EMPLOYMENT TRIBUNALS

Claimant: Miss W Osakwe

Respondent: ZLN Telecom Limited

HELD AT: Sheffield **ON:** 19 and 20 July 2017
22 August 2017 in chambers

BEFORE: Employment Judge Little
Mrs E M Burgess
Mr K Smith

REPRESENTATION:

Claimant: Ms N Prempeh, Solicitor (Nas & Griffith Legal Associates)
Respondent: Mr Ryan of Counsel (instructed by Squire Patton Boggs (UK) LLP)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of harassment fails.
2. The complaint of direct race discrimination also fails.
3. Accordingly the Claim is dismissed.

REASONS

1. **The Complaints**

Miss Osakwe presented her claim to the Tribunal on 23 December 2016. The complaints were breach of contract and race discrimination – there was also a reference to victimisation.

A preliminary hearing was conducted by Employment Judge Maidment on 28 March 2017 and he struck out the complaint of breach of contract. With the assistance of

the parties he was also able to clarify that *the race discrimination complaints* were **harassment related to race and direct discrimination**.

The **harassment** complaint was directed at the claimant's former line manager, Mr Zaheer Riaz, and the detriments were things which Mr Riaz had either said to the claimant or to others who had reported back to the claimant.

In relation to the **direct discrimination** complaint, the less favourable treatment was said to be the same subject matter as the harassment detriments, but in addition the claimant's dismissal. The dismissal had occurred after the claimant had only been employed for some six weeks.

2. The Issues

These were defined and agreed at the preliminary hearing. Rather than reiterating them at this point in our reasons, we have instead dealt with each issue in our conclusions which are set out below.

3. The evidence we have heard or received

The claimant has given evidence but she has called no other witnesses. Her written evidence was contained in two statements. The first ran to 41 paragraphs and although our copy was undated we were told that that had been served or was dated 30 June 2017. Without permission of the Tribunal, it transpired that the claimant had then served what was described as an “additional witness statement” on 11 July 2017. This statement ran to 14 paragraphs. Whilst being described as an “additional statement” it is not, for instance, made in response to evidence which had been served on the claimant by the respondent. Nor does it purport to deal with any new material from the claimant's own case. Instead it covers the same topics as the first statement but in different language and with different emphasis. We were never given an explanation for this. The claimant’s representation has remained the same throughout, albeit that her solicitor appears to have moved firms during the course of the case.

On the first day of the hearing Mr Ryan indicated that, in principle, the respondent objected to the late service of this second statement. However in practical terms the respondent had sought to address any prejudice by obtaining an additional statement of its own from a new witness, Mr Ian Hawley, the respondent’s Head of Software. In basic terms the respondent would not object to the claimant's additional statement if the Tribunal also allowed the respondent to rely upon Mr Hawley’s evidence. We took that course.

The respondent’s evidence was given by Mr T R West, Software Development Team Leader; Mr Zaheer Riaz, Business Analyst Manager and the claimant's line manager; Mrs N Kamarajn, Software Quality Assurance Engineer; Mr Ian Hawley and Mr R Farmer, Telecoms Product Manager. Mr Farmer’s statement had also been served late and we were told that the respondent sought to rely upon his statement to meet points raised in documents which the claimant herself had disclosed late in the day. It transpired that, somewhat deceitfully, the claimant had purported to make an application for a reference to Mr Farmer as late as 11 July 2017, but with the intention of using anything which Mr Farmer produced as evidence within her case.

The claimant was not therefore seeking the reference in respect of any prospective new employment. Mr Farmer had provided a brief reference on 13 July 2017. Ms Prempeh had no objection to the Tribunal considering Mr Farmer's statement. In fact it was only the statement that we considered because Mr Farmer did not attend the hearing. We did have a signed copy of his witness statement and we have therefore given that evidence such weight as we feel we can in the circumstances.

4. **Documents before us**

We have had a bundle comprising 348 pages.

5. At the preliminary hearing two days were allocated for the hearing of the merits and remedy if appropriate. However, because of the additional evidence we have referred to above and with the case being somewhat document heavy, despite the claimant only being employed for six weeks, we were only just able to complete the evidence during the two days, hence the need to reserve judgment.

6. **The Primary Facts**

6.1 The claimant describes her ethnicity as black African. Her CV (pages 44-46 in the bundle) describes her educational background as a Masters in Human Resource Management from Sheffield Hallam University, and a MSc in Business and Finance from the same institution. The claimant had worked as a Business Analyst for various large organisations, including PLCs since 2007.

6.2 The respondent is a provider of business phone, mobile phone, card processing and broadband packages to small business in the UK.

6.3 The claimant responded to a job advert placed by the respondent who was seeking a full-time Business Analyst. The job advert/specification is at page 57.

6.4 Following a telephone interview the claimant was shortlisted for an in person interview and that took place on 20 June 2016. The interview was conducted by Mr Hawley, the respondent's Head of Software, and Mr Riaz, the respondent's Business Analyst Manager. Unfortunately no formal notes were made of the interview or in respect of the rationale for what ultimately would be the appointment of the claimant. We were told that some rough notes would have been annotated to the CVs of the various candidates but those were subsequently destroyed.

6.5 Mr Hawley and Mr Riaz interviewed the other two candidates who had been shortlisted on the same day. Their first names were Ramprasad and Mansoor. During the course of these proceedings the claimant has referred to Ramprasad as "the Asian candidate". The claimant contends that during the course of the interview (but when Mr Riaz was not present) Mr Hawley told the claimant that Mr Riaz preferred the Asian candidate whereas Mr Hawley did not want to appoint him because he had arrived for the interview 20 minutes late. The claimant further contends that this alleged difference of opinion between the interviewers

led to them arguing. It is the claimant's case that Mr Riaz's alleged preference for Ramprasad and frustration at not being able to appoint him led Mr Riaz to conduct a campaign against the claimant denying her training, making unjustified criticism of her performance and canvassing and promoting other colleagues to (falsely) do the same. The respondent, and in particular Mr Riaz and Mr Hawley, deny that there was any such preference, argument and subsequently campaign against the claimant. We determine these contentious matters when setting out our conclusions below.

6.6 In any event, the claimant was appointed. The evidence of both Mr Hawley and Mr Riaz was that this was because she was the best candidate. Her answers to the interview questions were, they said, 'textbook'. Mr Riaz had a slight reservation in that the claimant did not go on to give examples of how she had dealt with particular matters during her career. However, he observed that not all candidates would.

6.7 The claimant's first day of employment was 4 July 2016. That was on a 12 month fixed term contract because the claimant had been hired to provide maternity cover for an employee called Helen Anayiotos. In fact the claimant and Ms Anayiotos worked together until Ms Anayiotos' departure to go on maternity leave on 29 July 2016. Accordingly during the first four weeks of the employment the claimant had the opportunity to shadow Ms Anayiotos.

6.8 The claimant was provided with an IT new starter training information pack (see pages 72-79) and that document contained links to other documents which would supplement the claimant's training. The intention, therefore, was that the claimant would "self train" but that she would be able to ask colleagues questions and, as noted above, benefit from shadowing the person whose role she was taking over. The respondent also assumed that whilst the claimant would need time to understand the respondent's bespoke systems, she was coming to them as a well qualified and fully experienced Business Analyst.

6.9 On 22 July 2016 there was a meeting arranged by Mr Riaz and attended by the claimant, Ms Anayiotos and Mr West. There are no notes, if any were taken, of this meeting in the bundle. Mr Riaz's evidence was that the purpose was to go through the particular project which the claimant was going to have responsibility for and which she was taking over from Ms Anayiotos. That project was the "Broadband Code of Practice" and it related to regulatory requirements about broadband speeds.

6.10 On her last day before maternity leave Ms Anayiotos sent an email to Mr Riaz which was copied to, among others, the claimant, and this provided an update on the current position regarding the project. A copy of this appears at page 124. The email noted that the claimant would take over from next week and that she would send a daily update – presumably to Messrs Riaz, West and Hawley. In the event the claimant provided no such updates.

6.11 The claimant had not been at work on 28 and 29 July and whilst the claimant has suggested that the reason for this was health related or in relation to her husband's health, the respondent points out that in fact the claimant had booked these two days as annual leave, making the request on 7 July 2016 (see page 107Ab). However, the claimant's evidence is that she had to report the reason for being off work and so on her return on 1 August she explained to Mr Riaz that her husband had been ill and was coughing up blood during the course of her time off. The claimant contends that Mr Riaz did not appear to show concern and that she later overhead him discussing her husband's illness with another colleague and stating that he hoped it was not contagious. The claimant contends that Mr Riaz's alleged discussion of her husband's health with others was a detriment in her harassment complaint and less favourable treatment in her direct discrimination complaint. Mr Riaz's evidence was that the claimant on her return to work at about that time had mentioned that her husband had had pneumonia. That conversation initiated by the claimant had taken place in front of other team members at Mr Riaz's desk, and Mr Riaz did not recall making any comment about contagion.

6.12 On 27 July 2016, following a discussion with the claimant the previous day, Mr Riaz sent an email to the claimant confirmed that he had arranged a meeting for 1 August 2016 and confirming the purpose of that meeting was "just to sync up and ensure our understanding as a group is correct and identify any gaps and you will be running the meeting ☺" (see page 122). That meeting actually took place on 2 August and was attended by Mr Hawley, Mr Riaz and of course the claimant. During the course of that meeting Mr Hawley became concerned about the claimant's apparent lack of knowledge and understanding. He asked the claimant some questions. On realising that she also had a poor understanding of the project itself and the process of requirement gathering, he drew a diagram which was intended to reflect the process which the claimant as a Business Analyst should have been using. Essentially that was the production of a "ticket" which would explain what the problem or requirement of the customer was – not simply by reiterating it – but by putting it into appropriate language that would be understood and could be acted upon by the technicians to whom the ticket would then be given. A photograph of that diagram as drawn on a whiteboard is at page 321 in the bundle. The Tribunal were told that it was a common practice for it to take photographs of diagrams or other information which had been set out on whiteboards during the course of a meeting. This is the only document from or of the meeting, because again no notes were taken or at least if they were none have found their way into the bundle. Having drawn this diagram Mr Hawley asked the claimant to explain back to him what she had understood. His evidence was that he was astonished that she could not explain what he described as a very simply process back to him and he concluded that she had not understood anything that he had said to her in the meeting. Mr Riaz shared Mr Hawley's view of the claimant's performance at that meeting. That was particularly so because he had explained the ticket process to her on at least three occasions and he understood that both

Mr West and another colleague had also explained the process on several occasions. Moreover the claimant had had in her possession since the beginning of her employment the training material which set out the process. The claimant contends that any shortcomings of hers at this meeting resulted from Mr Riaz's failure to properly train her. Moreover she contends that during the meeting Mr Hawley criticised Mr Riaz for not providing training. Further, the claimant contends that Mr Riaz was "visibly upset by Ian's outburst and from that point onwards proceeded to make the rest of my working life at XLN extremely difficult" (paragraph 22 of the claimant's first witness statement).

6.13 We find that the true flavour of the first meeting on 2 August can be gleaned from a text/messaging exchange which took place between Mr West and Mr Riaz on the following day. There is a transcript of that at page 129. Therein Mr West informs Mr Riaz that "we [Mr West and the claimant] had a talk this morning about what happened yesterday. She was starting to make excuses but I diverted her away from that and said I was more interested in what happens next today than what happened yesterday". He went on to comment that "on the whole, seems a bit more with it today. Hoping that yesterday was enough of a push". The claimant confirmed towards the beginning of her cross examination that she did not allege that Mr West was a discriminator or harasser.

6.14 Immediately after the 2 August meeting, but in the absence of the claimant, Mr Hawley expressed his concern to Mr Riaz and Mr West about the claimant. Mr Hawley had prior to the meeting heard from others about problems with the claimant's work and had already spoken to HR about the option of terminating the claimant's probationary period. The evidence of Mr Riaz is that it was he who suggested that the claimant should be given a little more time in the hope that her performance would improve. Mr Hawley was shortly to go on holiday and he indicated that the decision would be left to Mr Riaz.

6.15 In these circumstances Mr Riaz had a one-to-one meeting with the claimant later on 2 August. Unfortunately no notes were taken of this meeting either. The claimant's evidence is that during the course of this meeting Mr Riaz rebuked the claimant for failing to answer Mr Hawley's questions correctly, and that he "very angrily told me to 'watch my back'" (see paragraph 24 of the claimant's first witness statement). In her second witness statement the claimant says that Mr Riaz also told her that "people were complaining about me" but would not tell her who those people were (see paragraph 10 of the second witness statement). The alleged "watch my back" comment is another alleged detriment and/or example of less favourable treatment within the claimant's case. Mr Riaz denied that he made such a statement and says that he relayed to the claimant the concerns he and his senior colleagues had with regard to the claimant's performance, and that he told her that he would have not expected those concerns given the claimant's experience. He said that the claimant's performance needed to improve. He confirms that there was a discussion in general terms about complaints that he

had received from other colleagues which were about the claimant allegedly attending meetings unprepared and confusing people with the information that she presented. He also told the claimant that he was concerned that it appeared she lacked basic knowledge. He gave her the example of her request to a colleague for guidance on how to take a screenshot. Mr Riaz considered that that was a fairly basic task for someone who worked in IT. Mr Riaz was surprised that the claimant's own assessment of her performance was that she was doing well and she had not been aware of any concerns.

6.16 On 5 August 2016 a meeting had been arranged with a Mr Chris Jones, Senior Product Manager. Mr Riaz and Mr West were also present. It was intended that the claimant would lead this meeting. Prior to the meeting Mr Riaz had asked the claimant to make sure that she had familiarised herself with the areas of the CRM (the respondent's software system) that would be discussed and to send out an agenda. The claimant did not do so and Mr West realised that during the meeting the claimant did not appear to understand what she was asking and why. In those circumstances it was necessary for Mr Riaz and Mr West to take over running the meeting.

6.17 On 8 August 2016 a video conference had been arranged which was to include the respondent's Product Department in London. Again the claimant was supposed to run that meeting. Mr West and Mr Riaz, who were also present, felt that the claimant did not know what she was asking, and so again Messrs West and Riaz had to take over the meeting.

6.18 Mr Hawley was on annual leave for a period shortly after 2 August and in his absence Stuart Smalley, the software development team leader in the IT department, had been left in charge. Part of his brief was to oversee the situation regarding the claimant. It was in those circumstances that on 8 August Mr Smalley sent a text to the holidaying Mr Hawley. A copy appears at page 334 in the bundle. It reads as follows:

"Hey Ian, sorry tried to call you as Zaheer and Tom think its not working out with Winnie (the claimant) and Zaheer isn't happy letting her go without talking to you first. I told him I thought you would be ok about it but he still wants to talk to you. Hope you're having a good time."

Mr Hawley's reply, also on 8 August, is on page 335 in the bundle and reads as follows:

"I've said they should probably just get rid of her, unless there's a night and day change by noon but I can't see it happening or being the last time this happens.

Once she's gone if you can send an email around or if it makes more sense, once she's left the room, just stand everyone up and say, it isn't didn't [sic] work out."

6.19 On 9 August Mr Hawley wrote another text – this time to Mr West. A copy is at page 337. It reads as follows:

"Morning Tom, Stu and Zaheer tell me that Winnie is becoming a liability and is detracting rather than contributing. I've told Zaheer that unless there is truly a night and day change today that he should let her go. If you think that's the wrong call then let me know but from what Stu has said you and Zaheer are in violent agreement about it."

6.20 On 10 August 2016 there was an estimation and planning meeting. At that meeting the Business Analyst would present to the department the current "tickets" so that the technical team could work out their complexity and how long they would take. Mr West's view was that during the course of the meeting the information which the claimant provided did not make sense, both in relation to "user stories" (in effect the instructions from the client) and in relation to acceptance criteria (the list of conditions that must be satisfied for the work to be considered completed). The user stories were not, in Mr West's view, presented by the claimant in a clear fashion, and she seemed to be confusing the requirements of one ticket with another. He was also concerned that the claimant was very slow at navigating a computer when presenting. In fact during the course of cross examination Mr West described this as "it was like she had never used a computer". After the meeting some of those present contacted Mr West. One of those was a Michael Allen whose text can be seen at page 144. he wrote:

"Hey Tom, here's my main observations from the meeting today; Incorrect acceptance criteria. Putting wrong points a story [sic]. Not visiting areas of CRM that tickets related to. Not knowing what was needed then just agreeing with suggestions, without understanding. Struggled using Jira (the ticket master system) again."

Mr West commented:

"It'll be a rough morning (meaning the following day when it was intended to terminate the claimant's employment)…but don't think it reflects badly on any of us. Have done everything in our power to help."

Mr Allen responded:

"I agree, you especially have been very understanding with her and given her every opportunity to improve."

6.21 On 11 August 2016 Mr West wrote a lengthy email to Mr Riaz. A copy is at pages 168-170. He noted that after the previous day's estimation meeting it was clear that the claimant was not coping with the role and that was despite the efforts he had made to help things along. There was no sign of improvement. He referred to the concerns that had arisen at the 2 August meeting. Reference was also made to the 5 August meeting with Mr Jones and Mr West described the claimant as being completely unprepared for that meeting. A task that Mr West had given

to the claimant to produce "high level" user stories had taken a long time and the stories created made little or no sense. He referred to simple computing concepts such as copy/paste, scheduling an outlook meeting and dragging windows around the screen, as apparently being "new" to the claimant. The position was made worse because the claimant showed no intention of having a go at figuring things out by way of experimentation or investigation. He would have expected someone who was going to gather requirements for and design software features to be an experienced or advanced computer user and so comfortable with the core features of windows and any other operating system since the late 80s. On another task the claimant had provided information which made little or no sense. When he sensed that an improvement had occurred it transpired that it had come from material supplied by others. Before setting out the details of various tickets which the claimant had not produced satisfactory information for Mr West wrote:

"Given the experience that Wini is meant to have as a Business Analyst I'm shocked by her lack of investigative ability and general computer skills." (See page 169)

6.22 On the same day Mr Riaz sent an email to Katie Munro of the respondent's HR department. A copy is on pages 171-173. He reiterated the concerns in Mr West's email. Mr Riaz's conclusion was also that the claimant was not coping with the role and despite his efforts to help there was little or no sign of improvement.

6.23 Whilst in paragraph 29 of Mr West's statement he refers to making the decision to dismiss and confirmed that when being cross examined, Mr Riaz claims that he made the decision albeit with the blessing of Mr Hawley. Mr Hawley's evidence was that it was Mr Riaz's decision, but that he, Mr Hawley, thought that dismissal was probably the right thing to do. His impression of the claimant had been that despite the information on her CV, her performance was "as if she started the day before".

6.24 Later on 11 August 2016 the claimant was called into a meeting with Mr Riaz and Ms Munro of HR was also present. Again no notes of this meeting were taken. The claimant was informed that she would be failing her probation with immediate effect. Mr Riaz's evidence is that he went on to explain, or at least summarise, the reasons for that and the claimant's response was that Mr Riaz was a bad manager. Subsequently Ms Munro wrote to the claimant and her letter of 12 August 2016 is at page 174 in the bundle. The reason for termination of the claimant's employment is given as unsatisfactory performance during the probationary period. The claimant was paid one week in lieu of notice.

7. The Parties' Submissions

7.1 <u>The claimant's submissions</u>

The claimant's submissions begin with a recital of the allegations. We note that these are not entirely consistent with the list of issues recorded

at the March 2017 preliminary hearing and agreed at the beginning of our hearing. In particular, in the agreed issues there is no specific allegation that the respondent had failed to provide the claimant with adequate training. There is just the reference to Tom West allegedly pointing out to Mr Riaz that he ought to have provided the claimant with necessary training. Nevertheless we accept that in general terms the training issue is relevant to the claimant's dismissal which, she contends, was less favourable treatment because of her race.

We also observe that under the heading "Background facts" the submissions set out not only undisputed facts but also cover areas where there is disagreement between the parties.

The written submissions then go on to summarise the relevant law. Understandably the claimant describes the burden as being on her to prove facts from which the Tribunal could conclude that there had been unlawful discrimination. We should add that when summarising the law in the respondent's submissions Mr Ryan made the same point referring to the claimant needing to establish a prima facie case. No doubt in each case these submissions were written before the Employment Appeal Tribunal handed down its Judgment in the case of **Efobi v Royal Mail Group Ltd** UK EAT/0203/16/DA. We discuss the ramifications of that Judgment when dealing with the relevant law in the section which follows.

The submissions then go on to analyse the evidence which has been given to the Tribunal and we were reminded that the claimant contended that Mr West's email of 11 August 2016 (pages 168 to 170 "might have been fabricated and written at the behest of Zaheer (Riaz)").

When reviewing the evidence that Mr West gave, the submissions pose the rhetorical question as to why Mr West "had still penalised the claimant for events of the past" following the 2 August 2016 meetings. Here we remind ourselves that in cross-examination the claimant admitted that Mr West was not an alleged discriminator. Nevertheless the written submissions go on to suggest that because Mr West liked Mr Riaz and the "fact" Mr West reported to Mr Riaz meant it was unlikely that Mr West would go against anything that Mr Riaz said – hence Mr West allegedly being influenced about the content of the 11 August email. We should add here that it appeared to be common ground that Mr Riaz and Mr West were peers rather than Mr West being subordinate to Mr Riaz. Further the claimant contended that as Mr West had not discussed his concerns directly with her, the only plausible reason for that was because he did not actually have any genuine concerns about the claimant's performance.

Reviewing the evidence that Mr Riaz had given, the submissions appear to give incorrect dates for when the claimant started to be given tickets to work on (eg dates in June when in fact the employment did not begin till July) and the thrust of the submission was that it was wrong for the

claimant to have been given that level of work so early - it being apparently disputed that, per the respondent's case, those had been straightforward tickets and were viewed as part of the claimant's training.

The submissions go on to remind us that Mr Riaz had admitted in cross-examination that Helen Anayiotos (for whom the claimant was to provide maternity cover) had also struggled when she began her employment and had been provided with guidance. The submissions refer to Mr Riaz being asked why the same guidance had not been given to the claimant and why she had been "penalised for struggling with some aspects of the work in the first few weeks in her role". The submissions record Mr Riaz's response as being that Helen had accepted she was struggling while the claimant did not. On checking our notes of this exchange during cross-examination we note that Mr Riaz told us that if Ms Anayiotos did not understand something she would come to him for guidance. However his view was that if the claimant was struggling she did not make that clear to him. One of his concerns about the claimant was that it appeared that the claimant thought she was doing well. He told us that the difference between the claimant and Ms Anayiotos was that the latter did not struggle as a business analyst, but just with the particular scenarios.

The submissions contend that Mr Riaz had not given a truthful account when he stated that all stakeholders (a term which we understand the respondent applies to members of other parts of its business as opposed to customers or clients) were not happy with the claimant's work. The submissions go on to contend that no evidence was adduced in support of the allegation that stakeholders were not happy. We find this a difficult proposition to accept but will deal with it in our conclusions in these reasons.

It was suggested that the reason that no notes had been made of certain meetings was because any such notes would have shown that the claimant had not under performed.

When reviewing the evidence which Nisha Kamarajn had given for the respondent it was contended that that evidence had not been credible about her relationship with the claimant which had been more friendly than admitted by the witness. Ms Kamarajn had also sought to distance herself from the "its really bad you can't digest" comment made during the course of the illicitly recorded telephone conversation between her and the claimant. We note therefore that whilst at the preliminary hearing in March 2017 the claimant informed the Employment Judge that she would have a witness who would say that Mr Riaz had told her that the claimant was to be dismissed because she was not his preferred candidate, nevertheless the claimant in her closing submissions is now attacking that witness.

When reviewing the evidence which Mr Hawley had given to the Tribunal the claimant's submissions seek to analyse the likelihood of a reference

being made to Mr Riaz preferring the Asian candidate. With regard to the evidence that Mr Hawley had given in cross-examination about the various tickets which were in the bundle and more particularly those which were not because they had been deleted, the submissions describe those tickets as being vital evidence which it is said formed the basis of the reason to dismiss and so that "places a huge question mark on what was the actual reason for the dismissal".

In relation to the evidence given by Mr Farmer it was suggested that there was nothing in the request for that reference which the claimant had sent to Mr Farmer which indicated that the reference was for a job and that people requested references for various reasons (although not we would suggest in the hope that they can potentially be used in Employment Tribunal proceedings".

In conclusion the claimant submitted that although her race may not have been the sole reason for her dismissal, it was a significant factor which influenced Mr Riaz's decision to dismiss her. The respondent's account that the claimant had been dismissed on the grounds of her under performance could not be said to be credible or true.

7.2 <u>The respondent's submissions</u>

Mr Ryan summarised the case before us as being an unfortunately common scenario where an employee is dismissed during the course of their probationary period but feels that that dismissal was not justified. He went on to suggest that the claimant's real grievance was that she felt that she had been unfairly treated but was seeking to transform that – without any evidential basis and by simple assertion - into a claim of discrimination. The respondent's case was that there was no sufficient evidential base to support a shift in the burden of proof (although see our observations above about the recent **Efobi** case). It was noted that the claimant had never alleged that Mr West, Mr Hawley or Ms Kamarajn had been discriminatory in any way. Instead her case was entirely built on the alleged discriminatory influence of Mr Riaz. Mr Ryan went on to review the tickets contained in the bundle which were examples of the claimant's poor performance and lack of understanding. He went on to note that missing from the claimant's witness statement was any direct challenge to the concerns about those tickets. The claimant had received disclosure of Mr West's 11 August email in which he set out his concerns about the claimant's performance as indicated by those tickets. Whilst the claimant held a protected characteristic as Mr Ryan put it she was also he contended very clearly not meeting the standards expected. We were reminded of the comments made in internal texts within the claimant's team.

It was highly unlikely that what were described as detailed contemporaneous emails (Mr West's and Mr Riaz's of 11 August 2016) could be a sham – although we observe that Mr Riaz's email is largely repetition, we assume by cutting and pasting of Mr West's email.

Rather than Mr Riaz's influencing a dismissal, the evidence suggested that he was hesitant because he had wanted to speak to Mr Hawley first. It was accepted that Mr Riaz was the decision maker but in fact he had been heavily influenced by Mr West.

In terms of training and support the respondent denied that this had been lacking for the claimant. Online training had been available and the claimant had had the opportunity to shadow the person she was to take over from (Ms Anayiotos). There were no contemporaneous emails from the claimant requesting training or support but then not getting it. It was also the case that because of how the claimant had presented herself the respondent could have been excused for thinking that the claimant did not need a considerable amount of support and training. Even if the "best training in the world" or for that matter the worst had been given the respondent had every right to dismiss a probationary employee on performance grounds. Accordingly the complaint was if anything one of unfairness but not discrimination. It was conceded that Mr Riaz's decision to dismiss might well have been substantively unfair if the claimant had had two years service but those were not the facts which the Tribunal was dealing with.

In relation to the 'Asian candidate' allegation Mr Ryan's submissions analyse how that had, in his view evolved from a speculative assertion when the ET1 grounds were presented to a contention that this actually had been referred to by Mr Hawley. During cross-examination the claimant had not appeared to appreciate the significance of whether word Asian was used or not or whether the other candidate had simply been referred to as' the other guy'.

The respondent's primary case was that the other candidate was not preferred. By the time of the preliminary hearing in March 2017 the allegation had become that Mr Riaz had informed Ms Kamarajn at or around the time of the claimant's dismissal that the claimant had not been his preferred candidate. Mr Ryan also suggested that it was doubtful that Mr Hawley could have informed the claimant during her interview that Mr Riaz preferred another candidate because the claimant had been the first to be interviewed and so neither Mr Riaz nor for that matter Mr Hawley would have any knowledge of the second candidates qualities. It was also highly unlikely that Mr Riaz would have had an argument in the claimant's presence during the course of an interview for a job and having regard to Mr Riaz being subordinate to Mr Hawley.

Mr Ryan contended that it was only in the claimant's second witness statement that it was alleged that the phrase "Asian candidate" was used in front of her (as opposed to this being something which Ms Kamarajn allegedly told the Claimant later).

In fact Mr Riaz had not preferred any other candidate and if he had he had the ability to recruit them rather than the claimant. After the

claimant's dismissal she was not replaced with the previous Asian candidate or for that matter any Asian candidate.

In relation to the transcript of the claimant's telephone call with Ms Kamarajn, we were invited to treat it with caution and note that the conversation was entirely stilted and that the claimant's questions despite being vague and open to interpretation were nevertheless designed to elicit a response which the claimant could use in these proceedings. It was noted that during the cross-examination of Ms Kamarajn she was not asked about her alleged conversation with the claimant on the day of her dismissal about Mr Riaz's alleged preference for another candidate and that instead the Employment Judge had had to ask this question at the end of the cross-examination.

In relation to the harassment allegation, Mr Riaz denied that he had told the claimant to watch her back. He had not interrogated colleagues to garner complaints about the claimant. It had been Mr West who had approached team members not Mr Riaz. Whilst Mr Riaz had given his explanation of the conversation about the Claimant's husband's illness in his statement that had not been challenged during cross-examination.

Mr Ryan concluded his submissions by suggesting that the claim before the Tribunal had all the hallmarks of a claimant seeking a remedy for an alleged unfair dismissal as opposed to a complaint of discrimination. If the Tribunal were to reject the case that there was a non discriminatory explanation for the Claimant's dismissal it should not fall into the trap of relying on unexplained unreasonable conduct to support unjustified inferences and we were referred to the unreported case of the **Chief Constable of Kent Constabulary v Bowler** UK EAT/0214/16/RN. The tribunal should be cautious about readily inferring discrimination if it found unreasonable treatment.

The claimant had had an opportunity to embellish her allegations in her second witness statement (such as the reference to the Asian candidate) but such serious allegations should have been in the forefront of the victims mind and should therefore be couched in the pleadings. The claimant had also sought to bolster her case by approaching Mr Farmer under false pretences and recording the conversation with Ms Kamarajn. Mr Ryan suggested that the tendency of the claimant to seek such information in the manner that she did reflected the problems with her case namely inadequate evidence based upon speculation and anger at perceived unfairness. We were therefore invited to find that the claimant had not suffered from any discrimination as alleged.

8. **The relevant law**

8.1 Direct discrimination

This is defined in section 13 of the Equality Act 2010 in these terms:

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

8.2 Comparators

In order to assess whether there has been less favourable treatment, the Tribunal will usually be asked to consider and contrast the alleged treatment of a comparator – real or hypothetical. Section 23 of the Act provides as follows:

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

8.3 Harassment

This is defined in section 26 in these terms:

"(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conducted related to a relevant 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."

Sub-section 4 goes on to provide:

"In deciding whether conduct has the effect referred to in section (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 had that effect."

A comparator is not required in a harassment case. Instead a claimant needs to establish a link between the harassment and the relevant protected characteristic.

8.4 Burden of proof

This is described in section 136 in these terms:

"(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 sub-section (2) does not apply if A shows that A did not contravene the provision."

As we have mentioned briefly whilst discussing the parties' submissions, this statutory provision had been thought to retain the "shifting burden of proof" principle established or confirmed in such cases as **Igen Ltd v Wong** [2005] ICR 931 and the earlier case of **Barton v Investec Henderson Crosthwaite** [2003] ICR 1205. Both of those decisions relate to the pre Equality Act legislation. The formulation of the burden of proof provisions in the earlier legislation specifically required a complainant to prove facts so as to shift the burden to the Respondent.

In the recent Judgment of the Employment Appeal Tribunal in **Efobi v Royal Mail Group Ltd** Laing J held that section 136(2) did not put any burden on the claimant. Instead it required the Employment Tribunal to consider all the evidence from all sources at the end of the hearing so as to decide whether or not "there are facts etc". Accordingly the Tribunal is required to consider all the evidence not just the claimant's. We have to look at the "facts" as a whole.

We have directed ourselves on the issue of burden of proof in line with **Efobi**.

9 The Tribunal's conclusions

9.1 Our findings on the relevant disputed facts

Although in the light of **Efob**i there is no burden of proof on the claimant to prove discrimination, there is a burden of proof (as with any claim) for the claimant to prove such basic facts as 'were the allegedly discriminatory words or deeds said or done?' Here the Tribunal must apply the balance of probabilities approach. Is it more likely than not that the words were said or the act done?

9.1.1 Did Mr Hawley tell the claimant at her job interview that Mr Riaz wanted to give the job to the "Asian candidate"?

This contention is at the heart of the claimant's case both in respect of direct discrimination and harassment. She singles out Mr Riaz as the instigator of her dismissal and as the harasser. In paragraph 27 of her first witness statement the claimant says that it was clear Mr Riaz's intention was to bring down her self esteem and harass her so that she would quit the job. The claimant goes on "from the onset, it was clear that he preferred an Asian

candidate who had also attended the interview for the job in (sic) the same day with me."

However we note that in the particulars of claim the claimant suggests that it was Mr Hawley allegedly criticising Mr Riaz on 26 July 2016 for not providing proper training to the claimant that made Mr Riaz "very angry and made the rest of the claimant's working life at the company up until the day of her dismissal extremely difficult for her" (see paragraph 8 particulars of claim).

Returning to what was or was not said on the day of the interview we note that in the particulars of claim it is put in this way:

"the claimant believes that another candidate who was Asian was also interviewed for the position, and that the Asian candidate was preferred by the senior business analyst (Zaheer)".

If, as the claimant subsequently contended, she had actually been told about this preference by Mr Hawley on the day, we think it is odd that in the detailed particulars of claim prepared with the assistance of a solicitor the claimant refers to *a* belief rather than certain knowledge.

In the claimant's first witness statement the claimant refers (in paragraph 2) to Mr Riaz having an argument with Mr Hawley as he (presumably Mr Riaz) left to interview "the Asian candidate next door". The claimant does not refer to any argument in her particulars of claim. The claimant goes on to contend that Mr Hawley told her that he would not give the job "to the guy next door" as he was 20 minutes late for the interview but that Mr Riaz wanted him to do so.

In the claimant's second witness statement she says that Mr Hawley told her that Mr Riaz preferred the Asian candidate for the role but that he, Hawley would not offer the job to the Asian candidate. (see paragraph 4).

We note that Mr Riaz's evidence is that he did not have a preference for "the Asian candidate"; had not suggested to Mr Hawley that he might or did have such a preference and so did not have an argument with Mr Hawley about the issue. Mr Hawley corroborates that there was no intimation by Mr Riaz of his preference for the other candidate and so there was no argument. Mr Hawley's evidence as per his witness statement was that he believed he had informed the claimant, probably when escorting her out, that another candidate had arrived 20 minutes late and so he was unlikely to be recruited but he denied that he had made any reference to the other candidate being Asian (paragraph 3 of his witness statement). We observe that during cross-examination Mr Hawley confirmed that he may have made a reference to the other candidate being late but then went on to

say that did not recall telling the claimant that Mr Riaz preferred the other candidate although he then sought to correct this to not recalling telling the claimant that the other candidate was 20 minutes late. He went on to reiterate that Mr Riaz had never told him that he preferred the other candidate.

Returning to the claimant's evidence during cross-examination, when being pressed as to whether Mr Hawley had referred to Mr Riaz' alleged preference the Claimant replied:

"According to Nisha's statement, yes".

That of course is a reference to Nisha Kamarajn. As Ms Kamarajn actually denies that in her witness statement here the claimant must be referring to the alleged conversation between her and Ms Kamarajn on the last day of the claimant's employment. Whilst the claimant could have been suggesting to us that Ms Kamarajn's alleged statement corroborated the claimant's evidence about what she was told by Mr Hawley, we sensed that the claimant was changing her position to one where, after the event, she believed that is what had been happening (the preference) as opposed to that being something she knew about at the time. We are reinforced in that view by a statement subsequently made during the cross-examination evidence when, on being asked about Mr Hawley's witness statement at paragraph 3 the claimant answered:

"It's looking back that leads me to this conclusion – that Hawley had said what I allege."

When asked by Mr Ryan whether therefore this part of her case was speculation the claimant replied that it was belief. When asked why she had not put it in her ET1 which was surprising if such a shocking thing had been said the claimant replied that she did not know that she would be recruited and she had now had time to reflect.

There is also the point that on the claimant's case Mr Riaz was leaving her interview so as to go and interview "the Asian candidate". As the claimant contends that shortly afterwards Mr Hawley made the reference to Mr Riaz's preference, it is hard to see how Mr Riaz could have developed a preference for a candidate who he had not even begun to interview. Further we had assumed that Mr Hawley and Mr Riaz were the interview panel and so we are not sure why Mr Riaz would be going off to interview another candidate on his own. When the point about Mr Riaz's ability to have an opinion about a candidate he had not interviewed yet was put to her, the claimant suggested that possibly Mr Riaz had interviewed "the Asian candidate" over the telephone prior to the day of the in person interview. This was the first time the claimant had made this suggestion.

On the connected disputed fact of whether on the day of dismissal Ms Kamarajn told the claimant that Mr Riaz had said to her that he was going to dismiss the claimant because she was not the candidate he wanted in that job and further that Mr Riaz had preferred the Asian candidate (see paragraphs 34 and 35 of the claimant's first witness statement). Ms Kamarajn's evidence in her witness statement was that she was certainly not aware that the claimant had not been the preferred candidate. That had never been mentioned to her nor did she overhear anyone including Mr Riaz ever say that the claimant was not the best candidate. (See paragraph 8 of her witness statement). The claimant's solicitor did not cross-examine Ms Kamarajn on that point but the Employment Judge reminded Ms Kamarajn of what the claimant had alleged in paragraphs 34 and 35 of her witness statement. She confirmed that she had made no such statements to the claimant nor had she overheard anything along those lines being said.

When the claimant on some date in March 2017 telephoned Ms Kamarajn out of the blue illicitly recording the call and clearly hoping to entrap Ms Kamarajn the claimant is recorded as saying:

"He (Mr Riaz) has denied ever saying you know the situation of me not being when you intimated me on me not being the favourite candidate, the candidate that he actually wanted …"

The response of Ms Kamarajn to this is recorded as "hmm". We do not find that a response of "hmm" is equivalent to Ms Kamarajn agreeing that that is what had happened. The claimant has not actually asked her a question and so it is perhaps unsurprising that no answer is elicited. We also find that it is quite clear from the tenor of the transcript that Ms Kamarajn was distracted – she told us that at the time of the call she was busy with her child and household tasks. Most of the talking is done by the claimant and during the course of one monologue the claimant has referred to Mr West and Mr Riaz "spear heading" the whole thing and concludes by asking Ms Kamarajn if she can remember the time when her husband was not well. Ms Kamarajn's reply is "uh, yeah". We read that as her agreeing that she can remember when the claimant's husband was not well and it is clearly not a response to the earlier comments about spear heading etc. The majority of the responses from Ms Kamarajn during this conversation are monosyllabic.

Taking all this together, we are satisfied on the balance of probability that Mr Riaz did not have a preference for "the Asian candidate" and that clearly his preference was for the claimant because it was she that he and Mr Hawley gave the job to. It follows on the same test that we do not find that Mr Hawley told the claimant that Mr Riaz had a preference for the Asian

Candidate (despite the initial apparent contradiction during the course of cross-examination which was subsequently corrected). Equally we find that Ms Kamarajn did not and could not have confirmed to the claimant on her day of dismissal what the claimant allegedly knew on the day of the interview.

9.2 The harassment complaint

9.2.1 Did Mr Riaz tell the claimant to "watch her back" at the second meeting on 2 August 2016?

We remind ourselves that the evidence of Mr Riaz (paragraph 30 of his witness statement) is that this one to one meeting was held with the claimant following the meeting earlier that day when the code of practice project was being discussed. He told us that the purpose of the second meeting was to relay the concerns which he and his colleagues had about the claimant's performance at the earlier meeting. He accepts that he told the claimant that her performance needed to improve but he denies saying that she needed to watch her back. We observe that if a person is told to watch her back that would usually be in the context of the person making that comment believing that others had ill will towards the recipient of that advice. However it is the claimant's case that it was only Mr Riaz who had that bad motive and so it is rather odd that Mr Riaz would be warning the claimant about actions he was going to take. On the balance of probability we think it is much more likely that what Mr Riaz actually told the claimant was along the lines of she would have to watch her performance in the future in the light of what was perceived to be bad performance to date. Subject to our findings on what the claimant's performance actually was (see later) we consider that that would be a perfectly valid thing for a manager to say to an employee. However, even if the phrase alleged was used we fail to see how that was related to the claimant's race.

For these reasons we find that this aspect of the harassment complaint fails.

9.2.2 The alleged conduct of Mr Riaz telling someone in the presence of Ms Kamarajn that the claimant was not the candidate he preferred for the job

We have already found that this did not on the balance of probabilities occur and so this aspect of the harassment complaint fails as well.

9.2.3 Mr Riaz allegedly being unsympathetic towards the claimant's husband's illness and saying he hoped it was not contagious

Mr Riaz points out that contrary to what the claimant says in her first witness statement (paragraph 17) to the effect that she had to

report to Mr Riaz the reason for her being off work, that was not the case. She had not taken time off to look after her husband. Instead she had booked it off in advance apparently to attend a wedding. However Mr Riaz does accept that the claimant had told him that her husband had been suffering from pneumonia at about this time, but says that he does not recall discussing the claimant's husband's illness with anyone else or making any comment about hoping it was not contagious. The claimant contends that Mr Riaz's response when she told him that – on her case her husband had been coughing blood – was to say "wow". We accept that that may not have been an expression of sympathy but seems to have been an expression of surprise. To categorise that response as being unsympathetic is not entirely accurate. We note that Mr Riaz was not questioned about this allegation in cross-examination.

On the basis that the claimant's evidence is that she did overhear the 'hope its not contagious' comment whereas Mr Riaz's evidence is simply that he cannot recall making any such comment we find on the balance of probability that the comment was made. We accept that overhearing such a comment is likely to have violated the claimant's dignity and created a degrading environment for her. However the vital question is whether a link can be established between this conduct and a claimant's protected characteristic of race. When during cross-examination of the claimant this question was posed to her, her rhetorical answer was that Mr Ryan should ask Mr Riaz, but she went on to mention that she was the only black person in the office. We remind ourselves that in the leading case of **Madarassy v Nomura International Plc** [2007] ICR 867 it was noted that a finding of different treatment and different race was not enough and there had to be "something more". We accept that that guidance was given strictly speaking in the type of case where a comparator is required which is not so here. Nevertheless the claimant's contention that her being the only black person in the office provides the causal link is in our judgment insufficient. We also bear in mind that we have found against the claimant in respect of the core of her case – that Mr Riaz was against her because of his preference for the Asian candidate. Whilst we find the not contagious statement to be unsympathetic and in poor taste we do not accept that it was related to the claimant's race. Accordingly this aspect of the harassment complaint fails as well.

9.2.4 Mr Riaz's alleged interrogation of colleagues to obtain material to use against the claimant in respect of her performance – and then giving adverse reports to the claimant without attribution

As the factual issues here are also central to the complaint that the claimant's dismissal was an act of direct discrimination we do

not say more here about this allegation of harassment other than to say that for the reasons we explain later the claimant has not satisfied us on the balance of probability that this is what Mr Riaz was doing (in terms of interrogation) and that it was understandable that he was not attributing adverse comments to the claimant's colleagues. We find that this aspect of the harassment complaint fails.

9.3 Direct race discrimination

9.3.1 The alleged less favourable treatment which is also the subject matter of the harassment complaint

We have found that the "watch your back" comment was not made. We have also found that the claimant was not told by Ms Kamarajn (or for that matter by Mr Hawley) that Mr Riaz preferred "the Asian candidate". Accordingly we find that the complaints of direct discrimination in respect of those matters fail for those reasons.

We have found that ' hope its not contagious' comment was made by Mr Riaz. The claimant has not proposed any comparator – actual or hypothetical – for this part of her direct discrimination complaint. Clearly Ms Anayiotos would not be an appropriate comparator. We consider that an appropriate hypothetical comparator would be an employee who was not black African in ethnicity but having told her manager that her husband had been coughing blood heard that manager say to others he hoped it was not contagious. We cannot see that there are any facts from which we could decide that Mr Riaz made this comment in the hearing of the claimant but would not have made the comment in the hearing of the hypothetical comparator. It was an unfortunate thing to say but there is nothing to suggest that Mr Riaz's temporary lapse of judgment was because of the claimant's race. We therefore find that this aspect of the direct race discrimination complaint fails.

As noted above, we are dealing with the alleged less favourable treatment of interrogating the claimant's colleagues for information about the claimant's performance in the context of our conclusions on the dismissal issue.

9.4 Was the claimant's dismissal less favourable treatment because of her race (direct race discrimination)?

9.4.1 Was there less favourable treatment?

Clearly being dismissed during the course of a probationary period (or for that matter at all) is less favourable treatment.

9.4.2 Was that treatment of the claimant less favourable than the treatment which would have been afforded to others?

By "others", the necessary analysis is how the claimant was treated in comparison with the appropriate comparator. The claimant has chosen her predecessor Helen Anayiotos as her actual comparator. We understand Ms Anayiotos to be white although we were not informed of her ethnicity. We need to consider whether Ms Anayiotos is a comparator who meets the requirements of section 23. Were there any material differences between her circumstances and those of the claimant? The respondent says not. They acknowledge that when she first started Ms Anayiotos needed to familiarise herself with the respondent's systems and Mr Riaz concedes (in paragraph 48 of his witness statement) that there were some concerns regarding her performance when she started. He points out however that the difference between her and the claimant was that once Ms Anayiotos was provided with guidance she understood it and followed it. Mr Riaz also contends that the claimant had more support and training than Ms Anayiotos had when she began. At that stage Ms Anayiotos was reporting directly to Mr Hawley who as department head did not have much spare time to train anyone with the result that in effect Ms Anayiotos was left to her own devices. There was more support when she came under Mr Riaz's remit. We have also heard evidence from the respondent that Ms Anayiotos would recognise when she needed to ask questions, would do so and then would be able to carry out the task. We have no evidence that Ms Anayiotos was ever subjected to a capability procedure either informal or formal and she had been employed by the respondent for some time and of course that employment continued – at the material time Ms Anayiotos was on maternity leave and it was intended no doubt that she would return from that. For all these reasons we conclude that Ms Anayiotos is not the appropriate comparator.

In these circumstances it is incumbent on the Tribunal to construct the appropriate hypothetical comparator. In our judgment this would be a business analyst with the same stated experience and qualifications as the claimant; who was also in his or her probationary period; who had had the same internal training as the claimant; who had had concerns raised about his/her understanding of the role, in relation to some of it's basics and also the specifics of the respondent's operation – such concerns being expressed by senior managers and peers and of course who was not black African.

Using this hypothetical comparator we see no evidence to suggest that the respondent would have treated that comparator any differently to the treatment afforded to the claimant. He or

she would have been spoken to informally and if his or her performance did not improve or indeed appeared to deteriorate then the comparator would also have been dismissed.

We also note that the Preliminary Hearing in March was told that the claimant might rely upon hypothetical white or Asian comparators. However none have been advanced by the claimant during the presentation of her case.

9.4.3 In any event were there genuine and widespread concerns about the claimant's performance?

It is under this heading that we also deal with the outstanding issue in relation to the harassment complaint. Had Mr Riaz interrogated the claimant's colleagues in the hope of obtaining information which he could use to bring about the claimant's dismissal? This aspect of the claimant's case is severely damaged by our earlier finding that Mr Riaz did not have a preference for "the Asian candidate" such that it drove him to engineer the claimant's dismissal so that, on the claimant's theory, presumably the Asian candidate could be offered the job on her dismissal.

In any event it is clear to us that concern about the claimant's performance was not limited to Mr Riaz. It is unfortunate that the respondent has had the habit of not documenting various meetings. We were even told that such notes at the job interviews (apparently only annotations on candidates' CVs) had subsequently been destroyed. It might also have been helpful if for instance in the aftermath of the problematic meetings on 2 August 2016; 5 August 2016 and the estimation and planning meeting on 10 August 2016 – the participants in those meetings – Mr Hawley, Mr West and Mr Riaz had made notes about their concerns. As it is the Tribunal is reliant upon the testimony of those individuals – although there is the documentation which we will refer to below. We remind ourselves that the evidence of Mr Hawley in respect of the claimant's performance at the 2 August meeting (when he drew the diagram which the claimant could not explain back to him) was that he was astonished that the claimant could not give that explanation leading him to become concerned about the claimant's performance – especially when he was informed by Mr Riaz and Mr West that they too had had issues. We also remind ourselves that it was Mr Hawley's evidence that it had been Mr Riaz who had suggested that the claimant should be given time to improve.

Mr West's evidence in respect of the claimant's performance at the 5 August meeting with Mr Jones, was that the claimant had not familiarised herself with the CRM which was being

discussed and had not prepared an agenda. His view was that during the course of that meeting the claimant did not appear to understand what she was asking or why with the result that he and Mr Riaz had to take over the meeting. (see paragraph 15 of his statement). Mr West was also critical of the claimant's performance at the estimation and planning meeting on 10 August 2016. The user stories and acceptance criteria which the claimant had provided information on did not make sense and the claimant was not able to clarify the requirements or provide additional context when asked questions by the team. The claimant had not been able to clearly present on eight user stories. She was confusing the requirements of one ticket with another and did not seem to understand either. He also considered that the claimant was navigating the computer very slowly. He also referred to a text that he received from another colleague who was present at that meeting – a text received during the course of the meeting. That was from Mr Harden and a copy is at page 175 where he apparently describes the claimant's performance as "painful". Whereas one of the claimant's contentions as recorded at the Preliminary Hearing in March 2017 was that Mr Riaz had been interrogating a colleague called Daniel – it would seem that the same person Daniel Harden was volunteering his comments or critique of the claimant to Mr West. Whilst Mr Riaz's evidence expressed similar concerns about the claimant clearly he was not a lone voice. He refers to similar problems when the claimant was conducting the earlier meeting of 8 August 2016 which involved a video conference to the respondent's product department. Again Mr Riaz's evidence was that the claimant did not know what she was asking for and Mr West and Mr Riaz had to step in and take over

We have also had before us a text from a Michael Allen on 10 August 2016 commenting on the estimation and planning meeting. It seems that he may have been approached for his observations but significantly was approached by Mr West who the claimant says was not a discriminator. As we have noted in our findings of fact Mr Allen had various criticisms of the claimant's performance at the meeting. Mr Allen also commented in the message (which can be seen on page 145) that Mr West especially had been understanding with the claimant and had given her every opportunity to improve. On the same page is a further message from Mr Harden to Mr West. On Mr West's enquiry as to how things were with the claimant that day (we are not sure of the date) Mr Harden replies "alright I suppose. She had updated the AC for Ken's ticket about an hour or so ago and it didn't make any sense at all. Prob easier to talk to you about it". In a chain of messages between Mr West and Mr Riaz on 10 August (page 146) Mr Riaz

does enquire how Mr West is getting on with the claimant. Mr West's reply is:

"Estimation (meeting) was a disaster. Don't think anyone in the team would disagree. Dan and I made notes so you can see what the issues are. I think she knows its going badly."

The claimant has sought to counter this evidence by saying that the colleagues she spoke to never expressed concern about her performance and she complains that when Mr Riaz said that was not the case and there were concerns he would not disclose to her the identity of the colleagues who were complaining. Perhaps the claimant is suggesting that that should lead us to the conclusion that Mr Riaz was making it up and there were no complaints. The documentary and other evidence which we have referred to does not support that proposition. Instead we find it completely understandable that in the interests of a reasonable working relationship a manager may well think it appropriate not to inform a colleague of the identity of those who have concerns about her performance. Perhaps that would no longer hold good if the matter was being dealt with as a formal capability procedure for an employee who was not within their probationary period, but these were not the claimant's circumstances. We also consider that it is human nature that if a colleague is asked by another colleague whether they have any concerns about their work that colleague may well give a polite or non committal answer rather than risk offence or embarrassment. The claimant also seeks to rely upon the "reference" that she misled Mr Farmer into giving. A copy of that is at page 347. Although it is brief that can be described as a favourable reference but in his witness statement Mr Farmer has sought to distance himself from the views he expressed. We have not had the benefit of hearing from Mr Farmer direct for the reasons explained. In his statement he says that he did understand there was some performance issues with the claimant but he did not work particularly closely with her and so did not know the full extent of those concerned. He felt the claimant was a nice person and did not feel as though he could say no to the reference request. He did not want to do or say anything which would jeopardise her chances of getting a new role and he says that is why his statement was quite positive. In these circumstances we imagine that if the claimant had made a straightforward approach to Mr Farmer to see if he would give evidence on her behalf within these proceedings it is most likely that he would have declined or at least would have indicated that he would not have been able to give favourable evidence for the claimant.

Whilst we have criticised the respondent for the lack of some contemporaneous records, there is Mr West's very detailed email of 11 August 2016 at pages 168 to 170. We regard this as particularly significant because as a "non discriminator" he sets out a catalogue of problems that have been encountered with the claimant's performance. We regard the claimant's suggestion that Mr West had only written that email at the behest of Mr Riaz and that it did not contain Mr West's own genuine views to be entirely fanciful. Having heard evidence from Mr West we are satisfied that he would not have been swayed by such inappropriate considerations – although of course we have also found that Mr Riaz had no motive to ask him to do that anyway. Whilst the email was sent to Mr Riaz in the context that it was going to be forwarded to HR for their advice that is a very different state of affairs from Mr Riaz orchestrating complaints which were not genuinely held by Mr West and various other members of his team. We note that Mr Riaz has in effect cut and pasted Mr West's email into his own of 11 August 2016 and so we acknowledge that the reference on page 171 to "I argued for her to have more time to get to grips with things" is in fact a statement by Mr West where Mr Riaz has not changed the grammar.

9.5 Ultimate conclusion on dismissal and interrogation harassment complaint

Dealing first with the outstanding harassment complaint, for the reasons set out above we find that on the balance of probabilities there was not the conduct alleged of Mr Riaz interrogating colleagues so as to engineer the claimant's dismissal. As we have already confirmed this aspect of the harassment complaint must fail.

In relation to the direct discrimination complaint about dismissal we find that there are no facts to support the contention that the claimant's dismissal was because of her race. Instead it was quite clearly because of the commonly held view of senior managers that the claimant's performance was poor. We are mindful that in the text exchanges between Mr Smalley and Mr Hawley it is noted by the former that Mr Riaz was not happy about letting the claimant go without speaking to Mr Hawley first (see page 334). Again this indicates that if anything Mr Riaz was to an extent 'rooting' for the claimant.

We can understand the claimant's view that she had been unfairly treated. She believed she was doing a good job and that any shortcomings were related to her being new in the position or deficiencies in the training she had been given. It was no doubt a very unpleasant experience to be brought into a

meeting on 11 August 2016 only to be dismissed without an opportunity to have her say. The claimant may also have complaints that she had not been specifically warned that her job was at risk. However all these questions go to the issue of fairness. The claimant did not have sufficient service to have the right to bring a claim of unfair dismissal. If she had had such a right perhaps the respondent's would have dealt with the matter at least procedurally in a different way (although we do not doubt that they would still have been likely to have dismissed her). What is clear to us is that the claimant's treatment fair or unfair was crucially *not* because of her race. Accordingly we find that the direct discrimination complaint in respect of dismissal also fails.

Employment Judge Little

Date: 30th August 2017