EMPLOYMENT TRIBUNALS

Claimant: Ms F Alexandre

Respondent: Openreach Limited

HELD AT: Manchester **ON:** 19-22 and 25-26 April 2022 and 27 April 2022 (in chambers)

BEFORE: Employment Judge Slater
Ms C Bowman
Ms H Fletcher

REPRESENTATION:

Claimant: Ms S Aly, counsel
Respondent: Mr J Searle, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Tribunal does not have jurisdiction to consider the complaint of direct race discrimination in relation to the award of salary.

2. The other complaints of direct race discrimination are not well founded.

3. The complaints of harassment related to race are well founded.

4. The complaint of victimisation is not well founded.

5. Remedy for the complaints of harassment related to race will be determined at a remedy hearing on 15 December 2022.

REASONS

Complaints and Issues

1. The claimant claimed direct race discrimination, harassment related to race and victimisation.

2. The complaints and issues relating to liability were agreed at the outset of the hearing to be as set out in the Agreed List of Issues appended to these reasons.

3. Ms Aly clarified that the claimant relied on her ethnic origin, identified as Afro-Caribbean, for all the complaints, and additionally on her US nationality for the complaint of harassment related to race about the alleged joke about the claimant being deported whilst a visa application was ongoing.

4. During the hearing, Mr Searle conceded, on behalf of the respondent, that the claimant's grievance of 14 February 2020 was a protected act.

5. The Tribunal and the parties agreed at the start of the hearing, that the hearing would be limited to dealing with liability only, with a separate remedy hearing to follow, if required.

Summary

6. The claimant's complaints relate to a period of her employment under the management of Craig Warner, which began on 1 August 2019. The claimant is a US national and identifies herself as of Afro-Caribbean ethnic origin and black.

7. The claimant went on sick leave shortly after being told by Mr Warner that she was to be placed on a coaching/performance improvement plan.

8. The complaints relate to the salary the claimant was placed on when she transferred into the respondent organisation from BT to work in Mr Warner's team, comments alleged to have been made by Mr Warner, being told she was to be placed on a coaching/performance improvement plan, and the respondent not exercising its discretion to pay her full pay, when her sick pay reduced to half pay.

Facts

9. We heard a lot of evidence about matters which were clearly of genuine concern to the claimant. We have not made findings of fact in relation to all these matters, making findings of fact only in relation to those matters relevant to our decision. If we had decided that events occurred as alleged by the claimant, in relation to matters where there was a dispute but we have not made findings of fact, those further matters would not have assisted us in making our decisions. They are not matters from which we considered inferences of discrimination could be drawn. We do refer specifically to some matters of particular significance to the claimant, where there is a dispute, but indicate if we have not made a finding of fact because it was not necessary to do so. We have not referred to all the matters of concern to the claimant.

10. The claimant is a US citizen, having moved there as a child from Haiti. She identifies herself as of Afro-Caribbean ethnic origin and black.

11. The claimant began employment with BT in a graduate role on its graduate development programme on 19 September 2016. The claimant is highly educated, having two degrees; one from a prestigious university in the US and the other from Manchester University.

12. At the time of interview for the job with the respondent, the claimant's salary, was £36,320 p.a.. This would have risen to £36,900 after a pay review in June 2019. This was in a band one position. There was no direct equivalent grade in the respondent organisation but it is agreed that the grade D post to which the claimant was recruited, was a promotion.

13. The claimant had applied for a role with the respondent. She was called for an interview with Craig Warner and another manager, Amy Tasker, in June 2019. She was told that the role she had originally applied for no longer existed but was informed of another band D role, for which she was interviewed and offered the job.

14. Band D jobs had a salary range at the time of £34,000-£68,000. This salary range overlapped with the lower band E, which had a salary range of £27,500-£47,500.

15. The claimant requested a salary of £41,200. After consultation with HR and Craig Warner's manager David Brown, the claimant was offered and accepted a salary of £38,000. Craig Warner wrote to Louise Sutherland in HR (p.110) on 14 June 2019, writing:

> "having offered the role following our chat on Tuesday, I have been asked by the candidate if there is scope for a pay increase. She is currently on £36,320 and will be moving from a band one role into a D role. She has positioned that she would like to attempt an increase to c£41,200. I'd like to offer an increase, given this is a step up - I think £39,000 would be reasonable which is a 7% increase.
>
> "I don't think £41,200 is right, especially given the step up and being unproven at this level. Given the salaries of the other two people I've recruited and where she sits in the framework, I would like to offer some increase.
>
> "Can I do this?"

16. Louise Sutherland replied that they needed to be fair and consistent to others in their team too. She wrote "let me have a look at salaries on Mon and I will come back to you with a view."

17. Craig Warner replied with thanks, writing: "definitely wanted to be fair across the piece - my only previous DR's were in India so my view on UK salaries is poor!"

18. Craig Warner chased on this on 18 June. Later that morning, Louise Sutherland replied, asking for the claimant's name to check salary and writing: "I am thinking £38k would be reasonable but don't want to give to pay rises i.e. June pay review +

promotion pay review (and at same time not negatively impact on what she has received 1 June)."

19. Craig Warner replied with the claimant's name. Louise Sutherland then wrote, later that afternoon: "I have looked into her salary and compared to others I would suggest you speak to David first as it's important we have consistency."

20. Craig Warner then wrote to David Brown, Craig Warner's manager. He asked for David Brown's view on the salary offer for Fignola Alexandre. He wrote that he had asked Louise and the steer was to consider the offer in line with David's wider team. He asked for David Brown's view, writing:

> " - pre-annual review salary £36,320 as a Band 1;
>
> "- requested increase to £41,200. Believe this is too high but if you don't ask…;
>
> "- My view is that £38,000 is a good offer and reflects achieving a promotion.
>
> "- Post annual review, Fignola's salary has increased to £36,900, so £38,000 would be a further 3% increase."

21. Craig Warner's email to David Brown forwarded the chain of emails between him and Louise Sutherland, which included the information that this was a grade D role. Aside from this, we would have expected David Brown, as Craig Warner's manager, to be aware of the grade of role to which Craig Warner was recruiting, particularly given that he was recruiting for his only direct reports.

22. David Brown replied: "£38,000. Takes in line with other Es at starting. If she is good she has plenty of earning potential ahead of her…"

23. David Brown's reply is incorrect in referring to the claimant's role as that of a band E, rather than a band D. David Brown's explanation in evidence was that this was a typographical error. We consider it more likely than not that this explanation is correct, given the information in the email trail that the role was a band D and the reference to a promotion from band 1, in the email from Craig Warner to which David Brown is responding. Also, as previously noted, we would have expected David Brown to be aware of the grade of role to which Craig Warner was recruiting, this being part of David Brown's immediate team.

24. We accept that the claimant formed an understanding, based, she says, on conversations with Bernice Iyanda and Stephen Tait, that a 10% rise in salary was common on promotion and a 5% rise on a lateral move. On a subsequent lateral move her salary increased from £38,000-£39,900, a 5% increase. Bernice Iyanda and Stephen Tait did not give evidence to the Tribunal about salaries, although they gave evidence on other matters, so we are unable to make any findings as to their understanding about likely pay increases on promotion and what their understanding was based on. We accept the evidence of Theresa Hyde that she had a promotion without any pay rise at one stage and the evidence of Craig Warner that he made a lateral move in 2019 with no pay rise. We find, based on Craig Warner's evidence, that he had an employee on band E in his team who was promoted to band D and got no pay rise, where this person had been with BT for 18 years and was on a salary of

£40,500. In the claimant's submissions, Ms Aly referred to this person as white. Our notes of evidence do not record Craig Warner identifying the ethnicity of this person. We accept the evidence of David Brown that his experience was that they were recruiting heavily into D roles at the time so he understood that Louise Sutherland would, because of this, know about comparable salaries. Theresa Hyde suggested in evidence that it was standard to put people at the bottom of the band subject to their salary not being less than their previous salary. However, the claimant's pay increase on moving into band D shows that this was not always the practice. We had no evidence of salaries and ethnicity of comparable employees to the claimant. The claimant has not satisfied us that there was a custom and practice of employees receiving a 10% pay rise on promotion and a 5% rise on a lateral move.

25. Whilst we did not hear any witness evidence at this hearing about the salary of Bernice Iyanda, we note that, in the grievance appeal process, Craig Warner wrote (p.630), that he had no visibility of the salary of any other Ds, with the exception of his other direct report, Bernice Iyanda. He referred to her having a significantly higher salary than the claimant, being on different contract terms and much longer tenure in the business. He wrote that he suspected the high salary was the outlier, rather than the claimant's.

26. The claimant did not raise a complaint about her level of pay until the appeal against the grievance outcome when she asked that it be amended to a band D salary rather than that of a level E (p.459). The claimant did not expressly link the level of pay to her race in her appeal letter. It appears that the salary issue emerged as a result of the claimant obtaining copies of the email exchanges about her salary in response to a Data Subject Access request, in which David Brown made the reference to band Es. The claimant linked the decision on pay to her race in her claim to the Tribunal, presented on 11 June 2020.

27. The claimant began her new role as an industry engagement specialist on 1 August 2019. She reported directly to Craig Warner. She was recruited by Craig Warner at the same time as he recruited Bernice Iyanda and Jill Ruddock. Bernice Iyanda is black and Jill Ruddock is white. After a short period, Jill Ruddock was transferred by David Brown to another role as he thought her skill set would be better used in another team.

28. On 7 October 2019, Craig Warner was reporting to David Brown that both the claimant and Bernice Iyanda were firmly in "good work", given the time they had been in role (p.105). His comments about the claimant included that she had turned out some very good work. He wrote that he thought she had big potential within the business ops team and they should look to develop her. There was mention of some areas where the suggestion was that some development was needed e.g. refocusing her approach from monitoring to "are we ready" and facing a challenge, being naturally quiet, of having a presence in a large team.

29. The claimant required a visa to work in the UK. She was on a visa which was due to expire on 28 December 2019. An application for an extension of this visa had to be made before that date for her to be allowed to continue to remain in work in the UK. The visa renewal process started around October 2019. Understandably, the claimant found this a stressful process and had concerns about whether, if the application had not been made by December, there was a risk that relevant people would be

preoccupied with other matters. There was an issue about BT's licence with the building which was in some way related to the visa application and needed to be resolved before the application could be made.

30. On 14 November 2019, another manager, Lindsay Ferguson, was critical of the claimant in front of colleagues for raising the same question as on two previous occasions. Although Craig Warner had supported the claimant on a previous occasion, he did not do so on this further occasion. When the claimant raised his lack of support with him at a later meeting, Craig Warner said words to the effect that the claimant deserved it.

31. We have seen emails that show that, from 22 November 2019, Craig Warner was chasing progress on the claimant's visa application with those responsible for making the application. He escalated concerns about the visa application, at the claimant's request, to more senior managers on 5 December 2019.

32. On a date which the claimant placed in late October or early November and Bernice Iyanda placed as in December, the claimant alleges that Craig Warner made a joke about the claimant being deported. The claimant could not recall whether anyone else was present on the call when the joke was made. Bernice Iyanda recalled this occurring in a conversation between her, the claimant and Craig Warner. Craig Warner has consistently denied making such a joke, throughout the respondent's internal processes and in these employment Tribunal proceedings.

33. The claimant and Bernice Iyanda have been consistent in the essentials of the allegation, throughout the internal processes and at this Tribunal. It was suggested by the respondent in submissions that Bernice Iyanda had an axe to grind against the respondent, having brought her own Tribunal claim against the respondent, complaining about conduct by Craig Warner. That claim settled. We reject the suggestion that Bernice Iyanda gave evidence in these Tribunal proceedings in support of the claimant because of a personal vendetta against Mr Warner and/or the respondent. Bernice Iyanda continues to be employed by the respondent, having long service with BT and the respondent. She had only known the claimant through working with her for around six months. Although she and the claimant have remained in touch, having certain experiences in common, we find that theirs is not a close friendship and Bernice Iyanda found it difficult to come to the Tribunal and give evidence against her employer.

34. We consider it entirely possible that Craig Warner genuinely does not remember making the alleged comment because there was no obvious reaction when he made the comment and what he may have regarded as a light-hearted comment would not have had any great significance for him. We do not find that Craig Warner has deliberately lied about this in the internal process or these Tribunal proceedings. We accept that Craig Warner was supportive in relation to the claimant's visa application, but do not consider this precludes the possibility of him making a "joke" about the claimant being deported.

35. We do not consider that the lack of obvious reaction at the time from the claimant and Bernice Iyanda undermines the credibility of their evidence. It is not uncommon for people who are discriminated against not to react at the time, or often at all, despite feeling hurt and upset, particularly where the discrimination is from someone in a

senior position to them. The claimant first raised this in her grievance dated 14 February 2020 (p.130). We do not consider that the disparity in dates between the claimant and Bernice Iyanda undermines the credibility of their evidence about the essentials of the comment made. We accept the evidence of Bernice Iyanda that she was present on a call where Craig Warner made the alleged comment. We prefer the evidence of Bernice Iyanda and the claimant in finding that Craig Warner did make a comment as alleged, "joking" about the possibility of the claimant no longer being in the country when something needed to be done in the New Year. We do not find any evidence to suggest that he intended to cause hurt at the time. We consider that Bernice Iyanda, in describing him saying it joking, when interviewed in the grievance proceedings, was likely to be correct in her perception of his intention.

36. We accept the claimant's evidence that she was shocked and felt humiliated when Craig Warner made the comment, although she said nothing at the time. We find that the claimant was finding the visa application process very stressful at the time the comment was made. The "haha" in the claimant's message to Craig Warner when she later wrote that her visa had been approved (p.202), does not suggest to us that the claimant found the visa process a laughing matter. It is not clear to us that "haha" was intended as a laughing reaction but, even if it was, the situation once the visa was granted was very different for the claimant than when she was anxiously awaiting the submission of her application and decision on this.

37. The visa application was submitted on time and the claimant's visa was duly granted.

38. The claimant was to do a presentation on 12 December 2019 in the absence of Craig Warner. She sent him a copy of this and they had a conversation about it on 10 December. The claimant was on leave on 11 December. We find that the claimant was expecting, after the conversation, only for Craig Warner to insert a service slide into the presentation. However, Craig Warner sent her edits and notes which she was not expecting on the afternoon of the 11 December.

39. The claimant did the presentation on 12 December 2019. David Brown, who was in the audience for the presentation, gave negative feedback about the claimant's performance to Craig Warner. His criticism, set out in his witness statement, is partly about the structure, into which Craig Warner had an input. His criticism is partly about the claimant not appearing to understand the product and not being able to talk about it in a meaningful way.

40. We find that Craig Warner received some negative feedback about the claimant from other managers at various times. This included negative feedback from Matthew Dent and from Jo Koroma. Matthew Dent fed back that he had left calls delivered by the claimant feeling confused with the conversation that had taken place, not knowing if statements being made were questions or points on progress or update and that he was often unclear on what the claimant was doing. On a couple of calls, Jo Koroma felt that the claimant did not really understand what she was being asked to do and, rather than share the call, was asking questions instead of finding solutions giving people actions or picking up the actions from last time (p.853).

41. On 10 January 2020, the claimant and Craig Warner had a conversation during which the claimant alleges that Craig Warner told her that her confidence was at a

band E rather than a band D level. It is agreed that there was a reference to the claimant performing at band E level but a dispute as to whether this was in reference to the claimant's confidence being at band E level. It is not necessary for us to make a finding in relation to this dispute.

42. On 20 January 2020, Joanna Burke sent an email to Craig Warner, passing on feedback about the claimant. She wrote: "while I appreciate it takes time for people to get up to speed, the feedback from my team is that every time they find themselves on a call with Fignola they are repeating the same thing. With the team as busy/juggling as much as they are right now, this really isn't the best use of their time."

43. We find that, if Craig Warner tried to feedback to the claimant concerns raised by other managers, he did not do so in a clear way.

44. On 29 January 2020, the claimant went on a work visit to Belfast. In the evening, she had dinner with Craig Warner, Matthew Dent and Bernice Iyanda. The allegation in the agreed list of issues is that Craig Warner stated that he believed the absence of top-level black swimmers was "because of class". The claimant's witness evidence is that she mentioned that she could not swim and did not like swimming because of her hair and how that was quite a common reason in the black community and that Craig Warner then said "I thought it was because of class". Bernice Iyanda's witness evidence is that they were discussing sports, and Bernice Iyanda mentioned about there not being many black swimmers especially at a high standard in the likes of the Olympics and, when asked why, explained that it was because of an African belief about a mermaid figure who will come and take you into the water and you will never be seen again. She gave evidence that the claimant then mentioned that it was because their hair was brittle and the chlorine affects it, to which Craig Warner said "oh I thought it was to do with class." Matthew Dent cannot recall Craig Warner making such comment. Craig Warner denies making such a comment. He accepts that there was a discussion about swimming and the claimant mentioned about chlorine in swimming pools affecting the hair of black people and that there was a conversation about the relative lack of elite black swimmers. Craig Warner says that he referred to a tweet he had seen relating to the NFL which said that it is not unusual for elite black NFL players to be unable to swim and that one explanation had been that some players had progressed to the top of their sport from underprivileged backgrounds where swimming either was not encouraged or simply was not available.

45. We prefer the evidence of the claimant and Bernice Iyanda, in finding that Craig Warner made a comment about black people not swimming "because of class". Although they did not react at the time, we accept that they were both very offended by the comment and, therefore, more likely to remember it than Matthew Dent, to whom it would not have the same personal meaning. We find that the claimant and Bernice Iyanda took the comment as equating black people in general with people of low class. We find that Bernice Iyanda was genuinely upset when giving her evidence about this to the Tribunal, commenting "I've got as much class as anyone else." For the claimant, the comment had resonances of segregation in the US; she referred in her evidence to Rosa Parks and to swimming pools being drained if a black person had swum in them. The claimant wrote her first account of the event just over two weeks after the incident, in her grievance dated 14 February 2020 (p.130). She has been consistent in her allegation about the essential elements of this allegation in the internal process, in the claim form and in her evidence to this Tribunal. Bernice Iyanda

gave evidence supporting the claimant's account in the internal grievance proceedings and in these Tribunal proceedings.

46. We consider that the comment made by Craig Warner may have resulted from Craig Warner thinking about the NFL tweet he had seen but he did not, at least initially, articulate it in this way; the comment not coming out as a theory about a link with social deprivation in some cases but instead coming out as equating black people with people of low class. We find that Craig Warner may have gone on to refer to some NFL players being unable to swim in explanation of his comment. However, we find it more likely than not, that he made the reference to black swimmers and class, before doing this. Bernice Iyanda thought he may have made some comment about affordability following the reference to class. It would not be surprising if the claimant and Bernice Iyanda did not recall what was subsequently said, due to shock at the comment about class. We do not find that Craig Warner made the comment about class intending to offend. It may be that he had in mind, as he made the comment, what he had read on Twitter. It is possible that he does not recall making a comment about class.

47. On 30 January 2020, there was a conversation between the claimant and Craig Warner, during which Craig Warner made the remark "fake it until you make it". There was also a conversation about Nazis and positive intent. There is a dispute about exactly what was said in this conversation but we do not find it necessary to make any further findings of fact about this.

48. On 31 January 2020, the claimant sent to Mr Warner an email in which she wrote that she was feeling that nothing she did was good enough (p.195). She wrote that she had appreciated Craig Warner's feedback but wrote that recently, she had been feeling that her best in the role had not been good enough, that she felt judged and was not given the space to speak or given the benefit of the doubt. She gave some specific examples. She wrote that, even when she took on Craig Warner's advice and changed her way of working, it was still not good enough.

49. Craig Warner responded later that day. He referred to having told the claimant the day before that she was right where he expected her to be. He wrote about trying to find the right balance for feedback and suggested they discuss the best way to make sure they were communicating well and leaving with a common understanding. He suggested they catch up on Monday.

50. Craig Warner sought advice from David Brown, forwarding to him the claimant's email.

51. David Brown replied on 3 February (p.127). His email began: "my opinion, with some interaction, is that Fignola is struggling to perform in the role. She would benefit from a coaching plan and you would benefit from case manager support." He expressed the view that the claimant had been afforded opportunity whilst she learned the ropes and, having done this, was still not a material contributor. His comments suggested there were problems with the way Craig Warner was managing the claimant, as well as with the claimant's performance. He wrote that, whilst Craig Warner was giving the claimant things to work on, he was not necessarily helping her to work towards a point where things are satisfactory for her grade and role. He wrote: "my advice would be start with the end in mind - be clear on her performance (WTD,

GW), be clear on the standards for How and What (the level of a D, her role), and support her leading on the actions to improve in a formal structured coaching plan."

52. Around this time, David Brown was discussing a performance plan for Craig Warner with Craig Warner. There is some inconsistency in the evidence about when Craig Warner was on this performance plan. David Brown said in evidence this was September 2019 but Craig Warner said subsequently that he had checked this and the plan started in February 2020. From what David Brown said when interviewed by Maria Fletcher on 2 April 2020, Craig Warner was on a performance plan at that time. David Brown had concerns about Craig Warner's ability to be a manager, which he expressed at the grievance hearing. He considered that Craig Warner gave the claimant mixed messages about her performance (p.869) It appears that Craig Warner was on a plan over a number of months. We have not seen this plan. The claimant asked for disclosure of a performance plan but the request was in respect of one proposed in the grievance outcome internal document, which never came to fruition, so we do not conclude that the respondent was not telling the truth when they said that this plan did not exist. Based on Craig Warner's evidence, we find Craig Warner was angry when a plan was proposed but he came to find it helpful later.

53. David Brown thought that both the claimant and Craig Warner would benefit from having some form of structure in place regarding the claimant's performance. He felt that Craig Warner needed to start writing down the standard he expected from the claimant in order to be clear about the standard that she was operating at and to then have an open dialogue with her so she could think of action points to meet those expectations. He considered Craig Warner needed to ensure he provided the claimant with the necessary support so that improvements in her performance could be made.

54. On 3 February 2020, there was a Skype call between the claimant and Craig Warner. Craig Warner told the claimant in this conversation that he may need to put her on a coaching plan. This was confirmed on 11 February 2020 when he said he would put her on an informal coaching plan. He raised with the claimant negative feedback he had received from others. We have not seen any contemporaneous notes of these conversations. However, we have referred previously to evidence which shows that Craig Warner had, prior to these conversations, received some negative feedback from other managers about the claimant.

55. Craig Warner also told Bernice Iyanda around January 2020 that he was putting her on a coaching plan.

56. On 12 February 2020, Craig Warner edited the claimant's work about NOI extension. It is common ground that Craig Warner edited the claimant's emails at times.

57. On 14 February 2020, Craig Warner sent the claimant an outline coaching plan (p.181). The title was "improving performance - informal action plan." It appears that the terms performance plan and coaching plan were used interchangeably. Craig Warner had completed comments on the claimant's performance, giving examples. His covering email (p.180) said that they would discuss it on Tuesday, to go through, clarify understanding and create the action plan between them. He asked her to think about actions she would propose and the support she would like from him and anyone else to achieve her goals. The end of the draft plan included the statement: "I

understand that this action plan has been drawn up to assist me to improve my performance to meet the required standard for my role. I have been made aware that if my performance does not improve then it may lead to the next stage of the Improving Performance process being initiated." This indicated it was to be signed by the claimant. The manager was also to sign it to confirm they would give reasonable support and encouragement to assist in the achievement of the improvement plan.

58. The claimant correctly understood from this declaration that, if the plan did not lead to an improvement in her performance, then the formal Improving Performance process was likely to be started. Ultimately, this could have led to the claimant's dismissal.

59. The claimant, by an email dated 14 February 2020 (p.180), declined to attend the meeting to discuss the plan, saying she had been advised externally not to attend that meeting until certain matters were resolved. She told the Tribunal that she had received this advice from ACAS.

60. On the same date, the claimant presented a formal grievance (p.130). The grievance included the allegations about the visa and swimming/class comments and a complaint about being put on a coaching plan. It did not include a complaint about her pay.

61. On 17 February 2020, the claimant started a period of sick leave due to stress and anxiety. Maeve Clancy was allocated to be her duty of care manager. Fiona Bannister oversaw the grievance and absence process.

62. Maria Fletcher dealt with the grievance. She issued her outcome on 22 April 2020. She partly upheld the grievance in relation to inappropriate use of language (p.330). She did not make a clear finding in what she wrote at the time that he did not make those comments. We consider, based on what she wrote at the time, which is likely to be a better indicator of her thought process than her later reflections in evidence to this Tribunal, that either: she found that he had made those comments but excused them, on the basis that no malice was intended in relation to the swimming/class comment and that he had supported the claimant with her visa; or, she did not make a finding as to whether he made the comments because she thought it did not matter because of those factors.

63. Craig Warner was informed of the outcome. This included a recommendation about training which he should undertake. Maria Fletcher had put in her draft reasoning a recommendation that he be placed on a performance plan but this was removed from the final recommendation.

64. By an email dated 22 April 2020, the claimant was informed that her pay would reduce to half pay from 15 May 2020.

65. In accordance with the respondent's policy, the claimant was entitled to 3 months (92 days) full pay then 92 days half pay during sick leave in a two-year rolling period. The respondent had a discretion to increase the period of full pay if the absence was due to an injury at work.

66. The claimant began early conciliation with ACAS on 22 April 2020.

67. The claimant contacted the HR helpdesk to ask if her sick pay would be extended. Fiona Bannister advise the HR helpdesk that her sick pay would not be extended.

68. The claimant appealed the outcome of the grievance (p.451). From her letter, it appears that she understood that Maria Fletcher had found that the visa and swimming comments had been made but that this did not constitute harassment. She argued in her appeal letter that it should have been found to constitute harassment.

69. The claimant made a further request to extend her full pay.

70. A first-line absence review was held with Maeve Clancy on 6 May 2020. The claimant did not go into detail about the reasons for her absence because of her grievance. She said it would help if she was moved to a different manager and a different part of the company. We find that there had been a delay in holding the first-line absence review because of the claimant's grievance and that this was arranged once the claimant had received the outcome of the grievance.

71. On 14 May 2020, Theresa Hyde refused the claimant's request for an extension of her company sick pay. She wrote that they had investigated the allegations and come to the conclusion that there was no responsibility on the part of the company so it was not a work-related injury.

72. We accepted the evidence of Theresa Hyde that sick pay at full pay level is only extended in exceptional circumstances. She gave an example of where an engineer had been struck by a vehicle whilst working for the respondent and was poorly for a long period of time; she had decided that this was an exceptional circumstance warranting an extension of company sick pay.

73. On 21 May 2020 a second line absence review meeting was held with David Brown. David Brown looked into alternative roles for the claimant. He responded to various enquiries the claimant had raised. On 29 May 2020, he informed the claimant, after a discussion with HR, that her request for an extension of sick pay was still refused.

74. The ACAS early conciliation certificate was issued on 2 June 2020.

75. The claimant's trade union representative asked on 4 June 2020 for the claimant's sick pay to be extended. He renewed this request on 18 June and, on 19 June, Theresa Hyde agreed to extend the claimant sick pay for one month. She wrote that this was a "goodwill gesture", acknowledging there had been delays from both sides.

76. The claimant's claim to the Tribunal was presented on 11 June 2020.

77. On 18 June 2020, the claimant was informed that her end of year performance was "good work". We understand that this related to the year 19/20, part of which had been in the claimant's previous role.

78. The grievance appeal was dealt with by Shweta Taneja. She held a grievance appeal hearing on 15 July 2020 and sent an outcome to the claimant on 26 January 2021. She upheld Maria Fletcher's decision, although we did not find her evidence

clear as to what she thought Maria Fletcher had decided. It is not clear from the outcome letter that Ms Taneja came to the view that Craig Warner had not made the alleged comments about the visa and swimming/class. Her evidence to the Tribunal about the visa, was inconsistent as to what she found. In relation to the swimming/class comment, she said she found this had not happened.

79. Prior to managing the claimant, Craig Warner's experience of managing direct reports was limited. In 2013, he had two direct reports, both of whom were white males. He then managed a team in India with two Indian and one white male reports. His current team is all white. He did not get the point of having coaching plans with any of his direct reports other than the claimant and Bernice Iyanda.

80. In David Brown's immediate team at the time of 15 to 20 people, there were four people on coaching plans: Craig Warner, who is white, one other white employee, the claimant and Bernice Iyanda. Most of the immediate team were white. In his wider team of around 150 people, he estimated that 10% of employees were black.

Submissions

81. Both representatives made oral submissions. We summarise the submissions.

82. Mr Searle, on behalf of the respondent, submitted as follows. In relation to the complaints of direct race discrimination, he submitted that the claimant did not satisfy the initial burden of proof on her. There was no evidence that the claimant had been treated less favourably than a real or hypothetical comparator. Mr Searle accepted the possibility that the burden shifted in relation to the complaint about the coaching plan. Mr Warner had only two direct reports, both of whom were black and both were on coaching plans. Mr Searle submitted that, looking to the respondent for an explanation, the evidence was clear that the claimant had been promoted beyond her capabilities or was at a time where things were difficult and she was struggling and in a bedding in period. In relation to the complaint about the salary, Mr Searle submitted that the decision to pay £38,000 was clearly not motivated by the claimant's race.

83. In relation to the complaints of harassment, there was a clear dispute as to what was said. In relation to the visa comment, Mr Searle invited the Tribunal to prefer the evidence of Mr Warner and referred to evidence of Mr Warner's help to get the visa. Mr Searle questioned whether Ms Iyanda was a reliable and independent witness. Alternatively, he submitted that the comment, if said, was not unwanted because it was part of a conversation the claimant and Mr Warner were having. The comment was innocent.

84. In relation to the alleged comment about class, Mr Searle submitted that, if the Tribunal found it was said, it was not unwanted conduct in the context of the conversation. At the time, no offence was taken. In deciding whether the conduct had the requisite effect, Mr Searle accepted that the claimant was upset and remains upset and he commented that he did not know what she was upset about and did not know if this was fed into by her mental state. Mr Searle referred to the context of the conversations and the claimant making a joke about the visa. It had to be reasonable for the conduct to have the requisite effect. If the Tribunal thought the claimant was unreasonable to take offence, there would be no harassment within the meaning in section 26. Mr Searle referred to the case of **Richmond Pharmacology Ltd v**

Dhaliwal [2009] IRLR 336 EAT for a reminder that the Tribunal must apply its mind to the three elements of liability for harassment.

85. Mr Searle submitted that, in relation to the alleged comment about class, if the comment was made, it was about social inequality and not about racial inequality and it was not related to race. Mr Searle referred to the case of **Tees Esk and Wear Valleys v NHS Foundation Trust v Aslam** [2020] IRLR 495 EAT, submitting that the Tribunal needed a basis on which to say that class equated to race.

86. In relation to the complaint of victimisation, the respondent accepted that the 14 February email was a protected act. Mr Searle submitted that it was a huge leap to say that the decision three months later not to exercise discretion was in some way linked to that protected act.

87. In relation to jurisdiction, Mr Searle submitted that acts were separate and discrete involving different people and different times so the time limit must be applied. He said he did not take the issue of jurisdiction away from the Tribunal but did not push too hard on it.

88. On behalf of the claimant, Ms Aly submitted that it was necessary to understand the context, which was why there was so much evidence not directly relevant to the issues. She confirmed that there was no actual comparator for the complaints of direct discrimination.

89. Ms Aly submitted that there was no evidence that the role was beyond the claimant's capability and she was not told it was a development role. Ms Aly submitted that it was disingenuous of the respondent to say that there was poor performance, divorced from poor management. She submitted that putting the claimant on a coaching plan was completely unacceptable. In relation to the salary, she submitted that the order of the emails did not lie and Louise Sutherland plucked a figure from thin air without a comparison first. She questioned why no one picked up the reference to a comparison with other E bands made by David Brown. She suggested the story about the typo had been invented. The claimant's evidence was that she had conversations with people about there being a 5% increase on the lateral move and 10% for promotion. This was backed up by the evidence of Mr Tait. When the claimant made a lateral move, she got a 5% rise. Ms Aly submitted that the troubling email about the bands was enough to shift the burden of proof.

90. In relation to harassment, Ms Aly commented that the respondent had a difficult case in suggesting that the conduct was not unwanted. She submitted it was obvious the comments were made. The only person who denied the comments were made was Mr Warner. In relation to the visa comment, being supportive with the visa application did not preclude him making the comment. Ms Aly submitted that it was a difficult argument to say that class was not to do with race. They were talking about class and black people.

91. In relation to the complaint of victimisation, Ms Aly invited the Tribunal to look at the wider circumstances. The absence review had been delayed for two months for no particular reason, because of the grievance.

92. Ms Aly made detailed submissions about the credibility of the evidence of the various witnesses which we do not seek to summarise.

93. In relation to the complaint of direct discrimination about salary, the claimant said she was aware of people treated differently and Mr Tait agreed managers could be involved in salary setting. Mr Warner said one of his team had been making around £40,000 and was white. In relation to the complaint about coaching, David Brown had a 20 person team with four on a plan, including two black employees. The evidence was enough to shift the burden of proof. The respondent had not justified its behaviour. A lot of the capability points were down to Mr Warner's poor management. The claimant was not told about many of the apparent performance issues until 11 February.

94. In relation to harassment, Ms Aly submitted that the Tribunal must find in the claimant's favour. The evidence was overwhelming that the comments were made. Both comments were offensive and clearly unwanted. The respondent was clutching at straws by saying it was not unwanted. Ms Aly submitted that, once the Tribunal found that the comments were made, there should be no difficulty in finding that the comments were made with the requisite purpose or had the requisite effect. It was reasonable for the comments to have that effect. They had a severe effect on the claimant.

95. In relation to victimisation, Ms Aly submitted that we should look at the wider issues; the sickness absence policy and what happened.

96. In relation to jurisdiction, Ms Aly submitted that the same manager was involved and it was a continuing act. The only act which could arguably be out of time was the complaint about salary.

Law

97. The law on direct discrimination is contained in section 13(1) of the Equality Act 2010 (EqA). This provides: "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". Section 4 lists protected characteristics which include race. "Race" is defined by section 9(1) as including colour, nationality, ethnic or national origins.

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

99. Section 39(2) provides, amongst other things, that an employer must not discriminate against an employee by subjecting that employee to a detriment.

100. The law on harassment is contained in section 26 EqA. The relevant parts of that section provide:

> "(1) A person (A) harasses another (B) if –
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) The conduct has the purpose or effect of –

(i) violating B's dignity, or

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

……

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

(a) the perception of B;

(b) the other circumstances of the case;

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

Subsection (5) lists relevant protected characteristics which include race.

101. Section 27 EqA deals with victimisation. This provides:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(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."

102. When considering whether a claimant was subjected to detrimental treatment because they have done a protected act, the Tribunal must ask: what, consciously or subconsciously, motivated the employer to subject the claimant to the detriment? In **Chief Constable of West Yorkshire Police v Khan** 2001 ICR 1065, the House of Lords rejected a "but for" approach to victimisation; the Tribunal had to identify 'the real reason, the core reason, the causa causans, the motive' for the treatment complained of.

103. Section 136 EqA provides:

> "(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."

104. Case law reminds us that it is very unusual to find direct evidence of discrimination. Normally the Tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question. When considering whether the claimant has satisfied the initial burden of proof, the fact that a claimant has been subjected to unreasonable treatment is not, of itself, sufficient as a basis for an inference of discrimination so as to cause the burden of proof to shift.

Conclusions

Direct race discrimination

On 1 August 2019, the respondent awarded the claimant a salary of £38,000

105. The claimant was appointed to her new role, which was a promotion, at a salary of £38,000. This was more than her salary in her previous role, and towards the lower end of the salary band for band D, which was £34,000-£68,000. She had asked for £41,200.

106. The initial burden of proof is on the claimant to prove facts from which we could conclude that there was less favourable treatment because of race (her Afro-Caribbean ethnic origin). There is no actual comparator. The comparison is made with a hypothetical white comparator who is otherwise in the same material circumstances as the claimant. We conclude that material circumstances are the band and salary the claimant had prior to the promotion and the new role.

107. We accept that the claimant came, at some point, to genuinely believe that she would have received a higher salary on promotion had she been white. We also recognise that salary structures with wide and overlapping salary ranges for bands, as in this case, and where there is discretion on the part of the employer as to where to place the employee within the salary band on joining, can give rise to the potential for discriminatory treatment. The Equality and Human Rights Commission Code of Practice on Equal Pay (2011) lists "long pay scales or ranges" and "overlapping pay scales or ranges" as factors which pose risks in terms of potential non-compliance with an employer's legal obligations. This Code relates to equal pay for men and women but we consider the same risk factors could equally give rise to the risk of discrimination in pay because of race. However, we must consider the evidence before us in this case and, on the basis of that evidence, we conclude that the claimant has not proved evidence from which we could conclude that she had been less favourably treated because of race in relation to her salary. We had no evidence of salaries and ethnicity of comparable employees to the claimant. The claimant did not satisfy us that there was a custom and practice of employees receiving a 10% pay rise on promotion and a 5% rise on a lateral move (see paragraph 24). On the basis of emails we saw

(see paragraphs 15- 20), the respondent was trying to set a salary consistent with others in a similar position.

108. If we have jurisdiction to consider this complaint, having regard to the relevant time limit, we conclude that this complaint of direct race discrimination is not well founded. We will return to jurisdiction after dealing with the substantive merits of the complaints.

On 3 February 2020, Craig Warner told the claimant "maybe I need to put you on a coaching plan"
On 11 February 2020 Craig Warner informed the claimant that he was going to place her on an informal coaching plan

109. Both parties agreed that this was, in effect, one complaint, although listed as two complaints in the agreed list of issues. We, therefore, deal with it as one complaint about the claimant being told she was being put on a coaching plan.

110. The initial burden of proof is on the claimant to prove facts from which we could conclude that there was less favourable treatment because of race (her Afro-Caribbean ethnic origin). There is no actual comparator. The comparison is made with a hypothetical white comparator who is otherwise in the same material circumstances as the claimant.

111. We conclude that the claimant has satisfied this initial burden of proof because of the following matters. The statistics (albeit based on a small pool of around 15-20 people) show that black people were considerably over-represented in the number of employees in David Brown's immediate team who were on coaching plans. The claimant and Bernice Iyanda were the only black employees Craig Warner had directly managed (albeit from a small total number of direct reports and that he had also managed employees of Indian origin) and they were the only direct reports he was intending to place on coaching plans. Craig Warner had commented to the claimant only a few days before he said he would put her on a coaching plan that she was right where he expected her to be (see paragraph 49) which, on the face of it, is inconsistent with her performance being such that a coaching plan was appropriate.

112. The burden, therefore, shifts to the respondent to satisfy the Tribunal that there was no unlawful race discrimination.

113. Craig Warner had appointed the claimant and thought she had big potential (see paragraph 28). We conclude that both David Brown and Craig Warner thought the claimant had the potential to succeed in the role, but had some concerns about her current performance.

114. We found that other managers had given negative feedback to Craig Warner about the claimant's performance at times (see paragraphs 40 and 42). Lindsey Ferguson was openly critical of the claimant when she raised the same question in a meeting as she had raised twice before (see paragraph 30). David Brown had concerns about the claimant's performance (see paragraphs 39 and 51).

115. David Brown also had concerns about Craig Warner's management ability. He considered Craig Warner was giving the claimant mixed messages and not giving the

claimant the work she need to be given to be able to perform at band D level (see paragraphs 51-52).

116. David Brown saw an informal performance plan (or coaching plan) as a useful structure to improve the performance of the claimant by, amongst other things, improving the management of the claimant by Craig Warner (see paragraph 53). David Brown made the suggestion for the use of a plan and Craig Warner picked up on this suggestion. We conclude that the reason the use of a plan was suggested, was because of concerns about the claimant's performance, which included concerns that Craig Warner was not managing the claimant in a way which allowed her to demonstrate that she could perform at Band D level.

117. We conclude that the respondent has satisfied us that the claimant's race was not a material reason for the suggestion that the claimant be put on an informal coaching plan. We conclude, therefore, that this complaint of direct race discrimination is not well founded.

Harassment related to race

On 29 January 2020, Craig Warner stated he believed the absence of top-level black swimmers was "because of class".

118. We found that Craig Warner did make the alleged comment.

119. We conclude that the comment was related to race. They were talking specifically about black people and swimming. Craig Warner's comment was specifically about why many black people do not swim. The comment, therefore, related to race.

120. We found that the claimant was very offended by the comment (see paragraph 45). We conclude that the comment was unwanted.

121. We did not consider there was evidence showing that Craig Warner intended to cause offence. We consider the comment may have resulted from Craig Warner thinking about the NFL tweet he had seen but he did not, at least initially, articulate it in this way; the comment not coming out as a theory about a link with social deprivation in some cases but instead coming out as equating black people with people of low class. We conclude that the comment did not have the purpose of violating the claimant's dignity or creating a hostile, intimidating or offensive environment for the claimant.

122. We conclude, however, that the comment had the effect of violating the claimant's dignity or creating a hostile, intimidating or offensive environment for the claimant. Although this was said at a dinner, outside work hours, the respondent has not argued (rightly in our view) that the comment was made outside the course of Craig Warner's employment. The claimant was having dinner with Craig Warner and the others because they were all in Belfast for a work event. The claimant had to continue working with Craig Warner. She understood Craig Warner to be equating black people with people of low class and the comment had a particularly hurtful impact on her because of the history of segregation in the US. We conclude that the comment had the effect of violating the claimant's dignity and it was reasonable for the comment to have that effect, taking into account the claimant's perception and all the circumstances. The

context of a conversation about why many black people do not swim, and why there are few black elite swimmers, does not mean it was not reasonable for the claimant to feel that her dignity had been violated by the comment.

123. We conclude, for these reasons, that this complaint of harassment related to race is well founded.

In late 2019, Craig Warner made a joke about the claimant being deported whilst a visa application was ongoing

124. We found that Craig Warner did make the alleged comment.

125. We conclude that the comment was related to race i.e. the claimant's US nationality and, therefore, the need for the claimant to have a visa to remain working in the UK. We conclude that the comment was not related to the claimant's Afro-Caribbean ethnic origin. It was not because of her ethnic origin, but because of her nationality, that she required a visa.

126. We found that the claimant was shocked and felt humiliated when Craig Warner made the comment (see paragraph 36). We did not accept the argument that her "haha" in a message when her visa was granted, meant that she treated the visa process in a light hearted way. We found that she found the process very stressful.

127. We did not find evidence that Craig Warner had the purpose of violating the claimant's dignity or creating a hostile, intimidating or offensive environment for the claimant by making the comment. We consider it likely it was an ill-judged "joke", made without proper consideration of its likely effect on someone whose right to remain in the UK rested on a successful visa application. We conclude, however, that the comment had the requisite effect for harassment and it was reasonable, taking into account the perception of the claimant and all the circumstances, to have this effect.

128. Subject to the issue of jurisdiction, having regard to relevant time limits, we, conclude that this complaint of harassment related to race is well founded. We return to the issue of jurisdiction after dealing with the substantive merits of all the complaints.

<u>Victimisation</u>

129. The complaint relates to the respondent's refusal to exercise its discretion under the Sickness Absence Policy to refuse to pay the claimant full pay from 15 May 2020. The claimant argues that this was detrimental treatment because the claimant had done a protected act i.e. the grievance of 14 February 2020.

130. The respondent concedes that the grievance was a protected act. We consider this concession was correctly made.

131. The claimant was subjected to a detriment in having her pay reduced to half pay from 15 May 2020.

132. The remaining issue is whether the reduction in pay was because the claimant had presented a grievance.

133. We consider this to be an appropriate case in which to move straight to the reason why (assuming, without deciding, that the claimant would succeed in proving facts from which we could conclude there was unlawful victimisation). We conclude that the reason the claimant's pay was reduced was because this was in accordance with the respondent's policy that sick pay would reduce from full pay to half pay after 92 days' absence in a 2 year rolling period. The claimant had reached this point in her absence and the respondent was acting in accordance with its policy in reducing her pay. There was a discretion to extend full pay if the absence was due to a work-related injury, but the respondent did not conclude that the absence was for such a reason. Extensions of full pay were exceptional. There was no evidence before us of the granting of extensions in circumstances comparable to those of the claimant, whether or not other employees on extended sick leave had presented a grievance.

134. From the claimant's answers in cross examination, it appeared that she considered it victimisation to not extend sick pay because, but for the grievance, the claimant would have had a review meeting earlier, which may have led to her returning to work before she reached the stage of her pay being reduced. The case law is clear that a complaint of victimisation will not succeed on the basis that "but for" the protected act, the claimant would not have been subjected to the detriment. In deciding whether the detrimental treatment was because of the protected act, we must consider what, consciously or subconsciously, motivated the employer to subject the claimant to the detriment.

135. We conclude that it was the respondent's policy on sick pay and the respondent's view that this was not an exceptional case, involving absence due to a work-related injury, that motivated the respondent to refuse to extend the claimant's period of sick pay at the level of full pay. We, therefore, conclude that the complaint of victimisation is not well founded.

Jurisdiction

136. The agreed list of issues included issues about whether the complaints were presented in time and, if not, whether it would be just and equitable to extend time for presentation of the claims.

137. The claimant notified ACAS under the early conciliation procedure on 22 April 2020. A complaint about anything occurring before 23 January 2020 would, therefore, be presented out of time, unless the act of discrimination formed part of a continuing act of discrimination, ending with an act in respect of which the complaint was presented in time.

138. There are two complaints which are potentially out of time: the complaint of direct race discrimination about the award of a salary of £38,000; and the complaint of harassment related to race about the "joke" about the claimant being deported whilst a visa application was ongoing.

139. In relation to the complaint about salary, we found that this complaint was not well founded on its merits. We conclude that it does not form part of a continuing act of discrimination, since it was not an act of discrimination. It was also different in nature to the other complaints alleged. We do not consider we have any basis on which to conclude that it would be just and equitable to consider this complaint out of time. We, therefore, conclude that we do not have jurisdiction to consider this complaint. Had we had jurisdiction, we would have concluded that the complaint was not well founded, for reasons previously given.

140. In relation to the complaint of harassment about the visa "joke", we conclude that this formed part of a continuing act of discrimination with the comment about black swimmers and class. The person making the offending comments was the same: Craig Warner. The complaint in relation to the comment about black swimmers and class was presented in time. The complaint in relation to the visa "joke" is also, therefore, presented in time. If we had concluded it did not form part of a continuing act of discrimination, we would have concluded it was just and equitable to consider the complaint out of time. The claimant raised this in internal proceedings, once she had other concerns, including it in the grievance dated 14 February 2020 (unlike the complaint about salary which was not raised in the initial grievance, but only during the appeal process), and presented her Tribunal claim after the unsuccessful outcome to the grievance. We conclude that we have jurisdiction to consider this complaint of harassment related to race.

Employment Judge Slater
Date: 23 May 2022

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON
23 May 2022

FOR THE TRIBUNAL OFFICE

ANNEX
Agreed List of Issues

Direct race discrimination

1. Did the respondent treat the claimant less favourably, within the meaning of s.13 Equality Act 2010 in that:

    i. On 1 August 2019, awarded the claimant a salary of £38,000;

    ii. On 3 February 2020, Craig Warner told the claimant *"maybe I need to put you on a coaching plan"*;

    iii. On 11 February 2020 Craig Warner informed the claimant that he was going to place her on an informal coaching plan.

2. Was the claimant treated less favourably than:

    i. A hypothetical comparator.

3. In relation to any actual comparator cited by the claimant is there a material difference between the circumstances of the actual comparators?

4. Was the less favourable treatment because of the claimant's race?

    i. Are there facts from which the Tribunal could decide, in the absence of any other explanation, the respondent contravened section 13 (such that the burden of proof passes to the respondent)?

    ii. Can the respondent show that it did not contravene the provision (section 136(1) Equality Act 2010)?

Harassment related to race

5. Did the respondent engage in unwanted conduct (within the meaning of section 26 Equality Act 2010) related to the claimant's protected characteristic of race? The alleged unwanted conduct being:

i. On 29 January 2020, Craig Warner stated he believed the absence of top-level black swimmers was *"because of class".*

ii. In late 2019, Craig Warner made a joke about the claimant being deported whilst a visa application was ongoing.

6. Did the conduct have the purpose or effect of violating the claimant's dignity or creating a hostile, intimidating or offensive environment for the claimant?

7. Was it reasonable for the conduct to have the prescribed effect (within the meaning of section 26 Equality Act 2010) taking into account the perception of the claimant and all circumstances?

Victimisation

8. Was the claimant's grievance of 14 February 2020 a protected act?

9. Did the respondent refuse to exercise its discretion under the sickness absence policy to refuse to pay the claimant from pay from 15 May 2020 because of the protected act?

Jurisdiction

10. Have the claims been presented in time - within three months starting with the date of the act which the complaint relates?

11. Is the conduct relied upon extending over a period within the meaning of section 123 Equality Act 2010?

12. If not, it is it just and equitable to extend time for presentation of the claims?