EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms P Elliot	**v**	**One Housing Group Limited**

Heard at: London Central
On: 10 - 12 January 2018 and 15 and 16 January 2018

Before: Employment Judge Hodgson
Mr S Ferns
Ms T Breslin

Representation
For the Claimant: Mr, in person
For the Respondents: Mr Wojiechwski, solicitor

JUDGMENT

1. **All claims of direct discrimination fail and are dismissed.**
2. **All claims of harassment fail and are dismissed.**

REASONS

Introduction

1.1 By a claim presented to the London Central Employment Tribunal on 16 June 2017 the claimant brought claims of direct discrimination, and harassment.

The Issues

2.1 At the commencement of the hearing on 10 January 2017 the parties agreed that the issues were as set out in the case management hearing of 1 September 2017, as follows:

2.2 There are claims of direct race discrimination and harassment related to the protected characteristic of race.

2.3 The specific allegations of detriment/harassment relied on are:

2.3.1 Allegation 1 - by the respondent failing to give the claimant a probation review in October 2016, December 2016 and January 2017.

2.3.2 Allegation 2: by falling to provide the claimant with a digi pass which should have been provide not later than January 2017.

2.3.3 Allegation 3: by Mr Peter Moore refusing on 12 April 2017 to allow the claimant to work from home.

2.3.4 Allegation 4: by Mr Peter Moore speaking to the claimant aggressively on 24 April 2017 in front of other staff [Margaret Walker, Matilda, Yuliya and possibly Geoff].

2.3.5 Allegation 5: by Mr Peter Moore on 1 June 2017 falsely alleging there were errors in the claimant's work.

2.3.6 Allegation 6: by dismissing the claimant on 1 June 2017.

Evidence

3.1 We heard from the claimant, C1.

3.2 For the respondent we heard from Mr Peter Moore, R4; Mr Paul Rickard, R5; and Ms Hilary Judge, R6.

3.3 We received a bundle, R1, a chronology, R2, and a cast list, R3.

Concessions/Applications

4.1 On day one of the hearing, we agreed that the issues, as set out in the case management discussion of 1 September 2017, were accurate. The claimant confirmed that the allegations of detriment/harassment were recorded correctly.

4.2 We noted that the parties had supplied six bundles of documents and the claimant's statement was lengthy. We enquired whether the case had been listed with sufficient time. The parties agreed that no further time was needed, and agreed that the indicative timetable, as recorded on 1 September 2017, was appropriate. The claimant agreed that the cross-examination of each of the respondent's witnesses would take no more than one hour. The respondent's cross-examination of the claimant would take no more than three hours. We therefore agreed that sufficient time had been allocated.

4.3 The claimant indicated that a number of applications had been made prior to the hearing. The tribunal considered the file, and noted this there had been considerable correspondence. The tribunal drew the parties

attention to the order of 21 December 2017, which specified there appeared to be no outstanding applications, and if either party wished to proceed, that party should apply by letter giving the exact wording of any order sought. No such application was made by either party. The claimant was told that if she wished to apply for further documentation, she must make a specific application. No application was made.

4.4 We read for the rest of day one.

4.5 On day two, we checked, once again, that the parties still agreed the timetable.

4.6 We noted that a bundle of documents had been produced, which was said to be confidential. We confirmed that there was no order providing for either redaction or the hearing of any part of the case in private. Therefore, if the parties referred to any document, they must assume that the public would have a right to see it. We suggested that if any document was referred to, which had commercial sensitivity, the parties could apply to have that document considered in private. No such application was made.

4.7 We also noted that the parties may wish to redact documentation which was not relevant. The claimant indicated that there were certain documents which were redacted. We confirm that the claimant must apply for disclosure of the full document if she considered it relevant. No such application was made.

4.8 The claimant indicated that she had a number of documents which she proposed to introduce into evidence. We confirmed that it would be necessary to copy those documents and to provide them to the tribunal and to the respondent. Despite the indication that such documents would be put in evidence, they were not produced by the claimant.

The Facts

5.1 The respondent is a registered social landlord managing 15,000 homes in 26 London boroughs and surrounding counties.

5.2 On 16 July 2016, the claimant started employment as a business planning accountant.

5.3 The contract provided for a six-month probationary period. It states the respondent "may at its absolute discretion extend your probationary period."

5.4 There is a probationary procedure. It provides for probation review meetings. There should be 1:1 meetings with two formal meetings at three and five months to review performance. As regards unsatisfactory performance, it states:

> **Where problems are highlighted and/or training needs identified, appropriate support will be provided. In such cases, the manager will meet formally with the employee to explain the shortfall between the expected standards and those achieved, and to discuss any additional support or training which can be offered. The manager should also give an unambiguous indication of the necessary improvements and clear warning that their employment may not be confirmed if the required standards are not met within the agreed timescales.**

5.5 The respondent has a capability procedure, but that was not relevant to those on probation.

5.6 As the business planning accountant, the main functions of the claimant's job were as follows: first, to work with the development team, and review development appraisals before they went to the executive board; second, to build Excel models as required; and third, to prepare the financial plan, be involved with reporting (including the financial forecast return) stress testing, business analysis, and the review of such plans. The financial plan demonstrated the relevant figures, whereas the business plan showed the effects of the figures on the organisation and its working strategy.

5.7 At the time the claimant joined, the respondent's governance rating had been downgraded by the Homes and Communities Agency (HCA). There had been a number of problems, including difficulties with the business plan. One of the claimant's most important tasks was to work on, and complete, the business plan.

5.8 The claimant was invited to two induction sessions, one in August 2016 and one in October 2016. She attended neither.

5.9 The claimant was initially managed by Mr Nathan Pickles, who was the interim corporate finance director from June 2016 to December 2016. He was a consultant working three days a week, and his involvement with the claimant was limited.

5.10 During the early part of her employment, Mr Paul Rickard, chief financial officer, received a number of reports from staff who were concerned about the claimant's behaviour. He took no specific action.

5.11 In approximately August 2017, Mr Rickard was involved in recruiting a new director of corporate finance, Mr Peter Moore. Mr Rickard had known Mr Moore previously and had headhunted him. During their interview, Mr Rickard identified that there were difficulties with the claimant, but did not go into significant detail. The claimant's performance was one matter raised as part of a general discussion about improving performance.

5.12 Mr Moore started his employment on 16 November 2016. He had his first one-to-one meetings with the claimant on 25 November 2016. He had no previous experience as a financial planner; his experience was in treasury. The claimant assured him she had relevant previous experience.

5.13 Mr Moore began to have concerns about the claimant's performance within the first month, as he believed she departed from his instructions and did not complete tasks to his required level. He wanted a rebuild plan, but instead received what he considered to be a structure without data. This led to further discussions. Mr Moore explained that he needed to see the potential of the new structure and the fact that it gave correct results. At the beginning of December 2016, the claimant agreed to complete the task fully.

5.14 Mr Moore continued to have input and he assisted the claimant. However, he did continue to have concerns. One concern was that on 5 December 2016, the claimant sent an email to June Riley, director of financial management. She also escalated her concerns by copying in Mr Rickard. He was concerned the claimant's email was provocative and could be misinterpreted. He advised her to discuss matters with him before escalating them. She did not attend an interview arranged to discuss this. He continued to have concerns about the claimant's emails and the tone of them.

5.15 Mr Moore was concerned that it took the claimant's three months to complete the rebuild plan, rather than the one month he thought reasonable.

5.16 Mr Moore had further concerns about the claimant's work on the business plan. This was time sensitive. It was to be completed for the May 2017 board meeting. On 8 December 2016, Mr Moore sent an email to the claimant stressing the need to complete the business plan within a tight timetable. He indicated the plan would need to be prepared in the fourth quarter and presented to the board by February/March at the latest, to include all stress tests and covering reports. Work started in December 2016.

5.17 On 5 April 2017, Mr Moore agreed with the claimant a deadline for the business plan of 30 April 2017. The claimant was unable to comply, and the deadline was extended to 3 May 2017. The business plan, FFR, stress test, and scenario test were to be made available to Mr Rickard by that date, so he could prepare for the board meeting on 24 May 2017.

5.18 The claimant was unable to meet the deadline and extended time to 16 May 2017, and later extended it to 20 May 2017. As a result, no stress test could be presented to the board in May 2017. The plan was finally submitted by the claimant on 23 May 2017

5.19 Mr Moore continued to have serious concerns and sought HR advice. In early April 2017, Mr Moore had taken the view that the claimant should be assessed as failing her probation and dismissed, unless there was significant improvement, and the business plan was delivered within a reasonable time and appropriately drafted. Whilst dismissal was contemplated, and appeared to be likely, a final decision has not been made.

5.20 Mr Moore's concerns were such that he sought the assistance of an external consultant, Altair, to review the draft business plan in the claimant's absence. Joanna Williams, the claimant's predecessor, now worked for the consultant firm, and she was allocated. Ms Susan Kane of Altair confirmed that the brief was for Ms Williams to provide "the required Brixx, stress testing and FFR support" in the absence of the respondent's own financial planning accountant.

5.21 Mr Moore recognised there had been difficulty in the claimant meeting the relevant target. There had been delays in the provision of information, but he was critical of the claimant for not working around the information and, thereby, causing further delay. He believed the appropriate information could to be taken from the management accounts. The month 11 accounts were available, and any differences to period 12 would be insignificant. He had a number of meetings with her. On 3 May 2017 he made recommendations, but found her to be defensive.

5.22 Mr Moore was concerned that the business plan, as produced by the claimant, contained errors. When he received the plan on 23 May 2017, he had further concerns. There were difficulties with the debt adjustments. The originating debt was, in his view, wrong. He thought the claimant had failed to understand the fair value adjustment in the balance sheet which corrupted the interest bill by £3 - 4 million per annum.

5.23 On the day the claimant submitted the report, the claimant requested a weeks "flexi-leave" as she was exhausted. This directly led to the respondent paying Altair to review the business plan. When Ms Williams reviewed the report, she produced a draft report of the errors contained in the claimant’s draft. Ms Williams report suggested there were difficulties which included the following: rent inflation modelling errors; treasury objects were remodelled as the SWAPS object had not been used; the opening balance sheet required some corrections to correct double counting and some omissions; there was no working capital objects in the SPV section of the consolidated plan; and there were other difficulties with the plan structure. We can make limited findings about these observations. Mr Moore has not explained, in any detail, in his statement or anywhere else the significance of this report. There remains considerable dispute between the parties as to whether the claimant's work was defective and if so, whether that was blameworthy. Ultimately, it is not for this tribunal to say whether the claimant's work was, or was not, adequate. We are satisfied that Mr Moore believed that the claimant's work on this report was deficient.

5.24 Mr Moore was particularly concerned by the loan figures and the interest discrepancy. Further, he had a more general concern about the approach the claimant had taken which was extremely detailed, whereas he believed a more high level approach, whilst not examining every pound, could achieve a 95% accuracy.

Probation

5.25 The claimant did not receive, at any time, a formal probation review. She did have one-to-one meetings with Mr Moore.

5.26 On 19 January 2017, the claimant asked for clarification of her probation review. Mr Moore told the claimant that the probation would be extended, but he did not know for how long for. He did not formally confirm this in any letter. The claimant simply replied that was okay, and he thought that was sufficient. It is clear he did not follow the respondent's written procedure. As time progressed, and leading to March and April 2017, Mr Moore formed the view that the claimant was not right for the role or for the team. By April, he had formed the view the claimant's employment should be terminated, unless the completed business plan demonstrated a significant improvement in the claimant's work.

The dismissal

5.27 On 1 June 2017, the claimant returned to work. The claimant was asked to attend a meeting. There was discussion about the business plan. The claimant maintained there was nothing wrong with the business plan. She became angry and raised her voice. The true purpose of the meeting was to terminate her employment and eventually Mr Moore did this. There' has been some disagreement as to the length of the meeting. Two of the respondent's witnesses put the length of the meeting at 45 minutes and we find, on the balance of probability, that the claimant is mistaken as to the length of the meeting.

5.28 Mr Moore escorted the claimant from the premises. The claimant shouted at him to stop following as if she were a thief. She then shouted at him to the effect that he had a problem with black people, before she left the premises.

5.29 There are a number of other matters about which the claimant complains and we will deal with the factual circumstances relevant to those in our conclusions.

The law

6.1 Direct discrimination is defined in section 13 of the Equality Act 2010.

Section 13 - Direct discrimination

> **(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.**

6.2 **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 is authority for the proposition that the question of whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

> **"employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate**

comparator by concentrating primarily on why the claimant was treated as she was." (para 10)

6.3 **Anya v University of Oxford** CA 2001 IRLR 377 is authority for the proposition that we must consider whether the act complained of actually occurred (see Sedley LJ at paragraph 9). If the tribunal does not accept that there is proof on the balance of probabilities that the act complained of in fact occurred, the case will fail at that point.

6.4 Harassment is defined in section 26 of the Equality Act 2010.

Section 26 - Harassment

(1) A person (A) harasses another (B) if--

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(3) …

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

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

age; disability; gender reassignment; race; religion or belief; sex; sexual orientation.

6.5 In Richmond **Pharmacology v Dhaliwal** [2009] IRLR 336 the EAT (Underhill P presiding) in the context of a race discrimination case, made it clear that the approach to be taken to harassment claims should be broadly the same. The EAT observed that 'harassment' is now defined in a way that focuses on three elements. First, there is the question of unwanted conduct. Second, the tribunal should consider whether the conduct has the purpose or effect of either violating the claimant's dignity or creating an adverse environment for him or her. Third, was the conduct on the prohibited grounds?

6.6 In **Nazir and Aslam v Asim and Nottinghamshire Black Partnership UKEAT/0332/09/RN, [2010] EqLR 142**, the EAT emphasised the importance of the question of whether the conduct related to one of the prohibited grounds. The EAT in **Nazir** found that when a tribunal is considering whether facts have been proved from which a tribunal could conclude that harassment was on a prohibited ground, it was always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on that ground. That context may in fact point strongly towards or against a conclusion that it was

related to any protected characteristic and should not be left for consideration only as part of the explanation at the second stage.

6.7 In **Dhaliwal** the EAT noted harassment does have its boundaries:

> **We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award.**

6.8 Harassment may be unlawful if the conduct had either the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

6.9 A claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention. This may, in turn, require the Employment Tribunal to draw inferences as to what that true motive or intent actually was: the person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift, as it does in other areas of discrimination law.

6.10 Where the claimant simply relies on the 'effect' of the conduct in question, the perpetrator's motive or intention even if entirely innocent does not in itself afford a defence. The test in this regard has both subjective and objective elements to it. The assessment requires the tribunal to consider the effect of the conduct from the complainant's point of view: the subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that effect: the objective element. The fact that the claimant is peculiarly sensitive to the treatment does not necessarily mean that harassment will be shown to exist.

6.11 The requirement to take into account the complainant's perception in deciding whether what has taken place could reasonably be considered to have caused offence reflects guidance given by the EAT in **Driskel v Peninsula Business Services Ltd [2000] IRLR 151**, which concerned the approach to be taken by employment tribunals in determining whether alleged harassment constituted discrimination on grounds of sex. In **Driskel** the EAT held that although the ultimate judgment as to whether conduct amounts to unlawful harassment involves an objective assessment by the tribunal of all the facts, the claimant's subjective perception of the conduct in question must also be considered.

6.12 Section 23 refers to comparators in the case of direct discrimination.

Section 23 Equality Act 2010 - Comparison by reference to circumstances

> **(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**.

6.13 Section 136 Equality Act 2010 refers to the reverse burden of proof.

> **Section 136 - Burden of proof**
>
> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision. …**

6.14 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

> **Appendix**
> **(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.**
>
> **(2) If the claimant does not prove such facts he or she will fail.**
>
> **(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.**
>
> **(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.**
>
> **(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.**

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

Conclusions

7.1 We should consider each of the allegations of discrimination/harassment and whether the event relied on occurred as alleged by the claimant. If the events did occur, it is necessary to consider if there are facts from we would could find breach of the relevant provision. It so, has the respondent established that it did not breach the relevant provision.

7.2 We first consider whether the alleged events did occur.

Allegation 1 - by the respondent failing to give the claimant a probation review in October 2016, December 2016 and January 2017

7.3 The respondent failed to give the claimant a probation review at any time. In January, informally, the probation period was extended. However, no formal meetings were held at three months, five months, or at any other time.

Allegation 2: by falling to provide the claimant with a digi pass which should have been provide not later than January 2017

7.4 The respondent did not provide the claimant the digi pass prior to January 2017. The digi pass was a way of facilitating access to the respondent's server via a home computer. The claimant was not required to work at home. There was no formal arrangement which allowed her to work at home. She was still on probation. The contract did not require that she have a digi pass. This allegation, as framed, suggests that there was a need, right, or obligation, for the claimant to have a digi pass prior to January 2017. That allegation is not made out.

7.5 Mr Moore specifically refused to let the claimant have a digit pass on around 6 January 2017. However, he did suggest an alternative: using webmail.

7.6 Later in January, the position change. There was a general movement towards more flexible working which the respondent referred to as the "agile" trial. This involved a number of individuals being given laptops, work mobile phones, and digi passes. As a result of this, a digi pass was requested for the claimant, on or around 13 January 2017. There were delays in its being supplied which were largely due to the ICT department who delayed, believing that it should come from Mr Moore's budget. This was eventually sorted out.

Allegation 3: by Mr Peter Moore refusing on 12 April 2017 to allow the claimant to work from home

7.7 Mr Moore did refuse to allow the claimant to work from home on 12 April 2017. The claimant had no right to work from home. There was no specific policy. It was a matter of discretion for the line manager. Mr Moore's email of 12 April 2017 reminds the claimant that she need consider operational details. He queried the need for her to work from home. He had previously let her work from home on a number of occasions, when there had been difficulties with her plumbing and when she needed to stay in for deliveries. The refusal of 12 April 2017 was not an absolute refusal to allow the claimant to work from home. Mr Moore does refer to her migration to being an agile worker and the need to manage technology transitions to support flexible working arrangements. It is clear he is asking her to agree any home working with him.

7.8 Mr Moore was concerned that the claimant needed to be in the office to facilitate her supervision. He believed that if she needed a quiet area, she could work in a quiet room, within the office.

Allegation 4: by Mr Peter Moore speaking to the claimant aggressively on 24 April 2017 in front of other staff [Margaret Walker, Matilda, Yuliya and possibly Geoff]

7.9 Mr Moore accepts there was an incident on 24 April 2017. Mr Moore did raise his voice in the open plan office, in front of other members of staff, when he requested the claimant come to a meeting. It is clear there was

then a difficult meeting and he accepts his behaviour was at times inappropriate during the course of the meeting. He said he used words to the effect if she "had a problem" she should come into his office as "the bloody door is always open." He told the claimant to "stop stewing." He accepts he should not have sworn.

7.10 The exact trigger for his annoyance on this particular day is unclear. Mr Moore explains he was frustrated with the claimant, as there was continuing failure to meet the deadlines for the business plan. He states that both he and the claimant raised their voices during the conversation in his office. Mr Moore's written statement and oral evidence are not entirely consistent. In his oral evidence he accepted that he raised his voice in the open plan office, but he does not appear to accept this in his written statement.

Allegation 5: by Mr Peter Moore on 1 June 2017 falsely alleging there were errors in the claimant's work

7.11 The claimant has failed to pursue this allegation in any meaningful way. The claimant does not identify in her statement what she believes were the specific areas that Mr Moore is alleged to have falsely identified. Moreover, the claimant, despite being invited to do so by the tribunal, did not raise with Mr Moore the errors which she says were false. There was some evidence given about the loan interest. However, Mr Moore's evidence on this point was compelling and it is clear he genuinely believed that the claimant had made significant errors, particularly with regard to loan interest. There is no factual basis for the claimant's allegation.

Allegation 6: by dismissing the claimant on 1 June 2017

7.12 The claimant was dismissed and we have set out the relevant circumstances. It is clear that she was not told in advance that the meeting on 1 June 2017would be a probation review of any form.

<u>Are there facts from which the tribunal could find discrimination?</u>

7.13 The claimant identifies each of the allegations as being either claim of direct race discrimination, or claims of harassment. The claimant relies on colour and describes herself as a black person. Her case is that individuals who were white were treated better, or would be treated better.

7.14 The claimant does not seek to suggest that there are different facts which turn the burden in relation to the different allegations. The claim is pursued, effectively, as one claim of race discrimination which contains a number of allegations. It is therefore appropriate for us to consider all of the facts, and alleged facts, which the claimant says could lead to an inference of discrimination.

7.15 First, it is said that individuals from other racial groups were given probation interviews. This is clearly true. Mr Moore, for one, received a probation interview before he was confirmed in role. Mr Yuliya Lubska, a white woman, who was appointed in 2017 as a financial analyst, also

received a probation review. However, the full factual circumstances cannot be ignored. The claimant did not initially have a line manager. Mr Moore did not initially give the claimant a probation review, as he believed that he did not sufficiently understand her work and therefore he delayed. As time progressed, he became more concerned about the claimant's work and preferred to manage this difficulty, as he perceived it, by having one-to-one meetings and giving guidance. As a result, he did not engage directly with the probation process.

7.16 We doubt that the failure to give a probation interview in itself would be sufficient to turn the burden. It is clear that the claimant can point to a difference in treatment and a difference in race, albeit the individuals referred to by the claimant were clearly not in the same relevant circumstances. It is the claimant's case that this was unreasonable behaviour by the respondent. It is possible that the mere failure of policy can be seen as unreasonableness. In situations where there is unreasonableness, it may be possible to infer discrimination, but only when there is a failure of explanation for that unreasonableness. It is the fact that there is a failure of explanation which could lead to an inference. In this case, we doubt that there is sufficient evidence of unreasonableness to lead to a possible inference of discrimination.

7.17 The claimant suggests the failure to give her a digi press should lead to an inference. The claimant has pointed to other managers who had digi passes. We have had no proper evidence as to their specific tasks and responsibilities, but it is clear they were not the same as the claimant’s duties. The fact that other individuals may work from home with the consent of their line managers, or may be required to work from home, and therefore needed a digi pass may not be sufficient to turn the burden, as their circumstances are different.

7.18 It could be that the claimant would have liked a digi pass prior to January, but there is no evidence that she suggested it prior to 4 January 2017. Thereafter, Mr Moore made reasonable points, as the claimant had no right to work from home. Her contract did not require home work. Later, as part of the agile work programme, she was requested a digi pass. It is difficult to see how the claimant even establishes difference in treatment. There is insufficient evidence to suggest that other managers, who were in the same material circumstances, a received a digi pass when the claimant did not.

7.19 The claimant points to the refusal to allow her to work from home. The reality is that Mr Moore did allow the claimant to work from home on a number of occasions. He wanted her to work in the office because he was concerned about her work and believed she may need need supervision. He was concerned that she was not meeting deadlines. He believed that the situation would not improve by allowing the claimant to work from home, when the main difficulty appeared to be her approach and he may need to provide active management. In the absence of any specific need to work from home, or a specific right to work from home, and in the

absence of any specific agreement she work from home, the refusal could not lead to an inference of discrimination.

7.20 The claimant alleges that a decision was made in October 2016 that she should be dismissed. She alleges this decision was made by Mr Rickard. She also alleges that in some way this was communicated to Mr Moore, it is less clear whether she believes that it was a direct instruction given to Mr Moore or some form of pressure applied to him. We find that there is no evidence at all that Mr Rickard had decided the claimant should be dismissed in October 2016. There is clear evidence that Mr Rickard had concerns about the claimant, as he raised his concerns with Mr Moore, but he left Mr Moore to deal with any difficulties and to manage the claimant. Therefore, we cannot find there was any decision to dismiss the claimant in October 2016.

7.21 The claimant alleges that her performance difficulties were not brought to her attention adequately. We do accept that there was no formal probation meeting. However, there is compelling evidence that there were difficulties in the claimant's work which were discussed with her. Mr Moore had concerns about the claimant and her approach. He discussed his concerns on a number of occasions. Further, the claimant could be in no doubt that the delays in producing the business plan were seen negatively. We do not accept that the claimant failed to understand that there were difficulties with her performance. Whilst it would have been possible for Mr Moore to address his concerns more formally, it cannot be said that he did not raise his concerns with the claimant. His failure to raise his concern in a more formal way is not a fact from which we could infer discrimination.

7.22 The claimant alleges that the decision to dismiss had been taken by no later than 27 April 2017. We do not accept this as a fact. It is clear the dismissal had been contemplated by Mr Moore, and that he had accepted it was the most likely outcome. However, he delayed any final decision until after he had received the business plan.

7.23 We have considered whether discrimination could be inferred from the circumstances. We should stand back and look at the claimant's case as a whole; she is suggesting that from at least October 2016, and possibly from August 2016, Mr Rickard had a set intention to dismiss the claimant which in some manner, was communicated to, or adopted by, Mr Moore. The logic of the claimant's case is, despite this set intention, she then remained in employment until June 2016. She suggests that the respondent strung her along in order to obtain the business plan.

7.24 The claimant's position is inherently unlikely. She must postulate that, despite having a set intention to dismiss, the respondent then mismanaged her probation so badly that it ignored its own procedures and allowed her employment to continue for the best part of the year. Had it been Mr Rickard’s, or Mr Moore’s, intention to dismiss the claimant because of her race, it is far more likely that they would have used the procedure provided for in the probation policy to remove her at an earlier stage. Use of the policy would have obscured any influence of race; if

either Mr Rickard, or Mr Moore intended to dismiss the claimant because of her race, it is much more likely that they would have used the respondent's own procedures to hide the real reason. In this case, the failure to stick to the probation procedure supports a conclusion that there was no race discrimination. Waiting for the business plan before judging it suggests that the claimant was being given every chance to prove herself. For these reasons, we do not believe that Mr Moore's contemplating dismissing, or his failure to adhere to the probation procedure, are facts from which we could infer discrimination.

7.25 The claimant alleges that Mr Yuliya Lubska received her laptop first, despite joining later. Mr Lubska was a new employee. She did not have a desktop. She joined when agile working was already contemplated. It is Mr Moore's evidence that it was ICT who made the final decision as to when she received the laptop. It was not his decision. There was a clear logic for why she should receive a laptop, rather than a desktop that would have been outmoded. There is a difference of treatment and a difference of race, but the failure to give the claimant a laptop first, is not a fact from which we could infer discrimination.

7.26 The claimant relies on the alleged false allegation of mistakes in her business plan. There were no false allegations. Mr Moore genuinely believed that there were clear errors. We cannot infer discrimination from his raising errors with the claimant.

7.27 The claimant points to Mr Moore's treatment of her on 24 April 2017. We considered carefully whether an inference of discrimination could be drawn from Mr Moore raising his voice and using inappropriate language. It is clear that he did use swear words in front of others. It is less clear whether he raised his voice to other individuals, although he suggested, in his oral evidence, that he had. We cannot wholly ignore the circumstances. The conduct did not occur in a vacuum. It is apparent that he was frustrated with the claimant. It is also apparent she raised her voice when they were in the meeting. It is clear that there were difficulties with the working relationship, which led to Mr Moore not behaving entirely professionally. However, there is no indication at all that he used any words that were race specific and given all the circumstances, we find no inference can be drawn of race discrimination.

7.28 In all circumstances, we find that there are not any facts from which we could infer, in the absence of any other explanation, that there has been direct race discrimination. If we were wrong, it would be necessary for us to consider whether the respondent has shown it did not discriminate against the claimant on grounds of race.

7.29 We will consider explanations for each allegation.

7.30 Allegation one: we find the respondent has made out its explanation by reference to relevant cogent evidence. The claimant did not receive a probation review in October because of the difficulties with the first manager. He was a consultant. He did not directly manage the claimant. In October, Mr Moore had not started his employment. In December 2016

Mr Moore chose not to give the claimant a probation review because he had only been employed for a month and he did not fully understand the claimant's work. Moreover, he had serious doubts about the claimant's ability and he preferred to wait and see. The position adopted is entirely understandable, as his concerns were genuine. By January 2017, his concerns had, if anything, increased and he chose to manage the claimant's performance through a series of meetings. None of this had anything to do with the claimant's race.

7.31 Allegation two: the respondent establishes its explanation. There was no failure to provide the claimant with any pass before January 2017. There was no reason for her to have one. She did not work from home. She did not require one. She had no contractual right to one. Further, the claimant had not actively sought to the pass prior to January 2017.

7.32 Allegation three: Mr Moore did refuse to allow the claimant to work from home on 12 April 2017. The explanation is made out. Working from home was a managerial discretion. Mr Moore had serious concerns about the claimant's work. He preferred her to be in the office as he perceived that this would give him a better chance of supervising the work, and producing a better outcome. Mr Moore did allow the claimant to work from home when emergencies dictated.

7.33 Allegation four: it is clear that Mr Moore did speak inappropriately to the claimant. It is understandable that the claimant found his approach aggressive. However, we have accepted his explanation that he did so out of a sense of frustration, and that on reflection he realised he had been unprofessional. We have accepted that this inappropriate conduct was not because of the claimant's race. It was because of her approach to the work and his perception of her competence.

7.34 Allegation five: this allegation fails because there was no false allegation, by Mr Moore, of errors in the claimant's work. The explanation is that Mr Moore made the allegations because he believed them to be true. That explanation we accept.

7.35 Allegation six: we accept the respondent has made out its explanation. The claimant was dismissed because Mr Moore perceived her work was not of the standard required. We have been given cogent evidence which demonstrates that the claimant delayed in producing the business plan, and the business plan that was produced had significant errors. Moreover, he was concerned that the claimant took a week off immediately after producing the plan, thus preventing any immediate discussion. This led to his taking remedial action by employing an outside consultant. All this points to Mr Moore having the most serious concerns about the claimant's work, and demonstrates his dissatisfaction with the business plan as produced, and hence his dissatisfaction with the claimant's work.

7.36 There may be serious professional differences between Mr Moore and the claimant as to the level of detail needed. There may be a continuing dispute as to whether some or all of the claimant's figures as used were later accepted. We do not need to resolve that. At the time when Mr

Moore dismissed the claimant, he believed, genuinely, that there were serious deficiencies in her work. When it is clear that his belief was firmly held and genuine, whether he was right, or wrong, about her work is immaterial. Moreover, he had grounds for his belief because of the report from Ms Williams. It is clear that he had already contemplated dismissing the claimant in April. The difficulties with the draft business plan simply confirmed his perception that the claimant's work was inadequate and it was that perception which led to the dismissal. The dismissal occurred because of the quality of the claimant's work; it had nothing to do with her race.

7.37 Finally, we should consider whether the position is different in relation to harassment.

7.38 Allegation one: there is no basis on which we could say that the failure to give the claimant a probation review had the purpose of harassing the claimant. Further, we find it did not have the effect. When the probation review was discussed in January, the claimant made no objection. She simply said it was okay. This represents an acceptance of the situation. The claimant did not pursue it in detail thereafter. She did not raise any specific requests. Rather than have a formal probation meeting, there was continuing management of her work. Whilst this may not be welcome, we do not consider it to be a violation of her dignity or find that it created an environment which was intimidating, hostile, degrading, humiliating or offensive.

7.39 Finally, having regard to the explanation which we have already considered, we can find that the reason related to performance, not race.

7.40 Allegation two: there is nothing at all which suggests that the failure to give the claimant a digi pass prior to January 2017, was any form of harassment. It was not the purpose. Given that the claimant had no right to receive a digi pass, and there was no specific need for it, harassment cannot be seen as the effect. We have regard to the explanation, which we have considered above, it had nothing to do with race. It was not related to race.

7.41 Allegation three: Mr Moore's refusal on 12 April 2017 to allow the claimant to work from home did not have the purpose of harassing the claimant. Moreover, it did not have the effect of harassing her. There is no suggestion that the claimant found the refusal to allow her to work from home on that particular day violated her dignity, or created an environment which was in any sense intimidating, hostile, degrading, humiliating or offensive. Moreover, the explanation is made out by the respondent. It was not related to race. It related to her work and the need to manage that work.

7.42 Allegation four: Mr Moore shouting at the claimant, both in front of colleagues and in his office, is inappropriate behaviour. It is not every transgression which will be sufficiently severe to demonstrate harassment. The more serious the conduct, the more likely a single event will be seen as a violation of dignity, or the creation of an intimidating, hostile,

degrading, humiliating or offensive environment. We should be cautious before we impose upon managers such standards of conduct that any transgression could lead to a finding of harassment. The words employed such as violation and humiliation are serious.

7.43 We find that it was not Mr Moore's purpose to harass the claimant. As to whether it had that effect, we do take into account the claimant's perception. She clearly found it very distressing as she confirmed this to us in evidence. However, it is necessary to consider whether it is reasonable for the conduct to have had that effect. In this case, we note that the claimant did protest about treatment and that did lead to Mr Moore accepting he should not use swear words and he moderated his conduct. In those circumstances, it is not reasonable to find it had the effect of harassing the claimant.

7.44 If we were wrong about the effect, we have considered whether it related to the claimant's race. It did not. It arose entirely out of Mr Moore's frustration about the claimant's behaviour and ability. This allegation, therefore, fails.

7.45 Allegation five: this allegation fails because there were no false allegations of errors.

7.46 Allegation six: the claimant was dismissed. As an allegation of harassment, the claimant is concerned more with the approach to the dismissal than the dismissal itself. It is the failure to notify her of the meeting and thereafter the tone of the meeting that is advanced as harassment.

7.47 We cannot find that the failure to notify the claimant of the purpose of the meeting had the purpose, or effect, of harassing her. It may have been good practice to give some indication that it would be a probation review, but this was not an absolute necessity and she was told of the purpose in the meeting. As to the way the meeting proceeded, it is clear that there was disagreement between Mr Moore and the claimant. The claimant was forceful in her view, and the meeting was difficult. However, it is not unusual for employees to find meetings, which lead to dismissal, unpleasant. Something more is required before it can be said that the purpose of the meeting is to harass or that the effect is harassment. It is not every distressing meeting which will constitute harassment.

7.48 In any event, we have considered the respondent's explanation for the meeting and the dismissal. It is clear that the reason related to the claimant's performance, not her race. This allegation fails.

7.49 It follows for the reasons we have given that all allegations of discrimination and harassment fail and are dismissed.

7.50 We have not specifically considered whether any of the allegations are out of time. Although it is alleged by the respondent that allegation one and two are out of a time, we need consider that no further, as we have

considered the substantive position and found that the allegations cannot succeed in any event.

Employment Judge Hodgson on 6 February 2018