EMPLOYMENT TRIBUNALS

Claimant: Mrs I Zadernovskaya

Respondent: Ernst & Young Services Limited

HELD AT: Manchester **ON:** 25-29 September 2017

BEFORE: Employment Judge Slater
Mr M C Smith
Mr W Haydock

REPRESENTATION:

Claimant: In person
Respondent: Mr T Brown, counsel

JUDGMENT having been sent to the parties on 6 October 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The issues were discussed in detail and agreed on the first day of the hearing. These were set out in a list given to the parties. The complaints as clarified were of direct race discrimination, harassment related to race and discrimination arising from disability. The list was as follows.

Race discrimination

1. *The Claimant alleges that she has been directly discriminated against on the grounds of race, specifically her ethnicity - Russian.*

2. *The Tribunal must consider whether the complaint of race discrimination has been brought within the relevant limitation period and if not whether it is just and equitable to extend that limitation period.*

3. *Under section 39(2) Equality Act 2010 ("EA") an employer (A) must not discriminate against an employee of A's (B): - (a) as to B's terms of employment, (b) in the way that A affords B access, or by not affording B*

access, to opportunities for a promotion, transfer or training or for receiving any other benefit, facility or service, (c) by dismissing, or (d) by subjecting B to any other detriment.

4. *It is alleged that the Respondents directly discriminated against the Claimant under section 13 EA "a person (A) discriminates against another (B) if, because of protected characteristic (in this case, it is alleged ethnicity), A treats B less favourably than A treats or would treat others."*

5. *The comparator for the complaint of race discrimination is a hypothetical comparator ("Race Comparator"), with the exception of the alleged actions set out in paragraphs 6.8 where the Claimant seeks to rely on Maria Yiannakou; Elizabeth Jones; Andrew Evans; Andy Torkington; Anne Wong; Max Paterson; Alex S Broomfield; Oliver Conrad; Mun Soon Chin; Randi Sabir; Michael Duddle; Sally Alsayed; Abby Gumbley; James Morton; Richard Allison; Rob Bradstock; and Jason Smith as comparators.*

Issues

6. *Does the alleged treatment set out below in paragraphs 6.1 – 6.12 fall within section 39 EA? And if so, did the Respondent subject the Claimant to that treatment?*

    6.1. *Victoria Venning misrepresenting the Respondent's intention to help with MBA fees during the job interview 2 February 2015 and telephone call on 24 June 2015, then reneging on those oral promises.*

    6.2. *Offering a manager role rather than a senior manager role.*

    6.3. *Renege on promises regarding time off for the Claimant's MBA classes (as set out in an email to Nimrita Sandhu on 6 April 2015), including 2 days off in the week of 8 February 2016.*

    6.4. *Subjecting the Claimant to an unreasonable process for agreeing study leave*

    6.5. *Improperly reducing the payment and/or the total amount of accrued but untaken annual leave on termination of employment.*

    6.6. *Failing to provide reasonable assistance on relocation.*

    6.7. *Unreasonable delay and process to secure payment for Immigration Heath Surcharge.*

    6.8. *Allocation of a very high number of chargeable hours*

    6.9. *Not responding to complaint about chargeable hours*

6.10. Failure to protect Claimant against a client's security staff actions on 2 October 2015

6.11. Ms Hazlehurst contacting the Claimant regarding work in the period 29 October 2015 to 7 November 2015.

6.12. Initiating a meeting on 11 November 2015 regarding client engagements.

7. *If so, has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated the Race Comparator?*

8. *If so, was the less favourable treatment because of race?*

Employees and applicants: harassment

Section 40(1) EA: An employer (A) must not, in relation to employment by A, harass a person (B)—

(a) who is an employee of A's;

(b) who has applied to A for employment

Section 26 (1) EA: (1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

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

….

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

(a) the perception of B;

(b) the other circumstances of the case;

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

10. *Does the alleged treatment set out at paragraph 6.11 and 6.12 above satisfy section 26(b) EA? (If 'effect' only Section 26(4) EA should be taken into account)?*

11. *If so, did the Respondent subject the Claimant to that treatment and was it related to the protected characteristic of race (in this case the Claimant's ethnicity – Russian)?*

Disability discrimination

Section 6 EA Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

12. *The Claimant has identified her condition as "depression onset after treating a viral infection on the week from April 4, 2016".*

13. *Did the condition identified in paragraph 12 amount to a disability as defined in Section 6 EA at relevant times?*

Section 15 EA: Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if –

a. *A treats B unfavourably because of something arising in consequence of B's disability; and*

b. *A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonable have been expected to know, that B had the disability.

14. *Did the respondent subject the claimant to a detriment by doing the following:*

14.1. Victoria Venning and Victoria Kelsey making phone calls to the claimant asking her when she was going to leave.

14.2. Victoria Venning and Victoria Kelsey insisting that the claimant send in sick notes once the claimant had explained that the notes she had been given had no closing date.

14.3. Not referring the claimant to occupational health.

14.4. Processing the claimant's early release on 8 April 2016.

14.5. Treating the claimant's grievance letter as a letter of resignation.

15. *If so, by this treatment, was the claimant treated unfavourably because of something arising in consequence of her disability? (The "something arising"*

being, for 14.1 – 14.4, sick leave connected to the claimant's disability and, for 14.5, being that the claimant's disability meant she was unable to write as clearly as she would otherwise have done, so the respondent misunderstood the purpose of the letter).

16. *If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?*

17. *Did the respondent know, or could they reasonably be expected to know that the claimant had a disability?*

18. *The Tribunal must consider whether the complaint of discrimination arising from disability has been brought within the relevant limitation period and if not whether it is just and equitable to extend that limitation period.*

Remedy

19. *The Claimant seeks an award of compensation - is it appropriate to make such an award and, if so, what sum should be awarded?*

The Facts

2. The claimant had worked for Ernst & Young in Moscow in the past but was working in the private sector in Russia before joining the respondent in Manchester. The claimant was undertaking an MBA in France and was keen to continue with this. Ernst & Young were seeking a manager within the UK and Ireland Assurance Department. Such a position would a step down for the claimant.

3. The claimant had a first interview by telephone on 17 December 2014 with Max Paterson for the position of Audit Manager. In the notes of that interview, Mr Paterson noted under "points to probe in a subsequent interview" that the claimant was "massively overqualified for the role". The claimant then had a job interview with Victoria Venning by telephone in January 2015.

4. It is common ground that Victoria Venning agreed in principle that the claimant could have time off to attend the MBA course. However, there was no detailed discussion about whether such leave would be paid or unpaid and how study time was to be recorded, or as to the impact that this would have on expected chargeable time. How the arrangement would work in practice was not discussed between them.

5. Victoria Venning gave evidence that she expected the claimant to use holiday or unpaid leave for study leave and to use the 500 hours non-chargeable annual allocation for this purpose. However, we are not persuaded that she had addressed her mind to this at the time. In particular, we note her evidence that she had the impression that the claimant did not have much left to do to complete the MBA, although Max Paterson's notes of the interview indicated that the claimant still had approximately 18 months of a two year course to complete.

6. Had Victoria Venning addressed her mind to the details at the time, we accept that it is likely that it would have been her view that the claimant should use holiday,

unpaid leave and non chargeable hours allocation for the purposes of study, given that the MBA was not being undertaken for the benefit of the respondent, and the lack of any precedent for allowing paid time off for such a purpose. Since Victoria Venning did not discuss this with the claimant, it may be that the claimant had a different hope or expectation. However, the claimant did not seek to clarify or have put in writing an agreement relating to time off.

7. We accept the respondent's evidence that the respondent does not have a precedent of allowing people paid time off for study other than for qualifications required by the respondent under terms set out in a training contract. If people want to pursue other studies, they use holiday and may be allowed unpaid time off.

8. On 21 January 2015, the claimant emailed her MBA expected study dates to Gordon in the recruitment team.

9. On 29 January 2015, the respondent sent to the claimant a written job offer stating the role to be that of a manager. The terms of the offer included the details of relocation assistance and amounts that would be repayable to the respondent if the claimant left their employment within certain periods.

10. The claimant makes an allegation that she was offered a manager role rather than a senior manager role due to direct race discrimination. The claimant relies for her race discrimination claims on her ethnicity, that being Russian. We find that the claimant was offered a manager role rather than a senior manager role because this is the position that the respondent needed to fill and the claimant was fully aware of this from the interviews she had with Max Paterson and Victoria Venning.

11. The claimant signed her acceptance of the offer, dating this 1 February 2015. Although, in this hearing, the claimant disputed that the date was accurate on this form, we have no real reason to doubt that she dated it accurately at the time. On the form, she gave her preferred start date as being 1 April.

12. On 4 February 2015, in a new starter form, the claimant ticked a box to indicate that she did not consider herself to have a health condition or a disability.

13. The claimant alleges that Victoria Venning misrepresented the respondent's intention to help with MBA fees. Victoria Venning says that fees were not discussed. The claimant alleges direct race discrimination in relation to the alleged misrepresentation.

14. The claimant has not satisfied us that fees were discussed before she started work, but, even if we had preferred the claimant's evidence to that of Victoria Venning, taking the claimant's case at its highest, the claimant does not allege anything which would amount to an agreement to pay fees. The claimant gave evidence that she asked prior to starting if the respondent would pay part or all of the fees, and that Victoria Venning said "just come and we will sort it out".

15. In an email sent after the claimant started work to Louise Coops on 22 July 2015, the claimant asked, "Is there any possibility that EY Manchester participates in the above MBA costs?". The question posed in this way at that time suggests that the claimant did not believe that any agreement had been reached as to the payment of fees. If any agreement had been reached, or even if Victoria Venning had

suggested a possible willingness for the respondent to pay such fees, we would have expected the claimant to refer to this in that email.

16. On 6 April 2015, the claimant, in an email to Ninrita Sandu, replied to a request for a referee contact for her MBA studies. She also included, unsolicited, the times for her MBA classes.

17. Once the claimant started employment with the respondent, the claimant was able to take time out to attend her MBA courses. The claimant had some flexibility in arranging her time and was able to arrange her client work around the MBA commitments.

18. The claimant's oral evidence to us was that she initially recorded study leave as holiday but, when she was running out of holiday, she went back into the respondent's system and changed the coding on leave taken from holiday to study leave.

19. Victoria Venning took over as Head of the Audit Department in July 2015, shortly before the claimant began work there.

20. The claimant began her work for the respondent in Manchester on 20 July 2015.

21. On 22 July 2015, the claimant spoke to Victoria Venning about whether the respondent might meet part or all of her MBA costs. Victoria Venning told her to contact Louise Coops, Head of Resourcing. The claimant then sent the email to Louise Coops to which we have previously referred. She gave details in this email of her MBA costs and asked whether there was any possibility that the respondent would pay costs. She did not say that Victoria Venning had previously agreed or suggested the respondent might agree to meet such costs.

22. We note the claimant's evidence that she understood that, if the respondent agreed to fund, there would have to be a separate document to the contract dealing with this, and that she "hoped" that such a document could have been established on her arrival in the UK. This suggests to us a hope, rather than an expectation, that fees would be paid.

23. On 24 July 2015, Louise Coops replied to the claimant's email. She wrote that she was off work with a broken leg but she would look into the claimant's request and get back to her. There is nothing further in writing from Louise Coops about this. However, we accept that Louise Coops made enquiries and found that there was no precedent for offering funding other than for qualifications required by the respondent.

24. Some time later, either on 1 or 2 October (the dates varying from the parties), Victoria Venning told the claimant in a phone call that the respondent did not offer funding for MBAs or provide loans for such costs. Louise Coops said that she also had a telephone call with the claimant to this effect.

25. We accept the respondent's evidence that the respondent does not pay for qualifications or study programmes other than when an individual is gaining the qualification to meet the requirements of the specific area of the business, and that

the MBA does not meet this criterion. In the case of qualifications which the respondent requires individuals to obtain, the agreement about payment of fees and reimbursement by the individual if they leave within a certain period is set out in a written training contract. There was never any written contract with the claimant setting out any agreement as to study leave or fees to be paid.

26. The claimant alleges that, in the period July to August 2015, there was direct race discrimination in relation to a failure to provide reasonable assistance on relocation. We accept the evidence of Louise Coops that the standard assistance for an external candidate being offered a UK based role when hired from abroad was given to the claimant. Different provisions apply when people transfer within Ernst & Young from another country to the UK. Although the claimant had worked in the past for Ernst & Young, she was not working for them when she applied for the job with the respondent, so she was an external candidate.

27. The claimant was dissatisfied with the temporary accommodation originally provided. There is no evidence that the respondent knew it would be unsatisfactory and they moved the claimant and her family when she complained and extended the time temporary accommodation was provided for.

28. The claimant complains that the respondent did not provide her with housing search assistance or assistance in opening a bank account in the UK. We have had no evidence to suggest that the respondent would have provided such assistance to any other external candidate of any nationality coming to work for the respondent in the UK from outside or within the UK.

29. The claimant complains that she was unreasonably declined a company credit card. We accept the respondent's evidence that the decision to accept or reject an application for a credit card lies with the credit card provider, American Express, rather than with the respondent. The claimant was able to apply, and did so, in the same way online as anyone else going to work for the respondent. The claimant's evidence to us was that the online system informed her that her application was declined because her address could not be confirmed.

30. The Government introduced an Immigration Health Surcharge on 16 April 2015. This was after the claimant had accepted her offer of employment but before she in practice started work. The claimant and others who were subject to immigration control were required to pay the surcharge and were not reimbursed for this by the respondent until after the claimant had complained. The claimant makes an allegation of direct race discrimination in relation to what she says was an unreasonable delay and process to secure payment for the surcharge. There is no evidence that anyone else was repaid the surcharge more quickly.

31. We find that there were differences in practices between the respondent's Manchester office and Ernst & Young in Moscow and Paris at the time the claimant had previously worked in those offices. For example, there was no administrative assistance or secretarial support to help managers in Manchester at that time whereas the claimant had received such support in Moscow and Paris. In the past, secretarial or administrative assistance had been provided to managers in Manchester, but the practice had changed some time ago for all managers. Also, managers in the Manchester office are expected to carry out a first review at audit

rather than this being done by seniors, a lower level than managers. It appears from that the claimant may have experienced a different practice in Moscow and Paris.

32. The claimant alleges that, from September 2015 onwards, she was allocated chargeable hours which were too high. She alleges this was direct race discrimination. We accept the respondent's evidence that the total minimum hours a full-time employee outside London is required to work (including chargeable and non-chargeable hours) is 1950 per annum, and the expectation for managers of the claimant's grade was that they would do at least 1,450 chargeable hours per annum.

33. We accept the unchallenged evidence of Louise Coops as to the grades and nationalities of the individuals the claimant has claimed as actual comparators for the purposes of her complaint about allocation of chargeable hours. The only comparators named who worked at the same grade as the claimant, being an L3 manager, were Oliver Conrad who was German; Mun Soon Chin who was Malaysian; Randi Sabhir who was Barbadian; and Michael Duddle who was British.

34. Based on information about various hours different client projects may need, the resourcing team produces portfolios for each individual, setting out hours expected to be spent on various matters which are then adjusted as matters develop. The aim for each manager is to achieve a minimum 1,450 chargeable hours per annum, although, to reach the target, the resourcing team usually aims to list about 1,250 hours in the portfolios, which gives the manager some flexibility.

35. By 16 September 2015, the claimant and other employees were sent a first draft of their portfolios for the period July 2015 to June 2016 and invited to comment. The claimant's predicted hours for the year at this stage were 1,242. Those other managers at her level named as comparators were Mun Soon Chin 1,012; Randi Sabhir 1,248; Michael Duddle 1,300; and Oliver Conrad 1,321. The claimant replied to the proposed portfolio by email dated 17 September 2015. She wrote that, taking into account that she had MBA classes one week in September and one week in October, her hours per remaining three weeks in September/October came up to 55-57 chargeable hours per week. She suggested discussing the matter further. She also asked Helen, who was the resource coordinator, to retain on the booking system that she would be on study leave for one week from 12 October and one week from 8 February. As a result of the claimant's comments, one client was removed from her portfolio and reallocated to Mun Soon Chin.

36. We have been shown a chart of the chargeable hours worked in practice for the year. It appears from this that the claimant did not work consistently more chargeable hours than other managers of her grade. In November 2015, her hours were the highest of the managers, but in February they were the lowest. Other months her chargeable hours were somewhere in between.

37. In the counselling notes the claimant has obtained, there is a reference to the claimant saying to her counsellor that many of her colleagues worked 12 hours a day. We accept the evidence of Victoria Venning that working 50-55 hours per week on projects is not unusual for managers in the audit department in peak periods.

38. On 2 October 2015, there were a number of incidents which caused the claimant concern. She says that, when she was driving, she was followed by another

driver who got out of the car when she got to her client's premises and spoke to her and asked where she was from. Later, at that client's premises, she says that security staff asked for a list of non-UK nationals. The claimant spoke with Kate Jarman on her return to the office. The claimant alleges that there was a failure to protect her against the client's security staff's actions. She alleges that Kate Jarman found what she relayed to her ridiculous and funny. The claimant has not satisfied us that Kate Jarman did anything from which the claimant could reasonably have understood that Kate Jarman found it ridiculous or funny. We find that Kate Jarman spoke to relevant partners about the incidents so that they could follow this up with the clients. It appears that nothing was fed back to the claimant by the relevant partners.

39. The claimant alleges that Kate Jarman's actions were direct race discrimination. We note, however, an email from the claimant written to the respondent's solicitors in the course of this litigation in which she wrote that she did not think Kate Jarman acted as she did because the claimant was Russian. We find this was a clear statement that the claimant did not think Kate Jarman acted as she did because the claimant was Russian, despite the claimant's attempts at this hearing to persuade us otherwise.

40. In the period 29 October to 7 November 2015, there were a series of contacts between Gemma Hazlehurst and the claimant about work. Ms Hazlehurst was a partner in charge of, amongst other matters, the VPI audit. The claimant alleges that these contacts from Gemma Hazlehurst amounted to direct race discrimination. The claimant was away at the time that Gemma Hazlehurst was emailing her. We accept Gemma Hazlehurst's evidence that she would not normally contact someone who was on leave and, indeed, did not contact another colleague, Andy Torkington, when he was on leave because there was no reason to do so. However, Gemma Hazlehurst had not known the claimant was going to be away and the claimant had arranged a meeting for a time that Gemma Hazlehurst found that the claimant was to be away.

41. The background to this was that the claimant had agreed to work on the VPI audit for which Gemma Hazlehurst was the partner in charge. The claimant had not informed Gemma Hazlehurst that she would be away at the end of October and into November. The claimant had arranged a team planning meeting for 5 November. Understandably, Gemma Hazlehurst expected that the claimant would be at the meeting which the claimant had arranged. Gemma Hazlehurst had no indication before 30 October that things were not proceedings normally.

42. On 30 October 2015, the claimant sent an email to Gemma Hazlehurst. She wrote in the email that, when she had decided to help Gemma Hazlehurst initially with the VPI proposal, she really wanted to help her. However, she wrote that her portfolio had been updated and she could see the full picture, and, in order to serve her major client and other clients for whom she had already participated in planning procedures, "I believe it would be better if you choose another manager for VPI audit". She wrote that she preferred to concentrate on quality and not quantity of her engagements and hoped the clients would benefit from this approach. She also wrote, "Besides, due to family issues I will not be back in Manchester till the end of next week. I am already working remotely for two clients (though officially on

vacation – first time this year) and it makes it impossible to accept a third client these days".

43. On receiving this email, Gemma Hazlehurst sent an email to Victoria Venning. Victoria Venning was the claimant's counsellor, which in the respondent organisation means an appraiser and a person who has oversight of a manager's work. Gemma Hazlehurst contacted Victoria Venning because she expected Ms Venning, as the claimant's counsellor, to have a better idea about the claimant's work commitments than she did. Gemma Hazlehurst forwarded the claimant's email to Victoria Venning and asked whether the claimant had discussed this with Victoria Venning. She wrote that this was "a complete nightmare from my perspective as we promised the client her in the proposal. She had the industry creds and has just introduced herself to the client. Planning is also November and Andy T is overseas on holiday so there is no way he can backfill". She asked Victoria Venning if she could discuss this with the claimant.

44. Gemma Hazlehurst then wrote to the claimant by email on 2 November 2015. She wrote that, whilst she understood the claimant's concerns, the claimant needed to fulfil her commitments to the VPI project and wrote that finding another manager would not be feasible. She wrote that she had discussed the claimant's notes with Victoria Venning as the claimant's appraiser and so it probably made sense for the claimant to pick up the wider discussion/portfolio element with her.

45. The claimant then replied to Gemma Hazlehurst and said the connection was bad so she was not sure when she would be able to call her. She said she was only able to return on 6 November and, as they initially planned the team planning meeting on 5 November, that is why she had proposed that Gemma Hazlehurst choose another manager. She said she could not do the work for VPI on top of her other work and she would write separately to Victoria Venning.

46. Gemma Hazlehurst wrote again to the claimant on 3 November 2015. She wrote that the claimant had not raised any issue about other commitments before now and that there was not another manager available to take over the responsibilities on VPI.

47. Victoria Venning then wrote to the claimant and also called her. The call was to the effect that the claimant could not just disappear and leave a partner in the lurch, be uncontactable and back out of commitments and drop clients when it suited her.

48. On 11 November 2015, Victoria Venning had a meeting with the claimant which was also attended by Tehseen Ali and Kenny Hall. The claimant alleges that, by Victoria Venning initiating the meeting, the intention was to force her to accept more client engagements and that this was an act of direct race discrimination. We accept the evidence of Victoria Venning that the meeting was as a result of the claimant raising concerns about her workload and Tehseen Ali raising concerns about the claimant's work on his projects not being completed. In the meeting, it was agreed that the claimant would be taken off some jobs and the claimant was asked to send Ms Venning a list the jobs which she would not be able to do. The claimant subsequently sent a list on 11 November, listing jobs that she would not be able to complete before Christmas.

49. On 26 November 2015, Kate Jarman sent an email to Victoria Venning with concerns about the claimant. She made a comment in this email about attributing something to "different working cultures from what she was used to". We accept that this comment related to different working practices in different workplaces. It is clear from the context that the comment relates to the practice of having someone more junior reviewing work before the manager reviews it.

50. On 27 November 2015, Jill Needham sent an email to Victoria Venning with concerns about the claimant.

51. On 29 November 2015, Tehseen Ali sent an email to Victoria Venning with concerns about the claimant. He included a comment that the claimant had told him that she was seeking alternative employment.

52. Victoria Venning held a one-to-one counselling session with the claimant on 1 December 2015. We accept that Victoria Venning came to this meeting prepared to give the claimant feedback on the concerns which had been raised with her, but the claimant was not interested in hearing the detail of this because she said that she would be leaving the organisation by March.

53. The claimant first made contact with the respondent's employee assistance programme on 4 December 2015, requesting counselling. This is a confidential process and we accept that partners and others at the respondent would not have been aware of the fact that the claimant was having counselling or of the details of the session. The claimant subsequently attended counselling sessions in the period 23 December 2015 to 22 February 2016. The claimant has obtained from the counsellor copies of the notes of the counselling sessions.

54. On 10 December 2015, Victoria Venning sent an email refusing to allow the claimant to take two days' holiday in February 2016; however she did not question the 53 hours which the claimant had put down that she was proposing to take out in February for her MBA.

55. There was a reference in an email by the claimant to a meeting with Victoria Venning on 22 December 2015. However, Victoria Venning said in evidence she had no note in her diary of such a meeting. We consider it likely that the claimant's reference was to the meeting which Victoria Venning said took place on 1 December 2015 and that there was a mistake about the date. We had no evidence of the contents of any second meeting in December.

56. The claimant was in Paris for the purpose of her MBS studies in the period 28 February to 4 March 2016. She tells us that her son fell ill on her return and she worked at home for a week because of this.

57. On 8 March 2016, Victoria Venning sent an email to the claimant asking for her help with a client. The claimant replied on the same day by email, writing that she would be completely busy in April with her MBA studies and asked if Victoria Venning could count their discussion on 22 December 2015 as notice and calculate three months from that date. The claimant gave evidence to this Tribunal that she was on sick leave at the time, but she did not say this in her email to Victoria Venning, and the timing of this fits more with the period that the claimant says she

would have been at home with her son who was ill, being the week after she returned from Paris.

58. In a reply from Victoria Venning on 8 March 2016, Victoria Venning wrote that the claimant would have to give formal notice of three months, but she asked Louise Coops, who she copied into the email, whether they could do anything to expedite the claimant's notice period for her. Victoria Venning also wrote: "We will need to discuss the time off you need in April for your MBA as it will depend on whether you have enough holiday to take". She also asked the claimant to list the time she had been away working on her MBA during February if any, and any more time that the claimant felt she would need to complete it. Victoria Venning said she did not think she received any reply to this request.

59. From the respondent's records, it appears that the claimant was on sick leave in the period 10-21 March 2016.

60. On 29 March 2016, Victoria Venning sent an email to the claimant noting that she had been off sick. Victoria Venning also wrote that they were happy to let the claimant go "as soon as Kenny confirmed that he was ok with it", and that Kenny was waiting for an update from the claimant as to the status of the work she was doing on AMEC. Victoria Venning asked the claimant to give Kenny a call to discuss this.

61. The claimant replied to that email on 29 March 2016. She wrote that the AMEC engagement would be archived "by the end of this week at the latest" and asked whether she needed to talk to HR with regards to her leave date and other terms of leaving.

62. Victoria Venning replied on 2 April 2016. She wrote that she had spoken to Kenny the previous day regarding the remaining work on AMEC and, once the archive was completed, which needed to be early the following week, he was happy for the claimant to go. She wrote that she had, therefore, agreed with everyone concerned that the claimant could leave the respondent "next Friday – 8 April". She wrote that Louise Coops would process the paperwork. She copied the email to Louise Coops. She also asked the claimant to get in touch with Louise Coops on Monday to discuss the details.

63. On Monday 4 April 2016, Louise Coops asked Helen to process the claimant as a leaver; given the imminent agreed termination date she acted quickly to authorise this process on the basis of the instruction she had received from Victoria Venning.

64. The claimant began another period of sick leave on 4 April 2016. She did not return to work before her employment ended.

65. On 5 April 2016, which was after the processing of her departure had begun, the claimant sent an email to Victoria Venning. She wrote that she could not leave on 8 April 2016, writing that she had been signed off sick for two weeks from 4 April 2016 needing surgery. She suggested a meeting with Victoria Venning later in April to "discuss the final conditions of my leave then". We understand from the claimant's evidence to us that the claimant was being treated privately and was relying on

private medical insurance, which depended on her continued employment with the respondent.

66. Victoria Venning forwarded the claimant's email of 5 April 2016 to Louise Coops asking her to pick this up with the claimant. Louise Coops did not contact the claimant but sought advice from Victoria Kelsey in HR.

67. We note that the claimant obtained a sick note on 5 April 2016 for the period 4-18 April 2016. The reason for her absence was given as "endometriosis awaiting surgery" although the claimant says she was found subsequently not to have this condition. The claimant did not send the sick note to the respondent until 4 May 2016.

68. On 12 April 2016, the claimant received an email from HR concerning work permit fees which were to be deducted, stating that the amount was still to be calculated.

69. On 12 April 2016, the claimant had a call with Victoria Venning. The claimant said she had not handed in a formal resignation so was unsure what the legal position was in relation to what had been agreed.

70. On 15 April 2016, the claimant was disconnected from Ernst & Young resources.

71. On 18 April 2016, there was a call between Victoria Venning and Victoria Kelsey with the claimant. Victoria Venning had decided that she needed support from HR because of the complexity of the situation. It appears that no notes were taken of the telephone call. The claimant said she wanted to remain an employee for the time being.

72. The claimant obtained another sick note on 18 April 2016 for the period 18-25 April 2016. Again, the reason for absence was given as endometriosis. Again, the claimant did not send the sick note to the respondent until 4 May 2016.

73. On 19 April 2016, there was a conversation between the claimant and Victoria Venning in which the claimant said she needed to understand the visa requirements before proposing a leave date. Following HR advice, Victoria Venning told the claimant that she would be reinstated.

74. On 22 April 2016, Davinia Kramer, Employee Services Coordinator, spoke to the claimant about the process regarding her visa. The claimant asked for a breakdown of relocation costs.

75. On 25 April 2016, the claimant had an operation. She was given a sick noted dated 25 April 2016 for two weeks which gave the reason for absence as "post operative recovery". This was not sent to the respondent until 4 May 2016.

76. The claimant was reconnected to the Ernst & Young internal network on 27 April 2016. On that date, the claimant sent an email to Victoria Venning informing Victoria Venning that she had been operated on on Monday. She did not give any information on her condition and wrote that she would probably need to be operated on again. She wrote that the doctor had signed the sick leave until 9 May 2016 and

asked who to sent sick notes to. She wrote that, as her daughter's school year ended mid July, they would have to stay in the UK until 20 July 2016.

77. Victoria Venning replied on 27 April 2016. She asked the claimant to send sick notes to Helen Stewart. She wrote:

> "As we discussed when we spoke last week I'm keen that we agree a mutually convenient leave date so that we all know where we stand. Are you saying that 20th July is that date per your note below? If so please could you send me an email confirming this."

78. The claimant wrote back to Victoria Venning on 29 April 2016. She wrote:

> "I'm fine agreeing July 20th as the leave date as soon as financial conditions and my leave are agreed."

The claimant also asked whether sick leave would be paid.

79. On 29 April 2016, Davinia Kramer sent the claimant a further email relating to costs on leaving and visa matters.

80. On 4 May 2016, the claimant emailed sick notes for April to Helen Stewart.

81. On 5 May 2016, Victoria Venning wrote to the claimant with information about immigration. She wrote that she needed to provide her resignation in writing before they could provide further information.

82. On 6 May 2016, the claimant emailed Victoria Venning. She suggested a meeting at the end of the following week to discuss all possible options of her leave.

83. On 9 May 2016, the claimant obtained a further sick note giving the reason for absence as "post operative recovery 2-4 weeks". She did not send this to the respondent until 9 May 2016.

84. On 23 May 2016, HR wrote to the claimant concerning support available to her and advising her about the end of discretionary sick pay which, since she had been employed less than a year, was the maximum of 10 days, and the move to statutory sick pay.

85. On 27 May 2016, there was a call between Victoria Venning, the claimant and Louise Coops. Louise Coops made notes of this meeting by telephone after the call. We accept that the notes are an accurate summary of matters discussed. Amongst things mentioned by the claimant was that she was undergoing a series of tests as the medical consultant had some concerns that she may have cancer. The claimant also said that she needed, to make a decision, to understand the conditions of her leaving, especially in respect of her visa costs. Victoria Venning said that the firm needed her to put in writing the date she wanted to leave the firm in order to start this process. Victoria Venning said to the claimant that they were not asking her to leave the firm but the claimant had indicated it was her wish to do so and they just needed clarity on what the position was to be moving forward. The claimant confirmed it was her intention to leave but said she was sick now and needed to sort out her health

first. Louise Coops said they not seen a sick note that covered the period post 9 May and requested the claimant to provide it, either to her or Helen Stewart.

86. Victoria Venning said that, in an initial conversation with HR, they thought they could accept the claimant's emails sent about her desire to leave earlier in the year as formal resignation, and, therefore, in line with the policy, they would not pay sick pay. HR then reconsidered the evidence and changed the view on this and did not accept the emails as resignation so her sick pay had been reinstated, but Victoria Venning then explained that, since the claimant was in her first 12 months of employment, the rule was she was only entitled to ten days' paid sick leave. She said this was a UK firm-wide rule applying to all staff in year one of employment.

87. The claimant proposed that the firm should offset visa costs against the bonus she would be due. Louise Coops said the bonus process had not yet been commenced; there was no guarantee of any bonus being paid and if the claimant did leave over the summer she would not be eligible as bonuses were paid in October. They could not guarantee any bonus would be paid and the claimant would be eligible for this and reiterated that she could not net off visa costs against future bonus. Victoria Venning said they needed to have some clear decisions now: either she decided to stay with the firm and, when she was well enough, return to work or she confirmed she wanted to leave and accepted the contractual terms set out in her contract. The claimant said she needed time to think about this. Victoria Venning said they needed a clear decision and suggested they reconvene in seven days' time.

88. On 27 May 2016, the claimant sent Helen Stewart the sick note dated 9 May 2016.

89. On 27 May 2016, the claimant obtained a further sick note for the period 6-29 June 2016. This gave the reason for absence as "laparoscopic surgery" and some other investigation (the handwriting is hard to read). This was not sent to the respondent until 1 July 2016.

90. Victoria Venning sent subsequent emails to the claimant asking whether she had considered her position further to the call on 27 May and asking the claimant to call her.

91. On 15 June 2016, Victoria Venning wrote to the claimant. She asked for sick notes since the most recent one was now out of date and asked the claimant to contact her by 23 June 2016.

92. On 23 June 2016, the claimant sent an email to Victoria Venning saying she was sending a letter in the post in reply to the Victoria Venning's letter of 15 June. Victoria Venning replied, asking the claimant to forward to Helen Stewart a current sick note as the previous note had expired.

93. In an email dated 24 June 2016, the claimant wrote to Victoria Venning saying her current sick note "was not yet closed by the doctor since my last operation will next place next Tuesday". The claimant wrote she would forward it to Helen as soon as she had it the following week. She gave details of doctors Victoria Venning could call if Victoria Venning had doubts. We accept Victoria Venning's reason for asking

for sick notes was not because of doubts about illness but because absence was required to be covered by medical certificates under the respondent's absence procedure.

94. On Monday 27 June 2016, Victoria Venning received the claimant's letter dated 23 June 2016. She understood this to be a letter of resignation. The claimant says that it was a grievance not a resignation. The claimant wrote, after addressing various matters, that:

> "On 5 July '15 I will be leaving UK and EY for good and I hope that all formalities and administrative issues can be arranged prior to that date."

95. The claimant made no allegation of race or disability discrimination in her letter, although she did suggest that she could have a claim for compensation against the respondent, at least for deterioration of health, by which we understand she meant a personal injury claim.

96. On 1 July 2016, Victoria Venning replied, accepting the claimant's resignation. We find that it was reasonable for Victoria Venning to understand the letter as being a resignation. Victoria Venning did not require the claimant to work her notice period so said her termination would be effective as at 15 July 2016. The claimant did not respond to say that she had not intended to resign. The claimant, by email of 1 July 2016, sent the sick note dated 27 May for the period 6-29 June.

97. The claimant gave evidence that she completed her MBA work whilst on sick leave although she did not do as well as she had hoped.

98. The claimant alleges that there was an improper reduction of payment and/or total amount of accrued but untaken annual leave on termination of employment, and alleges that this was direct race discrimination. She complains that the respondent reduced the holiday entitlement by the time that she took full study leave. However, we have found that there was no agreement that the claimant could take paid time off for study additional to paid holiday leave. The claimant has not satisfied us that the respondent improperly reduced the payment due to her for accrued but untaken holiday.

99. On 15 September 2016, solicitors instructed by the claimant wrote to the respondent. They wrote in detail about matters to do with the claimant's employment, including a reference to what they said was the claimant's "understanding," as a result of conversations with Mrs Venning, that "EY would provide study leave for the claimant to attend the MBA". They wrote that the claimant also understood that enquiries were being made to establish whether EY could make part or full payment of her tuition fees. The letter does not assert that any concluded agreement was reached. The solicitors wrote that the claimant had been diagnosed with extremely low hormone levels and, as a consequence, suffered with fatigue and low mood and they submitted that those conditions had a substantial effect on her ability to carry out normal day-to-day activities. They suggested she fell within the definition of a disabled person for the purposes of the Equality Act 2010. They wrote of potential legal claims: assertion of rights to enforce a common understanding between the parties by way of estoppel by convention; claims for disability discrimination; and claims for race discrimination.

100. The claimant notified ACAS under the early conciliation provisions on 3 October 2016. The respondent replied to the claimant's solicitor's letter on 2 November 2016. The early conciliation certificate was issued on 17 November 2016 and the claimant presented her claim to this Tribunal on 16 December 2016.

101. We understand from the claimant's evidence that, following her resignation, she moved initially to Russia and then to France. The claimant gave evidence that she was still struggling with depression and had recently spent two weeks in a hospital in Moscow. She did not give any evidence about why she had been able to submit the claim to the Tribunal in December 2016 but not before.

102. We were referred to the following further evidence which is relevant to the issue of disability. The claimant attended counselling sessions through the employee assistance programme provided by the respondent. The respondent managers did not know that the claimant was attending counselling or the details of that counselling. In the notes, amongst other things, the claimant is recorded as telling the counsellor about various difficulties dating from before she moved to the UK. She was saying she was feeling stressed and anxious. She referred to memory and concentration difficulties. She wrote on 6 January that she had applied for a post in Paris where she had been happiest. She referred to feeling stuck in a career that no longer fulfilled her. She wrote about working long hours. She questioned whether she was depressed, saying she was certainly flat.

103. We have also been referred to notes that the claimant has obtained from a doctor who treated her in Russia on 23 August 2017. That doctor referred to the claimant having sought advice in December 2012 after the birth of one of her children, complaining, amongst other things, about increased irritability and sleep problems. The doctor wrote that the claimant had been treated for two weeks, 7 August to 18 August 2017, in a Neurosis clinic, and that, on 23 August 2017, she had sought help from the psychotherapist complaining about mood swings, anxiety, fear verging into panic, increased irritability, insomnia, memory impairment and impaired concentration.

104. The claimant told this Tribunal that she had obtained her medical notes from her treating GP in the UK. However, she had not disclosed these in these proceedings and we were not shown them. The claimant told us that they did not contain a diagnosis of depression and that she did not see her GP about depression. She said she went to see her GP in August or September 2015 with low energy. She said she was given blood tests which showed nothing. However, we note that, in the counselling notes of a session on 4 December, the claimant is recorded as having informed the counsellor that she had gone to her GP, who she said had stated she was depressed and given her antidepressants. However, the claimant said she did not want to take medication and was looking to find an alternative way to cope with her stress. It is, therefore, unclear what, if any, advice and diagnosis was given by the claimant's GP.

105. The claimant gave some oral evidence on the effects of her condition on her. She said she could not cope with what she had coped with for years. She could not do stressful work she did for years. Sometimes she could not drive her car, although she was driving the car when working for the respondent, and she said she sometimes could not get out of the house early.

Submissions

106. Mr Brown, for the respondent, produced a detailed written skeleton argument which he supplemented with brief oral submissions. Mr Brown informed the tribunal that he had emailed his skeleton argument to the claimant that morning. The claimant gave very brief oral submissions. She said that her witness statement was true. She said that when she wrote her letter of 23 June she hoped things could change and she could stay in the UK. She said her letter was sincere. It was not her intention that the letter would go to HR. She said her health was fragile. She said employers must take some responsibility for the health of their employees. She said she was not looking for compensation but looking for justice. The claimant did not otherwise address the issues the tribunal had to consider.

The Law

107. The law we have to apply is contained in the Equality Act 2010. For direct race discrimination the relevant provision is section 13 which provides that:

> "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."

108. Section 4 lists protected characteristics which include race.

109. Section 23(1) of the Equality Act 2010 provides that, on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

110. The provisions relating to harassment are contained in section 26. These provide that:

> "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."

111. Subsection (4) provides that:

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

112. The relevant protected characteristics include race.

113. In relation to the disability, the definition of "disability" is contained in section 6 of the Equality Act 2010 and schedule 1 to that Act. Section 6(1) provides that:

> "A person has a disability if they have a physical or mental impairment and the impairment has a substantial and long-term, adverse effect on the person's ability to carry out normal day-to-day activities."

114. The effect of an impairment is said to be long-term if it has lasted for at least 12 months, it is likely to last at least 12 months or it is likely to last for the rest of the life of the person affected. If someone has medical treatment then the Tribunal is to consider what the situation would be like if that medical treatment was not being received.

115. "Substantial" is defined in section 212(1) of the Equality Act 2010 as meaning "more than minor or trivial".

116. Discrimination arising from disability is in section 15 of the Equality Act 2010 which provides that:

> "(1) A person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know and could not reasonably have been expected to know that B had the disability."

117. Mr Brown, for the respondent, referred us to the case of *J v DLA Piper UK LLP* [2010] ICR 1052 EAT. This case referred to the test of impairment and drew a distinction between what is an impairment within the meaning of the Act and what is simply a reaction to adverse circumstances, such as problems at work or adverse life events. They accepted that the borderline between the two states of affairs is found often to be very blurred in practice but they were clear that such a distinction was routinely made by clinicians. The Employment Appeal Tribunal suggested that it may be a sensible approach to park the question of impairment and to consider the adverse effects first, which may inform the decision on whether there is an impairment.

118. In considering whether there has been unlawful discrimination we apply the burden of proof provisions which appear in section 136 of the Equality Act 2010. This states that:

> "(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."

119. In the recent of *Efobi v Royal Mail Group Limited, UKEAT/0203/16,* the Employment Appeal Tribunal has cautioned that this test does not place any burden on a claimant and the Tribunal must consider all the evidence as to whether there are facts from which the court could decide, absent an explanation, that there was unlawful discrimination. We bear this in mind in making our decision.

120. The time limit provisions are contained in section 123 of the Equality Act 2010. This provides that proceedings may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Tribunal considers just and equitable. It provides that conduct extending over a period is to be treated as done at the end of the period. Time limits are extended to take account of time spent in the early conciliation process with ACAS if notification to ACAS has been made within the normal time limit. The burden is on a claimant to satisfy the tribunal that it would be just and equitable to extend time.

Conclusions

121. Applying the law to the facts we have found in this case we reach the following conclusions. References to paragraph numbers are references to the list of issues.

Race discrimination

122. At paragraph 6.1, the claimant complains of Victoria Venning misrepresenting the respondent's intention to help with the MBA fees during the job interview on 2 February 2015 and a telephone call on 24 June 2015, then reneging on those oral promises.

123. We consider first the application of time limits. If, as the claimant says, Victoria Venning communicated on 2 October 2015 that the respondent would not assist with fees, the alleged act of discrimination was completed on 2 October 2015. This would mean that the claim should have been presented at the latest by 1 January 2016. There is no extension because of the early conciliation provisions since the claimant did not notify ACAS within the primary time limit. We are not persuaded that it is just and equitable to extend time. We do not consider that the claimant has advanced any good reasons for not presenting the claim in time. We note that, for much of the period, the claimant was able to work and do her MBA even if with some difficulty to her, and we have had very little evidence on the state of her health subsequently. We, therefore, consider we have no jurisdiction to consider the complaint at 6.1. However, we have gone on to consider what we would have decided if we had had jurisdiction.

124. We found as a fact that there was no agreement that the respondent would help with MBA fees. Victoria Venning, therefore, did not misrepresent the position to the claimant. We found that the respondent did not provide such assistance to anyone else. The claimant was not suffering less favourable treatment than anyone

else by the respondent not paying her fees, and the failure to pay fees could not have been because of race. The complaint, therefore, would fail on its merits.

125. At 6.2, the complaint is of offering a manager role rather than a senior manager role. We consider that the complaint was presented out of time. The offer was made on 29 January 2015 so the time limit expired on 28 April 2015. The claimant has not satisfied us that it would be just and equitable to extend time in all the circumstances. We do not consider that the claimant has advanced any good reasons for not presenting the claim in time. We, therefore, have no jurisdiction to consider the complaint at 6.2.

126. Again, we went on to consider what we would have found on the merits. We concluded that there were no facts from which we could have decided that there was less favourable treatment because of race. If the burden had passed to the respondent, they would have satisfied us that the reason they offered the claimant the role of manager rather than senior manager was because this was the position which they needed to fill. The claimant had been aware that this was a position for manager by no later than the interviews she had at which the respondent probed the reasons why she wanted a job for which they recognised and noted that she was massively overqualified.

127. We consider together the complaints at 6.3 and 6.4 since they deal with the same subject area. 6.3 is an allegation that the respondent reneged on promises regarding time off for the claimant's MBA classes, including two days off in the week of 8 February 2016. 6.4 is an allegation of subjecting the claimant to an unreasonable process for agreeing study leave.

128. We consider first the issue of time limits. Taking what we consider to be the most favourable view to the claimant, we consider it arguable that every time the claimant needed time off this was potentially part of a continuing act. This ended with the email on 8 March in which Victoria Venning told the claimant that time off in April would depend on whether she had enough holiday to take. The claimant was subsequently on sick leave in April and there were, therefore, no other times when she took off time for her MBA studies. We consider the end of a potential continuing act, therefore, to be 8 March 2016, which would mean that the time limit expired on 7 June 2016. The claim was not presented until December 2016, around six months out of time. For the same reasons we have given in relation to other complaints, we are not persuaded it would be just and equitable to extend time and we conclude we have no jurisdiction to consider these complaints.

129. However, we went on to consider the merits of the complaints.

130. On the facts, we found there was no agreement that the claimant could take paid leave for her MBA studies. However, she was allowed to take time off for her studies as holiday. This was in accordance with the practice for other employees who were undertaking study which was not required by the respondent. There are no facts from which we could conclude that this was an act of unlawful race discrimination.

131. At 6.5, the complaint is of improperly reducing the payment and/or the total amount of accrued but untaken annual leave on termination of employment. This

complaint is presented in time; there is correspondence about this and the matter is continuing up to, and indeed beyond, the presentation of the claim.

132. The claimant has not satisfied us that there was anything improper in the respondent's calculations. There was no agreement that study leave would be paid leave over and above holiday. There are no facts from which we could conclude that the calculation was because of the claimant's race. We conclude that the complaint of race discrimination is not well founded.

133. At 6.6 is an allegation of failing to provide reasonable assistance on relocation. The claimant relocated in July 2015 and relocation assistance was provided for a few weeks following her arrival. This complaint is considerably out of time and, for the same reasons as before, we do not consider it just and equitable to extend time.

134. Going on to consider the merits, we have found that the same relocation assistance was offered to the claimant as to others moving to the UK as external candidates. In relation to the accommodation provided on a temporary basis, we had no reason to believe the respondent knew the accommodation to be unsatisfactory; when notified about this, they provided alternative accommodation and, indeed, extended the time of provision of temporary accommodation. In relation to the other matters, there was no evidence that this assistance would be provided to anyone else moving as an external hire to the UK. There are no facts from which we could conclude that this was an act of less favourable treatment because the claimant was Russian.

135. At paragraph 6.7, the claimant complains of unreasonable delay and process to secure payment for the immigration health surcharge. The claimant says she was reimbursed for this surcharge on 27 August 2015. This complaint was presented considerably out of time and, for the same reasons as before, we do not consider it just and equitable to extend time.

136. If we had had jurisdiction, we would have concluded that the complaint was not well-founded. The surcharge was a new charge introduced after the claimant had been offered and accepted employment. The respondent did not reimburse the surcharge to anyone until the claimant complained. The respondent then decided to reimburse the claimant and other people in the same position. There is no evidence that the claimant was treated less favourably than anyone else subject to immigration control. There are no facts from which we could conclude that this was less favourable treatment because of race.

137. Paragraph 6.8 is an allegation of an allocation of a very high number of chargeable hours. We understand it to be a complaint about the allocation referred to in the email of 17 September 2015. The time limit therefore expired on 16 December 2015. The complaint is out of time and for the reasons previously given we do not consider it just and equitable to extend time.

138. We went on, however, to consider the merits of the complaint. This is a complaint where the claimant named actual comparators. We consider the only comparators in the same material circumstances to be those at the same grade; that is Mun Soon Chin, Randi Sabhir, Michael Duddle and Oliver Conrad. In the

allocation referred to in the September email, three of these comparators were given allocations higher than the claimant and one lower; the lower one being Mun Soon Chin. When the claimant sent her comments about the allocation, her hours were adjusted to give Mun Soon Chin one of her clients and to reduce the claimant's allocation. In practice, the claimant did not consistently work more chargeable hours than her comparators. There are no facts from which we could conclude that this was less favourable treatment because of race. However, if the burden had passed to the respondent, the respondent would have satisfied us that the portfolios had been arrived at on the basis of an attempt to list approximately 1,250 hours for each manager, taking into account predicted demands of jobs to which individuals had already been allocated or could have been allocated, and this was without regard to race.

139. Allegation 6.9 is an allegation that the respondent did not respond to complaints about chargeable hours. The claimant relies on her email dated 17 September 2015. This complaint is out of time and, for the reasons previously given, we do not consider it just and equitable to consider it out of time. The complaint would have failed on the merits. The respondent did respond to the claimant's complaint, taking one client off her at the time, and, later on, following the meeting on 11 November, the claimant's workload was further reduced. There are no facts from which we could conclude that this was an act of less favourable treatment because of race.

140. Allegation 6.10 is an allegation that the respondent failed to protect the claimant against the client's security staff actions on 2 October 2015. This is an allegation about the actions of Kate Jarman. The complaint is out of time and, for reasons previously given, we do not consider it just and equitable to extend time. Had we had jurisdiction, we would have found that the complaint failed on its merits. We found Kate Jarman could not reasonably have been considered to be finding the matter to be ridiculous or funny. We found she contacted the relevant partners for them to make enquiries, advising them of the claimant's experiences. We note that it was the claimant's view in an email in these proceedings that Kate Jarman did not act as she did because of race. In all these circumstances, there are no facts from which we could conclude that this was an act of less favourable treatment because of race.

141. Allegation 6.11 is of Ms Hazlehurst contacting the claimant regarding work in the period 29 October 2015 to 7 November 2015. The complaint is out time and, for reasons previously given, we do not consider it just and equitable to extend time. We have found that Ms Hazlehurst contacted the claimant because the claimant had agreed to do the VPI job, sought to withdraw from it and Ms Hazlehurst needed her to do the work. There are no facts from which we could conclude that this was an act of less favourable treatment because of race.

142. Allegation 6.12 is of initiating a meeting on 11 November 2015 regarding client engagements. This is out of time and, for reasons previously given, we do not consider it would be just and equitable to extend time. We accepted Victoria Venning's evidence that the meeting was initiated because of the claimant's concerns about her workload and because her partner had raised concerns about the claimant not getting work done on the matter for which she was responsible. In

these circumstances, we consider there are no facts from which we could conclude that this was an act of less favourable treatment because of race.

143. Allegations 6.11 and 6.12 were pleaded, in the alternative, as complaints of harassment related to race. These complaints are out of time and we do not consider it just and equitable to extend time. We consider that there are no facts from which we could conclude that the acts were related to race. In addition, we conclude that it was not reasonable for the conduct complained of to have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The conduct, therefore, does not fall within the categorisation of harassment within the Equality Act 2010 and we would have found the complaints to be not well-founded had we had jurisdiction to deal with them.

Disability discrimination

Disability

144. To succeed in these complaints, the claimant must first satisfy the Tribunal that she was at relevant times disabled within the meaning in the Equality Act 2010. This requires us to address four matters:

(1) Impairment;

(2) Adverse effect;

(3) Whether the adverse effect was substantial in the sense of more than minor or trivial; and

(4) Whether the adverse effect was long-term, that is having lasted at least 12 months, being likely to last at least 12 months or the rest of the life of the person affected. That must be considered as at the relevant time i.e. when the alleged act of discrimination is taking place.

145. The claimant relies on depression as the relevant condition. The relevant period that we are considering for the alleged act of discrimination is the period April to June 2016. However, we take account of any evidence relating to a period before that and also anything afterwards for the light it sheds on whether the claimant was disabled within that relevant period.

146. Taking the approach suggested in *J v DLA Piper,* we put to one side for the moment the question of whether the claimant suffered from a mental impairment and we consider the question of adverse effects.

147. In the period April to June 2016, the claimant was not at work, being off sick because of an operation. However, she was still working on her MBA during her sickness absence, although she says she was not able to do this as well as she would otherwise have been able to do this. Until the claimant went on sick leave on 4 April, the claimant had been working for the respondent and also doing her MBA studies. This was an extremely demanding workload. We have had very little evidence of adverse effects of the alleged condition of depression on the claimant. There are references in what she has said to the counsellor in the counsellor's notes

of memory and concentration difficulties. However, at the time she was consulting with the counsellor, she was still proving able to perform very demanding work for the respondent and to carry out her MBA studies. The claimant has not satisfied us that the adverse effects of any condition was substantial, in the sense of more than minor or trivial, on her ability to carry out normal day-to-day activities.

148. We return then to the question of impairment. On the evidence available to us, which is very limited, we are not satisfied that there was a mental impairment at relevant times, rather than a reaction to what were clearly extremely difficult life and work circumstances for the claimant.

149. Even if we had been satisfied that the claimant was suffering from an impairment which had substantial adverse effects at the relevant time, the claimant would not have satisfied us that the adverse effects were long-term in the sense of having lasted at least 12 months or being likely at the relevant time to last at least 12 months. This is whether or not, subsequently, it did last 12 months. In any event, we do not have evidence that would satisfy us that the adverse effects did go on to last at least 12 months.

150. The claimant, therefore, has not satisfied us that she was disabled within the meaning in the Equality Act 2010 at the relevant times because of depression or any other mental impairment. Because the claimant has not satisfied us that she was disabled within the meaning of the Act, the complaints of disability discrimination must fail. However, we go on to consider what we would have decided in relation to the other elements in relation to the claim.

Knowledge of disability

151. The respondent will have a defence to a complaint of discrimination arising from disability if the respondent did not know and could not reasonably have been expected to know that the claimant had the disability. We are satisfied, on the evidence, that the respondent did not know, and could not reasonably be expected to know, that the claimant was suffering from depression at that time. Indeed, the claimant did not recognise this herself. The claimant's sickness absences and the sick notes that were provided did not alert the respondent in any way to the claimant suffering from depression.

Time limits

152. We turn to the matter of time limits. The complaint at 14.4, which is of processing the claimant's early release on 8 April 2016, was presented out of time and, for reasons previously given, the claimant has not satisfied us that it would be just and equitable to consider the complaint out of time.

153. The complaints, other than that at 14.4, appear to have been presented in time.

The merits of the complaints of discrimination arising in consequence of disability

154. Although the complaints cannot succeed because we are not satisfied the claimant was disabled within the meaning in the Equality Act 2010 at relevant times and also because the respondent did not know and could not reasonably be

expected to have known that the claimant had a disability, we go on to consider what we would have found in relation to the merits of all the complaints of discrimination arising in consequence of disability.

155. At 14.1, the complaint is about Victoria Venning and Victoria Kelsey making phone calls to the claimant asking her when she was going to leave. They did, indeed, ask the claimant when she was going to leave. However, we do not consider, in the context, that this was subjecting the claimant to a detriment or unfavourable treatment. They asked her these questions because the claimant had expressed a desire to leave and then because of the subsequent lack of clarity of the claimant's position.

156. Even if these questions arose in consequence of her sick leave, the claimant has not persuaded us of a causal link between depression and the reason for her sickness absence, which was waiting for surgery and then post operative recovery. The claimant has suggested a connection between mental condition and physical manifestation, suggesting, therefore, that the underlying cause of the complaint for which she had an operation was depression. However, we have no medical evidence to that effect and we do not consider it a matter in which we can use judicial knowledge.

157. Complaint 14.2 is of Victoria Venning and Victoria Kelsey insisting that the claimant send in sick notes whilst the claimant had explained that the note she had been given had no closing date. We do not consider there was any detriment or unfavourable treatment in requesting sick notes of the claimant. It was part of the normal process that the claimant be asked for sick notes. She was asked for these because she was on sick leave. For reasons given in relation to the previous complaint we are not satisfied that this meant that this was something arising in consequence of disability.

158. Complaint 14.3 is of not referring the claimant to Occupational Health. We do not consider there was any detriment or unfavourable treatment by not doing this. There is nothing to suggest that Occupational Health would have assisted at this stage. The respondent did not refer her to Occupational Health because she had not reached the stage of absence at which that would be done in accordance with the respondent’s normal processes. We consider that this was not a failure arising in consequence of disability.

159. Allegation 14.4 is of processing the claimant’s early release on 8 April 2016. This did, we consider, amount to a detriment and unfavourable treatment in that it meant that the claimant was disconnected from the Ernst & Young system. However, we conclude that it did not arise in consequence of the claimant's disability. This happened because the claimant had said she wanted to leave and the respondent was acting in accordance with what they understood her wishes to be at the time. In addition, the claimant has shown no causal connection with depression, which is the condition relied upon for disability.

160. Complaint 14.5 is treating the claimant's grievance letter as a letter of resignation. We do not consider that the claimant suffered a detriment or unfavourable treatment by reason of this letter being treated as a resignation letter. We conclude that this was not because of something arising in consequence of

disability. The claimant has not persuaded us that she wrote in the way she did because of depression. The letter was, on its face, reasonably understood as a letter of resignation.

161. We would have concluded that the complaints of discrimination arising from disability would not have been well founded, if the claimant had satisfied us that she was disabled at relevant times within the meaning in the Equality Act 2010.

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Employment Judge Slater

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Date: 30 October 2017

REASONS SENT TO THE PARTIES ON

31 October 2017

FOR THE TRIBUNAL OFFICE