreement that the claimant would be doing some work across the whole week had not changed. There was no agreement that she could only work three days a week.

73. There followed an exchange of emails between the claimant and Ms Jacobs. We are not going to cite these in full. The key points are that the claimant said to Ms Jacobs she was working 5am-9pm every day and she wanted to condense her work for the first respondent to 3 days per week going forward. Ms Jacobs had asked about the claimant's workload and what needed to be progressed before the next Monday and the claimant said nothing needed progressing.

74. On 9 July the claimant sent a further email to Ms Jacobs. The key points of this were:

- She intended to commence a condensed 3 day week from 13 July.
- She reiterated that she was working 5am-9pm some days.
- She was unlikely to attend Monday's team meeting and this would continue in the future depending on her workload.

75. In respect of this email, we note again the claimant had not agreed with Mr Walling she could condense her work to just 3 days a week. Neither had she asked him this again at the time. This was a unilateral decision by the claimant.

76. On 13 July Ms Jacobs sought to arrange a meeting with the claimant. They had been due to have their monthly 1:1 on 21 July 2020 but Ms Jacobs decided to bring it forward. We accepted Ms Jacob's explanation that this was because she was concerned about the claimant due to the email exchanges the previous week. Ms Jacob's concerns were very understandable. This was in the middle of lockdown and everyone had been working remotely for several months. Discussions about wellbeing and work were commonplace. The claimant had not been attending team meetings, citing workload, and she had informed Ms Jacobs she was working 16 hour days. A manager trying to speak to an employee was not just understandable but can be seen as a positive thing to do to check on the wellbeing of the employee.

77. Ms Jacob's had access to the claimant's online diary. We have seen the diary for that week. The claimant had blocked out periods of time based on her own workload and time management. She did not have any external commitments such as meetings with clients diarised. At 9am on 13 July Ms Jacob's sent a meeting invitation for 14 July. We find this was appropriate as it did not clash with any external commitments, only the claimant's own plans for managing her workload.

78. The claimant rejected that meeting invitation. The claimant sent Ms Jacobs an email asking about the rearranged supervision and saying she could do 21 July or after. Ms Jacobs responded to explain she had brought it forward as she was concerned about the claimant's workload and she "*would like to see how I can ease the pressure'* so she would re-send for 14 July. The claimant responded to say she was fine with her work and she asked that the 1:1 was on 21 July. At approximately the same time Ms Jacobs sent another invitation for 14 July. The claimant declined this meeting.

79. At 11.34am that day the claimant sent to Ms Jacobs a relatively lengthy email. She resent it with some amendments at 11.51. We are not going to set out the contents of this email in detail. The gist of the email was to complain about Ms Jacob's management style and what the claimant perceived of micromanagement. She suggests there are difficulties with their relationship and they should limit their interactions. The claimant ends by asking that the 1:1 is rescheduled on or after 21 July. The claimant did not expressly complain about discrimination or mention race or any other protected characteristic. Neither does she complain about being treated differently to others in any way.

80. At 11.52 Ms Jacobs had sent another meeting invitation for 20 July 2020. The claimant has said that again this clashed with a commitment. The only commitment we could see in the claimant's diary for that time was time blocked out to assist her own workload management. There was no commitment such as a client meeting. The claimant declined this invitation from Ms Jacobs.

81. On 13 July Ms Jacobs was also in contact with Mr Walling. She initially emailed to ask for a catch up the following day. At 7.13pm Ms Jacobs sent an email to Mr Walling advising of difficulties she was having with the claimant. She stated she was at *'breaking point'*. Ms Jacobs referred to some historical matters, such as client complaints. She also informed him of the issues that day with the claimant rejecting the invitations for the 1:1. AJ forwarded the email correspondence with the claimant to Mr Walling.

82. The following morning at 7.54 the claimant wrote to Mr Walling. She forwarded the emails of 11.34 and 11.51 from the day before. She says she is '*suffering in silence'* and suggests something else may be going on and that Ms Jacobs is trying to sabotage her. The claimant does not mention discrimination, race or any other protected characteristic in this email. The complaints are quite general in nature.

83. The claimant has said that as part of this claim that this email was a complaint that should have been investigated. We reviewed fully the contents of this email. While the claimant does complain about Ms Jacobs in the email it is not a formal complaint and there is nothing in the email itself which suggests it should be treated as such. The email is informal in nature. Mr Walling did not directly respond to it that email at any point.

84. On 14 July 2020 Mr Jacobs tried again to rearrange the 1:1. We accepted Ms Jacob's evidence that she wanted to meet with the claimant to discuss her workload. The claimant had expressly said to Ms Jacobs she wanted it rearranged back to 21 July 2020 and this is what Ms Jacobs tried to do. Ms Jacobs sent an invitation at 4.42pm. Unfortunately this time the invitation did

clash with a client meeting the claimant. This rearranged 1:1 was exactly the same as the original 1:1 that had been cancelled the day before. However, Ms Jacobs accepted that she had not re-checked the Cl's diary on this occasion. We accept that this was a genuine error by Ms Jacobs as it was reasonable for her to assume that the Cl would still be free at the time of the original time. We find there was no ill intent by Ms Jacobs in sending this meeting request.

85. The claimant responded at 5.15pm to say there was a clash. The claimant asked if it was on purpose. In this email the claimant expressly says that at any further meetings Mr Walling or Mark Hynes, the first respondent's Corporate Director of Governance and Law, would need to be present.

86. Ms Jacobs sent a further invitation by return for 21 July but at a slightly later time. The claimant responded to ask if Mr Walling or Mr Hynes would be there. The claimant wrote again at 6.08pm reiterating that her attendance was subject to either Mr Walling or Mr Hynes being present.

87. At 6.35pm on 14 July Ms Jacobs forwarded the claimant's email to Mr Walling stating that '*this is madness'* and she will call Sellick as she felt it was getting out of hand. We have noted from the documentary evidence that Ms Jacobs and Mr Walling were due to have a 1:1 on 14 July 2020. Neither Mr Walling or Ms Jacobs gave evidence on what happened at that meeting. We have inferred from the documentary evidence and the way that Ms Jacobs asked about contacting Sellick in the email that there was probably a conversation between Ms Jacobs and Mr Walling about the claimant and what may happen next.

88. The following morning Mr Walling responded telling Ms Jacobs to call Sellick, which she did. During evidence, particularly the cross exam by the claimant, there was discussion about who actually made the decision. We accepted that ultimately it was Mr Walling 's decision. He provided the authorisation to Ms Jacobs, though we accept that he made this decision after Ms Jacobs raised concerns with him and there was probably some discussion between them. We accepted that as an agency worker Ms Jacobs did not have authority to make that decision.

89. Ms Jacobs called the agency and terminated the claimant's engagement. Ms Jacobs gave the agency one week's notice.

90. During the day on 15 July there was some further email correspondence between Ms Jacobs and the claimant. Ms Jacobs set out in email a summary of the difficulties about arranging the 1:1. She did not mention to the claimant directly that a decision had been made to terminate the claimant's contract.

91. The claimant responded to Ms Jacobs twice. The second email at 15.31 was resending the same email with some additional amendments. We are not setting out the contents of these emails in full. The gist was to complain about the breakdown in the working relationship from claimant's point of view. She reiterated she would only meet with Mr Walling and Mr Hynes present. She stated that Ms Jacob's actions had been vindictive and made general complaints about Ms Jacobs belittling her or being aggressive. She does not complain of discrimination, mention race or any other protected characteristic. There is

nothing in these emails where the claimant suggests she is being treated differently or worse than anyone else.

92. Immediately after this the claimant wrote to Sellick and forwarded some of the emails between her and Ms Jacobs. This essentially just repeated the same complaints that she had made a few days earlier to Ms Jacobs and Mr Walling. The complaints are about Ms Jacobs and her working relationship with Ms Jacobs. Overall the complaints are quite general in nature. The claimant does suggest she has been singled out. However, she does not make any mention of race or any other protected characteristic. She makes no suggestion about what why she feels singled out or why she thinks this was. This email was only sent to Sellick and neither Ms Jacobs or Mr Walling were copied in.

93. Looking at the claimant's emails to Ms Jacobs, Mr Walling and Sellick we have concluded that at this point there was a complete breakdown in the working relationship between all the parties. The claimant made it clear in her correspondence she does not want to work with Ms Jacobs and will not do so in the future. She expressly refers to the deterioration in the working relationship.

94. At some point during the day Ms Jacobs called Sellick to inform them of the decision to terminate the claimant's engagement. This was confirmed in an email at 3.58pm. The decision had already been made by Mr Walling by the time he sent the email to Ms Jacobs in the morning. Sellick called the claimant around 4pm and informed her that her engagement was being terminated with one week's notice. This was followed up by email. The claimant acknowledged this and clarified her last day would be 22 July 2020.

95. The claimant has said she was given no reason for the termination. There is no reason in any of the documented correspondence from Sellick. However, at 4.59pm the claimant sent an email to Mr Hynes and Mr Walling, copying in a number of other senior people at the council including councillors. In this she says: "I *am now told that I am no longer required due to funding'*. This suggests that she was given a reason. It may not have been the actual reason or a full explanation of the reasons that Mr Walling and Ms Jacobs decided to terminate her engagement. However, we find the claimant was given a reason. This reason was also at least partially true as Mr Walling had decided previously that once Ms Saleem returned from maternity leave the first respondent could not justify having three agency lawyers in the team.

96. In terms of Ms Jacob's and Mr Walling's reasons for the decision to terminate the claimant's engagement, we accepted their explanations as genuine. There was a combination of factors. There was an intention to reduce the number of agency lawyers due to Ms Saleem returning. There were also long standing issues with the claimant's performance, such as client complaints. As a result of this she had already been flagged as the agency worker likely to be let go. The trigger to the final decision was sequence of events from 8 July until 15 July. By 15 July 2020 there was a complete breakdown in the working relationship between the claimant and Ms Jacobs and claimant was refusing to engage with Ms Jacobs as her manager. The claimant's own emails from this period of time also make it clear that she viewed her relationship with Ms Jacobs as having broken down.

97. As noted above, the claimant sent a lengthy email complaining about the termination of her engagement and her other complaints about Ms Jacobs. In this she expressly suggests that Ms Jacobs acts in a certain way to team members of African descent. She also says that if matters cannot be resolved she will take out a grievance.

98. On 16 July 2020 the claimant sent a further email to Sellick. In this she says she is seeking legal advice and she has been in contact with ACAS in relation to brining a claim against first respondent. She says this is on the grounds of discrimination.

99. On 20 July 2020 the claimant sent a formal appeal to the first respondent. This was sent by email to Mark Hynes and Stuart Petrie, the CEO. It was also copied to some other senior employees and a councillor. This is quite lengthy and we will not go through in detail. For the purposes of the issues we are dealing with we just note that the claimant does expressly complain of discrimination on the grounds of race.

100. Mr Hynes replied to the claimant and informed her that as an agency worker she could not appeal against dismissal and she would not be able to pursue an unfair dismissal claim. He also said there was also no council policy that applied in her situation and the other policies, such as fairness at work, did not apply to agency workers. He does say that he would ask Mr Walling to respond to the issues that the claimant had raised about Ms Jacobs.

101. Mr Walling also wrote to the claimant on 20 July. He also stated that the claimant had no right to appeal as an agency worker. He set out some more detail about the reason her contract had been terminated. In this correspondence Mr Walling referred to the return of Ms Saleem and its impact on the first respondent's need for agency lawyers. Mr Walling also referred to the claimant's unilateral decision to change her working hours in a way that was not acceptable. One point we will also note about this email is that although Mr Walling says that there is no right to appeal for agency staff, he does in effect respond to the claimant's appeal. He reviews the decision to terminate the claimant's contract and states that the decision remained the same.

102. In this email Mr Walling also says that he will review the complaints the claimant made about Ms Jacobs. He says that he will contact the claimant if he needs to speak to the claimant about this. In response the claimant says she has no further information. As far as we are aware Mr Walling did not provide any outcome to any investigation and we were not provided with any evidence that an investigation had taken place. This is not part of the claimant's case, so we make no further findings in this respect.

<u>Miscellaneous findings of fact</u>

103. These findings of fact are for completeness and relate to some of the claimant's claims which are not based on specific events as set out in the chronology.

Offers of permanent positions to agency staff

104. During the claimant's engagement with the first respondent there were 3 agency lawyers in the contracts team. These were the claimant, Shirley James and Jane Davison. Moshina Saleem was on maternity leave and the agency lawyers were partially covering that role. We accepted Mr Walling's evidence that the agency lawyers were not covering other substantive roles, but were brought in to help manage the department's work load. There was no expectation that any of them may subsequently be offered permanent employment. We also accepted Mr Walling's evidence that there was no automatic movement from agency worker to permanent employee. If a permanent vacancy arose that may be offered to an agency lawyer. This may then be accepted by the lawyer, who would then become an employee.

105. The claimant did not provide any evidence that showed she had expected to be offered a permanent role by the first respondent. On the contrary, it is clear from the evidence that the claimant's engagement was under review by both her and the council. In part this was due to her desire to continue practicing as a barrister, which may not have been compatible with continuing to work for the first respondent. In Spring 2019 there had also been discussions with Sheila Saunders about the claimant leaving after her annual leave. We were also provided with evidence that showed the claimant was regularly discussing alternative roles with Sellick.

106. While the claimant worked for the first respondent no permanent roles were advertised in the contracts and procurement team. Shirley James and Jane Davidson continued to work for the first respondent as agency staff. Shirley James has now been offered and accepted a permanent role. This took place many months after the claimant left.

Complaints by other staff members.

107. Throughout these proceedings the claimant said there were other black members of staff within the contracts team who complained about Ms Jacobs and their complaints were not dealt with by the first respondent. Ms Bryan made a complaint about Ms Jacobs. This was not disputed and the first respondent also acknowledged that it took a lot longer than it should have for them to fully deal with the complaint. Ms Bryan had appealed the outcome of her grievance and one of the findings of the appeal outcome was there had been delays.

108. The claimant's relationship with Ms Bryan remained poor during 2019. On 6 November 2019 Ms Bryan raised a complaint directly with Mr Walling about the claimant. Ms Bryan also says in this email that she had experienced poor behaviour from other employees but she did not name them then. It is possible Ms Bryan may have been referring to Ms Jacobs, but in November 2019 she did not name her.

109. The claimant had asserted that Shirley James and Lorraine Clark also made complaints. There was no evidence that Shirley James made any complaint about Ms Jacobs. The claimant relied on some WhatsApp messages with Ms James. These were private conversations between the claimant and

Ms James where they share their views. There is no evidence that Shirley James ever complained about Ms Jacobs to the first respondent.

110. Within the outcome if Ms Bryan's appeal it is recorded that Ms Clark said she could not work with Ms Jacobs, and that was a reason she gave for leaving. There is no indication though that Ms Clark made a complaint. Within the appeal all that is said is that Ms Clark found Ms Jacobs condescending and she could not work with her. Any complaint was informal and it was made in the context of an agency worker explaining why she was leaving after only a short period of time.

111. All we can conclude there is some evidence that Mr Walling did not deal with formal complaints promptly and did not necessarily recognize when an informal complaint may have been made. In terms of complaints about Ms Jacobs, the evidence we had indicated there were some employees who found her supportive and good to work with. The evidence from Jade McKenzie-Benjamin was compelling in this respect, as was that of Steven Ruggles. Others did not like her management style. This includes the claimant, Ms Bryan and Ms Clark.

Comparators

112. For some of the claimant's claims of direct discrimination she has identified specific comparators. For completeness we make the following findings of those named comparators:

- Alex Jacobs is white and of Ukrainian/Jewish heritage. She was also engaged via an agency but her role was different as she was the senior lawyer.

- Tuba Kara was Turkish. She was also an agency worker but a paralegal, not a qualified lawyer.

- Monica Celoric is white. She was also agency staff. No further evidence was given about her role or which team or department she was in.

- Ernesto Meskauskaite is white. He is also agency staff but no further evidence was given about his role or which team or department he was in.

- Jane Davidson is white. She was engaged in the same role as the claimant and via the agency.

- Sheila Teli is Asian and engaged via an agency. No further evidence was given about her role or which team or department she was in.

- Shirley James is also black and the evidence we heard indicated she is of a similar heritage to the claimant. She was engaged via the agency in the same role as the claimant.

Notice pay

113. The claimant was given one week's notice. The claimant has suggested that other agency workers were given more than this. She has cited Shirley James being told she would get longer and suggested other agency staff did get more.

114. The claimant was not able to provide evidence to substantiate this, it was just an assertion. We note that Ms James' engagement was not terminated in any event. We heard from Mr Walling, and accepted his evidence on this point, that the normal arrangement with agency staff would be one week's notice but on occasion there may be practical reasons why longer notice could be given on either side. If longer notice was given it was because of the specific situation.

The Law

115. The Claims pursued by the claimant are:

    115.1 Direct race discrimination;

    115.2 Harassment on the grounds of race;

    115.3 Victimisation.

Direct Discrimination – Section 13 Equality Act 2010

116. Direct discrimination takes place where a person treats the claimant less favourably because of race than that person treats or would treat others. Under s23(1) Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case. 'Race' includes nationality or national origins.

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

118. Section 136 of the Equality Act 2010 sets out the burden of proof. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision.

119. Accordingly, where a claimant establishes facts from which discrimination could be inferred then the burden of proving that the treatment was in no sense whatsoever unlawful passes to the respondent. 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 for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondent 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.

120. The Court of Appeal in **Madarassy v Nomura International plc [2007] EWCA Civ 33; [2007] IRLR 246**, 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 (eg 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.'*

121. Inferences can only be drawn from established facts and cannot be drawn speculatively or on the basis of a gut reaction or 'mere intuitive hunch' (**Chapman v Simon [1994] IRLR 124)** or from 'thin air' (***Chief Constable of the Royal Ulster Constabulary*** **[2003] ICR 337**). Discrimination also cannot be inferred only from unfair or unreasonable conduct (**Glasgow *City Council v Zafar*** **[1998] ICR 120)**.

122. This means that to succeed with any of his claims for direct discrimination the claimant must first show that he has been treated less favourably than others in the same circumstances. The claimant must also have shown facts from which we can infer that the reason for the less favourable treatment may have been due to the claimant's race. Only after this does the burden shift to the respondent who must show that there is a different non-discriminatory reason for the treatment, that it is in no way due to the claimant's race.

<u>Harassment – Section 26 Equality Act 2010</u>

123. Under section 26 Equality Act 2010:

> *(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. …*
>
> *(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.*

124. With a claim for harassment the claimant must prove on the balance of probabilities that the conduct he has complained of occurred.

125. The test of whether the conduct amounted to harassment is part objective and part subjective. The Tribunal must take into account the claimant's subjective perception but it is also required to look at that objectively to see if it was reasonable for the claimant to have considered his dignity to be violated or that it created an intimidating, hostile, degrading, humiliating or offensive environment.

126. In **Grant v HM Land Registry [2011] EWCA Civ 769** the Court of Appeal said that:

> *"Tribunals must not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive environment". They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."*

127. In **Richmond Pharmacology v Dhaliwal [2009] ICR 724** the EAT stated:

> *"Dignity is not necessarily violated by things said or done which are trivial and transitory, particularly if it should have been clear that any offence was unintended. While it is also important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."*

128. Whether or not the conduct is related to a protected characteristic is a matter of fact for the Tribunal drawing on all the evidence before it.

<u>Victimisation – Section 27 Equality Act 2010</u>

129. Section 27 of the Equality Act 2010 provides as follows:

(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 about 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.

130. In a victimisation claim there is no need for a comparator. The Act requires the Tribunal to determine whether the claimant had been subject to a detriment because of doing a protected act. As Lord Nicholls said in **Chief Constable of the West Yorkshire Police v Khan [2001] IRLR 830**:-

> *"The primary objective of the victimisation provisions ... is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory right or are intending to do so."*

131. The Tribunal has to consider (1) the protected act being relied on; (2) the detriment suffered; (3) the reason for the detriment; (4) any defence; and (5) the burden of proof.

132. To benefit from protection under the section the claimant must have done or intended to or be suspected of doing or intending to do one of the four kinds of protected acts set out in the section. The allegation relied on by the claimant must be made in good faith. It is not necessary for the claimant to show that he or she has a particular protected characteristic but the claimant must show that he or she has done a protected act. An act can be protected even if the individual does not expressly make reference to a breach of the Equality Act 2010. However, the facts that are asserted must be capable of being a breach of the Equality Act 2010.

133. The question then to be asked by the tribunal is whether the claimant has been subjected to a detriment. The protected act must be the reason for the treatment which the claimant complains of, and the detriment must be because of the protected act. There must be a causative link between the protected act and the victimisation and accordingly the claimant must show that the respondent knew or suspected that the protected act had been carried out by the claimant, (**South London Healthcare NHS Trust v AlRubeyi EAT0269/09**). Once the Tribunal has been able to identify the existence of the protected act and the detriment the Tribunal has to examine the reason for the treatment of the claimant. This requires an examination of the respondent's state of mind. Guidance can be obtained from the cases of **Nagarajan v London Regional Transport [1999] IRLR 572** and **Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830**, **and St Helen's Metropolitan Borough Council v Derbyshire [2007] IRLR 540**. In this latter case the House of Lords said there must be a link in the mind of the respondent between the doing of the acts and the less favourable treatment. It is not necessary to examine the motive of the respondent **see R (on the application of E) v Governing Body of JFS and Others [2010] IRLR 136**. In **Martin v Devonshires Solicitors EAT0086/10** the EAT said that:

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

134. What this means is the claimant must first show that he has done something which is a protected act under the Equality Act 2010. Having established a

protected act the claimant must show there has been a detriment. The issue for the Tribunal to determine is whether or not there is a causal connection between the act and detriment

Time Limits

135. Employment claims under the EqA 2010 must be brought within three months of the act or omission complained of, or the end of that act if it extends over a period of time, subject to the just and equitable extension (s. 123 EqA 2010).

136. Guidance on whether conduct should be regarded as extending over a period of time can be found in **Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530**; summarised as follows in **South Western Ambulance Service NHS Foundation Trust v King [2020] IRLR 168:**

> "*Hendricks demonstrates that there are several ways in which conduct might be said to be conduct extending over a period (or, as it is sometimes called, a "continuing act"). One example is where there is a policy, rule or practice in place in accordance with which there are separate acts of discriminatory treatment. Another example given in paragraph 48 of Hendricks is where separate acts of discrimination are linked to one another and are evidence of a continuing discriminatory state of affairs, as opposed to being merely a series of unconnected and isolated acts. In both these examples, the continuing act arises because of the link or connection between otherwise separate acts of discrimination*."

137. The EAT in **King** held that where a series of acts is relied upon by a claimant as constituting a "continuing act", only those acts which are ultimately found to be acts of discrimination can form part of that continuing act.

138. In order to give rise to liability, the act complained of must be an act of discrimination. Where the complaint is about conduct extending over a period, the claimant will usually rely upon a series of acts over time each of which is connected with the other, either because they are instances of the application of a discriminatory policy, rule or practice or they are evidence of a continuing discriminatory state of affairs. However, if any of those constituent acts is found not to be an act of discrimination, then it cannot be part of the continuing act.

139. The Tribunal has discretion to extend time if it is just and equitable to do so. The presumption

Vicarious liability

140. Under section 109 of the Equality Act 2010:

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A –

(a) from doing that thing, or

(b) from doing anything of that description.

141. Guidance on whether something is done *"in the course of employment"* can be found in **Jones v Tower Boot Co Ltd [1997] IRLR 168 (CA)**. It will be a question of fact for the Tribunal to decide.

142. In this case neither the claimant nor the second respondent were employees of the first respondent. However early in proceedings the first respondent accepted responsibility for any acts or omissions of the second respondent on the basis that the second respondent was the first respondent's line manager.

143. The claimant maintained that the fourth respondent should also be liable. It is not impossible for there to be a situation where a person responsible for any act of discrimination to be simultaneously an employee of one principal and an agent of another principal. In the case of **Ministry of Defence v Kemeh [2014] ICR 625 (CA)** EJ Elias observed that there needed to be *"very cogent evidence"* to show the duties being done as an employee of one party were also being done as an agent of another.

Discussion and conclusions

144. The claimant made ten specific allegations of conduct that she said was discriminatory, of which two allegations were comprised of two elements. The claimant has argued that all allegations are of harassment on the grounds of race or in the alternative direct discrimination. She has then included claims for vicitmisation in respect of three of those allegations.

145. We first set out our conclusions in respect of the claims for harassment and direct discrimination, as each of these have been argued in the alternative. Under the Equality Act 2010 if any conduct is found to be harassment it cannot also be direct discrimination, so they are alternative claims.

146. In respect of each harassment/direct discrimination claim have looked at each factual allegation in turn and considered the following:

146.1. has the claimant proved the relevant facts; if so

146.2. do the facts show that there was unwanted conduct related to race with the proscribed purpose or effect (harassment); if not

146.3. do the facts show that the claimant has been treated less favourably due to race (direct discrimination)

147. When considering direct discrimination we have considered if the claimant has shown facts from which can infer the reason for that unfavourable treatment is race. If she has the burden of proof shifts so we then consider if the respondents discharged that burden by showing a different non-discriminatory reason.

Vanilla comment

148. As a matter of fact we concluded that Ms Jacobs did not make this comment to the claimant in August 2019 as alleged by the claimant. On the contrary we concluded it was the claimant who used the term.

149. The claimant did not prove on the balance of probabilities that the unwanted conduct or less favourable treatment occurred as she alleged. On this basis both claims for harassment and direct discrimination fail.

Glamour comment

150. We found that Ms Jacobs did refer in some way to the claimant being glamourous when introducing her to Ms Clark. The claimant objected to this so it was unwanted conduct. This was evidenced by the fact the claimant complained about it almost immediately to Ms Jacobs and to Simon Copsey.

151. We did not make a specific finding on the exact words used. The reason for this is that we have concluded that it is the effect of either iteration was sufficiently similar. In a business context we have concluded that being described as glamourous is potentially inappropriate. Looked at objectively, it could be taken as undermining or belittling the person being described, making them seem less serious and professional. We accepted that being introduced this way has the potential to be harassment as defined by the EqA.

152. To succeed with the claim the unwanted conduct must be related to a protected characteristic, in this case race. Whether conduct is related to a protected characteristic is a matter of fact.

153. We considered whether being referred to as glamourous could be said to be related to race. Having done so we do not find that is the case. There is nothing inherent in being described as glamourous that is related to race. The claimant also did not provide any coherent explanation about why she viewed this comment as being related to her race.

154. In terms of the context, we also heard from witnesses that the claimant took care of her appearance and dressed well at work. Ms Jacobs had previously complemented the claimant's dress sense, which the claimant acknowledged. We cannot see how the claimant would understand the comment as having any racial connotation, rather than being a misjudged comment on the claimant's personal style. Therefore, the claim for harassment fails.

155. In terms of the direct discrimination claim, we have already concluded that been introduced as glamourous in a professional context can be a detriment. It can be less favourable treatment compared to a more standard professional introduction.

156. The issue we then had to determine is whether there was any evidence from which we could infer that the reason for that treatment may have been race. The first stage involves identifying an appropriate comparator. The claimant has not identified an actual comparator for this incident. A hypothetical comparator would be a woman who Ms Jacobs worked with who dressed and presented herself at work in a similar way to the claimant but was not black.

157. In support of all her claims for direct discrimination the claimant drew our attention to what she said were multiple complaints by other black members of staff about Ms Jacobs. We found there had only been one formal complaint against Ms Jacobs, which was by Ms Bryan. There was some evidence that Ms Clark had informally raised concerns about working with Ms Jacobs when she left. There was no evidence that Ms James complained about Ms Jacobs.

158. We did not accept that complaints by Ms Bryan and Ms Clarke about Ms Jacobs were facts from which we could infer that the 'glamour' comment made by Ms Jacobs was due to race. The complaints by Ms Jacobs and Ms Clarke related to being managed by Ms Jacobs and her management style. This is a different type of interaction than the one the claimant is complaining about in this claim, which was a misjudged comment.

159. We also found that Ms Jacob's explanation for the comment credible. Ms Jacobs was trying to introduce the claimant in a complementary way. This was not a discriminatory reason. It was a reaction to the fact that the claimant did dress well at work. The comment was a misplaced complement but that error was not due to the claimant's race.

Being spoken in a humiliating public manner on two occasions

160. The claimant made two allegations of Ms Jacobs speaking to her in a humiliating manner. One was in December and following a meeting about the CDS Print and Design contract. The second was around the end of January 2020 and following a meeting about the Sensory Services contract.

161. As a matter of fact, we have concluded that these two incidents did not happen as the claimant describes. We did not accept the claimant's account of these events. We found Ms Jacobs' evidence more persuasive. This was corroborated by the evidence of other witnesses who confirmed this is not how Ms Jacobs tended to act in the office and they never heard anyone shouting.

162. The claimant has not proved on the balance of probabilities that the unwanted conduct she complains of happened. Therefore, the harassment claim fails. The direct discrimination claim also fails as she has not shown any less favourable treatment in this respect.

Public criticism of her work and legal advice

163. The claimant made two allegations of Ms Jacobs publicly criticising her work and legal advice. One relates to emails sent in the context of the CDS Print and Design contract. The complaint is based on emails sent in relation the Hawkswood Group contract. We were provided with the emails which the claimant says include this criticism.

164. We first considered whether these emails amounted to harassment. They were unwanted conduct because the claimant was upset by what she perceived as public criticism. Having reviewed the emails in question we cannot see any basis for concluding any unwanted conduct was related to race. The emails are all about work matters and the provision of legal advice. The harassment claim fails because there is no basis for finding the unwanted conduct was related to any protected characteristic.

165. In addition, although the claimant was upset by these emails, when looked at objectively we cannot see how they could be viewed as harassment. The emails are all professional in tone from to an employee from their manager. They provide legal advice and appropriate supervision. In evidence the claimant was critical of how Ms Jacobs communicated as a manager. She clearly felt that different language could be used. The differences in language and style the claimant indicated she would have preferred were trivial. For example, the claimant may have preferred that Ms Jacobs did not suggest she sought guidance in the future in an email that was copied into Kim Travis. However, there was nothing untoward in Ms Jacobs having done that.

166. We then consider direct discrimination. For this claim the claimant did not identify an actual comparator so she relies on a hypothetical comparator. The claimant did not provide any evidence that suggested that Ms Jacobs would have communicated differently in the same situation with a team member of a different race. On the contrary, we heard evidence from other witnesses who were also managed by Ms Jacobs. They all reported that she managed people and communicated in the same way. The claimant's argument that Ms Jacobs treated her less favourably in this respect is mere assertion. The direct discrimination claim fails.

<u>Intentionally disregarding work commitments</u>

167. As a matter of fact we have concluded this did not happen. Ms Jacobs was trying to rearrange a 1:1 meeting with the claimant. There had already been a meeting arranged but Ms Jacobs wanted to reschedule it so it took place sooner. Ms Jacobs was the claimant's manager and she was entitled to try and arrange a meeting with the claimant when she had concerns about her wellbeing, which we accepted were genuine.

168. The claimant asserted she had commitments which clashed with the rearranged meetings and that these were ignored by Ms Jacobs. This was not true. The claimant had merely blocked out time in her diary in order to manage her own time. There were no meetings with clients or other external commitments at any of the times when Ms Jacobs tried to arrange the meeting. The claimant has not proved that Ms Jacobs intentionally disregarded her work commitments. On the contrary, we find that the claimant repeatedly refused her manager's reasonable requests to attend a meeting.

169. For completeness, in respect of the harassment claim, given that the claimant subjectively still found this to be unwanted conduct, we find the following:

    169.1. There is no evidence on which we could conclude the meeting requests were related to race.

    169.2. Looking at this conduct objectively, it does not meet the definition of harassment. The meeting requests were reasonable management instructions made in the context of Ms Jacobs being concerned about the claimant's work load and working pattern. The claimant reacted to them in an unreasonable way.

170. We also find that this was not less unfavourable treatment of the claimant. On the contrary, Ms Jacobs was trying to arrange a meeting due to concerns about the claimant's wellbeing. Often this would be seen as a positive act, trying to provide an employee with support. There is also no evidence that Ms Jacobs would have acted differently with any other employee. The claimant's claim that she was treated less favourably in this respect and that was due to her race is just an assertion unsupported by any evidence.

Not investigating the claimant's complaint on 14 July to Jeremy Walling

171. We have found as a matter of fact this email was not a complaint that triggered any automatic obligation on Mr Walling to investigate. It was an informal complaint and there is nothing within the email that indicates the claimant wanted any investigation to be undertaken or that she expected any specific type of response.

172. Mr Walling did not respond to this email. However, matters escalated rapidly over the next couple of days. Within 24 hours of the claimant sending the email Mr Walling had decided to terminate the claimant's engagement in any event.

173. In terms of the claims advanced by the claimant, we accept that the claimant may have found the lack of response unwanted. She may have been upset by this fact. In respect of the harassment claim we have concluded as follows;

    173.1. We cannot see how any failure by Mr Walling to respond to the claimant could be viewed as conduct that is related to race. There are no facts to support such a conclusion.

    173.2. When looking at the conduct objectively, it does not meet the definition of harassment. The claimant may have wanted a response from Mr Walling. The lack of an immediate response to just a single email is not conduct likely to create the proscribed effect.

174. In terms of a direct discrimination claim, not responding to this type of email could be less favourable treatment if the claimant could show that Mr Walling would have responded more promptly or differently to a similar email from a non-black staff member.

175. The claimant argued that there was a pattern of the first respondent, and particularly Mr Walling, not responding to complaints by black staff members about Ms Jacobs. In support of this the claimant relied on complaints that she said were made by other black members of staff that were not dealt with.

176. In terms of the evidence, it is undisputed that Ms Bryan raised a grievance about Ms Jacobs and Mr Walling did not deal with that promptly. The claimant suggested that there were other complaints by black staff. We found there were no other formal complaints, though Lorraine Clark may have complained informally when she left.

177. We have considered whether these two complaints show that there is a pattern of Mr Walling not dealing with complaints by black members of staff and, if so, whether we can infer from this whether the reason Mr Walling did respond to the

claimant's email raising complaints because of her race. We have reached the following conclusions.

178. We do not consider that the delay in dealing with Ms Bryan's grievance shows any pattern. Although there was a significant delay the circumstances were very different. Ms Bryan was a permanent employee and she raised a grievance that was dealt with under the first respondent's policies, albeit not as promptly as it should have been. We do not consider that it is possible to conclude from this single instance that there was a pattern of not dealing with complaints.

179. The situation with Ms Clarke is more similar to the claimant's in that she was an agency worker who raised concerns when she left. The claimant raised her concerns before her assignment was terminated, but there is a similarity in that the concerns were informal and Mr Walling did not treat them as complaints. However, while this does show a pattern of not responding to informal complaints, we do not consider that we can infer from this that the reason Mr Walling did not respond to the claimant may have been race. The more pertinent shared characteristic of both the claimant and Ms Clarke was they were agency workers. There was no other evidence of facts from which we can infer that the claimant's and Ms Clarke's race may have been a factor.

180. In addition to this, we have already found that matters were developing fast at that time. The following day the claimant's engagement was terminated. The more obvious reason why Mr Walling did not respond to that email is that there was no need for him to do so, given that the claimant was an agency worker who was not going to work for the respondent any more.

181. On this basis the direct race discrimination claim fails.

<u>Termination</u>

182. The claimant's engagement was terminated and the claimant has said this is harassment. While this may be unwanted conduct there is no evidence that it was related to the claimant's race. We also do not see how it could be viewed that way. We also do not consider that looked at objectively it meets the definition of harassment.

183. If this claim were to succeed it would need to be one of direct discrimination. For this claim the claimant has named actual comparators:

- Alexandra Jacobs;
- Tuba Kara;
- Monica Celorico;
- Ernesto Meskauskaite;
- Jane Davidson.

184. The first four we conclude are not appropriate comparators as their circumstances are not sufficiently similar. Ms Jacobs was an agency worker but in a more senior role. The information we had about the next three was limited but they were not in the same role as the claimant. The only appropriate

comparator is Jane Davidson. She was also an agency worker and a contract lawyer in the same team and she is white.

185. We found as a matter of fact that Ms Jacobs and Mr Walling had a conversation some time before the claimant's engagement was terminated about reducing the number of agency workers within the contracts team. The claimant was one at risk as was Ms Davidson. In terminating the claimant's engagement she was treated less favourably than Ms Davidson. The question for us to determine was whether there is evidence from which we can conclude that the claimant was selected due to race.

186. As clarified in *Madarassey*, a different in race is not sufficient to shift the burden of proof. There must be something more. In this case we have concluded that there is no such evidence. At the time there were three agency workers who were contract lawyers. The third one was Shirley James, who was the same race as the claimant. While it is true that the claimant was treated less favourably than Ms Davidson it was also true that she was treated less favourably than Ms James. There is no other evidence that the claimant provided from which we could infer that it was the claimant's race that may have been why her engagement was terminated.

187. In addition to this, we have also concluded that this is a case where the facts are such that it is clear the respondent's reasons for terminating the claimant's engagement were wholly unrelated to race. The documented events of early July 2020 show that there was a rapid deterioration in the working relationship between the claimant and Ms Jacobs. Over the course of just a few days the situation had escalated and reached a point that it was no longer tenable for the claimant and Ms Jacobs to continue working together. This was something the claimant made clear in her own correspondence. The claimant had also unilaterally announced that she would be making changes to her working arrangements.

188. It is obvious from the evidence we heard that the claimant's contract because of these events. This was in the context of a decision that had already been made to reduce the number of locum lawyers in the department. These reasons are wholly unrelated to the claimant's race.

189. As part of this claim the claimant also said she was not provided with a reason why her engagement was being terminated. As a matter of fact we have found the claimant was given a reason. The claimant's own email from the day indicate she had been told that there was reduced funding. This may not have been the complete explanation it was still a reason and it was part of the underlying rationale. Mr Walling also provided the claimant with a more comprehensive explanation following her appeal. The claimant's claims based on a lack of reason fails because the claimant has not proved that the facts on which she relies.

<u>One week's notice</u>

190. The claimant was given one week's notice. This is what she was entitled to under her contract. The claimant was an agency worker. Had she been an employee her statutory entitlement would also just have been one week. The claimant's

complaint is that she was not given a longer period of notice. The claimant's argument was essentially that even though the contractual notice was a week the respondent exercised its discretion and gave other agency workers longer notice. In her case the respondent only gave her the contractual notice and she says this was either harassment or direct discrimination.

191. Before considering the individual claims, we will set out the relevant factual conclusions on this issue. The claimant asserted that other agency workers were given more notice. We also heard from Mr Walling on this point. We accepted his evidence that the first respondent usually gave agency workers just one week's notice. However sometimes longer notice would be given. This would depend on the circumstances, such as the needs of the department at the time. There was no general practice to give longer than contractual notice to agency worker and there would need to be some form practical or business reason why the respondent would want to give longer notice.

192. In terms of the harassment claim, we can see that the claimant was upset by what she perceived to be the sudden termination of her engagement. However, it was a standard management decision to give the clamant notice in line with her contractual entitlement. Looked at objectively we cannot see how this could be viewed as having the proscribed effect without some additional context. There was no such additional context in the claimant's case.

193. The claimant also said that giving her just one week's notice was direct discrimination on the grounds of race. To succeed with this claim she will need to show that she was treated less favourably than any actual or hypothetical comparator. For this claim the claimant named Shirley James and Sheila Teli as comparators.

194. We do not consider Shirley James would be an appropriate comparator. Ms James was also an agency lawyer in the same role as the claimant. The claimant has said that Ms James was told she would be given more than a week's notice. The claimant did not prove on the balance of probabilities that Ms James was told this. Further, Ms James shared the same protected characteristic as the claimant and did not have her contract terminated, so she was not actually given longer notice.

195. We were not provided with sufficient evidence by the claimant to conclude if Sheila Teli's role or circumstances meant that she could be a comparator. Neither were we provided with evidence that showed she had in fact been given more notice than the claimant

196. We were also not satisfied that the claimant has shown that a hypothetical non-black agency worker may have been given longer notice in the same circumstances in any event. The relevant circumstances are not just being an agency worker whose assignment was terminated. The relevant circumstances include the situation which lead to the claimant's contract being terminated. One of the reasons the first respondent terminated the claimant's assignment was the breakdown in her working relationship with her line manager, which was mutual. In these circumstances there would be no practical benefit to the respondent to give longer notice.

197. On this basis both the harassment and direct discrimination claim about the length of notice given fail.

Lack of appeal

198. The claimant was not given a right of appeal against the decision to terminate her assignment. She submitted an appeal nonetheless. Although there was no formal appeal process Mr Walling did in fact acknowledge her appeal and he reviewed the decision. While this may not have been a formal appeal there was in fact some form of appeal process.

199. The reason why the claimant was not offered a formal appeal was because she was an agency worker rather than an employee of the first respondent. She had no right of appeal under any policy. Neither was there any common practice to allow agency workers to appeal.

200. The claimant has said the lack of appeal is harassment. This lack of appeal may have been unwanted by the claimant. However, looked at objectively it does not have the proscribed effect. It was a standard management decision in respect to the termination of an engagement of an agency worker. As a matter of fact it was wholly unrelated to the claimant's race, being solely due to her status as an agency worker.

201. In terms of a direct discrimination claim, the claimant has cited the same 5 comparators as with the termination of her engagement. An appropriate comparator would be a non-black agency worker whose engagement was terminated and who was then allowed to appeal. The claimant did not provide any evidence of agency workers who had been allowed an appeal. We note that Alexandra Jacobs and Jane Davidson, who are the two comparators we know most about, did not have their contracts terminated. There was no evidence that any other agency workers were able to appeal. We also did not accept that the first respondent would have allowed an appeal for a hypothetical comparator.

202. We conclude that the claimant has not shown she was treated less favourably by being refused an appeal. She was treated the same as other agency workers. We also note that the first respondent potentially treated her more favourably than other agency workers due to the fact that Mr Walling did respond and review the decision.

203. On this basis both the harassment and direct discrimination claims fail.

Victimisation

204. The claimant said that she did the following things which were protected acts:

    a) her email to Ms Jacobs of 13 July 2020 at 11:34 (re-sent at 11:51);

    b) her email to Jeremy Walling on 14 July 2020 at 07:54;

    c) her email of 15 July 2020 at 15:31 to Ms Jacobs;

d) her email of 15 July 2020 at 15:33 sent to Sellick Partnership (formerly the third respondent and no longer a party to these proceedings);

e) her email to the first respondent on 15 July 2020 16:59;

f) her email of 16 July 2020 at 11:01 to Sellick Partnership; and

g) the contents of her appeal dated 19th July 2020 sent to the first respondent attached in the email dated 20th July 2020.

205. We found that the first 4 emails make no mention of discrimination, of race or any other protected characteristics. The complaints are quite general in nature. We concluded that there is no way of reading or interpreting these emails them as containing any type of complaint under the Equality Act 2010. They are not protected acts.

206. The claimant first mentions race in email (e), sent to the first respondent on 15 July 2020 at 16.59. She does not clearly set out any complaints that she has been discriminated against. However, she does include a comment about how other staff have been treated and she notes those other staff members were all of African descent. Our conclusion is this is enough to suggest she was complaining there may have been race discrimination so this is a protected act.

207. In the email to Sellick of 16 July 2020 (f) the claimant expressly says she has been in contact with ACAS and she will be brining a discrimination claim. This indicates the claimant will be doing something under the Equality Act 2010 so is a protected act.

208. In her appeal dated 19 July 2020 (g) the claimant expressly complains of discrimination so we find this is a protected act.

209. The claimant has complained of two detriments that she says is victimisation. The first is the termination of her contract. This decision ws made by Mr Walling early on 15 July 2020. It was then communicated to the claimant by 4pm on the same day by Sellick. We have found that the first protected act was the email the claimant sent to the first respondent at 16.59 on 15 July 2020. This was after the claimant had been notified of the termination of her engagement with the respondent. As it post-dated both the decision to terminate the engagement and the communication of that decision there can be no causal link between the protected act and the termination of the claimant's contract. Therefore, this victimisation claim fails.

210. The second detriment is the refusal to allow an appeal. The appeal itself is one of the communications that we have found was a protected act. The appeal was sent by the claimant after the other two emails which we have found were protected acts.

211. As a matter of fact, the reason the claimant was not granted a right of appeal was the fact she was an agency worker. She had no right of appeal under the first respondent's policies and no other general right of appeal. Her status as an agency worker was clearly the reason why she had no right of appeal, not the fact that she had done anything that was protected under the Equality Act 2010.

212. There was no evidence to suggest that the reason the first respondent did not allow an appeal was because the claimant complained of discrimination. On the contrary, we have already concluded that while there was no right of appeal, due to the claimant's status as an agency worker, Mr Walling did in fact review the decision and respond to her appeal.

213. We conclude the lack of appeal was not due to any protected act but very simply because of the claimant's status as an agency worker

Time limits

214. As none of the claimant's claims succeed, we do not also need to consider the issue of jurisdiction. For completeness we have briefly made the following findings on this issue:

    214.1. The 'vanilla' incident and 'glamourous' incident were individual incidents and not connected to anything else. There is no course of conduct. The last one occurred in December 2019 and the claimant did not start Early Conciliation until September 2020. Claims about these incidents would have been significantly out of time. There was no reason given by the claimant for why it would be just and equitable to extend time in respect of these isolated incidents. We cannot find any reason why it would have been just and equitable to extend time in respect of those claims.

    214.2. The complaints about Ms Jacobs shouting and undermining the clamant are sufficiently similar in nature that they could be a course of conduct. The last incident was in April 2020 so these claims would also be out of time. Again, we were not satisfied that it would have been just and equitable to extend time in respect of these claims.

    214.3. This means only claims about the events that lead up to the termination of the claimant's contract and after would be in time.

Liability of the Fourth Respondent

215. As the claimant's claims did not succeed it was not necessary for us to decide on any liability of the fourth respondent in respect of the actions of the second respondent.

216. The evidence we heard showed that the fourth respondent's role as employer of both the claimant and the second respondent was essentially just a formality. It was a practical arrangement put in place purely to facilitate payment for both the claimant and fourth respondent in respect of work they did for the first respondent. On a day to day basis the fourth respondent had no interaction with the second respondent or the claimant or any involvement in the work that either did.

217. The second respondent did work for the first respondent. She was managed by Mr Walling and she managed others who worked for the first respondent. All the complaints by the claimant about the second respondent related to this working relationship. We conclude that nothing that the claimant said the second respondent did could be viewed as being done in the course of employment with the fourth respondent.

218. On this basis, had we upheld any of the claimant's claims about the actions of the second respondent we would not have found the fourth respondent liable.

Employment Judge S Park
Date: 23 February 2024