EMPLOYMENT TRIBUNALS

Claimant: **Ms I Onugha**

Respondent: **Royal Free London NHS Foundation Trust**

Held at Watford, in part by CVP **On: 21-25 March 2022**

Before: **Employment Judge R Lewis**
Members: **Mr D Bean**
Mr M Kaltz

REPRESENTATION:

Claimant: **In person**
Respondent: **Mr G Powell, Counsel**

JUDGMENT

1. The claimant's claims of race discrimination fail and are dismissed.
2. The claimant's claims for holiday pay are dismissed on withdrawal.
3. The claimant's claims for overtime pay and travel expenses fail and are dismissed.

REASONS

1. These reasons were requested by the claimant after Judgment had been given.
2. This was the hearing of a claim presented on 20 February 2020. The claimant has represented herself. Day A was 14 December 2019 and Day B was 28 January 2020. The claimant was employed in the respondent's finance team for a period of about 24 weeks.
3. Following consideration under Rule 26, the claimant was on 23 June directed to clarify her claim of race discrimination. On 19 July the claimant submitted

particulars of claim, which indicated that she had had legal advice. The respondent submitted an amended response on 2 October.

4. On 25 October 2020 the Tribunal gave notice of a case management hearing. It took place before Employment Judge Hyams on 16 March 2021. His summary and Orders were sent to the parties on 27 March.

5. Judge Hyams' analysis of the issues (71-74 of the bundle) was the critical document for this Tribunal. In the intervening period, there was further correspondence in relation to case preparation and disclosure. A particular issue related to the provision of documents which the respondent asserted it could not produce because they did not exist.

6. The parties had exchanged witness statements. The claimant was the only witness on her own behalf, and had prepared a long primary statement, incorporating and cross-referring at length to documents, and a second statement dealing with travel expenses into which she had cut and pasted some personal card receipts.

7. The respondent provided the witness statements of three witnesses, all of whom gave evidence. They were Ms A Howell, deputy finance manager, who had been the claimant's line manager throughout her employment; Ms L Marsh, then financial operations director, and part of the senior management team for finance; and Ms H Lewis, who worked in the respondent's HR function.

8. There was an agreed electronic bundle of over 700 pages. It was far from easy to follow. A modest, chronological core bundle would have greatly assisted. There were in addition a few separate documents produced by the claimant much later than the Tribunal had directed. Mr Powell took no point as to late provision, but disputed their relevance.

9. Mr Powell in addition provided the Tribunal with a helpful chronology and cast of characters. He later provided closing submissions in writing; we made clear to the claimant that she was not expected to reply in writing, but was free to do so.

10. The Tribunal dealt with case management matters on the morning of the first day of hearing. For organisational reasons, the allocated time of hearing had been reduced from six days to five. The Tribunal therefore proposed, and the parties agreed, that in the five allocated days it would hear and fully determine the money claims, and determine liability only in relation to the discrimination claims, remedy for discrimination to be dealt with separately if needed. The first day of hearing was spent entirely on case management and reading. On the second day, the hearing proceeded fully remotely, and the claimant gave evidence for most of the day.

11. On that day, the claimant's CVP link was serviceable but unreliable. While we were sure that it did not inhibit our ability to do justice to the claimant's evidence, we were concerned that it could give rise to difficulties in the two days of cross-examination by the claimant which were to follow. In discussion after her own evidence, the claimant accepted this was the case, and expressed a strong preference to attend the Tribunal in person for the next two days. Mr Powell and the respondent's witnesses were unable to do so, and we were grateful therefore to Ms Blakemore, on behalf of Messrs Bevan

Brittan, for attending on those days to ensure that the respondent was represented in the Tribunal room. The non-legal members joined remotely.

12. The claimant was recalled on the morning of the third day to give evidence about the procedure for claiming overtime. Ms Howell gave evidence from 10.45 to 2.40 that day with a break; and Ms Marsh from 2.45 to 3.40. Ms Lewis gave evidence for one and a quarter hours on the morning of the fourth day. After a short adjournment, Mr Powell gave closing submissions. The Tribunal took a lengthy lunch adjournment, following which the claimant replied. The Tribunal gave Judgment just before the lunch break on the fifth day.

General approach

13. We preface our findings and discussion with matters of general approach.

14. In this case, as in many others, the Tribunal heard evidence about a range of issues, some of it in detail. Where we make no finding about a point of which we heard; or where we make findings, but do not discuss a point to the depth to which the parties went, that should not be taken as oversight or omission, rather as a true reflection of the extent to which the point assisted us.

15. That observation is made in many cases, but was of particular importance in this one, where the claimant appeared unrepresented, presenting a case which was relatively paper heavy and had legal complexities, in which she faced two problems in doing herself justice. The first was that her understanding of the law, procedure and technique of the Tribunal was that of a wholly inexperienced litigant in person; and secondly that at times her emotions about the events which the Tribunal had to consider appeared still raw.

16. A frequent difficulty faced by litigants in person is that of distinguishing between the points which they feel strongly about, and the points which are truly material to the Tribunal's adjudication. This was a recurrent, major problem for the claimant throughout this case. There were a number of points on which the claimant had strong feelings, and on which she wanted to cross-examine, but which did not in form part of the case identified by Judge Hyams. An additional complication was that on some points we could see that the claimant's sense of grievance was well founded.

17. Our approach includes applying to the workplace a standard of realism, which recognises that everyone makes mistakes at work, and that often things are said or written at work which with hindsight could have been better said or better written. Realism includes recognising the danger of hindsight, and acknowledging that no one goes to work with the ability to foresee the future. It has been necessary for the Tribunal, in this Judgment, to take care to distinguish from our analysis of racial discrimination those points which might lead to a well founded internal grievance, and/or upon which it seems to us that the claimant has good grounds to criticise the respondent.

Statutory framework

18. This was a claim brought mainly under the provisions of section 13 of the Equality Act 2010. It was a claim of direct discrimination. Section 13 is therefore to be read with section 39. Taken together, the two subsections provide:

"A person discriminates against another if, because of protected characteristic, A treats B less favourably than A treats or would treat others …

An employer must not discriminate against a person:

(a) In the arrangements A makes for deciding whom to offer employment ..

(a) As to the terms of employment;

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

(c) By dismissing B;

(d) By subjecting B to any other detriment."

19. At the heart of any claim of direct discrimination therefore is the issue of comparison, on which section 23 provides:

"On the comparison of cases for the purposes of section 13 .. there must be no material difference between the circumstances relating to each case."

20. That provision is often not well understood. Its effect in this case was to render comparison with any actual comparator almost impossible, and therefore left at the heart of this case comparison with a hypothetical comparator. A hypothetical comparator is a person of a different race from the claimant, but who in all other material respects was in the same position as the claimant.

21. One part of the claim was brought as a claim of victimisation. S.27 provides Section 27 provides that

"A victimises B if A subjects B to a detriment because (a) B does a protected act".

22. Section 27(2) includes in the definition of a protected act,

"doing any other thing for the purposes of or in connection with this Act; … making an allegation (whether or not express) that A or another person has contravened this Act".

23. Section 136 sets out the burden of proof provisions. Section 136(2) provides: "If there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred." That provision "does not apply if A shows that A did not contravene the provision."

24. Although this is the baldest summary of the relevant provisions, the fundamental, recurrent point throughout this case was that it consisted of a series of bare assertions, in which the claimant asserted that actions by managers were taken because of her race. Our recurrent findings are that there was not, in relation to any of them, any evidence which linked the event or action with the material protected characteristic; there was no cogent evidence of an actual comparator, or analysis of a hypothetical comparator; and there were, managerial reasons for the actions complained about, which had nothing to do with race, but with which the claimant passionately disagreed.

25. That finding is made while acknowledging that the claimant has grounds to be aggrieved by aspects of her management (eg the mistakes made by HR).

Money claims

26. We deal first, as a matter of convenience, with the financial claims.

Holiday pay

27. In her schedule of loss, the claimant asserted that the respondent had deducted three days excess holiday pay from her final pay. The respondent admitted that it had done so. On the face of it, she therefore brought a claim for three days holiday pay. It became apparent during the case that the claimant accepted that by the end of her employment she had taken more holiday than had accrued, and she accepted that the respondent was entitled to deduct from her final pay a sum in respect of an overpayment therefore of three days. The Tribunal put this point to the claimant at the end of the second day and the beginning of the third, and the claimant accepted it. The claimant stated plainly that she did not pursue the claim. That being so, the holiday pay claim is treated as dismissed on withdrawal.

Travel expenses

28. The claimant brought two other money claims. The first was a claim for travel expenses. The claimant's contractual place of work was Enfield Civic Centre. She might however be required to travel in the course of duties to work at Barnet or Hampstead. In accordance with guidance issued by the respondent in January 2019, the respondent agreed to meet those costs. In short, and in accordance with many such procedures, the respondent agreed to repay the costs of travel, to the extent only that they exceeded normal cost of travel to work, and subject to process being followed in claiming. In particular, the respondent's guidance stated (emphasis in original, 113): as below. We accept that the respondent also issued a separate policy which was supplemented by the guidance.

> "Expenses claims must be submitted **no later than the end of the month after the month in which the journey was undertaken."**

29. The claimant claimed the additional travel cost incurred for days worked in Barnet. Ms Howell agreed in evidence that that might be two days a week in practice, and costs therefore of £9.60 per week. The claimant agreed that she had made no claims during her employment.

30. As a claim for expenses, this claim could only be brought as a claim for breach of contract (Employment Rights Act section 27(3)). The claimant therefore was put to proof of a legally enforceable right to the sum which she claimed in the tribunal.

31. The claimant's difficulty, which we found was insuperable, was that the respondent had in her terms and conditions specified not just the right to be paid for travel costs; but the means and mechanism for payment. The means and mechanism were that a claim had to be made by the last day of the month after the month in which the expense was incurred. In order to make good a claim in the tribunal, it follows that the claimant had to provide evidence of three points: (a) that the journey was taken; (b) its cost; and (c) that she had claimed for it correctly at the time, in accordance with the relevant rules.

32. The claim fails in the absence of any evidence that the claimant submitted a claim in accordance with the applicable contractual procedure.

33. In rejecting the claim, we think it right to express a concern. Ms Howell, as the claimant's line manager, knew that the claimant had a long expensive commute every day, and that while the daily travel costs to Barnet might appear modest in isolation, they added up to a real sum of money, to which the claimant was entitled. At the very least, it would have been good practice if the respondent, or the line manager, or a more senior member of the finance team, had proactively put to the claimant in writing a short explanation of her entitlement and how it was to be exercised. It was no secret that the claimant was new to the NHS, and it would have been little work to achieve this.

Excess hours claim

34. In addition, the claimant brought a claim for what was in the papers variously described as flexi time, time off in lieu, overtime, or holiday pay. We find that it was in fact a claim for overtime, ie a claim that the claimant was entitled to be paid for hours worked in excess of her contractual hours.

35. The claimant worked a contracted week of 37.5 hours. She claimed that on average she worked 7.5 hours overtime per month (the equivalent of one full day) and she claimed therefore five days pay, one day per month for each month between July and November 2019.

36. We found this a troubling part of the case. The claimant's contract of employment incorporated Agenda for Change (AfC), the NHS framework for national terms and conditions. Paragraph 3.5 of AfC provides,:

> "Staff may request to take time off in lieu as an alternative to overtime payments. However, staff who, for operational reasons are unable to take time off in lieu within three months must be paid at the overtime rate."

37. We understand that AfC is subject to local implementation. Local implementation may be at Trust level, or, as Ms Marsh suggested, at finance team level within the respondent Trust.

38. Ms Marsh's evidence was that the respondent never pays the finance team for overtime. It meets its obligations under paragraph 3.5 of AfC by offering TOIL only.

39. Ms Howell's evidence, borne out to an extent by some of the email traffic between herself and the claimant, was that within her team of four, she operated a common sense informal mechanism, which was that staff might work late and ask informally for time off in lieu the next day or the following week. It was a swings and roundabout arrangement, which was subject to the requirements of core hours, and worked well, but made no provision for record keeping or resolving a dispute.

40. The claimant gave puzzling evidence that while at the respondent Trust she daily completed electronic timesheets which were stored centrally and would provide proof of her hours worked. She said that that is the system of her present employer, a different Trust. Ms Marsh gave firm evidence that that system, known as Allocate, did not apply to non-clinical staff of the respondent in 2019, and that the claimant was mistaken on that point. We accept that

evidence from Ms Marsh; we also accept that the introduction of Allocate is likely to have led to a significant change in the working practices described to us.

41. It was common ground that the work of the finance team was cyclical, and that the month end was a busy time of the cycle, at which the demand for extra hours would be most likely.

42. We accept that there were occasions, and possibly several, when the claimant worked longer than her contractual hours. We accept that there were occasions when Ms Howell agreed that she had flexibility to take time off in lieu. There was however no system at the time for record keeping which would show that the excess hours and the time taken off in lieu remained in balance, nor were we taken to any document which confirmed Ms Marsh's evidence that payment for TOIL was not available in the finance team.

43. We find that the claimant has failed to show a right to be paid the sums which she has claimed. We find that it has not been shown that the claimant's terms and conditions in fact included a contractual entitlement to be paid for worked overtime. While that is conclusive of the point, there would be another difficulty, even if there were a right to be paid for overtime.

44. If the right exists, it must by definition be a right to a stated rate of overtime for overtime actually worked. The claimant candidly agreed in evidence that she was not in a position to prove days or hours or periods worked, and that her claim was her informed estimate of the equivalent of one extra day per month. We do not accept that that can be a proper basis for a claim. Even if the right to overtime payment in principle had been shown to exist, we would have to reject the claim on that basis. The claimant's financial claims therefore failed in full.

Race discrimination

45. We turn to the claimant's discrimination claim. We were particularly assisted by the chronology presented by Mr Powell, who no doubt anticipated the difficulty which the Tribunal might have in coming to grips with a body of material which was presented in what appeared at times to be an indiscriminate or haphazard way. A further difficulty was that a number of the acts of discrimination identified by Judge Hyams were on their face every day management interactions, which almost by definition were difficult to define in isolation from previous history.

46. It seems to us useful to give an overview chronology, and then go to the details of the specifics.

47. The claimant, who was born in 1979, and is of Nigerian heritage, held a BA degree in finance, and the qualification of ACCA.

48. The respondent Trust has sites at Barnet, Enfield and Hampstead. Ms Marsh's evidence was that it had a finance team of 43, split into nine teams. Ms Howell, who is of British Caribbean heritage, was the manager of the team to which the claimant was recruited.

49. The claimant applied for, and on 14 January 2019 was unsuccessfully interviewed, for a Band 6 finance position (199).

50. The respondent subsequently advertised for three Band 5 management accountant positions (200). The claimant was interviewed on 22 February 2019.

51. The February interviews led the respondent to offer appointment to a best candidate, who rejected the offer. The claimant was the runner up, and with some misgivings, Ms Howell and colleagues decided to offer her the post.

52. In evidence, Ms Howell gave a decent and humane explanation of this decision. It was that the claimant had arrived late for her interview in January because of train disruption to Enfield. Ms Howell knew that that is a frequent problem on the line. She accepted that the claimant may well have been flustered and not done herself justice at the January interview. It seemed to her fair to offer the claimant the opportunity of a second interview in optimal conditions.

53. There then occurred the first significant mistake by the respondent. The original advertisement (200) was for a permanent Band 5 position. After the claimant's February interview, the recruiting manager, Mr Waremba, decided to offer the post as a six month fixed term contract. We accept that internal documentation showed that this decision was made by early March 2019 (207). We accept that the reason was to enhance flexibility, and not because the claimant was the successful candidate (215).

54. As we understood it, there were a number of reasons for changing the offer. We were not sure that Ms Howell gave evidence about all of them. We accept that the respondent had an urgent need to fill the vacant post. Ms Howell had misgivings about the claimant, but may have thought that she was prepared to take the risk of an uncertain appointment if at most the appointee were only to be in post for six months. Both Ms Howell and Mr Waremba were aware that management were planning to reorganise the finance function, so that the appointee might turn out not be required after six months, or might find a place in a new structure.

55. There was evidence about a telephone call between the claimant and Ms Howell in about the second week of March. Ms Howell's evidence was that she told the claimant that she was to be offered appointment on a six month fixed term. The claimant denied this. The binary dispute about this seemed unhelpful. It seemed to us likely that at the end of the conversation the claimant understood that she had been offered appointment, and would receive written confirmation, but had not taken in that it was a six month appointment. We accept that Ms Howell mentioned the six month contract, but that the claimant may not have understood the full implications of what Ms Howell said. Neither party was aware of any misunderstanding or ambiguity, and, like any new appointee, the claimant was entitled to attach weight to what her new employer put in writing.

56. The respondent's HR recruitment team wrote to the claimant on 26 March (216) to confirm the offer of employment. The letter said that the role was

permanent. That was a mistake. It was a bad one. The claimant was entitled to rely on the accuracy of the offer letter. The correspondence was not copied to Ms Howell. She therefore did not have an opportunity to correct the mistake.

57. There was then a delay, pending checks and clearances, and the claimant's employment began on 25 June. She was based at Enfield. Ms Howell was her line manager. The claimant identifies as British Nigerian and Ms Howell as Afro-Caribbean. The finance team, we were told, was about 60% Asian, 20% Black, and 20% White (we repeat the broad categorisations given to us).

58. The claimant began work thinking that her post was permanent and that she would have a six month probation period. That was what she had been told in writing. Ms Howell welcomed the claimant, understanding that she had come for a fixed term of six months, with a three month probation period. That mismatch of understanding and expectation was not corrected until September.

59. Other evidence indicated that at the same time, the claimant was experiencing difficult and painful ill health. Working for the respondent involved a long and expensive commute, and the challenge, well into her career, of learning to apply her knowledge and experience in a setting with its own systems and procedures. Ms Howell by contrast had been with the respondent since 2008, having joined as Band 3 and achieved promotion. She had no recent experience outside the respondent, and was new to the challenge of line management. It can readily be seen that the working relationship, from early on, had a real risk of running into difficulty.

60. The main day to day interactions with which this case was concerned took place between 14 July and 25 September 2019 and we return to them below when we consider the list of issues. By 5 August there had been a serious exchange between the claimant and Ms Howell, and Ms Howell had criticised the claimant's working ability.

61. On 30 August, the respondent sent the claimant the second version of her contract of employment. This correctly was stated as a fixed term contract to 24 December, but mistakenly gave a probation period of six months (actually the entire duration of the contract) rather than the three months which would have been correct. Some time in September, Ms Howell learned that the claimant had started employment in June on the basis of a written permanent contract. Ms Howell was relatively untroubled by this, as she was confident that she had told the claimant over the phone in March that she was appointed for a six month contract. A third, and correct, contract was sent to the claimant on 3 September (276) and signed by the claimant on 30 September (326), at which time her six months was well past its halfway stage. There was no indication that the claimant had challenged the accuracy of the September contract.

62. The final chronological phase of these events took place between about the end of September and about the end of November. A number of simultaneous strands presented. The claimant had a number of absences. She was referred to occupational health, whose report was received by Ms Howell on

25 October (428). Attempts to arrange a meeting between the claimant and Ms Howell so that Ms Howell could formally give the claimant 8 weeks notice of termination of her contract (due 24 December) were unsuccessful, and as the claimant began two weeks annual leave on 25 November, Ms Howell wrote to her on 27 November to give notice, to expire on 24 January 2020, ie the claimant's employment was extended so that eight weeks contractual notice could be given (515).

63. The claimant returned from holiday on 9 December 2019, and the same day gave five days' written notice (522), expiring the following Friday 13 December, on which day her employment ended.

64. On 20 November the claimant submitted a formal grievance (484) and also met Ms Marsh to speak about it (502). It did not expressly refer to race or discrimination. Correspondence about the grievance continued from December until May, as the respondent attempted to agree terms of reference of an investigation with the claimant. We accept the claimant's concerns about how this was managed: the procedure was protracted, and we share the claimant's surprise that the respondent appeared unclear that her grievance at east implied a complaint of discrimination. We of course accept that the onset of the first lockdown in February/March 2020 had a significant impact on the respondent's ability to deal with non-clinically urgent management issues.

List of issues

65. We now turn within that framework to the list of specifics identified by Judge Hyams (71-75) and we follow his numbering, which was to identify issues 11.1 to 11.10 inclusive and 12 to 13.

66. Issue 11.1 was an allegation that on 14 July 2019 the claimant told Ms Howell that she had a medical appointment which would require her to leave work during core hours; and that Ms Howell asked to see evidence of the medical appointment, eg medical letter or appointment card. The claimant's case was that this (ie Ms Howell's request to see evidence of the appointment) was, "less favourable treatment of her because of her race as, it is her case, Ms Howell would have treated a white or Asian employee differently in that regard." (The formulation is that of Judge Hyams).

67. We were taken at this hearing to a text message exchange which in fact was dated late August, in which the claimant messaged Ms Howell to say

> "I got a call yesterday afternoon to come in urgently and see a doctor. I booked in this morning .. I will come into work afterwards."

68. Ms Howell replied (682),

> "Hi the Trust core working hours is 8 to 4. You will either need to take as half day annual leave or make up the hours next week. Hope it all goes well."

69. Although the claimant relied on that as evidence, it was clearly not the pleaded event in question; it was many weeks later; it was not a request for evidence

but it was also not a denial of opportunity or refusal to attend an urgent medical appointment. It was a statement of fact about correct procedure. We were not taken to any written record of Ms Howell's request, and we take it that the allegation was that the request was made in conversation.

70. We accept the respondent's denial that the pleaded event has taken place. If the pleaded event was an inaccurate formulation of the late September event, we accept the respondent's formulation. It wished to show flexibility and support, particularly for a health issue, particularly for a pressing one. It was entitled to require adherence to procedure. It was in principle entitled to request evidence (subject to respecting privacy rights) from an employee who wished to be absent during core working hours. We can see no basis whatsoever for the suggestion that a hypothetical comparator would have been treated differently, or that race was a factor in Ms Howell's response.

71. Issues 11.2 and 3 related to an exchange on 5 August. The claimant's allegation was that Ms Howell was rude in language and manner to her, in a way in which would not have taken place with a white or Asian employee. We were taken to an exchange of emails (230). It was incomplete in the sense that clearly there had been matters not recorded on emails. Ms Howell asked the claimant very basic questions such as,

> "Can you provide an explanation of how to do income and expenditure accrual journal. What is DR and CR?"

She asked for a reply within 20 minutes.

72. The claimant replied 15 minutes later; she gave her reply to Ms Howell's question, and then wrote:

> "Apologies if you think I was trying to be rude – wasn't intended. I am very respectful towards you and don't want to lose my self-esteem because there is a level of perfection you require from me because I am not perfect. I am here to learn ways things are done here. I will correct the journal immediately."

73. In reply to a question from an NLM, Ms Howell said that the questions she asked were not to gain information, but to try to understand why a person of the claimant's experience and qualification was making the very simple mistakes which Ms Howell found in the claimant's work. We accept that although the language of Ms Howell's email was abrupt, and may have presented as sarcastic or even patronising, race was not part of it.

74. We also accept that the language used by the claimant quoted above (while making every allowance for it being written in the sixth week of employment to a line manager whose approval was essential) indicates acceptance of a learning position and of a need to work to Ms Howell's requirements. That approach seems to us entirely realistic, and not wholly consistent with the claimant's approach in evidence at this hearing, which was that Ms Howell had no grounds on which to find fault with her work.

75. Issue 11.3 was that in retaliation for the exchange of 5 August, Ms Howell "caused the claimant's permanent contract of employment being changed."

76. As indicated above, the claimant received the second version of her contract on about 30 August, an event which she said occurred at least partly because of her race.

77. We disagree. We accept that the intention of the respondent had since March been to employ the claimant on a fixed term. The correction on 30 August was long overdue. It was the restoration of what should have been the position. It was not related to race. It was not within Ms Howell's authority to change the claimant's terms and conditions and we find that she did not do so. That said, the claimant was entitled to an explanation and apology from the HR team which had made the mistake and was now correcting it, and we saw no evidence that that ever was given.

78. Issue 11.4 related to a meeting on 12 August (235) between the claimant and Ms Howell. The claimant has pleaded that she was told that she had failed her probation. We prefer Ms Howell's evidence that the purpose of the meeting was to try to set objectives (even if they were not reduced to writing). We prefer Ms Howell's evidence because as an inexperienced line manager, who was finding her working relationship with her direct report to be challenging, we do not think that Ms Howell would have conducted a probation review meeting with an employee who had not completed her probationary period. There had been the tension between the two only a week previously, and it did not seem to us likely that Ms Howell would depart from procedure. Finally, if the claimant were told that she had failed her probation on 12 August, we would have expected her to have recorded her dissent at the time and there is no record of her having done so. We find that a routine meeting took place, wholly untainted by any consideration of race. We find that the claimant had not failed probation, and was not told that she had done so.

79. Issue 11.5 referred to a discussion between the claimant and Ms Howell on 16 September, as a result of which on 30 September Ms Howell referred the claimant to occupational health. We accept that the immediate trigger for the referral was that the claimant had had five days of sickness absence within three months (331) and that Ms Howell liaised about the claimant's ill health with Ms Ma in HR.

80. Ms Howell explained that she discussed the possibility of referral to OH with the claimant on 16 September, and the claimant signed the form that day (334); but there was then delay in obtaining the additional portion of the form completed by the claimant, which was dated 30 September (336).

81. The reason why the referral took place was that the claimant had a pattern of short term absence on which Ms Howell sought and followed professional guidance, from both HR and OH. We accept that the referral was wholly unrelated to race. We also add that we do not necessarily accept that a referral to occupational health in this circumstance is a detriment as that term is to be understood, ie what a reasonable employee might reasonably consider to be a negative event in the workplace. It was in this instance clearly a welfare related event.

82. Issue 11.6 referred to events on 24 September. Ms Howell was working from home and had a telephone conversation with the claimant, which the claimant

described as angry and rude, leading the claimant, as she wrote, to "politely" hang up. In the course of the morning there was an exchange of emails between the claimant and Ms Howell (300-314). Ms Howell wrote,

"I was extremely disappointed in your conduct .. you were being very unprofessional."

The claimant replied,

"I've previously expressed the manner you speak to me which I find unprofessional .. you come across very rude."

We accept that the claimant at one point told Ms Howell that she was taking her bag and was going to leave, which was the reason why Ms Howell's email concluded,

"I would also like to note that I've not given permission for you to leave the office and if this happens it will be recorded as absent without permission."

The claimant subsequently wrote to Mr Francine, a more senior member of finance management.

83. Ms Howell's witness statement was that there was an exchange about her mistakes and ledgers, leading to a conversation which in turn became heated.

84. We had no evidence or reason to believe that Ms Howell lost self-control or any sense of professionalism in this exchange, as the claimant suggested. We accept that there was a conversation which became heated on both sides, and an email exchange of recrimination, following which Mr Francine was brought in as, in effect, honest broker. As a matter of pure drafting, we can only say that Ms Howell's email indicates a more measured and professional style than that of the claimant.

85. When we say that we can see no evidence of race in this matter, we should add in fairness to the claimant that on her analysis, this was another event in a sequence of racially motivated events, which had then lasted 10 weeks, and had by then included reduction of her employment status from permanent to fixed term. Her assertion of course was that the sequence of events was cumulative. It is important, when we consider these events one by one, not to lose sight of the claimant's over arching proposition.

86. However, we do not accept the claimant's starting point, which was that there was race-based hostility towards her on the part of Ms Howell from the very start of their working relationship. We do not accept that the exchange on 24 September came as part of a sequence of discriminatory events. Our finding is that they were part of a sequence of managerial interactions in a working relationship which appeared to be going wrong.

87. The next day, 25 September, a probationary review meeting took place attended by the claimant, Ms Howell and Mr Jandu. The review is documented in accordance with the respondent's procedures (317-319) and set out, as might be expected and conventional, points upon which the claimant was performing well, and areas on which she needed to improve. One of the latter

was to reduce an error rate which was described as 20 to 30%, and should achieve reduction to no more than 10%. The claimant's strength of feeling about what she identified as unjustified criticism of her professionalism was evident at this hearing and at paragraph 45 of her witness statement. We accept that Ms Howell's assessment was her honest professional opinion, untainted by race or any other inappropriate factor. In so saying, we acknowledge Ms Howell's surprise, that the claimant apparently performed below her own standards of achievement.

88. At issue 11.7, the complaint of less favourable treatment was formulated not in terms of the content of the meeting on 25 September, but in relation to the meeting having been called on one day's notice, and therefore without an effective opportunity for the claimant to have trade union representation. Ms Howell's answer was that the date had been arranged a few days previously but not recorded in writing, and that as a matter of usual practice a calendar reminder was sent on 24 September of a meeting the next day. She also wrote the trade union representation at a probation meeting was not the norm, and that the claimant had not requested it. The respondent's explanation sounded more inherently likely, especially as the deadline for the meeting (12 weeks from 25 June) had just been exceeded by 25 September. We do not need to find whether the meeting took place in accordance with best practice; we need only find that we could see no evidence that race played any part whatsoever in any aspect of the arrangements for the meeting.

89. The document was signed by the claimant and Ms Howell on 30 September, and we therefore take it that it accurately records what was said and the outcome, and reject the claimant's assertion in evidence that there was no arrangement for a further meeting or, as she called it, extension of probation.

90. Item 11.8 referred to management of the claimant's occupational health review. The claimant was seen by occupational health on 18 October and the report was sent to her on 21 October (406). It was sent to Ms Howell on 25 October (428). The report is confidential to the parties. As these reasons will come into the public domain, the only material point to record is that the report (404) it advised the recipient manager *"to carry out a stress risk assessment with her to identify areas she might need support."*

91. It was common ground that the risk assessment did not take place. The claimant's case was that the reason it did not take place was race.

92. Ms Howell gave a nuanced reply. Paragraph 38 of her witness statement said as follows:

> "On receipt of the OH report, I arranged to meet with the claimant to discuss what workplace adjustments she thought might help her .. I set this meeting up for 31 October 2019. The claimant asked if this could be re-arranged as it clashed with end of month reporting so she was busy with work. She then went off sick on 31 October, and when she returned on 18 November, she had a period of annual leave. She did not return to the workplace until 9 December."

93. In evidence, Ms Howell added that she did not hasten to arrange the meeting between receipt of the report on 25 October and the claimant's departure on sick leave on 31 October, because she had not dealt with a report of this kind

before, and wanted first to read and understand and be properly advised about it. She also of course could not foresee that the claimant would go on sick leave. We accept that there was a window between 18 and 24 November when a meeting might have been arranged, but there was some evidence (WS43) that Ms Howell was on leave for at least some of those few days. On 9 December, as set out elsewhere, the claimant tendered her resignation, and the question of stress review of course fell away.

94. Our finding is that the reason why the stress review meeting did not take place was an unfortunate combination of practical events, including, on the claimant's side: the busy period at month end, sick leave, annual leave, and resignation; and from the respondent's perspective, unavailability of Ms Howell and, at the risk of making an obvious statement, absence of foresight. Taking all of those events together, as we must, we find that race played no part whatsoever in absence of a meeting to progress the stress review.

95. Issue 11.9 asserted that a meeting arranged by Ms Howell on 24 October 2019 was arranged, at least in part ,on grounds of race. Issue 11.10 was a claim for victimisation as well as direct discrimination, and engaged, broadly, the reason for dismissal. We deal with these points together, as they engage the same question, which was the reason and procedure for termination of the claimant's employment.

96. It will be recalled that there had been muddle, and uncorrected mistakes, about the terms of the claimant's appointment. However, by the end of September, the respondent had corrected its mistake by sending the claimant a fully corrected contract of employment, and she had signed it. The claimant cannot after 1st October at the latest have had any legitimate expectation that her employment would continue beyond 24 / 25 December 2019 (six months from her start date).

97. Ms Howell's understanding, on HR advice, was that the claimant was entitled to 8 weeks notice. Logically, that should have been given by about 25 October. She therefore made a number of attempts to arrange to meet the claimant so that she could give her notice. We do not need to go into the details, but for a number of reasons, no meeting took place before the claimant went abroad on two weeks annual leave. In the knowledge that the claimant's absence on leave would inevitably delay any meeting, Ms Howell gave notice by letter dated 27 November 2019 (513). That had the effect of extending the claimant's employment to 24 January 2020. As stated above, the claimant returned from her holiday abroad on 9 December and resigned immediately. We can see no evidence whatsoever that race played any part in the procedure followed by Ms Howell, including but not limited to any attempt to meet the claimant.

98. We turn to the wider question, of the reason for dismissal. We remind ourselves that for the purposes of a claim of direct discrimination, we need not inquire whether race was the sole or main reason for dismissal, but whether it was a material factor.

99. The reason for the end of the claimant's employment was a combination of a number of factors. First, she had been employed on a fixed term contract, which was coming to an end (in so saying, we make allowance for the

respondent's mishandling of this issue, which may be criticised, but was not a discrimination matter). Secondly, the possibility of a post in a restructure had not materialised, and was not likely to do so imminently; thirdly, Ms Howell had identified performance issues which were a genuine cause of concern to her; and finally, was of course the plain fact of her resignation. We find that none of these factors was in any respect tainted by any consideration of race or discrimination. We find that race played no part whatsoever in the decision to dismiss.

100. Issue 12 raised an evidential point, namely as to the conduct of the claimant's grievance, including conduct after dismissal, but was expressly relied on as relevant background only. We accept that there may be cases where discriminatory behaviour after dismissal is consistent with discriminatory behaviour before dismissal, and may therefore shed be helpful evidence to the claimant. Where we have found that there has been no discrimination before dismissal, subsequent events are likely to be of much less assistance. We have summarised our view of the grievance procedure above and we do not add to it. We do not find that it takes any other complaint further. The claimant said a number of times that managers failed to 'take seriously' a grievance which she, a Nigerian woman, had put against Ms Howell, an Afro Caribbean woman. Her point was that white managers were inclined to reject a complaint by a black employee against another black employee. That was a troubling allegation, but there was no evidence in support of it, and cannot uphold it.

Employment Judge R Lewis

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Date: 11 April 2022

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE