



EMPLOYMENT TRIBUNALS

Claimant: Mrs B Parmar
Respondent: Leicester City Council
On: 23 – 27 January 2023
Before: Employment Judge Ahmed
Members: Miss J Dean
Mr K Rose
At: Leicester

Representation

Claimant: Miss Serena Crawshay-Williams of counsel
Respondent: Mr Paul Livingstone of counsel

JUDGMENT

The unanimous decision of the Tribunal is that the Claimant was discriminated against by reason of her race. The issue of remedy is adjourned.

REASONS

1. By a claim form presented to the Tribunal on 7 May 2021 the Claimant brings a complaint of direct race discrimination. There was initially some confusion at the start of the hearing as to whether the Claimant had obtained leave earlier to amend her claim to include a complaint of victimisation. The Respondent was under the impression that it had. We concluded that despite the Claimant having drafted a document setting out the proposed amendment, and the Respondent having gone so far as to submit amended Grounds of Resistance, no order giving leave to amend was in fact ever granted. There was no application for an amendment at the commencement of this hearing.

2. The Claimant began ACAS early conciliation on 23 March 2021. The early conciliation certificate was issued on 7 April 2021. There is no issue as to time limits in relation to the allegations.

3. In coming to our decision we have taken into consideration the evidence given by the following witnesses:

3.1 Mrs Bindu Parmar, the Claimant who gave evidence on her own behalf. Mrs Parmar did not call any other witness;

3.2 Ms Ruth Lake who is employed by the Respondent as the Director of Adult Social Care and Safeguarding;

3.3 Ms Caroline Tote who is employed by the Respondent as Director of Children Social Care And Community Safety

3.4 Mr Martin Samuels who is Strategic Director of Social Care and Education with the Respondent.

4. In addition we took into consideration the witness statement of Ms Caroline Joseph, HR officer, who was not called to give evidence. Her evidence was not controversial. We have attached the appropriate weight.

5. We have also taken into consideration the documents in the agreed bundle and the submissions made by counsel on both sides to whom we are grateful. This decision represents the views of all three members of the Tribunal.

6. We have used acronyms for those mentioned in this decision who did not give evidence but for whom anonymity may be important given that many of them remain employed by Leicester City Council and are not directly affected by this decision. Those individuals are as follows:

AE - was a team leader and at times an Acting Head of Service.

AL - was a team leader within Locality West.

HM - was Head of Service for C&R up to November 2020.

JD - was a Principal Social Worker in Social Care and Education.

JR - was a Team Leader in Locality West managed by the Claimant.

JSB - was Head of Service for Independent Living Services;

OC - was an agency social worker in Adult Social Care and was interviewed as part of a disciplinary investigation. OC resigned in December 2020

SA - was a team support worker managed by AL.

SCC - was a team leader and Acting Head of Service for Learning Disability Services from November/December 2020 onwards.

SO - was an Admin and Business Support Officer.

SR - was an agency social worker within Locality West then temporary team leader in C&R in January 2021.

7. We begin with a short explanation of the internal hierarchy within Leicester City Council at the relevant time insofar as it applies to the facts of this case. At the top of the structure is the elected City Mayor. Below him is the Chief Operating Officer, Ms Alison Greenhill. Below Ms Greenhill are several Strategic Directors which includes Mr Samuels. Miss Lake as Director of Adult Social Care and Safeguarding reports to Mr Samuels.

8. Ms Lake was at the material time responsible for 8 Service Areas in her Division. Each Service Area is led by a Head of Service or a Principal Professional. The Service Area headed by the Claimant was Locality West. There is also a section known as Contact and Response ('C&R') which provides a community front door service for new enquiries about adult social care.

9. The Claimant is a British National and describes herself as of Indian origin. She was born in Kenya and came to the UK in 1976 where she completed her secondary schooling. She subsequently obtained a MA degree in Social Work. She began her employment with Leicestershire County Council on 5 June 1989 and, following a gap for studies between 1992 and 1994, returned to work in the Older Persons' Mental Health Team as a qualified Social Worker. Following the merger of the local authorities her employment was transferred to Leicester City Council in 1997.

10. In 1998 Mrs Parmar was appointed to a Team Manager role and since then has worked in a management and leadership capacity. In 2002 she was appointed to a Service Manager's role managing multiple teams in social services. In 2015 she was appointed to her present role as Head of Service for Locality West. She therefore has considerable experience of social work and management. Her work involved a range of activities including safeguarding people from abuse, court of protection work, placement into residential/nursing care and homelessness amongst other activities.

11. At the relevant time Mrs Parmar had responsibility for several teams, each such team being managed by a Team Leader. The individual team leaders under Mrs Parmar's supervision were: JR (white British), NM (white British) AL (Indian) MA (white British) and ZA (Indian). AE and HM who are both Heads of Service are white British.

12. The Claimant has over 30 years of experience in her line of work. Apart from the events of this case she has not been the subject of any disciplinary proceedings or performance measures. Her employment ended on 26 April 2022 when she was dismissed. The events surrounding her dismissal are the subject of separate proceedings which are to be heard in due course and do not form part of these proceedings.

13. It is common ground that the relationship between the Locality West team and C&R was poor. This often extended to conflict between team leaders. Ms Lake was ultimately responsible for ensuring that the teams and Heads of Service co-operated and worked towards achieving the same goals and objectives.

14. The background to the events begins with an incident in May 2018 involving HM who was then Head of C&R. Ms Lake was engaged in a routine telephone conversation with HM which took place in an open plan office. At the end of the conversation HM was heard to swear to the extent it was overheard by several

people. Ms Lake went to see HM about the incident and HM accepted that that her conduct was inappropriate and unprofessional. Ms Lake took no further action.

15. On Friday 16 November 2018, some 10 minutes before the end of the working day and the day before Mrs Parmar had planned to go on annual leave for two weeks, HM sent an email in which she raised a number of matters about staffing issues. The email could conceivably have been sent earlier. HM felt that her team was unable to cope with their existing caseload and that some of the work should be re-directed or transferred to others particularly to Locality West. She had no power to impose this on other departments. She concluded her e-mail by saying:

“I am sorry for the inconvenience but we will have to direct callers to West Locality from Tuesday.”

16. Unsurprisingly the email did not go down well with the recipients. One of them wrote to say that the suggestion was ‘completely unfeasible’. Another wrote in more trenchant terms to say that:

“...enforcing such a move without due consideration of the existing resource is dangerous and will lead to unsafe practises putting service users at risk...There appears to have been none of the expected or anticipated professional dialogue/handover at senior management level. We request that...no further command/demand or confrontational emails are issued.....and that we all afford professional respect to each other.”

17. Mrs Parmar saw the email exchange on 24 November 2018 and sent a complaining email to Ms Lake in which she said:

“I'm not happy that I'm having to write this e-mail whilst being on a two-week holiday. I find it appalling that [HM] took the opportunity of me being away for two weeks to harass and bully my TLs. This has now become a bit of a pattern as you will remember from earlier this year when I was on leave. The tone of [HM's] e-mail was completely unacceptable and I need her to afford the same respect as I do to her TLs.”

18. On 5 December 2018 Ms Lake wrote the Claimant to say that the additional work would indeed move to West Locality but decided that no action was appropriate against HM as to the manner in which she had initiated the process.

19. On 8 January 2019 the Claimant attended a routine supervision meeting with Ms Lake. In the course of the meeting Mrs Parmar said she had been concerned about the tone of communications from HM. She went on to say that it was not acceptable for a Head of Service to ‘kick’ the Locality West Team Leaders. Mrs Parmar then accused Ms Lake of have an unconscious bias against black and ethnic minority Heads of Service. She said that when Ms Lake came to visit Bosworth House (where the Heads of Service were based) she always chose to sit with white colleagues. Ms Lake asked if she was being accused of being racist. Mrs Parmar said that she (Ms Lake) needed to reflect on that but that was how she felt.

20. Ms Lake decided to speak to the various team leaders to heal fractured relationships. She discovered that matters had escalated to the point where some of them were already in the process of lodging a collective grievance against HM. The eventual grievance contained the following comments:

“We as Team leaders feel devalued and denigrated by the oppressive and inequitable treatment we have found ourselves subjected to on two occasions in a year. We feel there has been a clear antipathy shown towards the West team leaders with any constructive assertions proffered being circumnavigated in favour of personal criticism and command.”

21. On 14 February 2020 JR was involved in an incident on a training course led by JD, a Principal social worker. JR felt she had been publicly humiliated by JD in the session. She emailed JD saying:

“I have been left feeling that the overt use of your position to address only myself in a large forum was designed to cause humiliation and denigrate.”

22. JR for her part replied saying:

“I find the content and tone of your e-mail unacceptable. I have formally raised this with Ruth [Ms Lake] who will be discussing this with Bindu about how we can move forward from this.”

23. Upon the matter coming to her attention Ms Lake decided that the appropriate course of action was to make an offer of mediation to JD and JR.

24. In October 2020 the Claimant was contacted by an officer from an employment agency regularly used by Leicester City Council. They said that one of the agency workers (SR) was not happy with his line manager (not Mrs Parmar) and no longer wished to work for the Council. Upon further investigation it became clear that prior to this conversation SR had encountered a difficult supervision session with his manager who was not happy that SR had apparently left a vulnerable service user in an unsafe home condition. The service user had later died and the police had requested a report on the team's contact with the service user. SR had seen the e-mail message about the service user whilst off sick and appears to have then ended his agency assignment with the Council.

25. SR was known to AE, his line manager and Mrs Parmar says that the two of them were good friends. In November AE personally went to SR's house to collect his SR's badge, laptop and locker key when his assignment had ended all of which appeared to go beyond the norm of a line manager's remit. In November 2020 SR apparently 're-joined' the Council as an agency worker with AE as his line manager but there remained concerns in some quarters about his work.

26. SCC, who is white British and was at the relevant time an Acting Head of Service. She had been allocated Mrs Parmar as her buddy/mentor. On 13 December 2020, SCC emailed Ms Lake to say she no longer wanted to be mentored by Mrs Parmar and that she had concerns about Locality West. Ms Lake asked SCC to put her concerns in writing. SCC submitted a statement identifying a number of incidents. These were it has to be said all at fairly low level. One of them was in relation to an employee, SO, who apparently did not know a code for a side room which SCC wanted to use which SCC found 'bizarre'. Another was that SCC had asked another worker, SA, to scan some documents. SCC got the impression from SA's demeanour that she looked uneasy at the request as though she had been forbidden to help those outside the team. SCC also said that a colleague had emailed to clarify an IT order and in a subsequent telephone conversation had told her that Mrs Parmar had been rude to her.

27. On 16 December 2020 AE sent an e-mail to Ms Lake in which she wrote of a number of concerns about the working relationship between Locality West and C&R. This was not a direct complaint against Mrs Parmar though it did refer to matters concerning Locality West for which Mrs Parmar was responsible.

28. On 20 December 2020 Ms Lake contacted Miss Nicola Graham an HR team manager to discuss what she says were her concerns about Mrs Parmar. There is no note of the discussion. Ms Joseph from HR was allocated to support Ms Lake.

29. On 4 January 2021 there was an angry e-mail exchange between JR, SR and AE about a case which did not apparently have safeguarding alerts actioned. Whilst the Claimant was copied in as Head of Service she did not have any direct involvement in the matter. The email began with JR pointing out to SR that a safeguarding alert had apparently been missed. AE had then intervened to say the person concerned had not in fact been left at risk. AE tried to speak to JR but her calls were not returned. AE then sent a strongly worded email to JR say that she found JR's 'tone' unhelpful and to suggest her team was not taking safeguarding alerts seriously was not the case. The next day AE emailed the Claimant as JR's line manager to complain of the 'accusatory' nature of JR's emails and said that this would lead to a formal complaint if it continued.

30. The Claimant had been on annual leave between until 5 January 2021 and she only saw the e-mail exchange on her return. Mrs Parmar considered the matter and was of the view that the dispute centred on a difference of opinion as to what point in time alerts should be entered on the system. She decided to seek the opinion of a Principal Social Worker.

31. On 7 January 2021, AE emailed Ms Lake about the above matter and said:

"I am sorry to involve you in this but we will need to discuss Bindu and her team's approach. A very simple matter has been escalated beyond all reason. I believe this is due to their intention to target SR (as Bindu suggested she would be doing to me on our initial conversation that they intended to scrutinise everything that had his name on it) and indeed myself by association. The West locality have a long reputation of intimidating and unhelpful behaviour long before I or SR joined the authority and I cannot understand why they are still able to behave in the way they do."

32. Dealing with the issue about SR's supervision, Mrs Parmar sent an email to AE on 8 January in which she indirectly referred to the earlier incident involving SR and said:

"It was agreed that HOS [Heads of Service] may need to be involved with any specific decisions made between SR and transfers to West which I don't wish to air in public."

33. A short while later AE sent an email to Ms Lake (which she did not copy to the Claimant) to say:

"I am absolutely disgusted with what Bindu is implying here. I will be raising this through the appropriate channels and will be making a formal complaint as this is victimisation. I will seek advice from HR as to the appropriate pathway to do so."

34. Also on 8 January 2021 AE apparently tendered her resignation (although it is agreed that AE did not in fact leave) and in her email to Ms Lake she wrote:

"I am myself at a loss why team leaders and Heads of Service in West are so unhelpful and appeared determined to undermine the team and individuals at every opportunity.....I am not prepared to work with people who are so vindictive and unprofessional in their approach. The most recent example of this was Bindu escalating the failure of C&R to deal appropriately with safeguarding alerts. In addition I cannot support the victimisation of another colleague by Bindu and her staff and I will be raising this through appropriate channels. SR intends to leave the authority as a result of this victimisation."

35. Ms Lake says that she then met a member of HR in early January 2021 to discuss what she should do and that both she and HR agreed that a disciplinary investigation was appropriate. Ms Lake also decided to temporarily transfer the Claimant from her role as Head of Service. She informed Mr Samuels about her decision. No such decision was made to suspend any other Head of Service.

36. On 12 January 2021 Ms Lake told the Claimant she was being transferred from her role whilst a disciplinary investigation took place and also emailed other Heads of Service to inform them of the decision.

37. On 14 January the Claimant was informed of the temporary transfer under the disciplinary procedure.

38. Between 26 January and 5 February 2021 Ms Lake interviewed nine witnesses as part of her disciplinary investigation. The list did not include SR.

39. On 9 February 2021 Ms Lake invited the Claimant to a disciplinary investigation meeting on 19 February to discuss the allegations which were as follows:

“Failure to behave in accordance with agreed management / leadership standards, both ASC specific and as set out in the code of conduct and professional social work standards;

Failure to ensure that people you directly manage behave in accordance with agreed standards;

That these failures have created an environment that is detrimental to individuals and to the delivery of core functions, which could impact on people who need our support”.

40. On 19 February Ms Lake held an investigation meeting with the Claimant remotely via Teams. The interview was recorded as were all the interviews. The meeting did not conclude and a follow-up meeting was arranged for 24 February 2021.

41. On 22 February 2021 Mrs Parmar sent an e-mail entitled ‘whistleblowing’ to 60 people within Leicester City Council, including the City Mayor and all elected Councillors. She also copied it to the Care Quality Commission. Within the e-mail Mrs Parmar made a number of allegations of whistleblowing and racially discriminatory behaviour against BAME staff by Ms Lake. We say no more about the contents of the email as it is the subject of separate proceedings.

42. The Claimant was absent from work from 23 February 2021 due to work related stress until 25 March 2021. The meeting that had been arranged for 24 February was postponed.

43. At some point between 24 February and 4 March 2021 Mr Samuels decided that the investigation would be taken over by another Director, Ms Caroline Tote.

44. On 17 March 2021 Ms Tote was provided with the recordings of the Teams interviews that had been undertaken and took time to view them all. None of the recorded interviews have been supplied to the Claimant in the process of disclosure nor have the transcripts been included in the otherwise voluminous bundle of 680 pages. The reason given is that they were deemed ‘not relevant’.

45. SR was not interviewed by Ms Lake but Ms Tote did want to speak to him. She wrote to him on 9 April requesting an interview. By then SR had left the role and was recovering from illness. No statement was ultimately taken from him.

46. OC was an agency staff member interviewed by Ms Tote on 23 March 2021 in relation to issues about matters OC had apparently raised with an agency about the Claimant some time earlier. The details relating to that interview have not been disclosed.

47. On 26 March 2021 following her return to work the Claimant was invited to the reconvened investigation meeting, this time with Ms Tote on 22nd April.

48. In the meantime the Respondent had instructed an outside expert to deal with the Claimant's allegations of alleged safeguarding failures and discrimination. On 31 March 2021 he submitted his report in which he concluded that there was no credible evidence to substantiate Claimant's allegations as to safeguarding failures or in relation to race discrimination. It appears that his decision was based on the papers only.

49. On 22 April 2021 the re-arranged investigation meeting took place between the Claimant and Ms Tote remotely via MS Teams. The notes of that meeting have been disclosed and are included in the bundle. The Claimant said that she did not understand, nor had she ever understood, what she had done wrong. Mrs Parmar is recorded as saying:

" I hope you can understand that I have been interviewed for 3 hours now and I still don't know what I have failed in. What code of conduct have I failed in? What professional standard have I failed in? Why can't somebody tell me what I have done wrong?"

50. There is no substantive reply from Ms Tote to that question. We note that at this point Ms Tote had listened to all of the earlier recordings of interviews.

51. A further meeting was arranged by Ms Tote for 7 May 2021 which although described as a 're-convened investigation meeting' was to all intents and purposes arranged to inform the Claimant that there was no case to answer and the process was being brought to an end. Confirmation of that was given in writing the same day.

52. On 7 May 2021 the Claimant presented her ET1 Claim Form to the Tribunal.

53. Prior to this hearing the Claimant made a subject access request of the Respondent. The reply reveals the following information: The Council does not hold information on the number of white and BAME employees from grade 10 above in Adult Social Care where disciplinary action was commenced prior to 2017. However two disciplinary actions have commenced since 2017. Both of them were against BAME employees. There is no record of any white comparable employee having been disciplined.

54. That information was supplemented by evidence at this hearing. The only other Head of Service to be the subject of a disciplinary investigation was JSB who is of Asian origin. The only other person of a comparable grade to the Claimant against whom a disciplinary investigation was commissioned by Ms Lake was KR, who is also of Asian origin. Ms Lake has not commissioned any disciplinary investigations against any white employees of a comparable status.

THE ISSUES

55. The issues are agreed as follows: did the Respondent subject the Claimant to the following treatment:

55.1 Making false allegations against the Claimant on or around 12 January 2021;

55.2 Transferring the Claimant from her role as Head of Service;

55.3 Causing a disciplinary investigation to be carried out against the Claimant on or around 12 January 2021;

55.4 Causing the Claimant to have to attend several disciplinary investigation meetings only for the Claimant to be advised that there was no case to answer;

55.5 Not considering lesser and more proportionate means of dealing with any alleged work or conduct issues by the Claimant such as mediation on or around 12 January 2021.

56. If so, in relation to each of the above, did the Respondent treat the Claimant less favourably than it treated or would have treated a comparator? The Claimant relies on a hypothetical comparator.

57. Can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude, in the absence of any other explanation, that the difference in treatment was because of the Claimant's race? If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

THE LAW

58. This is a claim of direct race discrimination. Section 13 of the Equality Act ("EA 2010") defines direct discrimination as follows:

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

59. Section 13 refers to treating a person "less favourably" which implies a comparison of treatment. Section 23 EA 2010 deals with comparators and states:

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

60. Section 136 EA 2010 deals with the issue of the burden of proof in discrimination cases and states:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

61. Section 136 EA 2010 is sometimes referred to as the 'reversal of the burden of proof' provision. There is considerable judicial guidance on how this should be applied. Whilst all the leading authorities are all pre-Equality Act cases, section 136 EA 2010 has not substantively changed the law on burden of proof prior to the introduction of the Equality Act 2010 (see **Efobi v Royal Mail** [2021] UK SC 33).

62. In **Igen v Wong** [2005] ICR 931 the Court of Appeal gave important guidance on the correct application of the burden of proof provisions. **Igen** was a case of sex discrimination but the same principles apply to race cases. The guidance in its final form is as follows:

"(1) Pursuant to section 63A of the 1975 Act [now section 136 EA 2010] it is for the applicant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the applicant which is unlawful by virtue of Part 2, or which, by virtue of section 41 or 42 of the 1975 Act, is to be treated as having been committed against the applicant. These are referred to below as "such facts".

(2) If the applicant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the applicant has proved such facts that it is unusual to find direct evidence of [sex] discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the applicant has proved such facts, it is important to 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.

(5) It is important to note the word is "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 proved by the applicant to see what inferences of secondary fact could be drawn from them.

(6) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire....

(7) 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 pursuant to section 56A(10) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(8) Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably on the grounds of sex, then the burden of proof moves to the employer.

(9) It is then for the employer to prove that he did not commit, or, as the case may be, is not to be treated as having committed, that act.

(10) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive 97/80.

(11) That requires a Tribunal to assess not merely whether the employer 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 sex was not any part of the reasons for the treatment in question.

(12) Since the facts necessary to prove an explanation would normally be in the possession of the employer, 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."

63. In **Madarassy v Nomura International Plc** [2007] IRLR 246, the Court of Appeal (approving **Igen**) made it clear that the burden does not shift to the employer simply on the Claimant establishing a difference in status (for example a difference in race) and a difference in treatment. Such 'bare facts' would only indicate a possibility of discrimination, not that there was in fact discrimination. "*Could conclude*" must mean that a reasonable Tribunal could *properly conclude* from all the evidence before it. Thus the first stage of the two-stage process envisaged by section 136 EA 2010 is to consider whether the Tribunal could properly conclude from the facts whether discrimination is a possible explanation for the treatment. At the second stage, once the Tribunal is satisfied that the Claimant has proved facts from which an inference of discrimination can be drawn, the Respondent must provide a non-discriminatory explanation for its treatment of the Claimant. If, on a balance of probabilities, the Respondent is not able to show that discrimination was not the reason for the treatment the Claimant must succeed. If the Respondent discharges the burden by proving, for example, that a non-discriminatory reason for the treatment exists, then the claim must fail.

CONCLUSIONS

64. There is no dispute as to the applicable law only its application. There is also no significant dispute as to the material facts.

65. There is no argument advanced by either party that this is one of those cases where discrimination - or the absence of discrimination - is so clear-cut that it is not necessary to go through the two-stage process.

66. We also think that there is very little substance in the point by Mr Livingstone that the allegation of direct discrimination was only put to Ms Lake very briefly and near the end of her cross examination as almost an after-thought. In most cases 'putting the case' is merely a formality. It is rarely the case that discrimination is admitted.

67. Similarly there is no substance in our view in the submission that the Claimant has not provided *evidence* of discrimination. There is rarely direct evidence of discrimination.

68. There can be no real argument that the Claimant was subjected to treatment which could potentially amount to less favourable treatment. A disciplinary investigation and suspension from the role of Head of Service are clearly potential acts of less favourable treatment. The real contentious areas in this case are of appropriate comparison, whether the burden of proof passes to the Respondent to show a non-discriminatory reason for the treatment and if so whether that burden has been discharged.

69. Having considered the evidence we are satisfied that the Claimant has established a prima facie case, that is to say the Claimant has proved facts from which an inference of discrimination might be drawn and the burden thus shifts to the Respondent to establish a non-discriminatory reason for the treatment.

70. We arrive at that conclusion for the reasons below but in essence it is because in a number of comparable situations where a disciplinary investigation might

reasonably have been instigated Ms Lake chose not to do so when it involved employees of a different race to that of the Claimant. Instead her normal approach was to offer mediation or to deal with it informally by discussion. In the case of the Claimant however she decided to take much more drastic action and she did so after she had been accused of unconscious racial bias. In particular we take into account the following the following:

70.1 HM had admitted to swearing. It was undoubtedly inappropriate conduct and was viewed as such by Ms Lake at the time because she took the time to go and see HM personally.

70.2 HM sent an email which caused such consternation that it led to a collective grievance yet no disciplinary investigation was commenced against HM. Whilst the final outcome as to the distribution of work was agreed by Ms Lake the manner in which it was done clearly offended others to the extent that they felt a collective grievance was necessary. There was nothing equally serious against the Claimant.

70.3 JR made strong allegations against JD that she said were “designed to cause humiliation and denigrate”. Ms Lake chose to offer mediation rather than instigate an investigation.

70.4 Despite victimisation of SR being a central allegation against Mrs Parmar (by AE) Ms Lake never interviewed SR which suggests she could not have thought there was any substance in the allegation. We do not consider the reason for not interviewing SR was that Ms Lake had simply not got round to it. Ms Lake had completed all of the nine proposed interviews by 5 February 2021. SR was never on the list of people to be interviewed. The Claimant was interviewed after the others which suggests that Ms Lake had decided to complete all her interviews until she got to the Claimant. It would make no sense to leave a meeting with SR after the Claimant.

70.5 The issue involving AE and the matter which HM thought was ‘escalated beyond all reason’ concerned JR and not the Claimant. Mrs Parmar had acted properly in seeking advice from JD.

70.6 The only employees that Ms Lake has ever disciplined are of Asian ethnicity.

71. Mr Livingston argues that the allegations against the Claimant were serious and it was right and proper that there should be an investigation. The fact that nothing came of them in the end was irrelevant – it is only when the allegations were properly investigated that it could fairly be concluded that no action was necessary. He also points out that in cross examination the Claimant accepted that there were ‘serious concerns’ or that these were ‘serious allegations’.

72. We will deal briefly with the concession. In fairness to the Claimant her concession was subject to the proviso that they were only serious “if they were correct” which she did not believe they were.

73. The Claimant clearly did not accept that these were serious allegations at the relevant time because she had consistently complained that there was no substance to them and she did not understand what she was supposed to have done wrong. Furthermore, Ms Lake never informed the Claimant of the allegations by AE and SCC. The Claimant only discovered them during the disclosure process in this case. She was therefore hardly in a position to admit they were serious if she did not know anything about them.

74. The reality is that there was nothing of substance to start a disciplinary investigation. There is nothing to suggest that Senior Managers such as Ms Lake

routinely initiate such investigations. Ms Lake must have appreciated there was nothing of substance because the wording of the allegations calling Mrs Parmar to an investigation did not set out any identifiable acts of misconduct. Ms Tote decided quite properly to discontinue the investigation once she considered the evidence. There is nothing to suggest Ms Lake would have discontinued it if she had not been removed from the process by Mr Samuels.

75. The e-mail sent by AE on 16 December raised general concerns about Locality West and not about the Claimant in particular. The two specific complaints were about another employee who was said to have spoken in an inappropriate or overly harsh way and who challenged a simple administrative request.

76. We conclude on the evidence that when it came to assessing the merits of behaviour allegations against white employees such as HM, AE and JR, Ms Lake was slow to move to formal measures. In the case of the Claimant she moved fairly speedily to investigation and suspension for something which was either at the same or lower level of alleged misconduct. We are satisfied that race played a part in her decisions. There is no other credible explanation.

77. We also draw adverse inferences from the failure by the Respondent to disclose relevant evidence. There was a conscious decision by the Respondent (or their legal team) not to disclose highly relevant evidence. It was clearly relevant because it was on the basis of such evidence that Ms Tote decided there was no substance in the allegations and decided as a consequence to terminate the investigation.

78. In fact it is not only the recordings of interviews that the Respondent has failed to disclose. Ms Lake said she made notes of witness interviews and may have shared these with HR. She may have typed them and saved them as a file. None of these notes or files have been disclosed. Miss Tote said she took notes from the investigation meetings which she kept for 6 months. The Claimant began proceedings on 7 May so the need to preserve such notes would have been obvious from the outset. Ms Tote's notes have not been disclosed. Ms Tote also interviewed OC and at least some interviews were recorded. Those recordings have not been disclosed.

79. We have considered the potential non-discriminatory explanations relied on by the Respondent. They are as follows:

79.1 That the disciplinary procedure was appropriate in order to speak to witnesses and gather evidence.

This argument is without substance. There was nothing preventing Ms Lake from making informal enquiries as she often did. Not every enquiry requires a formal investigation and suspension so that witnesses can be interviewed. Ms Lake was quite content to ask SCC to set out her concerns in writing.

79.2 That Ms Lake spoke to HR and it was agreed that this was the appropriate action to take.

Ms Lake cannot hide behind HR's actions or advice. It was her managerial decision to instigate a disciplinary investigation and temporary suspension.

79.3 The disciplinary process was preferable to any potential grievance procedure because it did not rely on complainants to raise grievances.

This was never offered as a rationale at the time and in any event has no merit. It is somewhat bizarre to suggest that because no-one had lodged a grievance that this somehow made a disciplinary process appropriate.

79.4 That when Ms Lake had raised issues with the Claimant in the past they had not been acknowledged as valid concerns.

This is an argument that appears to have been developed in the course of Ms Lake's evidence. In cross-examination Ms Lake could only give three examples where the Claimant had failed to acknowledge past issues. One was in October 2020 when Ms Lake told the Claimant to think carefully about her tone of emails as they could come across as 'curt and dismissive'. The email in question was not included in the bundle so we were not able to assess it fully. Clearly it was not seen as significant otherwise it would not have been omitted from the bundle. In any event the Claimant had replied to say that she was happy to discuss this at the next 1:1 meeting and Ms Lake had written back to say: *'That's fine – I know we won't see eye to eye on the tone thing'*. At the next meeting the issue was not even raised.

The second example relates to a discussion at a supervision meeting on 8 January in which Ms Lake had noted that she had seen emails from Locality West managers, including the Claimant, that she perceived to be 'rude and aggressive'. Those emails have not been included in the bundle either so the same observation applies.

The third relates to a supervision meeting on 3 March 2020 where it was noted that there were:

"wider concerns expressed by people who did not wish to formalise their concerns....about how working with some colleagues in West makes them feel – anxious, berated, attacked...BP reflected with RL on the individuals involved and their style/approaches/strengths/areas that require support or challenge and how RL could develop the relationships with TLs, JR in particular."

This concerns discussions some 10 months before the Claimant was subjected to an investigation. It was therefore largely historical. Ms Lake could scarcely have been thinking of this in January 2021 when she was deciding whether to start a disciplinary investigation.

79.5 That given the potential misconduct an investigation was appropriate.

There was no potential misconduct in reality. The allegations have never been particularised.

79.6 That at the time Ms Lake had received statements and emails from SCC, AE and a conversation with AE about AE's intention to resign.

The suggestion of AE resigning was clearly not serious nor do we find Ms Lake treated it as such. The matters relating to AE and SCC could not have been seen as serious because they were never communicated to the Claimant.

79.7 That there was potential targeting of SR and allegations of victimisation.

If Ms Lake had genuinely believed SR was being targeted it was at least necessary to interview him. SR had not complained of victimisation himself.

80. We are satisfied in all of the circumstances the Respondent has not established, on a balance of probabilities, a non-discriminatory explanation for the treatment of the Claimant.

81. We are also satisfied that (in the same or similar circumstances involving a white employee or at any rate one who was not Asian) Ms Lake would not have initiated a disciplinary investigation or suspended an employee from their role as Head of Service. We are satisfied the Claimant has been treated less favourably because of her race.

82. In relation to the specific issues our conclusions are as follows:

Issue 1

Making false allegations against the Claimant on or around 12 January 2021.

83. We do not find that the allegations were “false” in the sense that they were manufactured or fabricated. This allegation, as framed, is therefore dismissed.

Issues 2 and 3

Transferring the Claimant from her role as Head of Service and causing a disciplinary investigation to be carried out against the Claimant on or around 12 January 2021.

84. We are satisfied that the Claimant was treated less favourably than a hypothetical white comparator would have been (that is to say someone who was white British) in the same or similar circumstances for the reasons given above. These two allegations are therefore upheld.

Issue 4

Causing the Claimant to have to attend several disciplinary investigation meetings only for the Claimant to be advised that there was no case to answer.

85. The allegation is in relation to the disciplinary investigation interview conducted by Ms Lake on 19 February 2021, the first meeting with Ms Tote on 22 April 2021 and the meeting with Ms Tote on 7 May 2021.

86. The allegation in relation to the meetings on 19 February and 22 April are upheld for the reasons given above. Although Ms Tote took the latter meeting, and no allegation of discrimination is made against her, the decision to hold that meeting was really that of Ms Lake, the meeting having been postponed from its original intended date of 24 February when the Claimant fell ill. The second meeting was effectively a continuation of the first.

87. The allegation in relation to the meeting on 7 May is not upheld. The purpose of that meeting was simply to inform the Claimant that the investigation was to be discontinued. It is possible that the Claimant could have been informed prior to that date of discontinuance but there is nothing discriminatory about that. In any event it was not a ‘disciplinary investigation’ meeting.

Issue 5

Not considering lesser and more proportionate means of dealing with any alleged work or conduct issues by the Claimant such as mediation on or around 12 January 2021.

88. This allegation also succeeds for the reasons given above.

89. The issue of remedy is adjourned.

Employment Judge Ahmed

Date: 17 March 2023

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