EMPLOYMENT TRIBUNALS

Claimant: Miss B Kaunara

Respondent: Lloyds Bank PLC

HELD AT: Manchester **ON:** 20, 21 and 22 March 2017
24 March 2017
(in Chambers)

BEFORE: Employment Judge Tom Ryan
Mrs A Jarvis
Mr S T Anslow

REPRESENTATION:

Claimant: Mr B Chimpango, Solicitor
Respondent: Mr E Legard, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaint of unlawful race discrimination is not well-founded and is dismissed.

2. The claimant's complaint that she was unfairly dismissed is not well-founded and is dismissed.

REASONS

1. By a complaint presented to the Tribunal on 16 June 2016 the claimant made complaints of race discrimination and constructive unfair dismissal. The claims arose around the circumstances leading to allegations against her which were sent for a disciplinary hearing and her dismissal, as she alleged it to be, by reason of her resignation prior to that disciplinary hearing taking place. The respondent defended the claims, although it did not advance, should the claimant succeed in establishing that she was dismissed, a potentially fair reason for any dismissal that the Tribunal might find.

2. The matter came before the Tribunal (the present judge) on 6 October 2016 for a preliminary hearing for case management. At that time the unfair dismissal claim and race discrimination claim issues were defined as set out in paragraphs 3 and 4 of the record of that hearing. Insofar as the claimant's complaint of unfair dismissal was concerned, the claimant relied upon the matters set out in paragraphs 15(i)-(v) of the particulars of claim as comprising a beach of the implied term of trust and confidence. I identified also whether the claimant could be said to have resigned in response to that breach, or whether the claimant delayed in resigning such that it could be held that the breach was waived and the contract affirmed.

3. The complaint of race discrimination, which was said to be direct race discrimination, was based upon the matters set out in paragraph 16(i)-(iii) of the particulars of claim, and I recorded that the claimant also relied upon the commencement of the disciplinary proceedings against her as an allegation of race discrimination.

4. The claimant relied for the first two allegations on comparators, namely Bradley Davies and Aphra Moores, and upon hypothetical comparators in respect of the other allegations. So far as the allegations were contained in the particulars attached to the claimant's claim form, the claimant alleged that she was treated less favourably and subjected to a detriment in the following respects:

(1) That the claimant was treated less favourably by her manager, Tom Cartledge, and Lee Horridge when she was not fully supported in her role when she had been moved to a new section. Apart from being given insufficient training the claimant was not given sufficient feedback on her work and felt that she was being set up to fail in her role. The claimant complains that all her white colleagues, Bradley Davies and Aphra Moores, who had moved sections and departments were fully supported, for instance Bradley and Aphra received two weeks of training.

(2) The claimant was treated less favourably by her manager, Tom Cartledge, by not signing her off after she had achieved 97.5%, 98% and 100% performance in her new role. The claimant claims that her colleagues Bradley Davies and Aphra Moores who had achieved the same score were signed off by the manager.

(3) The claimant was treated less favourably by management, through Jane Frawn [sic] (whose name is in fact Jane Frow), who insisted that she should attend a disciplinary hearing despite the fact that she was signed off sick. The claimant claimed she would not have been pressurised in a similar manner if she were white. The claimant relies on a hypothetical comparator in this regard.

Evidence

5. The Tribunal heard evidence from the claimant in support of her case and from Mr Thomas Cartledge and Mrs Jane Frow on behalf of the respondent. Each witness provided a written witness statement which the Tribunal read as their evidence in chief. In addition the Tribunal was provided with a bundle of documents to which we refer where necessary by page number, and an agreed chronology and

both representatives put in written submissions at the stage when they made their submissions.

Findings of Fact

6. The Tribunal makes the following findings of fact.

7. It is convenient to state at the outset an outline of the factual matters which were largely not in dispute or which could be ascertained by independent documentation and witness statements.

8. The claimant was employed by the respondent from 24 January 2010 as a Customer Service Adviser ("CSA"). She performed a number of roles and in about August 2014 started work in the ISA Transfer Team in the respondent's Manchester premises where she worked. In late 2014 Mr Thomas Cartledge joined the ISA Transfer Team. At that point he was a Colleague Performance Manager and thus was the claimant's direct line manager as part of that team.

9. The structure of the respondent's business is that Customer Service Advisers ("CSAs") are supervised by Flow Leaders but are line managed by Colleague Performance Managers ("CPM") and the next grade up is that of Operations Manager.

10. In February 2015 the ISA Team was disbanded and the claimant was performing a number of ad hoc assignments for a few months.

11. The ISA Transfer Team, which is essentially receiving documentation and money from what are called "seeding providers", namely other Banks with whom customers have had ISAs previously, is responsible for receiving documentation and funds and ensuring proper records are kept and interest is properly accounted for in relation to ISAs that their customers have with the Bank.

12. Because of the nature of the ISAs and the tax advantages they attract there are busier and less busy periods of the year. Mr Cartledge's evidence was that normally there would be about five CSAs in the team but they would have up to ten CSAs around March and April at the change of tax year. For this reason in about May 2015 the Bank decided to assign a number of people to the ISA Transfer Team and, because there had been some changes in ISAs and the processes, to induct additional employees including the claimant into the ISA team.

13. In late May 2015 Mr Cartledge was managing the ISA Team. There were two Flow Leaders at that stage: Myra Sheiakh, who was assisted by another Flow Leader, Hafiz Parvaiz. The team already had two CSAs who were experienced in the work and when new employees started they were assigned the task of being Quality Checkers ("QCs"). They were Sairi Mahmood and Nick Kearney.

14. For the purposes of training and coaching staff in the work of the ISA Transfer Team the respondent had a process supported by a document called "Route to Competency: Record of Personal Success Savings Operations". Copies of these documents in relation to Bradley Davies and Aphra Moores who were recruited to the team at about the same time as the claimant are set out in the bundles (pages 119-, pages 133-).

15. There was no document in relation to the claimant's Route to Competency process provided by the respondent in these proceedings.

16. Mr Cartledge's evidence was that the initial teaching for this work was performed by another CSA, Smaranda Ihnatiuc. The process, so far as the other two named employees, Bradley Davies and Aphra Moores are concerned, appears to show that on 19 May 2015 they had training from Smaranda Ihnatiuc which consisted of a period of an hour in which they were given a high level overview of the process and provided with something called a "process map", that they then watched Ms Ihnatiuc undertake a piece of work using the process for a period of about an hour, then they were invited to answer questions to test their understanding of the process for a further hour, and finally they were processing work seen by the person conducting the training known as an SME and then, if they completed that satisfactorily, the training part of the process was signed off and in each case of those two employees it was signed off on that same day, 19 May 2015.

17. There then followed a period of coaching which was estimated to last four weeks but in the case of each employee lasted longer. The process is set out as far as coaching is concerned, for example at page 124. It is shown that in each week an assessment was made of the efficiency of the colleagues with a target for that. A record was made of any errors. The number of cases upon which they worked on each day was recorded and from a calculation of the number of errors and the number of cases worked a score was given both for efficiency and quality, with the intention being that the overall quality scores should achieve 98% or above in order for the employee to be summarily signed off as competent.

18. Week by week the overall efficiency is measured with a percentage score and for example in the case of the two named employees those weeks appear to start on 25 May 2015 and continue through, in the case of Mr Davies to 12 July 2015 and in the case of Ms Moores for longer. In both cases those employees were signed off; a decision taken by Mr Cartledge. Somewhat ambiguously the term "signed off" was applied by the Bank both to those who were signed off, in the sense of being removed from the process because their scores were not satisfactory, as happened with the case of Mr Davies, or where their processes showed that they were capable of doing the process properly, signed off positively as happened later in the case of Ms Moores.

19. Although both were signed off and the claimant compared herself with Ms Moores, it was clear on the evidence that Mr Davies was not signed off successfully. What occurred in the case of the claimant was that after a period of time and for reasons with which we will deal later the claimant was not signed off, either positively or negatively.

20. The claimant's case was that she was only provided with two hours of training because there were no trainers available, and then she agrees that she started in the same process as Mr Davies and Ms Moores, and indeed there were others who on the evidence also succeeded in being successfully signed off in the process.

21. In the course of the coaching process Mr Parvaiz raised concerns about two aspects of the claimant's work that it was said had been observed by him and others.

22. The first was an allegation of “cherry picking”, namely picking the types of case upon which the claimant worked to choose the simpler and less time consuming tasks which would have the effect of distorting her scores because, it is said, simpler and less time consuming tasks are likely to be completed more efficiently i.e. by more being done in a particular day, and with greater quality, because the employees are less likely to make mistakes.

23. The second allegation concerned what was said to be falsification of documents. This was Mr Parvaiz or other staff noticing that the claimant had completed two forms inconsistently. The first form was the i360 form which was notification of the number of cases which she completed each day. That should have matched, according to the respondent, something called the “QC database”. This is a database of cases submitted by the individual employees in coaching for quality checking. Since there was a requirement, as was common ground, that at this stage quality checkers would check 100% of the tasks undertaken by the employees, those lists should have matched exactly.

24. The summary of the difference between what was observed between the claimant and other members of the team who were in coaching is shown at pages 117 and 118 of the bundle. In the period 6 July 2015 to 31 July 2015 the claimant processed on an average per day 30.6 cases, and the other colleagues who were said to be an average of three colleagues, namely Mr Davies, Ms Moores and another member of staff in coaching, was said to be 30.2 cases, so there was a broad consistency.

25. The differences came in the types of cases that were processed. These are split into four groups: Notification, Cases Closed/CTF/Dividends, Exceptions and Certificates. In the case of the claimant Notifications were 48.79% and in the case of the comparators 34.43%. In the cases of Cases Closed/CTF/Dividends the claimant 25.49% and the others 8.6%. In the case of Exceptions 3.26% and the colleagues 0.003%, and in the case of Certificates 22.22% and the comparators 56.62%.

26. According to Mr Cartledge the Exceptions and the Certificates were more time consuming and more complex, whereas the Notifications and the other category were easier to recognise, easier to complete and took less time. The comparison therefore in relation to the figures at least resulted in the simpler cases comprising 74% of the claimant’s work whereas in the case of the comparators approximately 43%, and the corollary was that the claimant's proportion of the more time consuming/more complex work was significantly lower than that of the other colleagues.

27. In relation to the comparison of the i360 documentation and the QC database documentation, in the period of the 1-31 July 2015 Mr Parvaiz recorded that on each day except one there was a significant variation between the two records. On some occasions it was one or two a day; on only one day was there no variation and the variation on one particular day went up as high as 21. However on average the difference was 6.39 cases per day in the two records. The unchallenged evidence in relation to every other colleague in the team was that their two records, i360 and QC database, matched without any variation whatsoever.

28. These matters were brought to Mr Cartledge’s attention in early July. As a result he asked Mr Parvaiz and other members of the team to monitor the position,

and then conducted investigatory interviews having consulted Human Resources, first of all with the quality checkers, Saira Mahmood on 4 August and Mr Kearney on 5 August, and then had an investigatory meeting with the claimant later in the afternoon of 5 August 2015. A note of these meetings was taken in each case by Mr Lee Horridge.

29. The respondent's process required that the notes of the investigatory meetings be sent to employees and they were given four days in which to respond. The claimant was provided with the notes on 6 August 2015, but in the meantime she had asked to see Mr Cartledge, her line manager, at 7.30am on the morning of 6 August 2015 and Mr Cartledge had made a record of that conversation to the effect that the claimant admitted that she had been cherry picking at some point. The claimant disputed that she had said that but said that she had apologised but only for the discrepancy between the i360 and the QC database but sought to explain it.

30. What then occurred was that Mr Cartledge completed an investigatory report entitled "Factors for Consideration" which was not dated, but provided the following summary of the alleged misconduct. He said this:

> "The alleged misconduct is for cherry picking easy cases from the queue to boost the colleague's efficiency – which is an important factor when deciding year end ratings so this would lead to financial benefit. The other misconduct is putting more figures into i360 than the colleague has actually completed. There are instances throughout July where the colleague has submitted less work for quality checking than they have put on i360. This would either indicate the colleague is again trying to boost their efficiency or alternatively they do not want to disclose certain cases to be quality checked. Either would again lead to financial benefit as efficiency and quality scores are used towards colleague ratings."

31. He described that this was falsification of records, was gross misconduct, and cited a passage from the company policy. He was asked by the form to describe what coaching or support had been received, and he described that as:

> "Daily feedback, training with an SME, weekly feedback and guidance from FL (Flow Leader) when reviewing the route to competency document that Bahati had signed. Bahati used to be in the same queue and was deemed an SME who was responsible for quality checking the work so training should have been refresher training. The colleague is now on week 9 of their RTC document and I would have expected the colleague to have been signed off this 3-4 weeks ago."

32. In answer to the question whether the conduct was typical or out of character he entered the following:

> "I have no proof of any other instance of this happening – yet by speaking to members of the team – Bahati's reputation is this has happened before on numerous teams without being picked up by management."

33. In respect of "Does your investigation demonstrate the employee knows the correct procedure etc?" he responded:

> "Yes, I have asked specifically whether Bahati knows how to log her figures and select her work. It is more than reasonable to assume the employee knows the correct procedure to follow as she has worked in the same department for six years and there is a zero tolerance to cherry picking and falsification of records on i360."

34. He repeated that the colleague had signed a route to competency document which confirms they have had their training: "The colleague has detailed in the investigatory meeting that she understands the rules".

35. With regard to how well the procedure process protocol was published he responded:

> "This is very well communicated and engrained in the culture of the ISA department. We have compliance checks to ensure that i360 figures match with quality checking figures and this is picked up monthly and questioned. Bahati's teammates and colleagues raised these incidents, clearly showing that others on the same team as Bahati know the rules."

36. Under the heading "Motive" in answer to the question whether the investigation suggested reasons for the behaviour, he entered:

> "Yes, the colleague is eager to sign off her RTC document which could reflect badly on her year end rating if this goes past the suggested training period time. In this instance I'd expect Bahati to be signed off within a maximum of six weeks but we're now on week nine."
>
> He added:
>
> "There is a financial gain due to efficiency and quality scores counting towards colleagues' ratings which affect bonus and pay rise."

37. He identified risks and an impact on the business, and he said it should be dealt with, in his opinion, by way of formal disciplinary. He gave the overall rationale as "blatant disregard for group policy and procedure, falsification of records for personal financial gain".

38. Mr Cartledge submitted that report to Human Resources. Mrs Frow was appointed as the hearing manager, and in consequence on 20 August 2015 she wrote to the claimant (page 185) identifying the gross misconduct as, "Purposely selecting a large number of simple cases from the working queue to the significant exclusion of complex cases for the purpose of increasing your efficiency in order to benefit from a performance bonus" and "falsified group records by inputting more completion figures into i360 than you had actually completed". She set out the particulars of the case. She referred to a degree of dishonest and wilful disregard for group practices, identified potential and actual risks and warned the claimant that if found to be guilty of gross misconduct she might be dismissed, but if the allegations were not upheld no disciplinary action would be taken. She enclosed a copy of the disciplinary policy and set a date for the meeting as 2 September 2015 at 9.30am and told the claimant that she could be represented by a trade union representative or work colleague. With the letter she included the following documents:

- The disciplinary policy
- The investigatory meeting minutes held with the claimant
- The investigatory meeting factors for consideration
- A document described as “split of work” which we infer was the figures to which we have drawn attention
- The investigatory meetings with Nicholas Kearney and Sairi Mahmood
- Notes from the follow-up discussion with the claimant on 6 August 2015, which was Mr Cartledge’s note of that meeting
- Emails between the claimant and Mr Cartledge
- A copy of the Lloyds Personal Integrity Policy

39. That resulted in the claimant being signed off work by the doctor with work related stress from 25 August 2015 to 8 September in the first instance; from 8 September to 22 September and then from 22 September to 7 October 2015.

40. Again in summary what then ensued was that the disciplinary hearing for 2 September was postponed pending the claimant's recovery from ill health. In September the claimant was told an Occupational Health assessment would be organised. An Occupational Health assessment took place on 29 October 2015 and the claimant was seen by an Occupational Health Physician as a result of which an Occupational Health report was received by the respondent on 390 October 2015 (pages 228-229). That was a report from Dr Dale Archer, a Consultant Occupational Physician. He recorded that the claimant had been absent since 27 August 2015 with anxiety and depression arising out of work related issues. He described the claimant as suffering from very low mood “and is on appropriate treatment from her GP” and is currently waiting to embark upon a course of cognitive behavioural therapy in the following week.” He described the only barrier to work was her low mood which after such a length of time met the criteria for an adjustment disorder from which full recovery was expected. He said this:

> “She is not cognitively impaired and fully understands what is alleged against her even though she does not necessarily agree with the employer’s interpretation of events. When she will feel fit enough to return to work or attend an investigation of disciplinary hearing is entirely self determined and is not a medically determined matter. I agree with her line manager that whatever the outcome of this process then the sooner it is disposed of the sooner she can move forward and start recovery from her adjustment disorder.”

41. He stated that he assumed that the ill health was work related but that he could not attempt to independently verify the events that had taken place at work. he said at the same time that he was not able to determine a return to work “as it depends upon her own perception of her fitness to attend, though I have advised she engages with the employer sooner rather than later”.

42. On 9 November 2015 Mr Cartledge sought further advice from Human Resources saying he had just received the Occupational Health report and asked for further advice.

43. On 9 November 2015 Mr Cartledge wrote to the claimant asking to confirm a couple of problems and acknowledged that the claimant was saying she had felt she was not being treated fairly and said, as he had done at an earlier stage, that the claimant would have the opportunity to raise a grievance if she wished to do so.

44. On 19 November 2015 the claimant wrote to Mr Cartledge saying she was still not feeling well and had already bought a home flight ticket. The claimant is black African and the Tribunal infers she returned to her home country. She had said that her doctor advised her that to go and see her family might help and that she would be leaving tomorrow (i.e. 20 November 2015) and would be back on 10 January 2016 and she had submitted an extended sick note.

45. In the meantime HR advised that the respondent should chase up further Occupational Health advice and it was suggested to Mr Cartledge that the claimant be invited with a colleague to a hearing after something called the “Christmas embargo”.

46. On 9 December 2015 a subsequent letter was provided by Dr Archer to HR saying that the claimant (page 239) was not cognitively impaired and fully understood what is alleged against her even though she does not necessarily agree with the employer’s interpretation and she was able physically to attend the Occupational Health appointment and assessment.

47. On 13 January 2016 the claimant emailed Mr Cartledge saying that she had returned from home where she thought she would get relief but things did not go the way she was expecting. She said that she was still not feeling well and her doctor had assessed her condition and referred her back for counselling sessions.

48. On 15 January 2016 Ms Frow sent a letter inviting the claimant to a disciplinary meeting to take place on 29 January 2016. She reminded the claimant of her right to be represented by a trade union representative or a work colleague and she re-sent the documents.

49. On 21 January 2016 Ms Frow received a text message (page 254) from the claimant saying she would not be able to hearing the hearing. Ms Frow took advice and then attempted to contact the claimant and recorded in an email of 28 January 2016 that the claimant's husband had called her to say that the claimant was too ill to attend the meeting on the following day, that the claimant was on medication to 28 February 2016 and would go back for a further consultation. He had pointed out to Ms Frow that she was not a union member and could not follow that route. He asked if he could attend on her behalf but Ms Frow said that was not permitted according to the policy, and that at the request of the claimant's husband she had herself contacted the union to see if they would represent the claimant even though not a member, but the response was not favourable. The respondent advised the claimant’s husband that in the interests of giving the claimant the opportunity to attend the hearing that the hearing should be moved again 14 days on. As a result on 29 January 2016 a further letter was sent inviting the claimant to a meeting on 15 February 2016.

50. The claimant had been to her GP who wrote a letter to Ms Frow dated 29 January 2016 (page 257) which we quote in material part. It is a letter from Dr Duru of the claimant's GP practice in Oldham:

> "I understand she is going through some stressful situations at her workplace at the moment and as a result of this she has not been able to resume her usual duties. I am also aware that she has been scheduled that she attends certain meetings which she feels she is not in the right frame of mind to do at the moment and I am writing this letter to explain that she is not in the right frame of mind mentally and physically at the moment to attend any work related meetings. If there is any communication you want to pass to her you can either wait until she is fit mentally or you can address that through the mail to her. I will continue to monitor her progress and I hope this situation in her workplace will be resolved as quickly as possible. Please do not hesitate to contact me if you have any queries with this letter."

51. Upon receipt of that letter Ms Frow took advice from HR and HR then contacted, according to emails at page 259, the respondent's Group Legal Department and the advice was that the GP letter did not change anything and that it was suggested that the disciplinary hearing should be held in the claimant's absence if she was not well enough to attend, or she could put forward written representations, and the Group Legal Department also drew attention to the fact that the Occupational Health report said that the sooner the matter was resolved the better.

52. Ms Frow accordingly wrote to the claimant on 1 February 2016 saying that the re-scheduled meeting would remain and the hearing on 15 February 2016 would take place, but that the claimant had the opportunity to make written representations should she not wish to attend in person.

53. On 8 February 2016 Ms Frow reported to HR that she had confirmed by mobile as well as written post by recorded delivery what the decision was, but that on her day the claimant's husband had contacted her again saying she would not be attending and does not feel well enough to even submit anything in writing. He asked whether the meeting could be delayed until 24 February when she was looking forward to returning to work at the end of her current medication. Ms Frow asked for advice. The advice from HR was that if her diary could allow it then maybe Ms Frow should delay it but only if she could. Ms Frow therefore wrote to the claimant on 8 February 2016 saying that the hearing would be re-scheduled for Thursday 25 February 2016 and said towards the end of the letter:

> "Please note that as this meeting has already been re-scheduled once, it is unlikely it will be agreed to postpone it again, unless there are exceptional circumstances that are currently unforeseeable. Your failure to attend this meeting could result in the hearing being held and a decision taken in your absence."

54. On 18 February 2016 Ms Frow reported to HR that she had received a text that day confirming the claimant's attendance at the hearing scheduled for 25 February 2016.

55. Without further communication with Ms Frow on 22 February 2016 the claimant sent an email at 12:05 to Mr Cartledge. It is by that email that the claimant resigned and we quote it in full:

> "Dear Tom
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> Please accept my formal resignation from the Customer Service Administrator position with immediate effect from 22/02/2016.
>
> I have been off work with work related stress and I'm struggling to recover from it. I however no longer have any faith and trust with the company for the way I have been treated. I have therefore decided to resign and concentrate on my recovery. Thanks for giving me the opportunity and I wish the company continued success.
>
> Yours sincerely
>
> Bahati Kaunara"

56. Against that background we turn to make specific and necessary findings of fact in relation first to the allegations of race discrimination and secondly in relation to the allegations that the claimant relied upon as amounting to a breach of the fundamental implied term of trust and confidence.

Allegations of Race Discrimination

57. The first allegation concerned failing to give the claimant reasonable support.

58. The claimant alleged that Lee Horridge was her line manager at the material time together with Mr Cartledge. Although Mr Horridge was involved in taking minutes at the investigatory meetings, Mr Cartledge's evidence was clear and the Tribunal accepted that at no point was Lee Horridge the claimant's line manager. He was a CPM at the same grade as Mr Cartledge. Mr Cartledge accepted that Mr Horridge, who had a different range of duties, did provide line management support in a functional way in the team from time to time, including taking what are known as "huddles" for the provision of information to employees, and matters of that sort.

59. So far as Mr Horridge was concerned, part of the claimant's case concerned the fact that Mr Horridge was, during 2015, in a relationship with Jessica Frow, Jane Frow's daughter. As far as Jessica Frow was concerned she was a temporary rather than a permanent member of staff who was working in the department but in a different chain of command, and neither Mr Horridge nor Jessica Frow were in the line management chain of command that led to Mrs Jane Frow, who was more senior to anybody else about whom we heard in the case.

60. The suggestion that Lee Horridge did not fully support the claimant in her role was without foundation for that reason. It was not his job to support the claimant in her role: that was the job of the claimant's line manager, Tom Cartledge.

61. The claimant alleged that she was given insufficient training and was not given sufficient feedback on her work. So far as training was concerned, although the respondent was not able to produce the RTC form for the claimant, it is clear from the notes of the investigatory report, and in addition a copy of the claimant's mid

year performance review which was included in the bundle, that that RTC form clearly had existed and it is likely that it had been completed in a similar manner to that of the other employees about whom the claimant gave evidence. Dr Chimpango for the claimant drew attention to the fact that it was missing, and it appears that the respondent did not have a system in place for retaining those forms since it was only when the claimant raised her complaint some months later that by searching a variety of places the respondent was able to discover the RTC forms that were disclosed.

62. It was Mr Cartledge's evidence that these forms were not used in other offices that he had seen, but it seems likely given the layout of the forms that they would have been used at least in some other functions because they appeared to be general to the Savings Department rather than to the ISA team. Be that as it may, his evidence, and there was no evidence to point the other way, was that they were retained by the QCs or by the Flow Leaders but there was no centralised system for them to be retained.

63. Whatever the outcome of this case, we observe it might be sensible for the respondent as a learning opportunity to ensure that there is a system for the retention and production of these documents which might be relevant to pay disputes as well as to matters such as those with which this case is concerned.

64. There are emails in the bundle suggesting that the claimant raised concerns about feedback (pages 103-104). Mr Cartledge's evidence was that this was more to do with the time when feedback was received so that the individuals in coaching could learn from the QC responses if it was given in a more timely fashion and thus errors might not be repeated. When the claimant was taken to task by Mr Cartledge at the investigatory stage she alleged that she was not given sufficient support in the role, but at the same time the claimant was alleging that she had not done anything wrong in relation to the allegations of cherry picking or falsification of documents and had achieved comparable scores to those of Ms Moores.

65. The next allegation concerned failing to sign the claimant off after she achieved the prescribed target.

66. So far as the scores are concerned, the relevant comparison is between that of Ms Moores and the claimant. It is clear that Mr Davies, at an earlier stage, was scoring at a significantly lower degree and Mr Cartledge's evidence was that he was removed from the process to some other function for that reason.

67. So far as the scores were concerned, for the week ending 29 May the scores were as follows: Ms Moores 69.35%; the claimant 66.7%. Week ending 5 June Ms Moores 60%, the claimant 76.47%. Week ending 12 June Ms Moores 82%, claimant 90%. Week ending 19 June Ms Moores 87.10%, the claimant no evidence provided. Week ending 26 June the claimant 93.55%, Ms Moores 91.67%. Week ending 3 July the claimant 92.03%, Ms Moores 85.99%. Week ending 12 July the claimant 94.41%, Ms Moores 90.26%. Week ending 17 July the claimant 96.06%, Ms Moores 93.39%. Week ending 24 July the claimant 97.76%, Ms Moores 97.3%.

68. At that stage Mr Cartledge took the decision to sign Ms Moores off as being competent in the RTC process. In the two ensuing weeks, that is the weeks ending

31 July 2015 and 7 August 2015, the claimant scored 98.75% and 100% respectively.

69. The target for being signed off successfully in terms of the overall percentage of quality of work was 98%. It was Mr Cartledge's evidence, which the Tribunal accepted, that he had a discretion as a manager not to sign off an employee as having successfully completed the RTC process if there was evidence before him which caused him to have a suspicion or a belief that there was some misconduct which might reflect upon the integrity of the employee or the risk that the work of that employee might pose to the business, the customers or indeed to their own continued employment. Mr Cartledge's evidence was that the raising of allegations by Mr Parvaiz, which at that stage had occurred for some five or six weeks, was such that the business through him was entitled to treat the two members of staff, the claimant and Ms Moores, in a different way notwithstanding that that was not advertised to the witnesses as part of the process.

70. The claimant's suggestion that she was given two hours' training whereas the other members of the team upon whom she relied, Mr Davies and Ms Moores, were given training in the RTC process, on the face of it suggested that the claimant was not sufficiently trained. The claimant, however, maintaining that she had not done anything wrong in terms of the allegations that were made, was at least by implication putting forward that she was able to perform the task in at least as good a way if not better than Ms Moores, and therefore her evidence that she was inadequately trained or inadequately coached was significantly diluted.

71. Notwithstanding that the claimant alleged that she was not fully supported she acknowledged to Mr Cartledge, both at the investigatory meeting and apparently in the completion of the mid year performance review, although she was not questioned on this by the Tribunal or the representatives in our hearing, that she had received significant degrees of feedback, albeit perhaps not in such a timely manner as she would have wished or as perhaps ought to have occurred. There was no specific evidence that the Tribunal could accept that the claimant was as alleged being set up to fail in her role.

72. So far as the claimant was treated less favourably by her manager by not being signed off, the claimant compared herself to Mr Davies and Ms Moores and it is accepted that Ms Moores was signed off positively whereas the claimant was not, although the claimant had achieved, as we hold, at least as good a score as that of Ms Moores. So far as Mr Davies is concerned, the signing off of Mr Davies in a negative way was a matter which only came out after the parties had completed disclosure.

73. The third allegation was withdrawn in the course of submissions as we note below.

74. The fourth allegation of less favourable treatment in respect of race was that she was treated by Ms Frow less favourably by insisting that the claimant should attend a disciplinary hearing despite the fact that she was signed off sick, and whilst it is accepted that the claimant was subjected to disciplinary proceedings and was signed off sick and thereafter maintained that she could not attend through ill health, there was no evidence before the Tribunal of pressure in the detrimental sense. The Tribunal notes that Ms Frow permitted the claimant, in accordance with the process,

to attend by way of sending an alternative person or submitting written representations.

75. The additional allegation added at the preliminary hearing was that Mr Cartledge subjected the claimant to a disciplinary process by reporting it in the form that the Tribunal had seen.

76. There was no evidence adduced by the claimant other than that she was black and Ms Moores and Mr Davies were white employees. Dr Chimpango referred to the fact that those who were alleged to have discriminated against the claimant were all white in the course of submissions, but that was not a point that was explored in evidence and he accepted in the course of submissions that that was not of itself relevant for considering whether the claimant had established any facts relating to race other than the difference in characteristic and the difference in treatment. There was, for example, no evidence such as failure to complete a questionnaire. It was not suggested that there was any failure to disclose documents which would show a race related reason in the case.

77. By the same token, the Tribunal noted that the ethnic makeup of the training cohort was that Mr Kearney was white British, that Ms Mahmood, Mr Parvaiz and Myra Sheiakh were Asian, and that in the cohort there was another black African person undergoing coaching and the other members of the team who were undergoing coaching appear to have been Asian according to Mr Cartledge.

Constructive Unfair Dismissal

78. We now turn to the facts specifically relied upon by the claimant in relation to the complaint of constructive unfair dismissal. Those allegations are set out in paragraph 15 of the particulars of claim.

79. The third allegation under that paragraph concerns the allegation that the respondent failed to protect the claimant form the discriminatory conduct of her manager who was bent on securing a permanent position for his girlfriend and wanted to get rid of her. That was an allegation against Mr Horridge and was withdrawn by the claimant through her representative during the course of final submissions as an allegation which could go to a breach of the implied term, since it was accepted by Dr Chimpango that the claimant could not establish any fact which showed that Mr Horridge had acted in a discriminatory way since all he had done in this case so far as it was material was to take notes at the investigatory meetings.

80. Even had that matter not been withdrawn there was, we record, no evidence that Mr Horridge was bent on securing a permanent position for his girlfriend, that is Jessica Frow, since Jessica Frow according to Mrs Frow's evidence did not wish permanently to work for the Bank and therefore that allegation was illogical and in any event Mrs Frow herself is a more senior employee than Mr Horridge and the suggestion that he could therefore by discriminating against the claimant secure a permanent position for his girlfriend's mother was clearly without foundation. Neither was there any evidence that the claimant could point to in order to show that Mr Horridge wanted to get rid of the claimant from her employment.

81. The claimant relied upon the disciplinary proceedings being raised on baseless grounds.

82. So far as that is concerned, the claimant's previous work and the response of Mr Cartledge, both in the investigatory meeting and in respect of the mid year review, showed that the claimant was entirely aware of the need to record accurately the work.

83. So far as the i360 and QC database discrepancies were concerned, the claimant's response as set out in the investigatory meeting was that she had not completed them fully because she could not obtain some customer references. It might, the Tribunal accepted, have been the case upon a proper enquiry at a disciplinary hearing that there were some instances in respect of which the discrepancies could have been explained, and no doubt some might have been explained by clerical error, as the claimant also suggested. However, the evidence that the i360 and QC database figures for all other members of the team matched at every point in the process, which was not undermined or seriously challenged indeed by Dr Chimpango, was compelling evidence in the Tribunal's judgment which certainly merited Mr Cartledge referring the matter for that allegation alone to the disciplinary hearing, and it clearly undermined the suggestion that the reference to the disciplinary proceedings was on baseless grounds.

84. So far as the question of cherry picking was concerned, there was in the Tribunal's judgment certainly grounds, had the matter turned out in a different way, for the claimant to allege that the process of investigation or the adequacy of the investigation by Mr Cartledge was capable of criticism. Whether that would have resulted in a finding in her favour in all the circumstances is not a matter that we need to decide, indeed it would not be proper of us to do so. The question for the Tribunal is whether there was evidence that Mr Cartledge could legitimately form the view on a reasonable basis that there was a case to answer in relation to cherry picking.

85. So far as that was concerned, the facts appear to be these. Allegations of cherry picking were at least made by Sairi Mahmood and Nick Kearney and reported to Mr Parvaiz. It is apparent that Mr Parvaiz had a conversation with Mr Cartledge shortly before he wrote an email to him in early July. Mr Cartledge's evidence was that Mr Parvaiz was asked by him to put that in writing. It is clear that Mr Parvaiz did not do so and it would have been appropriate for Mr Cartledge to go back to Mr Parvaiz and require him to do so. What Mr Parvaiz reported was the i360/QC database discrepancy and more importantly another issue concerning the way in which the records were being maintained, but that specific issue was not referred to a disciplinary hearing.

86. The evidence of Sairi Mahmood and Mr Kearney was not entirely consistent and might well have been subjected to rigorous scrutiny at a disciplinary hearing had one taken place, or even potentially, had that resulted in the claimant's dismissal, at Tribunal proceedings. However, it was common ground that the claimant knew the process for cherry picking. She accepted in evidence that cherry picking was wrong and could be potentially subject to misconduct proceedings, and she accepted that there was some evidence before Mr Cartledge that would support a finding of cherry picking. There was certainly scope for Mr Cartledge to have caused that investigation into that to have been taken in more detail by reference to the IT Department, or by obtaining and producing screenshots which apparently had been taken at various points of showing that the claimant had four or five cases open on the screen in front of her when normally employees would deal with one or two at a

time. That might have led to a suspicion of cherry picking but the evidence about that before Mr Cartledge at least was not strong.

87. However, following the investigatory meeting the claimant accepted that she had asked to see Mr Cartledge at 7.30 the following morning. That led to Mr Cartledge making a record of the meeting which is shown at page 179. The material parts of that minute read as follows:

> "This morning Bahati asked if I was able to talk and we had a conversation in the Etihad room. Bahati explained that she felt like she had been singled out on the team and advised that all colleagues on the team had been cherry picking at some point. I stated I'd look into this but I still need to pursue Bahati's case with HR. Bahati admitted to cherry picking and apologised that this had happened. Bahati was clear to advise me that she would much prefer if this could be treated as a warning and she would promise to fix the problem with immediate effect. Bahati was very apologetic and indicated she would like to make a clean start and just be issued with a warning. I advised her that I would still be speaking to HR and I would advise her of next steps. I have noticed Bahati's admittance [sic] and apology on me raising this with the HR Consultant in my meeting on 10 August 2015."

88. So far as that note is concerned the claimant's evidence was that she did ask for the meeting and that the conversation took place. She appears to have accepted that she said that she had been singled out and that she apologised, but her evidence was that she apologised for the i360 QC database discrepancy and that she did not admit to cherry picking. However, there is evidence apart from this that the claimant had said on another occasion that there had been cherry picking by all the members of the team at some time. In those circumstances it seems to the Tribunal on the balance of probabilities that Mr Cartledge's note that the claimant admitted at least that she and others had been cherry picking at some point is supported by the claimant's own evidence.

89. Mr Cartledge's evidence, however, went further. It was that the claimant admitted cherry picking and that he had noted that immediately afterwards, and that although he had not sent it to the claimant for corroboration and it had not been referred to in emails that day between them which followed, it was the matter that he forwarded to HR and there is no doubt it was a copy of that document that was sent to the claimant within a fortnight of the meeting.

90. The parties agreed that there was no mention of i360 in the document and it was submitted in the course of the hearing that the Tribunal had to decide whether Mr Cartledge's evidence as to the contents of that conversation was true rather than whether it was mistaken.

91. It was not put to Mr Cartledge by Dr Chimpango on behalf of the claimant that that minute was not true, and the claimant although she gave evidence to the effect that she had not apologised for this and in the document she wrote shortly afterwards had said the same thing (pages 175-178), the Tribunal on the balance of probabilities concluded that the document was a true record of what the claimant said. But even if Mr Cartledge had misinterpreted what the claimant said, that she was apologising for cherry picking, it was at least to the point that the claimant was saying that all had been cherry picking at some point, a qualified admission by the

claimant of matters which could lead, even on her own evidence, to proceedings for misconduct. In those circumstances the Tribunal had to conclude that the description of the behaviour of the respondent as commencing disciplinary proceedings on "clearly baseless grounds" could not be sustained.

92. The claimant's final allegation was that the company had put pressure on her to attend the appointment with the company doctor and the disciplinary meeting when the claimant was signed off and in disregard of her doctor's advice. So far as that matter was concerned, when the claimant was referred to Occupational Health she had been reluctant but had agreed to go. Undoubtedly the respondent had the right to refer her to Occupational Health when she had been off for more than 28 calendar days. The claimant had in fact complained to Mr Cartledge that she did not want to be seen by the Occupational Health assessor but by the company doctor i.e. the Occupational Health doctor, Dr Archer. In those circumstances there was no fact to support the allegation that the respondent put pressure on the claimant to attend an appointment with the company doctor, that is precisely what she wanted. We have already stated our findings of fact in relation to the allegation of pressure to attend the disciplinary meeting.

93. So far as the disregard of the doctor's advice is concerned, the medical evidence, such as it was, from Dr Duru did not suggest that the claimant was unfit to attend for a diagnosable medical condition but just referred effectively to the claimant's concern that she was under stress. Bearing in mind that the claimant was facing disciplinary proceedings against potentially serious matters, the fact that she was under stress was perhaps not surprising. However, her own GP whilst asking the company to put off the disciplinary proceedings yet again did not go so far as to maintain that attending the meeting was likely to make the claimant ill. To that extent his advice and opinion was consistent with that of Dr Archer.

94. Finally we turn to the allegation of reasonable support. Whilst we recognise that the claimant made allegations at an early stage and made requests for support, and alleged that she did not receive it, by the same token the claimant was alleging that she should have been signed off at about the same time as Ms Moores for having achieved scores which were not only at least as good as Ms Moores but were in fact better. The evidence from Mr Cartledge was that whilst the trigger for signing off was 98% he had a discretion to look at the nature of the errors that were being made at that stage and he had noted that the preponderance of the errors made by Ms Moores in fact related to typographical errors and matters of that sort and were not errors in relation to critical areas of the work that was being done, and for that reason although she had only scored 97.3% by 24 July he signed her off.

95. Mr Cartledge was asked by the Tribunal what would have been the position in relation to the claimant's scores had she not had allegations hanging over her, and in Mr Cartledge's words "she would have been signed off – 100%". In other words, it was a certainty that without the allegations of misconduct she would have been signed off and could have carried out the work from then on.

96. The claimant's case with regard to reasonable support is inconsistent. In fact the claim was really advanced by Dr Chimpango on a different basis, namely that the concerns that were being raised in relation to cherry picking and the completion of the i360/QC database forms should have been addressed informally and the claimant advised how to proceed and warned. It is clear that from an earlier email

the claimant was advised by Mr Cartledge that the i360 form needed to be completed accurately, and the claimant was well aware in the Tribunal's judgment that she needed to submit all her work for quality checking. Either the figures in the i360 were wrong or the figures in the QC database were wrong, and the claimant was clearly, in the Tribunal's judgment, aware of the need to complete them accurately at the time.

The Law

97. We then turn to the legal position. So far as the complaint of race discrimination is concerned the Tribunal was reminded by the parties of the decision of the Court of Appeal in **Madarassy v. Nomura International Plc** [2007] IRLR 246 CA and the guidelines in **Igen Ltd v. Wong** [2005] IRLR 258 CA. It is not enough for an employee to identify a difference in race and a difference in treatment in that she has received less favourable treatment which is to her detriment, or which amounts to a detriment, she must establish some fact which points to the difference in characteristic, in this case race, being some part of the reason in order for the burden of proof to pass to the respondent.

98. So far as the complaint of constructive unfair dismissal was concerned, as set out in the record of the preliminary hearing, it is necessary for the claimant to satisfy the Tribunal that there has been by the respondent a breach of a fundamental term or a serious breach of a term by the employer which is so seriously damaging of the contract of employment with its implied duties of trust and confidence such that she is entitled to resign forthwith; that she did resign in response to that breach and not for some other reason; and that she does not delay after the breach has occurred to the point where it can be said that she has waived the breach and affirmed the contract.

99. The fundamental implied term of trust and confidence as formulated in the case of **Malik v BCCI** is to the effect that the employer must not, without reasonable and proper cause, a phrase that itself derives from the earlier case of **Hilton v China Limited [2001] IRLR 727**, conduct itself in a way which is calculated or likely to destroy or seriously undermine the confidence and trust that should exist between employer and employee. There is no doubt that it is a high hurdle for an employee to overcome as has been reinforced recently by the Employment Appeal Tribunal in the case of **Frenkel Topping Ltd v King** [2015] UKEAT 0106/15/2107 and the nature of the term and the difficulty of overcoming that hurdle was emphasised in the case of **Tullett Prebon plc v BGC Brokers** [2010] IRLR 648 (High Court).

Conclusions

Race Discrimination

100. Against that background the Tribunal reaches the following conclusions.

101. Overall, the Tribunal cannot sustain these allegations of race discrimination, even when looked at in the round and even if the Tribunal were to find that the claimant was able to show a difference in treatment and detriment in each case, in comparison either to an actual or a hypothetical comparator.

102. The reason for that conclusion is that even at the state of final submissions Dr Chimpango was unable to identify any piece of evidence which suggested that the reason for the claimant's treatment was related to her race, other than the difference in race between her and that of the comparators upon whom she relied.

103. In our judgment the racial background of the alleged discriminators is not relevant and is not supported, as Dr Chimpango has suggested, by authority, and his persistent reliance upon all the circumstances of the case, and in particular the failure of the respondent to deal with the claimant's misconduct, or alleged misconduct, in an informal way is, in the Tribunal's judgment, further confirmation that such a link between the race and the treatment cannot be established.

104. It is, in the Tribunal's judgment, no more than an attempt to argue that unreasonable treatment can amount to treatment related to a protected characteristic. As the Tribunals have pointed out on numerous occasions, that is simply a fallacy.

105. So far as the last allegation of discrimination is concerned, which was the only one that was in time, the Tribunal simply finds as a fact that there was no pressure that she attend a disciplinary hearing. There was a reasonable management instruction that she should do so, but whilst the claimant may have been stressed by that it did not, in the Tribunal's judgment, amount to a detriment.

106. That claim was the only one that was in time, and the earlier allegations, unless they formed part of a continuing act, were out of time. Other than the claimant's ill health, no evidence was advanced to say that it would be just and equitable to extend time, either in the witness statement or in the claimant's evidence.

107. With regard to the comparison with Bradley Davies, the Tribunal is satisfied that no like-to-like comparison can be made with him because he was signed off negatively rather than positively, and therefore was not subjected, when compared to the claimant's treatment, to more favourable treatment than the claimant. The claimant had not been signed off and had a chance, if the disciplinary hearing had taken place and had been resolved in her favour, of being signed off positively, and indeed would have been signed off positively but for those allegations, whereas Mr Davies simply did not make the grade.

108. The claimant's comparison with Ms Moores is not a like-for-like comparison because at the time when she was signed off she did not have disciplinary allegations hanging, as it were, over her head, whereas the claimant, although she did not know it at the time that Ms Moores was signed off, did have allegations that had been levelled against her.

109. The allegations that the claimant was treated less favourably by not being supported in her role when she moved to a new section simply could not be made out on the facts for the reasons we have already given.

<u>Constructive Unfair Dismissal</u>

110. We turn then to the allegation of constructive unfair dismissal, and for the same reasons we reject the allegation that the claimant was not given reasonable support to carry out her role.

111. The failing to sign the claimant off after she had hit the prescribed target with her colleagues is, in a sense, true so far as Ms Moores is concerned. However, the decision by Mr Cartledge not to sign her off at that stage because the allegations were hanging over her cannot possibly in the Tribunal's judgment be said to be a decision that was taken without reasonable and proper cause. It cannot therefore be or contribute to a breach of the contract of employment.

112. We reject the allegation in respect of Mr Horridge because it was simply not made out upon the facts. As the failing to sign off allegation cannot be said to be without reasonable and proper cause, the commencement of disciplinary proceedings against the claimant on what is alleged to be "clearly baseless grounds" equally cannot be treatment that was done without reasonable and proper cause, even if commencing disciplinary proceedings can be said, as indeed it probably can, to be conduct which undermines the trust and confidence, because it is undoubtedly going to undermine the trust and confidence of an employee.

113. Finally, we do not accept that the respondent's treatment in relation to requiring the claimant to attend an appointment with the company doctor and disciplinary meetings was treatment that could be said to have occurred without reasonable and proper cause.

114. Many employers, in the Tribunal's experience would not have been so patient and taken such steps as Ms Frow did take as we have described in attempting to get the claimant into a position where she could respond to the allegations. Certainly the requirement to attend the company doctor and the requirement to respond in some way to the disciplinary allegations, even if it was only by way of written representation, can in the Tribunal's judgment not to be said to be treatment that was not reasonable or done without proper cause.

115. In those circumstances, taken individually or as a whole, we do not consider that the actions, or indeed omissions by the respondent and their process in respect of the disciplinary proceedings so far as it led up to the point when disciplinary proceedings were initiated after the investigatory meeting, could be criticised procedurally. They do not amount, in the Tribunal's judgment, taken individually or as a whole, to treatment which amounts to a breach of the fundamental implied term of trust and confidence.

116. All that being said, the Tribunal acknowledges that the claimant had said from a relatively early stage that she considered the trust and confidence was lacking, but the claimant's perception is not the measure by which the respondent's behaviour is to be judged. It is the respondent's behaviour that is to be judged in deciding whether it is the respondent who has breached the fundamental implied term. Anyone who is faced with an investigatory meeting and thereafter disciplinary proceedings which might raise allegations of gross misconduct would no doubt feel that they were not trusted. That does not necessarily mean that the respondent has without reasonable and proper cause caused that breach of trust. It may be, although the Tribunal is unable to say in this case, due to the actions of the employee themselves.

117. Therefore, whilst we recognise that the claimant has, as an employee of the Bank of some six years, regrettably lost her employment, which is always a matter of regret the Tribunal is unable, for the reasons we have given, to uphold her complaints and they are dismissed.

118. We should not conclude without expressing an apology to the parties for the delay in producing this judgment was reserved so that reasons could be given in writing. The reason for the delay is only because of the pressure of other judicial work and is regretted.

Employment Judge T Ryan

6 June 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

13 June 2017

FOR THE TRIBUNAL OFFICE