EMPLOYMENT TRIBUNALS

Claimant: Miss A Cebulla

Respondent: BaxterStorey Limited

Heard at: Reading
On: 20 to 23 February 2024

Before: Employment Judge George;
Mrs C Tufts, and
Mrs C Anderson

Representation
Claimant: In person
Respondent: Mr K Aggrey-Orleans, counsel

Interpreter fluent in the Polish language: Ms M Dynos

JUDGMENT having been sent to the parties on 12 March 2024 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant who was born on 24 June 1980, started working for the respondent on 2 March 2020. During her employment she had been a Sous Chef and then working as a Head Chef. The respondent's business is the provision of catering services including, so far as is relevant for the facts of this claim, at Heathrow Airport for British Airways.

2. Following a period of conciliation which started on 28 October 2022 and ended on 9 December 2022, the claimant presented a claim which was received by the employment tribunal on 30 January 2023. An in-time response was entered from the respondents on 17 March 2023.

3. There were two previous preliminary hearings in this case on 7 July 2023 and on 8 September 2023. On 7 July Employment Judge Reindorf KC set out the complaints and issues to be decided in the case. She also listed the second preliminary hearing to consider various preliminary issues including whether

claims for unfair dismissal and unauthorised deduction from wages had been presented in time. Employment Judge Matthews decided they had not been presented in time and struck them out on the basis that the tribunal did not have jurisdiction to consider them as a result. The remaining complaints which it is necessary for us to decide at this hearing are race related harassment and direct race discrimination.

4. We had a file of documents to which both parties had contributed that was, initially, 293 pages long. An additional 7 pages from the employment tribunal file (documents 14 and 15) were added to the file on Day 2 of the hearing by consent. These were a witness statement prepared by the claimant, dated 1 June 2023 and some further information that she sent in writing to the tribunal on 7 May 2023 in response to an earlier case management order. They were inserted and became pages 294 – 300. This had arisen because the claimant's responses to cross-examination suggested that she was referring to an earlier statement to that which had been formally exchanged and adopted at the start of her evidence. This led to an investigation of the tribunal file where those relevant documents were found. Mr Aggrey-Orleans was content for them to be referred to while making the valid point that they were documents prepared for the court proceedings and not contemporaneous. We thanked him for that pragmatic approach and he cross-examined the claimant upon them.

5. We heard oral evidence from witnesses who adopted witness statements that had been exchanged in advance. In addition to the claimant herself, we heard from Abigail Austin - who is currently an Account Director, Darren Gilbertson - who is currently an Accounts Director, Julie McClure - whose current role is a General Manager, Liam Hook - who is also currently a General Manager, and from Linda McCann. Ms McCann is currently a General Manager but was, for most of the relevant period, the claimant's line manager. The respondent had also exchanged the statement of Ameya Kamat, a Sous Chef who worked alongside the claimant but who did not attend to be cross examined upon his witness statement. We therefore give it scant weight.

6. The issues we needed to decide at the liability stage were agreed by the parties to be those at page 57 sections 1 to 3. We do not repeat them here so that these reasons should not be unnecessarily long. Given the decision we have reached on the underlying substantive issues, we do not need to make a decision on whether any of the claims of discrimination and harassment were brought in time.

7. The tribunal are very grateful to the tribunal appointed interpreter in the Polish language, Ms Dynos, who provided word for word interpretation for much of the hearing. Time was also given for her to translate the witness statements from English into Polish to the claimant when the tribunal was not in session. In that way the claimant was able to confirm the truth of her own statement (it having been translated into a language which she fully understood) and to understand the evidence to be given by the respondent's witnesses. Ms Dynos and the claimant confirmed at the outset that they were able to understand one another and Ms Dynos carried out her duties with professionalism and diligence.

8. We were also grateful to the parties for their constructive approach to the

hearing which meant that we were able to conclude it and deliver an oral judgment with reasons within the allocated time.

Applicable Law

9. For the purposes of the claims under considering in these cases, the relevant sections of the Equality Act 2010 include the following,

    13 Direct discrimination

    (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

    23 Comparison by reference to circumstances

    (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

    26 Harassment

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

    (a) A engages in unwanted conduct related to a relevant protected characteristic, and

    (b) the conduct has the purpose or effect of—

    (i) violating B's dignity, or

    (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

    (2) A also harasses B if—

    (a) A engages in unwanted conduct of a sexual nature, and

    (b) the conduct has the purpose or effect referred to in subsection (1)(b).

    …

    (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

    (a) the perception of B;

    (b) the other circumstances of the case;

    (c) whether it is reasonable for the conduct to have that effect.

    39 Employees and applicants

    …

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

…

40 Employees and applicants: harassment

(1) An employer (A) must not, in relation to employment by A, harass a person (B)—

(a) who is an employee of A's;

10. By reason of s.212(1) the definition of detriment for the purposes of s.39(2)(d) and s.39(4)(d) does not include conduct which amounts to harassment – at least so far as complaints based upon the protected characteristic of race are concerned. It is therefore sensible to first consider whether the complaints of harassment are made out because, if a detrimental act which has been proven to have occurred is found to be unlawful harassment then it cannot also amount to direct discrimination, by reason of s.212(1) of the EQA.

11. What is and what is not harassment is extremely fact sensitive. So, in Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT at paragraph 22, Underhill P said:

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (…), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

12. The importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created for him was reinforced in Grant v HM Land Registry & EHRC [2011] IRLR 748 CA. Elias LJ said, at paragraph 47:

> "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

13. Furthermore, in Weeks v Newham College of Further Education [2012] EqLR 788 EAT, Langstaff P said:

> "17....Thus, although we would entirely accept that a single act or a single passage of actions may be so significant that its effect is to create the proscribed environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding.
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> ...
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> 21. However, it must be remembered that the word is 'environment'. An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff-room concerned."

14. The requirement in s.26 EQA that the unwanted conduct be related to the relevant protected characteristic is a broader test than is required by the s.13 EQA definition of direct discrimination where the less favourable treatment must be on grounds of the protected characteristic. Context is all important, particularly when the conduct complained of is verbal, but conduct which cannot be said to be "because of" a particular protected characteristic may, nonetheless, be related to it. The Employment Tribunal must focus on the evidence as a whole and neither the perception of the person who made the remark nor that of the complainant as to whether it was "related to" the protected characteristic is decisive. An analysis of the meaning of "related to" within s.26 is found in Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] I.R.L.R. 495 EAT where HH Judge Auerbach said this, at paragraphs 24 to 25:

> "… the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question.
>
> Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be."

15. In relation to direct discrimination, although the structure of the EQA invites us to consider whether there was less favourable treatment of the claimant compared with another employee in materially identical circumstances, and also whether that treatment was because of the protected characteristic concerned, those two issues are often factually and evidentially linked (Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL). This is particularly the case where the claimant relies upon a hypothetical comparator. If we find that the reason for the treatment complained of was not that of race,

but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to.

16. The application of the burden of proof in direct discrimination claims has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA.

17. When deciding whether or not the claimant has been the victim of direct race discrimination, the Employment Tribunal must consider whether she has satisfied us, on the balance of probabilities, of facts from which we could decide, in the absence of any other explanation, that the incidents occurred as alleged, that they amounted to less favourable treatment than an actual or hypothetical comparator did or would have received and that the reason for the treatment was race. If we are so satisfied, we must find that discrimination has occurred unless the respondent proves by cogent evidence that the reason for their action was not that of race.

18. The law anticipates a two-stage test to the issue of direct discrimination Nevertheless, it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). We should consider the whole of the evidence when making our findings of fact and if the reason for the treatment is unclear following those findings then we will need to apply the provisions of s.136 in order to reach a conclusion on that issue.

19. The provisions of s.136 have been considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC – and also in Efobi v Royal Mail Group Ltd [2021] ICR 1263 UKSC. Where the Tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. However, it is recognized that the task of identifying whether the reason for the treatment requires the Tribunal to look into the mind of the alleged perpetrator. This contrasts with the intention of the perpetrator, they may not have intended to discriminated but still may have been materially influenced by considerations of, in the present case, race. The burden of proof provisions may be of assistance if there are considerations of subconscious wrongdoing but the Tribunal needs to take care that findings of subconscious wrongdoing are evidence based.

20. More recently, in Field v Steve Pye & Co (KL) Ltd [2022] EAT 68; [2022] IRLR 948 EAT, HHJ James Tayler addressed the question of whether it is permissible to move directly to the second stage of the test for discrimination. He pointed out that where there is significant evidence that could establish that there has been discrimination, it cannot be ignored and a decision to move directly to the question of the reason for a particular act that should be explained. In effect, the basis for doing so would be that the Tribunal had assumed that the claimant had passed the stage one Igen test. He recommended that were there is evidence that could indicate discrimination, there was much to be said for properly grappling with the evidence and deciding whether it is or is not sufficient to switch the burden of disproving

discrimination to the respondent.

Findings of Fact

21. We make our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgement all of the evidence which we heard but only our principle findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

22. As the respondent's counsel said, this events outlined before us involve a very unfortunate situation and, in some ways, a sad case because, ultimately our conclusion is that misunderstandings soured what was, in general, a mutually respectful employment relationship.

23. The claimant worked as a Sous Chef and then as a Head Chef. She was clearly respected and valued for the quality of her work. She has also expressed considerable respect for managers who she worked with during her time at the respondent and expressed gratitude for their support in a number of employment matters outside the facts that have been the subject matter of this dispute.

24. We start by making some observations about some of the witnesses that we have heard from and the weight we give to the evidence.

25. When the claimant set out to explain her case and the nature of her complaint, it was very difficult to pin down what she was saying about particular dates and events. She tended, both in her questions and in her answers, to put different time periods and different events together. That meant that her explanations were sometimes difficult to follow. This was a difficulty which was completely distinct from any language difficulties. We observed her tendency to jump around in the chronology to be apparently linked to her strength of feeling about her experiences.

26. The claimant asked her questions almost exclusively through the interpreter and this means not only was she able to use the language she wanted in order to be clear but was helpful to the tribunal because it slowed the process down and made it easier to follow. The claimant clearly was able to understand the interpreter and the interpreter to understand the claimant. Ms Cebulla understood enough English to be able to interject if it appeared to her that Ms Dynos had misunderstood exactly what she had said. We could understand the claimant's spoken English most of the time but asked what she said and what others said to be repeated in Polish where it was unclear. We erred on the side of caution when asking for interpretation to take place to ensure comprehension whenever we had any doubt. We are confident that everything has been done that could have been done to mean that language was not a factor in us understanding the claimant's evidence in this hearing.

27. When we analyse the contemporaneous documentation we bear in mind Ms Cebulla's explanation that some of her emails and texts were written in English directly by herself and some by using Google translate to translate from Polish to English. There was one example where Google translate had apparently led to the removal of the word "not" that changed meaning of the sentence (page 189).

28. What the claimant meant in contemporaneous texts and emails that have been written by her in English is extremely relevant to our decision in this case. There can be no criticism of the claimant personally but her English spelling is not standard and, as a result, we have taken great care to ensure that we have identified the word that she intended to use where that affects our findings. Overall, we bear in mind when looking at the contemporaneous documents that the claimant's written English is limited and there is evidence that when the claimant used Google translate and then checked the text before sending a particular message that did not always lead to the message saying exactly what she intended to. We give every allowance for that when considering the contemporaneous documents. Nevertheless, there are some omissions from her contemporaneous communications which are not satisfactorily explained by translation or language difficulties.

29. The claimant also referred to being a litigant in person and said that she had tried her best to use clear language in a legal setting. We take on board what she says about this. She might not have known the words "discrimination" or "harassment" but, in our experience, if an individual has been called "stupid", or if they have heard the phrase "I'm not employing stupid Polish people", then they do not need a lawyer to be able to tell someone that that has happened to them.

30. The claimant's witness statement that was exchange for the hearing did not cover all of the issues. By that we mean that it did not cover all of the allegations which were listed in Judge Matthews' order as being pursued. In her oral evidence the claimant referred to a previous statement to the Judge at first hearing that took place on 7 July 2023. As explained above, Judge George located two documents already referred to on the paper tribunal file, they were admitted to the hearing file and Mr Aggrey-Orleans had the opportunity to cross examine the claimant about them. The claimant repeatedly said that she had set down everything she had wanted to say in that statement. However, it is clear that there were some details that she now pursues that were mentioned for the first time in the hearing before Employment Judge Reindorf KC. Indeed, some that were mentioned for the first time before us.

31. We look to the claimant for an explanation where important details have not been mentioned contemporaneously. Overall, her explanation for those omissions was not satisfactory in some respects. Consequently, we treat evidence on matters that are not documented contemporaneously with caution.

32. We also make some initial observations on the respondent's witnesses. The claimant alleged that all three of Ms Austin, Ms McClure and Mr Gilbertson failed to take action when she expressly told all of them about the difficulties she is now explaining to us.

33. We accept that there is quite a lot of evidence that Ms Austin and Mr Gilbertson, in particular, acted proactively to help the claimant when they were alerted to problems. They struck us as the kind of managers who do not let matters lie. Both went to see the claimant face to face to take steps to ensure that they understood her. They both emphasised to us that they valued her as a worker whom they wanted to retain and that was consistent with their actions at the time.

34. Mrs McClure had fewer interactions with the claimant but she was also an impressive witness. She came across as thoughtful and considerate about the claimant's distress in her grievance appeal meeting. We do not think that those witnesses at any stage took the easy way out and ignored allegations that merited action under the Dignity at Work policy.

35. There are two instances of Mrs McCann going out of her way to help the claimant; one in relation to a parcel and one (with Ms Austin) in relation to an HMRC refund. In doing this she assisted the claimant as a good manager to support an employee. We think, therefore, that even if it is plausible that in a busy kitchen when Mrs McCann had two sites to manage, she did not take or have as much time for the claimant as Ms Austin took, she was nonetheless supportive on her own terms. The evidence that she valued the claimant as a worker was borne out by her actions and in particular we accept that it was she who recommended the claimant for a £4,000 pay rise and promotion.

36. The allegation that the claimant gave clear information to Ms Austin and Ms McClure that Mrs McCann was guilty of race related harassment is inconsistent with how they presented and how they acted. We do not accept that they would have failed to act had they known about the allegations in the way that they are presented to us.

37. For all these reasons, we find that - unless covered by clear documentary evidence - previous allegations of the kind made within the litigation were not made during the employment. Save where covered by documentary evidence, the claimant did not make previous allegations of discrimination or harassment against Mrs McCann. That is not something she mentioned, for example, in telephone calls or face to face meetings.

38. As we say, the claimant's employment started on 2 March 2020; the contract is at page 64. She accepted that the wording of the written document means she had to work 40 hours a week, 5 over 7 days. The contract provides that overtime may be agreed with the line manager in advance (page 65). The pattern of working 5 days over 7 permitted for weekend working where business needs required. Oral evidence, which we accept, was that the employee could choose to have an alternative day off in the week or accrue a lieu day to be taken at another time.

39. The dispute before us was as to whether, in interview, Ms Austin told the claimant she would only be working Monday to Friday meaning that the written terms would be inconsistent with the actual terms agreed. However, on 28 May 2020 (page 90) the claimant asked Ms Austin about unpaid overtime for weekend working from April 2020 at Waterside. Ms Austin said that she would

get time in lieu but this is clear evidence the claimant worked during weekends in the short period of time she was at Waterside. This supports Ms Austin's evidence on this point. There is no suggestion in that text that the claimant objected or said this was contrary to her contract. We reject the allegation that what was agreed between them was not consistent with what was in writing.

40. On about 30 April 2020 the claimant moved to Technical Block J which is known as TBJ.

41. At the end of the following month the claimant texted Ms Austin saying she was unhappy about the hours there. That text pre-dated Mrs McCann's return from furlough. Ms Cebulla stated in it that she was working more hours than she is paid for and complained about a co-worker. There was a face to face meeting between Ms Austin and the claimant the following day as a result.

42. During this period, the claimant was effectively being managed by a Mr Garrett - who we understand to be more senior - but a skeleton staff were in place in TBJ commensurate with business needs during this phase of the coronavirus pandemic. Nevertheless, Ms Austin was still handling the claimant's payroll queries because the claimant was still attached to her unit. The claimant could not be furloughed at this point because of her short service and the respondent showed commitment to her by moving her rather than considering making her redundant. The claimant was understandably grateful and we accept that she felt vulnerable at this time because of her personal circumstances. The situation of the claimant working without an on-site manager caused by the effect of the pandemic on the business, seems to have led to a lack of proper formality in recording the claimant's time - see paragraph 9 of Ms Austin's statement which we accept.

43. Mrs McCann returned from furlough at the end of June 2020 and the claimant then reported to her but was, initially at least, still attached to Ms Austin's unit.

44. Some of the relevant evidence about this period jumps about a bit in time. We note texts from the claimant to Ms Austin (page 96 to 98) from December 2020 in which she set out hours she claimed to have worked and not been paid for during the previous year; the claimant also asked for clarification of lieu days. Pages 151 and 155 are emails from August and October 2020 from Mrs McCann asking Ms Austin to pay overtime to the claimant.

45. We consider there to have been a relatively informal situation where sometimes the claimant directly and sometimes Mrs McCann sent one off messages to ask for overtime to be paid to the claimant. So far as we can tell on the basis of the evidence before us, this situation seems to have continued up to the point where the claimant herself went on furlough in April 2021.

46. We understand the claimant's complaints about overtime to fall under three or four separate headings. She says she still has not been paid for some overtime from her period working at Waterside, whether this is limited to the weekends that are mentioned in the text of 10 December 2020 or not is unclear as the claimant has not pinpointed dates. Then she says there is unpaid overtime from the period when she worked at TBJ and was managed by Mr

Garrett. She complains that it is the respondent's responsibility for there to be a proper recording system but the fact remains that there is little, if any, documentary evidence of the dates worked and allegedly not paid for despite the grievance investigations of Mr Hook and McClure. We find those to have been sufficiently thorough. There was also some circumstantial evidence that it was unlikely that a large quantity of overtime would have been necessary at this time.

47. Thirdly, there is the allegation of overtime in relation to Mrs McCann. At times the claimant seemed to accept that this issue was limited to her complaint that Mrs McCann did not pay her overtime when the claimant did not take her break but paid overtime to others in the team in similar circumstances. However, at other times it seemed that the claimant's complaint was that Mrs McCann had not credited her with all overtime she had worked, see page 97.

48. Our findings on this are that the claimant was flexi furloughed until the end of September 2021, see the grid at page 278. There are timesheets from shortly after that in the bundle starting at page 125 but the claimant is not on that particular page. There is a dispute between the claimant and the respondent about whether the Anna referred to on page 126 - the week beginning 21 October 2021 - is the claimant herself. However, Ms Cebulla is shown on page 278 as having had some sickness and the entries on the timesheet for 28 October are consistent with that which support's the respondent's suggestion that that is the claimant.

49. Be that as it may, by the timesheet at page 131 (for 25 November), Anna is the third entry down. That is the first timesheet on which actual times are recorded for hours worked against the name Anna. By 22 March 2022 grievance hearing, 4 months later, the claimant is clearly happy that records are being kept which are accurate and satisfactory.

50. So, if one sets aside the break situation (the allegation that the claimant is prevented from taking breaks or is not paid for untaken breaks), we think that what the claimant is talking about with regards to overtime must all have happened before 25 November 2021 because that is the date on which she starts to appear on weekly time sheets with hours recorded. Taking the claimant's case at its height, potentially all of Ms Austin, Mr Garrett and Mrs McCann are said to be responsible for a failure to pay overtime.

51. The claimant was told she was transferring permanently to TBJ; it is not clear exactly when she was told this although she knew from 9 July 2021 she was no longer at risk of redundancy (page 110). However that this only really takes effect when she came off furlough. So within a reasonable time of the claimant being a full-time employee, permanently attached TBJ, she was on the timesheets.

52. We remind ourselves that the nature of the allegation in relation to overtime that we are concerned is that there was less favourable treatment in relation to not paying for overtime compared with somebody else and that it was done on the grounds of the claimant being Polish. There is no evidence the claimant was not paid for overtime when someone else in materially the same

circumstances was or would have been paid it. At one point she alleged that both she and a male were working overtime that was not being paid for under Mr Garrett. She said in the hearing before us that not being paid by him was nothing to do with race and yet the case of race discrimination in relation to overtime has been pursued. The respondent's managers have tried to sort out the overtime situation on multiple occasions from as far back as December 2020. What it comes down to is the claimant has not shown that any specific overtime is unpaid and she certainly has not shown that any errors are deliberate or anything from which it might be inferred that this was to do with race.

53. The claimant alleges that Mrs McCann frequently said "You are not my staff." The first instance of this allegation that we can find is in her messages at page 113. On 25 October 2021 she texted Ms Austin saying she had been busy; had not had a break and she says "Linda always speak to me I'm not her staff was asking for me overtime if pay need this month and she say to send you".

54. In our view, the explanation that Mrs McCann and Ms Austin gave for what the claimant appears to have understood Mrs McCann to have said is plausible in light of the date of it. The context in which the claimant makes that statement is a discussion about payment for alleged overtime worked pre-transfer to TBJ; the timing fits with that. We accept that it is likely that the claimant has misunderstood a comment by Mrs McCann explaining the limits of her own ability to deal with payroll matters for the claimant and therefore is only connected with the claimant's status pre-transfer as assigned to the Waterside Unit and not to race. We do not accept that it was said prior to this instance on 25 October 2021.

55. We return to August 2021 when the claimant was on flexi-furlough. There is a message at page 285 from the claimant to Ms Austen saying she is unhappy with too much work to do and saying that someone at the front of house is not helping. This appears to have been sent during the four days the claimant worked in August 2021. Ms Austin replied saying that she has a migraine and is off work and will discuss it the following week. The complaint was that the claimant is overworked and Mrs McCann has done nothing about it but not that she had behaved badly towards her.

56. We have already mentioned the message from October 2021 at page 113; Other than the comment about Linda saying "I am not her staff" – see our findings above - the complaint is about having too much work to do in the time available. The claimant states that she is only going to do contracted hours; she says pressure is equally on her and Ameya. She also states in that message that she was not able to take a break so this is a convenient point to set out our findings in respect of the allegation of being prevented from taking breaks.

57. We thought that Mrs McCann's explanation of the reason why some people in the TBJ Team took two breaks was persuasive and satisfactory. We accept it. TBJ team members chose to take their allotted 30 minutes in two shorter breaks as was convenient to them.

58. Furthermore, at base, this allegation appears to involve disagreement between Mrs McCann and Ms Cebulla about time management. Mrs McCann was of the view that, if the claimant managed her time better, she would be able to complete her work even if she took a break. She stated that she encouraged Ms Cebulla to do so. The claimant's evidence was not that she had been told not to take breaks and she accepted that Mrs McCann said she should manager her time better; she said she was too busy to. What she says in her text to Ms Austin at page 113 suggests that this affected the other Sous Chef as well. This is not evidence of a difference of treatment of the claimant by Mrs McCann. The underlying allegation that the claimant has been prevented from taking a break or was not allowed to take a break is not made out. That is not something the claimant has proved.

59. Part of the claimant's oral evidence about this was that Mrs McCann had told her that she needed to work faster so that she could have a break. There is also an allegation of race-related harassment of telling the claimant she was slow and needed to work faster. It seems likely that Mrs McCann did, in the context of a conversation about time management, say that the claimant needed to do some tasks faster and also that she had to choose her menus so that the work necessary fitted into the time available. There is nothing from which we can infer this had anything to do with race.

60. One of the specific allegations (list of issues 2.1.3) is that one of the occasions on which Mrs McCann is said to have called the claimant "stupid" was in about November 2021. We know that the claimant, on 25 October, had sent the message at page 113 to Ms Austin. If, as she claims, the claimant had been called stupid the following month it is difficult to understand why she would not have raised that sooner. In the context of the nature of the relationship with Abigail Austin (where both respected the other's strengths in their roles) and the fact of the complaints that had been made in October the absence of that particular complaint calls for explanation.

61. The first time the allegation of being called stupid is made was on 7 May 2023 in the claimant's further information (one of the documents located in the tribunal file). In that document the claimant alleged that "She screamed at me, called me stupid if I can't sort out the menu". This is not in the claim form itself and that is the first mention of the use of the word that we have found. It is not mentioned in the second grievance which uses the word "discrimination". It is particularly surprising that the allegation was omitted from the second grievance as was the allegation that Mrs McCann had used the words "Stupid Polish" either to call the claimant stupid Polish or to say that she did not intend to employ any other people.

62. We have weighed up the reasons the claimant now gives for having omitted the allegations. The second grievance is otherwise quite detailed. By the date of the second grievance she had moved away from TBJ, away from the management of Mrs McCann. It was sent when she had already handed her notice in to the respondent, so she had absolutely nothing to lose at that stage. This is an instance where there is no good explanation for failing to take the opportunity to allege that the comment was made if, as the claimant now says, it had been.

63. We find that Mrs McCann did not call the claimant stupid in November 2021 or on any other occasion. The claimant appears to have told Judge Reindorf (when she drew up the list of issues) that this happened again after the grievance and that is probably a reference to the February 2022 grievance.

64. The grievance was made by an email of 16 February (page 153). In it, the claimant expressed concerns about the work contract, saying that says she is only supposed to work Monday to Friday. She complained about unpaid overtime before she joined TBJ. She did not include an allegation about Mrs McCann's behaviour and therefore Mrs McCann was not interviewed in relation to the grievance.

65. Given the nature of the grievance we think it is probable that the February 2022 conversation about weekend working happened before it was presented. That conversation is referred to in Mrs McCann's paragraph 17 but also in Mr Kamat's paragraphs 5 and 6, and we think it is probable that the February 2022 grievance was a response to that conversation. It is clear that the claimant was unhappy about being asked to work weekends, at least initially. We have made findings that the request was in accordance with the claimant's contract. In fact, it was Ameya who agreed to do something temporarily which was not in his contract.

66. The allegation that the claimant experienced race discrimination in respect of pressure to work weekends is linked to the allegations in 2.1.6 that Mrs McCann got cross when the claimant could not work weekends and swore saying she "Didn't care and didn't give a shit". These actual words appear to have been first alleged at the preliminary hearing before Judge Reindorf KC; they do not appear in the 1 June 2023 statement that we can see, and they are not in her account of the incident in her witness statement for these proceedings which is found at the top of page 3 of that statement.

67. Had Mrs McCann been abusive in that way, in connection with the weekend working request, it is hard to understand why that did not come up in the grievance. The claimant agrees that it did not; the grievance meeting minutes are at page 134. She does not take issue particularly with those minutes. We find that those words were not said.

68. As previously stated, we also find that the allegation that Ms McCann again called the claimant stupid at about this time is not proved. We find that the claimant was asked to work weekends in exactly the same terms as her Indian alleged comparator.

69. The grievance meeting was held on 22 March 2022. The claimant's position on whether she will work weekends or not is not consistent throughout that meeting. It ends up appearing that she agreed she would work weekends as long as she was paid or had days off in lieu. The only explanation she gave to us is for why she did not tell Mr Hook about the alleged abusive language was that she did not believe he would help her. There was no basis for that conclusion. She has since adopted the position that Mr Hook and Ms Austin were in a relationship but did not explain any basis for that supposition and the first time she made that allegation was later. To the extent that it matters, we

accept Mr Hook's denial of a relation and we also think the explanation that the claimant did not believe that Mr Hook would help her is something she has thought up subsequently.

70. She criticises Mr Hook for a delay in producing the grievance outcome compared with the timescale he had told her would be met. On the face of it, there is some justification for this since the outcome following the meeting on 22 March 2022 was not produced until 10 May. Initially there was a misunderstanding about whether or not the claimant was going to produce more information to support her claim. Mr Hood extended time for her to produce, for example, the notes she had said she kept of the hours she was working. When he realised on return from annual leave that nothing more was going to be provided he took slightly more than 14 days to produce the outcome, but the two days' delay at that stage is not material. We accept his conclusions were genuinely his own.

71. The outcome is at page 159. His decision was evidence based; he concluded he did not uphold the grievance on the evidence in front of him. No clear allegation was made against Mr Hook or, indeed, against Ms McClure that by rejecting the grievance they were responsible for a discriminatory failure to pay overtime but if that is the claimant's allegation then we reject it. Ms McClure, in her turn, made her decision on the basis of the evidence in front of her.

72. The claimant appealed the grievance outcome immediately emailing Mr Hook saying she was unhappy with the outcome and asking for the HR email address (pages 157 and 158). She says now that these requests for the HR contact details were evidence of her reaching out about poor treatment by Mrs McCann but there is nothing in the content of any of them which would alert the respondent to that, or which amount to a prior consistent statement of the allegation she had received poor treatment up to that point.

73. At some point in April or May 2022 the claimant was promoted and received a £4,000 per annum pay rise. We accept that Mrs McCann instigated that. The fact that she approached Ms Austin and said that both Sous Chefs deserved a pay rise leads to an inference that Mrs McCann valued the claimant's work contribution and that is inconsistent with the attitude of someone who would say to her "I won't make the mistake again of employing anymore stupid Polish people".

74. According to the issues explained to Judge Reindorf KC, this was said to have happened in around the spring of 2022. Mr Aggrey-Orleans sought to pin the claimant down about this allegation in cross examination. She responded that, when she had answered the phone during one of the subsequent unsolicited phone calls after she left TBJ: "Even I answer the phone she call me stupid Polish." This specific allegation was made for the first time in oral evidence. It is not in her witness statement for the final hearing which appears to say that the alleged comment was said in response to her writing when she was not paid for overtime and over weekends; this is probably a reference to the grievance which would date the alleged "Stupid Polish" comment to sometime after February 2022.

75. However, the claimant also states in the same passage in her witness statement that it followed the accident when she slipped and the KP had washed the floor. That incident has been reliably dated to have happened in March 2021 (based upon the text at page 292). The full run of text messages support Ms Austin's evidence about this incident. We find that Ms Cebulla told Ms Austin that she had falsely informed Mrs McCann that the reason she slipped was floodwater when in fact she had slipped because the kitchen porter did not put up the wet floor sign when mopping it. There is nothing in page 292 text to Ms Austin that complains about Mrs McCann at all. The claimant appeared not to want to get the kitchen porter into trouble. Again it is hard to understand why, given what she does say in the text, the claimant would not have told Abigail Austin either in a text or face to face afterwards had Mrs McCann said something so obviously racist as that alleged in the witness statement.

76. The way the incident is represented in the claimant's witness statement for the proceedings is completely contrary to the contemporaneous text to Abigail Austin. Furthermore, the several different accounts the claimant has given of the offensive comment vary enormously. In issue 2.1.4, the reference is to spring 2022; the witness statement for the hearing puts forward March 2022 and in association with the grievance; for the first time in oral evidence she said it was on the telephone in August 2022. When the claimant was cross examined about the lack of previous complaint during the phone call of August 2022, Ms Cebulla said she had told the first Judge. That complaint is not in the record of hearing and it is not in the further information provided either in May or June 2023, so we find that that explanation is inaccurate. Furthermore, the alleged racist remark was not mentioned to Mr Gilbertson who was investigating those calls.

77. This is the most serious of the allegations and the only one which is overtly connected with race. We find that it was made for the first time during the first preliminary hearing and has broadened out since then without any consistency in terms of the numbers of occasions and dates on which the term "Stupid Polish" is said to have been used. We find that this is an embellishment of the claim which has grown in the telling but did not happen at the time.

78. The claimant emailed Ms McClure in respect of the grievance appeal on 25 May at about 17.30 saying she was happy to meet her on 27 May. She also said that she was not happy with the work conditions and that she had told Linda McCann that as soon as her grievance had finished she would leave because of the pressure.

79. We also refer to emails at page 249 to the HR officer saying that she needs help and that she has been pushed to work weekends. The HR officer responded the same day suggesting she discuss it with Ms McClure when they meet to discuss the grievance appeal.

80. It is clear that something happened on 26 May which was, to some extent, pivotal and it has been very difficult for the tribunal to pick its way through the competing accounts. The claimant's oral account was that she wanted to speak to Linda McCann and tell her that she has problems; we think she

probably wanted to say that she was unwilling to work overtime because that would be consistent with what she had told HR the previous day (see page 249). The claimant's account is that Linda McCann told her the case was closed and turned her back. This account has some support in the claimant having sent the email we have referred to the previous day to HR.

81. Linda McCann's account was that she went to find the claimant to tell her that the meeting with Ms McClure would not go ahead, or to tell her not to go to the meeting. As a matter of fact, Ms McClure was unwell, and the meeting was postponed ultimately to 9 June. Mrs McClure had emailed the claimant the same day at 10.09 (page 170) but the claimant may not have received that until later. So that is objective evidence to think that Linda McCann did go to find the claimant to make sure she was aware that the appeal hearing had been postponed. The claimant, at 09.34 (page 165), emailed Linda McCann and said that she was unhappy about the way that Linda McCann had approached her when she had asked to talk to her. So, the claimant's own email suggests that Mrs McCann had approached her (rather than the other way round). Potentially the claimant also wanted to speak to Mrs McCann at the same time to say that she did not want to work overtime. It seems possible that Mrs McCann did not wait to see whether the claimant wanted to say anything perhaps she was, as she suggests, distracted; it is what happens later that has more consequences for the relationship.

82. The claimant put the following to Mrs McCann in her cross examination. She said that:

> "Mrs McCann was outraged that I had written to the lady from HR. She told me she wouldn't go to any meetings because she had spoken to Abigail Austin and told she didn't have to go to any meetings and when I told her that I wouldn't like to have any problems by not going into meetings she turned her back on me and left. That's why I wrote another email to the lady from HR, and she told me to attend the meeting."

83. Comparing this with the contemporaneous records shows the claimant must be wrong in her recollection about that order of events. She seems to presume that Linda McCann somehow knew about the email to HR of 25 May and that was why she said she should not go the meeting rather than because Ms McClure was ill, and we think that the claimant is just not objective in her description of her interactions with Mrs McCann.

84. Later in cross examination the claimant put that when the email she had sent was received by Mrs McCann, Mrs McCann came and took her from lunchtime service and brought her to the office. This was Mrs McCann's response:

> "Anna ran into the office unhappy that I had turned my back on her. She said she was unwell, very unhappy and going to go home. She said I had disrespected her. I didn't know where it had come from. There was another colleague with me, a vending manager. I was flummoxed."

85. She explained that she then followed this with a WhatsApp message suggesting that they sit down together at 14.00. However it seems to be common ground that that was not sent or received until after the claimant had gone home. By that message (page 290), Mrs McCann said that she does not

understand and that the claimant does not need to work overtime. The wording of the text suggests that actually she sent it before they spoke in the meeting with the vending manager present. Be that as it may, there is simply no suggestion in the contemporaneous messages that the claimant has been forced to do anything.

86. There is a text message between the claimant and Mrs McCann on page 181 on this date and we find that it refers to this text. It does seem that the claimant was upset by what happened and the call that she says happened with Abigail Austin on 26 May would be consistent with that, as is the sick leave Ms Cebulla took after that and the fact that she resigned. She submitted a fit note, and we have read carefully the emails that she exchanged with various individuals in early June.

87. Giving every allowance for the challenges that the claimant faced, then and now, in articulating what she is upset about, the absence of the straightforward allegation of offensive language being used means that we find that Ms Cebulla was not a reliable witness about the incident on 26 May. The most that be said is that there was a misunderstanding about obligations to work overtime and at weekends but there is still no reason, based on our factual findings, to think that this was race related. On occasions the claimant seemed to put down the omission of the alleged 'Stupid Polish' comment to the use of Google translate but we do not accept that such a phrase to be omitted if she had written it into the translation software.

88. We cannot be sure exactly what happened to upset the claimant, but we are satisfied it was entirely to do with her misunderstanding that she was required to work overtime or in excess of her contracted hours, despite Mrs McCann's text to her to say that was not required.

89. The grievance appeal hearing with Ms McClure took place on 9 June. We accept her evidence about how she made the notes on page 177; They were forwarded to the claimant on 18 June and there was no complaint about those minutes until this hearing. Furthermore, the absence of any complaint in that hearing about the conduct of Mrs McCann is consistent with the email at page 186 that she would just like to get paid for her hard work. Ms McClure's outcome is dated 17 June but is sent on 22 June, see page 183.

90. The claimant started work for a different unit still in the respondent's employment at Windsor Centrica on 4 July having been on sick leave since 26 May. She wrote to the People Team on 11 July (page 186) asking to appeal for a third time and despite this being another opportunity to do so, and despite criticism of her previous manager, she still provides no statement of the case she now alleges.

91. The best evidence about the number of phone calls between Mrs McCann and the claimant up until August is Mr Gilbertson's recollection of what he saw when he looked into it. It turned out that the document he produced through his witness statement was not, in fact, one that he recognised. He was not able to help with the particular specific dates and times of the calls he was considering. Although the issues say that the last telephone call was on 17 August, the

messages pages 192 to 193 suggest it must have been slightly later. In those, the claimant asked not to be called. She corresponds with Mrs McCann herself and with Abigail Austin about the calls (see page 191 from 29 August 2022). The message from 25 August (page 189 – 190) does include a slightly more specific allegation of rudeness which we have taken into account when weighing up the claimant's evidence as a whole. It still does not amount to a previous consistent statement of the case put forward at the final hearing.

92. On 25 August and the following day Mrs McCann proffered the explanation for her repeated calls that there was another Anna on her phone. Although there seems to have been a slightly surprising number of phone calls, we think it more likely than not that Mrs McCann made a mistake and called someone she did not intend to. We reject the allegation she used the phrase "Stupid Polish" on the telephone, and she stopped calling by 26 August at the latest.

93. Following an unrelated incident the claimant resigned to her line manager at Windsor Centrica and to Darren Gilbertson on 19 October. He went to see her straight away, probably before her second email arrived. We have read carefully the email correspondence over the next few days at pages 201, 206, 211 and 214 which involve the claimant discussing in general terms previous bad experiences. Mr Gilbertson responds that he is sorry she is leaving and would like to help her with outstanding issues.

94. It is on 26 October that the claimant sets out a detailed grievance (page 254). Some of the matters complained of in this litigation are set out in that grievance and the claimant stated in it that she wished to raise a grievance about discrimination. She stated that she experienced poor treatment compared with another colleague and that "Mrs McCann has been very rude not one occasion" by which we understand her to mean on more than one occasion.

95. Our observation about the claimant's understanding of discrimination when she was cross examined about that is she seems to think it includes a difference in treatment on what she regards as unfair grounds. At times she needed to be prompted that this is a *race* discrimination case. She did not mention being the fact of being Polish in her October grievance or directly suggest that her Polish nationality was a factor in her treatment during any of her conversations with Mr Gilbertson.

96. On one occasion when she was asked bout difference in treatment between her on the one hand and those who are permanent members of the team assigned to TBJ on the other, she said "How can you tell me that's not discrimination". In a colloquial use of the word you might say that was discrimination in that a choice has been made between two groups but a complaint about unfair or unequal treatment for reasons which are not the statutory protected characteristics is not a complaint of unlawful discrimination under the Equality Act 2010.

97. On 28 October 2022 the claimant started early conciliation and then retracted her resignation on 6 November. That retraction was accepted.

98. Ms Cebulla met with Mr Gilbertson and Ms Martin on 8 November - see the

internal email about this meeting on page 263. When the respondent offered to honour the days in lieu as a gesture of goodwill this was rejected. The claimant said she was pursuing overtime in full, but Mr Gilbertson gave evidence that Ms Cebulla told him that she did not want to pursue her complaints against Mrs McCann. The claimant had every opportunity to challenge Mr Gilbertson's evidence about this and did not do so.

99. Much more recently, in November of last year, she resigned her position for unrelated reasons.

Conclusions on the issues

100. We now set out our conclusions on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions.

101. The factual allegations alleged to be race related harassment are listed in LOI 2.1 and are alleged in the alternative to be direct race discrimination (LOI 3.2.1). Our conclusions on whether the alleged acts amounted to unlawful harassment or discrimination are:

    a. To the extent that LOI 2.1.1 is made out, Mrs McCann's comment had nothing to do with race but the respondent has shown it was because the claimant was not on Mrs McCann's payroll. This is neither related to race nor treatment because of race and both harassment and discrimination fail for that reason.

    b. To the extent that LOI 2.1.2 and 2.1.5 were pursued they seemed to be part of the 26 May 2022 incident and will be covered below.

    c. As to LOI 2.1.3, the claimant has not proved that she was called "stupid" on any occasion. That did not happen so harassment and discrimination complaints do not succeed because the core factual allegation has not been proven.

    d. Similarly, in relation to LOI 2.1.4, the claimant has not proved that Mrs McCann said that she "would not make the mistake of employing any more stupid Polish people." That did not happen.

    e. In relation to LOI 2.1.6 - the allegation of getting cross when the claimant said she would not work on weekends - there was a discussion in which the claimant was asked to work weekends but there was no aggression or abuse during that conversation. So the claimant has not proved her case. Furthermore, there is nothing to link the request to race and exactly the same request was made of the claimant's Indian alleged comparator. To the extent that the factual allegation is made out it is neither related to race nor treatment because of race and both harassment and discrimination fail for that reason.

f. To the extent that the claimant was told she needed to work faster (LOI 2.1.7), the respondent has shown that the comment was entirely to do with time management and not to do with race. To the extent that the factual allegation is made out it is neither related to race nor treatment because of race and both harassment and discrimination fail for that reason.

g. There is an allegation at LOI 2.1.8 of speaking in an unpleasant tone. Objectively, on the evidence, we do not find there was anything out of the ordinary in the way that Mrs McCann spoke to the claimant. The claimant has not shown that the underlying factual allegation is made out and the complaint fails for that reason.

h. LOI 2.1.2, 2.1.5 and 2.1.9 to 12 all concern 26 May 2022. Our findings about that incident are in paras.80 to 88 above and we refer to but do not repeat our findings. As we say, we cannot be sure exactly what happened, but the claimant has not shown that contemptuous, rude or racist behaviour took place on this occasion. Objectively, we think it more likely than not that the claimant's feelings of upset on this occasion were entirely concerned with a misunderstanding about what she was required to do by way of overtime. The claimant's allegations – which are what give the alleged incident the nature which had the potential to be harassment or discrimination – are not made out and the complaint fails for that reason.

i. As to LOI 2.1.13, we accept that Mrs McCann made phone calls to the claimant which was unwanted conduct. However, the reason for the calls did not relate to race (but to a mistake caused by there being two Annas on Mrs McCann's phone), did not contain any racist abuse – contrary to the claimant's allegation. The respondent has satisfied us that the reason for the calls was entirely to do with mistaken identity.

102. Those conclusions mean that the harassment and discrimination allegations in relation to the specific allegations against Mrs McCann all fail.

103. Next, by LOI 3.2.2, the claimant alleges that there was less favourable treatment on grounds of race in relation to breaks. The claimant has not proved that she was not allowed to have breaks. She was allowed to take them, but she did not manage her time in order to enable her to do so. Whether more could or should have been done to make sure she took her breaks is a different matter, but we are satisfied there was no racism involved.

104. Our findings of fact in relation to the alleged failure to pay overtime (LOI 3.2.3) are set out most clearly (but not exclusively) in paras. 46 to 52 above. In para.52, in particular, we give our reasons for concluding that any deficiencies in relation to payment of overtime was in no way related to race. Indeed the claimant herself at times appeared clear that whatever the deficiencies were this was nothing to do with race.

105. The final allegation (LOI 3.2.4) is alleged pressure to work at weekends. The respondent was entitled to ask Ms Cebulla to work at weekends because it was

in her contract that she might be required to do so. There was no unreasonable pressure on her to do so. For those reasons, the underlying factual allegation is not proved. Furthermore, she was clearly treated the same as her comparator in that respect. We remind ourselves of paras.65 to 68 above and our finding that there was no objectionable language from Mrs McCann at the time she asked the claimant to work weekends and that her Indian alleged comparator was asked in exactly the same terms as she was.

106. The deposit is to be returned to the claimant. It had been imposed by Judge Reindorf KC on the unfair dismissal claim which was subsequently struck out by Judge Matthews for reasons unrelated to those for which the deposit was ordered. Mr Aggrey-Orleans agreed that the deposit should be returned to the claimant.

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Employment Judge George

Date: …10 May 2024……………….

Judgment sent to the parties on
16 May 2024

For the Tribunal office

Recording and Transcription
Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:
https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/