EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE FRANCES SPENCER**

MEMBERS: **MRS R MACER**
MR M WALTON

BETWEEN: **MR. L ITOYA** **CLAIMANT**

AND

INDIGO PARK SERVICES UK LIMITED **RESPONDENT**

ON: 9th- 13th January and (in chambers) 6th and 7th April 2017.

Appearances

For the Claimant: Mr. S. Ukegheson, Employment Law Consultant
For the Respondent: Mr P Maratos, Senior Litigation Consultant, Peninsula

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

(i) The Claimant was not dismissed within the meaning set out in Section 95(1)(c) of the Employment Rights Act 1996 and his claim of unfair dismissal fails.
(ii) The Claimant's claims of harassment contrary to section 26 of the Equality Act 2010 and direct race discrimination contrary to section 13 are not well founded and are dismissed.

REASONS

1. In this case the Claimant complains of harassment contrary to section 26 of the Equality Act 2010, direct race discrimination contrary to section 13 of that Act and of unfair constructive dismissal.

2. It was unfortunate that the issues had not been agreed or clarified prior to the start of the hearing. However having had a discussion in Tribunal the parties agreed a list of the issues which were in dispute. These are set out, for ease of reference, in the schedule to this Judgment. Neither side had prepared properly for this hearing. As we said in Tribunal the bundle was not set out chronologically and it appeared to us that there were documents that were likely to have been missing. The Claimant's witness statement did not refer by page number to the bundle and was couched in unspecific and general terms. The Respondent's witness statements were also far too brief and, it seemed to us, somewhat lazily prepared. It was left to the Tribunal to elicit much of the information that we needed to determine the case through additional questions of all the witnesses. We have done our best with the unsatisfactory material before us to unravel the evidence and to make the findings of fact set out below.

3. The Tribunal had a file of documents running to just over 350 pages. We heard evidence from the Claimant and, on his behalf, from Mr. Osimen, Mr Goodluck and from Mr Anjorin, all former colleagues of the Claimant's. For the Respondent we heard from Ms T Humbles, Human Resources Manager for the Respondent, from Ms L Brabin, HR Director, from Mr D Mitchell, Regional Manager, from Mr C Hoy, a Civil Enforcement Officer at the Respondent and from Mr Marr, Regional Commercial Manager, who heard the Claimant's grievance. On the first day of the hearing Mr Ukegheson informed us that none of the Claimant's witnesses could attend until Thursday - though he was unable to give us any reasons. Unsatisfactory as it was, we permitted the Claimant's witnesses to be heard out of turn and after the Respondent's witnesses had been heard.

Findings of relevant fact

4. The Claimant was employed by the Respondent on 27th August 2013 in the position of Assistant Contracts Manager. The Respondent's business is to provide "the development and management of car parking solutions for both public and private organisations". The Claimant was employed to work on the contract to provide parking enforcement for Bromley Borough Council (Bromley) and reported to the Contract Manager, Mr Mark Styler. Mr Styler reported in turn to Mr Mitchell as Regional Manager.

5. We were provided with an organisational chart for the Bromley contract. Mr Styler was, as we have said the Contract Manager and the Claimant was his deputy. At a level below the Claimant were two team leaders (as well as a maintenance/car park supervisor Ms Logan). The 2 team leaders at the relevant time were Mr Olonisakin, who is black British of Nigerian origin and Ms Kobylack, who is Polish. When Miss Kobylack went on maternity leave Mr. Fafowara, who is Nigerian, successfully applied to be seconded into her role. Beneath the team leaders were 3 Seniors, Mr Osimen, Mr Fafowara (until his secondment), who were both of Nigerian origin and Mr Frawley who is white British. Beneath that there were teams of Civil Enforcement Officers or CEOs, perhaps more colloquially known as traffic

wardens. Mr. Goodluck and Mr Anjorin were both CEOs. We understand that the organisational structure has now changed and the Team Leader position has been deleted. 2 new posts of Compliance Supervisor and Admin Supervisor have been created which are held by Mr Fafowara and Ms Kobylack respectively.

6. The Respondent undertakes checks for any new employees starting employment to establish that they have the right to work in the UK. Checks were carried out on the Claimant and on 23 September 2013 the Respondent was advised that the Claimant was entitled to stay and work in the UK. (92)

7. In 2014 a number of the Respondent's employees were dismissed for not having the right to work in the UK. One of these individuals was a Mr Arthur Kennedy of Nigerian origin. An external investigation was commissioned by Bromley and undertaken by Greenwich Borough Council. The Claimant and Mr Styler attended a subsequent fraud trial (141). The Tribunal did not hear any details of these events but it was common ground that following his dismissal Mr Kennedy continued to make repeated and persistent allegations to the Respondent, to its client Bromley and on social media that the Claimant and others employed by the Respondent did not have the right to work in the UK.

8. In June 2014 Ms Humbles emailed Mr McIntosh of the UKBA (96). At that stage the Claimant had a residence permit valid until December 2016. In her email Ms Humbles says that Mr Styler was worried that the allegations that Mr Kennedy had made about the Claimant could be true. She continues "Gut tells me that Linus is genuine and the documents that we have tally but we need to be 100% certain." She asked Mr McIntosh to confirm that the Claimant had the right to work. She attached his current passport, residence permit and the ECS check. There was no response to this query beyond an acknowledgment and Ms Humbles emailed again on 3rd September 2014 referring to Mr Kennedy's continued allegations and saying that the Managing Director wanted to be hundred percent certain that the Claimant (and Mr Fafowora) were able to work in the UK. Mr McIntosh responded on 9 September that the Claimant had been illegally in the UK till 2009 but now had leave to remain until 14 December 2016 without restrictions on employment. He continued "*Both are legally in the UK and entitled to work, any allegation suggesting that they do not have the right to work or are illegally in the UK should be treated as malicious*." That comment was made in the context of Mr Kennedy's repeated allegations.

9. On 25th September 2014 (104) Mr Herve from Bromley wrote to Mr Mitchell saying that he had again received specific allegations that CEO 194 and CEO 221 did not have permits to work in the UK and that it had also been alleged *"that the Assistant Contract Manager, Linus Itoya's passport photo is different to that held at the Home Office".* Mr Herve asked for a formal response to the detailed allegations.

10. Mr Mitchell then emailed Mr Styler asking who CEO 194 and CEO 221 were. In relation to the Claimant he said this: *"It is also alleged that the assistant Contract Manager Linus Itoya has a passport photo that is different to that held at the Home Office. We received confirmation from Talor [Ms Humbles] but I cannot find it can you? I cannot find the email and have requested a copy from Talor. I know that Leanne was actively involved in checking Linus out with Kevin at the UKBA."* Mr Styler in turn asked Ms Humbles to forward the relevant email from Mr McIntosh at the UKBA which she duly did, noting that Mr McIntosh had confirmed that the Claimant was fine to work. (Mr Ukegheson makes much of the reference in Mr Styler's email (100) to the words "not a good scan but seen the original" which, he submits, suggests that further checks were undertaken. We do not read those words as requesting a further check.) Mr Styler sent the Claimant a copy of Ms Humbles' response to him, so that he was aware.

11. In February 2015 the Claimant received the following email from Mr Styler. *"Linus he is attacking you big time reference Hackney! He still mentioned I am the modern slave driver and you are my whipping boy. The report is with the council and it keeps asking for it and both company senior managers and council want you checked out again. My hands are tied on this as I know you have been checked and cleared several times."*

12. The Tribunal did not hear from Mr Styler and the email was not put to Ms Humbles. Mr Ukegheson points to the reference to "both company senior managers and council want you checked out again" to suggest that there that further unnecessary checks on his statue took place. However Ms Humbles denies that she made any checks in February 2015 and we accept that evidence.

13. The Claimant was absent from work from the end of February until 7 May 2015, initially on holiday and compassionate leave and then on sick leave. On 28th April or thereabouts (while the Claimant was on sick leave) Mr Styler did a search on the Claimant's address via 192.com. He emailed Ms Humbles and Mr Mitchell as follows "*I know we keep going over this with the alleged allegations from Arthur [Kennedy] that Linus has been using a name Lenus. Whilst going through a new protocol for Dave, I noticed that all the documentation he submitted said Linus but the bank statement he submitted shows Lenus? Plus if you do a search address via 192.com there is a Lenus registered." (110B)*

14. Ms Humbles responded (110A) the same day. She said that she felt the spelling of the Claimant's name was irrelevant as it was quite possible for people to have 2 spellings of their own name and that she was a prime example. She continues "*I have lost count how many times I have asked Kevin McIntosh of the Home Office to confirm Linus's right to work in the UK. I have given him passport copies, date of birth, permits – all that we possibly can for Kevin to cross-reference with the Home Office records. The last response I had from Kevin on the subject was in October 2014".* She said that the response was that discretionary leave had been granted until 4 December 2016. She continues "*I think we need to remember that*

Arthur [Kennedy] has thrown a lot of mud with the hope that some would stick. Some of the names of individuals he has said do not have the right to work have been cleared as fine by the Home Office. Yes, some of what he said has proven to be correct but I do think in the case of Linus he is wrong. I cannot possibly see how the Home Office could confirm that Linus has the right to work on several occasions and still be incorrect. I can go back once more but I do not think the answer will change, however for peace of mind I do not mind?"

15. Ms Humbles then emailed Mr McIntosh and asked him to confirm his previous advice. [That email was not in the bundle nor do we know if there was a response].

16. In May 2015 Mr Styler was suspended following an allegation that he had made racist remarks. He did not return to work and subsequently left the Respondent with a Settlement Agreement. The Tribunal has no further details of the circumstances of his departure.

17. It is the Claimant's case that following Mr Styler's suspension and subsequent departure he was the acting Contract Manager. The Respondent denies this but says that he was simply being asked to "hold the reins". It is apparent that he was never formally appointed though, in the absence of a Contract Manager, he was the most senior employee dedicated to the Bromley Contract.

18. On 21st May the Claimant emailed Mr Mitchell saying that while he understood that he was not entitled to company sick pay following his absence on sick leave, he was unable to pay his debts and asking for financial help. (116) Mr Mitchell responded that he did not feel he could do anything with the sick pay, as he did not wish to set a precedent, but given that the Claimant had been asked to "hold the reins" for 2 weeks he would authorise an ex gratia payment of £500. (114). He tells the Claimant that he will assist when and where he could and that Chris Hoy would enable him to keep up and juggle the various tasks. As Mr Mitchell was on holiday the following week he was told that Mr Ware would be his link and managerial support. Mr Mitchell said he would visit Bromley on his return from leave on 1 June.

19. Following his suspension emails for Mr Styler were to be forwarded to the Claimant. On 19th May (112) the Claimant was told that the forward wasn't working fully and that he should use the link and password which was provided to enable him to check Mr Styler's inbox daily. He therefore had full access to Mr Styler's email account.

20. At that time Mr Hoy was working as a CEO on the Bromley contract. From 2009 to 2012 Mr. Hoy had been employed by the Respondent as Assistant Contract Manager at Bromley. He had then left the Respondent's employment but, following serious health issues, had returned to Bromley as a CEO – being concerned to keep his stress levels low. When Mr Styler was suspended Mr Hoy was called to a meeting with Mr Mitchell and the

Claimant and asked if he would act up as an additional Team Leader. Mr Hoy was hesitant but agreed to act up temporarily. It was Mr Mitchell's evidence, which we accept, that Mr Hoy had been asked to assist because he had previously been an assistant Contract Manager and had IT skills around filling in time sheets for payroll. This was intended to support the Claimant in the absence of Mr Styler. Mr Hoy did not, however, have any training on or access to the Navision system, nor did he have budget training.

21. On 22nd May the Respondent advertised internally for cover for maternity leave for one of the Team Leader roles on the Bromley contract. The Claimant was aware of this. Mr. Fafowara was successful in applying for that role.

22. It is the Claimant's case that after his "promotion" Chris Hoy started forwarding text messages to staff that arrangements had been made to dismiss the Claimant because he did not know what he was doing and that his girlfriend would not work with the Claimant. He told the Tribunal that he was shown the texts by "many staff" but that when he asked for them to be forwarded to him all the staff refused to do that "because Mr Hoy was leading the team". He also suggests that it became common knowledge to most staff that Mr Hoy's girlfriend, Lisa Locke, was coming to Bromley to be the new Contract Manager for a position that had not been advertised.

23. It was also the Claimant's case that Mr Hoy began to ridicule the Claimant in conversation with colleagues by calling him a "dumb Nigerian manager" and saying things like "is it because of the type of food you Nigerians eat that makes it impossible for you people to understand what you have been asked to do? Linus is just a waste of space and he will soon be sacked."

24. The Claimant was supported in this by Mr Goodluck. Mr Goodluck was a CEO until his resignation in September 2015 and is of Nigerian origin. In Mr Goodluck's witness statement he states that he started getting text messages from Mr Hoy stating that the Claimant was going to be dismissed to be replaced by Ms Locke. In cross examination, however, his evidence was contradictory. When asked about his statement in paragraph 9 that he believed "there was a text message circulated among some staff by Chris Hoy that the Claimant was to be removed" he said that he had not received a text message himself but had just heard rumours. However at paragraph 12 of his witness statement Mr Goodluck specifically states that he started getting text messages from Mr Hoy stating that Linus was going to be dismissed. When asked about this paragraph Mr Goodluck then said that he had personally received the text messages. He was not able to produce a copy of the texts because they had been sent to his old phone when his contract had expired and he had sent his old phone abroad. He had not printed off the text messages although he was aware by the time he sent his phone abroad that the Claimant had presented a grievance alleging race discrimination and that he intended to bring a claim in the Employment Tribunal alleging race discrimination. He said he had received 2 or 3 such messages.

25. It was also Mr Goodluck's evidence that during a cigarette break with Mr Hoy he overheard him calling the Claimant a "dumb Nigerian manager" and that when he was going into the kitchen with his lunch brought from home Mr Hoy said to Mr Goodluck "*what are you eating? It smells horrible! Is it because of the type of food you Nigerians eat that makes it impossible for you people to understand what you have been asked to do? Look at Linus, he is just a waste of space and he will soon be sacked anyway."*

26. Mr Hoy denied sending any text messages to any members of staff in the terms alleged. He denied that he told Mr Goodluck that the Claimant was a dumb Nigerian manager or made the comments described by Mr Goodluck about his food.

27. Having heard the evidence of Mr Hoy and Mr Goodluck the Tribunal has had no difficulty in preferring the evidence of Mr Hoy. We found the evidence of Mr Goodluck about the text messages not credible. If those text messages had been received and Mr Goodluck was aware of the Claimant's grievance and potential ET claim it is incredible that he would not have forwarded those messages to the Claimant's phone. Mr Goodluck's evidence about what Mr Hoy said to him during a cigarette break and in the kitchen is also wholly implausible. We have heard Mr Hoy and our assessment of him was that he was a reticent man who was most unlikely to have made any such comments.

28. Mr Osimen (who is Nigerian) was a Senior in the Bromley team. He also gave evidence that Chris Hoy had sent him a text message to say that Linus would soon be dismissed because the Respondent want to replace Linus with Ms Locke. In cross examination he expanded on this and said that the text also said that other team leaders ---- *"myself, Tolu and James would be fired"* He had not retained a copy of the text message as his phone had been corrupted in October. He had not forwarded the text to the Claimant although he had told the Claimant about the text. He had not complained about the text to the Respondent. Mr Osimen resigned from the Respondent at the end of August 2016 because, he said, he was badly treated by Ms Locke.

29. Mr Anjorin is Nigerian and worked as a CEO until he left on 31st July 2016. He had been recruited by Mr Hoy at the time that Mr Hoy was a Contract Manager. He told the Tribunal that he had no issues with Mr Hoy. However he also told the Tribunal that Mr Hoy told him that "they would sack that bastard Linus" during the course of a "friendly chat", which appears to us somewhat of a contradiction in terms. He had not seen the text but he was aware of it because Jade (one of the admin staff) had told him about it before he acted as the Claimant's companion at the Claimant's grievance hearing.

30. Despite the supporting evidence of Mr Goodluck and Mr Osimen we do not accept that any such texts were sent. Nor do we accept the comments alleged to been made to Mr Goodluck.

31. On 10th June 2015, after Mr Styler had left, Ms Humbles circulated to Contract Managers internal adverts for 3 roles, including the role of Contract Manager for the Bromley contract. The closing date for applications was 17th June. The Respondent's procedure for filling internal vacancies was for the advertisement for the role to be sent via email to the Contract Manager whose responsibility was then to circulate the vacancy within his or her team and to display it on the noticeboard. It is the Claimant's case that he was not notified of the vacancy and that Ms Locke was simply "slotted in". However it is apparent that the advert was in fact circulated to all Contract Managers on 10th June (122) and as the Claimant had responsibility for opening Mr Styler's email account he would have been responsible, in Mr Styler's absence, for distributing the advert and displaying it on the noticeboard.

32. Ms Locke, who was the Regional Support Manager at Watford applied for the role. This was, for her, a sideways move rather than a promotion. It is the Claimant's case that on 16th June he was told by Mr Hoy that the application period for the position of Contract Manager would close the following day and that he had been surprised as he had not seen the advert. Mr Hoy says, however that he did not tell the Claimant what the closing date was for the position as he did not know the closing date. He himself was not interested in the position. He does accept that he had one conversation with the Claimant when he told the Claimant that he should apply for the role. Either way it is apparent that the Claimant was aware of the role one day before the deadline for applications and did not apply.

33. On the 3rd July the Claimant was absent from work (at that time without a fit note) and presented a grievance (125). In the grievance the Claimant made a number of complaints namely that:

    a. There had been an excessive number of immigration checks about him which was discriminatory
    b. The Respondent had failed to support him in the face of Mr Kennedy's constant attacks on him on social media.
    c. He was discriminated against in a number of ways, including that he was paid less than the previous assistant Contract Manager, Mr Ahmed, who was British Asian, he had insufficient training and was not trained on Navision or health and safety. He was set up to fail following Mr Styler's departure and the pressure on him had impacted his health.
    d. He was not consulted regarding the appointment of a 3rd Team Leader (i.e. Mr Hoy) who had been appointed without due process and who had started forwarding text messages that he and other black Team Leaders would be dismissed and that his girlfriend could not work with him.
    e. He was not informed about the position of the Contract Manager that had been advertised.
    f. He was not consulted on the transfer of Mr Hoy to another contract.

g. This was all part of an elaborate plan to effect his dismissal and that he was being made a scapegoat following the allegations made by Mr Kennedy.
h. The company was not diverse in terms of its structure.

34. The Respondent did not receive the Claimant's grievance email sent on 3rd of July and the Claimant re-sent it on 8th July. This was acknowledged by email dated 16th July. During July the Claimant remained off work although at that stage it was uncertificated.

35. On 12th August Mr Marr wrote to the Claimant inviting the Claimant to a grievance hearing on 14th August at 2 pm. The Claimant sent his first fit note dated 4th August to the Respondent at some point prior to 13th August. On 13th August he asked for the meeting to be rearranged until after the period of his sickness absence which ended on 4th September.

36. On 18th August 2015 the Claimant was invited to a rearranged hearing on 23rd September. This was not acknowledged but on 4th September 2015 the Claimant forwarded a further sick note signing him off for a period of 2 months.

37. On 7th September the Claimant sent a further grievance email to the Respondent, which broadly is a reiteration of the first grievance.

38. Following receipt of the Claimant's 2 months sick note the Respondent circulated an internal advertisement on 8 September 2015 (196) seeking applicants to fill the assistant Contract Manager role on a secondment basis for a period for 2 months.

39. The Claimant subsequently confirmed that, despite his sick note he was able to attend the meeting on the 23rd. This went ahead and the Claimant was accompanied by Mr Anjorin. Ms Humbles took manuscript notes (and the Respondent had not bothered to have them typed up, making them almost impossible for us to read). The Claimant referred to text messages but could not produce evidence of these messages having been sent or received.

40. While the Claimant was off work Mr Mitchell took the decision to move the assistant Contracts Manager's office. Mr Mitchell took that decision because the office was not ideally situated. It was necessary to walk through another office in order to get to it and the assistant Contract Manager's office needed to be more accessible to staff. Mr Mitchell also told the Tribunal that the Claimant always kept the door locked or closed and the windows had been covered with paper so that it was impossible to see in. He therefore moved the Claimant's office to the middle area of the building to make it more accessible. The Claimant was not informed because he was off sick (though in our view it would have been courteous to inform the Claimant even if he was off sick). It is the Claimant's case that moving his office and his personal belongings amounted to harassment and direct discrimination because of his race.

41. After the grievance hearing Mr Marr asked the IT department to check the records for the Claimant's phone and Mr Hoy's phone. The IT department in turn contacted Vodafone, who advised that they were unable to retrieve text messages. In the absence of the texts Mr Marr concluded that the allegation could not be proved.

42. The Claimant chased the outcome of his grievance on 29th September and 6 October. (163) Mr Marr responded that he had undertaken an extensive investigation and expected to complete his response "later this week". However no outcome had been received by 16th October, when the Claimant when he resigned (167).

43. Iin his resignation letter the Claimant cites (i) the delay in sending him an outcome to his grievance, (ii) the removal of his belongings from his office; and (iii) his belief that the Respondent deliberately failed to advertise the vacant position of Contract Manager in order to appoint a white woman to the position and that he had been discriminated against and (iv) his recent grievances. The resignation letter makes it clear that the Claimant believed that the Respondent had breached its duty of trust and confidence and warns unless he could reach a compromise agreement with the Respondent he would be taking legal advice about pursuing a claim in the Employment Tribunal.

44. There was no immediate acknowledgement and the Claimant re-sent his email on 19th October and chased again on 20th October referring to the fact that there had been no acknowledgement. The Respondent finally acknowledged receipt on 21st October (174)

45. The Grievance outcome letter was sent to the Claimant on the 26th October 2015. It was Mr Marr's evidence that when he finalised the grievance outcome letter he was unaware of the Claimant's resignation. On balance, we accept that evidence. We note that in the grievance outcome(177) Mr Marr accepted that further training could have been given to the Claimant by the Respondent and recommended that, as and when the Claimant returned to his post, a suitable training plan was engaged to bring him fully up to speed with Navision. He also recommended that he be considered for budget training which, although not a requirement of his post, might be considered for his future development. This suggests to us that at the time that the letter was finalised Mr Marr was unaware of the Claimant's resignation. Mr Marr did accept, however, that by the time the letter was actually sent he was aware of the Claimant's resignation, but not the contents of the resignation letter. For the most part, however, the grievance was not upheld.

46. It was the Claimant's case that the Respondent had failed to provide training to him on budget and expenditure but the other managers, who were not of Nigerian origin, namely Mark Styler, Saleh Ahmed, and Alice Latham had received such training. Mr Ahmed had been the Claimant's predecessor as the assistant Contract Manager. Alice Latham, is white

Irish and Mr Ahmed is British of Bangladeshi origin. The Claimant said that he had asked Mr Styler for training and that Mr Styler had said that he would request training when it was available but that it never happened. He had not escalated the matter.

47. As Assistant Contract Manager the Claimant was not required to be trained on Navision. Navision was a financial system for purchase ordering. The Respondent's evidence was that access to Navision was reviewed on a contract to contract basis. If the Contract Manager had access to Navision it was not necessary for the Assistant Contract Manager to have access – although it was possible. Mr Hoy who had previously been an Assistant Contract Manager had never been trained on or had access to Navision. Mr Mitchell gave evidence that following Mr Styler's suspension the Navision system on the Bromley contract was dealt with by Doug Ware for the first 3 weeks after which Mr Ware gave the Claimant some training on Navision. (Ms Humble gave evidence, when questioned in cross examination, that the record showed that the Claimant had accessed Navision over 30 times before he left.)

48. Mr Ahmed had previously been a Contract Manager at the Respondent and had received Navision training. He left the Respondent's employment for a short period (having been TUPE transferred out). He returned to the Respondent' employment as an assistant Contract Manager .As he had already had the Navision training he continued to have access. The Respondent gave no evidence as to whether Alice Latham had access to Navision as an assistant Contract Manager on another contract, nor were any questions put to the Respondent about this in cross examination. Although, given the Respondent's failure to deal with this point ,we find on the balance of probability that Ms Latham did have access to Navision there was no evidence which would support that this differential was due to her race.

49. It is also the Claimant's case that he was not trained on health and safety whereas Mr Styler, Mr Ahmed and Ms Latham were trained by Kevin Hudson. The Respondent said that Mr Hudson did not conduct training in respect of health and safety and they were unclear what training the Claimant was referring to. When questioned by the EJ the Claimant remained unclear as to what health and safety training he should have done, saying only that there had been an asbestos issue and he did not know what to do. The Claimant was too unspecific as to what he was denied for us to make any findings on this.

<u>The relevant statutory provisions and the law</u>

50. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is taken to be dismissed by his employer if "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".

51. It is established law that (i) conduct giving rise to a constructive dismissal must involve a fundamental breach of contract by the employer; (ii) the breach must be an effective cause of the employee's resignation; and (ii) the employee must not, by his or her conduct, have affirmed the contract before resigning. If a fundamental breach is established the next issue is whether the breach was an effective cause of the resignation, or to put it another was, whether the breach played a part in the dismissal (Nottingham County Council v Miekle and Abbey Cars Ltd v Ford EAT 0472/07).

52. In this case the Claimant claims breach of the implied term that the employer should not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and her employer. (*Courtaulds Northern Textiles Limited – v Andrews [1979] IRLR 84).*

53. In considering whether there had been a breach of the duty it is the impact (assessed objectively) of the employer's behaviour on the employee that is significant - not the intention of the employer *(Malik v BCCI [1997] IRLR 462*.

54. In *Tullettt Prebon v BGC Brokers LP and others 2011 IRLR 420,* the Court of Appeal explained the legal test by reference to the recent case of *Eminence Property Development Ltd v Heaney 2010 43 EG. 99* "The legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon or altogether refuse to perform the contract." "All the circumstances must be taken into account in so far as they bear on an objective assessment of the intention of the contract breaker. That means that motive, while irrelevant if relied upon solely to show the subjective intention of the contract breaker, may be relevant if it is something or it reflects something of which the innocent party was, or a reasonable person in his or her position would have been aware and throws light on the way the alleged repudiatory act would be viewed by such a reasonable person."

55. The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In *Omilaju v Waltham Forest LBC [2005] ICR* the Court of Appeal said that the final straw may be relatively insignificant, but must not be utterly trivial: Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective."

Direct race discrimination and harassment.

56. Section 39 of the Equality Act 2010 prohibits an employer discriminating against or victimising its employees by dismissing them or subjecting them to any other detriment. Section 40 prohibits an employer from harassing its employees.

57. Section 13 defines direct discrimination as follows:-

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

Race is a protected characteristic.

57 Section 26 defines harassment as follows

(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.

58. Although isolated acts may be regarded as harassment, they must reach a degree of seriousness before doing so.

59. In Richmond Pharmacology v Dhaliwal (2009 ICR 724) the EAT stressed that the Tribunal should identify the three elements that must be satisfied to find and employer liable for harassment. (1)Did the employer engage in unwanted conduct? (2) Did the conduct in question have the purpose or effect of violating the employee's dignity or creating an adverse environment for him/her? (3) Was that conduct on the grounds of the employee's protected characteristic?

60. Proving and finding discrimination is always difficult because it involves making a finding about a person's state of mind and why he has acted in a certain way towards another, in circumstances where he may not even be conscious of the underlying reason and will in any event be determined to explain his motives or reasons for what he has done in a way which does not involve discrimination.

61. The burden of proof is set out at Section 136. It is for the Claimant to prove the primary facts from which a reasonable Tribunal could properly conclude from all the evidence before it, in the absence of an adequate

explanation, that there has been a contravention of the Equality Act. If a Claimant does not prove such facts he will fail – a mere feeling that there has been unlawful discrimination, harassment or victimisation is not enough. Once the Claimant has shown these primary facts then the burden shifts to the Respondent and discrimination is presumed unless the Respondent can show otherwise.

62. In the case of Madarassy v Nomura International PLC [2007] IRLR 246 it was held that the burden does not shift to the Respondent simply on the Claimant establishing a difference in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable Tribunal could properly conclude from all the evidence before it that there may have been discrimination."

63. The principles for determining whether there has been a breach of the Equality Act 2010 were set out in Islington London Borough Council -- v- Ladele 2009 ICR 387

Conclusions

64. Although there were issues as to whether some parts of the Claimant's discrimination claim were in time, it was necessary to deal with the whole factual matrix in order to consider the constructive dismissal claim and the issue of whether the conduct relied on could be said be "conduct extending over a period" ending on a date which was within the relevant time limit. (Section 123 of the Equality Act 2010). As we have found that the claims all fail on their merits, it was not necessary to consider the jurisdictional time points.

Direct race discrimination. Did the Respondent discriminate against the Claimant because of his race?

65. The Tribunal had a lengthy list of factual matters on which the Claimant relied to support his direct discrimination complaint. He relies on a hypothetical comparator but also compares his treatment with that of Mr Hoy, Mr Styler Mr Ahmed and Ms Latham. Many of these matters are also relied on to support a claim of harassment under section 26.

Right to work checks

66. Paras 1a, b, c, d, g, h, i, and n (f was withdrawn, save to support the constructive dismissal claim) are all allegations relating to the checks that the Respondent conducted about the Claimant's right to work in the UK. Our findings of fact are set out above. It is the Claimant's case that the Respondent's behaviour in conducting the right to work checks on the Claimant was less favourable treatment that related to his race. He refers in particular to the fact that the Home Office had categorically stated on 9th September 2014 that the Claimant had the right to live and work in the UK and any allegation suggesting that he did not have that right should be treated as malicious. He therefore says that any further checks must have been racially motivated.

67. We have set out above the history of the checks made on the Claimant. The Respondent has a duty to check that the Claimant had the right to

work. In September 2014 the client, Bromley, specifically requested confirmation from the Respondent about the Claimant. No further checks were undertaken at that time –Ms Humble merely forwarded the email from the Home Office so that the client could be reassured. There was nothing untoward or discriminatory about that.

68. In April 2015 Mr Styler raised an issue about the spelling of the Claimant's name. (At this time the Claimant was absent on sick leave) It is apparent from the email that he sends (110B) that he had spotted a discrepancy in the spelling of the Claimant's name which mirrored the allegations made by Mr Kennedy. This discrepancy prompted him to do a check on 192.com.and to raise a query with Ms Humbles. Given the heightened atmosphere caused by Mr Kennedy's allegations, we do not accept that the reason for asking him to do a check was less favourable treatment because of his race. Rather the treatment related to the need to be 100% certain that there was nothing in Mr Kennedy's accusations, given the sensitivities of the client. In any event Ms Humbles did no more than ask for confirmation of the Home Office that their previous advice stood and no more. It is a gross exaggeration on the Claimant's part to suggest that such contact was an attempt to "criminalise" him. Nor is a search on 192.com a breach of the Claimant's right to privacy and family life. We do not accept the Claimant's contention that the Respondent was trying to "find evidence" to ease him out.

69. Further none of the comparators mentioned by the Claimant are appropriate. All were either British or EU nationals with an automatic right to work in the UK.

Training

70. In paragraph 1e of the list of factual issues the Claimant complains about failure to offer the Claimant training opportunities We do not accept that the Respondent failed to offer training opportunities to the Claimant that were relevant to his role. As assistant Contract Manager he was not required to have training either on Navision, or on budgets. There was no evidence that the Claimant made any formal requests for training which have been recorded in writing. Mr Hoy, who is white who had previously been an assistant Contract Manager had not had training on Navision, nor had he had budget training. Ms Latham had had training, but the evidence did not suggest that this was because of race. When the Claimant made it clear that he wanted Navision the Respondent agreed to provide this.

71. The Claimant also suggests that he should have had such training when he became acting Contract Manager in May 2015. However it was apparent that he was not formally appointed as acting Contract Manager but was simply holding the reins for a temporary period while Mr Styler's future was unclear. After three weeks, and Mr Styler's departure, he was trained by Mr Ware until he absented himself on 3rd July 2015. Nor do we accept that the Respondent failed to provide the Claimant with Health and Safety training. The Claimant was wholly unclear as to which aspects of Health and Safety training he did not receive and we can make no findings on this aspect of his claim

72. (As for paragraph 1j the Claimant clarified that the reference to "intense pressure at work" was a reference to the immigration checks and lack of training which we have dealt with above.)

Promotions

73. The Claimant alleges that Mr Hoy was promoted without due process (para 1k). We do not accept that Mr Hoy was promoted. He was asked to act up as a third Team Leader because he had skills that would be of assistance to the Claimant, who was without a Contract Manager, and temporarily leading the team. This request that he should act up was for legitimate reasons unconnected to race.

74. We do not accept that (paragraphs 1l and q) the Respondent failed to give the Claimant the opportunity to apply for the Contract Manager role. The Claimant complains that the advertisement was not put up on the noticeboard but the fact was it was his responsibility to do that as he had access to Mr Styler's email account. Once he did become aware of the advertisement he did not apply.

Texts

75. We do not accept that Mr Hoy sent the alleged text messages. (para 1m)

Grievance process

76. The Claimant also alleges, (at paras 1o and 1p) that the Respondent discriminated against him by failing to deal with his grievance adequately and by the delay in responding. In evidence the Claimant clarified that the delay about which he was complaining related not to the delay before the grievance hearing but to the delay between the grievance hearing and the outcome letter being dispatched. He also alleged that the Respondent failed to follow their own procedures or follow the ACAS Code of Conduct but gave no particulars as to what these failures were or in what respect his grievance was not adequately dealt with. He did not appeal the outcome.

77. The grievance hearing took place on 23rd September 2015 and the Claimant had not received an outcome 3 weeks later on 16th October when he resigned. 3 weeks is not an unduly lengthy time given the length of the Claimant's grievance and the investigations in relation to the phone records and there was no evidence to suggest that someone of a different race would have received a quicker or better outcome.

Advertising the Claimant's job and office move

78. As for para 1r the Respondent did not advertise the Claimant's job while he was off sick. As should have been clear to the Claimant from the face of the advertisement, they advertised a 2 month secondment position for the period of the Claimant's sick note.

79. While the Respondent did move the Claimant out of his office, there were good reasons for this. The Respondent was entitled to do so and there is no reason to suspect that this was less favourable treatment related to his race.

80. Looking at the Claimant's allegations both individually and as a whole he has failed to shift the burden of proof that the actions of the Respondent were less favourable treatment because of his race.

Harassment

81. The factual matters relied on to support the Claimant's claim of harassment related to his race are the same as those set out above to support his direct discrimination complaint. We are clear that the factual matrix set out above does not support the Claimant's case that the Respondent engaged in unwanted conduct which had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The claim fails at steps 1 and 2 of the test in Richmond (see above). Nor is there material from which we could conclude that the Respondent's conduct was related to the Claimant's race.

Constructive dismissal

82. The Tribunal is satisfied that the Respondent was not in fundamental breach of the Claimant's employment contract and that there was no dismissal within the terms of section 95(1)(c). The Respondent was entitled to carry out immigration checks as to the Claimant's right to work. The Claimant was appropriately trained and supported when he found himself without a Contract Manager. His grievance was heard and dealt with. There was no slotting in of Ms Locke or unfair promotion of Mr Hoy. The office move was within the Respondent's gift and was for good reasons. The grievance outcome was not unduly delayed. Sadly, the Tribunal has concluded that the Claimant's complaints about the text messages sent by Mr Hoy have been fabricated and that his witnesses did not tell the truth about the texts and comments made to them by Mr Hoy.

83. All the claims fail and are dismissed.

Employment Judge Frances Spencer
10th April 2017