



EMPLOYMENT TRIBUNALS

Claimant
Miss G Khan

- v -

Respondent
Moorfields Eye Hospital
NHS Foundation Trust

Heard at: London Central

On: 6-12 November 2018

Before: Employment Judge Baty
Ms KA Church
Ms S Boyce

Representation:

For the Claimant: In person
For the Respondents: Ms Y Genn (counsel)

RESERVED JUDGMENT

1. The claimant's complaints of direct discrimination and harassment (race and religion); of constructive discriminatory dismissal (race and religion); and of indirect discrimination on the grounds of religion all fail.

REASONS

The Complaints

1. By a claim form presented to the employment tribunal on 10 October 2017, the claimant brought complaints of direct discrimination and harassment (race and religion); indirect discrimination on the grounds of race and religion; and unfair constructive dismissal. The Respondent defended the complaints.

2. The case had originally been listed to be heard in April 2018, but was postponed due to the lack of a judge available to hear it. It was relisted to the above dates.

3. At the start of this hearing, the claimant confirmed the following (much of which was clear from previous correspondence from her):

1. The claimant recognised that she did not have two years' continuous employment for the purposes of her ordinary unfair constructive dismissal complaint and therefore withdrew that complaint; the tribunal dismissed it. However, she was clear that she was nevertheless claiming constructive discriminatory dismissal (race and religion) as part of her direct race/religious discrimination/harassment complaints, where no such continuous employment threshold applies. The parties and the tribunal accepted this.

2. The claimant confirmed that there was no indirect discrimination complaint on the grounds of race but that any indirect discrimination complaints brought were on the grounds of religion only. To the extent that there had been any indirect discrimination complaint on the grounds of race, the tribunal dismissed such complaint.

3. The claimant confirmed that there was no victimisation complaint.

4. The claimant confirmed that, whilst at one point there had been correspondence with the tribunal about whether she should seek to have the claim amended to include a complaint of disability discrimination, there had been no such amendment and there was no complaint of disability discrimination.

4. It was, therefore, agreed between the parties and the tribunal that the remaining complaints to be heard at this hearing were of direct discrimination and harassment (race and religion); constructive discriminatory dismissal (race and religion); and indirect discrimination on the grounds of religion.

The Issues

5. There was no agreed list of issues before the tribunal. Both the claimant and the respondent had produced their own lists of issues but neither were adequate for the tribunal's purposes; the claimant's list did not set out the specific allegations of discrimination and the respondent's list, whilst attempting to do this, did not appear to capture the full extent of the allegations in the claim form. The claim form itself was very generalised in the way it made the allegations. Consequently, the respondent had previously sought further particulars of the individual allegations in the claim form and the claimant had replied to these in a document which extended to some 22 pages. Furthermore, the statements produced for the hearing were lengthy, with the claimant's alone extending to some 67 pages.

6. It would have been lengthy and time-consuming to distil with the clarity which one would normally prefer each and every allegation set out; this could have taken up a considerable proportion of the five day listing in itself. However, the complaints all appeared to derive from the relatively short period of time from January 2017, when the claimant began to be managed by Ms Katherine

Goodwin, to the point when the claimant handed in her resignation on 26 May 2017, with a few complaints relating to the timing of the subsequent internal investigation into a grievance she raised about the earlier issues.

7. In the light of that, therefore, the tribunal proposed that it should not go through and try and set out each and every individual complaint and put it into a properly drafted list of issues but that, rather, having identified the legal heads of complaint (as set out in the section above), it would read the statements and hear the evidence, and find whatever facts were necessary to determine whether such complaints had been made out and whether or not discrimination had taken place; that its enquiry would not go beyond the allegations in the claim form, as particularised in the claimant's response to the request for further and better particulars; but that it would not necessarily refer to every single instance or allegation set out in the claim, the response to the request for further particulars or the claimant's witness statement (which were voluminous) if it did not consider that necessary properly to determine the claim. The judge stated that this was not his ideal approach (it would have been better had there been an agreed list of issues prepared before the hearing commenced) but that in the circumstances this was the best proposal. The parties agreed and the tribunal proceeded on that basis.

Adjustments

1st day

8. At the start of the hearing, the judge explored whether any adjustments needed to be made. The claimant, as she had indicated in previous correspondence, stated that she had a mental health disability. She asked if she could take extra breaks if needed and if her husband could sit next to her during the hearing. The judge explained that that was absolutely fine and was permitted. Breaks were duly given when the claimant needed them.

9. The claimant also asked if she could see the cross-examination questions which would be asked of her in advance. She explained that her disability meant she found it difficult to process information. She explained that she had a letter from her psychotherapist in relation to her disability. A copy of this very brief letter, dated March 2018, was at page 393b of the bundle. It outlined what the psychotherapist considered the claimant's condition was (PTSD, depression, disassociation, anxiety and work-related stress). It did not say anything about specific symptoms (it made no reference to difficulties in processing information) or about any adjustments which might be required, and certainly nothing about adjustments in relation to a tribunal hearing.

10. Ms Genn objected to this request. She noted that the letter in question was from a therapist and not from a medical professional; furthermore, whatever remarks it made about the claimant suffering from mental health issues, it did not refer to adjustments which might assist her at a tribunal hearing at all, let alone the issue of seeing cross-examination questions in advance. She noted that there were two occupational health reports in the bundle and neither of them indicated a need for such adjustments either. Ms Genn was prepared to allow

the claimant additional time during cross-examination to think about her answers if necessary. Allowing the claimant to see the questions in advance would, however, prejudice the respondent.

11. The tribunal adjourned briefly to consider the request. We turned down the request for the reasons given by Ms Genn.

3rd day

12. Before the hearing recommenced at the beginning of the third day, the tribunal clerk reported to the tribunal that the claimant wanted to speak to the tribunal alone to discuss issues concerning her disability. The tribunal did not permit this but was prepared to allow the claimant, if she wanted to, to appear before it with only Ms Genn from the respondent present; the claimant confirmed via the clerk that she wanted to do this.

13. Without going into detail about her condition, the claimant explained that one effect of her condition was “disassociation”, which affected her focus. She said that she thought that she had suffered from this during these proceedings (for example at the point the previous day when she asked for (and was given) a break). She asked if, when she was cross-examined that day, she be allowed to have a bit more time to answer the questions and to read through documents in the bundle that she was taken to if necessary; the tribunal explained that this would be no problem and Ms Genn said that she had no objections to this.

14. The claimant also asked if any of her family members who were going to be with her during the day could, if they felt that she was suffering from a moment of disassociation, interject to let the tribunal know so that she could take a break. Ms Genn was more concerned about this on the basis that someone might interject if the claimant was being asked, for example, a difficult question. However, the tribunal decided that it would be the judge of that if the situation arose; it may be that a family member was able to see if the claimant was struggling even if it was not apparent to the claimant or to others in the room, so the tribunal was happy to allow any family members to interject if they considered it necessary, and the tribunal would then take a view as to what to do. In any event, no such interjections occurred during the claimant’s evidence, which was completed that day. Furthermore, on a couple of occasions during her evidence, the claimant paused before answering; the judge asked her if she was okay; and on two occasions she asked for a break, which she was given. Otherwise, however, the claimant appeared to be entirely capable in answering the questions put to her.

4th day

15. On the fourth day of the hearing, which was a Friday, the claimant attended the tribunal with Ms C Maughan of the PSU in attendance with her. The judge clarified with Ms Maughan whether or not she was supporting the claimant or actually representing her from this point on. Ms Maughan made clear that she was there only for support and was not representing the claimant. The claimant continued to represent herself for the rest of the hearing.

16. That day, in accordance with the timetable agreed between the tribunal and the parties at the start of the hearing (see below), the tribunal was due to hear the remainder of the respondent's witnesses and the parties' submissions. At the start of the day, the claimant asked the tribunal if submissions could be adjourned until the final day of the hearing after the weekend. She stated that she wanted time to read Ms Genn's written submissions before making her own oral submissions and stated that, because of her condition, she needed more time to read them. Ms Genn objected. The tribunal adjourned briefly to consider the request.

17. The tribunal declined the claimant's request for the following reasons. First, as Ms Genn had submitted, there was no medical evidence before the tribunal which indicated that the claimant required more time; all there was was the very brief psychotherapist's letter of March 2018 which outlined what the psychotherapist considered the claimant's condition was, but which gave no detail of the symptoms of the condition in relation to her appearing before a tribunal or any adjustments that might assist any such symptoms. Secondly, this request was made late, on the last day of the evidence, and after the tribunal had agreed a timetable with the parties. If the request was granted, much of the fifth and final day of the hearing would be taken up with submissions; this was likely to mean that the tribunal could not deliberate and come to a decision within the allocated time frame and more time would be required on another occasion to complete this, thereby depriving this tribunal's resources from other tribunal users; furthermore, there would be an additional cost to the respondent of having to attend on the final day of the hearing (which had been set aside for the tribunal to deliberate, such that the parties would not have had to have attended otherwise). Thirdly, Ms Genn's written submissions were relatively short (14 pages) and the tribunal decided to take a longer lunch break to enable the claimant to have more time to read those submissions, starting at 2:30 PM in the afternoon. The tribunal therefore decided that making this adjustment was proportionate but that adjourning the hearing over the weekend, as the claimant had requested, would not have been proportionate.

The Evidence

18. Witness evidence was heard from the following:

For the claimant:

the claimant herself.

For the respondent:

Ms Katherine Goodwin, who joined the respondent on 3 January 2017 as Assistant Divisional Manager, and to whom the claimant reported from January 2017 onwards;

Ms Emral Jarrold, formerly the Deputy Director of HR at the respondent.

Mr Neil Willis, an HR Manager employed by the respondent;

Ms Alison McGirr, who has been employed by the respondent as a Divisional Manager since March 2017; and

Ms Kelly Anderson, an HR Manager employed by the respondent;

19. An agreed bundle numbered pages 1 - 441 was produced to the tribunal. In addition, the respondent produced a draft chronology and the claimant produced a document headed "claimant's written submissions".

20. The tribunal read in advance the witness statements and any documents in the bundle to which they referred.

21. A timetable for cross-examination and submissions was agreed between the parties and the tribunal at the start of the hearing and was largely adhered to.

22. Ms Goodwin, who was the main witness for the respondent, had since left the respondent and was not available to attend the tribunal for the whole of the hearing. It was therefore agreed between the tribunal and the parties that her evidence could be heard first, before the claimant gave her evidence.

23. At the start of the second day, the claimant explained that she thought there was a missing document from the bundle, specifically an external report into the allegations which she had made, to which she had seen reference. Ms Genn stated that she had not seen such a report and would make some enquiries; having taken instructions she stated that it was not clear if such a report had ever been finalised. It was agreed that she would email her instructing solicitors straightaway so that a search could be carried out with a view to any such report, if in existence, being provided later on in the morning. Just before lunch, Ms Genn informed the tribunal that she had now received notification that this draft report had been discovered; it had been produced in January 2018; had never been finalised; and was 26 pages long and had been prepared by an external consultant. It seemed likely that it was disclosable, although Ms Genn had not had the opportunity yet to look through it to satisfy herself of this. Ms Genn agreed to check quickly in the lunchtime period and, if she considered it disclosable, to give a copy to the claimant, which she duly did.

24. When the parties returned after lunch, the judge, whilst acknowledging that the claimant would not have had time properly to read the report, asked the claimant what she wanted to do in this respect and whether she wished to add it to the bundle, emphasising that there may be a difficulty if the claimant later wanted to ask Ms Goodwin questions about the document, as Ms Goodwin was only available that day and the claimant had indicated that she had a further two hours of questions for her in any case. The judge asked Ms Goodwin whether she was aware of the report; she said she was aware of it and had been asked to do a statement for it in January 2018. This further begged the question as to whether any further statements which had been taken for the purposes of this external report were in the respondent's possession and were disclosable.

25. The claimant said that her priority was to ask Ms Goodwin the other questions she had for her and acknowledged that, if she did have questions about the report, they could be put to other witnesses of the respondent in due course when she had had the opportunity to read the report properly. The judge therefore instructed the respondent to prepare paginated copies of the report which could be added to the bundle the following morning. Furthermore, the judge reminded the respondent of its ongoing duty of disclosure which may apply in relation to any copies of statements taken for the purposes of this report and that, if there were documents to be disclosed, these should be disclosed to the claimant as soon as possible; any decision as to whether they too would need to be added to the bundle should therefore also be taken as soon as possible; Ms Genn acknowledged this.

26. On the following morning, the third day of the hearing, the respondent came with those paginated copies of the draft external report. However, when asked by the judge whether the parties wished that it to be added to the bundle, the claimant stated that she had not fully read it and did not want it added to the bundle; Ms Genn said that, if the claimant did not want to add it, then the respondent didn't feel it needed to be added either; and the draft external report was not, therefore, added to the bundle.

27. At the start of Ms Goodwin's evidence, Ms Genn asked whether, now that the issues had been clarified to the extent that it was clear that there was a constructive discriminatory dismissal complaint, and the claimant appeared to be relying on the event set out at paragraph 69.2 of Ms Goodwin's witness statement as the last straw for the purposes of this constructive dismissal complaint, she could ask a couple of supplemental questions to Ms Goodwin so that she could give some further detail in relation to this particular incident. The judge asked the claimant whether she objected. The claimant stated that she had a disability and needed extra time to process information and so was at a disadvantage; she therefore objected. The tribunal, however, decided to allow the supplemental questions: they dealt with self-contained issues and would be brief, therefore not requiring any significant extra time; they consequently concerned a relatively small amount of additional information and so would not prejudice the claimant greatly, notwithstanding any issues of retaining information which she may have; the event was part of the claimant's claim; it was not until that morning absolutely clear that this was a constructive discriminatory dismissal complaint and that this event was said to be the last straw; so on the balance of prejudice, it was fair that the respondent should be able to ask these brief supplemental questions.

28. Both parties produced written submissions, which the tribunal read, and the parties then supplemented these with oral submissions.

29. Given the time constraints, the tribunal reserved its decision.

The Law

Direct race discrimination and harassment (race and religion)

30. Under section 13(1) of the Equality Act 2010 (the Act), a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others (direct discrimination).

31. Under section 26(1) of the Act, a person (A) harasses another person (B) if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

32. In deciding whether conduct has the effect referred to above (but not the purpose referred to above), each of the following must be taken into account: the perception of B; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect.

33. Race and religion are protected characteristics in relation to both discrimination and harassment as referred to above.

34. For the purposes of the comparison required in relation to direct discrimination between B and an actual or hypothetical comparator, there must be no material difference between the circumstances relating to B and the comparator. By contrast, there is no requirement for such a comparison in establishing harassment.

35. Under section 39(2) of the Act, an employer must not discriminate against an employee of his on various grounds, including dismissing him or subjecting him to any other detriment. Under section 40(1) of the Act, an employer must not harass an employee of his. Where conduct constitutes harassment, it cannot also constitute a detriment as defined in the Act and therefore cannot be direct discrimination as well as harassment.

Indirect Religious Discrimination

36. Under section 19(1) of the Act, a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice (PCP) which is discriminatory to a relevant protected characteristic of B's. Religion is a relevant protected characteristic.

37. Section 19(2) provides that a PCP is discriminatory in relation to a relevant protected characteristic of B's if:

1. A applies, or would apply, it to persons with whom B does not share the characteristic;

2. It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;
3. It puts, or would put, B at that disadvantage; and
4. A cannot show it to be a proportionate means of achieving a legitimate aim.

Burden of proof

38. The burden of proof rests initially on the employee to prove on the balance of probabilities facts from which the tribunal could decide, in the absence of any other explanation, that the employer did contravene one of these provisions. To do so the employee must show more than merely that she was subjected to detrimental treatment by the employer and that the relevant protected characteristic applied. There must be something more. If the employee can establish this, the burden of proof shifts to the employer to show that on the balance of probabilities it did not contravene that provision and, in doing so, the employer must prove on the balance of probabilities that the treatment was “in no sense whatsoever” because of the relevant characteristic. If the employer is unable to do so, we must hold that the provision was contravened and discrimination/harassment did occur. If, however, the tribunal is in a position to make clear positive findings one way or another, it is not necessary to apply the burden of proof.

Constructive discriminatory dismissal

39. In order successfully to make a complaint of discriminatory dismissal, an employee must first prove on the balance of probabilities that she was dismissed by the employer. An employee may be considered to have been dismissed where she resigns in circumstances where she is entitled to terminate her employment contract by reason of the employer’s conduct.

40. This form of dismissal is commonly referred to as constructive dismissal. In the leading case on the subject, Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA, the Court of Appeal ruled that the employer’s conduct which gives rise to a constructive dismissal must involve a repudiatory breach of contract. In order to claim constructive dismissal the employee must establish on the balance of probabilities that:

1. There was a fundamental breach of contract on the part of the employer;
2. The employer’s breach caused the employee to resign;
3. The employee did not delay too long before resigning, thereby affirming the contract and losing the right to claim constructive dismissal.

41. Individual actions by an employer that do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of, for example, undermining the trust and confidence inherent in every contract of employment. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a “last straw” incident, even though the “last straw” by itself does not amount to a breach of contract or even unreasonable conduct (although it would be rare for objectively reasonable conduct to constitute a “last straw”). It suffices if it contributes to the employer’s earlier breaches (if any) and/or cumulatively undermines trust and confidence.

42. An employer must not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (Malik v Bank of Credit and Commerce International SA [1997] ICR 606).

43. Where the acts relied on by the employee constitute an act or acts of unlawful discrimination, it does not necessarily follow that this will amount to a breach of the relationship of confidence and trust entitling the claimant to resign and claim constructive dismissal.

Assessment of Evidence

44. We consider that the evidence of the respondent’s witnesses was very credible, in particular that of Ms Goodwin, who was the primary witness for the respondent and who was cross-examined for the vast majority of the claimant’s time cross-examining the respondent’s witnesses. First, what Ms Goodwin said about her management style and her desire to ensure that the service ran as efficiently as possible whilst at the same time showing flexibility to and indeed care for the claimant is borne out in the large number of emails and other documentary evidence which we have seen in the bundle. They do not paint the picture of, as the claimant seeks to suggest, a manager who is conducting a campaign from the start to bring the claimant down; they evidence a manager who was thorough, focused, but also prepared to devote a lot of time to managing her reports and who was caring. In addition, this was backed up over the many hours that Ms Goodwin was cross-examined; she was clear and consistent in her answers; they were consistent with the large amount of documentary evidence in the bundle; she was prepared to make concessions where she felt she had made a wrong decision in the course of her management and to accept responsibility and did not seek to attribute blame elsewhere.

45. In addition, we found the other four witnesses of the respondent credible; again, their evidence tied in with the large amount of documentary evidence before us and with Ms Goodwin’s evidence (that includes the evidence of Ms Jarrold, who clearly had a good relationship with the claimant) and we have no reason to doubt the evidence they gave.

46. By contrast, we had much more concern regarding some of the things stated by the claimant in her evidence. First, it is clear from the large amount of documentary evidence that we have seen that she was continually pushing back

on suggestions being made by Ms Goodwin; indeed, some of her emails to her manager are actually quite rude. This contrasts with the picture of herself that she has portrayed before the tribunal. In addition, she continually tried to suggest to various witnesses of the respondent that somehow she had raised issues of discrimination (or that such issues should have been clear to them) before she raised them in her resignation email; however, they were clear that she had not raised issues of discrimination with them and the documentary evidence backs that up. In conjunction with that, and paradoxically, she also sought to suggest that somehow she was too frightened to raise issues; that does not however tie in with the documentary evidence where it is quite clear that, where she does have an issue, she is not frightened to speak her mind and the fact that, only a few days after Ms Goodwin began to manage her, she went to a senior HR manager, Ms Jarrold, and tried to get her to change her line manager at that point; these are not the actions of someone who is frightened to raise issues. Another example is that the claimant put it to Ms Jarrold, someone with whom she had a good relationship, that she had been crying at their meeting in January 2017; Ms Jarrold was clear that she had not been. The claimant also littered her evidence with new matters that were not in her witness statement and frequently did not answer questions straightforwardly. Nor did she make any concessions even where it was obvious that they should have been made; one example is her repeated insistence that Ms Goodwin refused to let her go to the toilet, when it was clear that that was not the case and Ms Goodwin had merely given that as one example of the things that the claimant did as part of her process of packing up for the day before the end of her contractual working hours such that she was not on many occasions actually working through to the end of her contractual working hours. We are not saying that the claimant does not at this point genuinely consider that some of the things she maintained happened really happened; merely that, for whatever reason, her perception of what happened is in many respects vastly different from reality.

47. For all these reasons, where there is a conflict in the evidence but no documentary evidence supporting one version or another, we prefer on the balance of probabilities the evidence of the respondent's witnesses over that of the claimant.

Findings of Fact

48. We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues.

49. The claimant was employed by the respondent NHS trust from 7 September 2015 onwards. She tendered her resignation on 26 May 2017, with her employment terminating on 23 July 2017.

50. The claimant is Bangladeshi and she is a Muslim.

51. The claimant was at all times employed as a Band 7 Service Manager. She reported initially to Ms Maggie Middleton, the Divisional Manager. This was an unusual structure as Ms Middleton was a much more senior manager, three

levels of seniority above the claimant. (By contrast, when Ms McGirr became Divisional Manager in March 2017, the claimant was reporting to Ms Goodwin (Assistant Divisional Manager), who in turn reported to Ms Patricia Murphy (Deputy Divisional Manager) who in turn reported to Ms McGirr (Divisional Manager).) Ms Middleton accordingly had a much wider remit of managerial duties covering a much wider area, beyond her managerial responsibilities in relation to the claimant.

52. The claimant was given an appraisal by Ms Middleton in August 2016. Large sections of this appraisal were not completed, including the sections which set objectives for the claimant and the personal development plan. Within the sections of the appraisal which she filled in, the claimant identified problems with work which she maintained she faced; these included workload, communication, others not doing their jobs, and lack of support from senior staff. The fact that they were contained in this appraisal form indicated that they were in existence earlier than August 2016. By December 2016, the claimant was signed off work due to stress because of workplace issues. She acknowledged in cross-examination that the issues which caused her to be signed off with stress had affected her at least in the last quarter of 2016; however, given what is set out in the August 2016 appraisal, we find that they were affecting her much earlier than that too.

53. Ms Goodwin started work at the respondent on 3 January 2017. The claimant was back at work by this stage. Whilst the claimant and Ms Goodwin met at this point, any interaction between them was limited.

54. On 9 January 2017, the claimant started a further period of sick leave due to stress, returning on 20 January 2017.

55. Ms Middleton left the respondent on 13 January 2017. The interim Divisional Manager, Ms Karen Hunter (who replaced Ms Middleton prior to the arrival in March 2017 of Ms McGirr), decided on 16 January 2017 that the claimant, and another Band 7 Service Manager, JO, should report to Ms Goodwin. At the time, these were Ms Goodwin's only two reports. Ms Hunter decided that the historic arrangements whereby the claimant (and JO) reported directly to the divisional manager did not make sense.

56. JO is female. She is black and of West African origin. She is not a Muslim.

57. No handover was carried out by Ms Middleton to Ms Goodwin in relation to the claimant. In particular, Ms Goodwin did not know the reason why the claimant was on sickness absence and assumed, given the time of year, that it would probably have been due to a cold/flu type of illness.

58. Ms Goodwin met the claimant on 23 January 2017. She intended to use the meeting both as an introduction and to talk about work and how she intended to perform her role as line manager and as a return to work meeting.

59. At the meeting, the claimant presented Ms Goodwin with a fit note and told her that her illness had been stress-related; Ms Goodwin did not know this until that point. She was not entirely clear how to deal with this and therefore did not specifically agree to anything at that point and stated that she needed to seek advice from HR. The claimant has suggested that Ms Goodwin “rejected” her fit note; Ms Goodwin denies this. For the reasons of respective reliability of evidence referred to above, we accept Ms Goodwin’s evidence that she did not reject it (which will also be a very odd thing to do) but merely did not take any decisions at that point and said she needed to speak to HR.

60. As part of her management style, Ms Goodwin held weekly one-to-one meetings with her reports and set out in clear terms what actions and duties were expected of them, both for the immediate and long-term, and would record the action points for them to take away. She had herself previously been managed in this way and at her previous job had managed her reports in this way. She found this style helpful and effective, in particular because there was no ambiguity as to what the manager’s expectations were of the report in question. She implemented this style in relation to both the claimant and JO. This style of management was a much more hands-on and rigorous style than either of them had been used to previously. Neither of them liked it.

61. The claimant pushed back against suggestions which Ms Goodwin made. Ms Goodwin’s objective, particularly given the previous hands off management style which applied to the claimant and the fact that she had previously had periods of sickness absence due to stress, was to set the claimant clear goals so that she knew what was required of her, and to be regularly available to her should any issues arise, in the hopes that that might alleviate any stress which the claimant felt.

62. The claimant reacted particularly badly to being asked to do what she considered menial jobs which should be done by someone of a lesser grade. However, these were ad hoc jobs which, if asked, she was expected to do as part of her job description. Furthermore, the evidence of the respondent’s witnesses was that, in accordance with the respondent’s ethos of teamwork, it was expected that where necessary employees would have to do jobs of this nature. However, the claimant reacted badly to this, often stating that it was “not her job” and sometimes refusing to do such jobs.

63. Ms Goodwin spoke to the claimant about the tone of some of her email correspondence, both with herself and with others. As noted, we have seen a lot of the email correspondence in question; some of it is very abrupt and, at other times, in relation to Ms Goodwin, some of it is rude and even sarcastic. The claimant does not consider it to be so; however we have seen the emails and we find that it was. The reason Ms Goodwin addressed her about her email correspondence was because of its tone.

64. On 26 January 2017, the claimant contacted Ms Jarrold. They had a meeting. She told her that she had felt stressed with work and had been off sick from 9-19 January 2017 as a result. She suggested that Ms Goodwin had been “micromanaging” her and not supporting her and stated that she would like to

have a change of line manager. Ms Jarrold was conscious that the claimant was only a few days into her new line management and that it was much too soon to be concluding that a new line manager was necessary and, furthermore, it was not Ms Jarrold's decision; she explained this to the claimant. However, she spoke with Ms Goodwin and she also asked Ms Goodwin to use Mr Willis, HR Manager, as a point of contact to address any issues regarding the claimant's return to work following her sickness absence.

65. Ms Goodwin implemented a policy amongst her team (herself, the claimant and JO) that, in order to support the demands of the service, only one of them should be away on holiday at a particular time. Both the claimant and JO were aware of this policy. Ms Goodwin had made clear that it would be important that the three of them check with each other before booking any annual leave requests so as to ensure that no more than one of them was off at the same time. These arrangements were particular to Ms Goodwin's team and were not replicated in other teams, in particular the team of Ms Goodwin's equivalent, Ms Meryl Reinink, who also managed a team of Band 7 Service Managers.

66. On 31 January 2017, the claimant set out her annual leave requests as Ms Goodwin had asked and she approved them. She also approved her to carry over four days into the next leave year and noted that the claimant had mentioned taking further leave in April. In an email of 31 January 2017, the claimant thanked Ms Goodwin for approving her leave and stated:

"I said I would like to take a period of leave to celebrate Ramadan/Eid (religious festival) around May. I will know dates once Ramadan has been confirmed nearer the time and will of course give you as much notice as reasonably possible to request leave."

67. The claimant commenced a further period of sickness absence, which lasted from 13 February 2017 until 19 March 2017.

68. At the end of February 2017, Ms Goodwin booked a holiday for one week from Monday 19 June 2017 and returning on Monday, 26 June 2017. Before doing so, she checked that neither the claimant nor JO were off at that time. She did not think anything about Ramadan/Eid as the claimant had indicated that she would be wanting to take time off around May. Choosing that week in June as holiday was important for Ms Goodwin as it fitted in with her husband's much more limited availability as well.

69. When the claimant returned from sickness absence, a phased return was agreed with her over a period of four weeks and various adjustments were put in place for that period, including adjusted hours and Ms Goodwin relieving the claimant of some tasks. This was all arranged through Ms Goodwin and Mr Willis.

70. In late April 2017, the claimant raised the issue of taking some annual leave for Ramadan. At that time she indicated that the leave which she would request would be in June 2017. A contemporaneous email of 21 April 2017 shows that Ms Goodwin asked the claimant to confirm what dates she would like to request in June 2017, reminded the claimant that it was expected that only one of the three would be away at any one time, noted that the claimant had said that

she couldn't confirm when Ramadan was as yet and noted that Ms Goodwin would try to be flexible but noted that 17-21 June was when Ms Goodwin was on leave.

71. The claimant subsequently said that she wished to take one week's leave commencing on 19 June 2017, with Eid (which falls at the end of Ramadan) being on Saturday, 24 June 2017. This was precisely the week which Ms Goodwin had already long since booked as leave, a fact which the claimant was aware of. Ms Goodwin told the claimant that she had booked this week off already and the claimant said that she had always had Ramadan off and therefore wanted it anyway. Ms Goodwin therefore went back to the claimant suggesting that as a compromise she could take the week off after Ms Goodwin returned from leave, and that, if she wanted to take up to 2 days off during the week prior to Eid (when Ms Goodwin was away), Ms Goodwin would accommodate this. She felt that this was a good compromise as she was offering some flexibility and ensuring that the claimant had a week off around the period in question, whilst also ensuring that service provision was maintained and not placing an unbearable burden on JO, who would otherwise have been on her own in the office for a whole week. The claimant did not explain to Ms Goodwin that there was anything in particular requiring leave in the week commencing 19 June 2017 and, as far as Ms Goodwin was concerned, she thought that they had reached a sensible compromise. The claimant in fact booked leave for 16 June 2017 and the week of 26 June 2017. In the end, this annual leave was not taken because the claimant went on sick leave on 15 June 2017 until 3 July 2017.

72. The claimant had previously suggested to Ms Goodwin that she was not able to book her leave earlier than she did because the dates of Ramadan were not fixed at that stage. She maintained the same at this tribunal. It was put to her that it is quite possible through a simple internet search to ascertain in advance when Ramadan falls on a particular year (and indeed, a search of the internet quickly reveals when Ramadan will fall in future years). When this was put to the claimant, firstly she denied it; then, when pressed, she stated that she was from a particular Muslim sect where it was not possible to identify when Ramadan falls until very late on. This was completely new and no reference to this specific sect had been made in the proceedings so far. Furthermore, the claimant advanced no evidence other than her assertion as to problems in identifying the dates of Ramadan or indeed of this particular sect (which she never identified by name). In the light of that, and faced with the evidence that one can ascertain the dates of Ramadan in advance, we find that the claimant was not prevented from booking her leave further in advance due to an inability to ascertain the dates of Ramadan; moreover, we accept Ms Genn's submission that the reason why she did not book a holiday further in advance was simply that, under her previous management, she was used to taking holiday when she wanted because the policies applied in relation to holiday were much less rigorous than under Ms Goodwin.

73. Ms Goodwin saw a copy of the August 2016 appraisal of the claimant completed by Ms Middleton and noted that many sections were not completed. She felt that it was important that objectives should be set and worked towards

and that she should start again in terms of this appraisal process. She did the same in relation to JO. The claimant was given a significant amount of warning that she was going to have a meeting to discuss her appraisal and objectives going forward. The claimant reacted badly to this and ultimately the appraisal objectives were never finalised before the claimant's resignation.

74. The claimant has suggested that her appraisal rating affected her potential for a salary increment. This was not correct because the increment is paid when someone receives a performance rating of "satisfactory" or better and, albeit she had significant performance concerns about the claimant, Ms Goodwin decided to rate her "satisfactory". However, the allegation about the alleged impact upon the salary increment is something that, notwithstanding the clear evidence to the contrary, the claimant persisted with at this tribunal.

75. There were also issues with the claimant's adherence to start and finish times and attendance at meetings during work. In particular, there were occasions when the claimant arrived late for work or left work before her finish time. Unlike other employees, many of whom worked well in excess of their contractual hours, the claimant rarely did this but generally stuck to her contractual hours; that in itself was not problematic but, on many occasions, she would in fact arrive late or leave slightly early or stop actually working prior to her finish time and spend the rest of the time packing up (washing up, going to the toilet etc) during work time such that she was not working her full contractual hours. Ms Goodwin picked her up on this and we have seen email evidence of the same. She did so because the claimant was not working her full contractual hours.

76. In May 2017, the claimant, along with other Band 7 Service Managers, including JO, did a presentation about the performance of their respective divisional services. The claimant's presentation was poor and she could not answer some fairly basic questions about her services. After the meeting, Ms Goodwin told her that some of these questions were simple ones which she should have known the answer to. At that meeting, for the first time, Ms Goodwin indicated to the claimant that they may need to look at some form of performance process in relation to the claimant. No such indication had previously been given and, in the end, at no stage was the claimant put on any performance process.

77. By email of 26 May 2017 to Ms Goodwin, the claimant handed in her notice. In that email she stated:

"Under current management I have faced significant bullying, intimidation, racial and religious discrimination. I'm no longer able to work in such a hostile environment and the position I have been forced into is tantamount to constructive dismissal and falls short of "Moorfield's Way" of being caring, organised, excellent and inclusive.

On the basis of this experience I will also be consulting with a lawyer. However, I think it would be beneficial for the trust and myself not to go down this route and will be open to considering an early release with full pay for the 3 month notice period including annual leave entitlement."

This was the first time that the claimant had mentioned racial and religious discrimination.

78. The week after the claimant handed in her resignation was half term and the division as a whole was particularly short staffed. There was a training session for divisional management that week, which could either be done in June or September. Ms Goodwin was due to be attending the training, as was the claimant and JO, but due to the lack of people around, Ms Goodwin decided that some people needed to stay back. She asked the claimant to stay back and she did not go to the training herself either. She therefore sent only JO from their team.

79. In the light of the allegations in the claimant's resignation email, the respondent of its own volition decided to conduct an investigation. The investigation was led by Ms Jenny Martin, the Head of Nursing, who was supported by Ms Anderson of HR.

80. The claimant was very reluctant to be involved in that investigation notwithstanding the fact that she remained an employee of the respondent at that time and was at work for much of her notice period. She was invited to an investigatory meeting on three occasions. On two occasions she declined to go because of what she said were issues about the availability of a trade union representative and on the third she said she was too busy at work. Ms Anderson went to Ms McGirr about this and Ms McGirr made clear that, whatever the work requirements were, they should not stop the claimant being available for an investigatory interview. The claimant was angry with Ms Anderson about going to speak to Ms McGirr. She told Ms Anderson categorically that she did not want or need an investigation. She was, however, in the end, interviewed as part of this investigation.

81. JO was also interviewed as part of the investigation. She was asked about Ms Goodwin's management. In relation to this, she stated that she had never been managed that way before. She stated in response to questions about whether she had been undermined or shouted at by Ms Goodwin, that she had been. She described Ms Goodwin as commanding/demanding and authoritative. She made clear that she was aware of the annual leave requirement which Ms Goodwin imposed about two out of the three of them having to be in the office at one time. When asked if she felt that other people were favoured in the office (outside JO and the claimant), she said that it was hard to say as Ms Goodwin didn't manage them but that her tone was different when she talked to them. When asked about her current working relationship with Ms Goodwin, she stated that it was okay and added that "she is a very good manager in her own way", stating that she was different, felt that she had got better but sometimes felt that she had managed her as a Band 3 which she considered demoralising but that, however, she had been very supportive with a personal issue which she had.

82. Ms Martin also interviewed SD, who was an acting up Service Manager. SD was of a lower grade than both the claimant and JO. She had also recently been managed by Ms Goodwin, although she was not part of the team of three (Ms Goodwin, the claimant and JO) referred to already; SD's tasks were part of a different work stream, with several people reporting to her.

83. SD is female. She is of Indian ethnic origin. Her religion is Hinduism. We have no evidence before us that SD was a poor performer and, therefore, find she was not.

84. Ms Martin asked SD about whether she had any issues or concerns with Ms Goodwin as a line manager. SD stated that she had no issues; that Ms Goodwin was very supportive and went out of her way to support and help; that she liked working with her and that she specifically made time for her; that they had regular one-to-one meetings; that she liked them as it gave her a chance to go through any queries; that Ms Goodwin always helped and that she was very thorough; that she was always very polite and friendly and that the meetings were always documented; and that she was very happy working with her and that she had always been very supportive.

85. Ms Goodwin's evidence before the tribunal was that there were significant performance concerns not only with the claimant but also with JO and we accept that. Furthermore, she managed the claimant and JO in the same way, as she did SD. Having analysed the investigation interviews set out above and the evidence given by Ms Goodwin and the claimant at this tribunal, we consider that the adverse comments made by the claimant and JO were, on the balance of probabilities, as a result of the fact that both were underperformers, were unused to the much more rigorous management style of Ms Goodwin, and consequently did not like it; and not because Ms Goodwin was being unfair to either of them. The contrast with the evidence of SD, who is extremely complimentary about Ms Goodwin's management style, is stark; and SD, by contrast, was not a poor performer.

86. Ms Martin's report was completed in September 2017. She did not uphold any allegations of discrimination. There was no unreasonable delay in completing the report and the time taken was, understandably, due to the number of witnesses whom Ms Martin interviewed over July and August 2017.

Conclusions on the issues

87. We make the following conclusions, applying the law to the facts found in relation to the agreed issues.

Direct discrimination and harassment (race and religion)

88. We turn first to the allegations of direct discrimination and harassment. We note that, as set out earlier in this judgment, there is no defined list of the allegations which are the subject of this claim. The facts found above cover many of the allegations made by the claimant in her claim and her response to the further and better particulars. They do not cover them all; however, that is because the analysis of whether or not such allegations form the basis of successful discrimination complaints stands and falls by the same reasoning which applies to those allegations which we have set out in our findings of fact. It is therefore neither necessary nor proportionate to go any further than we have in our fact-finding.

89. We turn first to the comparators cited by the claimant for the purposes of her direct discrimination complaints. The claimant's allegations are about her treatment by Ms Goodwin. All of the comparators cited whom the claimant has described as being white and non-Muslim were other Band 7 Service Managers. However, crucially, none of them were managed by Ms Goodwin; rather, they were managed by Ms Reinink. That is clearly a material difference between their circumstances and those of the claimant. They are not therefore valid comparators.

90. The claimant has not sought to compare herself and her treatment to JO, the other Band 7 Service Manager managed by Ms Goodwin. That is not surprising, because Ms Goodwin's approach to management in relation to JO was the same as her approach in relation to the claimant (for example one-to-one meetings, setting objectives at appraisals and the holiday policy) and there is therefore no difference in treatment.

91. The claimant is, therefore, left with relying on a hypothetical comparator. She appears to accept that she and JO were treated in the same way and one can therefore only assume that any hypothetical comparator in relation to her race discrimination complaints she relies on is someone from a non-BAME background managed by Ms Goodwin. This still does not assist with her direct religious discrimination complaints as JO, who was treated the same way as the claimant, is not a Muslim.

92. However, leaving that aside, this is a case where it is very easy to conclude, without even needing reference to the burden of proof, that the reason for the treatment of the claimant was not in any way because of or related to race or religion, such that all of the complaints of direct discrimination and harassment fail.

93. There is no evidence before us, beyond the claimant's assertion, that any of Ms Goodwin's actions in managing her were because of or related to her race or religion. The nearest we get is the tentative statement by JO in her investigatory interview that Ms Goodwin has a different tone when she speaks to others in the office, albeit acknowledging that she doesn't manage those other people. As we've already found, any difference in treatment from others in the office was due to the fact that Ms Goodwin was managing JO and the claimant and indeed that they had performance issues; it was not because of or related to race or religion.

94. Furthermore, there are non-discriminatory reasons, which we accept, for all of the allegations referred to. Most are set out in our findings of fact above but, by way of example, Ms Goodwin held one-to-one meetings because she thought they were an effective management technique; she brought the claimant up about her email tone because the tone of her emails was at fault and sometimes rude; she addressed with the claimant her being late or leaving early because she was being late or leaving early; she set objectives (or tried to set objectives) for the claimant because she thought that these would be beneficial both to the claimant and for the purposes of the service; and she maintained the

holiday policy which she did because of the needs of the service. None of these reasons are anything whatsoever to do with the claimant's race or religion.

95. The direct discrimination and harassment complaints therefore all fail.

96. It is worth stressing for the claimant's benefit that, even if Ms Goodwin's management of the claimant had been at fault (and we have made no findings that it was), that would not in itself found a claim of race or religious discrimination. Just because a manager might be a bad manager or even an unfair or unreasonable manager, it does not follow that such behaviour is because of race or religion.

Indirect discrimination (religion)

97. Nothing in the mass of allegations has been clearly identified as an indirect discrimination complaint and there has certainly been no attempt to split this up into the four constituent elements required to establish a successful indirect discrimination complaint (as set out in our summary of the law above). From the evidence we have heard, the only area which could constitute such a complaint concerns the issues of the claimant seeking to take holiday during Ramadan. As identified above, that cannot be a successful direct discrimination complaint; that is because any restriction on the claimant's ability to take holiday in the week she wanted to in June 2017 was not because she was a Muslim but because of the policy put in place for the purposes of maintaining the service that only one out of the claimant, JO and Ms Goodwin should be away on holiday at one time. That policy applied to all of Ms Goodwin's Band 7 reports, regardless of their religion.

98. That leaves a potential indirect discrimination complaint, albeit one that has not been constructed for us by the claimant. There is therefore an element of our having to try and discern what possible PCP might be relied on, what the general and individual disparate impact as a result of such a PCP relied on is and then to consider justification.

99. First, we consider the situation if the PCP relied on is that the claimant and JO had to give long notice of any annual leave they wished to take. However, that PCP has not been established. There is no suggestion that, if the claimant had given short notice of holiday she wished to take on dates when another member of the team did not already have pre-booked holiday, that such holiday would not have been granted. The issue was that Ms Goodwin had pre-booked holiday on the dates when the claimant wanted to take her holiday. That PCP therefore is not established.

100. The only other PCP which we can think is relied on is the policy itself, namely that no more than one of the three should be away on holiday at any one time. However, whilst that was Ms Goodwin's stated policy (which the claimant and JO were both aware of), it was not in fact fully applied in relation to the claimant's holiday request; specifically Ms Goodwin allowed the claimant to take two days in the week prior to Eid (the week beginning 19 June 2017 when Ms Goodwin herself was also away), albeit the claimant did not in the end book

them. However, to the extent that she did not permit the claimant to take the whole of that week, she did apply the PCP of only allowing one of the three of them to be away on holiday at any one time to 3 out of the 5 days of that week. To that extent the PCP was applied.

101. Secondly, in terms of group disadvantage, the claimant has not established that Muslims generally would be disadvantaged by not being able to take holiday at this time. Eid itself that year fell on 24 June 2017, which was a Saturday; so if the claimant's issue was that she wouldn't be able to be away from work on Eid itself, that clearly didn't apply. As to Ramadan, clearly the claimant herself (and thousands of other Muslims in Britain) would be working for large parts of Ramadan; the claimant was not seeking to take the whole of Ramadan as annual leave, so having to work in Ramadan per se cannot be a disadvantage to her, even from her own point of view. She may have liked to have taken the period of Ramadan immediately prior to Eid as holiday but she has not established that not being able to do so put her at a disadvantage as a Muslim. Furthermore, even if that was her preference, she was given the option of taking the two days immediately prior to Eid as a holiday by Ms Goodwin, but she did not even choose to take this up; this is further evidence that it did not put her at a disadvantage, even from her own point of view. Given the timing of Eid that year, therefore, the claimant has not established that the turning down of her holiday request put her at a disadvantage or would have put other Muslims at the same disadvantage. The indirect discrimination complaint fails for that reason.

102. We have already rejected any indirect discrimination complaint on the basis of a PCP that the claimant be required to give long notice of any holiday request on the basis that no such PCP was established. However, even if it had been established, we accept Ms Genn's submissions that such an indirect discrimination complaint would fail because the claimant would not have been able to establish disparate impact. This is because, as set out in our findings of fact, it has not been established that it was not possible to ascertain well in advance when Ramadan would fall. We therefore accept that the claimant could have notified Ms Goodwin far earlier (before Ms Goodwin had booked her own holiday) that she wanted to take holiday on that particular week in June. The claimant simply did not do so because she was used to being able to take holiday as and when she wanted to under the previous less rigorous regime. There was therefore no disparate impact and an indirect discrimination complaint based on that PCP would also have failed.

103. As the indirect discrimination complaint is disposed of, it is not strictly necessary to consider the issue of justification. However, for completeness, we address that in relation to the PCP that has been established, namely the policy of requiring only one person to be away at one time. The reason for this policy was to provide optimal service and not to put unnecessary pressure on the remaining member of the team who, in the absence of the policy, would be left in the office alone. That is an entirely legitimate aim. Furthermore, we consider that Ms Goodwin's application of that legitimate aim in the case of the claimant's holiday request was entirely proportionate. She did not apply the policy blindly but gave some flexibility by allowing the claimant the week after Eid as holiday and two days in the week leading up to it, notwithstanding that this would leave

JO alone in the office for those days. There was no other way of applying the policy (or effectively disapplying it) without leaving one member of the team alone for an entire week, with the consequent unacceptable impacts on service provision and on the individual in question. For these reasons we consider that the application of this PCP was justified and the indirect discrimination complaint would fail for this reason too.

Constructive discriminatory dismissal

104. For the claimant's complaint to amount to constructive discriminatory dismissal, at least some of the acts/omissions of the respondent which she relies on must have been discriminatory; we have found that none of them were. Therefore, this complaint fails for this reason.

105. However, we also find that none of the acts/omissions amounted either individually or cumulatively to a breach of the claimant's contract, let alone a repudiatory breach of contract (a breach of the implied term of trust and confidence). All of them were legitimate management decisions, for which there was reasonable and proper cause. They were neither calculated nor likely to destroy or damage trust and confidence. It is simply that the claimant, who was not used to being managed in this way, did not like being managed in this way. The constructive discriminatory dismissal complaint therefore fails for this reason too.

106. Finally, we do not consider that the claimant resigned because of these acts/omissions. The claimant had been unhappy with Ms Goodwin's management style right from the beginning and did not resign. We do not consider that Ms Goodwin's criticisms about her presentation in May, which the claimant maintains was the final straw which led to her resignation, are likely to be the trigger for her resignation; they are just one of many examples of Ms Goodwin giving the claimant feedback, albeit critical feedback, on her performance. What is significant about that meeting where those criticisms were made is that, for the first time, Ms Goodwin indicated to the claimant that she was considering performance managing her. In short, we find on the balance of probabilities that the claimant decided to jump before she was pushed and in her resignation letter attempted to secure an early exit with notice pay and holiday pay into the bargain. Her striking unwillingness to participate in the respondent's investigation into her discrimination complaints is further indicative that the complaints themselves were not what was important here; rather, as we have found, she wanted to exit when she realised that performance management was imminent.

107. The constructive discriminatory dismissal complaint therefore fails for this reason too; namely that the claimant did not resign because of the alleged repudiatory conduct.

Conclusion

108. All of the claimant's complaints fail.

Employment Judge Baty

Dated: 12 November 2018

Judgment and Reasons sent to the parties on:

13 November 2018

For the Tribunal Office