



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110998/2021

5

**Final hearing held in Glasgow on 20 - 23, 27 and 29 March 2023
Deliberations 29-31 March 2023**

10

**Employment Judge D Hoey
Members L Millar and M McAllister**

Ms J Adegun

**Claimant
In Person**

15

The Scottish Ministers

**Respondent
Ms S Monan -
Solicitor**

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the unanimous judgment of the Tribunal that the claims of harassment and victimisation are ill founded. Each of the claims raised in this case is dismissed

REASONS

25

1. The claimant in this case had lodged a number of claim forms. The claims comprised race discrimination, unfair dismissal and other payments. While the box for other payments had been ticked in the ET1 there was no information within any claim form as to what the other payments were (and this was not mentioned during the hearing at all until submissions stage, by which stage the claims had been finalised and evidence heard). The unfair dismissal claim had been dismissed at an earlier hearing.

30

2. This case has had a considerable history with a large number of preliminary hearings having been fixed to ensure the case was properly case managed. Ultimately the parties worked together to focus the claims such that by the

commencement of day 2 the claimant advised the Tribunal that 2 claims were being advanced, harassment and victimisation.

3. The Employment Judge began the hearing by ensuring the parties understood the overriding objective and of the need to ensure that matters proceeded justly and fairly, to include the need to place both parties on a equal footing and that cost and proportionality was considered.
4. The first day had been spent clarifying the claims being advanced. The claimant had indicated at the commencement of day 1 that the claims she wished to bring differed from those which had been communicated to the Tribunal in the course of earlier case management hearings (which was a matter the respondent raised). The detriments relied upon in her victimisation claim (and the protected act) seemed to differ from those previously advised and the harassment claim appeared to include different acts. The respondent's agent had advised that it had prepared its case on the basis of the information previously communicated to the Tribunal (which fundamentally differed from what the claimant was setting out at the start of day 1) and if the claimant wished to proceed upon a different basis that would have a significant impact. The claimant was given the first day to consider the specific claims she wished to advance and the detail of such claims.
5. The claimant was advised that if she wished to alter the claims from those previously communicated to the respondent and the Tribunal, she would require to make an application to do so, making it clear what the specific claims were to ensure fair notice. The respondent had indicated that it was likely to object and there could be cost consequences given the cost implications of further delay. The claimant therefore had to choose whether to proceed with the claims as advanced or to make an application to alter those claims, thereby giving the respondent fair notice of the revised claims.
6. The claimant considered matters and chose to proceed with the specific claims as had been previously communicated to the Tribunal (and no others). The claimant chose not to make any application to revise the claims she wished to make and the parties worked together to identify the specifics of the

2 claims now proceeding, harassment and victimisation. The only evidence led was evidence relevant to those 2 claims.

7. The hearing was conducted in person with the claimant presenting the claim on her own behalf. The witnesses gave evidence orally. As the claimant was not represented, the claimant was given the opportunity to present her evidence by way of a written witness statement. She agreed to this, as did the respondent. The claimant was able to set out in writing the evidence she wished to be taken into account and give supplementary evidence.
8. The claimant was also given considerable time to prepare her questions for each witness, with the Tribunal allowing lengthy breaks each day to ensure sufficient time was given for the parties to fully prepare and present their case.

Case management

9. The parties had worked together to focus the issues in dispute and had, by the conclusion of the Hearing, provided their suggested statement of agreed facts and list of issues. The Tribunal is grateful for the parties working together to assist the Tribunal deal with matters fairly and justly and thereby achieve the overriding objective.
10. The Employment Judge assisted the claimant by ensuring her case was put to the witnesses and the points arising were focussed and relevant to the issues the parties had agreed the Tribunal had to determine.
11. One of the issues in this case related to the reasons why the respondent had ended the claimant's promoted post earlier than the anticipated end date. The respondent had advised the claimant at the time of specific areas where she had not performed. On a number of occasions, the claimant sought to focus on other areas of her performance. Many of those areas of her performance were not in dispute. The material issue in this case was the reasons for ending her promoted post sooner which was the focus of the evidence. In essence the claimant disagreed with the conclusion of Ms Kehoe, her manager, and the Tribunal had to determine what was more likely than not the position from the evidence before it.

Issues to be determined

12. The parties had broadly agreed the issues to be determined by the Tribunal which were as follows:

Harassment related to race (section 26 of the Equality Act 2010)

- 5 i. The act relied upon was the claimant being told by Mr Walls on 24 June 2021 that she would receive her pre-promotion salary related to her race. It was accepted this occurred and it was unwanted conduct. The first issue was whether this was related to race.
- 10 ii. If so, did the conduct have the purpose of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, having regard to the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct complained of to have that effect?
- 15 iii. Alternatively, did the conduct have the effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, having regard to the perception of the claimant, the other circumstances of the case and whether it is reasonable for the conduct complained of to have that effect?

Victimisation (section 27 of the Equality Act 2010)

- 20 iv. The **first detriment** relied upon was the claimant's line manager, Ms Kehoe, telling the claimant that she was slow at doing her work and making too many mistakes. It was accepted, for the purposes of this claim, that this had occurred. The issue was whether that amounted to a detriment.
- 25 v. If so, the next issue was whether the claimant was subjected to this detriment because she raised Tribunal claim number 4110998/2021.
- vi. The **second detriment** relied upon was the fact that the claimant's End Year Review was not conducted. It was accepted this occurred. The first issue was whether it amounted to a detriment in law.

- vii. If so, was the claimant subjected to this detriment because she raised Tribunal claim number 4110998/2021.
- viii. The **third act** was the claimant's line manager telling the claimant that she would not be seeking contributions from the claimant's previous line manager, Mr Dick, for the End Year Review Report and that Mr Dick's contributions would not be factored in when writing the End Year Review Report? It was not accepted this occurred and the Tribunal needs to decide whether it happened.
- ix. If so, did it amount to a detriment.
- x. If so, was the claimant subjected to this detriment because she raised Tribunal claim number 4110998/2021?
- xi. The **final detriment** relied upon was whether the claimant's line manager ending her TRS role on 4 May 2022 (and offering her an alternative role) amounted to a detriment (it having been accepted the respondent ended her TRS role and offered her a permanent role).
- xii. If so, was the claimant subjected to this detriment because she raised Tribunal claim number 4110998/2021.
13. The parties had agreed that remedy would be determined at a separate hearing if the claimant was successful.
14. The foregoing had been considered carefully by both parties and confirmed by the claimant as the only claims and issues to be determined having been given time to agree same.
15. At the submissions stage of the hearing, the claimant having confirmed the above represented the claims proceeding, the Employment Judge noted that the claimant had included in her submissions (at paragraph 74) a section on "pension contributions – outstanding issue". Following a discussion during submissions, the claimant accepted that this was not a claim she had advised the Tribunal she was progressing during the hearing. It was not included in the list of issues (and no details were in the claim form).

16. The claimant had indicated that it was part of the victimisation claim and would only be relevant if her claim had succeeded and was not being raised as a standalone claim (and had not been so advanced during the course of the Hearing). There had been no evidence led that dealt with the specific claim and it had not been raised prior to the submissions stage. The claimant had been given every opportunity of clarifying the specific claims to be addressed which had been done in the agreed list of issues the parties had finalised and no other issues had been raised that required to be determined by the Tribunal.
17. The parties confirmed the Tribunal would consider the claims that had been set out by both parties as set out in the issues above, the claim for harassment and victimisation. In the event the claims were not well founded, each of the claims would be dismissed. If any of the claims were successful, as had been agreed, the Tribunal would fix a separate hearing to determine what losses were sustained as a consequence of any unlawful treatment.

Productions and witnesses

18. The parties had agreed productions running to 329 pages.
19. The Tribunal heard from the claimant, Mr Walls (policy officer who was previously worked in HR services), Ms Kehoe (claimant's line manager) and Mr Parton (a senior manager who was present with Ms Kehoe at meetings).
20. The parties were able to agree a significant amount of facts and focus the matters in dispute, thereby assisting the Tribunal in resolving the issues in dispute.

Facts

21. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). There were a number of factual matters raised by the parties

which were not necessary to determine the issues in this case and they are not referred to.

22. Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence and making a decision as to what was more likely than not to be the case. The Tribunal was assisted by the parties reaching agreement, in respect of some of the key facts and by both parties providing what they understood the facts to be in light of the evidence. There were few material facts in dispute that were necessary to resolve the issues which the Tribunal did by considering the full factual matrix and the information produced at the time, deciding what happened on the balance of probabilities, namely what was more likely than not to have happened from the evidence presented to the Tribunal.

Background

23. The respondent is the Government of Scotland with between 12,000 and 14,000 employees. The claimant worked as Finance Administrator within the respondent's Economic Strategy Director from 28th June 2019. She worked as Finance Administrator (Grade A3) within the Social Security Scotland Directorate from 20 July 2020.
24. The claimant passed her final probation review with the highest overall grade attainable within the Scottish Government – "Overall Marking – Exceptional".
25. The claimant's previous line manager, Mr Dick, who conducted her final probation review confirmed that the claimant's conduct demonstrated behaviours and values expected of Scottish Government staff. He also commented that the claimant's workplace conduct was "excellent" and that the claimant's professional attitude was a great example and that the claimant represented Corporate Finance well in meetings with other stakeholders.
26. The claimant moved to the role of Regeneration Policy Officer (Grade B1) in the Regeneration and Towns Strategy Team in the Housing and Social Justice Directorate on 1 June 2021.

27. The claimant's salary increased when she moved from the A3 to the B1 role on 1 June 2021.

Call between Mr Walls and the claimant on 24 June 2021

5 28. In June 2021, Mr Walls was Team Leader for the Change of Grade Team within the Scottish Government HR function. He had access to the intranet.

29. A Teams call took place between the claimant and Mr Walls around 1pm on 24 June 2021.

10 30. Prior to the call on 24 June 2021, the claimant had received an email from Mr Kinnear with a Change of Grade Contract indicating her new promoted grade B1.

31. The claimant wrote to Mr Kinnear on 24 June 2022 requesting further clarification regarding some of the information sent in Mr Kinnear's email.

32. Mr Walls searched the staff directory to obtain the claimant's contact details before sending her a message on Teams requesting a call.

15 33. The Scottish Government's eHR collects personal information of staff including ethnicity, gender and nationality.

34. Mr Walls viewed the claimant's name and telephone number/email address on Scottish Government records and systems portal before the call.

20 35. Mr Walls and his team did not receive any personal information regarding the employees whose cases they process, except their name and employee number. Mr Walls was not aware of the claimant's race prior to the call.

36. Mr Walls' team have 'view only' access to eHR, meaning they can only see limited employee information, which does not include information about an employee's race.

25 37. When Mr Walls told the claimant that she would be receiving an underpayment, she started shouting at him telling him that he had not processed her change of grade payment because she is black and that he was a "racist".

38. Mr Walls tried to explain what had happened in relation to the claimant's change of grade and what could be done to assist her, but he could not do so because she kept shouting at him and cutting him off when he tried to speak.
39. Mr Walls remained calm on the phone and decided to hang up because he was being continually cut off by the claimant.
40. The claimant was one of 131 of the respondent's employees whose change of grade cases could not be processed in June 2021 due to lack of capacity in the payroll team and the decision to focus endeavours on ensuring all staff received at least their basic salary.
41. The claimant, along with 130 other members of staff, received an email from James' Line Manager, Mr Deponio, on 23 June 2021 informing them that their change of grade had not been processed that month. The claimant denied receiving this email but the Tribunal considered on the balance of probabilities that he had received it.
42. The claimant is black. There were a number of other races and nationalities affected within the 130 other staff, some others being black and some others being white. The race of the employee was entirely irrelevant to this issue.
43. During the call Mr Walls told the claimant that she would be receiving an underpayment of her salary for the month of June 2021. She would be receiving her A3 salary, rather than her B1 salary.
44. During the call, the claimant demanded that she be paid her full salary. The claimant told Mr Walls that his comments were racially discriminatory. Mr Walls tried to explain the reason for the delayed payment but the claimant would not listen and accused Mr Walls of being racist.
45. Both the claimant's and James Wall's cameras were off during the call.
46. Mr Walls ended the call as he was not prepared to be subject to the tirade the claimant had launched against him.
47. The claimant had been treated no differently to the other 130 members of staff who had changed grades. The sole reason for the treatment the claimant

received was because the relevant team was short staffed and could not process the amount of salary increases (and their focus was instead to ensure all staff received some payment).

Protected act

- 5 48. The claimant raised Tribunal claim number 4110998/2021 (“the claim”) on 22 August 2021 and this amounts to a protected act for the purposes of the victimisation claim.

Knowledge of the protected act

- 10 49. During the claimant’s employment with the respondent, Ms Kehoe and Mr Parton were not aware that the claimant had raised the claim or made race discrimination allegations.

- 15 50. Ms Kehoe and Mr Parton were aware that there was an issue between the claimant and a former manager, which meant that the particular manager could not conduct the claimant’s end of year review, but neither Ms Kehoe nor Mr Parton knew any details of that issue including that it related to an allegation of race discrimination.

- 20 51. Ms Kehoe had spoken with another manager to identify someone to carry out the claimant’s review and had been told that there had been a complaint against a staff member by the claimant but Ms Kehoe was not told (and did not ask) about the nature of the complaint and she was unaware of the claim at the material times. Ms Kehoe did not know the complaint related to race.

Claimant’s Temporary Responsibility Supplement (TRS) role

- 25 52. The respondent has a policy whereby if a member of staff temporarily takes on the duties of another post in a higher pay range (called a TRS role) the individual may receive a TRS supplement (in addition to their normal pay). The TRS is paid as a difference between the substantive salary and TRS range minimum. Any TRS supplements require to be authorised. The process is informal at a manager’s discretion. Managers have the right to end the TRS

role prior to the end date as there is no entitlement to a fixed period and the role is subject to the manager's discretion.

53. The claimant's move to the role of Project Management Support Officer (Grade B2) on 10 January 2022 within the Connected Communities Division, was a TRS role. The role had been advertised within the Scottish Government internal vacancies.
54. Only staff on a permanent contract with the Respondent can apply for a TRS role.
55. The claimant applied for the Grade B2 role and was interviewed by Ms Kehoe and Ms Walder. The claimant had experience of working with Scottish Government finances and of mailbox management. The claimant had been working in the New Scots Refugee Integration Strategy project team.
56. The claimant's role was intended to continue until the end of the project in December 2022.
57. The claimant's line manager in the role was Ms Kehoe and counter signing officer was Ms Walder.
58. The Claimant's team comprised herself, two other colleagues and her line manager, Ms Kehoe. The postholders were TRS staff. In other words the claimant, her two colleagues and her line manager were all on TRS when the claimant joined the team.
59. It was agreed when the claimant accepted the TRS role that she would go back to another role at her substantive grade (B1) when the role ended.
60. The claimant's role related to the reporting of project finances that were required each quarter. The reporting requirements were strict given the part of the project the team were working on was EU grant funded.
61. The claimant had a two week handover with the outgoing postholder, when she started the role. The claimant's predecessor had left a comprehensive written note setting out the key duties, tasks and how to deal with issues

arising. The predecessor had coped with the demands of the role which demands were reasonable.

- 5 62. The outgoing postholder left the New Scots Refugee Integration Strategy project team around 24 January 2022 to work elsewhere within the respondent.
63. The outgoing postholder was not the only member of the team who secured a substantive post at their promoted grade. A predecessor had left the team but not gone to a promoted role.
- 10 64. The claimant's role included reviewing and processing quarterly returns from 56 funded projects, including managing the mailbox that these came into; providing step-by-step advice on how projects could resolve any issues within those returns; and processing the payments and circulating a weekly update to those colleagues acting as the main point of contact for the projects to let them know any updates on their projects' returns.
- 15 65. The claimant's role was fast paced and was part of an EU funded project. It was very important the post holder was accurate and efficient as projects depended upon the claimant's role for their income (in whole or in part). The role was also subject to potential audits and following guidance and process was important to ensure the rules were followed. The post holder required to
20 be autonomous and efficient and be able to work under pressure without a large degree of supervision.
66. The claimant completed all mandatory training within deadlines agreed with her line manager. On 13 January 2022, the claimant agreed with her line manager that she would complete training which she did timeously.
- 25 67. The claimant stated in her monthly conversation template on 18 February 2022 that she had concerns regarding the Project Officers awaiting responses regarding returns, and that she was waiting for her line manager to review tasks so that she could issue responses to the Project Officers.

Issues about the claimant's performance arise

68. The claimant had meetings with Ms Kehoe and Mr Parton on 9 March 2022, 22 March 2022, and 4 May 2022 each of which addressed concerns the respondent had about her performance in key areas of her role.

69. At the meeting of 9 March 2022, the claimant was told that there were
5 concerns about her performance in the role, and that the respondent would be monitoring her performance. The sole reason why the claimant was told about the concerns her manager had was because of the concern that she was underperforming and the claimant's role was important given the bodies that relied upon the respondent for their income. The claim was in no sense
10 whatsoever a reason for the treatment the claimant received.

70. At the meetings of 9 March 2022 and 22 March 2022, the claimant was told the following in relation to her performance:

a. Problems around issuing the weekly project updates to Project
15 Officers/RICs (including the fact she did not issue the update to key partners and errors and omissions in what was included). The project officers/RICs rely on receiving this information to allow them to do their job. It was vital that information was issued and accurate. The claimant had failed to do so.

b. There were concerns with the claimant's prioritisation and initiative.
20 The claimant had expressed a desire for detailed task lists, but while such an approach was acceptable at the lower grades the claimant had previously worked, such an approach was not compatible with the higher B2 level role, where there was an expectation of greater autonomy, and when to seek advice.

c. Concerns were raised around the claimant's communication style and
25 mailbox management. This included feedback from project partners and stakeholders who had raised concerns both around the tone and timeliness of responses and items being missed.

d. The claimant was also advised that her manager was having to hold
30 back on giving her some of the key tasks of the role, such as

processing the quarterly financial returns and work on risk management, as it had become clear she was feeling overwhelmed and struggling to carry out the role properly.

71. The claimant had been told at both meetings that her performance required to improve. She was required to work on her own as the role was more senior than her previous grade which had less autonomy.
72. During the call on 22 March 2022, the claimant told Ms Kehoe and Mr Parton that she had to take time off work for a family emergency and she was on leave from 25 March 2022 until 11 April 2022.
73. The claimant's performance did not improve when she had returned to work and she had continued to make errors. The claimant's manager had concerns that the claimant's errors could result in projects not receiving the essential funding on which they depended timeously.
74. At the meeting of the 4 May 2022, the claimant was told that her Ms Kehoe and Mr Parton continued to have concerns in relation to her performance.
75. The claimant was given the following examples:
- a. Upon her return from annual leave, she had been assigned a cut and paste task to repopulate 51 forms for funded projects and insert links into an internal toolkit. The claimant had been given clear instructions and several examples. A reasonable period to complete the task would have been two days but the claimant felt it would take her 3 times as much. The claimant had also been told that she had completed the task incorrectly and created further work.
 - b. The claimant was advised that there were continued issues with the management of the shared mailbox, which the claimant was responsible for overseeing.
76. Ms Kehoe and Mr Parton explained to the claimant that the previous post holder who had been at the same level as her, had coped well with the

demands of the role. The claimant had been advised that if her performance did not improve the TRS role may be ended prematurely

77. Ms Kehoe and Mr Parton told the claimant that they were concerned about the backlog of payments.

5 78. The claimant disagreed with Ms Kehoe's and Mr Parton's views about her performance. She believed she had been performing well in the role.

Ending of the TRS

79. On or around the start of May the respondent decided that the claimant could no longer continue in the TRS role. The claimant's managers believed that
10 the workload was too much for the claimant. While there were areas where the claimant had done well, there were a number of key areas that remained of concern. These had been areas of the claimant's performance that had been raised with her during her meetings. While the claimant disagreed with the respondent's assessment, that was their view based upon the information
15 that had been communicated to them. The claimant's line manager could no longer continue to hold back the work or to fix the errors the claimant made. The TRS role would end and another role would be offered to her.

80. The claimant was told that her TRS was being ended with immediate effect on 4 May 2022 at the meeting on 4 May 2022.

20 81. The claimant was told that it was not possible for her to continue to work in her TRS role as a result of the concerns about her performance held by the respondent.

82. Ms Kehoe and Mr Parton told the claimant that the Ukraine team was very busy and there was a grade B1 role for her in the Ukraine team. This had
25 been sourced by the respondent as they had promised to ensure there was a permanent role available for her when the TRS role ended.

83. The claimant said that she did not feel that she was in a place to be able to discuss the role and asked for time off.

84. Ms Kehoe and Mr Parton told the claimant it was important that she took time to focus on her wellbeing. The claimant arranged with Ms Kehoe to take annual leave and she was absent from work until 16 May 2022.
85. The respondent had arranged for the manager of the Ukraine team to be available to discuss the role with the claimant if she wished to discuss it.
86. The claimant did not put forward any reasons as to why she did not want to do the Ukraine role, or try to engage in a discussion about it with Ms Kehoe and Mr Parton prior to her resignation on 20 May 2022.
87. The claimant's TRS was ended solely because of the concerns the respondent had about the claimant's performance and the claim was in no sense whatsoever a reason for that treatment.
88. As TRS can be revoked at any time, Ms Kehoe and Mr Parton were not obliged to give the claimant an opportunity to improve her performance before removing her TRS.
89. Ms Kehoe and Mr Parton told the claimant that it would not be fair to keep her in the TRS role when she was struggling so much with the demands of the role.
90. Ms Kehoe and Mr Parton told the claimant that they had arranged for a colleague who would be the claimant's team leader in the Ukraine team, to speak to her about the role and provide more details of what it would involve.
91. Ms Kehoe and Mr Parton were clear with the claimant that although she had struggled with her TRS role, that she was valued in the Division.
92. Ms Kehoe and Mr Parton told the claimant that she may want to consider other options before deciding to resign.
93. The claimant never had any unauthorised absence during this role.

Correspondence to claimant

94. Following the decision to cancel the TRS, Ms Kehoe sent a written communication to the claimant confirming the position. That stated that there

has been 3 performance related conversations. At the first two the claimant had been advised that there were specific concerns about the claimant's performance despite the 2 week handover and comprehensive handover document that had been left for the claimant.

- 5 95. The communication noted some of the specific areas that had been covered at the performance discussions, including the claimant's delayed issuing of communications and updates (and the importance of ensuring updates were issued to the team as they depended on that information), that the claimant was struggling with prioritising and showing initiative and was seeking greater support (which was not consistent with the higher grade role the TRS covered), concerns about communication style and mailbox management and the fact some tasks had been held back from the claimant given the concerns about her inability to carry out the limited tasks she had been given.
- 10
96. The claimant had been advised prior to the final meeting that the respondent was giving consideration to removing the TRS if her performance did not improve and she was aware of this. The communication noted that prior to 4 May meeting there had been further examples of poor performance, including an inability to complete a spreadsheet task within a reasonable period of time and to do so accurately. There continued to be issues with management of the shared mailbox.
- 15
- 20
97. The respondent had decided that it would not be fair to continue in the role as the claimant had been struggling with the tasks and there were concerns about the backlog and pressures, including the pressure on the claimant's wellbeing.
- 25
98. Consequently the claimant had been advised that the TRS would be ended earlier than they had hoped (with immediate effect) and the respondent, as they had advised at the start, would offer the claimant a B1 role which had been located in the Ukraine team which would better match the claimant's skills and experience.

99. The claimant returned to work on 16 May 2022 and had a call with Ms Kehoe and Mr Parton that morning to discuss next steps. On the call, the claimant said she was feeling unwell and wanted to take annual leave, and asked for details about how to take a career break. Ms Kehoe and Mr Parton said that they felt that it was important for the claimant to focus on her wellbeing.

End of year review

100. The respondent's appraisal year runs from 1 April to 31 March.

101. The claimant started having discussions with her line manager around completing her end year review (EYR) from February 2022.

102. In March 2022, HR sent out information for managers to start scheduling dates for EYR with their staff.

103. On 7 March 2022 following a discussion with Ms Kehoe, the claimant sent an email to the relevant managers who had managed the claimant from 1 April 2021 to 31 March 2022.

104. Ms Kehoe stated on 18 March 2022 that Alex McGhie would conduct the Claimant's EYR.

105. On 18 March 2022, the claimant wrote to her line manager regarding having a meeting or scheduling a time to prepare and agree contributions from Ms Kehoe to the Claimant's End Year Review.

106. On 29 April 2022, Ms Kehoe told the claimant in an email "... since the In Year Review covers the period until 30 September, this should mean that we already have something to cover most of the time you worked with Alex and that nothing further is required from Mr Dick [the claimant's manager in an earlier role she carried out] either (since he managed you before the IYR was completed), so you don't need to worry about getting anything from Mr Dick".

107. The sole reason why Mr Dick's input was not needed in respect of the end of year review was because the claimant's manager understood his input had already been captured in the mid year review and there was no need to

include his comments again for the EYR. The claim was in no sense whatsoever a reason for this treatment.

108. On 29 April 2022, Ms Kehoe said in an email that the claimant's End Year Review will not be conducted until she had had her own on 9 May 2022. Ms Kehoe was focussing on her review (which was 9 May) and would have arranged the claimant's review thereafter. The deadline for the review was the end of May each year. Steps were being taken in the interim to obtain information to allow the review to take place.
109. On 3 May 2022, Mr Parton emailed Ms McBrearty and Ms Kehoe stating "it would be helpful to catch up with you re the EYR issue in due course. I understand there may be complications with Joanne, Jovita's RO prior to Gillian writing her EYR". The complications referred to were the fact the claimant had raised a complaint about a colleague. Neither Ms Kehoe nor Mr Parton knew the details of the complaint (or that race was a factor). The complications related to the fact of the complaint and the impact upon finding someone who could deal with the EYR.
110. The claimant was absent from work from 4 May 2022 until the termination of her employment on 6 June 2022.
111. The respondent's process for end of year reviews stated that end of year reviews for 1 April 2021 to 31 March 2022 should be completed by the end of May 2022.
112. Monthly Conversation notes can be used to gather information on staff performance to feed into In-Year Reviews (IYR) or EYR as the case may be.
113. The claimant would have received an EYR had she continued to work for the respondent. It was more likely than not that her review would have included comments covering the entire year.
114. The only reason why the claimant had not received her end year review was because she left her employment prior to the end date for the reviews which was the end of May. Ms Kehoe would have progressed matters following her

review (after 9 May) The claim was in no sense whatsoever a reason for this treatment. The only reason was the claimant's earlier departure.

115. Ms Kehoe had understood that the claimant's earlier line manager, Mr Dick, would not require further input into the claimant's EYR as she understood he had already provided information that had been taken into account in the in year review. She did not consider it necessary to seek further input from him. That decision was entirely unrelated to the claim and solely because she understood Mr Dick's input had already been captured in the in year review.
116. This had been communicated to the claimant by email of 29 April 2022 where it was noted that the review would be led by the person in Regeneration that was leading the review. Nothing further was required from Mr Dick since he had managed the claimant before the in year review was completed and so the claimant did not need to worry about getting anything from him (because his input had already been captured and the claimant had moved teams).
117. The claimant was not happy that her time with Mr Dick would not be included since that included time within the year and she wanted his input included.
118. Ms Kehoe responded stating that she had understood Mr Dick would have contributed to the in year review (which would have covered the time the claimant spent working in his team) and so further input would not be needed. Given what the claimant had said, Ms Kehoe explained that she had misunderstood the position as it appeared Mr Dick had not contributed to the in year report. She explained that she would seek input from HR to ensure the proper process was followed.
119. It was not therefore correct to say that Ms Kehoe had concluded that Mr Dick's contribution would not be sought nor input factored into the end of year review report since that was a misunderstanding and Ms Kehoe was seeking the input of HR to progress matters fairly. The claimant left her employment before this matter was able to conclude and had she remained in post it was more likely than not that Mr Dick's input would have been factored into the discussion and properly taken into account.

Resignation

120. The claimant had a call with Ms Kehoe and Mr Parton on 20 May 2022 during which she told them that she would be resigning that afternoon. She resigned on 20 May 2022 and her employment terminated on 6 June 2022. She did not
5 wish to take up the role the respondent had secured for her and she left her employment. The respondent had sought to support the claimant, including by looking at options (and suggesting she take time to consider) but the claimant did not wish to continue to work for the respondent.

Observations on the evidence

10 121. The Tribunal found that the claimant was an intelligent and capable individual. She fully understood the legal issues arising and was capable of presenting her claims and fully engaging with the legal and factual issues. The claimant had experience of the Employment Tribunal before and clearly understood the legal tests underpinning each of her claims. The claimant ensured that
15 she put her case to each of the witnesses and that her position was fully understood.

122. While the claimant was clearly passionate about her case and her treatment, the Tribunal found that her evidence was, in places, not credible nor reliable. The claimant had limited and poor self awareness and was unable to accept
20 the facts when issues arose with which she disagreed, even although the objective position and evidence was clear. An example of this was whether there were performance meetings. The claimant said there was none. When pressed, she accepted there were 3 meetings that discussed her performance at which she was told her performance would be kept under review. Her
25 witness statement significantly minimised the performance meetings she had (to the extent of very little reference to them) and instead focussing on areas the claimant believed she had done well or others had treated her poorly. The Tribunal took full account of the points made by the claimant and the efforts to which she believed she had gone but fully accepted the position, in stark
30 contrast, set out by Ms Kehoe who managed the claimant and who had first hand experience of how she had performed in key areas of the promoted role.

123. The claimant had been given specific and clear examples of areas where her performance had been less than required. The claimant did not and could not accept that criticism of her and she focused on other areas where her performance was good (particularly in other, lower grade, roles). She also focussed on errors of her manager rather than on the objective facts, such as the errors she had made and areas where her performance was demonstrably less than the required level, notwithstanding the challenging role she was undertaking.
124. The claimant was also adamant that a reason for her treatment was her race. This was, however, despite there being any basis that the claimant's race was relevant in any way to the treatment she relied upon. The claimant believed that because she disagreed with the things that happened to her, it must be her race that was a factor. That belief was entirely misplaced.
125. The only evidential basis the claimant had for her assertion that race was a factor was her statement in her witness statement that she "felt" she had been "racially discriminated against". She alleged the respondent "would not have treated white colleagues in the same way". This was despite the fact the respondent did precisely that, a fact known by the claimant. She had argued that she had been told her promoted role salary would not be paid to her because of her race. This was despite the fact she knew 130 other staff (some of whom were white and some of whom were black) were treated in precisely the same way and despite the person telling the claimant this not knowing about the claimant's race, at least until the call he had with her. Despite those facts the claimant continued to assert the treatment she received was because of race.
126. The Tribunal was satisfied the claimant had been told of the reason for non payment of her promoted salary, which was the same reason as 130 other people (in a similar position to the claimant). While the claimant argued she had not received the email communication, the Tribunal was satisfied on the balance of probabilities she had been sent the email (as the sender of the email had told Mr Walls who had known about it). The claimant relied on technical differences to seek to argue the email had not been sent. She also

relied upon a later email referring to a wrong date but that email referred to the correct day of the week and the date was clearly a typographical error. The claimant's evidence was not credible and she sought to rely upon technical issues rather than upon the substantive issues.

5 127. It was clear that the claimant fundamentally disagreed with her manager's
conclusions about the claimant's performance (and was not prepared to
agree) and the claimant sought to argue her manager had made mistakes,
not properly supported her or had an ulterior motive to treat the claimant
badly. That was entirely unsupported by the evidence. The previous roles the
10 claimant had done were at a lower grade with differing skills and demands.
The claimant did not engage with the specific criticisms levelled at her and
focussed instead on other areas (where she had performed well). Instead of
seeing her managers at trying to support her and help her reach the required
level of performance, the claimant sought to find disagreement and a sinister
15 motive, which was not present. It was clear that the respondent's concerns
about the claimant's performance were genuine and were having a significant
adverse impact upon the project and a stage had been reached that required
the respondent to take the action it did, irrespective of the claimant's
disagreement as to her abilities and performance in this particular role.

20 128. The Tribunal considered the credibility of each of the witnesses and found the
claimant lacking in credibility. The claimant on a number of occasions said
things which were untrue. For example the claimant was clear during the
submissions stage that Ms Kehoe had accepted in evidence that she knew of
the Employment Tribunal claim at the material times. The Employment Judge
25 said he had understood that Ms Kehoe had not said that in evidence (and in
fact said the contrary) but the claimant was clear that this had been admitted
and she proceeded on that basis.

129. The Tribunal considered the notes of the hearing and was satisfied that the
claimant was wrong in saying Ms Kehoe had accepted she knew of the claim.
30 The claimant assumed that because Ms Kehoe knew the claimant had raised
a complaint about a colleague that must have been about race and that there
must have been a discussion about the Tribunal claim. There was absolutely

no evidential basis for that assertion and it was misrepresenting what Ms Kehoe actually said.

130. The claimant believed that there was a concerted effort to remove her from her role. In fact, the respondent was seeking to do the opposite. Had the respondent wished to remove the claimant, they could have done so far
5 sooner. Instead the respondent fairly and reasonably gave the claimant 2 opportunities to improve her performance. She was fairly told of some examples as to where the respondent believed the claimant was not performing to the required standard. The fact she was otherwise performing
10 well was not relevant to that issue. Neither was the fact her manager made mistakes too. It was as much in the respondent's interest that the claimant succeed in the role as it was in the claimant's interest.

131. The Tribunal was satisfied there was no sinister purpose or ulterior motive to remove the claimant or treat her adversely. The respondent acted fairly and
15 reasonably in supporting the claimant in her role. It was the claimant's misplaced perception that led her to the conclusion she reached rather than any evidential or objective basis.

132. The claimant was unable to accept that race was an irrelevant consideration. The claimant's race, at no stage in the facts of this case, was relevant, It was
20 only the claimant who believed it was. The claimant was unable to accept the reasonable concerns the respondent had and assumed it must therefore relate to race. As indicated above, in her witness statement the claimant stated that she "felt racially discriminated against". The only basis for that was because she "knew the same would not be proposed to white colleagues".
25 Yet the claimant knew that precisely the same thing was proposed to white colleagues – all colleagues who had received a TRS role were treated in precisely the same way – irrespective of race. Despite that (and that knowledge) the claimant continued to insist her race was a reason. That was entirely misconceived.

30 133. In stark contrast to the claimant's evidence, the Tribunal found the respondent's 3 witnesses to be genuine, credible and fair. Each witness gave

their evidence in a considered and careful way, even despite the claimant's emotive questioning.

134. The Tribunal found that in the event of a dispute, the evidence of the respondent's witnesses was to be preferred. The Tribunal had no hesitation in finding that the evidence of the respondent's witnesses was more likely than not to have been what happened in contrast to the claimant's evidence. There were a number of examples where the claimant maintained her position, such as denying there were any performance related meetings, and then in cross examination eventually accepting that there had been 3 meetings dealing with her performance. The claimant focussed on aspects she believed supported her case to the exclusion of the other evidence (which often led to the opposite result to that suggested by the claimant).

135. The Tribunal was careful to assess each evidential dispute separately. The Tribunal assessed the evidence led and was satisfied the evidence presented by the respondent was more credible and reliable.

136. With regard to specific factual disputes, the Tribunal was satisfied the claimant did know of the reason why she had not been paid her promoted rate. The Tribunal accepted the respondent's evidence she had been sent the email which set out the reasoning for the change. The claimant knew 130 other staff, with people of differing races, black and white, had been treated in precisely the same way as the claimant. Despite that, the claimant believed her race was a reason for the treatment. There was no basis for this. The Tribunal also accepted Mr Wall's evidence that the claimant shouted at him and did not let him explain the position. He tried to remain calm during the tirade.

137. It was notable during the claimant's cross examination at one stage in proceedings she shouted at a witness when becoming emotional, disagreeing with what had been said. The Employment Judge emphasised the need to maintain professionalism during the proceedings.

138. The Tribunal found Mr Wall's evidence to be clear and candid. His evidence was accepted by the Tribunal and any disputes with what the claimant said were resolved by accepting what Mr Wall's said. For example the Tribunal

accepted Mr Wall's evidence that the claimant had been sent an email confirming the reasons for the change. Mr Walls had himself been told by the author of the email that the email had been sent to each of the 131 affected individuals. He was dealing with matters relating to this. The Tribunal considered the evidence carefully and concluded the email had been sent to the 131 individuals, including the claimant. The email simply set out the position and reasons for the delayed payment (and the claimant had sought further information which was why Mr Walls was calling her). There was no evidence from the claimant challenging that she had not received the email when the claimant had been later told the email had been sent to her, even although there was a typographical error regarding the date. On balance it was more likely than not that the claimant had been sent the email and had known the reason for the delayed payment.

139. The Tribunal found Ms Kehoe to be clear and candid. She had sought to support the claimant. She accepted she had made mistakes but she made it clear that she required the claimant to perform to the required standard. While the claimant had excelled in previous roles, those were at lower grades with differing demands and skill requirements. The team required competence in key areas given the nature of the role. It was a fast paced environment. Ms Kehoe was supportive of the claimant and wanted the claimant to do well. Ms Kehoe had appointed the claimant and gave her support. She gave the claimant an adequate opportunity to improve. The claimant's predecessor had managed to carry out the role without any issue and the demands of the role although challenging were reasonable. Ms Kehoe was concerned for the claimant's welfare and genuinely believed the claimant's welfare was at risk if the claimant continued in the role. The role did not suit the claimant given the pace and working environment. It was regrettable that the claimant was unable to see the issues and improve. Instead the claimant perceived a sinister motive which was not present.

140. Where there were evidential disputes between the claimant and Ms Kehoe, the Tribunal was satisfied Ms Kehoe's evidence was to be preferred. Ms Kehoe genuinely wanted to support the claimant, even if the claimant

disagreed that she was under performing. The claimant's experience was at a lower level role where more support and assistance was available. The role in question required the individual to show initiative and work quickly. It did not suit the claimant. The claimant could not accept the respondent's assessment of her performance was so different but she failed to appreciate how different the new role was and the fact it was at a higher level requiring different skills.

5

10

15

20

25

141. The Tribunal accepted Ms Kehoe's evidence that she did not know of the claimant's Employment Tribunal claim at the time she made the decisions and only learned of it after the relevant decisions had been made. At the material times she knew of a dispute the claimant had with a colleague but did not know the details of the dispute nor that it related to race. There was no evidence whatsoever to support the suggestion that she did know of it at the relevant time and the claimant could provide no evidence. The fact Ms Kehoe knew there was a dispute in no way meant she knew an Employment Tribunal claim had been lodged and Ms Kehoe was clear and candid in saying she had no such knowledge. The Tribunal fully accepted her evidence. The fact Ms Kehoe learned of the claim subsequent to the incidents in question was a different matter. The claimant in her submissions refers to Ms Kehoe accepting she knew of the claim at the time she made the decisions. Ms Kehoe did not say this in evidence and accepted she knew a complaint had been made but had no knowledge at the material time of the claim. That was accepted by the Tribunal having carefully assessed the evidence presented to the Tribunal. There was no basis to find she knew of the claims at the times the decisions were made in this case. That was accepted by the Tribunal.

30

142. Mr Parson was clear and honest in his answers. He accepted that he was not the claimant's day to day manager but he reviewed the evidence Ms Kehoe had of the claimant's performance and he reached the same conclusion as Ms Kehoe. He also had no knowledge at the relevant times of the claimant's Employment Tribunal claim nor that her race had been raised. The Tribunal accepted Mr Parson's evidence that he did not know of the claim at the relevant times. The Tribunal accepted his evidence and in the event of

evidential disputes preferred his evidence to that of the claimant's. His evidence supported what Ms Kehoe had said.

Law

Burden of proof

5 143. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

“(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.*

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

144. The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

15 145. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

20 146. In **Hewage v Grampian Health Board** 2012 IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in **Igen Limited v Wong** 2005 ICR 931 and was supplemented in **Madarassy v Nomura International Plc** 2007 ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should
25 only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

147. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

148. It was confirmed by Lord Justice Mummery in the Court of Appeal that it is not always necessary to address the two-stage test sequentially (see **Brown v London Borough of Croydon** 2007 ICR 909). Although it would normally be good practice to apply the two-stage test, it is not an error of law for a tribunal to proceed straight to the second stage in cases where this does not prejudice the claimant. In that case, far from prejudicing the claimant, the approach had relieved him of the obligation to establish a prima facie case.

149. The Tribunal was also able to take into account **Field v Steve Pye & Co** EAT2021-000357 and **Klonowska v Falck** EAT-2020-000901.

10 *Harassment*

150. In terms of section 26 of the Equality Act 2010:

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

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

15 (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.”

151. It is important to consider the conduct with regard to each element of the statutory test. Whether or not the conduct relied upon is related to the characteristic in question is a matter for the Tribunal to find, making a finding of fact drawing on all the evidence before it (see **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam** EAT 0039/19). The fact that the claimant considers the conduct related to a particular characteristic is not necessarily determinative, nor is a finding about the motivation of the alleged harasser. There must be some basis from the facts found which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in the manner alleged in the claim. In that case the Employment Appeal Tribunal held it is a matter for the Tribunal to determine making a

finding of fact drawing on all the evidence before it. There must be some feature of the factual matrix identified by the Tribunal which leads it to the conclusion conduct is related to the protected characteristic and the Tribunal should articulate clearly what feature of the evidence leads it to that conclusion. The Tribunal should consider the matter objectively.

5

152. For example in **Hartley v Foreign and Commonwealth Office Services** 2016 ICR D17 the Employment Appeal Tribunal held that an Employment Tribunal had failed to carry out the necessary analysis to see whether comments made by the claimant's managers during a performance improvement meeting — accusing her of rudeness and apparently questioning her intelligence when she failed to understand a spreadsheet of comments concerning her performance — were related to her Asperger's syndrome. The Employment Appeal Tribunal emphasised that an Employment Tribunal considering the question posed by section 26(1)(a) must evaluate the evidence in the round, recognising that witnesses "will not readily volunteer" that a remark was related to a protected characteristic. The alleged harasser's knowledge or perception of the victim's protected characteristic is relevant but should not be viewed as conclusive. Likewise, the alleged harasser's perception of whether his or her conduct relates to the protected characteristic "*cannot be conclusive of that question*".

10

15

20

153. **Warby v Wunda Group Plc** EAT 0434/11 is authority for the proposition that the conduct should be viewed in context in assessing whether the conduct is related to the protected characteristic. The then President of the Employment Appeal Tribunal, Mr Justice Langstaff, upheld a Tribunal's decision that an employee accused by her superior of having lied about a miscarriage was not subjected to conduct "*related to*" her sex within the meaning of the sex discrimination provisions then in force. Langstaff P held that context was important and that the tribunal had been entitled to find that the accusation was made in the context of a dispute over a work matter, about which the employer believed that the employee was lying. Thus the conduct complained of was an emphatic complaint about alleged lying; it was not made because of the employee's sex, because she was pregnant or because she had had a

25

30

miscarriage. While that case considered the predecessor legislation, the issue was whether the conduct was “*related to*” the protected characteristic.

154. In **Kelly v Covance Laboratories Ltd** [2016] IRLR 338 an instruction not to speak Russian at work, so that any conversations could be understood by English speaking managers was not related to race or national origins, even though it potentially could have been. The conduct was because the employer was suspicious about what was being said and could not understand. Viewed in the context of the company’s business and risks the employer’s explanation for the conduct was accepted and the conduct was not related to race or national origins.

155. In **UNITE the Union v Nailard** [2018] IRLR 730 the Tribunal had held that a failure to address a sexual harassment complaint made against elected officials of the union could amount to harassment related to sex “*because of the background of harassment related to sex*”. The Court of Appeal considered that went too far. There had been no findings as to the mental processes of the (employed) officials of the union dealing with the complaint and whether they had been motivated by sex discrimination. The Court of Appeal noted that the previous potential liability for third party harassment under the Equality Act 2010, section 40 had been repealed and there was no automatic liability on the part of the union for harassment by third parties (if that was how the elected officials were to be characterised). The union could be (vicariously) liable for acts of discrimination by its employees but there would need to be a finding that the employees in question were themselves guilty of discrimination. An important point of this case was the reminder that Tribunals should focus on the conduct of the person who carried out the act and determine whether that conduct is related to the protected characteristic (not whether the conduct of someone else or some other conduct is related to the protected characteristic). If the action (or inaction) is because of illness or incompetence it may not relate to the protected characteristic.

156. At paragraph 7.10 of the Code the breadth of the words “related to” is noted and some examples are provided. It gives the example of a female worker who has a relationship with her male manager. On seeing her with another

male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker but because of the suspected affair, which is related to her sex. This could amount to harassment related to sex.

5

157. At paragraph 7.11 the Code states that in the examples there was “a connection with the protected characteristic”.

10

158. The question of whether the conduct in question “relates to” the protected characteristic requires a consideration of the mental processes of the putative harasser (**GMB v Henderson** 2017 IRLR 340) bearing in mind that there should be an intense focus on the context in which the words or behaviour took place (see **Bakkali v Greater Manchester** 2018 IRLR 906). In **Bakkali** the question was whether a comment as to whether an individual was said to be still promoting ISIS/Daesh was related to race. The Tribunal found it was not as it related to a previous conversation. The Employment Appeal Tribunal emphasised that context is important and the words used must be seen in context. In considering whether the conduct is related to the protected characteristic there should be an intense focus on the context of the offending words or behaviour. The mental processes of the perpetrator are relevant in assessing the issue.

15

20

159. In **Raj v Capita** 2019 UKEAT 0074/2019 the Employment Appeal Tribunal upheld a Tribunal which had found that the massage at his desk by a manager was not conduct related to sex. The conduct was misguided encouragement by a manager. It was an isolated incident and the context was key: a standing manager over a sitting team member in a gender neutral part of the body within an open plan office. In that case the Tribunal did not expressly consider the burden of proof provisions but had found that the conduct was in no sense whatsoever related to sex.

25

160. Section 26(4) of the Act provides that:

30

“(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.”*

5 161. The terms of the statute are reasonably clear, but guidance was given by the Court of Appeal in **Pemberton v Inwood** 2018 IRLR 542 in which the following was stated by Lord Justice Underhill: *“In order to decide whether any conduct falling within sub-paragraph 10 (1)(a) of section 26 Equality Act 2010 has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the*
10 *putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b)).”*

15 162. The Code states (at paragraph 7.18) that in deciding whether or not conduct has the relevant effects account must be taken of the claimant’s perception and personal circumstances (which includes their mental health and the environment) and whether it is reasonable for conduct to have that effect. In assessing reasonableness an objective test must be applied. Thus,
20 something is not likely to be considered to be reasonable if a claimant is hypersensitive or other people are unlikely to be offended.

163. In relation to the effect of the conduct, intention is not a prerequisite and the effect is to be considered from the perception of the claimant. The Code (at paragraph 8.20) gives the example of a club manager at a meeting making derogatory comments and jokes about women to a mixed sex audience. It is
25 not that person’s intention to offend or humiliate anyone, however the conduct may amount to harassment if the effect of it is to create a humiliating or offensive environment for a man or woman in the audience.

164. Relevant circumstances include the claimant's personal circumstances, cultural norms and previous experience of harassment. The perpetrator being in a position of trust or seniority over the recipient is also a relevant factor.

5 165. Further as Underhill LJ stated above when deciding whether the conduct has the relevant effects (of violating the claimant's dignity or creating the relevant environment) the claimant's perception and all the circumstances must be taken into account and whether it is reasonable for the conduct to have the effect (Lindsay v LSE 2014 IRLR 218). Elias LJ in **Land Registry v Grant** 2011 IRLR 748 focused on the words "*intimidating, hostile, degrading,*
10 *humiliating and offensive*" and said "*Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upset being caught*".

166. Chapter 7 of the Code contains useful guidance in applying the law in this area and we have had regard to that guidance.

15 *Victimisation*

167. Victimisation in this context has a specific legal meaning defined by section 27:

(1) *A person (A) victimises another person (B) if A subjects B to a detriment because--*

20 (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*
25 *this Act;*

(c) *doing any other thing for the purposes of or in connection with this Act;*

(d) *making an allegation (whether or not express) that A or another person has contravened this Act.*

(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.*

5

168. This provision does not require any form of comparison. If it is shown that a protected act has taken place and the claimant has been subjected to a detriment, it is essentially a question of the “reason why”. In other words, the protected act must be an effective and substantial cause of the treatment, it does not need to be the principal cause.

10

169. Something amounts to a detriment if the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to her detriment – see paragraphs 31-37 of the speech of Lord Hope in **Shamoon v Chief Constable of the RUC** 2013 ICR 337.

15 **Submissions**

170. Both parties produced detailed written submissions and the parties were given the opportunity to consider each other’s submissions. Both parties asked the Tribunal to consider their submissions and the facts and decide the issues on that basis. The Tribunal deals with the parties’ submissions as relevant below, but does not repeat them in detail. The parties’ full submissions were taken into account in reaching a unanimous decision.

20

Decision and reasons

171. The Tribunal spent a substantial amount of time considering the evidence that had been led, both in writing and orally and the full submissions of both parties and was able to reach a unanimous decision on each of the issues. The Tribunal deals with issues arising in turn.

25

Harassment related to race (section 26 of the Equality Act 2010)

The act relied upon was the claimant being told by Mr Walls on 24 June 2021 that she would receive her pre-promotion salary related to her race. It was accepted this

occurred and it was unwanted conduct. The first issue was whether this was related to race.

5 172. The Tribunal considered the evidence led and the context and was entirely satisfied the conduct in question was entirely unrelated to race. Race was in no sense whatsoever connected to the treatment the claimant received. The sole reason for the treatment was because of the limited staff the respondent had to deal with changes in pay and the internal decision to ensure everyone was paid, thereby taking staff away from processing changes in pay to
10 ensuring new starts were paid.

173. The claimant's race was entirely irrelevant and unconnected to the decision not to pay her the salary to which she was entitled. It was a background factor that had no relevance to the conduct. The conduct was not related to race in any sense.

15 174. If the Tribunal had found the conduct was related to race, the Tribunal would have not found that the conduct had the purpose of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The purpose was solely to inform the claimant of the reasons why she would not receive the sum she was expecting.

20 175. The Tribunal was also satisfied that even if the conduct had the effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant having analysed the context and circumstances it would not have been reasonable for the conduct to be so regarded by the claimant. The respondent was facing unprecedented
25 challenges given the impact of the pandemic and the number of staff whose salary had to be amended. They chose to focus on ensuring everyone received at least their basic salary. Those carrying out amended roles that justified a supplement would have to wait for those sums. The approach taken was entirely reasonable and fair and it was entirely unreasonable for the
30 claimant to find the conduct to have the proscribed effects set out.

176. In all the circumstances having carefully considered the facts and evidence, the claimant's claim of harassment is ill founded. The conduct was entirely unconnected to race. The harassment claim is dismissed.

Victimisation (section 27 of the Equality Act 2010)

5 *The first detriment relied upon was the claimant's line manager, Ms Kehoe, telling the claimant that she was slow at doing her work and making too many mistakes. It was accepted, for the purposes of this claim, that this had occurred. The issue was whether that amounted to a detriment.*

10 177. The Tribunal found the issue as to whether the claimant was told that she was slow and making too many mistakes was a detriment. The case law makes it clear that the threshold is low but there requires to be some negative impact and reasonably considered adverse. This was finely balanced since there can obviously be cases where being told you are making mistakes and too slow
15 is obviously a detriment but that depends upon the context. The way in which the matters were communicated to the claimant in this case was entirely fair and reasonable. The claimant was supported and given clear examples as to why she was not performing at the level required. That was said in a constructive and supportive way to encourage the claimant to improve. It was
20 in the respondent's as much as the claimant's interest she do so.

178. On balance, the Tribunal concluded the way in which the claimant was told she was not performing did not amount to a detriment in law. It was part of the normal performance management process. Had the manner of the discussion been different and arguably had action been taken without
25 advising the claimant of the issues, such conduct could well amount to a detriment but advising the claimant as to genuine concerns about her performance in the way it was done did not amount to a detriment.

The next issue was whether the claimant was subjected to this detriment because she raised Tribunal claim number 4110998/2021.

179. The key issue was the reason for the treatment. The Tribunal was entirely satisfied that those who advised the claimant about her performance concerns did not know of the claim (directly or indirectly). The claimant assumed in this case that because Ms Kehoe knew the claimant had raised concerns about a colleague that Ms Kehoe must have known it was due to race. That assumption was entirely misplaced. The dispute the claimant had with a colleague was a private matter and it would have been wrong for the details of the dispute to have been disclosed to other parties. There was no evidence whatsoever that the claim had been disclosed to those making the decisions about the claimant's performance at the relevant time. The claim was not known by those making the decision at the time the decisions were made and accordingly could not have been a cause, in any sense, for the treatment.
180. In any event, the Tribunal was satisfied that the reason for the treatment was solely because of the genuine concerns the respondent had about the claimant's performance (and in no sense because of the claim). There was no doubt the claimant had excelled in previous roles but there were genuine and serious concerns about the claimant's performance in the TRS role.
181. The Tribunal considered the claimant's assertion that Ms Kehoe and others wished to have the claimant moved or that there was a sinister purpose behind the treatment the claimant received. The Tribunal found such assertions to be entirely misconceived and without any evidential basis or merit. There was no sinister or ulterior purpose or motive in the respondent's treatment of the claimant. The sole reason for raising the concerns that were raised was the genuinely held belief the claimant was struggling with particular (and important) parts of the role. Those difficulties were creating real issues for the respondent which required to be addressed.
182. The claimant disagreed with the respondent but it was a matter for the respondent as to their assessment of the claimant's performance. The Tribunal found no evidence to challenge the genuineness of the respondent's belief. The claimant's predecessor had coped with the demands of the role, which demands appeared reasonable. The fact the claimant had carried out

other roles very well did not alter the fact that the TRS role was a promised post and required different skills, which caused the claimant issues.

183. The respondent sought to support the claimant and guide her but ultimately her performance in key areas had not improved and the only reason why she was told she was not performing to the required level was because of the belief the respondent reasonably held from their experience of the claimant's work. The claim was entirely unconnected to the treatment. This claim is ill founded.

*The **second detriment** relied upon was the fact that the claimant's End Year Review was not conducted. It was accepted this occurred. The first issue was whether it amounted to a detriment in law.*

184. The Tribunal carefully considered what a detriment is in law. On the facts the Tribunal was satisfied It was not a detriment for the claimant to be told that her end of year review would be concluded at the end of the process, within the timescale set out for the reviews. While other managers may deal with matters in a different way, it was entirely reasonable for Ms Kehoe to choose to focus on having her end of year review first (which was 9 May) and therefore (prior to the end of May) finalise arrangements for the claimant's end of year review. Ms Kehoe reasonably and fairly told the claimant that this was to happen and the claimant understood and accepted she would have her review, but would have to wait until Ms Kehoe had her review first. That approach was fair and reasonable and did not amount to a detriment as defined by the authorities.

If so, was the claimant subjected to this detriment because she raised Tribunal claim number 4110998/2021?

185. Even if the treatment had amounted to a detriment, for the same reasons behind the foregoing act, the reason for the treatment was entirely unrelated to the claim. Ms Kehoe did not know about the claim at the point in time she told the claimant her review would take place following Ms Kehoe's review on 9 May. There was no evidence whatsoever to support the assertion Ms Kehoe

decided upon this course of action because of the claim. Ms Kehoe did not know about the claim the material time and so the claim could not be a reason for the treatment.

186. Even if Ms Kehoe had known of the claim at the time, the only reason for the treatment was Ms Kehoe's desire to get her review concluded first and then deal with the claimant's review. The claim was entirely unconnected to this action. This claim is accordingly ill founded.

*The **third act** was the claimant's line manager telling the claimant that she would not be seeking contributions from the claimant's previous line manager Mr Dick for the End Year Review Report and that Mr Dick's contributions would not be factored in when writing the End Year Review Report? It was not accepted this occurred and the Tribunal needs to decide whether it happened.*

187. The Tribunal considered the evidence led before the Tribunal and concluded that this act had not been made out. Ms Kehoe had understood that Mr Dick's contribution in relation to the claimant's performance when she worked in his time had already been captured (as part of the mid year review) and as such there was no need for his input to be obtained on a second occasion. But when the claimant noted that this understanding was incorrect Ms Kehoe accepted what the claimant said and advised her that she would seek the input of HR to ensure proper process was followed and the review carried out fairly. The claimant chose to leave her employment before the matter could be concluded. In other words had the claimant remained in post her review would have been carried out (and it was likely that all relevant information of the claimant's performance during the full year would have been obtained). This act as alleged by the claimant has not been established in evidence.

If so, did it amount to a detriment?

188. Given Ms Kehoe advised the claimant that she had misunderstood matters and sought the input of HR, the Tribunal would have been satisfied, had it been necessary to do so, that the treatment did not amount to a detriment. The claimant's review would have taken place. There was still time to do so

and the full year would have been taken into account. There was no suggestion this would not have occurred.

If so, was the claimant subjected to this detriment because she raised Tribunal claim number 4110998/2021?

5

189. As Ms Kehoe did not know about the claim at the time, the claim could not be a reason for the treatment, even if it had been made out. Further and in any event, from the evidence, the Tribunal would have found that the claim was entirely unconnected to the reason for the treatment. The claim is ill founded.

10

*The **final detriment** relied upon was whether the claimant's line manager ending her TRS role on 4 May 2022 (and offering her an alternative role) amounted to a detriment (it having been accepted the respondent ended her TRS role and offered her a permanent role).*

15

190. It was accepted that this occurred and amounted to a detriment

20

191. The only issue is therefore whether doing so was because she raised Tribunal claim number 4110998/2021. The Tribunal again carefully considered the evidence and was satisfied that those making the decision to end the claimant's TRS and offer her the alternative were not in any sense aware of the claim at the time the decision was made. Ms Kehoe and Mr Parson did not know of the claim at the material time as they only learned of it later.

25

192. Even if the claim was known by Ms Kehoe or Mr Parson, the sole reason for ending the TRS prematurely was because of the claimant's performance during her time carrying out the role. While the claimant disagreed with the respondent's assessment of her, the respondent reached a fair and reasonable conclusion. The respondent's view, reached following an assessment of the evidence of the claimant's performance, with their experience of the role and the demands of it, was that the claimant was unable to properly discharge key responsibilities. The respondent was genuinely concerned for the claimant's welfare. While the claimant believed she was

30

performing well, and indeed had performed well in some areas, and while Ms Kehoe herself had made mistakes and missed matters, ultimately the claimant's performance had not reached a reasonable standard and the respondent took the decision, having given the claimant 2 chances to show a demonstrable improvement, to end the TRS. The claim was in no way a reason for the treatment relied upon.

193. In reaching this conclusion the Tribunal considered the detailed evidence the claimant led with regard to her performance and the issues she raised and how she believed she had been treated. The Tribunal preferred the evidence of Ms Kehoe which was focussed on the key issues. While the claimant disputed what Ms Kehoe said, the evidence was objectively clear and supported the reasonable conclusion Ms Kehoe (supported by Mr Parton) had reached. The claim was entirely irrelevant to the decision to end the TRS role and offer the alternative role.

194. This claim is ill founded.

Observations

195. The Tribunal in reaching its decision in this case was mindful of the fact that the claimant was not legally represented. The claimant was an intelligent and articulate person who was capable of dealing with the issues in this case. She fully understood the legal issues and was clearly able to present her case as she understood it.

196. It was regrettable that the claimant had not fully engaged with the objective position and instead focused on what she perceived the position to be. Whilst the claimant may have been treated differently on other occasions because of her race, the Tribunal found no evidence whatsoever to support her assertions in this case.

197. The Tribunal recognises there can be cases where the reason for the treatment is unclear and it is only by assessing the evidence led that the reason can be determined. In this case the claims were harassment and victimisation. There was no basis to find that the treatment relied upon for

harassment related to race at all. The objective position as clearly set out by the respondent from the moment the issue arose made that position clear.

5 198. Similarly those making the decisions on which the victimisation claim was based did not know of the Employment Tribunal claim the claimant raised at the time they made the decisions relied upon. The claimant based that claim upon a misplaced assumption. Further and in any event the claim was entirely irrelevant and unconnected to the decisions made, which were entirely for justified and legitimate reasons. The claim was irrelevant to those decisions.

10 199. It was regrettable that the claimant chose to resign from the respondent when the respondent had sought to support her and find a role that was more suited to her skills and abilities.

200. Finally the Tribunal repeats what it said at the conclusion of the submission stage and thanks both parties for working together to assist the Tribunal in making its decision in accordance with the overriding objective.

15

20 **Employment Judge: D Hoey**
Date of Judgment: 03 April 2023
Entered in register: 03 April 2023
and copied to parties