EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondents**
Ms Hassan	Coventry University (R1) Coventry University Recruitment and Admissions Ltd (R2) Peoplesfuturelimited (R3)

AND

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT	Midlands West	**ON**	7 – 16 February 2024 (14 & 15 February In chambers)
EMPLOYMENT JUDGE	Harding	**MEMBERS**	Ms Whitehill Ms Howard

Representation
For the Claimant: In Person, assisted by her sister
For the Respondent: Mr Quickfall, Counsel

REASONS

1 An oral judgment and reasons having been provided to the parties on 16 February 2024, and a written judgment sent to the parties on the same date, these written reasons are provided following a request for written reasons from the claimant made on 26 February 2024.

Case Summary

2 The claimant pursues claims of direct race discrimination, harassment related to race, victimisation, indirect discrimination based on the protected characteristic of disability and a failure to make reasonable adjustments. The claimant worked on R2's Enquiry team as a Course Specialist Adviser. Essentially she was responsible for dealing with enquiries from prospective students of Coventry University (R1). She had a contract with R3 and was sent under that contract to work for R2. Her claims primarily relate to the conduct towards her, whilst working on the Enquiry team, of the team leader, Ms Prendergast, and a colleague, Mr Flowers, as well as the claimant's failure to secure a permanent position on this team and the claimant's subsequent resignation. There are also complaints of disability discrimination which concern the arrangements that the respondents made for Covid testing to be carried out when staff returned to the office after lockdown.

The claims/ Issues

Direct race discrimination/harassment

3 On the list of issues it was recorded that the claims of direct race discrimination and harassment related to race were pursued by the claimant against R1 and R3. At the start of this hearing we clarified with Mr Quickfall, for the respondents, that in the event that any of the claims of direct race discrimination and harassment related to race succeeded, R3 accepted that it would be liable for these claims. That was on the basis that at the time when the asserted incidents occurred both the claimant and the alleged perpetrators, Ms Prendergast and Mr Flowers, were employees of R3 (in the wide sense as defined under section 83 of the Equality Act).

4 We clarified with the claimant that, as was set out in the list of issues, it was also the claimant's case that R1 was liable for any successful acts of discrimination/harassment; it was said by dint of Ms Prendergast and Mr Flowers being agents of R1. We explained carefully to the claimant what the definition of a contract worker was under section 41 of the Equality Act and she confirmed that it was not her case that she was a contract worker of R1. The claimant also confirmed that she did not assert that she was an employee of R1; in fact she did not assert any employment relationship of any type between herself and R1.

Direct Race discrimination (complaints against Ms Prendergast)

5 The claimant describes herself as black African for the purposes of these claims. The claimant asserts that Ms Alice Prendergast did the following acts/omissions amounting to less favourable treatment because of race;

5.1 From November 2020 required the claimant to deal with more telephone enquiries and fewer online enquiries than white English call advisers in circumstances where online enquiries were less stressful to deal with.

5.2 At the beginning of December 2020 Ms Pendergast informed the claimant that she was not handling calls as well as her white English colleague Rebecca.

5.3 After 18 December 2020, in response to a question from the claimant on the group chat facility on Microsoft teams Ms Pendergast wrote “I have already told you this, you should know this?”. *Note in the list of issues the date set out was 18 December 2021, but it was agreed that this was a typographical error.*

5.4 Inform the claimant she should not have offered a place on a course to a prospective student because they did not have the grades to meet the criteria when they did.

5.5 Send the claimant a message asking where she was when Ms Pendergast could see the claimant was on the telephone.

5.6 Send three messages to the claimant within a minute asking where she was when Ms Pendergast could see the claimant was on the telephone.

5.7 Inform the claimant that her colleagues had booked the same time off as the claimant had requested when they had not.

Harassment related to race

6 Complaints 5.2, 5.3, 5.4, 5.5 and 5.6 are also pursued as claims of harassment related to race.

7 In addition the claimant makes the following complaints of unwanted conduct related to race on the part of Ms Prendergast;

7.1 At the beginning of December 2020 it is asserted Ms Prendergast said to the claimant “I don’t think you can do this job, Rebecca can handle calls much better than you”. This complaint therefore overlaps with, but is not completely identical to, the complaint set out at 5.2 above.

7.2 On 18 June 2021 Ms Prendergast informed the claimant’s colleagues that the claimant had been unsuccessful in securing a permanent position and was taking the day off as a mental health day.

Direct race discrimination (complaints against Mr Flowers)

8 It is the claimant’s case that Mr Flowers did the following acts of less treatment because of the claimant’s race:

8.1 From November 2020 required the claimant to deal with more telephone enquiries and fewer online enquiries than white English call advisers in circumstances where online enquiries were less stressful to deal with.

8.2 During March 2021 refused to speak to the claimant face-to-face.

8.3 From December 2020 informed the claimant that she was not handling calls as well as her white English colleagues.

Harassment related to race (complaints against (Mr Flowers)

9 All of the claims of direct race discrimination against Mr Flowers are also pursued as claims of harassment related to race.

Disability discrimination

10 In accordance with the agreed list of issues these claims were pursued against R1 only. It was the claimant's position that R1 was liable for these claims because, she said, R2 was a subsidiary of R1. However, after discussion at the start of this hearing, Mr Quickfall informed us that in the event that any of these claims were successful R2 accepted it would be liable for those claims. This would be on the basis that *if* we were to find there was a PCP applied it was employees of R2 who applied it and R2 accepts that the claimant was a contract worker for it as defined under section 41. The claimant confirmed that she wished to pursue these claims against R2. Technically speaking this was an amendment application because, in the list of issues, it was only R1 who was said to be the respondent for these claims. However, Mr Quickfall, for the respondents, very pragmatically indicated that there was no objection to the claims being pursued in this way. Accordingly, these claims were pursued against R1 and R2. The list of issues also referred to a section 41(1) (d) "disability related detriment" claim against R1 (i.e. a contract worker claim) but, as set out above, once the definition of a contract worker as set out in the Equality Act had been explained to the claimant she had confirmed that it was not her case that she was a contract worker of R1.

11 The disability is cerebral palsy. The respondents accept the claimant was a disabled person by way of her cerebral palsy at the relevant time, and that they had knowledge of this.

Indirect disability discrimination

12 It is the claimant's case that the first respondent and/or second respondent applied a PCP that she was required between 16 March 2021 - 26 March 2021 to attend Priory sports hall for a Covid test twice a week without disabled access (to be specific it was accepted by the claimant that the building

had a disability accessible entrance but it was the claimant's case, at least initially, that this had been blocked off by a one way system). The substantial disadvantage this is said to have caused is that the only available access was via a set of steps, the claimant cannot use steps unaided, because of the effects of her cerebral palsy, and the claimant therefore needed help from a colleague to use these steps to access the building. It is the claimant's case that those suffering from cerebral palsy would be put at this particular disadvantage compared to those without cerebral palsy.

13 It is the respondent's case that this PCP was not applied, it being disputed that the building did not have disabled access which was accessible, in the alternative it is said that this was a proportionate means of achieving a legitimate aim. The legitimate aims relied upon are having one testing centre and/or managing it in a way to comply with social distancing by having a one-way system.

Failure to make reasonable adjustments

14 It is the claimant's case that R1/R2 applied a PCP that she was required between 16 March 2021 - 26 March 2021 to attend Priory sports hall for a covid test twice a week without disabled access. The substantial disadvantage this is said to have caused is as set out at paragraph 12 above. The reasonable adjustment contended for is that the claimant should have been permitted to use the disabled access to the building. Once again, the respondents dispute that this PCP was applied.

Victimisation

15 In the list of issues these were said to be claims against either R2 or R3. We clarified at the start of this hearing that R2 accepted that at the time the alleged detriments occurred all of the alleged perpetrators were employees of R2 and the claimant was a contract worker for R2. Accordingly, R2 confirmed that in the event that any of the victimisation claims were successful it was liable for these claims. In the light of this concession the claimant confirmed that these claims were pursued by her against R2 alone.

16 It is accepted by the respondents that the claimant did two protected acts; on 27 March 2021 and on 15 April 2021.

17 The claimant asserts the following detriments were done to her because she had made these protected acts;

17.1 Complaints 5.2, 5.3, 5.4, 5.5, 5.6, as set out above.

17.2 R2 refused the claimant a permanent role.

17.3 On 18 June 2021 Ms Prendergast informed the claimant's colleagues that the claimant had been unsuccessful in securing a permanent position and that she was taking the day off as a mental health day.

17.4 The claimant's resignation, which the claimant asserts was because of the breach of confidentiality set out in 17.3 above, which the claimant asserts was done because of the protected acts.

Documents and Evidence

18 We explained to the parties at the start of the hearing that only those documents that we were asked to read, or were taken to during the hearing, would be considered to be in evidence before us. Both parties had referred to relevant documentation in their witness statements, and the respondent had additionally provided a reading list, but on being informed of this the claimant likewise submitted an additional reading list. We duly read and considered all of these documents.

19 We were provided with an agreed bundle of documents running to 901 pages. Additional documents were produced during the course of the hearing without objection from either party. These formed supplementary bundles two and three.

20 From the respondent we had witness statements for; Ms Prendergast, Team Leader Conversion Team, Mr Flowers, Specialist Course Adviser, Ms Cookson, Head of Conversion and Ms Loughron, People Adviser. For the claimant we had a witness statement from the claimant and from Ms Bepoto, who had worked for a period of time on the Enquiry Team.

Observations on the witnesses

21 We bear in mind, when making general observations on credibility, that such general observations need to be treated with some care. That is because, in essence, it is perfectly possible for a witness to lack credibility in respect of one particular point or issue whilst still being a reliable witness on other points or issues. Nevertheless, there are some general observations that we consider it important we make.

22 We had some concerns about the claimant's evidence. There were a number of reasons for this. Firstly, whilst the claimant frequently made assertions in her witness statement about the conduct of Ms Prendergast in particular but also that of Mr Flower, using labels such as "condescending, rude or hostile" to describe them, she then frequently failed to give any actual examples of what she meant by this. For example, she asserted that Ms Prendergast and Mr Flower would make condescending and rude comments and pass them off as jokes. However, she failed to give a single example of this in her witness

statement and was also unable to give a single example of this during her oral evidence.

23 The claimant had a tendency to exaggerate in her oral evidence, in our view. For example, one of the claimant's claims of race discrimination was that after 18 December 2020 Ms Prendergast had said to the claimant "I have already told you this you should know this". In the claimant's witness statement, paragraph 34, this was described as happening on one occasion. Yet in the claimant's oral evidence the claimant asserted this was said repeatedly; her evidence was that it was Ms Prendergast's "go to phrase" for all of the members of the "outgroup", (which the claimant defined as everyone who was not white English), and of whom she was one.

24 She complained further in her witness statement that Ms Prendergast would accuse her of doing things wrong when she had not, and gave a single example of this. In her oral evidence the claimant asserted that this happened for many months on "virtually every case (i.e. enquiry) that I have dealt with". The claimant accepted in her evidence that she would deal with 50 enquiries a day.

25 We considered that on occasion the claimant's perceptions of how she was treated, which we accept were genuinely held, were not borne out by the objective, contemporaneous evidence. For example, the claimant asserted that various messages that had been sent to her by Mr Flowers were aggressive/hostile/ amounted to micromanagement of her and demonstrated a pattern of harassment. These aggressive/hostile/harassing messages included, by way of example, the following from Mr Flowers, page 354;
"hello when you look into your cases please don't fret when you see lots in there….. They will be the allocation over the next few days…… It's going to be 92 assigned to you…… They are all certificate-based ones so well easy….. Some are from today as well so don't think you need to do them all tomorrow lol…. See what you can get done over the next 2 days okay thank you. Any questions give me a shout. Just remember you are not expected to get them all done straightaway… You are just quite good at these ones.

26 Read objectively this is clearly designed to be a reassuring message for the claimant; Mr Flower was explaining that he was giving her a large volume of work (a larger volume than normal) but that this was balanced out by the fact that the complexity of the work was not significant and she would have a longer timeframe than normal in which to deal with them.

27 Most importantly, there was a very significant example of inconsistency between the claimant's oral evidence and what she had written in her witness statement. One of the claims of disability discrimination was that the claimant was required to attend Priory sports hall for a Covid test twice a week, as we have set out above. In her witness statement the claimant had explicitly stated, paragraph 60, that when she attended the test centre there was a one-way

system in place which blocked off access to the building via the disabled access door. Her oral evidence initially was consistent with this, she stated that the disabled access door had been blocked off by the one way system. After she had been taken in detail by counsel through the floor plan for the building and had been taken to her own photograph of the one-way system which had been set up around the entrances (which did not appear to show the disabled entrance blocked off) her evidence changed entirely. The claimant stated that she remembered being upset because she was turned away by a staff member from the disabled access door. Counsel for the respondent asked the claimant to confirm that it was now her evidence that she had walked down the ramp to the disability accessible entrance and had been turned away by a staff member, and she confirmed that this was her evidence. She repeated that she had tried to use the disabled access and had been turned away. That, of course, was wholly inconsistent with what she had written and described in her witness statement. But not only that; it was inconsistent with what she had written in her grievance about this matter, inconsistent with what she had said in the grievance hearing and inconsistent with how she had identified this complaint in the list of issues. It was, moreover, an important inconsistency because it went to the very heart of one of her claims.

Ms Bepoto

28 We also had concerns about how much weight could properly be attributed to Ms Bepoto's evidence. This was principally because there were examples of Ms Bepoto making complaints about things in her witness statement, or in her oral evidence, which she later accepted were not accurate.

29 For example at paragraph 37 of her witness statement she had written:
"Alice (a reference to Ms Prendergast) went so far as to say that she didn't trust the ethnic employees to carry out their duties".
Yet when she was asked about this in cross-examination she accepted that Ms Prendergast had never said this. Instead her evidence became that this is what she (Ms Bepoto) had inferred from Ms Prendergast's conduct.

30 She wrote at paragraph 25 of her witness statement that Ms Prendergast openly favoured white English team members by giving them duties outside of the limits of their job descriptions. When asked who Ms Prendergast gave these additional duties to she responded it was Mr Flower and Ms Boneham. Yet when asked to explain what additional duties were given to Ms Boneham she was unable to. She initially said that she was "not too sure". She then said that Ms Boneham was "basically unaccounted for" and after that said "it was more that her role didn't have as much weight" (i.e. workload) as others did; a completely different issue to that of people being given additional duties outside of their job descriptions.

31 Just as with the claimant, Ms Bepoto also had a tendency in her witness statement to make statements of a very broad nature but without actually providing much specific detail of individual incidents. For example in paragraph 12 her statement she wrote:
"She (a reference to Ms Prendergast) shamefully ceased to inspire the team and employees to continually improve their performance, hold herself accountable for the team's performance, and make decisions based on evidence and a fair assessment of the circumstances. Both towards all staff and ethnic minorities but more towards people of colour since when work was not completed by the other white staff, it was thrown as our responsibility to finish. Instead of making plans for the week, she regulates how she feels each day. For example, she assigns the minorities of the team to finish new and incomplete duties on the same day while giving easy tasks to her favourite co-workers".

32 As we have already commented above, we remained mindful that general impressions concerning credibility need to be treated with considerable care. But in a case such as this, where much of it relied upon perception and there were many allegations about incidents in respect of which there was no contemporaneous documentation, we considered our general observations on occasion to be of some relevance when making our findings of fact.

Findings of fact

33 We have set out the majority of our findings of fact in the section below but some findings, particularly where they also form a conclusion, appear in our conclusions section. From the evidence that we heard and the documents we were referred to we made the following findings of fact:

Structure of the respondents

33.1 R2 and R3 are wholly owned subsidiaries of R1. R2, known as CURA, is responsible for recruiting new students for R1. R2 deals with prospective students from the enquiry stage through to application and then enrolment. For most of the time with which this case was concerned R2 comprised a number of different teams; the enquiry team, the comms team, the faculty recruitment and conversion team and the campus events team.

33.2 R3 operates as an employment business which is responsible for engaging agency workers for assignments with R2 and R1.

33.3 The claimant describes herself as black African. She was diagnosed with cerebral palsy when she was less than one year old. She had three major surgeries on her legs whilst growing up and as a result has multiple metal plates in both legs. Her mobility is very limited; with assistance (i.e. holding on to someone or something) she can walk non-

stop for about 20 metres, which will take her about 6 minutes. When she is tired her ability to walk reduces further. Stairs are difficult for her to negotiate. Maintaining her balance is very hard and consequently she is unable to go up or down stairs unaided; she is only able to manage stairs if she has railings or a person to hold onto.

33.4 The claimant was first engaged by R3 in July 2020 to work for R2 for a two week period in early August 2020 carrying out a role of Clearance Customer Specialist Adviser – i.e. to help with the student clearing process. She was provided with the terms of her engagement by R3, pages 244-247. The place of work for this assignment was her home for the first week of the assignment and the engineering and computing building on Coventry University campus for the second week, page 245. It was recorded in the terms of engagement, page 245, that the claimant has cerebral palsy which affects her mobility. It was said that a workstation/office on the ground floor of the engineering and computing building had been requested and that no other adjustments were required.

33.5 Also in August 2020 R2 decided to set up an enquiry team which would be focused solely on the UK. This was a brand new team for which new processes and ways of working were to be introduced, and it was to be focused on three key enquiry channels; email, telephone and, after the end of October 2020, live chat. R2 decided to set up this team quickly and the entire team was recruited via R3. All team members were engaged as agency workers for R3 and then sent on assignment to work for R2.

33.6 The claimant was one of those recruited to work on the newly formed enquiries team. She was recruited as a Course Specialist Adviser. Once again, for the purposes of this assignment, she entered into a contract with R3, pages 261 – 263. In this document the claimant was described as being an agency worker working under a contract for services with R3. The hirer was identified as R2. It was confirmed that the start date of the assignment was 17 August 2020, that the anticipated length of the assignment was six months and that the claimant would work Monday to Friday between 8:30 AM and 5 PM, page 261. The location of work was described as being on campus.

33.7 It was recorded within the document that the claimant had cerebral palsy which affected her mobility, page 261. It was further recorded that if she was working on an upper level floor then a lift would be required but that no further adjustments were needed.

33.8 The claimant was provided with a job description, page 257. Her main duties and responsibilities included; offering a welcoming approach to all inbound and outbound communications with enquirers, applicants and offer holders, clearly articulating responses to prospects who are

considering a course with the University, having up-to-date knowledge of the University's courses and campuses, responsibility for achieving individual targets for the key steps within the customer journey, including contact and application rates and engaging effectively through telephone, instant messaging, social media, email and other communication methods.

33.9 The newly formed team initially comprised the claimant, Alice Prendergast, Connor Flower, Rebecca McKernan and Molly Boneham. Before us, Ms Prendergast, Mr Flower, Ms McKernan and Ms Boneham were all described as white English.

33.10 Mr Flower, like the claimant, started work with R2 on 17 August 2020 as a Course Specialist Adviser. Like the claimant he entered into a contract with R3, pages 982 – 997, which was described as a contract for services. Mr Flower was described as being an agency worker supplied by R3 to work for the hirer, R2. He signed his contract electronically on 23 July 2020, page 995. The respondents accept that Mr Flower was an employee, in the wide sense, of R3 by way of this contract and accept that he was a contract worker of R2.

33.11 Ms Prendergast, likewise, started on 17 August 2020, page 1014, again as a Course Specialist Adviser. Once again her contract was with R3, and in her terms of engagement she was described as being an agency worker of R3 and the hirer was identified as being R2. The respondents accept that Ms Prendergast was an employee, in the wide sense, of R3 by way of this contract and accept that she was a contract worker of R2.

33.12 Initially, the team was managed by Jo Cookson, Head of Conversion. We have little doubt that when the team was first set up things were somewhat disorganised. A shift pattern was not set up until several weeks after the team had started work, see below, and by way of further example a training programme was only made available to the team about three weeks after they had started work, page 291.

33.13 It was decided that the team would work a 3 shift pattern. The times of the late shift varied somewhat over the course of the events with which this case is concerned, but in general the shifts were 8 AM-4:30 PM, 8:30 AM-5 PM and 11 AM-8:30 PM. This shift pattern, we infer, was put in place in early September 2020 as shortly after this Ms Cookson emailed the team referring to having provided confirmation of the shift pattern that they would be following, page 293. Those on the early and normal shifts worked from the office; the late shift was worked from home.

33.14 In the same email Ms Cookson set out what the process would be for the team when they wanted to apply for annual leave. She explained, page 293, that if possible she would like only one member of the team off at any one time. She stated that she had created an Excel file for them to use when they wanted to book leave. Team members were asked to check the calendar first to ensure that there was not another team member already on holiday, following which they could add their name to the file and then email Ms Cookson to request authorisation. Ms Cookson explained that authorisation would be provided in writing as this authorisation would need to be passed onto R3. Ms Cookson stated that she would consider requests for leave if another team member was already off.

Ms Prendergast is appointed to Team Leader

33.15 It was quickly realised by R2 that the team needed a dedicated team leader to support the team with day-to-day activities. In October 2020 the role of Team Leader was advertised internally. It was advertised for five days, this being a requirement for all internal vacancies.

33.16 Ms Prendergast and Mr Flower were both interviewed for the role, and Ms Prendergast was successful. R3 provided Ms Prendergast with new terms of assignment to reflect her new role, pages 1019-1022. In these terms Ms Prendergast was once again described as an agency worker working for the hirer, R2, through R3. It was set out that the assignment would start on 28 October 2020 and would likely last for 6 months, page 1019.

33.17 On 22 October 2020 Ms Cookson emailed the team, page 310, informing them that following an interview process Ms Prendergast would be taking up the role of Conversion Team Leader from Thursday 29 October. It was explained that from then Ms Prendergast would act as the day-to-day lead for the team and that she would assume responsibility for the rota and tasks from the next week onwards.

33.18 It was further explained that four new specialist course advisers had been recruited and would be joining the team on 2 November 2020. These included Ms Bepoto, Ms Taneesha Warwick-Oliver and Ms Muldaryte, page 310. Ms Bepoto describes herself as black African. Before us, Ms Warwick-Oliver was described as Asian/white and Ms Muldaryte was described as Eastern European.

Work allocation

13.19 As set out above, there were three main channels by which enquiries were received by the team; telephone, email, and from October

2020 live chat. Initially, telephone call enquiries were dealt with in a very low-tech way. Each adviser had a desk phone and calls made to the enquiry number would be routed through to the desk phones. This meant that, initially at least, Ms Prendergast had no visibility of the number of calls coming through to the team, nor did she have any visibility of the number of calls that an adviser was handling and nor did she have the technology to enable her to listen in to any of the calls. Technology to listen in to the calls was not, in fact, available for the whole of the time that the claimant was working for R2.

33.20 Email enquiries came into the team via a shared inbox. The nature of the enquiries made ranged from general enquiries about courses from prospective students, or current students wishing to progress onto another course, to more specific enquiries about qualifications required for a course or what documents a student was required to produce.

33.21 When Ms Prendergast was appointed she was met with a significant backlog of email work; there were thousands of emails in the team inbox waiting to be dealt with. The volume of telephone enquiries was also very high at this time. Initially, all she could do was respond in a very reactive way to what was happening on any particular day, rather than having proper systems and processes in place.

33.22 Prior to the recruitment of the four additional advisers there were five people, including Ms Prendergast, available to do the work, and initially work was allocated on a daily basis with, more often than not, three people to deal with phone calls and two to deal with emails. When live chats became available people also had to be allocated to this enquiry line as well.

33.23 We accept Ms Prendergast's oral evidence and find that when she took over, in general, she rotated people evenly around each of the three enquiry channels. However, as the team settled in a little more, and the numbers of people on the team expanded, those people who expressed a preference for telephone work, namely Ms McKernan and Ms Warwick-Oliver, spent longer on the telephones than the others on the team.

33.24 In relation to the workload, those on the phones would simply be required to deal with whatever volume of calls came in that day, with assistance being provided from other team members if the call volume was very high. The level of workload on any particular day was, therefore, determined by demand. In relation to emails Ms Prendergast would assign 50 emails each day to each adviser allocated to the email channel, although they were not required to complete all 50 emails within the course of the day.

33.25 People allocated to the telephones were also expected to do some of the email/live chat enquiries during quieter periods. Ms Prendergast made everyone on the team aware that during quieter periods on the telephones they would be expected to complete 20 – 25 email/live chat cases. We accept the evidence of Ms Prendergast and find that this requirement was applied to everyone.

33.26 Live chat operated in a similar way to telephone calls in that the workload on a particular day was driven by the number of enquiries made. It was a busy enquiry channel. The adviser allocated to the live chat enquiry channel would be expected to deal with all of the enquiries that came in and was expected to be able to deal with up to three live chats at the same time.

33.27 We do not find that dealing with live chat enquiries was less stressful than dealing with telephone enquiries; the claimant did not explain the basis on which she asserted this to be the case. Both of these enquiry channels required instant responses during live conversations.

33.28 Ms Prendergast had no means, at this time, of either seeing or monitoring each adviser's actual output, in terms of number of enquiries dealt with on any particular day.

33.29 Ms Prendergast maintained Ms Cookson's system in relation to booking annual leave. The only change made was that the aim that there should only be one person off at a time became a maximum of two people off at one time when the team expanded. Ms Prendergast made it clear to her team that annual leave requests would be dealt with on a first-come first-served basis.

Mr Flower's additional responsibilities

33.30 During a one-to-one with Ms Prendergast at the end of October 2020 Mr Flower requested that he be given some additional responsibilities in order to help him bridge the gap in his experience as a team leader/manager so that he could move into such a role in future. He made this request because he had been unsuccessful at interview for the role now being filled by Ms Prendergast. Ms Prendergast agreed that once or twice a week he would be responsible for allocating email enquiries to the team. We do not find, as the claimant and Ms Bepoto suggested, that this amounted to Ms Prendergast openly favouring Mr Flower by giving him duties outside the limit of his job description because he is white English. He got the additional responsibilities because he asked for them as a development opportunity following his unsuccessful interview. There was no suggestion on the evidence before us that anyone else on the team made the same request at this time. We also accept the oral

evidence of Mr Flower and find that he was not responsible for making a decision as to who would be working on which enquiry channel on what day, that remained the responsibility of Ms Prendergast. He only did this occasionally if he was covering for Ms Prendergast when she was out of the office, and this was a responsibility that was shared out amongst other team members as well.

33.31 Mr Flower would allocate email enquiries (known as cases) to team members from the shared inbox once or twice a week. He tended to allocate approximately 50 emails at a time to each team member working on the email enquiry channel, allocating on the basis of date and time received. As time went on he would also sometimes allocate emails by the nature of the enquiry. Sometimes the team might receive multiple enquiries about the same issue and if that happened Mr Flower would allocate all the emails about that issue to a particular team member. He also on occasion allocated missed live chat queries. If a live chat had not been responded to then it would generate an enquiry similar to an email.

33.32 Matters were a little more organised on the team by November 2020. Ms Prendergast had introduced two rotas by then. The first was a weekly rota which was made available to the team every Monday which set out which enquiries channel each adviser would be working on for each day of the week. There was also a shift rota which was produced monthly. Each adviser, apart from Ms Warwick-Oliver, rotated around each shift. Ms Warwick-Oliver was allocated to one shift to help her manage a health condition.

Work allocation claimant

33.33 We accept the evidence of Ms Prendergast and find that the claimant expressed a preference for dealing with email enquiries rather than enquiries over the telephone and that consequently Ms Prendergast allocated her somewhat more email work than her colleagues. It follows from this that the claimant did less of the telephone and live chat work than others.

33.34 We do not find that Mr Flower allocated the claimant telephone enquiry work more than live chat enquiry work. Mr Flower, in fact, was not, as we have set out above, generally responsible for making a decision as to who would be working on which enquiry channel on what day. That remained part of Ms Prendergast's role unless she was out of the office, and when this happened he was one of a number of people who carried out this responsibility.

33.35 We have preferred the respondent's evidence because there was, bar a bare assertion from the claimant and Ms Bepoto, no evidence

produced to show that the claimant was allocated more telephone work than other types of work. For example, there were no copies of the weekly rota produced nor a record provided by the claimant of how many days she was allocated to what type of work in any given timeframe.

33.36 Neither, for the avoidance of doubt, do we find that at some unspecified point Ms Prendergast said that she did not trust the ethnic minority employees to carry out their duties including answering calls, as Ms Bepoto asserted in her witness statement. We reject that evidence not least because Ms Bepoto accepted in cross examination that this had never been said.

33.37 We do not find, as the claimant and Ms Bepoto asserted to be the case, that there was an “in group” and “out group” in the office with the in group comprising the white English call advisers and the out group comprising the claimant, Ms Bepoto, Ms Warwick-Oliver and Ms Muldaryte. We reject this evidence because (i) this was one of the issues in respect of which the claimant’s evidence was very vague and lacking in any detail, it was in reality little more than an assertion, (ii) taking into account our assessment of their credibility and (iii) because the very few specific examples of asserted favouritism that they gave in their evidence turned out to be nothing of the sort. See for example what the claimant and Ms Bepoto said about the allocation of additional duties to Mr Flower, paragraph 33.20 above.

33.38 Neither do we find, as the claimant and Ms Bepoto asserted, that Ms Prendergast would require the ethnic minority members of the team (as they were referred to by the claimant and Ms Bepoto) to perform excessive amounts of work, or regularly give them tasks last minute to finish that day. Once again, what was striking about this evidence was that it was no more than an assertion; at no point was any cogent evidence led of a specific example of this. Ms Bepoto was asked a number of times during cross examination to give a specific example of what she knew about workload allocation. What she eventually said is that Tanisha (Warwick-Oliver) “might say she had 120 emails to do and she was on calls” and Connor (Flowers) and Molly (Boneham) “might say oh I’ve only got 50 left”. Aside from the fact that saying that something “might” have been said is not the same as saying that something was said, and so this evidence lacked cogency, it was notable that this evidence did not really address the issue of workload allocation at all. Even if these comments were made all that could sensibly be inferred from that is that at a particular point in time Ms Tanisha Warwick-Oliver had 120 emails to do and Mr Flower and Ms Boneham 50 emails. But what amount of work they had *left to do* at any particular point in time is a totally separate issue from what amount of work they were *allocated*.

The offer to the student

33.39 At some point, we do not know exactly when, but on balance we find it was prior to the upcoming lockdown (for which see below), the claimant made an offer to a prospective student for a place on a course. Ms Prendergast told the claimant that she should not have made the offer because the student did not have the right grades to meet the criteria. Making an offer in such circumstances can cause serious issues for the admissions team further down the line. Ms Prendergast was, at this stage, new to the role and new to the criteria for admissions. She went to check the situation with Mr Flower and then came back to the claimant to tell her that she (the claimant) had been right and Ms Prendergast had been wrong. Ms Prendergast, we find, apologised to the claimant. We base most of these findings on the oral evidence of the claimant. We base our finding that this happened prior to the lockdown on the oral evidence of Ms Prendergast, as her evidence was that this took place when she was very new to her team leader role and had only been in it for a matter of weeks.

Incident December 2020

33.40 We do not find that in December 2020 after Ms Prendergast had listened to the claimant handle a difficult call she said loudly to the claimant in front of her colleagues; “I don’t think you can do this job, Rebecca can handle calls much better than you as she has dealt with complaints before”. We prefer the evidence of Ms Prendergast and find that this incident unfolded as follows. Ms Prendergast overheard some of a call that the claimant was handling with a customer who had previously been dealt with by Ms McKernan. As the claimant was on a desk phone Ms Prendergast was not able to hear much but she could tell it was a difficult call and that the conversation had become fraught. Ms Prendergast advised the claimant to end the call and said that she would get Ms McKernan to call the student back. Ms Prendergast was of the view that Ms McKernan would be well placed to handle the call not only because had she dealt with this customer before but also because she had a background of working in complaints, so she was experienced at dealing with difficult callers. Ms Prendergast also told the claimant that it was clear that it had been a difficult call to handle and there might be a need for training on how to deal with difficult customers.

33.41 We prefer Ms Prendergast’s’ evidence because the claimant’s account of this incident was inconsistent. In her grievance hearing, for which see below, the claimant complained, page 365, that Ms Prendergast had said that “Rebecca can handle difficult calls like this, she has a background in complaints”. The claimant then went on to say that she (Ms Prendergast) “formulated the claimant did not have experience”, page 365, by which, the claimant accepted in cross examination, she meant she

had inferred that Ms Prendergast thought she did not have the necessary experience to handle the call. There was no mention, in this account, therefore of Ms Prendergast expressly saying to the claimant "I don't think you can do this job, Rebecca can handle calls much better than you". This version of the incident only appeared in the claimant's witness statement. The account the claimant provided in her grievance was, in fact, quite close to Ms Prendergast's account of the incident before us. Of course, saying or, indeed, implying that someone lacks experience and might need to be trained on a particular aspect of the role is a very far cry from saying to someone that they cannot do their job.

33.42 We do not find that Mr Flower at any point said to the claimant that she was not handling calls as well as her white English colleagues, or not handling calls as well as Ms McKernan. The claimant led no evidence on this at all in her witness statement. When this was put to her in cross examination she accepted that she had not provided any evidence in relation to this complaint. Later on in her evidence, when asked about that omission again and to provide further detail, she said that Mr Flower would not look at her or greet her and would micromanage her, but that, of course, was a different issue to the complaint that he had compared her unfavourably to her colleagues.

Cisco Webex

33.43 With the threat of a lockdown looming R2 introduced a new telephone system known as Cisco Webex. This enabled calls to be taken through a laptop and headset rather than a physical desk phone. One of the principal advantages of this system was that it meant that the advisers could work anywhere. With this new system also came a degree of greater visibility of the advisers work. An adviser could prevent a call coming through to them by going into a "not ready" status and the system showed if they were doing this. It also showed an orange status if the system was trying unsuccessfully to connect a call to an adviser. However, these two features of the system did not work well. Repeatedly, the system would show advisers as being in orange or not ready status when, in fact, they were on a call. This problem persisted for many months and throughout the entirety of the time that the claimant was working for R2. The system also showed the number of callers that were waiting.

Lockdown

33.44 A matter of weeks after Ms Prendergast became team leader a further lockdown was looming, and the entire team started to work remotely from home. This was the case between 18 December 2020 and 15 March 2021. The team constantly used Microsoft teams to stay in contact and a group chat facility on Microsoft teams was set up.

33.45 With everyone working remotely, however, and the Cisco system not working properly, this meant that Ms Prendergast often had no idea what people were working on, if they were assigned to the phones, unless she directly asked them.

Ms Prendergast asks where the claimant is

33.46 At some point during this period, no one provided us with a specific date, Ms Prendergast sent a message to the claimant via the Teams group chat asking “where are you”. This was on a day when the claimant was allocated to the telephones and the number of calls was building up, and Ms Prendergast was not able to see reliably whether the claimant was on the telephone or not. As the claimant had previously told Ms Prendergast she did not always check the group chat when she was on the telephone Ms Prendergast then sent two consecutive messages directly to the claimant (i.e. not on the group chat) again asking where she was. Ms Prendergast was attempting to clarify whether the claimant was at her desk ready to take calls as calls were building up. We accept the claimant’s evidence and find that there was another occasion at around this time when Ms Prendergast again asked her where she was.

Ms Prendergast says “I have already told you this….”

33.47 On balance we accept the evidence of the claimant and find that at some point shortly after the lockdown had started, and in response to a question from the claimant on the Microsoft Teams group chat, Ms Prendergast responded “I have already told you this, you should know this”. We also accept the evidence of Ms Prendergast and find that this was at a time when multiple matters were having to be cascaded to the team remotely and frequently questions were being asked by the team about issues which they had already received an answer to. We have little doubt it was a very stressful period as the team, and Ms Prendergast, had to adapt suddenly to remote working whilst at the same time grappling with a completely new telephony system.

33.48 We also accept the claimant’s evidence and find that at some point, we know not when, Rebecca McKernan asked Ms Prendergast a question over the Teams group chat. This question was prefaced with;
“this may sound like a silly question but…. “. To which Ms Prendergast responded;
“There is no such thing as a silly question”.

Teams messages between the claimant and Mr Flower December 2020 – March 2021

33.49 On 19 December 2020 Mr Flower messaged the claimant on Teams:
“these calls are back to back would you mind jumping on if you are not already please”.
On 23 December 2020 Mr Flower sent the claimant a message via Teams;
“Hiya, don’t think you’re signed into live chat just make sure you are as I had 3 there”. The claimant responded that it had just signed her out but she was back on now, page 685. Later on that day he messaged her saying:
“hello need you to call someone please I can’t do it as I know the girl well”, page 685.
She responded “sure”.

33.50 On 16 February 2021 he messaged the claimant to say, page 354;
“Hiya, Can you make sure that when you add Certs or anything that you update the application please. Not having a go, I’ve just found two there”.

33.51 On 9 March 2021 Mr Flower messaged the claimant as follows:
“morning, I have given you 40 cases today, 22 of them should all be the same enquiry, just asking for student ID numbers for accommodation so nice and easy ones and then 18 cases that are just random ones but all good”, page 684.

33.52 He sent a further message on Tuesday at 11.43 (we do not know the date of this message), page 683;
“Hiya I have a meeting in 15 minutes can you hop on live chat in a bit please”
to which the claimant responded of course and Mr Flower thanked her. He then messaged again:
“can you hop on live chat now please need to get something done before I go in”. The claimant responded that she was on live chat and he said “oh thank you sorry”.

33.53 He sent a further message on 24 March 2021 in the following terms, pages 354 and 681.
“hello when you look into your cases please don’t fret when you see lots in there…… They will be the allocation over the next few days…… It’s going to be 90 to assign to you…….. They are all certificate-based ones so well easy…… Some are from today as well so don’t think you need to do them all tomorrow lol. See what you can get done over the next 2 days okay thank you” page 681. He continued that if the claimant had any questions she should “give him a shout” and ended his message saying “just remember you’re not expected to get them all done straight away you are just quite good at these ones. I appreciate it”, page 682. The claimant thanked Mr Flower but also reminded him that she was off until Monday

saying she would see what she could get done that day. Mr Flower responded that was not a problem and thank you, page 682.

33.54 We do not find that these messages were belittling or displayed hostility towards the claimant or were harassing (in the non-legal sense) of her because that is not, on any objective reading of the messages, the tone that is conveyed by them. In two of the March messages Mr Flower is allocating the claimant email cases, as it had been agreed with Ms Prendergast he could do. On the day when he allocates the claimant what appears to be a very high workload he warns her of this and explains why the work has been allocated in this way, reassuring her that he does not expect her to complete everything over the usual timescale. He also asks her to help out with some telephone and live chat work at times when he needs some assistance, but he always does so in a polite way, for example;
these calls are back to back would you mind jumping on if you are not already please".

Message from Ms Prendergast to the claimant on Teams

33.55 On 1 February 2021 Ms Prendergast sent the claimant the following message on Teams;
"well done for Jan - good numbers for cases - let's see if we can focus on leads this month and live chats I will give you some more time on (we infer live chat) to get you practice on those"

February 2021; the claimant's leave request

33.56 At either the very end of January or beginning of February the claimant made a request for some leave. She checked the calendar, as she was required to do, and it did not show that anyone else on the team was on leave on the days that she wanted. She therefore emailed a request for time off to Ms Prendergast. Ms Prendergast did not deal with annual leave requests on a daily basis. At the point when she received the claimant's request she was aware that Molly Boneham had earlier put in a request for leave, which she likewise had not dealt with, but which she believed was for some of the dates also requested by the claimant. Ms Prendergast responded to the claimant in the following terms, page 352:
"hey - just going through emails and got your annual leave one, Molly has requested some of them dates so I need to double check and I will let you know shortly" .

33.57 That response was consistent with Ms Prendergast's usual approach of dealing with leave requests on a first-come first-served basis; an approach which the team were well aware Ms Prendergast applied. Based on the claimant's evidence we find that Ms Prendergast did, in fact,

go back to the claimant and confirm she could have the days she had requested. We also accept the claimant's evidence, on balance, that Ms Boneham worked the days that the claimant had requested, and we infer from this, on the balance of probabilities, that Ms Boneham had not, in fact, requested any of the dates that the claimant had.

The claimant's contract extension

33.58 On 21 February 2021 the claimant's contract was extended to 31 May 2021, page 332.

March 2021; the lifting of lockdown and arrangements for testing

33.59 R1 decided that in order to minimise the risk of infection anyone working on the University campus after the lockdown had been lifted would be required to take a Covid test twice a week and produce a negative test result. R1 set up a test centre in the sports hall of the university's Priory building, which was adjacent to the claimant's office. As part of the process of setting the test centre up an operating procedure was produced which listed the following amongst the considerations for using this particular building as the site for the testing centre, page 943 supplementary bundle two; "the test site is located in our central campus area for accessibility and has disabled access entrance". Accordingly, the respondent took steps to make sure that it was using a building for the test centre which had disabled access. The accessible entrance, it was not disputed, was accessed via a ramp. To describe the layout of the various entrances; if a person was standing facing the building on the ramp that led down to the accessible entrance, then on what would be the right-hand side of the building, there were two doors a little distance away from each other, page 963 supplementary bundle two. A number of stairs, about five, led down to these doors. The accessible entrance was on a different side of the building, the adjoining side, and it was part way down this side of the building, page 963.

33.60 R1 set up a one-way system for entry and exit to the building using the two doors on the right-hand side of the building. The entrance was via the door that was furthest along this side of the building and, after testing, people would exit via the nearer doorway. Crash barriers were put up to separate people coming down this side of the building as they either entered or exited the building.

33.61 But, as set out above, the accessible entrance was a little distance away from this and on an different side of the building. We do not, for the avoidance of doubt, find that the barriers used for the one-way system had in some way blocked off the accessible entrance. Whilst the claimant had asserted this in her witness statement, in her oral evidence she completely

changed her evidence on this point, as have already set out above. This was a fundamental inconsistency that wholly undermined the claimant's evidence in respect of this matter. In any event, the entrances were on two totally different sides of the building and it was obvious from the photograph that the claimant had produced of the one-way system, page 613, that the barriers setting up the one way system were nowhere near the accessible entrance, and certainly were not blocking it. The disability accessible entrance remained accessible, we find.

33.62 R1 informed R2 that there was a requirement that anyone working on campus must test twice a week, and produce a negative test. Senior management within R2 considered this and an instruction was cascaded via managers and team leaders within R2 that those people working in the office would be required to provide a negative Covid test twice a week.

33.63 There was no immediate requirement on the part of R2 for all of its employees/workers to return to work in the office. Discussions took place within Ms Prendergast's team about whether they wanted to return to campus or continue to work from home. As a team the preference was to return to work from the office. The only person who expressed reservations about this was Ms Warwick-Oliver, who was vulnerable, and it was agreed that she would continue to work from home.

33.64 The rest of the team returned to the office on 15 March 2021.

33.65 We do not find that people were instructed by R2 that they *must* use Priory building test centre. We reject the claimant's evidence because the respondent's evidence on this point was consistent and that evidence was corroborated by Ms Bepoto, in her oral evidence, who confirmed that no such instruction was issued. That said, we do find that there was a strong expectation or preference on R2's part that people would use this test centre. R2 preferred people to use this test centre because it was convenient, as it was located right next to the office, and, as booking was not required, the respondent was able to stagger when in the day people went for their tests. We base these findings on the oral evidence of:
Ms Bepoto;
"There was no instruction to go to Priory but it was advertised as the one to use as it was the closest and most convenient",
Ms Prendergast;
"I told them ….. the preferred option was to use the Priory sports hall as this was next to our office and the easiest",
And Ms Cookson
"We did recommend Priory because it was on campus and you didn't have to book. Using Priory meant we could have a staggered approach to testing, arranging when people went".

33.66 The claimant decided to use the test centre within the Priory building; it was conveniently located for her as it was right next to the office. It was not disputed that when the claimant went to the test centre she used the entrance and exit system set up down the right hand side of the building, and accessible only via stairs. For the avoidance of doubt, we do not find that the claimant did not know that there was a disability accessible entrance to the building, because before us the claimant initially repeatedly asserted that this entrance had been blocked off by the one-way system. Clearly, therefore, the claimant knew of this entrance. We can only infer that the claimant assumed that she should use the main entrance/exit when she saw the one-way system that had been set up around it.

33.67 When the claimant arrived at the building she went to the main entrance/exit, therefore, and saw that she had to negotiate a number of steps. There were no handrails and so the claimant had to go back to the office and ask a colleague to accompany her and help her down the stairs. We have no doubt that this was a distressing and tiring experience for the claimant.

33. 68 We do not, for the avoidance of doubt, find that on any occasion when the claimant visited the Priory building to take a test she attempted to use the disabled access but a person blocked her access to this entrance and turned her away. We found the claimant's evidence on this point completely lacking in credibility, for the reasons we have already set out at paragraph 27 above.

33.69 The claimant took tests in this building four times over a period of two weeks. She then spoke to Ms Prendergast, but she did not tell her about the difficulties that she had encountered accessing the building. What the claimant told Ms Prendergast, we find on the balance of probabilities, was that she wanted to work from home because it was the start of Ramadan. We did not find it entirely easy to make findings of fact in relation to what the claimant had said to Ms Prendergast during this conversation. Ms Prendergast readily admitted that her recollection of the conversation was very vague, but she said she thought that the claimant had asked to work from home because it was the start of Ramadan. The claimant did not deal with this conversation at all in her witness statement but in her oral evidence, she also said that she had asked to work from home because it was the start of Ramadan. The oral evidence of the claimant and Ms Prendergast was consistent therefore. However, Ms Prendergast had been interviewed by Ms Cookson on 17 February 2022, for the purposes of the claimant's grievance appeal (see below), and what she told Ms Cookson at that time was that the claimant had said that the last time she went to the Priory building she had struggled and so it was immediately agreed she would work from home, page 618. We were very

conscious that this account was provided somewhat closer in time to when the conversation had actually taken place, and when memories might well have been more accurate. Nevertheless, as both the claimant and Ms Prendergast gave the same account of the conversation in their oral evidence, we have accepted their evidence.

The introduction of Cisco Finesse

33.70 In March 2021 the respondent introduced Cisco Finesse. This was similar to Cisco Webex but it provided greater visibility of the work being undertaken, via what was known as a wall board. Ms Prendergast and the team were not only able to see how many people were on hold waiting for their calls to be answered but how long they had been holding for. The system also recorded the number of calls that an adviser had taken, although this was unreliable and frequently the function did not work. The systems problems that had been encountered with Cisco Webex persisted with Cisco Finesse, particularly in terms of accurately showing when the advisers were on a call.

Mr Flower's interactions with the claimant March 2021

33.71 We do not find that in March 2021 Mr Flower refused to speak to the claimant face-to-face when they were both in the office; principally because the claimant failed to give a single example of when she had been ignored by Mr Flower, and describe what had happened; it was no more than assertion.

33.72 In preferring Mr Flower's evidence that this did not happen we also took into account that opportunities for face-to-face interaction between them during this period were, in fact, very limited. The claimant only returned to the office between 15 and 27 March, before she started to work from home, and Mr Flower was, during this time, working a lot of the time from home because a close family member was seriously ill. Additionally, the opportunities for interactions generally were quite limited; the office was in large part a call centre type environment with those advisers who were on the telephones working with headsets on and often continually taking calls.

Ms Bepoto complains

33.73 On 26 March 2021 Ms Bepoto made an informal complaint to HR about what she considered to be incidents of racism on the team, particularly involving Mr Prendergast. In May 2021 this became a formal complaint of race discrimination. We accept the evidence of Ms Prendergast and find that she had no knowledge of this complaint. That evidence was not challenged by the claimant. Ms Bepoto did give

evidence to say that Cheryl Dempsey, a manager at R3, had told her that her complaints would be discussed with Ms Prendergast, but there was no evidence before us to suggest that this had actually happened. In any event we understood it to be Ms Bepoto's evidence that no action was taken in respect of her grievance by Ms Dempsey until July 2021, after the events with which this case is concerned.

The first protected act

33.74 The day after Ms Bepoto made her informal complaint the claimant put in a formal complaint, pages 348 – 352. She wrote that the statement was only her own experience and had not been skewed by anyone else's, page 350. She stated that she had come to the point where she had no desire to continue with her assignment, page 350. The claimant complained of a lack of fair and equal workload distribution amongst the team writing that it had been very clear from day one that Ms Prendergast had her favourites "while the rest of us (the ethnic minorities) are treated like subhumans", page 351. She stated that the ones that Ms Prendergast considered "subhuman" were expected to do more work. She complained that Ms Prendergast looked at her work to find mistakes and accused her of making mistakes when in fact she did not and that Ms Prendergast had constantly belittled her in front of others. She then provided an example of a message Ms Prendergast had sent to her on Microsoft Teams which she considered to be an example of belittlement, pages 352-353, which was as follows:

"well done for Jan-good numbers for cases-let's see if we can focus on leads this month and live chats I will give you some more time on (sic, we infer live chat) to get you practice on those"

33.75 She then gave an example of what she considered to be favouritism on the part of Ms Prendergast, referring to the message that Ms Prendergast had sent to her on 2 February 2021 about annual leave, see paragraph 39.56 above.

33.76 The claimant further complained that when she had worked for the clearance team in August 2021 one of the team leaders, Peter, had spent the entire week micromanaging people. She described him as condescending towards her and making her feel like she was not capable of doing the work, page 352. She stated that he only interacted with white British staff and wholly ignored the ethnic minority staff. She complained about another team leader at this time, Luke, who, she said, had made an comment, "whoa I hope this doesn't lead to protest" which was inappropriate, as it was made to a room of five black women in the middle of the Black lives matter protest. She suggested that there was deep rooted institutional racism at Coventry University, page 353.

33.77 She complained of disability discrimination in relation to the arrangements that she asserted had been made for taking a Covid test. She stated that a one way system had been put in place and that the allocated entrance to the building had stairs and no railing and the allocated path for disabled people had been closed off, page 353.

33.78 She stated that she also wished to raise a complaint against Mr Flower who she described as dismissive, hostile, a bully and a micromanager, page 353. She stated that he refused to acknowledge her existence at work, would never speak to her face-to-face and, she complained, he felt like he had the right to give her work and ask what she was doing, which was micromanagement. She asserted he had demonstrated a pattern of harassment and then gave some examples of this based on interactions on Microsoft teams, which are the messages set out at paragraphs 33.49 – 33.53 above.

Deletion of the Teams chat

33.79 On 8 April 2021 Ms Prendergast deleted the Microsoft Teams group chat. She informed the team that she was doing this, page 357, she said this:
"I'm about to start a new chat, so we can start fresh and start to save important messages et cetera, so I will be removing everyone from this one and starting a new one in a moment".

33.80 On balance we accept the evidence of Ms Prendergast and Ms Cookson and find that this came about in the following way. Reorganisations were taking place and a number of teams were coming together; in particular the International enquiries team was being merged with Ms Prendergast's team. Ms Cookson had conversations with Mr French, who managed the international team, about the need to retire some of the legacy Microsoft teams spaces to ensure that there was a single Microsoft teams space to work in, so that teams could work together and learn together and have access to the same set of documentation. Ms Cookson, in turn, informed Ms Prendergast that she wanted one single Microsoft teams space for the combined team. Accordingly, Ms Prendergast deleted the existing group chat and started a new one which would be for everyone to join.

Interview with claimant re grievance 15/4/21: second protected act

33.81 Ms Cheryl Dempsey from R3 met with the claimant to discuss her grievance on 15 April 2021, pages 365 – 380. Ms Leigh Loughran from HR attended to take notes. We do not find that these notes were inaccurate. Whilst the claimant asserted this to be the case there was no

evidence to support this assertion and, in any event, when the claimant was taken through the notes during cross examination she, in the main, accepted that the things that had been written down had been said.

33.82 The claimant talked about the incident when she had been handling a difficult call and Ms Prendergast had intervened. She said that Ms Prendergast had said that Rebecca can handle difficult calls like this she has a background in complaints. She then went on to say that she (Ms Prendergast) “formulated she did not have experience”, page 365.

33.83 She confirmed that every day two or three people were covering enquiries on the telephone for eight hours a day and there were a lot of calls, page 366. She complained that during lunch hours she had been covering the phones on her own.

33.84 She complained that recently Ms Prendergast had messaged her twice in the group chat on teams in less than 30 seconds and had then messaged her again, page 367. Whilst discussing this incident she explained that there was a new phone system which was experiencing a lot of system errors. She stated there were system delays, and sometimes the system would show that a person was ready to take a call when they were already on a call, page 367.

33.85 She complained about the incident where Ms Prendergast had queried an offer that she had made to a prospective student, describing Ms Prendergast as standing over her whilst querying it. She complained that Ms Prendergast had then gone to check the situation with Mr Flower and afterwards had come back to her and told her that the offer was in fact correct, page 370.

33.86 The claimant complained that there was no set workload or consideration of case complexity and she asserted that they had an unreasonable amount of cases to deal with. She said that Ms Prendergast considered that subhumans were expected to do more work and close more cases to avoid her humiliation and bullying, page 371. There was discussion about some of the Teams messages sent to the claimant.

33.87 Under a heading in the interview notes of “discrimination” there then followed discussion about the asserted incident in August 2020 when the claimant had been working for the clearance team and her team leaders were Peter and Luke. The claimant complained that Luke had made a comment; “Whoa I hope this doesn’t lead to a protest” which was inappropriate as it was made to five black women in the midst of the black lives matter process, page 373.

33.88 There was a discussion about the facilities at Priory Hall. The claimant explained that the allocated entrance to the building had stairs and no railing and so she had needed to ask a colleague to accompany her. She stated that due to Covid restrictions buildings had one-way systems and this neglected to consider people with disabilities, page 375. It was suggested to the claimant that it would have been possible for her to order home tests, and the claimant responded that she did not know that, page 375.

33.89 The claimant also stated that Mr Flower had been treating her in the same way as Ms Prendergast; dismissive, hostile, a bully and a micromanager, page 376. She was asked what that meant in practice and the claimant stated he had been aggressive and hostile, refused to acknowledge her existence at work, never spoke to her face-to-face and he felt like he had the right to give her work and micromanage her. She was asked for specific incidents and referred to some of the Microsoft teams messages set out above, page 376.

33.90 Later on in the interview the claimant stated that she was trying to hold people accountable for discriminatory behaviour and that training was needed, page 378. She stated that equality and diversity training was needed for Ms Prendergast. She stated that Ms Prendergast needed a better view of diversity and the fact that not everyone is the same. She said that during a conversation in the office it had become apparent that, although Ms Prendergast had travelled around the world, she had not learnt any other languages. She stated that English was known around the world but growing up in Norway, as the claimant had done, it was a necessity to learn another language, page 378-379.

33.91 The day after this interview the claimant emailed what were known as CU internal support, page 363. She thanked them for their support and then wrote this;
I wanted to quickly ask when my assignment with CU will end? And is there any chance for me to continue on? Being able to help the students with their enquiries regardless of how big or small it is has been an absolute pleasure and I learned so much over the last 8 months. I don't want that to go to waste.
If you have any information about the assignment I would really appreciate it.
The claimant was, therefore, seeking an extension to her assignment.

<u>Ms Dempsey's interview with Ms Prendergast 27 April 2021</u>

33.92 We accept the evidence of Ms Prendergast and find that she was not, either in advance of the interview or during the interview with Ms Dempsey, shown a copy of the claimant's grievance of 27 March.

33.93 Ms Cheryl Dempsey, Senior Operations and Business manager with R3, interviewed Ms Prendergast on 27 April 2021, pages 389 – 394. Ms Loughron from HR attended to take notes.

33.94 At the start of the interview Ms Prendergast was told that Ms Dempsey was investigating a complaint which needed to look at workflow, allocation of work, discussions both within the team and one-to-one, and potential harassment leading to feelings of anxiety and stress, page 389.

33.95 She was asked questions during the interview such as; what was your methodology for workload delegation, page 389, have you had any feedback from Rahma regarding workload, page 390, how were lunches managed, page 391, how would you cover annual leave, page 391, did you have targets, page 391 and had the claimant bought any problems to her about workload, page 392.

33.96 Ms Dempsey said that she understood the clamant had a disability and Ms Prendergast was asked whether the claimant had bought up or identified anything to put in place. Ms Prendergast responded that everyone had adjustments in place as health and safety had come round and checked workstations, page 392. She was asked whether information had been passed on from HR regarding adjustments, to which she said no, and she was asked whether the claimant had raised any problems about testing at Priory Hall. Ms Prendergast said that she had carried the claimant's bag on one occasion because she had difficulty walking between the office and a building referred to as EEF (i.e. not the Priory building), and had not thought about her walking to Priory, but that the claimant had not mentioned anything about it, page 392. The conversation then moved back to the claimant's workload.

33.97 She was asked whether she recalled a conversation regarding travels and languages spoken and not having to learn a different language, page 394. Her response was that her view was that she only spoke one language and she wished languages were taught in school.

33.98 On balance, we accept Ms Prendergast's evidence and find that she thought at the time that a relatively low-key, informal complaint had been made by the claimant, and possibly others on her team, over the telephone to Jayna Patel, a consultant for R3, about general matters such as workload allocation and her management style and team processes. She was not aware that a complaint of race discrimination or harassment related to race had been made by the claimant.

33.100 We accept Ms Prendergast's evidence for the following reasons. She had not seen the written grievance and there was no explanation

given to her at the start of the interview about what was being investigated. The word discrimination was not used once by Ms Dempsey either when explaining the purpose of the interview or when going through her questions. Ms Dempsey did not make any reference at all to race during the interview or use any form of words that might suggest that allegations were being made of differences in treatment because of race or of conduct related to race. Whilst, as we have set out in paragraph 33.94 above, Ms Dempsey did on a single occasion at the start of the interview use the word harassment, it was not said that there were allegations of harassment related to race, and, of course, harassment is very often used within the workplace as a term to describe general behaviour that annoys or upset someone; in that sense it is often used interchangeably with bullying. There was a very brief discussion about whether there had been a conversation in the office about travelling and languages spoken but there was nothing to suggest from the way the question was put about this that the essence of this complaint was about race discrimination (if, indeed that was the case so far as this issue was concerned).

33.101 As to a complaint of disability discrimination, we find, based on Ms Prendergast's oral evidence, that she thought that the claimant had raised some form of disability related problem about using the Priory building for testing, specifically, she assumed, difficulties with having to walk to and from it. That much was evident from the interview notes, page 392, in that when Ms Dempsey asked whether the claimant had talked to Ms Prendergast about any problems with Priory Hall she responded by talking about an occasion when the claimant had had difficulties walking between the office and EEF and then said that "she (Ms Prendergast) did not think about walking to Priory".

33.102 We accept the evidence of Ms Prendergast and find that she did not have any knowledge, during or following this interview, that the claimant had complained that the accessible entrance at Priory building had been blocked off by the one-way system forcing her to use the stairs, which was difficult for her to do. We do so because:
As we have already said, Miss Prendergast had not seen the written grievance, there was no explanation at the start of the interview about what was being investigated, Ms Prendergast was not informed during the interview that this was the nature of the complaint made, she was not asked any questions that might have enabled her to infer this was the issue, the questions were all very general, and neither had she been told about this difficulty by the claimant when she asked to work from home in March 2021, see paragraph 33.69 above.

33.103 The first time Ms Prendergast became aware that the claimant had made a formal complaint was in September 2021 when she was

contacted by Ms Wilmott of HR about the interview process, page 543. The first time that she became aware that the claimant had made a complaint of race discrimination and harassment against her, and saw the written grievance, was when she was preparing for this tribunal claim.

Extension to claimant's contract

33. 104 On 1 June 2021 the claimant's contract was extended until 17 July 2021, page 424.

The claimant's application for a permanent call adviser role

33.105 As part of the change that led to the merger of the International enquiries team and the UK enquiries team, see above, it was also decided that the roles on the team within the new structure should be filled by direct recruitment into permanent roles. Consequently, five permanent call adviser vacancies on the Enquiry team were advertised by the respondent. It was decided that the interview panel would comprise Mr French, the manager with overall responsibility for the combined International and UK enquiries teams and the two team leaders for those teams, Ms Prendergast and Ms Salma Hussain. There was no evidence before us to suggest that Mr French knew of the claimant's protected acts; when the claimant was asked about this in evidence she said that she "did not know" if he knew. Accordingly we do not find that he knew of them. The claimant accepted in evidence that Ms Hussain did not know of her complaints, and accordingly we find as a fact this was the case.

33.106 As we set out at paragraph 33.73 above, Ms Bepoto had herself by this time raised a formal complaint of race discrimination but Ms Prendergast did not know of this complaint. It was not suggested by the claimant that either Mr French or Ms Hussain knew of this complaint.

33.107 The questions for the interview were competency based questions which were set ahead of the interview and were standard across all of the interviews. Examples included; under the criterion of dealing with complaints:
Can you share a time when you made a complaint as a customer and felt the person or organisation you dealt with handled it particularly well, or particularly poorly, and how would you use this example to provide excellent customer service as a specialist course adviser? And;
Under the criterion working in a team: can you think of a time where you challenged current working practice with an alternative method, pages 906-907 of supplementary bundle 2.

33.108 In accordance with the respondent's usual process each question was to be marked out of 10 with each member of the panel noting down

their comments on each question. Each panel member scored each question, but the interviews were scheduled so that the panel had half an hour after each interview to discuss and come to agreement on the scores for each answer for each candidate. In practice, therefore, whilst each panel member initially gave each answer a score, it was a joint scoring system with the panel agreeing in the half an hour after the interview the mark that would be awarded for each answer for that candidate. Consequently, each panel member's marks for each candidate were the same.

33.109 The claimant applied for the role, pages 406 – 421, as did the rest of the team; Ms Boneham, Ms McKernan, Ms Warwick-Oliver, Mr Flower and Ms Bepoto. Accordingly, there were six applicants for five vacancies.

33.110 The interviews took place on 15 June 2021.

33.111 We accept the evidence of the respondent and find that the claimant did not perform particularly well at interview. The maximum score that could be achieved was 210 marks (7 questions with a maximum of 10 marks available per question for each panel member). The claimant achieved a total mark of 78 points, or 37% of the maximum available, pages 905 – 907 supplementary bundle 2. This made her the lowest scoring candidate. Ms Boneham was the highest scoring candidate achieving 177 points out of 210, pages 931-933 supplementary bundle 2. Ms McKernan and Ms Warwick-Oliver were the next highest scoring candidates both scoring 171 points, pages 921 – 923 and 925 – 927. Mr Flower came next with 141 points, pages 928 – 930 and Ms Bepoto came after this scoring 120 points, pages 917 – 919.

33.112 This was, we find, a genuine scoring process on the respondent's part; the claimant was not deliberately marked down. We explain our reasons for making this finding in our conclusions below.

33.113 On 16 June 2021 Ms Prendergast made enquiries with a colleague, Tom Beale, who had customer service adviser vacancies on his team as she thought these vacancies would potentially be suitable for the claimant, page 540.

33.114 On 17 June 2021 the candidates were each contacted by Mr French to inform them of the outcome of the interviews. This was done by Microsoft Teams, and Ms Prendergast was also present. Ms Boneham, Ms McKernan, Ms Warwick-Oliver, Mr Flower and Ms Bepoto were all offered permanent positions. The claimant was informed that she had been unsuccessful. We do not find that Mr French told the claimant that she was not what they were looking for, we prefer the evidence of Ms Prendergast that she was told that there was a lack of "sales through

service" approach. The claimant was also informed of the vacancies on Mr Beale's team and told that she could apply for these. Ms Prendergast sent the claimant the link for these vacancies later that day, page 540. She also contacted the claimant to say that she was "here if you want to chat", page 540.

33.115 That evening, 17 June 2021, at 9:45 PM the claimant emailed Ms Prendergast, page 448. She stated that she was disappointed that she had not got the specialist course adviser position and asserted that she had been told that she was not what the respondent was looking for. She said this was difficult given that she had been working in the role for the past 11 months. She asked if she could take what she termed a mental health day the next day, 18 June 2021. She stated that she would continue working her four weeks notice but that she hoped it could be understood why she needed the day off. She asked for this to be kept private and confidential saying she had not spoken to any of her other colleagues. We pause to note that whilst there was a reference to working four weeks notice in this email, this appeared to be a reference to there being four weeks left to run on the claimant's contract; it was not suggested by either the claimant or the respondent that the claimant had resigned on this date, that came a few days later, see below.

Events on the 18 June 2021

33.116 It was the claimant's case that on 18 June Ms Prendergast named her as the unsuccessful candidate to all of her colleagues in the office and told them that she was not in the office because she was taking a mental health day. We prefer the evidence of Ms Prendergast that this did not happen. We do so for the following reasons. The claimant, of course, was not in the office that day; Ms Bepoto was, and she sent the claimant a number of voice messages and text messages, pages 452 – 453 and 675 – 680. It was these that were the claimant's source of information as to what was said in the office that day. The voice messages and text messages were intertwined chronologically and needed to be read together but it was evident from these that what Ms Bepoto told the claimant was that there was a conversation in the office, the detail of which we will come to shortly, which had been preceded by a conversation between Ms Bepoto and Ms Prendergast on Teams. Ms Bepoto reported to the claimant that during this earlier conversation between just the two of them Ms Prendergast had said to her that she was just letting her know that one person was not successful, page 452, and that this person was her partner (i.e. her shift buddy at work). Ms Bepoto's shift buddy was the claimant at this time.

33.117 However, it is not this conversation about which complaint was made; the claimant's complaint was about what Ms Prendergast had

allegedly said in the office. As we have set out above, her source of information for this, as the claimant readily confirmed on a number of occasions in cross examination, was *only* the voice messages and text messages from Ms Bepoto. That is significant because what is missing from these messages is any suggestion from Ms Bepoto that at any point that day Ms Prendergast had told people in the office that the claimant was taking a mental health day. Likewise, there is no suggestion within the messages and texts that Ms Prendergast had named the claimant to the team as the unsuccessful candidate. In fact, it is apparent from the text exchanges between the claimant and Ms Bepoto that the claimant did *not* think at the time that Ms Prendergast had named her to her colleagues. We say this because one of her messages to Ms Bepoto was, page 678, "just because she's not saying the name doesn't mean she should just open her stinking mouth".

33.118 Additionally, Ms Bepoto's witness statement was strikingly silent on this alleged incident in the office; it did not mention it at all.

33.119 Taking all of this into account we prefer Ms Prendergast's evidence and find that she came into the office late in the afternoon on 18 June and found the team members discussing that they had been successful at interview. During the course of this conversation she heard one person say that it was obvious who did not get it "as they were not here". Mindful that this was a sensitive situation, she intervened saying regardless of whether they had figured it out (in terms of who was unsuccessful) it was a sensitive situation and should not be discussed. She did not, we find, say that it was the claimant who was not successful nor that the claimant was taking a mental health day. For the avoidance of doubt, we were mindful when making this finding that Mr Flower did at one point suggest in his evidence that, there was something said about the claimant "taking a personal day" but that was not the complaint made by the claimant and in any event he also gave evidence that he could not remember this conversation. On balance, therefore, we did not consider his evidence on this issue to be particularly reliable.

<u>The claimant's resignation</u>

33.120 On 21 June the claimant emailed Ms Dempsey and Jayna Patel, page 611, to say that she was resigning from her position as specialist course adviser. She stated that although she had been content to continue with her temporary role until the contract end date on 16 July, despite not getting the permanent position, she unfortunately could not continue due to further circumstances with her team leader breaching her confidentiality on Thursday 17 June (in fact this should have referred to the date of Friday 18 June). She confirmed that she would work one week's notice

and acknowledged in her email the valuable experience that she had learned whilst working for the respondent.

33.121 The claimant also emailed Ms Prendergast and Ms Cookson, page 610. In this she wrote that she had said she wanted things to be kept confidential especially about the fact that she did not get the position. She said she was not sure what had got lost in translation but it was sad and disheartening that confidentiality had been broken. She said colleagues had reached out to her after she (Ms Prendergast) had apparently openly mentioned it on Friday 18 June. She stated she was disappointed in Ms Prendergast's decision to disregard her request for privacy as she came to terms with the outcome of the recruitment process.

Grievance outcome

33.122 The claimant's grievance outcome was delivered to her in writing on 23 June, pages 471 – 476. In the main the claimant's grievance was rejected save for one point in relation to the test centre at Priory building; at this point it seems Ms Dempsey had accepted the claimant's assertion that the disabled access had been blocked off. The claimant subsequently appealed this decision but that appeal was rejected in December 2021, pages 457 – 469.

The Law

40 Section 13 of the Equality Act 2010 states that:
(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

41 Section 23(1) provides that on a comparison of cases for the purposes of section 13 there must be no material difference between the circumstances relating to each case.

42 The burden of proof is set out in section 136 EqA which states:
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

43 It is now well established that the term "because of" in the Equality Act has the same meaning as that given to the words "on the ground of" under the legacy legislation; see for example **Onu v Akwiwu [2014] ICR 571**. Accordingly we directed ourselves in accordance with the legacy case law as follows. When dealing with claims of direct discrimination the crucial question that has to be determined in every case is the reason why the claimant was treated as she was,

Lord Nicholls **Nagarajan v London Regional Transport [1999] ICR 877**. As Lord Nicholls stated in the case of **Nagarajan**;

"Section 1(1)(a) is concerned with direct discrimination, to use the accepted terminology. To be within section 1(1)(a) the less favourable treatment must be on racial grounds. Thus, in every case it is necessary to inquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances. The crucial question just mentioned is to be distinguished sharply from a second and different question: if the discriminator treated the complainant less favourably on racial grounds, why did he do so? The latter question is strictly beside the point when deciding whether an act of racial discrimination occurred. For the purposes of direct discrimination under section 1(1)(a), as distinct from indirect discrimination under section 1(1)(b), the reason why the alleged discriminator acted on racial grounds is irrelevant."

44 So far as the burden of proof is concerned, the proper approach has been addressed by the Court of Appeal in **Igen Ltd v Wong [2005 IRLR 258**, **Madarassy v Nomura International plc [2007] ICR 867** and **Laing v Manchester City Council [2006] IRLR 748**. The Supreme Court in **Royal Mail Group v Efobi [2021] EWCA Civ 18** confirmed that the law remains as set out in these cases despite changes to the wording of the burden of proof provisions in the Equality Act. In summary, as per **Igen**, the burden is on the claimant to establish facts from which a tribunal could conclude on the balance of probabilities, and absent any explanation, that the alleged discrimination had occurred. At that stage the employer's explanation for the treatment - the subjective reasons which caused the employer to act as he did - must be left out of the account. It was also explained in **Madarassy** that the facts from which discrimination could be inferred can come from any evidence before the tribunal, including evidence from the respondent, save only for the absence of an adequate explanation.

45 Whilst something else is needed to reverse the burden "not very much" needs to be added to a difference in status and a difference in treatment in order for the burden to be on the respondent to prove a non discriminatory explanation, paragraph 56 **Veolia Environmental Services UK v Gumbs UKEAT/0487/12** and **Deman v The Commission for Equality & Human Rights [2010] EWCA Civ 1279**, paragraph 19.

46 Although a two stage approach is envisaged by s.136 it is not obligatory. In some cases it may be more appropriate to focus on the reason why the employer treated the claimant as it did and if the reason demonstrates that the protected characteristic played no part whatever in the adverse treatment, the case fails. It was explained in **Amnesty International v Ahmed [2009] ICR 1450** that where explicit findings as to the reason for the claimant's treatment can be made this renders the elaborations of the "**Barton/Igen** guidelines" otiose. "There would be fewer appeals to this tribunal in discrimination cases if more tribunals took this straightforward course and only resorted to the provisions of s54A (or its cognates) where they felt unable to make positive findings on the evidence without its assistance." This approach was expressly endorsed by the Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37**. That said, the EAT in **Field v Steve Pye & Co Ltd and ors [2022] IRLR 948** cautioned against an automatic application of this approach. The EAT highlighted the earlier guidance in **Hewage**, that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination.

47 At the second stage, the respondent is required to prove that they did not contravene the provision concerned if the complaint is not to be upheld. 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 because of, in this case, race since "no discrimination whatsoever" is compatible with the Burden of Proof Directive. That requires the tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that (in this case) race was not a reason for the treatment in question. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof, **Igen**. If the respondent fails to establish that the tribunal must find that there is discrimination.

Victimisation

48 Victimisation is defined is section 27 of the Equality Act as follows:

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because –
>
> (a) B does a protected act
>
> (b) A believes that B has done, or may do, a protected act.

49 The Equality Act definition requires the tribunal to make three findings: whether a protected act was done (in this case that is admitted) and, if so,

whether the claimant was subjected to a detriment; and, if so, whether that was because of doing the protected act. There is no requirement under the Equality Act for a comparator. Victimisation claims are also subject to the provisions of section 136 of the Equality Act relating to the burden of proof,

Indirect Discrimination/failure to make reasonable adjustments

50 Section 19 of the Equality Act states that;

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) A cannot show it to be a proportionate means of achieving a legitimate aim.

51 Section 6
(3) In relation to the protected characteristic of disability-
(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

For the purposes of the indirect disability discrimination claim it is for the claimant to prove the particular disadvantage to herself and the group (which in this case would be others who had the claimant's particular disability, see section 6 EQA), which is caused by the PCP.

Failure to make reasonable adjustments

52 The reasonable adjustments duty is contained in Section 20 of the Equality Act and further amplified in Schedule 8. In short, the duty comprises of three requirements. If any of the three requirements applies, they impose a duty to make reasonable adjustments. Section 21 provides that a failure to comply with one of the three requirements is a failure to comply with the duty to make reasonable adjustments by A (A being the employer or other responsible person) and amounts to discrimination, Section 21(1) and (2).

53 The first requirement was the relevant one for the purposes of this case and is as follows, Section 20(3):

> "The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."

54 Section 41(4) of the Equality Act provides that a duty to make reasonable adjustments for a disability applies to a principal (as well as to the employer) of a contract worker. The principal's duty to make reasonable adjustments applies in respect of work which the principal may make available or actually does make available, Equality Act Schedule 8, paragraphs 2 and 6(1). In relation to work which is made available, a principal is obliged to comply with the first, second and third requirements of the reasonable adjustments duty, which includes the duty set out above.

55 What amounts to a provision, criterion or practice is to be given a very wide meaning. Paragraphs 4.5 and 6.10 of the 2011 Code of Practice on Employment state that a PCP may include any formal or informal policies, rules, practices, arrangements or qualifications. An expectation that employees will do something is sufficient to amount to a PCP, **Carreras v United First Partners Research UKEAT/0266/15**. The PCP does need to be identified with care and in identifying or constructing the PCP it is important to bear in mind that it must be the cause of the substantial disadvantage (or particular disadvantage for an indirect claim) about which complaint is made, **Secretary of State for Work and Pensions (Jobcentre Plus) v Higgins UKEAT/0579/12** and **Nottingham City Transport Ltd v Harvey UKEAT/0032/12**.

56 A substantial disadvantage for the purposes of a claim of a failure to make reasonable adjustments is one that is more than minor or trivial, section 212 EQA. Whether or not such a disadvantage exists in a particular case is a question of fact. As set out above, it is the PCP that must place the claimant at the disadvantage, and the substantial disadvantage should be identified by taking into account what it is about the disability which gives rise to the problems and effects which put the claimant at the substantial disadvantage identified. It is essential to find the nature and extent of the disadvantage which the claimant is placed at by reason of the PCP**, Newham Sixth Form College v Sanders [2014] EWCA Civ 734.**

Constructive dismissal

57 In order to establish that there has been a constructive dismissal the leading authorities, in summary, show that the claimant must prove on the balance of probabilities five matters namely: 1. The existence of a relevant express or implied contractual term. 2. There must be a breach of contract on the part of the respondent and this may be either an actual breach or an anticipatory

breach. 3. The breach must be sufficiently important (fundamental) to justify the Claimant resigning, or else it must be the last in a series of incidents which justify her leaving. 4. She must leave in response to the breach and not for some other unconnected reason. 5. She must not delay too long in terminating the contract in response to the employer's breach otherwise she may be deemed to have affirmed the contract. The term relied on in this case is the implied term of trust and confidence. The House of Lords in **Malik v. BCCI [1997] IRLR 462** held that the term was an obligation that:
"The employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee." The implied obligation covers a wide range of situations in which a balance has to be struck between an employer's interests in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited. The burden lies on the employee to prove the breach on the balance of probabilities.

Submissions

58 Mr Quickfall, for the respondent, in his submissions, dealt firstly with the issue of Ms Prendergast's knowledge of the protected acts for the purposes of the victimisation claims. The only source of her knowledge, he submitted, was the interview that had been held with her on 27 April 2021 and there was not sufficient within that to alert Ms Prendergast to the fact that there had been a complaint made by the claimant of race discrimination or harassment related to race. He submitted that it was a "more interesting question" as to whether it could be said Ms Prendergast had knowledge of a complaint of disability discrimination following on from this interview. The complaint that the claimant had in fact made as her protected act was about access to the Priory sports hall, and in particular that the allocated entrance to the building had stairs with no railing with the accessible entrance having been blocked off. That was the protected act and, he submitted, the question for us was the extent to which Ms Prendergast had knowledge of *that* protected act. The very limited conversation that had taken place with Ms Prendergast about this during the interview on 27 April was, he submitted, insufficient to put her on notice that there had been a complaint of a breach of the Equality Act but even if he was wrong on that the complaint that Ms Prendergast assumed the claimant had made was about walking to Priory sports hall from the office, which was not the claimant's protected act. Even if he was wrong on this, he submitted, and Ms Prendergast did have knowledge of a protected act, there was no evidential basis on which we could find that the protected act had played any part in any of the detriments.

59 He submitted that many of the claims of direct race discrimination were out of time and that many of the claims, such as the allegations that the claimant was required to deal with more telephone enquiries than others, had no evidential basis at all and failed on the facts. For those complaints that were factually accurate, he submitted, there was no evidence at all that the conduct

was because of race or related to race and that it was difficult to see that stage one had been passed in relation to any of the allegations.

60 The vast majority of the allegations, he submitted, relied solely on the claimant's perception of events. That, he suggested, should be treated with a great deal of caution. He submitted that in paragraph 64 of her witness statement the claimant had referred to working in a "toxic environment", which was an allegation she had repeated frequently during her oral evidence. Yet, he submitted, the claimant had actively sought two contract extensions, which was inconsistent with this expressed view of the environment. Additionally, he submitted, in her grievance the claimant had relied upon messages sent to her by Mr Flower which were described as showing evidence of harassment and belittling behaviour and yet there was absolutely nothing of that type in those messages, all of which were entirely innocuous and, in fact, were friendly and supportive. He submitted that this was an example of the claimant's perception of events being impaired and not objectively reasonable. He submitted that this undermined the claimant's credibility.

61 In relation to the disability discrimination claims he submitted that the only requirement that was applied was that people working in the office provide a negative Covid test twice a week. He submitted that it was the claimant who chose to test at Priory Hall as this was most convenient for her. He submitted that there was, in any event, disabled access to these premises and he suggested that we should disregard the claimant's evidence, given for the very first time in cross examination, that she was prevented from using this entrance by an unknown individual. If this had happened, he submitted, the claimant would have raised it before. He pointed out that the claimant's grievance was written within a few days of the claimant's last visit to the test centre and yet it had not made any reference to an individual blocking her way. The truth was, he submitted, that this did not happen.

62 We should record as part of these reasons that at the end of Mr Quickfall's submissions, which had been conducted remotely, a "thumbs up" emoji appeared momentarily on Mr Quickfall's screen. Mr Quickfall did not see it, but the judge, one wing member and the claimant did. Each member of the tribunal panel immediately explained to the claimant that this emoji had not been sent by them (there is not, in fact, the technical capability to do so on the system the tribunal was using, at least so far as we know). Mr Quickfall told us he had a Teams channel open with the respondent, and we can only assume that this is where the emoji originated from. Mr Quickfall apologised for this.

63 The claimant's sister made submissions on the claimant's behalf. She submitted that the claimant was not a lawyer and could not afford a representative. She stated that she hoped the claimant had highlighted her experiences of microaggression, humiliation, belittlement and unwelcome remarks, exclusions and being ignored. It was said that the suggestion on the

part of the respondent that there was a lack of evidence in relation to the race and disability claims was unfair because the claimant did not know what was important from a legal point of view. We were reminded that the claimant's grievance was concluded two days after the claimant had resigned despite the grievance investigation interviews having been held in April. It was suggested that there was a lack of transparency or unwillingness on the respondent's part to conclude the claimant's grievance.

64 It was submitted that in the case of **Igen v Wong** the court had underscored the shifting burden of proof, recognising the complexities of proving discrimination claims. It was said that the in case of **Efobi v Royal Mail Group** the court had highlighted that in particular cases there might be systemic bias.

Conclusions

65 Some of the matters about which complaint was made were pursued as acts of both direct race discrimination and harassment related to race and some were pursued as acts of direct race discrimination, harassment related to race and victimisation. We found it most convenient to analyse each factual complaint in turn. Where, for example, a particular incident was pursued as direct race discrimination, harassment related to race and victimisation we have considered all three claims together. This means that we have taken a slightly different approach to the order of the claims as compared with how they are set out in the list of issues. For ease of reference we have maintained the numbering of claims that was set out in the list of issues.

66 Some claims were pursued against more than one respondent. Where this was the case we found it most convenient to consider the substance of the complaint first of all, on the basis that we would then consider which respondent was liable for any successful act of discrimination, if this was necessary.

Complaint 4(a): From November 2020 Ms Prendergast required the claimant to deal with more telephone enquiries and fewer on line enquiries than her white English colleagues, when on line enquiries were less stressful

67 This was pursued as a claim of direct race discrimination. We could only deal with this complaint in broad and general terms because that is the nature of the evidence that was put before us. As we have already commented, there was no actual breakdown or detail provided as to what work was being done by person on the team for any working day, let alone evidence as to what was happening over the longer term.

68 Doing the best that we can on the evidence that was put before us, this complaint fails on the facts. In general people were evenly rotated around all three channels of work (telephones, live chat and email, paragraph 33.23). However, the people who dealt with the most telephone enquiries (and it follows

from this, therefore, fewer online enquiries and indeed email enquiries) were Ms McKernan (white British) and Ms Warwick-Oliver, described before us as white/Asian, para 33.23. The claimant, in fact, dealt with more email enquiries than others, paragraph 33.33, because she had expressed a preference to do so, and it follows from this that she also dealt fewer telephone enquiries and online enquiries than others.

69 Moreover, the claimant has not proved as a fact that online enquiries (i.e. live chat enquiries) were less stressful than dealing with telephone enquiries, paragraph 33.27.

Complaint 4(b), 6 and 21: at the beginning of December 2020 Ms Prendergast told the claimant she was not handling calls as well as Rebecca McKernan (and for the purposes of the harassment claim additionally said to the claimant "I don't think you can do this job").

Direct race discrimination

70 This was pursued as a claim of direct race discrimination, harassment related to race and victimisation. This complaint is not entirely factually accurate, on our findings. What we have found happened is that whilst the claimant was on a particular call with a student in December 2020 Ms Prendergast advised the claimant to end the call and she then said that she would get Ms McKernan to contact the student back. She also told the claimant that it was clear that it had been a difficult call to handle and that there might be a need for training on how to deal with difficult customers, paragraphs 33.39 and 33.40.

71 We considered that to be close enough to the claimant's original complaint, as identified on the list of issues, to amount to a complaint that falls within the list of issues and it therefore required analysis by us; after all the implication in what Ms Prendergast said, even if the direct words, on our findings, were not used as the claimant had asserted, was that Ms McKernan would be better placed than the claimant to handle this particular call.

72 For the purposes of the direct race discrimination complaint the comparator would be somebody who was not black African, who worked as a Specialist Course Adviser, who was struggling to handle the call, who did not have a background in complaints and who had not dealt previously with the student in question. There were no facts from which we could conclude that the claimant was treated less favourably than this comparator because of race but even had the burden of proof moved across to the respondent we would have concluded that the respondent had proved that the reasons for Ms Prendergast's actions were that; the claimant was struggling to handle what was a difficult caller, and Ms McKernan had both dealt with this caller before and had a background in complaints handling, meaning that she was particularly well

placed to deal with this call. That is a complete explanation that is in no sense whatsoever because of race.

73 To the extent that Ms McKernan was identified as a statutory comparator on the list of issues, we concluded she was not such a comparator. A comparator must be in the same circumstances, in all material respects, as the claimant. Ms McKernan was not. She had dealt with the caller previously and had a background in complaints handling. This was not the case with the claimant. These are material differences.

Harassment related to race

74 There was an additional element to the factual complaint for this claim; namely that Ms Prendergast had also said to the claimant I don't think you can do this job". That aspect of the claim has failed on the facts, paragraph 33.39.

75 In relation to what was, on our findings, said we were prepared to accept that the claimant had proved that Ms Prendergast's actions in this regard were unwanted conduct. We did not consider that the actions of Ms Prendergast could be characterised as conduct that had the *purpose* of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her but we concluded that the claimant had proved that it had that *effect* on her, particularly given her own perspective.

76 We did not conclude that there were facts from which we could conclude that the conduct of Ms Prendergast was related to race and consequently it did not appear to us that the burden of proof had reversed. However, on the assumption that the burden of proof had reversed we concluded that the respondent had proved that the conduct of Ms Prendergast was not in any way related to race. The reason for the conduct was as we have just set out above. The concept of conduct related to a protected characteristic goes wider than the reason why but there still requires to be some connection between the conduct and the protected characteristic. Had the burden of proof reversed we would have concluded that the respondent had proved that no such connection existed.

Victimisation

77 This complaint not only self-evidently failed but also, in our view, demonstrated the somewhat scattergun approach that the claimant took to this case. The claimant's two protected acts were done on 27 March 2021 and 15 April 2021, paragraphs 33.73 – 33.78 and 33.81 – 33.90. Both protected acts, therefore, *postdate* this incident. It follows from this that neither protected act can have influenced Ms Prendergast in her actions on this day. Accordingly, this claim fails.

Complaints 4(c), 7 and 21: after 18/12/21 Ms Prendergast messaged the claimant on the group chat facility saying "I have already told you this, you know this".

78 This was pursued as a claim of direct race discrimination, harassment related to race and victimisation.

79 Once again, we would make the point that the evidence that was produced in relation to this complaint from both the respondent and the claimant was extremely limited. The claimant did not tell us, for example, what question it was that she asked to produce the response about which complaint was made, nor did she tell us about the manner in which the question was raised. Perhaps unsurprisingly, given the vague nature of the complaint, Ms Prendergast's evidence was simply that she could not remember ever having responded to the claimant in this way. Nor do we know when it was that Ms Prendergast responded to a question from Ms McKernan by saying "there is no such thing as a silly question".

80 Doing the best we can on the evidence that was put before us, on our findings of fact this complaint was factually accurate, paragraph 33.47. For the purposes of the direct race discrimination complaint the comparator would be a person working as a Specialist Course Adviser who was not black African who had raised the same type of query as the claimant in the same manner as the claimant. As we have already commented, however, we do not know either of these things on the evidence that was before us. Importantly, it would also be someone who raised their question at around the same time as the claimant (we will explain the significance of timing in a moment).

81 To the extent that Ms McKernan was identified as a statutory comparator on the list of issues we concluded she was not such a comparator because no one suggested that the claimant had prefaced her query with the phrase "this may sound like a silly question but". The manner in which a question is asked will be an important factor to the way in which a response is provided, and accordingly Ms McKernan and the claimant were in materially different circumstances.

82 Analysing this complaint in what was, effectively, a significant lack of context, we concluded that the claimant had not proved facts from which we could conclude that Ms Prendergast responded to the claimant in the way that she did because of race. It is a comment that is sharp in tone and it would certainly have been better, given its tone, to send the response to the claimant privately rather than in the group chat facility, but these particular features do not, in our view, amount to facts which move the burden of proof across to the respondent. After all, even if the response could be considered to be unreasonable conduct on Mr Prendergast's part, it is well established that

unreasonable conduct on its own is not generally enough to move the burden across.

83 That said, whilst Ms Prendergast told us she could not remember ever having responded to the claimant in this way, she did also provide us with some relevant context as to the reason why this comment might have been made. Even had the burden of proof moved across to the respondent we would have concluded that the respondent had proved a non-discriminatory reason for this comment having been made, as follows. This incident occurred shortly after the team switched to wholesale remote working as a result of a lockdown. This was the first lockdown which this team had experienced, because the team was not in existence when the first national lockdown had taken place. We have little doubt that things were somewhat chaotic; the team was still in its infancy, Ms Prendergast had been in charge for under two months, paragraph 33.17, an entirely new telephony system had been introduced to enable people to work remotely and the team were adapting, for the very first time and at short notice, to wholesale remote working, paragraph 33.47. As we have found, paragraph 33.47 above, Ms Prendergast found herself having to cascade large amounts of information to the team remotely and frequently questions were being asked by the team about matters which they had already received an answer to. We think it more likely that not that the claimant's question fell into this category, that much was evident from the words used by Ms Prendergast; "I have already told you this, you know this". We find and conclude, moreover, that Ms Prendergast's tone was sharp because of the pressure that she and the team were working under at the time, paragraph 33.47. Which is a cogent explanation for why Ms Prendergast responded as she did, and it is an explanation that is in no sense whatsoever because of race.

Harassment related to race

84 We were prepared to accept that the claimant had proved that Ms Prendergast's actions in this regard were unwanted conduct. We did not consider that the actions of Ms Prendergast could be characterised as conduct that had the *purpose* of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her but we concluded that the claimant had proved that it had that *effect* on her, given the tone of the comment and the fact that it was put on a group chat which all the claimant's colleagues were able to see.

85 We did not conclude that there were facts from which we could conclude that the conduct of Ms Prendergast was related to race and consequently it did not appear to us that the burden of proof had reversed. However, on the assumption that the burden of proof had reversed we concluded that the conduct of Ms Prendergast was not in any way related to race. The reasons why Ms Prendergast responded as she did were as we have just set out. The concept of conduct related to a protected characteristic goes wider than the reason why the

conduct happened (i.e. it goes wider than the mental processes of Mr Prendergast) but there still requires to be some connection between the conduct and the protected characteristic. We concluded that the respondent had proved that no such connection existed.

Victimisation

86 This complaint fails. The claimant's two protected acts were done on 27 March 2021 and 15 April 2021, as set out above. Whilst we do not know the exact date of this incident it was at some point during the lockdown period. Both protected acts, therefore, *postdate* this incident. It follows from this that neither protected act can have influenced Ms Prendergast in her actions on this day.

Complaints 4(d), 8 and 21: Ms Prendergast informed the claimant she should not have offered a place to a student because they did not meet the grades when in fact they did.

87 This was pursued as a claim of direct race discrimination, harassment related to race and victimisation. This complaint was factually accurate, see paragraph 33.38 above. For the purposes of the direct race discrimination complaint the comparator would be a Specialist Course Adviser who was not black African who Ms Prendergast believed had wrongly made an offer to a student of a place on the course when they did not meet the criteria. We concluded that the claimant had not proved facts from which we could conclude that she was treated less favourably than this comparator because of race but even had the burden of proof moved across to the respondent we would have concluded that the reason why this occurred was because Ms Prendergast initially believed that the offer had been wrongly made. That is a complete explanation that is in no sense whatsoever because of race.

88 In accepting the respondent's explanation we took into account the following. This is exactly the type of issue which one would expect Ms Prendergast, in her role of team leader, to pick up on with the advisers; there is nothing surprising in her doing this. It was, moreover, a serious issue for the respondents if an offer was incorrectly made, paragraph 33.38 above. In that context it would have been surprising if Ms Prendergast had *not* done anything about it. Additionally, we considered it significant that, even on the claimant's version of events, Ms Prendergast came back to her later on and told her that she (i.e. the claimant) had in fact been right and she apologised, paragraph 33.38. Had race been Ms Prendergast's motivating factor and had she deliberately been trying to criticise the claimant regardless of whether that criticism was justified, as the claimant suggested, then she surely she would not have done this. Ms Prendergast's behaviour after the incident was much more consistent, in our view, with the respondent's explanation that Ms Prendergast had made a genuine mistake. Neither is it surprising that mistakes were made; as we have commented a few times now Ms Prendergast was new to the role

and attempting to manage the team in what were chaotic times. Mistakes were, most likely, commonplace.

Harassment related to race

89 We are prepared to accept that the claimant had proved that Ms Prendergast's actions in this regard were unwanted conduct. We did not consider that the actions of Ms Prendergast could be characterised as conduct that had the *purpose* of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her but we concluded that the claimant had proved that it had that *effect* on her, particularly given her own perspective.

90 We did not conclude that there were facts from which we could conclude that the conduct of Ms Prendergast was related to race and consequently it did not appear to us that the burden of proof is reversed. However, on the assumption that the burden of proof had reversed we concluded that the conduct of Ms Prendergast was not in any way related to race. The reason for the conduct was as we have just set out. There was nothing to suggest on the evidence before us that the conduct was associated with race in some other way and it follows from this that the respondent has proved that the conduct was in no sense whatsoever related to race.

Victimisation

91 This complaint fails. The claimant's two protected acts were done on 27 March 2021 and 15 April 2021, see above. Whilst again we were not told the exact date of this incident we have found that it was prior to the lockdown. Both protected acts, therefore, *postdate* this incident. It follows from this that neither protected act can have influenced Ms Prendergast in her actions on this day.

Complaints 4(e), 4(f) 9, 10 and 21; Ms Prendergast sent the claimant messages asking where she was, on one occasion three times within a minute when she could see the claimant was on the telephone.

92 This was pursued as a claim of direct race discrimination, harassment related to race and victimisation. These complaints are broadly factually accurate, in that we have found that the messages were sent, paragraph 33.46 above. What we have not found, however, is that the messages were sent at a time when Ms Prendergast could see the claimant was on the phone. To the contrary, we have found that they were sent at a time when Ms Prendergast had no reliable way of seeing who was on the phone and when, paragraph 33.43. For the purposes of the direct race discrimination complaint at 4(e) on the list of issues the comparator would be a Specialist Course Adviser who was not black African who was working remotely from Ms Prendergast using a system which would repeatedly show advisers being in orange or not ready status when, in

fact, they were on a call, and for the purposes of complaint 4(f) it would additionally be an adviser who had told Ms Prendergast that they did not always look at the Microsoft teams group chat when they on the telephone, and who was working remotely on the telephones on a day when calls were building up.

93 We concluded that the claimant had not proved facts from which we could conclude that the claimant was treated less favourably than these comparators because of race but even had the burden of proof moved across to the respondent we would have concluded that the reason why this occurred was because the system was unreliable, Ms Prendergast needed to know whether the claimant was at her desk and on the phone or not and as they were working remotely the quickest way to find this out was to send her a message via teams, which was a constant means of communication, paragraph 33.44 above. On the second occasion when three messages were sent it was also part of the reason why this happened that Ms Prendergast could see that calls were building up, paragraph 33.46. As to the repetitive nature of the messages on the second occasion, the second and third messages were sent privately to the claimant, and immediately following the first, because the claimant had previously told Ms Prendergast that she did not always look at the group chat when she was on the telephone and Ms Prendergast needed to know quickly (in response to the calls building up) what the claimant's situation was. This is a complete explanation that is in no sense whatsoever because of race.

Harassment related to race

94 We were prepared to accept that the claimant had proved that Ms Prendergast's actions in this regard were unwanted conduct. We did not consider that the actions of Ms Prendergast could be characterised as conduct that had the *purpose* of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her but we concluded that the claimant had proved that it had that *effect* on her. The messages are fairly blunt in tone after all (no niceties, a simple "where are you") and on the second occasion were sent repetitively in very quick succession.

95 We did not conclude that there were facts from which we could conclude that the conduct of Ms Prendergast was related to race and consequently it did not appear to us that the burden of proof had reversed. However, on the assumption that the burden of proof had reversed we concluded that the conduct of Ms Prendergast was not in any way related to race. The reason for the conduct was as we have just set out. There was nothing to suggest on the evidence before us that the conduct was associated with race in some other way and it follows from this that the respondent has proved that the conduct was in no sense whatsoever related to race.

Victimisation

96 This complaint fails. It was accepted that these incidents occurred during lockdown when everyone was working remotely. People returned to work on 15 March 2021, paragraph 33.64; the first protected act took place on 27 March 2021 and the second on 15 April 2021. Both protected acts, therefore, *postdate* this incident. It follows from this that neither protected act can have influenced Ms Prendergast in her actions on this day.

Complaint 4(g); Ms Prendergast told the claimant her colleague (Ms Boneham) had booked time off on dates the claimant had requested, when she had not.

97 This complaint was pursued as a complaint of direct race discrimination only. This complaint is, on our findings, a factually accurate complaint, paragraph 33.56 above. Mr Quickfall in submissions had suggested that a correct reading of Ms Prendergast's message to the claimant was, in fact, that she said no more than she needed to double check whether Ms Boneham had requested the same dates as the claimant. For the avoidance of doubt, we reject that submission. What the message said was "Molly has requested some of them dates so I need to doublecheck and I will let you know shortly". A fair reading of those words is that some of the dates had already been requested by Ms Boneham and Ms Prendergast would therefore double check whether the claimant could have those dates as well.

98 For the purposes of the direct race discrimination complaint the comparator would be a Specialist Course Adviser who was not black African who had made a request for leave in respect of dates which Ms Prendergast believed had earlier already been requested by a colleague. We concluded the claimant had not proved facts from which we could conclude that the claimant was treated less favourably than this comparator because of race but even had the burden of proof moved across to the respondent we would have concluded the respondent had proved that the reason why this occurred was because Ms Prendergast believed that Ms Boneham had already requested the dates, as she explained in her email at the time, a maximum of two people were allowed off at any one time at this point, she operated leave on a first come first served basis, as the team were well aware, paragraph 33.29 above, and she needed to check what the situation was before agreeing to the claimant's leave request. This is a complete explanation that is in no sense whatsoever because of race.

99 Additionally, even on the claimant's evidence, Ms Prendergast granted this leave application. In order for something to be a detriment it must be something in relation to which a reasonable worker would or might take the view that the treatment was in all the circumstances to her detriment. Judged objectively it is difficult to see that checking the claimant's leave request against other requests, and the small delay this would have caused to granting the leave request, could amount to a detriment. Checking leave requests is the type of matter which line managers have to deal with all of the time, it is an operational

necessity, and a reasonable worker would know this and would not, we conclude, view that as detrimental treatment.

Complaint 11: Ms Prendergast told the claimant's colleagues on 18 June 2021 in breach of confidentiality that she had been unsuccessful in securing a permanent position and was taking the day off as a mental health day.

100 This was pursued as a claim of harassment related to race and victimisation. It is clear that the second part of this complaint fails on the facts; we have not found that Ms Prendergast told the claimant's colleagues in the office that the claimant was taking the day off as a mental health day, paragraph 33.119 above.

101 As to the first part of this complaint, the situation is arguably slightly more nuanced. On our findings, nobody, in fact, named the claimant as the unsuccessful candidate. One individual, we know not who, did say that it was "obvious who did not get it as they were not here" but that was not Ms Prendergast. All that Ms Prendergast did, on our findings of fact, was react to that comment, saying regardless of whether they had figured it out it was a sensitive situation and should not be discussed, paragraph 33.119.

102 It seemed to us, therefore, that this entire complaint failed on the facts. For the avoidance of doubt, however, had we been required to analyse the reason why Ms Prendergast said what she did we would have concluded this was because there was speculation in the office and she intervened to try to stop it. That is a complete explanation that is in no sense whatsoever related to race or because of the protected acts.

Complaints against Mr Flowers

Complaints 5(a) and 12: From November 2020 Mr Flower required the claimant to deal with more telephone enquiries and fewer online enquiries than white English advisers when the online enquiries with less stressful

103 This was pursued as a claim of direct race discrimination and harassment related to race. This complaint fails on the facts. Firstly, Mr Flowers was not responsible for allocating the claimant to deal with telephone enquiries most of the time, this was Ms Prendergast, that is unless Ms Prendergast was away from the office, paragraph 33.30.

104 For the periods of time when he was in charge of allocation (although we do not know the specific dates of when this happened) then, as for Ms Prendergast, this claim fails on the facts. As we have already explained, on our findings, the people who dealt with the most telephone enquiries (and it follows from this therefore fewer online enquiries and indeed email enquiries) were Ms McKernan (white British) and Ms Warwick-Oliver described before us as

white/Asian, para 33.23. The claimant, in fact, dealt with more email enquiries than others, paragraph 33.33, because she had expressed a preference to do so, and it follows from this she also dealt fewer telephone enquiries and online enquiries than others. Neither has the claimant proved on the facts that online enquiries (i.e. live chat enquiries) were less stressful than telephone enquiries, paragraph 33.27.

Complaints 5(b) and 13; during March 2021 Mr Flowers refused to speak to the claimant face-to-face.

105 This was pursued as a claim of direct race discrimination and harassment related to race. This complaint fails on the facts, paragraph 33.71 above.

Complaints 5(c) and14: from December 2020 Mr Flowers informed the claimant she was not handling calls as well as her white English colleagues/ Ms McKernan.

106 This was pursued as a claim of direct race discrimination and harassment related to race. This complaint fails on the facts, paragraph 33.42 above. It is to be noted that the claimant herself led no cogent evidence in relation to this complaint. All that was said, at paragraph 52 of her witness statement, was that;
"He also questioned my calls in the same way AP did, and it was clear that he had taken on her prejudice that I was not doing the work properly". But that is nothing more than an assertion; the claimant was unable to give us details of any actual example of this alleged conduct and, in terms of the specific complaint set out above, she did not at any point state in evidence that Mr Flowers had said to her she was not handling calls as well as Ms McKernan.

Disability Discrimination

107 The respondent conceded that the claimant was disabled by way of her cerebral palsy at the relevant time.

108 The PCP for the purposes of the indirect disability discrimination claim and the claim of a failure to make reasonable adjustments was said to be:
Between 16 March 2021 and 26 March 2021 a requirement to attend Priory sports hall for a Covid test twice a week without disabled access and with the requirement to use steps to access the building.

109 The claimant, we conclude, has not proved that this PCP was applied, although she has proved that part of this PCP was applied. We say that for the following reasons. On our findings, paragraph 33.65 above, the requirement (in the sense of a mandatory instruction) that R2 applied was that all employees returning to work in the office on campus had to take a Covid test twice a week, and produce a negative test result.

110 However, that is not the end of the matter because it is clear that an expectation or assumption on a respondent's part may be enough to amount to a PCP, **Carreras v United First Partners Research UKEAT/0266/15**. On our findings there was a strong expectation or preference on R2's part, which was made known to employees and workers, that people would use Priory sports hall test centre; it very much suited the respondent that people do so because the combination of its location and the fact that tests did not have to be booked in advance meant the respondent could control when people went to their tests, thus ensuring that there was a staggered approach and not everyone went at the same time, paragraph 33.65 above. That expectation or preference, we conclude, is sufficient to amount to a PCP.

111 Accordingly, we concluded that the claimant had proved not just that there was a requirement to test twice a week but also that there was a requirement (in the sense of an expectation or strong preference) that this be done at Priory sports hall building.

112 It was also the claimant's case, however, that the PCP additionally comprised a requirement to use a building which did not have disabled access, and which had to be accessed via stairs. Pausing there, it would seem to us that this could equally readily have been expressed as part of the substantial disadvantage for the purposes of the reasonable adjustments claim or the particular disadvantage for the purposes of the indirect disability discrimination claim. But either way the claimant needs to prove, as a matter of fact, that this was part of the PCP and/or part of the substantial disadvantage/particular disadvantage caused by the requirement to attend Priory building.

113 The claimant has not proved, as a matter of fact, that she was required to attend a building which did not have disabled access and which had to be accessed via the stairs. To the contrary, it was a building that had disabled access via a ramp, paragraph 33.59, which the respondent had identified as being suitable for use because of its accessibility, paragraph 33.59, and which the claimant could have used, paragraph 33.61. Accordingly, she has not proved that this element of the asserted PCP was applied.

114 In the alternative, even if the allegation that the building did not have disabled access and had to be accessed by the stairs is analysed as part of the substantial disadvantage/particular disadvantage, the claimant has failed to prove that the asserted PCP (which for the purposes of this analysis would be a requirement to attend Priory building twice a week for a Covid test) caused the asserted substantial disadvantage (having to use the stairs to get into the building). The building did have an accessible entrance and accordingly being required to attend the building did not cause the disadvantage of "having" to use the stairs. Even if the substantial disadvantage was said to be using the stairs rather than "having" to use the stairs, what caused that, on our findings, was the claimant's assumption that she had to use the main entrance. It must be a PCP

applied by the respondent that causes the disadvantage not an assumption made on the claimant's part. Accordingly, whichever way it is analysed, this claim fails.

Further victimisation claims

Complaint 22: the claimant was refused a permanent position with R2 because she had done protected acts.

115 The three people who interviewed the claimant for the permanent role and made a decision as to whether to offer it to her were Mr French, Ms Hussain and Ms Prendergast, paragraph 33.105 above.

116 The respondent conceded that the claimant did protected acts on 27 March and 15 April 2021, as we have already set out. We have not found that either Mr French or Ms Hussain had knowledge of the protected acts, paragraph 33.105.

117 The protected acts do not, of course, need to be the sole or only reason for the treatment, they only need to materially influence the treatment in question. It would, in our view, be sufficient, therefore, in order for this claim to succeed if we had concluded that Ms Prendergast alone was influenced by the protected acts when she made her decision about the role.

118 This meant that we had to engage with the (not entirely straightforward) issue of Ms Prendergast's knowledge of the protected acts. On our findings the first time she became aware that the claimant had made a formal complaint was in September 2021 when she was contacted by Ms Wilmott of HR about the interview process, paragraph 33.103. The first time that she became aware that the claimant had made a complaint of race discrimination and harassment, and that it was against her, and the first time that she saw the written grievance, was when she was preparing for this tribunal claim, paragraph 33.103 above. She was not told about the race discrimination/harassment complaints during the interview of 27 April 2021, paragraph 33.98 above. Accordingly, she did not have knowledge of this element of the protected acts at the relevant time.

119 The situation is somewhat more nuanced, however, in relation to the claimant's complaint about disability discrimination. This was mentioned, at least in broad terms, during the interview with Ms Prendergast that took place on 27 April 2021. As we have set out above, what Ms Prendergast understood from what she was asked and what she was told during this interview was that the claimant had raised some form of disability related problem about using the Priory Building for testing, specifically having to walk to and from it, paragraphs 33.101 – 33.102.

120 This interview was, on our findings, Ms Prendergast's only source of information in relation to this complaint. She had not been shown the written complaint nor was she told about it by the respondent, paragraph 33.92. Neither had the claimant alerted her to it; we refer in particular to our finding that when the claimant asked Ms Prendergast if she could work from home at the end of March 2022 she did not mention her difficulties with the building but instead said she wanted to work from home because of Ramadan, paragraphs 33.68 and 33.69. Accordingly, we analysed this issue on the basis of the information provided to Ms Prendergast in the interview of 27 April alone.

121 All that is required in order for there to be a protected act is that facts are asserted that are capable in law of amounting to an act of discrimination. And so the question for us was whether Ms Prendergast had knowledge of a complaint from the interview that asserted facts that were capable in law of amounting to an act of discrimination.

122 We considered that to be rather finely balanced, but ultimately we concluded that she did have knowledge of asserted facts that were capable in law of amounting to either a claim of indirect disability discrimination or a claim of a failure to make reasonable adjustments, although admittedly it was knowledge of no more than the bare bones of such a claim. She had knowledge of the PCP; a requirement to access the Priory building for testing and Ms Prendergast knew that the claimant had asserted that she had difficulty in using the building, and that those difficulties arose out of the claimant's cerebral palsy, paragraph 33.101. She assumed the complaint that had been made was about walking to the building, paragraph 33.101.

123 Mr Quickfall submitted that this was not enough because Ms Prendergast had assumed that the claimant's difficulties were with walking to the building, whereas in fact the actual protected act concerned difficulties with accessing the building. He submitted she had no knowledge of the actual protected act and this was required. Put in the legal framework of a claim of either indirect discrimination or a failure to make reasonable adjustments his submission was essentially that Ms Prendergast was not aware of the right asserted disadvantage for either type of claim.

124 The short answer to this point, we considered, was that in order to have the requisite knowledge Ms Prendergast only needed *either* to have known that the claimant had done a protected act or *believe* that she had done or might do a protected act. If we are correct in our analysis that what she had in her mind was sufficient to amount in law to an allegation of indirect discrimination or a failure to make reasonable adjustments it matters not, it seemed to us, that Ms Prendergast believed the claimant had complained about a different disadvantage to the one the claimant had actually identified. It still amounts to a belief that the claimant had done protected act.

125 Accordingly, we concluded that Ms Prendergast had knowledge of a protected act, namely her belief with regard to a complaint of disability discrimination made by the claimant. As Ms Prendergast was the only person out of the interviewing panel, on our findings, with knowledge of the protected act the focus of the next part of our analysis was on Ms Prendergast alone. The question for us was were there facts from which we could conclude that Ms Prendergast's decision-making process, which would include the way in which she went about marking the claimant's answers during the interview, was because she believed the claimant had done a protected act.

126 We concluded that the claimant had not proved any facts which would move the burden of proof across to the respondent but we were, in any event, prepared to assume that the burden had moved. We concluded that the respondent had proved that the reason why the claimant was not given a permanent role was because of her performance at interview. We reached this conclusion for the following reasons.

127 Firstly, there was the contemporaneous interview documentation which was produced for each interview panel member for all candidates interviewed. These showed, quite clearly, that the claimant scored a lower mark than any of the other candidates, and did so by a substantial margin. She only scored a total of 78 marks compared with the next candidate, Ms Bepoto, who scored 120 marks. The highest mark, achieved by Ms Boneham, was 177 points, more than double those achieved by the claimant, paragraph 33.111.

128 As we have set out above, we have found that this was a genuine marking process, and not one in which the claimant was deliberately marked down, as the claimant asserted, paragraph 33.112. We made this finding for the following reasons. The only point made by the claimant in relation to the marking process was that we should draw an adverse inference against the respondent because she and Ms Bepoto, both of whom had made complaints about race discrimination, were the bottom two ranked candidates. But in order for there to be even the possibility that the marking process was influenced by this, the panel, or at the very least, Ms Prendergast, would have had to have knowledge not just of the claimant's protected act but also Ms Bepoto's complaint of race discrimination. We have found as a fact that Ms Prendergast did not know of Ms Bepoto's complaint, paragraph 33.73 above. Additionally, even if, contrary to our primary findings, it is assumed that Ms Prendergast did have knowledge of both complaints of race discrimination, it requires to be remembered that Ms Bepoto *was* offered a permanent role. For these reasons we concluded that no adverse inference could be drawn against the respondent from the fact that the claimant and Ms Bepoto were the two lowest scoring candidates.

129 That point aside, the claimant did not seek to challenge the marking process in any way. As the claimant was representing herself, albeit with some assistance from her sister, we thought it appropriate to ask Ms Prendergast a

number of questions about the marking process ourselves. It was notable that, despite the passage of time, Ms Prendergast was able to explain cogently why some of the claimant's answers had attracted a low mark. By way of example she told us that, in relation to the question concerning dealing with customer complaints, whilst the claimant had been able to give an example of when she had made a complaint as a customer the second part of the question had not really been answered by the claimant in any detail. The second part of the question, as set out above, was how would you use this example to provide excellent customer service as a specialist course adviser and the claimant's response was a very general one; "to listen and understand and follow up with any questions and be patient and you don't know what the person is going through".

130 Of course, even if the interview marking process was genuinely done, it would still have been possible for Ms Prendergast to be subconsciously influenced by her belief in the claimant's protected act. But there were factors that pointed firmly away from this being the case. Firstly, on our findings, after the interview Ms Prendergast made enquiries to see if she could help the claimant find a job with the respondent elsewhere, paragraph 33.113. That seemed to us to be an unlikely outcome if Ms Prendergast was consciously, or subconsciously, influenced by her belief in the claimant's protected act.

131 Secondly, we also took into account the nature of the complaint (i.e. the protected act) about which Ms Prendergast was aware, versus the complaints of which she was unaware. Some of the complaints of race discrimination that the claimant had made about Ms Prendergast were personal and expressed in a way that could have caused upset. For example Ms Prendergast was described (in the context of the race complaints) as a bully who humiliated and belittled people repeatedly and who created a toxic work environment. She was said to be hostile, rude and a micromanager. It was said that:
"Alice has her favourites while the rest of us, the ethnic minorities are treated like sub- humans", and that
"The ones Alice considers subhuman are expected to do more work",

132 It would have been almost impossible, it seemed to us, for someone to be able to set complaints of this nature out of their mind when they were interviewing for a post a few months later *on their own team*. But, significantly, we have found that Ms Prendergast was *not* aware of these complaints. What she was aware of, on our findings, was a complaint of a wholly different nature. It was a complaint, in legal terms, of indirect disability discrimination or a failure to make reasonable adjustments. That complaint was not in any way, shape or form targeted at Ms Prendergast herself. In fact, it did not really involve Ms Prendergast at all. It was not about decisions that had been made by her, her only involvement in it was to relay instructions about testing from more senior management. In our view this made it much less likely that Ms Prendergast was influenced by this complaint when making her decision at interview.

133 Added to that, the main focus of the 27 April meeting with Ms Prendergast very much lay elsewhere. The vast majority of the meeting was spent discussing matters such as workload allocation, how lunch breaks were covered and how she would cover annual leave. None of which formed part of the protected act of which she was aware. There was no emphasis given to the disability complaint in the meeting, had there been this may have led to it becoming something that stuck in Ms Prendergast mind and influenced her decisions at a later point. But to the contrary, the emphasis of the meeting lay firmly elsewhere.

134 Linked to this Ms Prendergast believed, as we have found, that the issues raised arose out of an informal complaint that the claimant and possibly others on her team had made over the telephone to Jayna Patel of R3. There was nothing that was on a formal footing, so far as Ms Prendergast was concerned, and certainly no suggestion of any form of formal outcome involving learning or development for Ms Prendergast that she was aware of. What she understood to be the informal nature of the matters raised lent further weight to it being the case that she did not have the complaint in her mind (consciously, or subconsciously) when marking the claimant's answers during interview and making decisions on who should be offered a job.

135 Lastly we took into account that Ms Prendergast had knowledge of the disability discrimination complaint on 27 April 2021, which was when her interview took place. Yet the claimant was granted a contract extension on 1 June 2021 to work for another 6 weeks on Ms Prendergast's team. Had Ms Prendergast been minded, consciously, or subconsciously, to take against the claimant because she had done this protected act then surely this extension would not have happened.

Complaint 23: Victimisation: constructive dismissal

136 On the claimant's case, there was only one incident relied upon for the purposes of this claim, see the list of issues, paragraph 23. The asserted fundamental breach of contract was that Ms Prendergast on 18 June 2021 had, in breach of confidentiality, told the claimant's colleagues that the claimant had been unsuccessful in securing a permanent position and that she was taking a mental health day. This was said to be a breach of the implied term of trust and confidence.

137 As we have already set out, on our findings this entire complaint fails on the facts. All that Ms Prendergast did, on our findings of fact, was react to a comment from someone else that it was "obvious who did not get it as they were not here" by saying that regardless of whether they had figured it out it was a sensitive situation and should not be discussed, paragraph 33.119.

138 Analysing this complaint on the basis that this is the conduct complained about, we concluded that simply comes nowhere near conduct that could be said to amount to a fundamental breach of contract, in the form of conduct likely to destroy or seriously damage the implied term of trust and confidence. The test is not, of course, one of unreasonableness, because whilst almost all breaches of the implied term of trust and confidence are going to amount to unreasonable behaviour, not all unreasonable behaviour amounts to a breach of the implied term. This conduct, on the part of Mr Prendergast, however, does not even pass the threshold of unreasonableness, judged objectively. But even if we were wrong on that the next question would be whether Ms Prendergast had reasonable and proper cause for making the comment that she did. We conclude that, judged objectively, she did have reasonable and proper cause; she was trying to stop gossip in the office, mindful that it was a sensitive situation. That was an entirely appropriate (reasonable) response to the situation that she was faced with.

139 Accordingly the claimant has not established a fundamental breach, in the form of a breach of the implied term of trust and confidence, and this complaint therefore fails.

Employment Judge Harding
24 April 2024