EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MS ANNE GIWA-AMU	**V**	**DEPARTMENT FOR WORK AND PENSIONS**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: **CARDIFF** **ON:** **29TH, 30TH, 31ST MAY, 1ST & 4TH JUNE 2018 & 10TH SEPTEMBER 2018 (CHAMBERS DISCUSSION ON 11TH & 12TH SEPTEMBER 2018)**

BEFORE: **EMPLOYMENT JUDGE HOWDEN-EVANS**
MR P CHARLES
MS K GEORGE

REPRESENTATION:
FOR THE CLAIMANT: **IN PERSON**

FOR THE RESPONDENT: **MR ALLSOP (COUNSEL)**

RESERVED JUDGMENT

The tribunal's unanimous decision is that:

1. Contrary to s39(2) and s13 Equality Act 2010 the Respondent has directly discriminated against the Claimant because of her race.

2. Contrary to s40(1)a and s26 of Equality Act 2010 the Respondent has harassed the Claimant by unwanted conduct related to her race.

3. Contrary to s39(2) Equality Act 2010 the Respondent has directly discriminated against the Claimant because of her age (s13 Equality Act 2010).

4. Contrary to s40(1)a and s26 of Equality Act 2010 the Respondent has harassed the Claimant by unwanted conduct relevant to her age.

5. Contrary to s40(4) and s27 of Equality Act 2010 the Respondent has victimised the Claimant because she had carried out protected acts as defined therein.

6. The Claimant's claims of direct discrimination because of sex and harassment related to sex are not well founded and are dismissed.

Reasons

1. References to the hearing bundle appear in square brackets throughout this Judgment.

Background

2. The Respondent, the Department of Work and Pensions ("DWP") is a public authority.

3. The Claimant has previously worked as a Designated Case Worker in the CPS (Grade B2), a trainee solicitor, Company Secretary and Executive Director with a US oil company.

4. On 13th February 2017, the Claimant commenced work for DWP in the Caerphilly Service Centre Crown Building as an Administrative Officer, appointed on an 18-month fixed term contract. She was one of a number of newly appointed Administrative Officers that completed an induction week and then a number of weeks of training. The new trainees started their induction week on 13th February 2017 and were due to finish training on 17th March 2017, before going on to work in different parts of DWP.

5. The Claimant describes herself as being of Nigerian-Welsh origin. She was the only non-white trainee that was completing training in Nicola Foley's group of 9 trainees.

6. The Claimant was 55 years old at the time of the training. She was the only trainee over the age of 50; the tribunal understand Nicola Foley, the trainer, was in the same age group as the Claimant.

7. On 13th March 2017, which was the start of her fifth week of employment, the Claimant submitted a grievance headed "Formal complaint of bullying and racial harassment" [p141-142] and started her sick leave on the same day. The Claimant remained on sick leave with stress at work until the termination of her employment. At the reconvened tribunal hearing in September 2018 the Claimant continued to be signed unfit for work due to stress at work.

8. In addition to her grievance of 13th March 2017, on 16th March 2017 the Claimant sent an email which added further allegations [p147].

9. At some point between 14th and 16th March 2017, Karen Williams was appointed to investigate the Claimant's grievances.

10. On 16th March 2017 the Claimant contacted ACAS. ACAS early conciliation procedures continued until 11th April 2017.

11. On 22nd March 2017, Ms Williams interviewed the claimant before interviewing the Claimant's colleagues on 24th March 2017. On 5th April 2017, Ms Williams notified the Claimant that she had decided not to uphold the grievance [p150 which enclosed the grievance investigation report and minutes of meetings, p151 to 175].

12. On 9th April 2017, the Claimant appealed the grievance decision to Alison Thomas [p176]. On 19th May 2017 the Claimant attended a grievance appeal meeting with Ms Thomas. On 25th May 2017, Ms Thomas wrote to the Claimant explaining she was not upholding the Claimant's grievance appeal [p199 to 201]. The Claimant did not receive this letter until 15th June 2017 as the original letter had been sent by recorded mail and was not collected from the Post Office.

13. The Claimant presented her ET1 claim on 28th June 2017 [p1 to 21]. This alleged harassment, direct discrimination and victimisation (by reference to the protected characteristics of race, age and sex). This ET1 was vetted and date-stamped on 7th July 2017 before being served on DWP on 21st July 2017.

14. On 13th July 2017, Ceri Morris conducted a formal attendance management meeting by telephone with the Claimant [p211 to 213].

15. By letter of 18th September 2017, the Claimant was invited to attend an attendance management meeting [p223 to 224]. The Claimant did not receive this letter. The Claimant did not attend the attendance management meeting on 29th September 2017.

16. By letter of 4th October 2017 Linda Clarke informed the Claimant she was dismissed as she had failed to maintain an acceptable level of attendance / had been unable to return to work within a reasonable timescale [p225 to 226]. The Claimant did not appeal the decision to dismiss her.

17. On 29th September 2017, DWP submitted their ET3 Response [p28 to 47]. A preliminary hearing by telephone was conducted by Regional Employment Judge Clarke on 20th October 2017 [p48 to 53]. As the claimant had been dismissed and wished to bring new proceedings in respect of the dismissal, it was agreed that it was appropriate for any claims arising from dismissal to be added to the existing proceedings. The claimant had agreed to provide a Scott Schedule and it was suggested by Regional Employment Judge Clarke that the allegations relating to dismissal could be added as a further row in the Scott Schedule or an application to amend could be made.

18. A further preliminary hearing by telephone was conducted by Employment Judge Whitcombe on 8th February 2018 [p95 to 98]. At this hearing, the Respondent confirmed they did not object to the Claimant's application to

amend her claim to include allegations relating to the dismissal. A Scott Schedule had been prepared, which listed 25 different items/alleged incidents of discrimination. Employment Judge Whitcombe urged the parties to try to reduce the number of items on the Scott Schedule. By the time of the final hearing, the Claimant had agreed to remove 6 of the items / alleged incidents, to narrow the issues the tribunal had to determine. This left 19 items / alleged incidents to be considered by the tribunal. On the Scott Schedule [p67 to 94] the Claimant was no longer pursuing Items 6, 9, 14, 15, 16 & 24.

The Issues

19. Before the hearing started, the Employment Judge circulated a draft list of issues / matters the tribunal would need to decide. Parties agreed this captured the issues between the parties. This list of issues / matters the tribunal needed to determine was as follows:

20. The issues to be determined in the **race discrimination claims** were as follows:

Direct discrimination (s13 Equality Act 2010)

20.1. Is there an actual comparator (i.e person in not materially different circumstances, not sharing the claimant's race)?

20.2. If not, what are the characteristics of the correct hypothetical comparator?

20.3. Has the claimant been subjected to a detriment?

The Claimant's allegations of detriment on grounds of race were listed in Items 1; 2; 4; 5; 7; 8; 10; 11; 12; 13; 17; 19; 20; 21; 23 & 25 of the Scott Schedule

20.4. In subjecting the Claimant to a detriment (if applicable) or dismissing the Claimant, has the Respondent treated the Claimant less favourably than it treated (or would treat) this comparator?

20.5. Was this less favourable treatment because of race (i.e. nationality and/or colour)?

Harassment (s26 Equality Act 2010)

20.6. Has the Respondent or an employee of the Respondent engaged in unwanted conduct related to race?

The Claimant's allegations of unwanted conduct related to race are listed in Items 1; 2; 4; 5; 7; 12 & 13 of the Scott Schedule.

20.7. Did this conduct have the <u>purpose</u> of violating the Claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for the Claimant?

20.8. Did this conduct have the <u>effect</u> of violating the Claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for the Claimant?

20.9. If it had "the effect" referred to above, was it reasonable for this conduct to have that effect, taking into account the Claimant's perception and all the circumstances of the case?

20.10. If unwanted conduct was undertaken by an employee of the Respondent, was this done "in the course of that employee's employment"?

20.11. If yes, did the Respondent take all reasonable steps to prevent this employee from doing that act or doing anything of that description?

21. The issues to be determined in the **sex discrimination claims** were as follows:

<u>Direct discrimination (s13 Equality Act 2010)</u>

21.1. Is there an actual comparator (i.e person in not materially different circumstances, not sharing the claimant's sex)?

21.2. If not, what are the characteristics of the correct hypothetical comparator?

21.3. Has the claimant been subjected to a detriment?

The Claimant's allegations of detriment on grounds of sex were listed in Item 12 of the Scott Schedule

21.4. In subjecting the Claimant to a detriment (if applicable) or dismissing the Claimant, has the Respondent treated the Claimant less favourably than it treated (or would treat) this comparator?

21.5. Was this less favourable treatment because of the claimant's sex?

<u>Harassment (s26 Equality Act 2010)</u>

21.6. Has the Respondent or an employee of the Respondent engaged in unwanted conduct related to sex?

The claimant's allegation of unwanted conduct related to sex was set out in Item 12 of the Scott Schedule

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

21.8. Did this conduct have the effect of violating the Claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for the Claimant?

21.9. If it had "the effect" referred to above was it reasonable for this conduct to have that effect, taking into account the Claimant's perception and all the circumstances of the case?

21.10. If unwanted conduct was undertaken by an employee of the Respondent, was this done "in the course of that employee's employment"?

21.11. If yes, did the Respondent take all reasonable steps to prevent this employee from doing that act or doing anything of that description?

22. The issues to be determined in the **age discrimination claims** were as follows:

Direct discrimination (s13 Equality Act 2010)

22.1. Is there an actual comparator (i.e person in not materially different circumstances, not sharing the claimant's age group)?

22.2. If not, what are the characteristics of the correct hypothetical comparator?

22.3. Has the claimant been subjected to a detriment?

The Claimant's allegations of detriment on grounds of age are contained in Items 2; 3; 4; 5; 7; 8; 10; 11; 12; 13; 17; 18; 19; 20; 21; 22; 23 and 25 of the Scott Schedule.

22.4. In subjecting the Claimant to a detriment (if applicable) or dismissing the Claimant, has the Respondent treated the Claimant less favourably than it treated (or would treat) this comparator?

22.5. Was this less favourable treatment because of the claimant's age?

Harassment (s26 Equality Act 2010)

22.6. Has the Respondent or an employee of the Respondent engaged in unwanted conduct related to age?

The claimant's allegations of unwanted conduct related to age are set out in Items 2; 3; 4; 5; 7; 12; 13 of the Scott Schedule.

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

22.8. Did this conduct have the effect of violating the Claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for the Claimant?

22.9. If it had "the effect" referred to above, was it reasonable for this conduct to have that effect, taking into account the Claimant's perception and all the circumstances of the case?

22.10. If unwanted conduct was undertaken by an employee of the Respondent, was this done "in the course of that employee's employment"?

22.11. If yes, did the Respondent take all reasonable steps to prevent this employee from doing that act or doing anything of that description?

23. The issues to be determined in the **Victimisation discrimination claims** are as follows:

Victimisation (s27 Equality Act)

23.1. Has the Claimant done a "protected act" or did her employer belief she had done a "protected act"? (i.e. did the Claimant make or did the employer belief she had made an allegation that the Respondent or another person has contravened the Equality Act 2010?)

The claimant alleged each of the following was a protected act:

- *On 9th March 2017 her telling Nicola Foley that Daisy Cartwright was bullying her due to her appearance* – the respondent denies the Claimant said this to Nicola Foley*;*
- *On 13th March 2017 the Claimant submitting a formal complaint;*
- *On 13th March 2017 her telling Emma O'Connor she was on sick leave as she had been subjected to racial harassment;*
- *In May 2017 the Claimant submitting an appeal to the grievance outcome; and*
- *In June 2017 the Claimant issuing tribunal proceedings.*

23.2. If yes, did the employer subject the Claimant to a detriment because she had done or because the employer believed she had done this protected act?

The claimant's allegations of victimisation detrimental treatment are set out in Items 10, 11, 13, 17, 19, 20, 21, 22, 23 & 25 of the Scott Schedule.

Time Issue

23.3. Have any of the acts of discrimination occurred more than 3 months before proceedings were issued?

The Respondent contends Item 1 and 2 on the Scott Schedule occurred more than 3 months before proceedings were issued

23.4. Are they part of conduct extending over a period?

23.5. Is it just and equitable for the time limit to be extended?

The Hearing

24. The case was heard by an employment tribunal siting in Cardiff. The case originally had a time estimate of 8 days, but due to listing difficulties, it was only possible to list 5 days in May / June 2018. During these 5 days we were able to hear all the witness evidence; the hearing resumed in September 2018 at which point the tribunal heard closing submissions from both parties before retiring to consider their decision.

25. At the final hearing, the Claimant presented her own case. Mr Allsop, Counsel, represented the Respondent.

26. At the outset of the Hearing we discussed the timetable and order of evidence. The morning of the first day was devoted to reading the bundle of documents (of nearly 400 pages) and the 10 witnesses' statements.

27. In the afternoon of Day 1 and through to Day 5 we were able to hear witnesses' evidence. These were:

27.1. On Day 1 & 2, the Claimant gave evidence;

27.2. On Day 3 we heard:

- Ryan Steadman, DWP Executive Officer and Team Leader, who was in a business manager type role and was responsible for assisting the trainer;

- Daisy Cartwright, who was a newly appointed Administrative Officer and was undertaking training with the Claimant;

- Alisha Blue, who was a newly appointed Administrative Officer and was undertaking training with the Claimant;

- Robert Lewis, who was a newly appointed Administrative Officer and was undertaking training with the Claimant.

27.3. On Day 4 we heard:

- Nicola Foley, DWP Executive Officer and the training provider that had delivered training to the Claimant and other newly appointed Administrative Officers;
- Ceri Morris, DWP Executive Officer, who was the Claimant's line manager from 13th June 2017;
- Karen Williams, DWP Executive Officer, who decided the outcome of the Claimant's grievance.

27.4. On Day 5 we heard:

- Alison Thomas, DWP Senior Executive Officer, who had decided the outcome of the Claimant's appeal against the grievance outcome;
- Linda Clarke, DWP Senior Executive Officer, who had taken the decision to dismiss the Claimant.

28. All witnesses gave evidence on oath. In relation to each witness, the procedure adopted was the same: the Tribunal had read each witness's statement, there was opportunity for supplemental questions (or in Ms Giwa-Amu's case, for Ms Giwa-Amu to address matters raised in the respondent's witnesses' statements) before questions from the other side, questions from the tribunal and any re-examination (or in Ms Giwa-Amu's case, opportunity for Ms Giwa-Amu to clarify anything she felt she had not been able to explain fully in answering questions).

29. On 10th September 2018 the tribunal reconvened and heard lengthy closing submissions from both parties. The tribunal commenced its chambers discussion on 11th September and was able to conclude this discussion on 12th September 2018. Given the seriousness of the allegations and the number of factual disputes in this case, the tribunal took great care making its findings of fact.

Findings of Fact

Background

30. The Claimant commenced work for DWP in the Caerphilly Service Centre Crown Building on 13th February 2017. There were a number of newly appointed Administrative Officers who started on the same date as the Claimant, completed an induction week with the Claimant and then undertook a further four weeks of training.

31. During the induction week, the Claimant was part of a bigger group of new employees; by the second week of employment she had been assigned to Nicola Foley's group of 9 trainees. This group of 9 trainees comprised of the Claimant, Daisy Cartwright, Alisha Blue, Robert Lewis, Jacob Fenner, Robert Powell, Sion Wilder, Annabelle Williams and Sian Jones.

32. In this group of 9 trainees, the Claimant was the only non-white trainee and the only trainee over the age of 50.

33. For some of the trainees, Daisy Cartwright included, this was their first "proper" job. It was clear from the evidence that some members of the group of 9 trainees did not always behave in a professional manner during this training. For instance, the tribunal have heard evidence of trainees spinning each other on office chairs and there being *"a lot of banter within the group"*. None of the evidence indicates the Claimant participated in this banter or horseplay.

34. At some point in the first week, trainees completed an eLearning diversity training exercise. In addition, Nicola Foley showed the tribunal a slide she used for a PowerPoint presentation, which had the heading "Learning Contract" and one of the nine bullet points on the slide was "Equality Act". The Claimant asserts and the tribunal accepts there was no meaningful equality and diversity training on the course. We note that Ms Foley and the other DWP witnesses were not able to give us an explanation of what was covered in the equality and diversity training. We were repeatedly told they "couldn't remember" what it covered or they "couldn't describe it", which demonstrates whatever equality and diversity training was given, it was not fit for purpose.

35. A further difficulty that trainees encountered was they were not given employment contracts or terms of employment. The Claimant's "Statement of Terms" was dated 12th October 2017 – 6 days after she had been dismissed.

36. We were not able to ascertain who was the Claimant's line manager prior to June 2017. Robert Lewis, one of the Claimant's fellow trainees was tasked with getting the Claimant to tick the DWP Induction Line Manager's Checklist. He also tried to help the Claimant when she was experiencing IT difficulties, but the Claimant continued to experience difficulty accessing all the DWP computer systems as she had no line manager to turn to for help. This IT difficulty meant there were times she was not able to access emails that the other trainees were accessing.

37. We turn to make findings of fact on the specific allegations:

Scott Schedule Item 1

38. The Claimant alleged in the first week of their employment Daisy Cartwright had a conversation with the Claimant, during which Ms Cartwright said Ms Cartwright had been called "Paki Lover" in her previous employment. The Claimant alleged this was a conversation between the two of them and took place when Ms Cartwright was sat next to her. Ms Cartwright accepted she had made this comment, but said this was in the context of a larger group discussion when the trainees were all discussing bad experiences in previous employment.

39. There were noticeable differences between Ms Cartwright's account of this incident in her witness statement and her evidence on oath. Her witness statement suggested this conversation happened on the first day of their employment, whereas in oral testimony, Ms Cartwright believed she made the statement during the second week of training when the group were sat in pairs in the training room. In oral evidence, Ms Cartwright suggested the trainees at the desks in front turned their chairs around to take part in the conversation. What was clear from her evidence on oath was that she accepted that when she spoke these words the Claimant was sitting next to her and the group were sitting in pairs, classroom-style.

40. The Claimant's account of this incident has been consistent throughout. She raised this in her grievance on 13th March 2017. She has always been quite clear that this was said by Ms Cartwright during a one-to-one conversation with her, during a break in training. The tribunal accept this comment was made during a one-to-one conversation between the Claimant and Ms Cartwright. The tribunal accept that after this conversation (during their first week in work together) the Claimant attempted to sit away from Ms Cartwright and chose to sit by Anabel Williams, but by the second week of employment, when they moved to the training room, she found herself seated next to Ms Cartwright again.

Scott Schedule Item 2

41. The Claimant alleged that in mid to late February Ms Cartwright told the Claimant it was racist to say it always rained in Wales and criticised the Claimant for always talking about the weather. The Claimant first raised this allegation during her grievance interview with Karen Williams. In oral testimony the Claimant explained she was offended by Ms Cartwright's comments; this had occurred shortly after Ms Cartwright had completed the eLearning equality training and the Claimant felt Ms Cartwright resented having to complete diversity training and was trivialising discrimination.

42. In her evidence, Ms Cartwright accepted that she had said to Annabelle Williams that it was racist to say it always rained in Wales. She also admitted saying words to the effect of *"[the claimant] is giving her usual weather report"*. Ms Cartwright said she was making these comments as a joke. When Karen Williams interviewed Ms Cartwright during the grievance investigation and asked her about these comments, Ms Cartwright was noted as saying *"[the Claimant] was always talking about the weather as she didn't have much in common with the rest of the group as she was that bit older, and she would joke that it was [the Claimant]'s weather report she didn't think this had upset [the Claimant] and her comments were meant as banter."*

43. During her grievance investigation, Karen Williams asked Annabelle Williams whether she recalled Ms Cartwright making these comments. Annabelle Williams was noted as replying *"there were lots of conversations over the weather. She did not recall this comment but [Ms Cartwright]'s tone and banter can maybe sometimes go a bit too far"*. In

response to this Karen Williams asked if there was anything else Annabelle Williams wished to add, to which Annabelle Williams is recorded as saying *"There is lots of banter within the group and as I'm English there is some banter directed to me but I take it as banter and I am not offended."*

44. In Robert Lewis's evidence, he recalled Ms Cartwright telling the Claimant it was racist to say it always rained in Wales. He noted the comment was made as a joke and the Claimant did not give any indication she had been upset at the time.

45. The tribunal find that Ms Cartwright did tell the Claimant it was racist for the Claimant to comment that it always rains in Wales. We also find Daisy Cartwright did, on a number of occasions, make comments like *"its [the Claimant]'s weather report again"* when the Claimant mentioned the weather.

Scott Schedule Item 3

46. The Claimant alleges that in early March 2017 Ms Cartwright told other trainees the Claimant had stolen ice-cream from the freezer.

47. The background to this allegation is that most of the trainees (but not the Claimant) received a group email from someone in DWP complaining that their ice-cream had been taken from the freezer. Ms Cartwright said repeatedly to her fellow trainees *"[The Claimant] has taken the ice-cream".* Ms Cartwright accepts she did accuse the Claimant of stealing the ice-cream but says this was a joke. Ms Cartwright clearly said this a number of times in front of the Claimant to her fellow trainees.

48. During Karen Williams's grievance interviews, Jacob Fenner said he had witnessed this incident, they were all joking and blaming each other. Ms Williams asked him whether he recalled the Claimant being upset by this and telling Ms Cartwright to "leave it". Mr Fenner responded *"Yes I could see [the Claimant] was upset by this, I think it was either Rob Lewis or myself said to [Ms Cartwright] to calm it down. [Ms Cartwright] can sometimes go a bit over the top with her banter."*

49. During the grievance interviews, Ms Cartwright was asked, could she recall telling the group the Claimant had stolen the ice-cream. She was noted to respond *"Once again this was banter and as a group they were all blaming each other, even the trainer Nicola. She did not have any indication from [the Claimant] that she had taken this too far. If she had she would have stopped immediately'*. She was then asked, did she recall Jacob telling her to 'leave it'. Ms Cartwright replied *"she didn't recall this but maybe she went too far with the banter but no offence was intended".*

50. The Tribunal note that none of the evidence indicates the Claimant joined in this banter; she did not accuse anyone of stealing icecream.

51. The Tribunal finds that whilst others might have been accused of stealing the ice-cream, as a chain of events, the Claimant was accused first, and this accusation was made repeatedly by Ms Cartwright. The Claimant was upset by this and asked Ms Cartwright to “leave it”, but Ms Cartwright continued to “blame” the Claimant. Others, including Mr Fenner noticed the Claimant was upset and asked Ms Cartwright to calm down.

Scott Schedule Item 4

52. The Claimant alleged that in early March 2017, Ms Cartwright sprayed body spray on herself just after the Claimant had complained that another trainee had sprayed body spray in the training room.

53. In the Scott Schedule, DWP accepted Daisy Cartwright would spray body spray on herself in the training room but denied the Claimant had ever complained to Ms Cartwright about another colleague (or Ms Cartwright) spraying body spray.

54. Mr Lewis and Ms Cartwright both sprayed body spray on themselves in the training room. During his evidence, Mr Lewis explained that the Claimant had told him she didn’t like it, he had apologised and hadn’t sprayed body spray in the training room after that discussion.

55. During the grievance investigation, when Ms Cartwright was asked about this specific allegation, she said she didn’t recall the incident and if it had happened, she was sorry. She had then become visibly upset. She talked about this being her first job and said she didn’t mean to upset anyone with her banter. She then asked if she could write to the Claimant to apologise.

56. Ms Cartwright’s witness statement differs from this as she doesn’t say “if it happened, she apologises”. Instead she says she can’t recall specific incidences of spraying in the office and she can’t recall the Claimant ever objecting to anyone using body spray. During cross examination, she recalled spraying before going to visit a relative and commented this was to “*take away the smell of the office*”.

57. The Claimant raised this allegation in her grievance interview with Karen Williams – the Claimant’s account on that occasion, in her witness statement and during oral evidence has remained consistent. She has been quite clear that, not only did Ms Cartwright spray herself directly after the Claimant had objected about Mr Lewis spraying body spray, Ms Cartwright used so much spray it caused Annabelle Williams (who was sat in front of them) to cough.

58. We find on balance of probabilities that is it more likely than not that the Claimant did complain to Ms Cartwright when Mr Lewis had sprayed body spray and that Ms Cartwright proceeded to take out her own body spray and spray it whilst sat next to the Claimant. This made Annabelle Williams cough. We think it is telling that Ms Cartwright started to cry when this

allegation was put to her during the grievance investigations. This behaviour could not be passed off as "banter".

Scott Schedule Item 5

59. The Claimant alleged that in early March 2017, Ms Cartwright purposefully spun on her chair next to the Claimant after the Claimant had told Ms Cartwright that watching her spinning on her chair was making the Claimant feel sick.

60. In the Scott Schedule, DWP accept Ms Cartwright did spin on her chair, but alleges the Claimant joked she was feeling sick and moved away from Ms Cartwright.

61. Having heard evidence from the witnesses, the tribunal finds that Ms Blue and Ms Cartwright were spinning on chairs at the back of the training room. The Claimant told them she thought it was unsafe. Ms Cartwright then returned to her chair next to the Claimant. Ms Cartwright says she returned to her chair because it was the end of the break. Ms Cartwright then proceeded to spin on her chair next to the Claimant. The Claimant told Ms Cartwright she was making her feel sick and explained quite clearly her concern about Ms Cartwright spinning so close to her. Mr Fenner came to spin Ms Cartwright even faster on her chair. The Claimant said, and we accept, she felt she had to move away from Ms Cartwright's spinning as she was worried the chair might hit her.

The "Stop looking at me like that" Comment

62. This was originally an allegation of discrimination. In attempting to reduce the issues the Claimant agreed not to pursue this. The Tribunal notes that both parties accept that on Wednesday 8th March 2017, the Claimant was working with Ms Cartwright when Ms Cartwright said "stop looking at me like that" to the Claimant. There is a dispute as to the manner in which this was said. As it is no longer an allegation of discrimination, we have not made further findings of fact about this comment.

Scott Schedule Item 7

63. The Claimant alleged that when she arrived for training on Thursday 9th March 2017 Ms Cartwright made gestures to Ms Blue about the Claimant.

64. In the Scott Schedule, DWP accept Ms Cartwright did make gestures to Ms Blue, but Ms Cartwright cannot recall what they were about. Ms Blue cannot recall what the gestures were about but confirmed they did not relate to the Claimant.

65. In her grievance letter of 13th March 2017, the Claimant stated *"On 9th March 2017 I arrived for training and as I sat down [Ms Cartwright] jumped up and began making signs to Ms Blue who was sitting behind me. I became so distressed by the ongoing bullying and harassment that I had*

to leave the training session on two occasions. [Ms Foley] came to ask me what was wrong and I informed her about [Ms Cartwright]'s conduct".

66. During the grievance interviews on 24th March 2017, Ms Blue couldn't remember making gestures to Ms Cartwright on 9th March which had upset the Claimant and caused her to leave the training room. She did recall the Claimant being upset on that day and had told Ms Foley and Ms Foley had gone to speak to the Claimant.

67. During cross examination, Ms Cartwright denied making any gestures to Ms Blue. This was different from the account in her witness statement which accepted she had made gestures to Ms Blue but said they weren't about the Claimant.

68. The Respondent submits the gestures might have been related to the trainer and the use of mobile phones in the training room as Ms Blue and Ms Cartwright recalled sometimes making gestures about this. The Tribunal does not accept this as being the reason for the gestures on the 9th March 2017. There was no reference to this explanation during the grievance investigation interviews and it would have been natural to have offered this explanation at the time.

69. The tribunal accepts that Ms Cartwright did make gestures to Ms Blue and this was immediately after the claimant had arrived and sat down beside Ms Cartwright. We don't know whether they were gestures about the Claimant or not, but the Claimant reasonably perceived them to be about her and left the room distressed.

70. Another minor issue was whether Daisy Cartwright had told Nicola Foley that the Claimant had left her security card in her computer when the Claimant left the room distressed. Ms Cartwright could not remember this. In evidence, Mr Lewis confirmed, and the tribunal accept, that it was Ms Cartwright that told Ms Foley the Claimant had left her security card in the machine. Mr Lewis had then removed the Claimant's security card as it was posing a security risk. The card was returned to the Claimant.

Scott Schedule Item 8

71. The Claimant alleged Mr Stedman had refused to assist the Claimant to access e-learning modules.

72. The tribunal found Mr Stedman to be a very credible witness and accept that setting up IT was outside his role. Despite this, Mr Stedman did try to help some of the trainees, including the Claimant, to access eLearning. We accept there was no deliberate attempt not to help the Claimant, rather Mr Stedman did what he could to help but was burdened by numerous other tasks. The tribunal accept that the fact the Claimant had not managed to get her eLearning up and running must have made the training harder for her.

Alleged Protected Act 1: The Claimant's Conversation with Nicola Foley on Thursday 9th March 2017

73. On Thursday 9th March 2017, when the Claimant left the training room in a state of distress, Ms Cartwright alerted Ms Foley, the trainer, and Ms Foley went to speak to the Claimant in the toilets. Ms Foley found the Claimant and they proceeded to have a conversation away from the training room.

74. The Claimant alleges during this conversation, she told Ms Foley that Ms Cartwright was bullying the Claimant due to the Claimant's appearance. During the conversation, the Claimant told Ms Foley about the *"stop looking at me like that"* comment and said what particularly upset her was that she couldn't help the way she looked. Ms Foley asked whether the Claimant had been bullied before and the Claimant told Ms Foley her daughter had experienced bullying for years in medical school. The Claimant did not want to escalate the matter as she knew they were reaching the end of training and she would be able to move away from Ms Cartwright.

75. Ms Foley's account of this conversation differs – she says the Claimant told her Ms Cartwright had made a comment the previous day and the Claimant was aware she was being a little sensitive about it (the Claimant denies saying this). The Claimant had described the *"stop looking at me like that"* comment. Ms Foley alleges the Claimant said she didn't think Ms Cartwright had intentionally upset her (the Claimant emphatically denies saying this). Ms Foley also recalled the Claimant telling Ms Foley about her daughter being bullied in medical school to the extent that she became disabled. Ms Foley denies the Claimant said she felt she was being bullied by Ms Cartwright. Ms Foley recalls offering to speak to Ms Cartwright and recalls the Claimant declining this offer.

76. The tribunal also considered p112 in the bundle. Ms Foley's evidence was that she had created the typed note [p112] on the same day as the discussion with the Claimant in the toilets. Clearly this cannot be accurate evidence; the documents is headed "Conversation with Anne Giwa-Amu 08/03/2017" when the conversation in the toilets actually took place on Thursday 9th March 2017 (the penultimate day the Claimant was in work). Other witnesses (eg Mr Lewis) agree the Claimant left the room distressed on <u>Thursday 9th</u> March 2017. P112 also refers to the Claimant attending work "on Thursday and Friday as usual" which it could not do if it had actually been drafted on Wednesday 8th March. Ms Foley was given the opportunity to correct her evidence, but instead asserted it must have been on 8th as that was her daughter's birthday.

77. P112 stated the Claimant had come into work upset that morning. This is not supported by any other witness – other witnesses were all clear the Claimant became upset whilst in the room and during cross examination Ms Foley conceded the Claimant had become upset at some point after 9am and before mid-morning break.

78. The tribunal found the document at p112 to be self-serving. It was a document created sometime after 10th March 2017 in an attempt to support Ms Foley's actions.

79. The other concern the tribunal has about Ms Foley's evidence is that she told the tribunal she had not spoken to Karen Williams about this incident and the first she was aware of the Claimant's grievance was November 2017. During her oral evidence, Karen Williams was very clear that she had a brief meeting with Ms Foley in March 2017 and Ms Foley had given her "an overview" of the situation. The tribunal accept Karen Williams's evidence on this – she was honestly admitting there had been a brief meeting with Ms Foley, that this wasn't minuted and hadn't been referred to in her investigation report.

80. The tribunal prefer the Claimant's account of her conversation with Ms Foley. We find that the Claimant did tell Ms Foley she was upset by Ms Cartwright's behaviour, that she felt she was being bullied by Ms Cartwright and what was particularly upsetting was, it was because of the Claimant's appearance and the Claimant could not help the way she looked. This account is wholly compatible with the Claimant going on to discuss her daughter having been bullied previously. The tribunal also accepts the Claimant told Ms Foley she did not want the matter escalated and did not want Ms Foley to speak to Ms Cartwright.

Scott Schedule Item 10

81. The Claimant alleges that Ms Foley spoke to Ms Cartwright about Ms Cartwright's behaviour towards the Claimant without the Claimant's permission and in breach of DWP procedure that states harassment and discrimination must be dealt with by management.

82. P246 of the bundle (DWP's Grievance Policy) explains

    "DWP has a zero tolerance policy to harassment discrimination and bullying and takes all allegations seriously whether they are one of the characteristics protected by law (eg age race sex disability sexual orientation) or not."

83. P250 (DWP's Grievance Procedure) explains at paragraph 2.4 *"All cases of harassment discrimination and bullying must be dealt with by management investigation."*

84. Section 3 of the same document provides an informal procedure "Employee Action". Paragraph 3.2 provides

    "Where an employee is uncomfortable with someone's behaviour, they should try to have an honest and open discussion with the colleague concerned. If it is not possible to talk directly with the colleague the employee's line manager may act as a facilitator and/or may suggest other ways in which to resolve the issue, for example, through mediation."

85. Paragraph 3.3 provides

"If the employee has tried but not been able to resolve an issue with the person concerned or reasonably feels unable to attempt to resolve it, they may refer the matter to their line manager for Manager Action."

86. As the Claimant has pointed out it is for the employee to decide on this course of action, not the trainer.

87. Ms Foley admits she had spoken to Ms Cartwright, after lunch, on the same day as her discussion with the Claimant, when the Claimant had been distressed (9th March 2017). Ms Foley's evidence was, that Ms Cartwright asked if the Claimant was OK and Ms Foley replied that the Claimant seemed OK. Ms Foley's evidence continued - she had told Ms Cartwright that the Claimant had taken exception to something Ms Cartwright had said and Ms Cartwright should be mindful that sometimes people don't take things the way we intend them.

88. The Claimant realised Ms Foley had broken her confidence and spoken to Ms Cartwright as when the Claimant returned from lunch she found Ms Foley speaking to Ms Cartwright, Annabel Williams and Ms Blue; Ms Cartwright was saying to Ms Foley that she had tried to include the Claimant by inviting her to join her for a walk. (The Claimant denies being invited to join Ms Cartwright for a walk). The Claimant was upset that Ms Foley had spoken to Ms Cartwright and felt Ms Foley's actions had made her situation worse.

89. The Tribunal find that Ms Foley did speak to Daisy Cartwright about her behaviour towards the Claimant. The Claimant had been clear that she did not want Ms Foley to speak to Ms Cartwright about the Claimant being upset and Ms Foley breached the Claimant's confidence and spoke to Ms Cartwright about this. This was also in breach of the DWP policy on how to handle harassment complaints as set out in the Grievance Procedure.

Scott Schedule Item 11

90. The Claimant alleges that Ms Foley spoke to the rest of the training group about "ongoing issues with the Claimant".

91. Ms Foley admits that first thing on Friday morning (on 10th March 2017), when the Claimant was not present, she spoke to the other trainees about the importance of abiding by the Learning Contract. The Learning Contract covers behaviours expected in the classroom, such as respecting each other. Ms Foley said she reminded the other trainees that we are all different and should think about how things can be interpreted, and that humour can sometimes be taken incorrectly. She maintains there was no reference to the Claimant. In her witness statement she explained her reason for speaking to the other trainees was *"because the Claimant had become upset about the comment made by [Ms Cartwright*]."

92. The Tribunal find it must have been obvious to the other trainees that the Claimant had made a complaint. Ms Cartwright, Ms Blue and Mr Lewis were aware the Claimant had left the room in tears twice on the previous day. During her grievance investigation interview, Sian Jones, one of the other trainees explained *"she sat at the front of the training room and [the Claimant] sat at the back with [Ms Cartwright] and [Ms Blue]. She knew [the Claimant] had been upset the day before with [Ms Cartwright]."* If even the trainees at the front of the room were aware the Claimant had been upset the day before, when Ms Foley started to talk about respecting each other it must have been obvious who she was speaking about. This is particularly so as Ms Foley was choosing to have this talk in the Claimant's absence.

93. The Claimant came into the training room at 9am and discovered no one was there. She went looking for the trainer and other trainees and when she returned to the training room she found everyone including the trainer returning to their desks. She formed an impression that Ms Foley had been having a further discussion about the incident the previous day. She felt embarrassed and upset by Ms Foley's actions.

Scott Schedule Item 12

94. The Claimant alleges that on Friday 10th March 2017, Mr Lewis shouted to the other trainees "*I touched Anne [the Claimant]'s bum*".

95. In the Scott Schedule, the Respondent denies Mr Lewis said "I touched Anne's bum". The Respondent says as Mr Lewis was leaving the room his bag brushed against the Claimant. He did not want the Claimant to think if was intentional, so he said her *"Sorry Anne it was my bag. I didn't touch your bum".*

96. Mr Lewis gave evidence to the tribunal. Prior to his evidence, Mr Allsop explained Mr Lewis experiences anxiety which can present as being brusque or difficult. The tribunal checked Mr Lewis felt able to give evidence. Mr Allsop confirmed he was ready to do so. The employment judge reminded Mr Lewis that he could take a break at any time he wished to during his evidence. The tribunal have borne in mind, the impact of Mr Lewis's anxiety in considering Mr Lewis's evidence.

97. When Mr Lewis started training at DWP in February 2017, Mr Lewis's mother was already working for DWP. Mr Lewis was comfortable in that environment and was a confident trainee – he assisted others (including the Claimant) with IT issues and helped the trainer (he got the Claimant to sign the Line Managers checklist, he took the Claimant's security key out of her machine when she left the room).

98. Mr Lewis's account of the incident on Friday 10th March was that at about 3.30pm, he tried to squeeze past the Claimant who was standing up and talking to Ms Foley. As he squeezed past her, they were back to back and his bag, which was over his shoulder, brushed the Claimant's bottom. During his evidence, Mr Lewis stood up to give us an indication of where

he was, where the Claimant and Ms Foley had been and how he squeezed past the Claimant.

99. During cross examination, it was pointed out to Mr Lewis that Ms Foley had left at lunchtime on Friday 10th March to attend a dental appointment, so she could not have been talking to the Claimant. Mr Lewis accepted this could be true and that the Claimant was talking to someone else. Having heard all the evidence, the Tribunal accept that Ms Foley had left at lunchtime on Friday 10th March 2017, to attend a dental appointment. She had left Mr Lewis in charge of the group for that afternoon.

100. During cross examination, when the Claimant put to Mr Lewis he had used the words *"I touched Anne's bum. I touched Anne's bum",* rather than deny these words or offer different words, Mr Lewis said *"sexual harassment comes from a pathological desire that I'm not capable of feeling".*

101. The tribunal considered Mr Lewis's account, that he had said *"Sorry Ann it was my bag. I didn't touch your bum".* Mr Lewis agrees the Claimant had not said anything to prompt these words. It struck the tribunal as being a strange phrase to use – to actually refer to the word "bum" – there was no need to use this word, he could have just said "Sorry" or "Sorry I didn't mean to knock you". The tribunal has heard that the Claimant did not socialise with Mr Lewis and was not a close friend of Mr Lewis's. In this context it was unusual for Mr Lewis to choose to use the word "bum".

102. When we considered the Claimant's account, we noted the Claimant appeared to refer to "I touched Anne's bum" (singular) in her initial grievance, but in her claim form and witness statement she had said that Mr Lewis had repeated this phrase. Mr Allsop cross examined the Claimant on this point and she maintained Mr Lewis had actually repeated the phrase. The tribunal considered whether the Claimant was embellishing her account over time, but accept she has not – we accept she was genuinely embarrassed by the incident and if anything has played it down in earlier accounts. In cross examination she explained she was embarrassed to give this evidence. Throughout the hearing the Claimant presented as a quietly spoken lady – she was clearly self-conscious and embarrassed in giving this evidence. She explained she had been bent over picking up her things at the time of contact with Mr Lewis / his bag. She believed the contact had been accidental, but was upset that Mr Lewis had not apologised and had instead said the words he had and said them as publicly as he did.

103. The tribunal accept the Claimant's account of this incident. We accept Mr Lewis said, *"I touched Anne's bum. I touched Anne's bum"* when he had brushed against her and this was addressed to the group rather than to the Claimant. We accept Ms Foley, the trainer was away at a dental appointment that afternoon, leaving Mr Lewis in charge. That same day the group had been made aware the Claimant had complained in some way. Whilst we note Mr Lewis has anxiety which

meant he could present as being brusque or difficult, when he had the opportunity to specifically deny that he had said "I touched Anne's bum" twice, he gave a small speech which explained his reasons for not being sexually attracted to the claimant, rather than saying *"You've got that wrong - I didn't say those words."*

Scott Schedule Item 13

104. The Claimant alleges that on Friday 10th March 2017, as she was leaving the training room she said *"Goodbye"* to a small group of trainees (Robert Powell, Robert Lewis and Sian Jones); she alleges Mr Powell replied "*See you Monday*" and Mr Lewis added "*if she comes back*".

105. Whilst Mr Lewis denies making this comment, the claimant has referred to this comment in her grievance, letter of appeal against the grievance outcome, claim form and witness statement. Friday 10th March 2017 was the last day the Claimant attended work at DWP; on Monday 13th March 2017 she sent her grievance and was signed unfit to work due to work related stress. Given this fact, the dynamic of the group, 'the talk" Ms Foley had with the group that morning, the fact the trainer was away at that point and the comments he had made about touching her bottom, the tribunal accepts it is more likely than not that Mr Lewis did make this comment as the Claimant was leaving the training room. The Claimant had become a target for their jokes and Mr Lewis was joining others in the group in this activity.

Scott Schedule Item 15

106. In closing submissions, the Claimant asked to reinstate allegation 15. This allegation, whilst being stated in the original Scott Schedule, had been "pruned off" as an issue – it was one of the 6 that the Claimant had previously indicated she was no longer pursuing in an effort to make the case more manageable. The tribunal considered it would not be fair to the Respondent or their witnesses to reinstate this allegation at this late stage in the proceedings as it would require recalling witnesses to give evidence. The tribunal does not think it would be furthering the overriding objective (which includes avoiding delay so far as compatible with proper consideration of the issues) if we were to reinstate this allegation.

Scott Schedule Item 16

107. This was initially an allegation of race and age discrimination, but when the Claimant was trying to reduce the issues she agreed to not pursue this as an allegation of discrimination, but rather rely on it as background information. As the hearing progressed a number of the Respondent's witnesses chose to give evidence about this, to explain the circumstances, so we felt it appropriate to make findings of fact, albeit we are not considering these facts as an act of discrimination.

108. The Claimant alleged she was not included in the group emails arranging an end-of-training night out. Mr Lewis's evidence was the clearest explanation of how the night out had been arranged. There had been an open discussion about an end-of-training night out in the training room between trainees and this discussion moved to a chain of emails between trainees. Mr Lewis believed it was either himself or Mr Fenner that started the chain of emails. Mr Lewis said he had overlooked adding the Claimant to the chain of emails. He honestly admitted he had not invited the Claimant to attend the end-of-training night out. Mr Lewis said the Claimant had previously been invited to lunch and chosen not to attend. In cross examination it became clear Mr Lewis had, on previous occasions, said to the group, rather than to the Claimant directly, *"I'm going to the pub; anyone want to join me?"*

109. In oral closing submissions, the Respondent's counsel suggested that arrangements for the end-of-training celebration were not finalised until the week commencing 13th March 2017, by which time the Claimant was no longer in work. The Tribunal finds that, whilst arrangements might not have been finalised, by the 10th March 2017 (the Claimant's last day in work), there were ongoing plans for the end-of-training celebratory evening. The Claimant had not been invited to attend this, but most if not all of the other trainees had been invited, as had the trainer, Nicola Foley.

Alleged Protected Act 2: The Claimant's formal written complaint of 13th March 2017

110. On 13th March 2017, the Claimant submitted a grievance headed "Formal complaint of bullying and racial harassment" [p141 & 142] and started her sick leave on the same day. Her grievance included

"Whilst sitting next to Daisy Cartwright she told me that she had been called a 'Pakki lover' in her previous employment for serving Asians who were waiting in a queue…..

For no justifiable reason, she began to show hostility towards me….

I was speaking to Nichola Foley and commented that it was going to be a warm day and Daisy Cartwright expressed her annoyance….

a member of staff sent out a group email complaining that someone had stolen her icecream from the fridge…After informing the group about the contents of the email, Daisy told them I had stolen the ice cream. I was shocked and expressed my disgust but she carried on for at least 5 minutes until Jacob told her to stop.

Daisy then began to spin around in her chair next to mine and at one stage I had to move quickly out of my desk space in fear that she was going to hit me…

On 9th March 2017, I arrived for training and as I sat down Daisy jumped up and began making signs at Alisha…I became so distressed by the ongoing bullying and harassment that I had to leave the training session on two occasions….

Due to the impact this is having on my learning and on my health I wish to make a formal complaint and hope it will be fully investigated."

Alleged Protected Act 3: The Claimant's telephone conversation with Ms O'Connor on 13th March 2017

111. The tribunal has seen telephone notes indicating that in response to the grievance, Ms O'Connor phoned the Claimant on 13th March 2017 [p143]. The notes record the Claimant as saying she could not return to work alongside these colleagues again and be in the same room as them. Ms O'Connor was not called to give evidence and the Claimant gave very little evidence on the matters discussed during this conversation, so we have not been able to make detailed findings of fact about this conversation.

Scott Schedule Item 17

112. The Claimant alleged that Karen Williams's instruction to Ms Cartwright not to apologise to the Claimant was an act of discrimination. The background to this allegation is as follows:

113. In addition to her grievance of 13th March 2017, on 16th March 2017 the Claimant sent an email which added further allegations [p147]. This also attached a sick note for 21 days (to 5th April 2017). The additional grievance stated *"…as I prepared to leave on 10 March 2017, Robert Lewis touched my bottom and announced to the others "I touched Anne's bum". I presumed this was accidental even though no one had ever accidentally 'touched my bum' in the past. I later heard him comment he did not expect me to come back on Monday".*

114. At some point between 14th and 16th March 2017, Karen Williams was appointed to investigate the Claimant's grievances.

115. On 22nd March 2017, Karen Williams interviewed the Claimant [p154 to 157]. During this interview, the Claimant added to her grievance the incident with body spray and explained she had told the trainer, Ms Foley, she was upset by Ms Cartwright. The Claimant told Karen Williams that Ms Foley, the trainer, had spoken to Ms Cartwright and Ms Blue. The Claimant also told Ms Williams she felt excluded by the group and said the whole group had gone out in the evening but she had not been invited.

116. On 24th March 2017, Ms Williams interviewed [p158 to 175],

- Daisy Cartwright;
- Alisha Blue;

- Jacob Fenner;
- Annabelle Williams;
- Sian Jones;
- Robert Lewis;
- Robert Powell; and
- Sion Wilder.

117. Liz Burt attended as notetaker. During the course of her interview, Ms Cartwright became upset and offered to write a letter of apology to the Claimant. Ms Williams told Ms Cartwright that whilst the investigation was going on there was to be no contact with the Claimant.

118. Ms Williams explained she had told Ms Cartwright this as she was concerned if Ms Cartwright had been allowed to write a letter of apology it could have been seen as an attempt to prejudice the outcome of the investigation. The tribunal accept Ms Williams was right to stop Ms Cartwright from writing a letter of apology at this stage. It could have been seen as an attempt to persuade the Claimant to drop the grievance. The tribunal accept Ms Williams would have given this same advice in any investigation and this advice had nothing to do with the Claimant's protected characteristics.

Scott Schedule Item 18

119. The Claimant alleges, the Respondent accepts and the tribunal notes, that during the grievance investigation interview on 24th March 2017, Ms Cartwright said the Claimant *"didn't have much in common with the rest of the group as she was that bit older".* This is captured in the minutes of Ms Cartwright's interview [p159].

120. In addition, the minutes of the interview with Ms Blue note the following,

"[Ms Williams]: Do you feel [the Claimant] was part of the group?

[Ms Blue]: yes but she is older than the rest of us and she didn't have anything in common with her."

121. The minutes of the interview with Mr Fenner record him as saying *"[the Claimant] is older than the rest of us".*

Scott Schedule Item 19

122. The Claimant alleges, the Respondent accepts and the tribunal notes, during the investigation, the Claimant was not given a copy of the minutes of the Claimant's interview to be able to approve the accuracy of these minutes and to clarify the issues.

123. At the time of undertaking the interviews (22nd and 24th March 2017), Karen Williams believed she was fact-finding and that someone else would be determining the Claimant's grievance. On 4th April 2017 she

was told she was to determine the grievance, so on 5th April 2017 she wrote to the Claimant confirming her decision.

124. The Tribunal were concerned that the minutes of the grievance interviews appeared to be very brief – the questions had been set out in detail, but actual witness responses were very brief rather than capturing the full account each witness had given. Of more concern was the fact Ms Williams had reassured Ms Cartwright at the end of her interview [p161] that she would *"get her report written up quickly so this matter could be resolved as soon as possible…She also stated that Daisy was not to worry about any outcome…".* Ms Williams was making these comments before she had interviewed the seven remaining witnesses. The Claimant had made allegations of racial harassment against Ms Cartwright; this comment at the end of the interview caused the Claimant to feel Ms Williams had prejudged the grievance.

Scott Schedule Item 20

125. The Claimant alleges, the Respondent accepts and the tribunal notes, in her grievance decision [p152], Ms Williams concluded there was *"no malicious intent to cause offence"* and did not uphold the Claimant's grievance.

126. In her grievance decision letter of 5th April 2017 [p150], Karen Williams states,

"I am writing about our grievance meeting on 22nd March 2017 where we discussed your complaint against Daisy Cartwright for bullying and racial harassment.

The main reasons for your grievance were that Daisy had made unnecessary racial comments which you felt had been directed at yourself and that her behaviour towards you was intimidating over a four-week period.

My decision is to not uphold your complaint..the basis for the decision is that from the evidence I gathered I did not identify any malicious intent to suggest bullying or racial harassment."

127. In the Investigation Report [p151 to 153] that accompanied this letter, Karen Williams identified the subject of the complaint as being Daisy Cartwright alone. She explains her meeting with the Claimant and notes

"It was clear from the meeting that [the Claimant] had felt intimidated in the workplace which she felt had occurred due to her age difference with the majority of the group and she also felt that her ethnicity played a part….Her complaint is against Daisy Cartwright but she had felt increasingly isolated from the group as a whole."

Having noted the interviews she undertook, Ms Williams concludes

"My findings from these interviews is that there was no malicious intent to cause offence and certainly the overall feeling was that Daisy Cartwright was the only person within the group who made a concerted effort to keep [the Claimant] involved. Daisy was visibly upset and shocked by the complaint and I felt this reaction was genuine. The incidents (listed 1-4) described by [the Claimant] are not denied by anyone involved but the context in which they occurred have not been interpreted as offensive or intimidating by anyone else….With regards to the complaint of racial harassment whilst [the Claimant] has taken offence personally to the comment made I am satisfied from the explanation that the context in which the comment made was not from a racial element…..I have considered if what has happened could be reasonably considered to cause offence and whilst it is not doubted that [the Claimant] feels aggrieved by the incidents described, my answer to that question is no. Whilst I do not uphold the complaint of bullying and racial harassment…the evidence obtained through the interviews with all parties suggest that Daisy has exhibited unprofessional behaviour in the work place and has often taken jokes too far. Although from the evidence I do not believe there has been any malicious intent behind this, this situation undoubtedly caused [the Claimant] distress and I am recommending to the Line Manager that a discussion is held with Daisy regarding standards of behaviour and appropriateness of topics of conversation in the workplace. I also recommend this is carried out with the rest of the team."

128. It is unfortunate that whilst Karen Williams had completed Equality and Diversity training at some point, she could not remember when. She believed the Respondent had a policy of requiring managers to repeat this training every 3 years but could not recall her training.

Scott Schedule Item 21

129. The Claimant alleged Karen Williams had only addressed 5 alleged incidents rather than the 10 incidents reported by the Claimant. Whilst the Appendix to the Report [p154 to 157] only identified 5 incidents in its headlines, the Tribunal can see that the questions of witnesses were trying to cover the other allegations. The Tribunal note this was Ms Williams's first grievance investigation and this explains why she was not as meticulous as perhaps she ought to have been in identifying, fully investigating and reaching conclusions on each precise allegation.

Alleged Protected Act 4: the Claimant's written appeal against the grievance outcome

130. By letter of 9th April 2017 [p176] the Claimant appealed the outcome of her grievance by enclosing her original grievance and explaining *"I am writing to appeal the decision following the investigation of my formal complaint of bullying and racial harassment…..Although all the incidents I have complained of have been admitted, Karen Williams has decided the incidents 'could not be reasonably considered to cause*

offence'. I am appealing this decision as it is irrational, unfair and biased."

131. By letter of 21st April 2017 [p177 to 178], Alison Thomas invited the Claimant to attend an appeal meeting with herself. This letter was sent by recorded delivery. Royal Mail reported they had been unable to deliver the letter and it had not been collected from the sorting office.

132. By letter of 11th May 2017 [p180 to 181], Alison Thomas explained the difficulty in delivering the original invitation to appeal meeting and rearranged the meeting to take place on 19th May 2017. To ensure the Claimant received this letter, Mr Steadman posted it through the Claimant's letterbox.

133. By letter of 19th May 2017 [p184 to 187], the Claimant provided a full explanation of her grounds of appeal. In particular, the tribunal notes the Claimant was objecting that the Equalities Act 2010 did not require proof of *"malicious intent".* The Claimant also pointed out that Ms Williams appeared to have merged her 10 allegations into 5 incidents and made errors in investigating the allegations – for instance, Ms Williams had investigated the "if she comes back" comment by asking witnesses if they heard Rob Lewis say this to the Claimant <u>on the stairs</u>; the Claimant's allegation was that it was said <u>in the training room</u>. These errors arose, as Ms Willliams had not asked witnesses (and particularly the Claimant) to check and approve their statements prior to making her decision.

Scott Schedule Item 22

134. The Claimant's appeal against the grievance outcome was considered by Alison Thomas. The Claimant alleged Ms Thomas's decision not to uphold the Claimant's appeal [p199 to 201] and the comment in Ms Thomas's decision that were acts of discrimination [p200].

135. Ms Thomas explained she undertook a review of the grievance process, rather than re-hearing the grievance in its entirety. In response to the Tribunal's question, she confirmed she believed she had two options available to her – to uphold the decision or not uphold it. She did not appreciate she was able to recommend mediation and in response to Tribunal questions accepted, with hindsight she should have considered this.

136. The Tribunal had the benefit of seeing Ms Thomas's handwritten notes [p148 & 149]. Ms Thomas had clearly noted *"Why was Nicola not called as a witness?"* and yet did not appear to interview Nicola Foley herself or make further enquiries into this. The only person Ms Thomas interviewed as part of her review was the Claimant.

137. Unfortunately the appeal process was not as thorough as it could have been. For instance, it was not until this tribunal hearing that Ms Thomas realised that Karen Williams had undertaken a "fact finding"

exercise and had not realised she was going to be the grievance decision maker until after she had concluded her investigation. Ms Thomas did not properly investigate the Claimant's objection that Ms Williams had failed to investigate the allegation against Mr Lewis. When Ms Thomas was asked by the Tribunal whether she had seen this as being a complaint against a number of trainees, Ms Thomas confirmed she had considered this with HR but had treated it as a complaint against Ms Cartwright alone. With the benefit of hindsight, Ms Thomas accepted the allegation that the Claimant was left out of the group night out could have been evidence of harassment.

138. The Tribunal find that Ms Thomas did not undertake a full review of each of the objections raised in the Claimant's appeal.

139. The Tribunal were concerned that Ms Thomas, who held a senior position at DWP, appeared to have an inadequate understanding of diversity and equality issues. For instance, during cross examination, when Ms Thomas was asked to identify indicators of harassment, her response was *"I couldn't tell you off the top of my head"*. Ms Thomas confirmed that she would have undertaken diversity training at some point in the last 3 years but could not recall when. She confirmed this would have been eLearning training.

140. In Alison Thomas's appeal outcome letter [p200] she stated

"I know that during our appeal meeting you wanted to highlight that references had been made in witness statements to your age, but that you did not actually tell your colleagues at any time how old you were. Although this may be the case, <u>I do accept that individuals will form an opinion on such matters when they meet someone, based on a number of factors, and as such this is part of human nature</u>." [Tribunal's emphasis]

The Tribunal were disappointed to see this conclusion stated in a discrimination grievance appeal outcome letter. This statement, stated as it was without any further comment, implies that discrimination related to age is part of human nature and should just be tolerated..

Scott Schedule Item 23

141. The Claimant alleged that she had been dismissed without notice and this was an act of discrimination. The Respondent accepted the Claimant had been dismissed but asserted she was paid 5 weeks' notice pay.

142. The background to this allegation is that the Claimant was on sick leave with work related stress from 13th March 2017. On 13th March 2017 Emma O'Connor phoned her [p143] and offered to move the Claimant to a different team within the same DWP building. The Claimant did not want to return to work until the investigation had been concluded. During the same telephone conversation, Ms O'Connor

offered to refer the Claimant to occupational health, but the Claimant declined this.

143. Ms O'Connor phoned the Claimant on 14th, 16th, 20th, 23rd, 27th March 2017 [p144 to 145]. During these telephone conversations, the Claimant repeatedly stated she did not wish to be referred to occupational health and she did not feel able to return to work. In the conversation on 27th March 2017, the Claimant asked Ms O'Connor to cease phoning as she was communicating through ACAS with DWP's HR.

144. On 20th April 2017, Ms O'Connor was told by DWP's HR department that ACAS conciliation had come to an end, that the Claimant had decided not to return to work and that she was to follow the attendance management procedure.

145. Ceri Morris phoned the Claimant on a number of occasions (and sometimes on a number of occasions on the same day) [p202] as part of the DWP's Attendance Management policy. The Tribunal notes that on 14th June 2017, the Claimant had not yet received the outcome of the Grievance Appeal and was anxious that she did not want contact from anyone at DWP. The Claimant was requesting the appeal outcome be sent to her by email, but the Respondent was concerned about the security of email communications.

146. On 26th June 2017 Ms Morris attempted to phone the Claimant on a number of occasions during the day and eventually spoke to her at 5.20pm. The Claimant confirmed she had received the grievance appeal outcome and Ms Morris asked how she was feeling. Ms Morris wanted to discuss a stress reduction plan in connection with returning to work, but the Claimant did not want to discuss this.

147. The tribunal notes an email from Aidan Price, the Claimant's union representative, to Ms O'Connor, dated 28th June 2017 [p204 and 205]. Mr Price writes *"As a result of our conversation, I would be grateful if you no longer contact [the Claimant] who is currently off sick and is feeling incredibly stressed and concerned about her future having recently raised a racial harassment and bullying complaint…..I'm not sure why you were contacting [the Claimant] often on a daily basis, given the sensitive nature of this case and the member's health and when guidance states that the frequency of contact should be agreed between the parties?....After speaking to [the Claimant] I will be contacting HR to find someone outside of this process; someone who is better placed to help [the Claimant] possibly start taking steps forward; she is also reluctant to return to Caerphilly after the treatment she had received; therefore a move to another office other than Caerphilly may be appropriate".*

(Alleged Protected Act 5: the Claimant issuing Employment Tribunal proceedings)

148. The Claimant presented her ET1 claim on 28th June 2017 [p1 to 21]. This alleged harassment, direct discrimination and victimisation (by reference to the protected characteristics of race, age and sex). The ET1 was vetted and date-stamped on 7th July 2017 before being served on DWP on 21st July 2017.

149. By letter of 4th July 2017 [p206 & 207], Ms Morris asked the Claimant to attend an absence management meeting at the Caerphilly office on 13th July 2017 or to telephone to make other arrangements for a meeting.

150. The Claimant asked for the meeting to be conducted by telephone. An attendance management meeting was conducted by telephone, by Ms Morris on 13th July 2017.

151. This telephone conversation was formally minuted [p211 to 213]. During the conversation, the Claimant asked whether Ms Morris had received the Employment Tribunal claim form and asked *"what proposals are you to come up with for me to return to work?"* Ms Morris asked *"what could be put in place to allow her to come back?"* The Claimant explained she did not feel she had been treated fairly and had been working in a hostile environment. The Claimant explained her difficulty in returning to work in that building. The Claimant requested a copy of her employment contract and the "sickness policy" and explained she didn't have a phone number to contact HR to request them. Ms Morris gave the claimant a phone number for HR.

152. By letter of 26th July 2017 [p214 to 216] Ms Morris provided the Claimant with a copy of the minutes of their telephone discussion on 13th July 2017. Also on 26th July 2017, Ms Morris wrote out an Attendance Management Report, [p217 & 218] which contained the following,

"[The Claimant] has been absent due to "stress at work" and feels that the investigation into her complaint was unfair and she has been treated unfairly. She would like another investigation carried out. [The Claimant] has refused a referral to occupational health and also refused all offers to support her return to work. [The Claimant] appealed against the outcome of her grievance and has received the outcome, she is now taking the matter forward with an external Employment Tribunal.

At the end of her one-page report, Ms Morris concludes "*I recommend that [the Claimant] is dismissed. They have been given adequate guidance, support and time to improve their attendance, but have not shown that there is any reasonable prospect of achieving the required level of attendance within a reasonable timescale."*

153. In response to Tribunal questions, Ms Morris confirmed she had not requested an occupational health referral with the Claimant in her

telephone call on 13th July 2017, but had done so in one of the earlier calls.

154. The tribunal notes that at the time of writing this report, Ms Morris was aware the Claimant did not have her employment contract and did not have a copy of the sickness policy. In answering the Tribunal's questions, Ms Morris explained that it was not possible for a line manager to phone the shared services HR and request they send a copy of an employment contract to an employee that was on sick leave. The employee had to phone shared services and request it themselves.

155. When the tribunal enquired about the possibility of the Claimant moving to work in a different building (as Mr Price had suggested), Ms Morris confirmed she had only explored opportunities in the Caerphilly building, but she believed Ms O'Connor had looked for opportunities in a different building in April 2017. When it was suggested she could have looked for opportunities in other buildings in July 2017, Ms Morris admitted she could have done but hadn't done so.

156. In response to Ms Morris's letter of 26th July 2017, the Claimant wrote a letter of 28th July 2017 [p219 to 222]. This included the following comments,

"3. I did not say "What proposals are you to come up with for me to return to work?" I said that it is for you to put forward proposals for my return to work. On at least two previous occasions when you telephoned, I asked you to put forward your proposals for my return in writing. This has not been done.

4. I attempted to contact HR on the telephone number you provided but I was informed it was the wrong number. I was provided with another number and spoke to Andrew (Team K, Newcastle Call Centre). He informed me that the sickness policy is in restricted information only available on the intranet. He asked me to send an email to …..to request my contract of employment. I am yet to receive my contract of employment."

157. By letter of 18th September 2017 [p223 & 224], the Claimant was invited to attend a sickness absence meeting with Linda Clarke on 29th September 2017, at the Caerphilly office. This letter confirmed Ms Clarke would be considering whether the Claimant should be dismissed or demoted or whether her absence level should continue to be supported. The Tribunal notes this invited the Claimant to attend a meeting at the Caerphilly office, which was not very thoughtful, given the Claimant's work-related stress and difficulty in returning to the Caerphilly office building.

158. The Claimant did not receive Ms Clarke's letter of 18th September 2017 and was not aware of the meeting on 29th September 2017 until after the event.

159. Ms Clarke prepared for the 29th September 2017 meeting by reading Ms Morris's notes (including the Attendance Management Report, [p217 & 218] and the Claimant's letter of 28th July 2017 [p219 to 222]). When the Claimant did not attend the meeting on 29th September 2017, in October 2017, Ms Clarke made enquiries of Ms Morris and was told that Ms Morris was not surprised the Claimant had not attended the meeting and the Claimant had made it clear she did not want further contact from the Respondent. Ms Clarke attempted to phone the Claimant but the Claimant did not pick up the phone.

160. On 4th October 2017, Ms Clarke made enquiries of the Post Office and learnt that the Claimant had not picked up Ms Clarke's letter of 18th September 2017 from the Post Office; this letter had been sent by recorded delivery. Ms Clarke knew (from Ms Morris) that the Claimant had not collected other letters from the Post Office that had been sent via recorded delivery. Ms Clarke did not seek to rearrange the meeting, but instead concluded the Claimant was not going to engage with the Respondent.

161. Ms Clarke's evidence was that she considered the circumstances, including *"that the Claimant had been given every opportunity to state her views but had declined to do so or engage with the process. She had not taken the opportunity to attend the meeting and make representations at that meeting or in writing / by telephone".* Ms Clarke sent her letter of 4th October 2017, confirming her decision to dismiss the Claimant.

162. Her letter of 4th October 2017 [p225 & 226] states,

"You started employment with DWP on 13/02/2017, you commenced training and went off sick on 13/03/2017 with 'stress at work'. I understand from the case file that you raised a grievance of bullying and racial harassment which was not upheld, since that time you have not engaged with DWP…..After considering all the relevant factors, I have decided that your employment with DWP must be terminated because you have failed to maintain an acceptable level of attendance / have been unable to return to work within a timescale that I consider reasonable….You are entitled to 5 weeks' notice. However you are not required to work your notice period. I have agreed that you will receive a payment instead of serving the notice period. Your effective date of dismissal will therefore be 06/10/2017."

163. In the "Attendance Management Decision Maker's Record of Decision" [p227 & 228], Ms Clarke notes *"[The Claimant] started employment on 13.02.2017 and went sick on 13.03.2017 with stress at work, she put in a grievance that was investigated but not upheld. [The Claimant] has refused to engage with DWP, consent to an OHS [occupational health referral] or attend any meeting be it face to face or over the telephone. [The Claimant] has made no attempts to engage or come back to work. I have made the decision to dismiss."*

164. It appeared from the decision letter and the record of decision that Ms Clarke did not fully consider the Claimant's 4-page letter of 28th July 2017. During the Tribunal's questions, when it was suggested that the Claimant's letter of 28th July 2017 did not demonstrate the Claimant was wholly failing to engage with DWP, Ms Clarke explained the Claimant had asked for no contact and had not collected letters from the Post Office. It was suggested to Ms Clarke that this might be indicative of someone experiencing mental illness and Ms Clarke accepted that mental illness would affect each person differently. Ms Clarke explained she thought the Claimant would appeal the decision to dismiss her and this would give her "another bite at the cherry".

Scott Schedule Item 25

165. The Claimant alleged the Respondent had delayed the Claimant's final pay and this was an act of discrimination. The Respondent alleges the Claimant received her final pay on 30th November 2017.

166. As we have previously noted the Claimant did not receive her employment contract until 12th October 2017, 6 days after her dismissal. The Claimant has never received her October and November 2017 payslips.

167. Linda Clarke's evidence was that after her decision to dismiss, the Claimant's line manager, would have completed the form at Pages 239a & b in the bundle. This form "RMG32: Leaving Organisation Form" confirmed the Claimant's last day of service as being 6th October 2017 and indicated she had been dismissed, with the reason for dismissal being selected from a dropdown menu. On p239a, someone, has selected "Unsatisfactory References" as the reason for dismissal, which is clearly an inaccurate description. Further in the sections at the bottom of the form for "Payment instead of Notice Period" and for "Compensation in Lieu of Notice Period" both have been left unselected or left to read "No". This form was dated 13/10/2017, but an identical copy of the form appeared at Pages 239c & d in the bundle, albeit this is dated 29/11/2017.

168. By email of 31st October 2017 [p234], the Claimant wrote to Ms Morris explaining she had not received her final payslip and needed it to be able to claim Jobseekers Allowance. Later that day the Claimant sent a further email [p233 & 234] to Ms Morris confirming she had not been paid her final pay and had no money for food.

169. Ms Morris replied by email that same day [p234] explaining she could not access the Claimant's payslips or any of the Claimant's personnel details. She provided the Claimant with a contact number for Shared Services HR. Calls to this telephone number are charged at 2p per minute plus network provider connection charges.

170. The Claimant responded by requesting an email address for Shared Services HR. Ms Morris confirmed there was no email address but the Claimant would be able to send a text [p232].

171. The Claimant responded by asking Ms Morris to contact Shared Services HR and ask them to contact the Claimant on her home phone number. Ms Morris contacted Shared Services and was advised they were *"unable to call employees or ex-employees"* [p231].

172. On 1st November 2017, the Claimant emailed Ms Morris again confirming she was still waiting for her payslip and salary and pleading for someone from DWP to chase this up urgently. Ms Morris contacted Shared Services HR again and was told they could not disclose information to Ms Morris and told the Claimant had to contact them directly [p230].

173. In December 2017, the Claimant received £2,418.83 into her bank account, from the Respondent. As she still has not received a payslip for October or November 2017, she is unsure how this has been calculated. None of the Respondent's witnesses have been able to assist in this regard.

174. Ms Clarke and Ms Morris were able to explain that payroll were not aware of the Claimant's dismissal until 17th October 2017, which was after the 13th October 2017 cut off for the October payroll. They both confirmed that due to the length of the Claimant's sick leave, she would not have been in receipt of sick pay at the end of her employment.

175. It may be the case that itemised pay statements have been prepared and are available on the DWP internal intranet, but this is inaccessible to an employee that is on sick leave and unable to attend DWP premises. Further this is inaccessible for a former employee.

176. Ms Morris believed the Claimant had been overpaid in the final amount paid to her, but could not explain how. The Tribunal accepts the Claimant's account (which is not challenged by the Respondent's witnesses) that DWP had subsequently demanded repayment of part of this final payment and threatened her with legal action in relation to the alleged overpayment. DWP had passed the Claimant's details to debt collectors in relation to this alleged overpayment.

Respondent's submissions

177. The Respondent's counsel presented a Skeleton Argument comprising 13 pages. The Tribunal will not attempt to summarise those submissions but incorporates them by reference.

178. As the Claimant was a litigant-in-person, it was agreed the Respondent's Counsel would give oral submissions first. The Employment Judge took a detailed note of each party's oral submissions.

179. During lengthy oral closing submissions, on 10th September 2018, the Respondent's counsel reminded the Tribunal of the burden of proof and the need for the Claimant to establish a causal link between any detriment and the Claimant's protected characteristics. The Respondent's counsel submitted the sheer number and the nature of allegations being made by the Claimant called into question the Claimant's credibility and her perception of events. He highlighted areas of inconsistency in the Claimant's account of events. Counsel for the Respondent then took the Tribunal through each of the Scott Schedule Items and made submissions specific to that allegation. In particular, counsel emphasised the need for the Tribunal to carefully examine the context of each event.

Claimant's submissions

180. The Claimant presented oral closing submissions during the afternoon of 10th September 2018. She did this by taking the Tribunal through each of the Items on the Scott Schedule. She identified areas where the respondent's witnesses had provided inconsistent evidence. During the course of these submissions, the Claimant applied to reintroduce Items on the Scott Schedule that had been pruned out prior to the hearing.

181. After hearing the Claimant's oral closing submissions, the Respondent's counsel was able to make further closing submissions to address matters raised by the Claimant. In particular, the Respondent's Counsel objected to the Claimant's application to reintroduce Items on the Scott Schedule that had been pruned out in an effort to make the case more manageable (eg Item 15).

182. Having heard further submissions from both parties upon the point, the Tribunal determined it would not further the overriding objective if we were to allow allegations of discrimination to be revived so late in the proceedings – the Respondent would have to recall witnesses and there would be substantial delay in concluding these proceedings.

Relevant law

183. During this hearing, the Tribunal have been referred to and have considered the following authorities:

- *Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931, CA;*
- *Laing v Manchester City Council and anor 2006 ICR 1519, EAT;*
- *Madarassy v Nomura International plc 2007 ICR 867, CA;*
- *Hewage v Grampian Health Board 2012 ICR 1054, SC;*
- *Ayodele v CityLink Ltd and anor 2018 ICR 748, CA;*
- *Unite the Union v Nailard 2017 ICR 121;*
- *Bakkali v Greater Manchester Buses (South) Ltd t/a Stage Coach Manchester EAT 0176/17;*

- *Chawla v Hewlett Packard Ltd 2015 IRLR 356, EAT;*
- *Chief Constable of Greater Manchester Police v Bailey 2017 EWCA Civ 425, CA;*
- *Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL;*
- *London Borough of Southwark v Afolabi 2003 ICR 800, CA.*
- *Apelogun-Gabriels v London Borough of Lambeth and anor 2002 ICR 713, CA*
- *Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA*,
- *Rhys-Harper v Relaxion Group plc and ors 2003 ICR 867, HL*
- *Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting 2002 ICR 646, CA*
- *Burton and anor v DeVere Hotels Ltd 1997 ICR 1, CA*,
- *Mandla and anor v Dowell Lee and ors 1983 ICR 385, HL*.
- *Reed and anor v Stedman 1999 IRLR 299, EAT*

184. The provisions of the Equality Act 2010 ("EqA") apply to these claims. EqA protects employees from discrimination based on a number of "protected characteristics". These include race (see Section 9 EqA), age (see Section 5) and sex (see Section 11).

185. Chapter 2, EqA lists a number of forms of "prohibited conduct". In this claim, the Claimant alleges three types of prohibited conduct: direct discrimination, harassment and victimisation.

The claim of direct discrimination

186. S 39(2) EqA provides an employer must not discriminate against an employee by dismissing them or subjecting them to any other detriment.

187. Direct discrimination is defined by S13 EqA (so far as is material) in these terms:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats of would treat others.
(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

188. Direct discrimination is comparatively simple: It is treating one person less favourably than you would treat another person, because of a particular protected characteristic that the former has. The protected characteristic has to be the reason for the treatment. Sometimes this will be obvious, as when the characteristic is the criterion employed for the less favourable treatment. At other times, it will not be obvious, and the Tribunal will need to consider the matters the decision maker had in

mind, including any conscious or sub-conscious bias. No hostile or malicious motive is required. However, direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic.

189. The Claimant has to demonstrate less favourable treatment: it is not enough to show she has been treated differently.

190. S 23(1) EqA provides there should be no material difference in circumstances between the claimant and any comparator or hypothetical comparator (save for the protected characteristic).

The claim of Harassment

191. S40 EqA provides an employer must not harass an employee.

192. Harassment is defined in S26 EqA, which provides:

(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

193. The effect of s26 is that a claimant needs to demonstrate 3 essential features: unwanted conduct; that has the proscribed purpose or effect; and that relates to either her race or her age or her sex. There is no need for a comparator.

194. The EHRC Employment Code explains that unwanted conduct can include "a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour".

195. "Unwanted" is the same as "unwelcome" or "uninvited."

196. When considering whether the conduct had the proscribed effect, the tribunal undertakes a subjective/objective test: the subjective element involves looking at the effect the conduct had on the claimant (their perception); the objective element then considers whether it was reasonable for the claimant to say it had this effect on her (see

Richmond Pharmacology v Dhaliwal [2009] ICR 724). The EHRC Employment Code notes that relevant circumstances can include those of the claimant, including his/her health, mental health, mental capacity, cultural norms and previous experience of harassment; it can also include the environment in which the conduct takes place.

197. In *Weeks -v- Newham College of Further Education UK EAT 0630/11* Mr Justice Langstaff said that ultimately findings of fact in harassment cases had to be sensitive to all the circumstances; context was all important.

198. It was pointed out by Elias LJ in the case of *Grant v HM Land Registry [2011] EWCA Civ 769* that the words "violating dignity", "intimidating, hostile, degrading, humiliating, offensive" are significant words. As he said:

"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."

199. Exactly the same point was made by Underhill P in *Richmond Pharmacology*

"..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 (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

200. "Violating" is a strong word. Offending against dignity, hurting it, is insufficient. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.

201. In *Warby v Wunda Group plc, UKEAT 0434/11, 27 January 2012,* context was again emphasised

"…we accept that the cases require a Tribunal to have regard to context. Words that are hostile may contain a reference to a particular characteristic of the person to whom and against whom they are spoken. Generally a Tribunal might conclude that in consequence the words themselves are that upon which there must be focus and that they are discriminatory, but a Tribunal, in our view, is not obliged to do so. The words are to be seen in context;"

202. The Tribunal should consider the circumstances shown by the facts it found as a whole. In *Read and Bull Information Systems Ltd v Stedman [1999] IRLR 299* , Morison J noted:

"It is particularly important in cases of alleged sexual harassment that the fact-finding tribunal should not carve up the case into a series of specific incidents and try and measure the harm or detriment in relation to each. As it has been put in a USA federal appeal court decision (eighth circuit) [USA v Gail Knapp (1992) 955 Federal Reporter , 2nd series at page 564]:
'Under the totality of the circumstances analysis, the district court [the fact finding tribunal] should not carve the work environment into a series of incidents and then measure the harm occurring in each episode. Instead, the trier of fact must keep in mind that "each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes." '"

The claim of Victimisation

203. S39 (3) and (4) EqA sets out the circumstances in which victimisation is prohibited in the employment field. These include dismissing an employee (s39 (4)(c) and subjecting an employee to any other detriment (s39(4)(d)).

204. Former employees can claim victimisation under the EqA: see Underhill LJ interpretation of s108 EqA in *Rowstock Ltd and anor v Jessemey 2014 ICR 550, CA*.

205. S27 EqA provides,

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

(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

206. Essentially, to succeed with a victimisation claim, a claimant must establish two matters: that they have been subjected to a detriment (see next paragraph) and that this was because s/he had done a protected act or the employer believed s/he had done or might do a protected act.

207. In discrimination law, a "detriment" occurs when, by reason of the act(s) complained of a reasonable worker would or might take the view that he has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment. (see Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL).

208. In relation to s27(2)d EqA, it is not necessary for the claimant to use the words "Equality Act", however the asserted facts must be capable of amounting to a breach of the Equality Act.

209. A person claiming victimisation does not need to show the detrimental treatment was received solely because of the protected act. Per Nagarajan v London Regional Transport 1999 ICR 877, if the protected act has a *"significant influence"* on the employer's decision-making, discrimination has been proved. It was later confirmed in Igen Ltd v Wong 2005 ICR 931, that for an influence to be *"significant"* it has to be *"an influence which is more than trivial".*

An Employer's liability?

210. S109 EqA provides that anything done by an employee in the course of his employment must be treated as being also done by the employer. It does not matter whether that thing is done with the employer's knowledge or approval. However, it is a defence for the employer to show that it took all reasonable steps to prevent that employee from doing that thing, or from doing anything of that description.

The burden of proof in discrimination claims

211. S136 Equality Act 2010 establishes a "shifting burden of proof" in a discrimination claim. If the claimant establishes facts, from which the tribunal could properly conclude, in the absence of an adequate explanation, that there has been discrimination, the tribunal is to find that discrimination has occurred, unless the employer is able to prove that it did not. In the well-known cases of *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332 and Igen Ltd & others v Wong & others [2005] IRLR 258*, the Court of Appeal gave the following guidance on how the shifting burden of proof should be applied:

211.1. It is for the claimant to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant that is unlawful. These are referred to below as "such facts".

211.2. If the claimant does not prove such facts their discrimination claim will fail.

211.3. It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves.

211.4. In deciding whether the claimant has proved such facts, remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

211.5. It is important to note the word "could". At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

211.6. In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

211.7. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a questionnaire….

211.8. Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

211.9. Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of [eg race], then the burden of proof moves to the respondent.

211.10. It is then for the respondent to prove that he did not commit that act.

211.11. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of race, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

211.12. That requires a 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 race was not a ground for the treatment in question.

211.13. 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. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

212. In *Madarassy v Nomura International plc [2007] IRLR 246*, the Court of Appeal warned against allowing the burden to pass to the employer where all that has been shown is a difference in treatment between the claimant and a comparator. For the burden to shift there needs to be evidence that the reason for the difference in treatment was discriminatory. It is also well established that treatment that is merely

unreasonable does not, of itself, give rise to an inference that the treatment is discriminatory.

213. It is also established law that if the tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious discrimination, then it is not improper for a tribunal to find that even if the burden of proof has shifted, the employer has given a fully adequate explanation of why they behaved as they did and it had nothing to do with a protected characteristic (see *Laing v Manchester City Council 2006 ICR 1519)*.

214. Very little direct discrimination is overt or even deliberate. The tribunal should look for indicators from the time before or after the decision, which may demonstrate that an ostensibly fair-minded decision was, or equally was not affected by racial bias. (see *Anya v University of Oxford [2001] ICR).*

215. Having reminded ourselves of the authorities on the burden of proof, our principle guide must be the straightforward language of S136 EqA itself.

Time Limits

216. S123 EqA prescribes time limits for presenting a claim:

(1) …Proceedings…may not be brought after the end of-
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the tribunal thinks just and equitable
…
(4) For the purposes of this section-
(a) conduct extending over a period is to be treated as done at the end of the period;

217. The leading authority on determining whether "conduct extends over a period of time", or not, is the Court of Appeal decision in the *Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530*. This established that the employment tribunal should consider whether there was an "ongoing situation" or "continuing state of affairs" (which would establish conduct extending over a period of time) or whether there were a succession of unconnected specific acts (in which case there is no conduct extending over a period of time, thus time runs from each specific act). As Lord Justice Jackson indicated in *Aziz v First Division Association [2010] EWCA Civ 304*, in considering whether there has been conduct extending over a period, one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents.

Conclusions

218. The Tribunal started by considering whether it had jurisdiction to hear the allegations contained in Item 1 and 2 of the Scott Schedule, these being outside the usual 3-month limitation period.

219. The Tribunal concluded that the incidents alleged in Item 1 and 2 of the Scott Schedule formed part of conduct that extended over a period of time as they were further incidents of Daisy Cartwright's behaviour towards the Claimant. The Claimant experienced an ongoing situation with Daisy Cartwright, right from the start of her employment. Daisy Cartwright is involved in the behaviour alleged in Items 1, 2, 3, 4, 5, 7 and 18 – this was conduct from the first week of training (week beginning 13th February 2017) through to the Claimant's last week in work (incidents on 8th and 9th March 2017).

220. The Tribunal found that Item 1 and 2 of the Scott Schedule were part of a continuing course of conduct and that the Tribunal had jurisdiction to consider these complaints.

221. Further and in the alternative, the Tribunal is mindful that one month after the incidents in Item 1 and 2 of the Scott Schedule, the Claimant was signed off work with work related stress and continued to be signed unfit for work up until the hearing. As such, and as the Claimant had presented her claim on 28th June 2017, the Tribunal found it would have been just and equitable to extend the time limit for presenting the claims in Item 1 and 2.

Direct discrimination

222. The issue of appropriate comparators was not really contested. In the Scott Schedule, for each allegation, the Claimant had identified one of more of the other 8 trainees that were undertaking the same training as her. The Respondent did not take issue with this. The Tribunal accepts that the other 8 trainees were appropriate comparators, as they did not share the Claimant's age group or race and there was no material difference to their circumstances.

223. In relation to each allegation, the Tribunal started by considering whether the Claimant had been treated less favourably than the comparator, ie objectively viewed, had the Claimant been subjected to a detriment compared to the comparator? If we were satisfied the Claimant had been treated less favourably we went on to consider whether this less favourable treatment was because of the claimant's protected characteristic. In each of the allegations listed below we found the Claimant had not established facts from which we could properly conclude in the absence of other explanation that the Respondent had directly discriminated against the Claimant. Our findings in this regard were as follows:

223.1. Scott Schedule Item 1, Ms Cartwright telling the Claimant that Ms Cartwright had previously been called "Paki Lover": the Tribunal considered whether Ms Cartwright describing to the Claimant an incident that had occurred during her previous employment and using this phrase could be regarded as the Claimant being treated less favourably. The Tribunal concluded it could not. The Tribunal considered whether a reasonable worker would consider the Claimant had been subjected to a detriment by Ms Cartwright's conversation and concluded they would not. Further and in the alternative, the Tribunal concluded that Ms Cartwright was just as likely to repeat this story, including the highly offensive language, to other trainees that did not share the Claimant's race.

223.2. Scott Schedule Item 2, Ms Cartwright telling the Claimant it was racist for the Claimant to comment it always rains in Wales and saying "*It's [the Claimant]'s weather report again*". The Tribunal concluded that, viewed objectively, the reasonable worker would not regard this as being subjected to a detriment. Further and in the alternative, Ms Cartwright had made the same comments to Ms Williams who did not share the Claimant's age group or racial origins.

223.3. Scott Schedule Item 3, Ms Cartwright accusing the Claimant of stealing ice-cream. The context to this was that other people in the group were also accused of stealing the ice-cream and this was supposedly said in jest. However, Ms Cartwright repeatedly made this accusation and the Claimant was upset by the accusation such that others intervened. As others in the group were also accused, the Tribunal had to consider whether being accused more times than others could be regarded as being subjected to a detriment. We felt that a reasonable worker would not regard this as being subjected to a detriment.

223.4. Scott Schedule Item 4, Ms Cartwright deliberately spraying herself with body spray, whilst next to the Claimant, just after the Claimant had complained about Mr Lewis spraying body spray. The Tribunal considered whether it was possible to find that the Claimant had been treated less favourably, (as she disliked body spray), than Annabelle Williams who had been caused to cough by Daisy Cartwright's actions. The Tribunal concluded this was not an act of treating the Claimant less favourably than others. Again, we felt a reasonable worker would not regard this as being subjected to a detriment.

223.5. Scott Schedule Item 5, Ms Cartwright spinning on her chair next to the Claimant after the Claimant had said it was making her feel sick. The Tribunal considered whether a reasonable worker would consider this act to be detrimental treatment. The Tribunal concluded the act of spinning on a chair next to someone, even if that person felt they had to move away, could

not be said to amount to subjecting that person to detrimental treatment.

223.6. Scott Schedule Item 7, Ms Cartwright making gestures to Ms Blue immediately after the Claimant had sat next to Ms Cartwright. Here, as the gestures were made behind the Claimant's back, the Tribunal was not able to make a finding as to the nature of the gestures made. We have found the Claimant held a genuine and reasonable belief that the gestures related to her, but we have no evidence as to what type of gestures they were. In these circumstances we do not have facts from which we could infer the Claimant has been treated less favourably.

223.7. Scott Schedule Item 8, Mr Stedman's inability to support the Claimant to access e-learning. We have found Mr Stedman did what he could to assist the Claimant but was unable to solve her IT problems. He was not able to devote more time to supporting the Claimant as he was burdened by numerous other tasks. As such we did not find he had treated the Claimant less favourably than others. Further and in the alternative, if any other member of the group had been experiencing the same difficulty as the Claimant, he would have treated them in exactly the same way as he treated the Claimant.

223.8. Scott Schedule Item 10, Ms Foley speaking to Ms Cartwright, breaching the Claimant's confidence and DWP's policy on how to handle harassment complaints. The Tribunal notes Ms Foley beached the Claimant's confidence when the Claimant had expressly told her not to. We also note Ms Foley did not follow the procedure that is in place to support a victim of harassment – had she followed this procedure and referred the matter to the Claimant's line manager, or respected the Claimant's wishes, the Claimant may well have been able to complete her training and continue in employment with the DWP. This breach of confidence had a substantial impact on how the Claimant was treated by the group in the following day and a half and had an impact on how the Claimant felt continuing to train alongside Ms Cartwright. She was upset by this breach of confidence and felt Ms Foley had made her situation worse. The Tribunal finds that a reasonable worker would equally feel Ms Foley had made the situation worse and would also regard the breach of confidence as being subjected to a detriment. The Tribunal found this was an act that subjected the Claimant to a detriment.

223.9. Ms Foley knew she had done the wrong thing as she created a self-serving note [p112]. If Ms Foley had given a truthful account to Ms Williams, this could have changed the whole course of events.

223.10. The Tribunal considered whether Ms Foley treated the Claimant less favourably than she would have treated one of the comparators. Here we found that, had another trainee (eg Mr Fenner or Ms Blue) made a complaint about Ms Cartwright, Ms Foley would have handled the situation in exactly the same manner. We found she would have tried to speak to Ms Cartwright in breach of that trainee's confidence. As such we cannot say the Claimant has been treated less favourably than the comparators.

223.11. Scott Schedule Item 11, Ms Foley speaking to the other trainees, in the absence of the Claimant, making it obvious that the Claimant had made a complaint about another trainee. This inappropriate discussion caused the Claimant to be embarrassed and upset and it caused other trainees to adversely change their behaviour towards the Claimant (the incidents involving Mr Lewis). The Tribunal found that a reasonable worker would consider they had been subjected to a detriment if a trainer had caused other employees to believe that worker had made a complaint about a fellow employee. It certainly compounded the difficulties the Claimant was facing in the workplace.

223.12. However, when we considered whether the Claimant had been treated less favourably than the comparators, we found the trainer would have treated the comparators in the same manner. If Ms Blue or any of the other comparators, had confided in Ms Foley, Ms Foley would have had a similar discussion with the remaining trainees.

223.13. Scott Schedule Item 17, Ms Williams telling Ms Cartwright that she should not apologise to the Claimant and that there should be no contact with the Claimant. As explained earlier in the judgment, the Tribunal were satisfied this was in no way whatsoever related to the Claimant's age or race. The Tribunal concluded Ms Williams would have told Ms Cartwright this, whatever the complainant's race or age, as Ms Williams was concerned any contact could be seen as putting the Claimant under pressure to drop the grievance. The Tribunal accept this did not amount to detrimental treatment.

223.14. Scott Schedule Item 18, Ms Cartwright stating the Claimant "didn't have much in common with the rest of the group as she was that bit older". The context to this statement was that Ms Cartwright made it during the grievance investigation interview, to Ms Williams. She was not saying this directly to the Claimant. As such, whilst the Tribunal accepts this is evidence of Ms Cartwright's mindset, it does not amount to subjecting the Claimant to a detriment as it was not said directly to the

Claimant. The Tribunal finds this was not an act of treating the Claimant less favourably.

223.15. Scott Schedule Item 19, Ms Cartwright failing to give the Claimant a copy of her interview statement, for the Claimant to sign, losing the opportunity to clarify the issues and correct any errors. Procedural errors meant the Respondent failed to thoroughly investigate and respond to the bullying the Claimant was experiencing and missed an opportunity to remedy the situation. In the comments she made at the end of Ms Cartwright's interview, Ms Williams appeared to prejudge the situation – however at this point she did not realise she was going to be the decision maker. The Tribunal reminded itself that discrimination cannot be inferred from unfair conduct alone. Simply demonstrating that conduct was unfair does not trigger the shifting of the burden of proof. The Tribunal has to have indications that there might be discrimination related to the Claimant's protected characteristic. The Tribunal found these errors did not amount to subjecting the Claimant to detrimental treatment.

223.16. The Tribunal concluded the procedural failings in the grievance investigation were wholly unrelated to the Claimant's race or age. We concluded that any of the comparators would have been treated in the same manner. We could not say the Claimant had been treated less favourably than one of the comparators, as Ms Williams's inexperience and lack of adequate training meant she was just as likely to have made these mistakes in any investigation of a comparator's grievance.

223.17. Scott Schedule Item 20, Ms Williams concluding there was no "malicious intent to cause offence". The Tribunal were concerned that neither Ms Williams nor Ms Thomas appeared to have a good understanding of equality and diversity issues. Indeed, none of the DWP managers appeared to appreciate the impact discrimination and even perceived discrimination can have on an employee and the care with which an employer should consider discrimination investigations / dismissal following discrimination allegations. Neither Ms Williams nor Ms Thomas appeared to understand that harassment can occur when conduct is having the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for an employee (regardless of the other employee's motive).

223.18. Whilst dismissing a person's grievance could be regarded as subjecting that person to a detriment, the Tribunal concluded that Ms Williams's mistaken understanding of harassment could have resulted in a trainee that did not share the Claimant's age or race also being subjected to a detriment.

For instance, if one of the trainees was subjected to harassment on grounds of sexual orientation, they could equally have suffered a detriment as a result of Ms Williams's lack of understanding of harassment. This meant we did not find Ms Williams had treated the Claimant less favourably than she would have treated a comparator.

223.19. Scott Schedule Item 21, the Tribunal concluded the Claimant had not been subjected to a detriment as Ms Williams had actually considered the Claimant's 10 allegations.

223.20. Scott Schedule Item 22, Ms Thomas's decision not to uphold the Claimant's appeal against the grievance outcome and her comment that forming an opinion on age was *"part of human nature".*

223.21. The Tribunal found the comment demonstrated a lack of understanding of equality and diversity training. We also found a reasonable worker would consider they had been subjected to a detriment when their grievance appeal had been dismissed. However, we found the Claimant had not been treated less favourably than Ms Thomas would have treated one of the comparators. We were concerned Ms Thomas had not completed as thorough a review as the Claimant's appeal had warranted, but we were satisfied that Ms Thomas would have approached an appeal presented by one of the comparators in exactly the same manner.

223.22. Scott Schedule Item 23, Ms Clarke's decision to dismiss the Claimant on 4th October 2017, with the Claimant receiving 5 weeks pay in lieu of notice and the dismissal taking effect on 6th October 2017. The Tribunal accept that being dismissed constitutes detrimental treatment. We turned to consider whether the Claimant was treated less favourably than Ms Clarke would have treated a person that did not share the Claimant's race or age group.

223.23. The Tribunal found the decision to dismiss the Claimant was a harsh decision, given the Claimant did ask for the Respondent to put forward proposals for her to return to work (in her letter of 28th July 2017 [p219 to 222]) - this was not an employee that was defiantly ignoring all contact from her employer. However, the Tribunal do not find that there was any link between Ms Clarke's decision and the Claimant's race or age group. The Tribunal cannot say Ms Clarke treated the Claimant less favourably than she would have treated one of the comparators.

223.24. Scott Schedule Item 25, the Claimant not receiving her payment in lieu of notice until early December 2017. The Tribunal accept that not being paid on time amounts to

detrimental treatment. The Tribunal considered whether the Claimant had been treated less favourably than one of her comparators would have been treated in similar circumstances. The Tribunal accept payroll were not notified of her dismissal until 17th October 2017, after the 13th October cut off for the October payrun. The Tribunal considered whether someone that did not share her race or age would have been treated in this manner, ie would there have been a similar lack of urgency in processing their final pay as there had been for the Claimant. The Tribunal concluded there would have been. As such the Tribunal did not find the Claimant had been less favourably treated than someone who did not share her race or age group.

224. When it came to considering the actions of Mr Lewis (Scott Schedule Items 12 and 13), the Tribunal reached the following conclusions:

224.1. Scott Schedule Item 12, Mr Lewis loudly telling the group, "I touched [the Claimant]'s bum, I touched [the Claimant]'s bum". The Claimant was embarrassed by this situation and humiliated by Mr Lewis announcing this to the group. The Tribunal considered that a reasonable worker would find this experience upsetting and would regard this as being subjected to a detriment.

224.2. Scott Schedule Item 13, Mr Lewis's comment "if she comes back". The Tribunal considered the context in which this comment was made – the previous day the Claimant had left the training room distressed on two occasions and had told the trainer she felt she was being bullied. The whole group realised the Claimant was distressed. Mr Lewis was aware of the Claimant's distress. He was also aware, from Ms Foley's discussion with the group, in the Claimant's absence, that the Claimant had made a complaint. The Claimant was being left out of the discussions about the end-of-training celebration; she was being left out of the group. The Claimant had tried to carry on and had left the room saying "goodbye" to other trainees. Mr Lewis's comment was a nasty dig and proved to be the final straw – it underlined the message "we don't like you". The Claimant was not able to return to work and these were the last words she heard on leaving the training room. In this context, the Tribunal accepts a reasonable worker would consider they had been subjected to a detriment by these words.

224.3. When we considered whether, in humiliating the Claimant (Item 11) and making this nasty remark (Item 12) Mr Lewis had treated the Claimant less favourably than Mr Lewis would treat the comparators, we found his reason for treating the Claimant in this manner was because he wanted to join in the activity of targeting the Claimant, of making jokes at her expense. We

also found he was motivated by the fact the Claimant had made a complaint about a fellow trainee.

224.4. We considered whether he would have acted in the same manner if the Claimant had been Welsh, white or the same age as him. There was no evidence suggesting Mr Lewis had treated any of the comparators in this manner. The difficulty we encountered was Mr Lewis was treating the Claimant like this, in part because she had become the target of Ms Cartwright's jokes – would the Claimant have become the target of Ms Cartwright's jokes if the Claimant had been Welsh, white or the same age as Ms Cartwright? As we go on to explain in our conclusions on the Harassment claims, we found Ms Cartwright's treatment of the Claimant was related to the Claimant's race and was related to the Claimant's age. There are facts from which we could reasonably infer Mr Lewis has treated the Claimant less favourably than he would have treated someone who did not share her age group. There are facts from which we could reasonably infer Mr Lewis has treated the Claimant less favourably than he would have treated someone who did not share her race. As such we found the burden of proof had passed to the Respondent to show that Mr Lewis's treatment of the Claimant was in no way whatsoever related to her race or her age. This is a burden that the Respondent has been unable to discharge; the Claimant's race and age had influenced Ms Cartwright's behaviour towards the Claimant, which in turn influenced Mr Lewis's behaviour towards the Claimant.

224.5. In relation to these acts of direct age discrimination, there is no evidence of a legitimate aim or any justification for this treatment.

224.6. Turning to consider the direct discrimination claim on grounds of sex, we found that Mr Lewis would have acted in the same manner if the Claimant had been male, as Mr Lewis was motivated by joining in the activity of making jokes at the Claimant's expense. We were satisfied this was not an act of direct sex discrimination. We found there was no causal link between the Claimant's sex and these actions and therefore we do not consider this was direct sex discrimination or an act of harassment related to sex.

Harassment

225. The Tribunal accepts that each of the following incidents amounted to unwanted conduct:

225.1. Scott Schedule Item 1, Ms Cartwright telling the Claimant that Ms Cartwright had previously been called "Paki Lover". Ms Cartwright was using a highly offensive term, during a

conversation with someone who was not white. Even if these words had been used in a group dynamic (which Ms Cartwright alleged, but the Tribunal did not accept) this would have immediately made the only non-white person in the group feel alienated. The Claimant took offence at Ms Cartwright using this term and whilst she did not raise this with Ms Cartwright at the time, she tried to sit away from Ms Cartwright after this conversation, indicating this conduct was unwanted.

225.2. Scott Schedule Item 2, Ms Cartwright telling the Claimant it was racist for the Claimant to comment it always rains in Wales and repeatedly saying "*It's [the Claimant]'s weather report again"*. As previously discussed, the Claimant reasonably found this to be trivialising discrimination. The Tribunal have heard evidence that bullying had caused the Claimant's daughter to become disabled. As the only non-white trainee, being told by Ms Cartwright that she was being racist for commenting on the weather upset the Claimant. Any person whose life had been affected by discrimination would have been upset by this comment. It was unwanted conduct. The Tribunal considered whether repeatedly telling the group *"It's [the Claimant]'s weather report again*" could be "just banter", as has been suggested by Ms Cartwright. The Tribunal had no evidence to suggest that the Claimant had ever engaged in banter herself. The Claimant reasonably perceived this as being routinely criticised by Ms Cartwright, when the Claimant was trying to find a topic of conversation to share with the group. Against the backdrop of the Claimant being more and more marginalised by the group, the Tribunal accepts that Ms Cartwright repeatedly making this comment was unwelcome conduct for the Claimant.

225.3. Scott Schedule Item 3, Ms Cartwright repeatedly accusing the Claimant of stealing ice-cream. Whilst this might have started as a joke, Ms Cartwright should have stopped as soon as the Claimant asked her to. Instead, Ms Cartwright continued to repeat the statement until the Claimant became so upset that others in the group noticed how upset the Claimant was and told Ms Cartwright to stop. This was clearly unwanted conduct.

225.4. Scott Schedule Item 4, Ms Cartwright deliberately spraying herself with body spray, whilst next to the Claimant, just after the Claimant had complained about Mr Lewis spraying body spray. The Claimant had expressly told Ms Cartwright that she didn't like body spray being sprayed in the training room. When she raised this, she had been referring to Mr Lewis using spray when he was sat further away from the Claimant than Ms Cartwright was sat. The Claimant had made it clear how much she disliked this practice – to respond by doing that exact practice whilst sat next to the Claimant is clearly unwanted conduct.

225.5. Scott Schedule Item 5, Ms Cartwright spinning on her chair next to the Claimant after the Claimant had said it was making her feel sick. The Tribunal did not accept Ms Cartwright's allegation that the Claimant was joking. The Claimant was objecting as the activity was having a negative impact on her. The Claimant was making it clear that she disliked this particular practice and it was adversely affecting her. To then deliberately subject the Claimant to more of that practice, is clearly unwanted conduct.

225.6. Scott Schedule Item 7, Ms Cartwright making gestures to Ms Blue immediately after the Claimant had sat next to Ms Cartwright. Given the history of negative behaviour that she had experienced from Ms Cartwright, when Ms Cartwright made gestures behind her, the Claimant reasonably believed these gestures were about her and left the training room in a state of distress. As the gestures had such a profound impact on the Claimant, the Tribunal finds they amounted to unwanted conduct.

225.7. Scott Schedule Item 12, Mr Lewis telling the group, "I touched [the Claimant]'s bum, I touched [the Claimant]'s bum". The Tribunal has already explained how humiliating the Claimant perceived this to be as Mr Lewis had said this loudly to the group rather than to the Claimant. The Tribunal finds this was unwanted conduct.

225.8. Scott Schedule Item 13, Mr Lewis's comment "if she comes back". The Tribunal has already found this to be a nasty comment that proved to be the final straw for the Claimant. It was another act of public humiliation. As such the Tribunal find it to be unwanted conduct.

226. The Tribunal then considered whether the unwanted conduct had the purpose <u>or</u> effect of violating the Claimant's dignity or creating an intimidating hostile, degrading, humiliating or offensive environment for the Claimant. The Tribunal reminded itself that context was very important and that "violating dignity" and "intimidating, hostile, degrading, humiliating, offensive" are significant words, which required the Tribunal to look for effects which were serious and marked.

226.1. Scott Schedule Item 1, Ms Cartwright telling the Claimant that Ms Cartwright had previously been called "Paki Lover". The Tribunal noted that Ms Cartwright was discussing an occasion when Ms Cartwright had been called this highly offensive name, rather than Ms Cartwright directing an offensive insult at the Claimant. At the time of telling this story, Ms Cartwright was sat next to the Claimant and was addressing the Claimant rather than the group as a whole. This conversation took place in the first few days of their training, when trainees were getting

to know each other. Against this context, the Tribunal accepts that whilst Ms Cartwright was highly insensitive she was not deliberately intending to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant – this conduct did not have the requisite "purpose" for s26 (1)b EqA. The Tribunal went on to consider whether it had the requisite "effect" for s26 (1)b EqA. We were concerned at the ease with which Ms Cartwright had used this highly offensive term in a discussion with the Claimant, the only non-white trainee in the group. During cross examination, Ms Cartwright accepted this was a derogatory racial word and she accepted the use of it could cause offence. She could have told the story without using this language and the fact she chose to use this highly offensive language at all demonstrated ignorance of diversity issues and even a lack of compassion for Asian people's feelings. Ms Cartwright's use of these words deeply upset the Claimant and she tried to avoid sitting by Ms Cartwright after this. The tribunal accepts the Claimant felt Ms Cartwright had violated her dignity by using these words. It was reasonable for the Claimant to feel her dignity had been violated by Ms Cartwright using such highly offensive racial words in a discussion with her, the only non-white trainee in the group. The tribunal accept another non-white person could have felt their dignity had been violated by the use of these words. As such the Tribunal found Ms Cartwright's use of these words had the effect of violating the Claimant's dignity.

226.2. Scott Schedule Item 2, Ms Cartwright telling the Claimant it was racist for the Claimant to comment it always rains in Wales and repeatedly saying "*It's [the Claimant]'s weather report again"*. Whilst the "racist" comment was another highly insensitive racial comment that was being made to the only non-white trainee, the Tribunal accept that Ms Cartwright's conduct at this stage was not with the "purpose" of violating the Claimant's dignity or creating a particular environment for the Claimant. When we turned to consider whether this unwanted conduct had the "effect" set out in s26 (1)b EqA, the Tribunal accept that, consciously or subconsciously, Ms Cartwright resented having to undertake diversity training. The Claimant was upset that Ms Cartwright was trivialising discrimination. The Claimant's daughter had experienced bullying that had caused her to become disabled; true bullying had already had a negative impact on the Claimant's family, which is why the Claimant was so insulted by a comment that she perceived was trivialising discrimination. The Tribunal accept the Claimant felt her dignity had been violated by this comment. The Tribunal considered whether, viewed objectively, it was reasonable for the Claimant to feel her dignity had been violated. During her grievance investigation interview, Annabelle Williams had identified Ms Cartwright was

overstepping the mark with these weather remarks *("[Ms Cartwright]'s tone and banter can maybe sometimes go a bit too far.")* As the only non-white trainee, the Claimant had already experienced Ms Cartwright using highly offensive racial language and now Ms Cartwright was implying the Claimant was being "racist". The Tribunal accepts it was reasonable for the Claimant to feel her dignity had been violated again. This further comment had the effect of violating the Claimant's dignity again.

226.3. Scott Schedule Item 3, Ms Cartwright repeatedly accusing the Claimant of stealing ice-cream. Whilst this might have started as a joke, the Tribunal note that the Claimant was the first person to be "blamed" and that Ms Cartwright carried on with this conduct, even after the Claimant had asked her to stop. It was obvious to others that the Claimant was upset by this conduct and they intervened to stop Ms Cartwright. Ms Cartwright was not addressing the Claimant alone in this "joke" – instead she was publicly addressing the other trainees in the group. This was a further occasion in which Ms Cartwright was making jokes at the Claimant's expense. The Claimant is not an extroverted person - we have not heard any evidence of her "engaging in banter". During his grievance interview, Sion Wilder described the Claimant as being a "quiet person" and commented that others in the group were "big characters". Given this dynamic in the group, why was Ms Cartwright using the Claimant as the subject for her joke? We considered whether this was to get the Claimant more involved in group interactions. If this had been the motivation behind the comments, Ms Cartwright would have stopped as soon as the Claimant asked her to. We found that in this act, Ms Cartwright revealed the Claimant had become the target of her jokes and these were jokes at the Claimant's expense rather than jokes she was sharing with the Claimant. She was happy to continue with these jokes regardless of the upset they were causing the Claimant. This was not a one-off incident – Ms Cartwright had previously made jokes to the group at the Claimant's expense (the regular "weather report" comments). This behaviour was creating an environment in which the Claimant, a quiet individual, was regularly humiliated in front of the other trainees. We concluded that as Ms Cartwright continued with this action, even when the Claimant had made it clear she wanted her to stop, and as there had been previous incidents of mocking the Claimant, Ms Cartwright's actions had the purpose of creating a humiliating environment for the Claimant, the only non-white person in the group and the only trainee that was clearly much older than the other trainees.

226.4. Scott Schedule Item 4, Ms Cartwright deliberately spraying herself with body spray, whilst next to the Claimant, just after the Claimant had complained about Mr Lewis spraying body

spray. The Claimant had made it clear how much she disliked this practice – to respond by doing that exact practice whilst sat next to the Claimant was an act that was deliberately intended to offend the Claimant. When considered with Ms Cartwright's earlier behaviour towards the Claimant the Tribunal are satisfied that this was an incident in which Ms Cartwright was acting with the purpose of creating a hostile environment for the Claimant.

226.5. Scott Schedule Item 5, Ms Cartwright spinning on her chair next to the Claimant after the Claimant had said it was making her feel sick. The Claimant had made it clear she disliked this particular practice and it was adversely affecting her. To continue with this unwanted conduct, was another deliberate act on the part of Ms Cartwright and further evidence of Ms Cartwright acting with the purpose of creating a hostile environment for the Claimant.

226.6. Scott Schedule Item 7, Ms Cartwright making gestures to Ms Blue immediately after the Claimant had sat next to Ms Cartwright. We have no evidence as to the nature of the gestures made, as the Claimant didn't see them properly and other witnesses cannot recall the gestures. This has meant we did not feel we were able to make findings about Ms Cartwright (or Ms Blue)'s motivation behind these gestures. We turned to consider whether these gestures had the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The Claimant perceived these gestures were negative gestures about her. They had occurred as soon as she sat down next to Ms Cartwright. The previous day Ms Cartwright had made the "stop looking at me like that" comment to the Claimant. By this point, the Claimant had experienced a series of unwanted conduct from Ms Cartwright, some of which had the intention of creating a humiliating or hostile environment for her. The Claimant was immediately and very obviously upset by these gestures. Even trainees that were sat at the front of the room, (the Claimant and Ms Cartwright were sat at the back of the room), appreciated "*[the Claimant] had been upset ...with [Ms Cartwright].*" (Sian Jones' comment during the grievance investigation interviews). The Claimant left the room in a state of distress, leaving her security key connected to her computer. Others in the group alerted Ms Foley who left the room to speak to the Claimant. Immediately after this incident, the Claimant confided in Ms Foley that she felt she was being bullied by Ms Cartwright, because of her (the Claimant's) appearance. The Claimant felt these gestures were further acts creating a hostile and humiliating environment for her. The Tribunal finds that given the history of events she had experienced with Ms Cartwright, it was reasonable for the Claimant to feel she was being bullied and that the gestures

(taken with Ms Cartwright's previous acts) were unwanted conduct that had the effect of creating a hostile and humiliating environment for her.

226.7. Scott Schedule Item 12, Mr Lewis telling the group, "I touched [the Claimant]'s bum, I touched [the Claimant]'s bum". The Tribunal considered whether this could be horseplay or Mr Lewis saying something impulsively without any negative motive. The Tribunal concluded this was not the case. There was no evidence of the Claimant ever sharing jokes with Mr Lewis and they did not socialise as friends. The Tribunal found this was Mr Lewis joining in the activity of deliberately making jokes, loudly to a wider audience, at the Claimant's expense. The Claimant felt humiliated by Mr Lewis saying these words and the way in which they were said to the rest of the group. From the nature of these words and the manner in which they were said, the Tribunal concluded Mr Lewis was intentionally violating the Claimant's dignity. Further and in the alternative, this had the effect of violating the Claimant's dignity. The Claimant felt humiliated by Mr Lewis's words and found it difficult to talk about this incident even at the time of the tribunal hearing. This incident occurred the day after the Claimant had left the room twice in a state of distress. The Tribunal considers that, objectively viewed, it was reasonable for the claimant to perceive that Mr Lewis had violated her dignity.

226.8. Scott Schedule Item 13, Mr Lewis's comment "if she comes back". As we have previously stated, the whole group, including Mr Lewis, knew the Claimant had been distressed the previous day, such that she had to leave the training room twice. He also knew she had made a complaint about a fellow trainee. That same afternoon, Mr Lewis had publicly humiliated the Claimant (Scott Schedule Item 12). The Claimant was trying to carry on and had said goodbye to other trainees immediately before this comment. This comment was said loudly enough for the Claimant to hear it. The Tribunal found this was a nasty dig which was underlining the message "we don't like you". This was unwanted conduct with the purpose of creating an intimidating and hostile environment for the Claimant. Further and in the alternative, this had the effect of creating an intimidating and hostile environment for the Claimant – we considered the impact this comment had on the Claimant – she described this made her feel excluded and isolated from the rest of the group. In her conversation with Miss O'Connor on 13th March 2017, ie 3 days later, the Claimant said she could not return to work alongside these colleagues or be in the same room as them. The Claimant only had 5 days of training left to complete and following that she would have been able to move into different areas of DWP. She had completed 4 weeks of training and was so close to

finishing the course, yet could not attend as a result of the impact of Mr Lewis and Ms Cartwright's behaviour. It was reasonable for the Claimant to perceive she faced a hostile and intimidating environment. Everyone knew how distressed she had been the previous day – for Mr Lewis to engage in two acts, both of which ridiculed her in front of the other trainees, gave her the clear message, and would have given anyone else in these circumstances the clear message, that she was not liked and not welcome in the group.

227. The Tribunal went on to consider whether the conduct of Ms Cartwright could be said to relate to the Claimant's race.

227.1. Upon meeting the Claimant, Ms Cartwright would immediately realise the Claimant was non-white and the only non-white trainee in the group and yet she considered it appropriate to use highly offensive racial terminology in a conversation with the Claimant, albeit she was repeating this as part of a story.

227.2. Ms Cartwright resented having to undertake equality and diversity training and trivialised this training by telling the only non-white trainee it was racist to comment it always rains in Wales.

227.3. Within this group of trainees, there was evidence of a person's race being used as a reason for subjecting that person to "banter": Annabelle Williams commented in the grievance investigation interview *"There is lots of banter within the group and as I'm English there is some banter directed to me…"*

227.4. The only non-white trainee was increasingly publicly mocked by Ms Cartwright (even when the Claimant made it clear she wished this to stop) and was Ms Cartwright's first target for jokes – she was the first person Ms Cartwright accused of stealing the ice cream.

227.5. The only non-white trainee was increasingly excluded from the group, such that she was not invited to the end-of-training celebration that the other trainees were arranging and had even invited the trainer to.

228. The Tribunal considers that these are facts from which the Tribunal could properly infer that either consciously or sub-consciously, Ms Cartwright was motivated, at least in part, by the Claimant's race in subjecting the Claimant to this unwanted conduct.

229. The Tribunal considered whether the conduct of Mr Lewis could be said to relate to the Claimant's race.

229.1. Mr Lewis had played an active part in arranging the end-of-training celebration and had overlooked inviting the Claimant, the only non-white trainee, to this event.

229.2. The only non-white trainee was regularly being targeted for ridicule by Ms Cartwright (to the extent that others in the group identified Ms Cartwright was upsetting the Claimant). Mr Lewis

chose to engage in two acts of publicly humiliating the only non-white trainee, the day after the Claimant had been so obviously upset by Ms Cartwright. There was no evidence to suggest that any other trainee had been ridiculed like this by Mr Lewis or any other member of the group.

229.3. Within this group of trainees, there was evidence of a person's race being used as a reason for subjecting that person to banter (Annabelle Williams's comments).

230. The Tribunal considers that these are facts from which the Tribunal could properly infer that either consciously or sub-consciously, Mr Lewis was motivated, at least in part, by the Claimant's race, in subjecting the Claimant to this unwanted conduct.

231. The Tribunal went on to consider whether the conduct of Ms Cartwright could be said to relate to the Claimant's age.

231.1. Upon meeting the Claimant, Ms Cartwright would immediately realise the Claimant was considerably older than all the other trainees.

231.2. Ms Cartwright referred to the Claimant's age difference twice during the grievance investigation interview, including the comment *"[the Claimant] didn't have much in common with the rest of the group as she was that bit older"*.

231.3. Other trainees in the group, Ms Blue and Mr Fenner, identified the Claimant's age difference as being a reason for her having nothing in common with them (Ms Blue) and for her not being invited to the group night out (Mr Fenner).

232. The Tribunal considers that these are facts from which the Tribunal could properly infer that either consciously or sub-consciously, Ms Cartwright was motivated, at least in part, by the Claimant's age in subjecting the Claimant to this unwanted conduct.

233. The Tribunal considered whether the conduct of Mr Lewis could be said to relate to the Claimant's age.

233.1. Upon meeting the Claimant, Mr Lewis would immediately realise the Claimant was considerably older than all the other trainees.

233.2. In arranging the end-of-training celebration, Mr Lewis had overlooked inviting the Claimant, the only trainee that was considerably older than the other trainees. Whilst Mr Lewis had invited Ms Foley, who was in the same age group as the Claimant, Ms Foley was the group trainer and had a special relationship with Mr Lewis, in that she had left him in charge of the group and had treated him like her deputy –Ms Foley was not a suitable comparator, as there were material difference in her circumstances.

233.3. In targeting the Claimant for public ridicule, Ms Cartwright was targeting the only trainee that was obviously in a different age

group than all the other trainees. Influenced by Ms Cartwright's behaviour, Mr Lewis chose to engage in further conduct publicly ridiculing the Claimant.

233.4. Three trainees in the group, Ms Cartwright, Ms Blue and Mr Fenner, identified the Claimant's age difference as being a reason for her having nothing in common with them (Ms Cartwright and Ms Blue) and for her not being invited to the group night out (Mr Fenner).

234. The Tribunal considers that these are facts from which the Tribunal could properly infer that either consciously or sub-consciously, Mr Lewis was influenced by the Claimant's age in subjecting the Claimant to this unwanted conduct.

235. As the Tribunal has facts from which it could properly infer race discrimination and age discrimination has taken place, the burden of proof passes to the Respondent to demonstrate that this treatment was in no way whatsoever related to the Claimant's race. The Respondent has not been able to discharge this burden. We have no evidence of any other trainee being targeted repeatedly in the manner that the Claimant was targeted for ridicule. Ms Cartwright, Mr Lewis and the Respondent have not been able to provide an explanation for this treatment that demonstrates this treatment was in no way whatsoever related to the Claimant's race or her age. As such the Tribunal finds the series of unwanted treatment were acts of racial and age-related harassment.

The Victimisation claims

236. Of the allegations listed in the victimisation claim, the Tribunal has identified the following acts as the Claimant being subjected to a detriment: Scott Schedule Items

10 (Ms Foley speaking to Ms Cartwright),
11 (Ms Foley speaking to the other trainees),
13 (Mr Lewis's "If she comes back" comment)
20 (Ms Williams dismissing the Claimant's grievance)
22 (the Claimant having her grievance appeal dismissed), and
25 (not being paid on time).

Item 23 is also relevant as this refers to the claimant's dismissal.

Protected Acts?

237. The Tribunal considered whether the Claimant had done a protected act. Clearly issuing tribunal proceedings (in June 2017) (Alleged Protected Act 5) was a protected act and fell within the definition of S27(2)a EqA.

238. S27 (2)(d) EqA provides that *"making an allegation (whether or not express) that A or another person has contravened this Act"* is a protected act.

239. Protected Act 1: The Tribunal considered whether, during the Claimant's conversation with Ms Foley on 9th March 2017, the Claimant asserted facts which were capable of amounting to a breach of the EqA. The Tribunal note the Claimant did not have to use the words "Equality Act", but she did have to expressly complain about something that could amount to a breach of the EqA.

240. During the conversation on 9th March 2017, the Claimant expressly told Ms Foley, that Ms Cartwright had said "Stop looking at me like that" to her, the previous day, and that the Claimant was being bullied by Ms Cartwright and the Claimant believed it was because of the Claimant's appearance. The Claimant had just left the training room in tears and went on to talk about her daughter being bullied previously. In her witness statement, Ms Foley explained she had spoken to the group because the Claimant had been upset about the comment made by Ms Cartwright. The Tribunal finds that the Claimant had, in good faith, expressly asserted facts which were capable of amounting to a breach of the Equality Act 2010 (racial or age harassment given that the Claimant referred to her appearance) during this conversation with Ms Foley. This was a protected act, falling within S27(2)d EqA.

241. Protected Acts 2 & 4: The Tribunal finds that both the formal written complaint of 13th March 2017 and the written appeal (which enclosed the 13th March 2017 complaint) were acts protected by S27 (2)(d) EqA. They both clearly set out detailed allegations of racial harassment.

242. Alleged Protected Act 3: the claimant's conversation with Emma O'Connor on 13th March 2017. The Tribunal did not have sufficient evidence about this conversation. The Tribunal did not find this to be a protected act.

243. Turning to consider whether the Claimant was subjected to detriment because she had done protected acts. The Tribunal considered whether, in subjecting the Claimant to detriment by breaching the Claimant's confidence and speaking to Daisy (Item 10) and subsequently speaking to the other trainees (Item 11), Ms Foley was significantly influenced by this Protected Act 1. Whilst we accept Ms Foley was attempting to resolve the situation, we do find that she was significantly influenced by the Claimant's allegation of racial harassment. In her actions in Item 10 and Item 11, Ms Foley subjected the Claimant to a detriment and this was because the Claimant had done a protected act, namely made allegations of racial harassment. These were acts of Victimisation.

244. In relation to Item 13 (Mr Lewis's "If she comes back" comment) whilst we were satisfied that Mr Lewis was targeting the Claimant, in part because he believed she had made a complaint about Ms Cartwright, he did not know the allegations that the Claimant had actually made and did not know that the Claimant had done a protected act. As such he could not be significantly influenced by the protected act and Item 13 did not amount to an act of victimisation.

245. In relation to Items 20 (Ms Williams dismissing the Claimant's grievance) and Items 22 (the Claimant having her grievance appeal dismissed), whilst both Ms Williams and Ms Thomas were aware the claimant had done protected acts, namely alleged racial discrimination, the Tribunal are satisfied that the protected acts did not significantly influence their decision making. They reached the conclusions they did as Ms Williams was inexperienced and Ms Thomas had a lack of understanding of diversity issues, not because the Claimant had done protected acts. The Tribunal were satisfied these were not acts of victimisation.

246. In relation to Item S23 the Claimant's dismissal, the Employment Tribunal noted the comment "[the Claimant] is now taking the matter forward with an external Employment Tribunal" in Ms Morris's report [p217] that concluded "I recommend [the Claimant] is dismissed". Ms Clarke considered this report and when the Claimant failed to attend their attendance management meeting, she decided to dismiss the Claimant despite being aware the Claimant had not received the invitation to attend the meeting. The Tribunal found that both Ms Morris and Ms Clarke's decision making was significantly influenced by the Claimant's protected act of issuing tribunal proceedings. They subjected the Claimant to a detriment by dismissing her and this was because she had issued tribunal proceedings under the Equality Act 2010. The Claimant's dismissal was an act of victimisation.

247. Turning to consider Item 25, the Tribunal considered whether the delays in processing and paying the Claimant her final pay were because she had done a protected act. The Tribunal found that either Ms Clarke or Ms Morris did not action the instruction to payroll for the Claimant's final pay as quickly as they could have done and the deadline for the October payroll had passed. The decision to dismiss the Claimant had been made on 4th October and payroll were not notified until 17th October. Whilst Ms Clarke did attempt to assist the Claimant at the end of November 2017, nobody has been able to explain the 13-day delay which meant payroll didn't process the Claimant's pay in October. Not paying the Claimant on time amounted to subjecting the Claimant to a detriment. When considering the decision to dismiss the Claimant, we found that both Ms Clarke and Ms Morris were significantly influenced by the Claimant's protected act of issuing proceedings. In the absence of any explanation for the 13 day delay, we have facts from which we can properly infer, this delay was also related to the Claimant's protected act of issuing employment tribunal proceedings. The tribunal are satisfied that the protected act was a significant influence on Ms Clarke and Ms Morris's behaviour at that time, which included failing to process the Claimant's final salary in a timely manner. This was a further act of victimisation.

248. The Tribunal considered S109 EqA (the employer's defence) and whether the Respondent had demonstrated it had taken all reasonable steps to prevent an employee from committing acts of discrimination.

Given the findings we have made in relation to the adequacy of the equality and diversity awareness training, we have concluded there were further steps that the Respondent ought to have taken. We have found this training was not fit for purpose.

249. The employment judge will set out directions to prepare the case for a remedy hearing in a separate Order.

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Employment Judge L Howden-Evans

Dated: 20th December 2018

JUDGMENT SENT TO THE PARTIES ON

………20 December 2018………....

……………………………………………
FOR THE SECRETARY OF
EMPLOYMENT TRIBUNALS