



EMPLOYMENT TRIBUNALS

Claimant: Miss A Waring

Respondent: Tudor Contract Cleaners Limited

Heard at: Manchester

On: 12 – 15 April 2021
16 April 2021
(In Chambers)

Before: Employment Judge Feeney
Mrs C Bowman
Mr N Stemp

REPRESENTATION:

Claimant: In person

Respondent: Mr Salter, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

The claimant's claims of

(a) Under the Equality Act 2010

- 1 direct sex discrimination fail and are dismissed.
- 2 Direct race discrimination and harassment based on race fail except in relation to issue no 16.
- 3 Victimisation fail and are dismissed.

Constructive unfair dismissal Under Employment Rights Act 1996 fails and is dismissed

The matter should be listed to consider remedy in respect of issue 16 which will be limited to injury to feelings.

REASONS

1. The claimant brings claims of direct race discrimination, harassment, victimisation, direct sex discrimination and constructive unfair dismissal. There was a long discussion at the beginning of the hearing regarding the fact that the claimant had not covered in her witness statement several matters raised in her claim form and in the respondent's list of issues. It was agreed that in respect of the matters the respondent was aware of and had the witnesses here to meet the claimant would be allowed to give supplementary evidence. The claimant had also raised matters which would require a new witness and it was agreed those would not be pursued.
2. The alternative was to postpone the case and allow the claimant to submit a further witness statement; the respondent the same. Neither party wished to do this particularly as the matter might not have been relisted before 2023.

List of Issues

3. Direct Race Discrimination
 - 3.1 That the claimant was never given appraisals or personal development plans.
 - 3.2 16 May 2018. After returning to work following an operation Ms McArdle stated "Adele, I thought you had been for an operation they took your hair".
 - 3.3 May 2018. Teresa McArdle. During a conversation between the claimant and Emma Hague Teresa McArdle interrupted stating she had heard on the radio about society's lack of concentration, looked at the claimant and said I bet "yours is even lower" before walking off.
 - 3.4 June 2018, the claimant was reprimanded by Stephen Bottomley via an email in which he had cc'd all senior management for not completing a task that he had instructed the claimant to do, specifically this task was not the claimant's responsibility and it was a job that could have been done by any other person in that office. The claimant will say that this treatment was on account of the protected characteristic of race.
 - 3.5 June 2018. A position opened for the Central Office Manager role, the opportunity was not offered internally for the claimant to apply.
 - 3.6 12 June 2018. The claimant requested from Teresa McArdle and Rob Morrison further training in maths, the claimant states nothing was provided.
 - 3.7 August 2018. Tickets were purchased to attend a local charity ball, Joanne Rolska and Dorota Rutkiewisz were invited with the remaining tickets going to customers, the claimant states she was not invited.
 - 3.8 November 2018. Despite holding a Fire Marshall certificate, the claimant was not selected as a Fire Marshall.

- 3.9 17 January 2019. Complaint raised with Rob Morrison in relation to a derogatory comment by Joanne Rolska (“they can’t drive because they are black”).
- 3.10 January 2019. The claimant expressed she needed a laptop to complete her work. This was not provided.
- 3.11 April 2019. New job roles to commence 1 May 2019. North and South Co-Ordinators, roles shared between David Ogden and the claimant, Mr Ogden would not complete work thereby putting pressure on the claimant.
- 3.12 August 2019. Teresa McArdle offered David Ogden and the claimant a business course, the claimant lacked functional skills essential to the completion of the course such support to obtain said functional skills was not offered by the business in Maths, English and IT.

Issue 13

- 3.13. 11 October 2019. During the discussion with the claimant’s tutor (on a course provided by the respondent) she was advised that appraisals would need to be submitted to pass her module. The claimant and David Ogden (white male) were on the same course, the claimant states she did not receive appraisals while David Ogden did and therefore could not comply with this requirement.

Issue 14

- 4.1 August 2017 to October 2019. The claimant made constant requests to go on site whilst jobs were being done but the claimant was never allowed on site. David Ogden, white male made such a request and was sent on site visits.

Issue 15

- 5.1 16 August 2019. Claimant’s notice was accepted without discussion previously David Ogden had handed his notice in on two other occasions specifically January and May 2019 but was allowed to discuss and work through his issues.

Issue 16

- 6.1 January 2020. At the grievance hearing Diane Cheeseborough stated she couldn’t understand why the comment made by Joanne Rolska around 17 June 2019 offended the claimant.

Direct Race

- 4. Were any of the acts or omissions established to have occurred out of time. If so, are the acts or omissions part of the series of acts and if so is the last of the series in time. If not, is it just and equitable to extend time.

5. Who is the comparator relied on and what are the material circumstances of that comparator? David Ogden, white male, or hypothetical comparator.
6. By reference to the alleged acts, omissions and the identified comparator was the claimant subject to less favourable treatment because of her race.

Harassment

7. What is the protected characteristic the claimant seeks to rely on (the claimant relies on the protected characteristic of race, specifically being mixed heritage black Caribbean/White)?
8. What is the conduct that had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment? The claimant relies on the following:-
 - 8.1 May 2017. The claimant was requested to become company's First Aider. She was advised by Teresa McArdle she would not receive any bonus or pay review for the extra responsibility. When David Ogden, Margaret Newlove, Hazel Earnshaw and others were made Fire Marshalls they were given lanyards, ID and a rota. Their appointment was formally announced through email and internal notice, the claimant did not receive any of the above for the First Aider's role.
 - 8.2 16 May 2018. After returning to work following an operation Ms McArdle stated "Adele, I thought you had been an operation they took your hair".
 - 8.3 May 2018. Teresa McArdle. During a conversation between the claimant and Emma Hague Teresa McArdle interrupted stating she had heard on the radio about contemporary society's lack of concentration, looked at the claimant and said I bet "yours is even lower" before walking off.
 - 8.4 Position open for Central Office Manager role. Opportunity was not offered internally for the claimant to apply.
 - 8.5 August 2019. Teresa McArdle offered David Ogden and the claimant a business course, the claimant lacked functional skills essential to the completion of the course such support to obtain said functional skills was not offered by the business in Maths, English and IT.
 - 8.6 August 2018. Tickets were purchased to attend a local charity ball, Joanne Rolska and Dorota Rutkiewicz were invited with the remaining tickets going to customers, the claimant states she was not invited.
 - 8.7 November 2018. Despite holding a Fire Marshall certificate, the claimant was not selected as a Fire Marshall.
 - 8.8 17 January 2019. Complaint raised with Rob Morrison in relation to a derogatory comment by Joanne Rolska ("they can't drive because they are black").

- 8.9 January 2019. The claimant expressed she needed a laptop to complete her work. This was not provided.
- 8.10 February 2019. The claimant was challenged by Steve Bottomley for the length of time she had taken for her dinner time. Mr Bottomley had been given wrong information from Dave Ogden and the claimant had been on a work-related errand, Margaret Newlove would often leave site to run errands, but she was never challenged in relation to the length of time she was away from her desk and Margaret Newlove is a white female.
- 8.11 April 2019. New job roles to commence 1 May 2019. North and Somerset Co-Ordinator's, roles shared between David Ogden and the claimant, Mr Ogden would not complete work thereby putting pressure on the claimant.
- 8.12 August 2019. Teresa McArdle offered David Ogden and the claimant a business course, the claimant lacked functional skills essential to the completion of the course such support to obtain said refresh Maths, English and IT skills were not offered by the business.
- 8.13 11 October 2019. During the discussion with the claimant's tutor (on a course provided by the respondent) she was advised that appraisals would be needed to be submitted to pass her module. The claimant and David Ogden were on the same course, the claimant states she did not receive appraisals when David Ogden did.
- 8.14 August 2017 to October 2019. The claimant made constant requests to go on site whilst the job was being done. The claimant was never sent on site, the claimant alleges David Ogden made such a request and was sent on such site visits.
- 8.15 17 October 2019. Notice was accepted without discussion.
- 8.16 January 20. At the grievance hearing Diane Cheesborough stated she can't understand why the comment made by Joanne Rolska around 17 January 2019 offended the claimant.
- 8.17 January 2020. Failure to follow ACAS code of practice.
- 9 Are any of the acts or omissions established to have occurred out of time, if so are the acts or omissions part of a series of acts and if so, is the last in the series in time, if not is it just and equitable to extend time.
- 10 Did any of the above acts if held to be raised in time violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or otherwise offensive environment.
- 11 In the alternative, was the claimant subject to less favourable treatment on account of any of the above.

12 Victimization

12.1 What were the protected acts the claimant relied on : complaining about the comment made by Joanna Rolska in January 2019 to Rob Morrision:

12.2 The detriments were:

12.1.1. August 2019 to October 2019. Theresa McArdle made constant remarks about the claimant leaving her desk on one particular day commenting she would chain the claimant to it.

12.1.2. September 2019. In conversation with Theresa McArdle, David Ogden and DR an email from a former colleague was brought up. Theresa McArdle singled out the claimant stating I hope you have not seen it.

12.1.3. 9 October 2019. Theresa McArdle called across the office stating that she heard Olivia (the claimant's daughter) was the most common name, the claimant replied stating it wasn't when she named her daughter, Ms McArdle cut her off mid-response, saying I didn't ask for your life story.

13. If detriments are established are they out of time, if so, is the act or omission part of a series of acts or omissions and if so has it last in a series in time, if not is it just and equitable to extend time.

14. The claimant alleges the above instances were in relation to the claimant putting in a complaint in January 2019 in relation to a derogatory comment made by Joanne Rolska (they can't drive because they are black

15. Direct Sex Discrimination

15.1. The claimant relies on her gender of female.

15.2. What are the alleged acts or omissions which the claimant asserts amounted to a less favourable treatment.

15.2.1. February 2017 to October 2019. The claimant was never given appraisals, personal development plans or training as opposed to her male colleague David Ogden.

15.2.2. April 2019 new job rules to commence 1 May 2019, North and Southern Co-Ordinators role share between David Ogden and the claimant, when Mr Ogden did not complete work it would put pressure on the claimant.

15.2.3. January 2019. The claimant expressed she needed a laptop to complete her work, this was not provided.

15.2.4. July 2019, Teresa McArdle was advised by the claimant that the workload was making her work over her working hours and as

such making the claimant late in relation to collecting her daughter. Teresa McArdle advised the claimant she would need to manage her time more effectively. David Ogden was allowed flexible working hours.

15.2.5. 12 June 2018. The claimant made a request for further training to Teresa McArdle and Rob Morrison re functional skills and qualifications. Refresh Maths, English and IT skills. She was not supplied with any such training. Matthew Oldham and David Ogden, Igli Peci and Nicky Marshall were supplied with the training they requested.

15.2.6. 11 October 2019. During a discussion with the claimant's tutor on a course provided by the respondent she was advised that appraisals would need to be submitted to pass her module, the claimant and David Ogden were on the same course, the claimant states she did not receive appraisals whilst David Ogden did.

15.3. Are there any acts or omissions established that occurred out of time. If so, are the acts or omissions part of a series of acts and if so is the last in the series in time. If not, is it just and equitable to extend time.

15.4. Who is the comparator relied on, actual or hypothetical and what are the material circumstances of that comparator. The claimant relies on David Ogden, male.

15.5. By a reference to the alleged acts or omissions and the identified comparator was the claimant subjected to less favourable treatment because of her sex.

16. Constructive Unfair Dismissal

16.1. What are each of the acts which the claimant alleges amounts to a breach of the implied term of trust and confidence and/or express terms.

16.1.1. Making it impossible for an employee to do their job, for example by giving them too much work or not responding to their requests for help with their workload.

16.1.2. 12 September 2019. The claimant had booked half a day off to attend a friend's funeral, the claimant received numerous missed calls from Michael Cassidy in relation to a broken-down vehicle, the claimant felt forced to leave the wake early to attend in the recovery of the vehicle.

16.1.3. 18 September 2019. The claimant gave a colleague a lift to work, during this journey the claimant was told the colleague had a life-threatening blood born virus. The claimant had previously administered first aid to this colleague without PPE at the point of an accident, at no

point was the claimant made aware of the potential exposure to the ailment by the employer.

- 16.1.4. 7 October 2019. Upon returning back to the office following a week away David Ogden, Richard Bell, Nicky Marshall and Fabian (CEO) were involved in secret talks and meetings the claimant was not invited to or made aware of.
- 16.1.5. 14 October. David Ogden was given authority to re-schedule work for the claimant and the claimant would have to ask permission for her work to be re-scheduled. No formal discussion to that effect was had with the claimant.
- 16.1.6. 14 October 2019. The claimant was receiving pressure from senior management, enquiries made of staff regarding the figures required were ignored.
- 16.1.7. 15 October 2019. Fresh delivery of chemicals without the data sheet attached. The claimant had to address the delivery.
- 16.1.8. 15 October 2019. Operatives were informed that they must report to David Ogden on their return to the unit, this was previously a key responsibility of the claimant, the change was not discussed with the claimant.
- 16.1.9. 15 October 2019. Andrew Flanagan came to the claimant's aid in attempting to extract information about invoice ready work from Nicky Marshall and Richard Felps. The claimant had previously requested this information as it was holding up her and the accounts department. The claimant will say she had been fobbed off by both of them. The claimant will say that when Andrew Flanagan attempted to extract the information he was fobbed off and ignored several times, following which he threw his pen on his desk in frustration and the claimant walked away from the conversation. The claimant will say that whilst her initial question has now been answered which enabled her to do her job Richard Felps clarified with Andrew Flanagan that he needed to arrange with David Ogden when the job would be completed. This confirmed to the claimant that she had been stripped of her duty to arrange this.
- 16.1.10. 15 October 2019. The claimant will say the final straw came as a collective of the above, the final act being that after the claimant had walked out of the office following the above exchange it took her colleagues two hours to realise she was missing, the claimant felt this emphasised she was no longer a valued member of the team.

- 16.2. By reference to the acts established to have occurred did the respondent fundamentally breach the implied term of trust and confidence and/or express in that did the respondent:-
- (a) Have reasonable and proper cause for its conduct and
 - (b) If not, was the conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence.
- 16.3. Did the claimant act in such a way as to delay resigning to affirm any breach.
- 16.4. If so, was the claimant's resignation by reason of an established breach or breaches of some other reason.
- 16.5. Was the claimant dismissed for a fair reason.
- 16.6. If the Tribunal finds that a fair procedure was not followed would the claimant still have been dismissed or is there a percentage likelihood that the claimant would still have been dismissed or would have left even if a fair procedure had been followed.
- 16.7. If the Tribunal finds that the claimant was unfairly dismissed did the claimant contribute to that dismissal.

17. Witnesses

- 17.1. For the claimant the claimant herself and three other witnesses, Janice Buckley ex HR Assistant, Emma Howard, ex-employee, Joanne Youd, ex-employee, and for the respondent Teresa McArdle, Fabian Caqueret. Teresa McArdle is Health and Safety Officer; Quality and HR Director and Mr Caqueret is Managing Director of the company.

Tribunal's Findings of Fact

18. The Tribunal's findings of facts are as follows.
19. The claimant began working for the respondent on 6 February 2017. She had originally applied for a Cleaning Operative role, but the HR Advisor Joanne Youd asked her to apply for the part time role on offer as an Administrator as it would fit in with school hours which the claimant needed to assist her in caring for her daughter. The claimant's role was to organise the respondent's cleaning jobs, working on reception and on invoicing.
20. In April 2017 Teresa McArdle joined the respondent as HR HS Manager and the claimant and Ms McArdle were initially friendly although the claimant's view was that Ms McArdle mainly spoke about herself.
21. In May 2017 Teresa McArdle asked the claimant to become a company First Aider. She asked that it be put in her contract and she was advised there would be no extra pay although the claimant alleges when she was asked to do this role on a previous occasion she was told she would get £25 a month however there was no verification of this and that there would be an internal

announcement when she began. This is relevant because the claimant sought to compare her treatment on being appointed a First Aider with that when other staff were appointed as Fire Marshalls later on. Ms McArdle's evidence was that she was a First Aider, there was no announcement about her becoming a first aider and she received no increase in pay as a result.

22. The claimant said things were difficult in July 2017 after four consecutive receptionists left, Joanne Rolska was hired but struggled with matters and constantly had to be helped by the claimant. Also, she was advised while she was on leave in August 2018 that the person hired to replace Sally Howard as Window Cleaning Co-Ordinator, David Ogden, was struggling and she needed to help him when she returned from annual leave.

2018

23. In January 2018 the claimant was finding it difficult constantly trying to help David Ogden and having to undertake some of another employees work this work. The claimant increased her hours, but she says this did not help.
24. In February 2018 she received a disciplinary for non-completion of her duties from Joanne Youd.
25. In May 2018 the claimant received some results back from the Gynaecological Department of Salford Royal Hospital and had to have a procedure immediately the next day, the claimant told Ms Buckley who advised her to tell Ms McArdle but she refused to do that because she had already discussed the matter with Teresa and Teresa had frightened her regarding the condition. She advised everybody simply that she was on annual leave, her procedure was successful, and she returned to work on Wednesday. She entered the office and Teresa and Ms Buckley were there, Teresa called out to the claimant "Adele they have taken your hair, I thought you had had an operation". The claimant said she was devastated by this because nobody except for Ms Buckley knew that the claimant was having an operation and she could see Janice Buckley was shocked by this outburst, especially in front of four men. No gynaecological matters were referred to and Teresa McArdle somehow knew about this operation and thought others knew – she was trying to lighten the atmosphere and welcome the claimant back. This would not be the first time Ms McArdle's sense of humour struck a wrong note.. The reference to taking 'your hair' was because the claimant had had a new haircut.
26. In May 2018 the claimant was talking to another member of staff Emma Hague,(later Howard) who was getting married and the claimant and Ms Buckley had made for Emma Hague's bridal car as a surprise. Once she was talking to Emma Hague outside the office because they were both smoking Teresa McArdle came along and interrupted them by saying she had heard something on the radio about generation Z's (or millennials) lack of concentration. The claimant then said that Ms McArdle looked directly at the claimant and said, "I bet yours is even lower" and walked away. Ms Howard gave evidence to say she had witnessed this conversation however Mrs Howard said that Ms McArdle had said it was about ethnic minorities. Clearly the claimant had never said this just that the 'cutting' comment about her own concentration levels which she believed was aimed at her because she was

black. Unfortunately, we find Mrs Howard's evidence unreliable in the light of this glaring inconsistency which must have been deliberately aimed at supporting the claimant's claim. Ms McArdle believed she had made a general comment not one specifically aimed at the claimant. Ms McArdle stated that the claimant was misinterpreting this, and it was simply a conversation about how people couldn't concentrate anymore because of social media. The claimant agreed there was nothing racial about the comment when she was cross examined about it. There was nothing in the words said which made it specific, 'yours' can mean plural or single. We find that Ms McArdle did not mean this comment to be specifically directed at the claimant.

27. The claimant says that her burden of work was increasing, and work was being restructured, David Ogden was preoccupied with this and did not help the claimant. The claimant says she complained to Nicky Marshall her line manager, but he never took it seriously. She tried to speak to the newly appointed General Manager Steve Bottomley, but he was always busy.
28. The claimant was also concerned that Joanne Rolska was appointed to a new post as Central Admin Manager, the role was not advertised, and the claimant was aggrieved about this however familiarity with Excel was one of the requirements for this post and the claimant did not have this. Further, nobody else had the opportunity of applying for this post. It was the claimant's belief that Teresa McArdle was friends with Joanne Rolska and this may have been why she got the promotion however Ms McArdle stated this was not true and that there had been an issue when Ms Rolska's partner was threatening her and Ms McArdle let her stay one night at her house while she sorted out alternative accommodation.
29. On 13 June the claimant received an email from Steve Bottomley. She described it in her witness statement as the final straw. This said "Adele, further to our chat yesterday I am disappointed that something that should be straightforward has not been done, having provided a procedure and taken the time on a number of occasions to explain the procedures and reinforce how important TFGM is to Tudor only increases the disappointment and frustration. I am afraid your reason for being busy is not acceptable excuse and not having sent the satisfaction notices out, particularly given there are so few, I have also explained that we are moving to a monthly valuation of works where it is imperative we are able to confirm works have been done. The issue of the satisfaction notices must be a priority action and any further failure to do so will not be acceptable. Another important procedure we have agreed is the inspection of works, during the conversation you mentioned Nicky has also not inspected some of the jobs and I asked you to provide a list of what has been done and what hasn't. I need this for my meeting this morning with TFGM so please provide this by return email". This was sent at 7:52. It was copied to James Taylor, Joanne Rolska, Nicky Marsh, Matt Murphy, Teresa McArdle and Robert Morrison.
30. The claimant while not completely happy that Mr Bottomley had berated her in this fashion was particularly aggrieved at the individuals to whom he had copied the email. The claimant was also aggrieved because the job in question was Mark Wolstenholme's job not the claimant's, she felt that she had previously been told off for not completing tasks because she was helping other people

who were unable to do their job and complete their own tasks so on that day she sent her resignation out to all to ensure it reached the right people.

31. Following her resignation, she had a meeting with Teresa McArdle and Robert Morrison where they discussed the problems leading up to her resignation. She also discussed that she wanted to progress in the company but felt that her lack of GCSEs held her back. Teresa said that was something she could help her with, the claimant said she told her English was her weaker subject and that her grammar wasn't the best and she would like to do a refresher in Word, Excel and Sage. There was also a discussion about the pay review, that she had been asked to increase her hours to help the Big Change Project by Joanne Youd so it would be good to have an increase in pay and she retracted her notice.
32. The claimant retracted her resignation after this meeting. However, it was the claimant's view that following this there were no improvements after this. She was given further work by Robert Morrison in that she had to fully create and plan and schedule the calendars with the available work which was normally a duty for managers.
33. On 14 August the claimant and other colleagues attended Ms Howard's wedding. The claimant complained about Joanne Rolska's behaviour there which she raised with Robert Morrison the next Monday, but he just shrugged it off. However, no claim arises from this incident.
34. As the company was reorganising (the Big Change project covered many aspects of the respondents' working practices) and staff were made aware that there might have to be redundancies in administration. The claimant received a text message informing her that the jobs in the new structure being released and unfortunately the deadline was the day after the claimant was due back from annual leave. The claimant was taking 14 days off and TM sent her a text message 14 days into her holiday asking her to ring her. The claimant was abroad and had jet lag on the day she had to return to work and obtained very vague job descriptions. The hours did not fit in with her childcare, so she declined the offers in an email of 29 August. She noted that "when I retracted my notice in the meeting with you both in June I truly adore my job and the ethos on which the company was build, I have built a fantastic relationship with both clients and operatives and with that in mind please accept this decision was not made likely i.e. to reject the jobs, I totally understand that the needs of the business are your priority but mine has to remain with the needs of my child as always stated during this role. " The claimant was advised by Teresa McArdle and Robert Morrison to apply for the job and they would sort the hours out if the claimant was successful. The claimant's belief was that otherwise all the jobs were earmarked for existing individuals. The claimant did obtain the role in question.
35. An annual ball that the respondents bought tickets for annually was due to take place on 16 August. It was the claimant's belief that she would be going that year however Dorota and Joanna attended, and she could not understand why she had been overlooked. It appears that the tickets were given to Joanne

Rolska and she simply decided to take her friend. There was no management input into this.

36. In November 2018 the claimant said that she felt the atmosphere in the office was toxic because Joanne and Derota constantly spoke in Polish, David Ogden would disappear from his desk and take breaks during peak time, the claimant would have to pick up some of his duties and those of the unallocated zero hours contract roles that had not been filled. Ms McArdle had had the main phone diverted to the office so that it would constantly ring, and nobody would answer it except for the claimant. Teresa McArdle also had reception emails diverted to the claimant, so she had to respond to those as well .
37. The Fire Marshall roles were then announced in December, and the claimant was gobsmacked at the fuss that was made about then she said. She held the highest qualification in the business, and she felt it contrasted greatly with when she was appointed a First Aider that there was no fuss about this. She was upset she was not considered for the role but the respondent said that they needed to keep a certain number of first aiders in place so an employee could not do both jobs. She also complained that she was not provided with a proper First Aid kit.
38. In December 2018 the claimant heard from Bobby Robinson regarding a comment the Ms Rolska had made. Mr Robinson stated that he had told Joanne to ask one of the staff to do a certain job and she had replied they can't drive they are black. He said that David Ogden had said to her "you can't say things like that". Mr Robinson said Joanne just smiled and shrugged her shoulders and he left the room. He said he felt she knew what she was saying. The claimant didn't know what to do because she was offended by the comment, but she hadn't heard it.

2019

39. On 21 January 2019 the claimant decided to make a formal complaint about Ms Rolska's comment. She was sending an email when Rob Morrison called the claimant and Derota into a meeting room and asked them did they have an issue with the support Joanne was giving us. DR used this opportunity and bombarded Rob with Joanne's failings. The claimant had previously advised him she was concerned about the amount of staff that were leaving and she told him of her intention to make a formal complaint about Ms Rolska. Mr Morrison said he was aware and there was an investigation. The claimant was concerned as no one had spoken to her however it would not have been appropriate to speak to the claimant as she had not overheard anything.
40. The next morning the claimant went to see Rob again with a piece of paper in her hand and he said to her "don't say that is your notice I need you". He then admitted (there is no evidence from Mr Morrison as he left the respondents soon after this incident) that in fact it was the first time he had heard about the incident with Ms Rolska but he didn't want to say anything in front of DR and he reassured the claimant it would be dealt with. He said that Teresa was dealing with many issues about Joanne and she would get back to the claimant about this one in due course. The claimant did not submit a written complaint after these conversations with Mr Morrison.

41. By February the claimant had not heard anything more about the incident so she decided to ask asked TM, she described it as 'confronting Teresa' but when she got to TM's office JR was in there and it was the claimant's perception they were giggling together so she did not proceed. A result of this the claimant felt it was time to look for a different job. The claimant was speaking to somebody she knew about moving to work for them but the hours and distance away did not fit with the claimant's needs. Mr Ogden also advised the claimant that he had made a complaint about Ms Rolska regarding the comment she had made to Bobby Robinson. Mr Ogden had allegedly been in a relationship with Ms Rolska and they had split up and the claimant felt that he was seeking revenge.
42. Around this time, the claimant says she asked for a laptop for her work, but she did not receive one. TM she believed that due to financial constraints no new laptops were being purchased in January, however even so she had no direct knowledge regarding this request. .. We had no details regarding who she had asked, what their response was etc accordingly we find that the claimant did not ask for the laptop in a clear way and therefore this request was not properly picked up. When she asked later once she started her course she was offered one of TM's. but as she left the respondent and consequently left the course this was never provided..
43. In February also the claimant objected to an email sent by Mr Bottomley which complained about the time the claimant had spent on her lunch. She was aggrieved about this as she said this was because David Ogden had given him the wrong information regarding where she was, and she was actually on a work-related errand. She cited Margaret Newlove as a comparator she advised was never challenged about the time she spent away from her desk.
44. The claimant alleges that in April 2019 Mr Ogden had resigned on three occasions in the previous months and his behaviour to Ms Rolska was out of control. The claimant says she complained to management, but nobody did anything. He went on sick leave and Mr Bottomley allegedly commented hopefully he won't return. JR reported this back to David Ogden and David complained about this, the claimant complained that Mr Ogden's complaint was taken ultra-seriously whereas hers wasn't and draws a comparison for the purposes of her claim. There was no evidence regarding how Mr Ogden's complaint had been handled by the respondent .
45. In relation to his resignations there was a text message exchange with the claimant at the end of April where he says he is going to put in his resignation however there was no further specific information as to whether he did formally resigned nor specifically if he did why he withdrew it .
46. In May 2019 the claimant became the Northern Co-Ordinator and Mr Ogden the Southern Co-Ordinator although she felt the balance of work was still on her and that the changes to do with the "big change" were constantly failing. She felt David had a new arrogance about him and was constantly in with Matt Murphy the CEO. However, this was because Mr Ogden had been tasked with helping with Big change a matter the claimant did not complain about.

47. The claimant said in July she raised with TM that her increased work pressure was causing difficulties with her collecting her daughter from school, but no allowances were made for her. The claimant claimed that David Ogden was allowed to work flexibly but there was no evidence of that and there was no formal or written request from the claimant regarding this.
48. In August 2019 the claimant and Mr Ogden were offered a business course to help them in their work and they both accepted. The claimant began in September that year the course that Ms McArdle had arranged for her, she argued throughout that she was set up to fail this as there was an introductory test which she did not know anything about, however she did pass it. She also complained she did not receive any additional support in English, Maths and IT as she had requested earlier although the respondents disputed that she had requested this. We find it had been agreed the claimant would undertake this course and in the respondent's belief this met her needs and were unaware she wanted something different. We accept the respondent's evidence - there was no corroboration of the claimant's assertions.
49. Nicky Marshall told the claimant that David was using every opportunity to discredit the claimant in order to get a promotion and the claimant felt like it became a boy's club, however, there was nothing to support this, it was the claimant's perception.
50. The claimant said in September 2019 (although it was described as in August in the claim form/list of issues)TM said to her that 'she needed to chain her to her desk', TM said she may have said that she need to 'tag' the claimant as she was often away from her desk but denied saying referring to chaining. However, we find the claimant's description more plausible.
51. In September there was a further incident the claimant was aggrieved about which was that an email had been accidentally sent around to various people and Teresa McArdle said specifically to the claimant "I hope you've not seen it". The claimant was aggrieved because she felt she was being targeted. Again, Ms McCardle said it was a general comment. We accept Ms McArdle's evidence on this point.
52. 15 September 2019. The claimant complained that she sadly had to attend the funeral of a friend and was rung during the wake to be asked for some information. Michael Cassidy rang stating he had had a blow out on the motorway and the matter needed sorting out. She told Mike to ring Nicky, Rich or Teresa and he said he had tried but nobody had answered, and Teresa didn't know what to do. The claimant therefore rang recovery and as she held the company credit card so that the matter could be sorted out, however she needed authorisation due to the cost and rang Andrew Flanagan to secure a number then he rang Margaret Newlove who rang Matt Murphy who rang Rich and it was eventually authorised. The claimant complained about being interrupted at the wake and having to leave it. The respondent stated that the claimant needed to take responsibility for answering the phone. She did not

need to answer the phone during the wake, the claimant stated she needed to keep her phone on in case there was an emergency with her family . However, the claimant even if she answered the phone and once, she realised who it was she could easily have turned it off and insisted that Mr Cassidy sought the matter out with somebody who was working.

53. 18 September 2019. The claimant was having a conversation with her colleague whilst driving into work when she was told he had a clinic appointment explaining that he had a life-threatening blood born virus, the claimant had previously had administered first aid to this colleague without PPE at the point of an accident and she was extremely concerned that at no point was she made aware the potential exposure to the employee's ailment. The respondent produced information to show that they had taken advice regarding the employee's condition and had been advised that it was not dangerous to others, accordingly they were respecting the individual's confidentiality by not advising other members of staff of it given that there was no or minimal risk to others.
54. In October 2019 the issue regarding the claimant's daughter's name arose, the claimant said that Ms McArdle shouted across the room "isn't your daughter called Olivia that is a very common name" and the claimant said, "it wasn't when she called her daughter that" and then Ms McArdle said, "I didn't ask for your life story". Ms McArdle agrees she said something along those lines, but it was because the claimant launched into a very complicated explanation which she simply did not have time for. It was clearly rude, but Ms McArdle denied it was said because of anything to do with the claimant's race, colour etc.
55. In respect of the course the claimant and Mr Ogden were (on which Ms McArdle had arranged) the tutor asked the claimant for her appraisals as he had already received Mr Ogden's. The claimant was shocked as she did not know that any appraisals were taking place. TM stated that Mr Ogden had asked for the appraisals, so they had been undertaken, the respondent did not undertake appraisals of staff routinely. She also had not been aware there was a qualifying test before she could go on the course, which she passed. TM stated that the claimant had been given all the information regarding the course beforehand so she could only conclude that the claimant had not read fully through all the information. We accept this was the explanation and not as the claimant believed that she was being 'set up to fail'.
56. The paperwork in the bundle for the course stated that it was a business admin diploma level 2 and that she was assessed on 9 September 2019 as E£ in English and Maths and that her target was Level 1 – this suggests that some tuition was to be provided to the claimant in these subject areas.
57. On returning from annual leave on 7 October the claimant believed that Mr Ogden was involved in 'secret' talks and she was left out of these. FC explained that these discussions were in connection with the Big change project and Mr Ogden was one of those involved in this.
58. More generally the claimant complained that throughout her employment she asked to go on site visits but was not allowed to whereas Mr Ogden was, the

respondent's explanation was that the claimant was behind with her work and being part time it was harder to fit it in. Given she was behind with her work it would not have helped had she been allowed out for several hours to undertake a site visit. Further Mr Ogden was involved with the big change project which made the site visits more relevant to his work.

59. On 11 October Fabian, the new Managing Director came in and asked the claimant why she hadn't completed the calendars, she said she had not stopped all day as she had had to carry the whole division whilst David, Nicky and Richard were upstairs in a meeting. Mr Caqueret looked confused and stated David had only been needed for a short time so he should have been helping her. The claimant then began her calendars and Matt Murphy then reprimanded her for not finishing her invoice sheet. She said she needed further clarification of completed work from Richard which she had not received. She said she had to leave as she had to collect her daughter and was then travelling to Surrey, she was sent a message on the way down to Surrey by Ms Marshall, she was travelling along with someone else who was a CIPD member by who she complained to about how heavy her workload was and the worker said she needed to address her issues at work as she recognised the signs of burnout, the claimant felt she would deal with matters when she returned to work.
60. When she arrived in work on 14 October the calendars were completed on the walls and Mr Ogden was tapping away on his laptop, she asked him what this was and he said, "I did this over the weekend". She felt it didn't match the work however she had no time to do anything else as they were expecting Dianne Cheeseborough, a new non-executive director. The claimant felt a lot of work had not been completed and there was a deficit of £40,000 and that in the meeting with Ms Cheeseborough she was being challenged about this, but she could not get the information for the invoicing that she needed. A colleague AF said advised her on their way home that he would get in early and get this information for them.
61. On 15 October the claimant came in, logged into her computer and saw a message from 9 October sent to everybody except her. In the claimant's view this email was giving her work to others particularly Mr Ogden
62. On the same day an issue arose regarding a chemical delivery and the claimant went to show Barry Robinson where it was when she had an accident which left her with a facial scar, however she does not rely on this for this claim but she was concerned that there was no data sheet there and complained to Mr Robinson "that's another job that I'll have to do".
63. She then returned with a colleague AF and challenged the other members of staff for the information they needed. No one answered and AF threw his pen on the desk and repeated the question to Richard and Nicky at which point they started to answer but Derota R got from her desk and interrupted. Richard then turned to David and said, "when can we fit it in".
64. The claimant felt this was the final straw, she put her coat on and quietly walked out, she said she could hardly breathe because nobody would give her the information, and nobody was paying her any attention.

65. The claimant also was aggrieved as nobody rang her until two hours after she had left but she states this was simply to arrange paying for his parking. Teresa eventually did call her, but she decided not to answer.

66. She drafted her resignation letter and held back sending it until later. At 4 o'clock the claimant emailed Matt Murphy, and Mr Caqueret and said:-

“Good morning all, (as she drafted this earlier,) as I imagine you all haven't noticed yet I walked out of the office at 7:55 am, this is my formal resignation to take effect immediately, I appreciate the extra pressure that will put on the team but I spare no apologies for this as I need to put my own welfare and self-respect first. I am well aware I will be breaching my contract and totally understand the repercussions of this drastic action but after the extreme failings of the previous issues I have no faith in discussions to resolve which brings me to take such actions, out of respect for my past loyalty I would have appreciated formal notice I was being removed from my duties role instead of just being forced to do the tasks everyone else feels beneath them. I have removed myself from all Tudor Groups and the work phone is on my desk. Matt/Fabian please don't mind my decision is not made lightly but I feel I can no longer carry on under these present circumstances”.

67. On 16 October Matt Murphy replied:-

“We are sorry to hear you have decided to submit your formal resignation, Teresa did try to make contact with you yesterday to discuss any issues or concerns however she was unable to reach you. If you would like to discuss things further, please can I ask you to contact Teresa directly or alternative feel free to speak to myself or Fabian. Once again, we hope you are ok and wish you all the best for the future”.

68. It was the claimant's belief that the respondents were opening the door to the claimant retracting her resignation and had lengthy conversations late on 16 October with Nicky Marsh and Richard and she felt that they had resolved a number of issues, she accepted the offer of an exit interview but was shocked when access to her work email was denied and she began to realise that the purpose was not to try and resolve the issues so she could return to work.

69. The exit interview took place on 22 October with Fabian Caqueret, the claimant and Teresa McArdle. In this meeting the claimant said she felt there were many furtive conversations something was going on, she had had a difficult year and she felt isolated and she was aware that Joanne Rolska had made a racist comment although she comment she didn't think Joanne was racist and she felt overshadowed as Joanne was living with Ms McArdle. Dave and Joanne had split up and there had been hell in the office, no one had properly discussed who should do what with the new roles, neither had she obtained a laptop, she felt she had been set up to fail (although she didn't mention this was in relation to her course). She had told Richard Phelps she felt she had been left out of everything, but nothing changed. Appraisals had not been done and again she felt set up to fail. That everybody ignored her in the office, and she needed the information in order to ascertain why the company was £40,000 down. AF had also asked the same question and he got no response; she

couldn't do her job without assistance. She felt she couldn't go to Teresa McArdle because she was friends with Joanne Rolska. She had complained to Matt Murphy, but he had not got back to her. Ms McArdle explained that Ms Rolska had simply moved in for a very short time while she sorted out her domestic situation.

70. Mr Caqueret asked three times if there was anything else the claimant wanted to ask and each time she declined. Mr Caqueret said that he thought when he invited the claimant to answer his question that she would say that if things could be changed she would like to come back to work and that was their opportunity to do so but she didn't do that.
71. The claimant had expected some outcome from the exit interview, but no further communication was received.
72. On 8 November the claimant raised a formal grievance writing to Mr Caqueret.
73. The claimant's grievance stated that

“as discussed in my exit interview I have some serious concerns with the treatment I received whilst employed by Tudor, firstly I need to make this clear I had no intention of exiting so abruptly but felt I had no other option to continue in such a toxic environment. My decision was forced due to the treatment I had received over a two-year period and a lack of confidence that any issues raised to HR would be dealt with in a professional manner. ... my resignation was made in the heat of the moment out of sheer frustration of constantly being ignored. During our meeting I raised the issue about the derogatory racist comments made by one of your appointed managers namely Joanne Rolska referring to her subordinate she made the statements “they can't drive because they are black”. As you can imagine this statement not only offended myself but also the three witnesses that heard it, I chose to raise this informally on 17 January 2019 to Robert Morrison to avoid any victimisation from Joanne's close friend Teresa HR Director. On 18 January Rob assured me this matter was being dealt with and Teresa would call me in due course to discuss, as Teresa stated during the exit interview she was aware of both the informal complaint and the formal complaint raised by my colleague David Ogden but she felt the statement Joanne had made was misinterpreted which I feel is not a good enough excuse to justify blatant racism or disregard to a fellow employee's feelings. Teresa choosing not to take action in regard to Joanne's comment or to have any respect for how this would make a person of colour feels makes her vicariously liable. I chose to raise this face to face during the exit interview and expressed my concerns about not feeling the ability to raise this directly to Teresa out of fear of victimisation as I felt Teresa would not put her personal friendship to one side whilst she dealt with a professional issue. Teresa justified her cohabiting with Joanne at the time this came to light as she, Teresa had received a phone call at midnight from the Police Station stating Joanne had been beaten up by her then boyfriend Kenny and she needed a place to stay. Again, Joanne's personal problems are not my concern when the above statement was made I took this as an excuse to cheapen my serious allegations thus strengthening my initial concerns of unprofessional behaviour disclosing an ex employee's private and confidential business in an attempt to avoid answering my

allegations (Teresa failed to act appropriately due to her personal friendship with Joanne). I was an employee with Tudor coming up to three years, during that time although my knowledge and client familiarity is extensive I was constantly overseen on numerous occasions for in house development, I was constantly made to feel inferior, I was made aware that my colleague David was on a higher rate of pay than myself despite the fact I had more responsibility and duties than him. He was offered more opportunities and treated better than me, I strongly feel my treatment was different to my peers, with problems I raised above I feel my lack of being able to develop was due to discrimination of my race and gender. I have exceeded and developed in all other paths I have taken but with Tudor after nearly three years I seem to be going backwards doing duties everybody else felt beneath them. In order to complete my role as Co-Ordinator I needed a laptop for over a year, I was promised I would receive one but never did which greatly hindered my ability to complete my work undisturbed. Again, I was let down by Tudor.

HR did put me on a course sixteen months after I was promised it but without the use of the laptop I was unable to begin and the sheer workload that I had was excruciating with no support or help from my peers, despite me constantly asking them to help with the workload. I have typed a full detailed report highlighting all the issues spanning over two years, I can send you a copy if you would like. My intention is going to an Employment Tribunal citing the grounds of constructive dismissal and discrimination, I am so disappointed you failed to resolve this matter informally forcing me to take action. In this day and age, the forms of discrimination I allege should not be allowed to happen and can be quite damaging. I offered to discuss informally in order to build bridges and deal with my concerns head on but the option to do anything constructive or have my issues heard were prematurely disregarded and your decision to accept my resignation without being allowed to air my issues. Furthermore, a job of Office Manager at Tudor was posted on the day my resignation was accepted offering between £7,000 to £12,000 more than what I was being paid to complete the tasks, again no internal opportunity was offered before advertising externally. The job spec was what I had been doing for the past three years with an apprentice completing the minor important jobs which held me up daily. Again, evidence how unappreciated I was as an employee and my fears discrimination is in place.

I will be claiming constructive dismissal on the grounds of Health and Safety at Work Act 1974 and the Equality Act 2010 (Gender and Race). I will also be claiming loss of earnings as I am now out of work, I have the supporting paperwork needed and witness statements to back up my claims. I would be grateful if you could let me know you have received this”.

74. A grievance meeting did take place on 28 November held by Emma Whitmore, Independent Risk and Compliance Consultant. The claimant felt that the interview was horrendous as Ms Whitmore kept steering away from things, her laptop crashed, and she was scared they would have to go through it again. She spent the following four days in bed as she felt so stressed after this, she received a reply on 21 December despite Ms Whitmore saying that she would get a response within five days. The claimant went to ACAS on 21 November and the consultation period ending on 20 December. The claimant received a

response by letter of 20 December to her grievance . The claimant felt that the response was linked to the issuing of the ACAS Certificate.

75. The letter was very short. It stated that “having concluded the investigation into your concerns my decision is as follows:-
- (i) Your concerns were not formally brought to the attention of the company prior to your resignation and therefore it gave us no opportunity to address them. Whilst I fully understand from your pre-prepared statement on the minutes of your hearing that you had been unhappy it was not made clear to anyone and it came as a surprise when you suddenly decided to leave. In the light of being given no opportunity to deal with this prior to your resignation I cannot uphold this grievance.
 - (ii) You stated that you felt a racist comment regarding black people had been made and was not properly investigated or dealt with, I can confirm that we dealt with this matter as soon as it came to our attention and I would like to reassure you that we take allegations of this kind extremely seriously and endeavour to investigate them thoroughly and take immediate action against the individual involved, however on our findings during this investigation it turned out that the person in question has difficulty expressing her thoughts in English as English is not her first language and thus the comment came out sounding like it was a racist comment when in fact it was not meant to be at all. She was given a warning and subsequently sincerely apologised for causing any distress which was never her intention and agreed to a mentoring programme which continued until her departure from the company, thereby I partly uphold this grievance due to the fact that I acknowledged the comment was made, however I do not believe it was made with any racist intent.
 - (iii) I investigated your gender allegation and during your employment there were equal opportunities for all genders for both training and progression. You mentioned a male colleague was on a higher rate than you however there were also female colleagues on higher rates and male colleagues on the same or lower rates. I am not aware of you mentioning this and if you had we would have had the opportunity to confirm the above to you. Therefore, I do not uphold this grievance.
 - (iv) Your accident which happened on 31 July was recorded in the incident records and also reported in the August board pack. You state you were the only first aider in the business and that you were not aware of the location of the Defibrillator and also that you were not supplied with a First Aid kit. At the time of the accident there was two other office based first aiders and further field based first aiders. There is no Defibrillator in the business. You were supplied with the First Aid kit in May 2017 which I understand you gave to one of the operatives to take to site, we did however find a First Aid kit with all of the contents in date in your desk drawer, there is also a First Aid kit in reception together with First Aid kits for use in the vehicles located in the main office. I was disappointed to discover that following your accident you yourself

did not move the object to make the area safe. Therefore, with all the facts above I cannot uphold this grievance”.

76. We note at this point that in relation to the last point this did not form part of the claimant's claim before the Tribunal although we did hear evidence about the First Aid kit.
77. The claimant appealed the grievance outcome on 28 December 2019.
78. The appeal hearing took place on 20 January and is particularly relevant in respect of one of the claimant's claims where Miss Cheeseborough asks her about the alleged racist comment. The claimant says confirmed the comment was made by JR and overheard by three people, Dave, DR and Bobby, Bobby told the claimant what was said, the claimant played it down as she was embarrassed. Diane Cheeseborough asked that the comment was made in a conversation with a number of people when AW was not present and no particular individuals were specified, J is Polish, English wasn't her first language and J had a history of coming across the wrong way. She had been counselled about it and attended training on communication . The claimant complained that no one had advised her of the outcome. Yes, but she stated specifically that she didn't like the black comment.
79. In addition, the claimant said that FC had given his opinion that he did not think the comment by JR was made in an intentional way. The claimant felt he should not have said that when he doesn't know. Diane Cheeseborough said, “regardless of whether the comment had been intention or unintentional does AW feel the action that has been taken was appropriate”. She agreed it was appropriate, but it was too late and not dealt with in a good way. AW was too embarrassed to raise it previously but understands that once it was raised people in the company did take it further and take action. AW would like zero tolerance for any behaviour like that and professional training mentoring sessions. Claimant says during the meeting Diane Cheeseborough asked her why she was offended by it, when she was not present when it was said. The claimant felt that comment showed a profound misunderstanding of the nature of discrimination. Ms Cheeseborough did not give evidence therefore we accepted this was what was said.
80. The claimant's grievance was not upheld. Ms Cheeseborough wrote the claimant an outcome letter on 25 February 2000. She stated that in relation to the constructive dismissal grounds she said where her concerns had been brought to the attention of the company action had been taken on separate occasions in 2018 and 2019 when she had highlighted concerns about workload or hours the company worked with the claimant to agree reductions or increases in hours. In relation to the matters just prior to the claimant's resignation she had never brought them to the attention of the company and gave them no opportunity to address them. Accordingly, this was not upheld. In relation to the alleged racist statement heard by a third party it had been agreed with the claimant that this had been properly investigated and dealt with, although the claimant was not fully aware of the actions at the time she reassured her that the allegation was taken seriously and action was taken. She confirmed “in this incident the individual involved did not have English as a first language however as you questioned the results of the investigation ... we

discussed and you agreed at the appeal hearing that regardless of the individuals intent appropriate and immediate action had been taken by the company. The individual was given a warning, subsequently sincerely apologising for causing any distress which was not her intention and agreed to a mentoring programme which continued until her departure from the company on 10 May 2019". All appropriate action had been taken immediately and no recurrence was or has been reported to the company, and it was agreed that appropriate training would take place in the future going forward. In relation to the gender allegation where the claimant stated that in relation to her male colleague with a similar title who was on a higher rate of pay she stated that he had joined Tudor in August 2017 on an hourly pay rate lower than that associated with your role but later got a probationary increase followed by salary reviews, at times when the claimant's hourly rate increased bringing both salaries in line however following a restructure in November 2018, the male colleague successfully applied for a role that attracted a higher rate of pay differing from your own in both tasks and skills required and that explained the difference in pay. In that restructure the claimant had applied for one role before turning down that role due to the required hours impacting on the private activity you undertake outside of work. The company then reviewed the hours of that job to allow you to take that role and the difference between your role and the male comparators role was not questioned at the time. In May 2019 both pay rates were reviewed. The claimant was awarded a higher increase than the male colleagues role, the remain in difference to pay was due to the identified material differences in the two roles.

81. In relation to the training the male colleague and yourself offered an accepted training as the roles differed it is reasonable to expect training activity would also differ. Accordingly, the claimant's grievance was not upheld and it was confirmed that regarding the claimant's accident on 31 July 2019 she had removed that from the grievance.

The Law

Time Limits

82. Under Section 123 of the Equality Act 2010 a claim must be brought to the Employment Tribunal within three months of the act complained of. Section 123 states that:-
- 82.1. Subject to Section 140B proceedings on a complaint under Section 120 may not be brought after the end of:-
- (a) A period of three months starting with the date of the act which the complaint relates; or
 - (b) Some other period as the Tribunal thinks is just and equitable.
83. Section 123 goes on at sub section 3 to say for the purposes of this section:-
- (a) Conduct extending over a period is to be treated as done at the end of the period; and

- (b) Failure to do something is to be treated as occurring when the person in question decided on it.
84. In respect of the Tribunal's just and equitable discretion to extend time in a discrimination case the Tribunal should not take a prescriptive approach although the list of factors and the Limitation Act 1980 Section 33 approved in **British Coal Corporation -v- Keeble 1997 EAT** are not to be slavishly followed.
85. In relation to conduct extending over a period a distinction has to be made between a one-off act and something continuing. To decide whether there has been a series of acts extending over the period the Tribunal must hear evidence and make findings of fact, not simply deciding on the pleadings **Catering School Limited -v- Rose EAT 2019**, although the granting of an extension should be an exception rather than a rule, **Robertson -v- Bexsley Community Centre 2003 Court of Appeal**, approved in **Chief Constable of Lincolnshire Police -v- Caston 2009 Court of Appeal**. **The leading case on continuing act is Hendricks -v- Metropolitan Police Commission 2002** where the Court of Appeal stated that proof of a rule, policy, practice or scheme is not necessary in order to come within this section providing a continuing effect can be shown.

Constructive Dismissal

86. An employee may lawfully resign employment with or without notice if the employer commits a repudiatory breach. Resignation can be interpreted as an election by the employee to treat himself as discharged from his contractual obligations by reason of the employer's breach. This is known as constructive dismissal and is a species of statutory unfair dismissal by virtue of section 95(1)(c) Employment Rights Act 1996.
87. It was described in **Western Excavating (ECC) Limited v Sharpe [1978]** by Lord Denning as follows: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed".
88. An employee must act reasonably quickly in responding to a repudiatory breach of contract otherwise s/he may be taken to have accepted the continuation of the employment contract and affirmed the contract. However, mere acceptance of salary without the performance of any duties by the employee will not necessarily be regarded as an affirmation of the contract following an employer's repudiation. In **W E Cox Toner (International) Ltd v Crook 1981 EAT** it was said that delay by itself was not enough there either had to be an additional factor(s) or continued delay. An employee can work 'under protest' but must make it clear that he or she is reserving their right to accept the repudiation of the contract.
89. The EAT also considered this matter in **Chindove v William Morrison Supermarkets Limited [2004]** which said that:

“He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue, that the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case the employee is at work then by continuing to work for a time longer than the time in which he might reasonably be expected to exercise his right he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time, all depends upon the context. “

90. A claimant can rely on implied or express terms of the contract. Express terms can be written or oral. The claimant relied on the breach of the implied term of trust and confidence in this case as well as the duty to provide a safe working environment and to investigate a grievance.
91. In **Wood v WM Car Services (Peterborough) Limited [1982]** the Court of Appeal approved the development of the implied term of trust and confidence. It was finally given House of Lords’ approval in **Malik v BCCI** in 1997 where Lord Steyn stated that the question was whether the employer’s conduct so impacted on the employee that viewed objectively the employee could properly conclude the employer was repudiating the contract. It is not necessary to show that the employer intended to damage or destroy the relationship of trust and confidence. The court said the Tribunal should “look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that an employee cannot be expected to put up with it”.
92. In **Malik** the formulation is that the employer “must not conduct itself in a manner calculated and likely to destroy confidence and trust” and it is relevant to consider whether the employer’s conduct in question was “without reasonable and proper cause”. This is not the same as the range of reasonable responses test. However clearly if there was proper cause the claim will fail.
93. In proving breach an employee may pray in aid evidence of past repudiatory breaches even though he waived his right to object to them at the time. **Lewis v Motorworld Garages Limited [1985]**.
94. A failure to make adequate investigations into allegations of bullying or harassment can amount to a fundamental breach of contract – **Reed and another v Stedman EAT [1997]**.
95. Regarding breach of a suitable work environment/health and safety this was established in **Walton and Morse vs Mrs Jill Dorrington EAT (1997)**.
96. The particular incident which causes the employee to leave may in itself be insufficient to justify resignation but may amount to constructive dismissal if it is the last straw in a deteriorating relationship. This means that the final episode itself need not be a repudiatory breach of contract although there remains the causative requirement that the alleged last straw must itself contribute to the previous continuing breaches by the employer, **Waltham Forest Borough Council v Omilaju [2004] CA**, and not be an unjustified sense of grievance.

97. In **Kaur vs Leeds Teaching Hospitals NHS Trust [2018] CA** a unjustified act contributing to a course of conduct or a breach of contract can revive early affirmed repudiatory breaches but the tribunal's decision was upheld that the application to the claimant of a properly followed and justified disciplinary procedure could not be a repudiatory breach or an unjustified act.
98. Therefore, the claimant has to show that the matters he relies on either individually or cumulatively amounted to a breach of the implied term of trust and confidence. He then has to establish that that breach played a part in his decision to resign (here a resignation letter maybe of evidential value but it is not determinative of what was the effective cause for the resignation) and he has to show that he has not unduly delayed or affirmed the contract.
99. A claimant can also rely on specific breaches without a continuing course of conduct however if they are in the past an argument maybe made that the claimant has either affirmed by not doing anything about it or it may find as a fact that the claimant has not resigned because of that breach given the passage of time.

Race and Sex Discrimination

100. The claimant brings a claim of race discrimination in respect of direct discrimination, harassment and victimisation in relation to sex discrimination the claimant relied on direct discrimination

Direct discrimination

101. Section 13 of the Equality Act 2010 sets out the definition of direct discrimination. This is where (1) A person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others.
102. Section 136 of the Equality Act 2010 sets out the burden of proof to be applied in discrimination cases. This says that if there are facts from which a court could decide in the absence of any other explanation that a person (A) contravened the provision concerned the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
103. The shifting burden of proof rule assists Employment Tribunals in establishing whether or not discrimination has taken place. In **Martin v Devonshires Solicitors [2011]** the EAT stressed that "While the burden of proof provisions in discrimination cases are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination – generally that is facts about the respondent's motivation ... they have no bearing where the Tribunal is in a position to make positive findings on the evidence one way or another and still less where there is no real dispute about the respondent's motivation and what is in issue as its correct characterisation in law", and in **Laing v Manchester City Council** Justice Elias then President of the EAT said that if the Tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial

discrimination then that is the end of the matter. It is not improper for the Tribunal to say in effect there is an open question as to whether or not the burden has shifted but we are satisfied here that even if it has the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race. At the same time, he also said the Tribunal cannot ignore damning evidence from the employer as to the explanation for his conduct simply because the employee has not raised a sufficiently strong case at the first stage. That would be to “let form rule over substance”. So, if the matter is not clear a claimant needs to establish a prima facie case of discrimination, which is shorthand for saying he or she must satisfy stage one of a two-stage shifting burden of proof then the burden shifts to the respondent to explain the conduct.

104. In **Laing** Elias suggested a claimant can establish a prima facie case by showing that he or she has been less favourably treated than an appropriate comparator. The comparator must of course be in the same or not materially different circumstances. A paradigm case is where a black employee who is better qualified than a white employee is not promoted where they were the only two candidates for the job. However, the case obviously becomes complicated where there are a number of candidates and there are other unsuccessful white candidates who are equally well qualified. If there are no actual comparators of course hypothetical comparators can be used.
105. The question was asked in **Madarassy v Nomura International Plc [2007] CA**, is something more than less favourable treatment required? Lord Justice Peter Gibson stated in **Igen v Wong [2005]** that “The statutory language seems to us plain. It is for the complainant to prove the facts from which the Tribunal could conclude in the absence of an adequate explanation that the respondent committed an unlawful act of discrimination. It does not say that the facts to be proved are those from which the Tribunal could conclude that the respondent could have committed such an act ... The relevant act is that the alleged discriminator treats another person less favourably and does so on racial grounds. All those facts are facts which the complainant in our judgment needs to prove on the balance of probabilities. **Igen v Wong** also said it was not an error of law for a Tribunal to draw an inference of discrimination from unexplained unreasonable conduct at the first stage of the two-stage burden of proof test. It seems the difference between the approach in **Madarassy** of Mummery in saying that a difference in treatment and a difference in status is not enough, and that of Elias in **Laing v Manchester Council**, which followed **Igen v Wong** stating that it was sufficient to establish genuine less favourable treatment if at the first stage the employer cannot rebut by evidence and it takes into account the fact that a claimant will not have overt evidence of discrimination but could have evidence of how they had been treated differently to other employees who do not share the relevant protected characteristic.
106. In the recent case of **Efobi v Royal Mail [2021] SC** the supreme court confirmed ,after this had been doubted by the EAT, that burden of proof in a discrimination case is on the claimant to establish a prima facie case .
107. Another approach is to consider whether a Tribunal should draw inferences from the primary facts which would then shift the burden, and if a non-

convincing explanation is provided by the respondent then discrimination would follow.

108. Regarding inferences Employment Tribunals have a wide discretion to draw inferences of discrimination where appropriate but this must be based on clear findings of fact and can also be drawn from the totality of the evidence. In **Glasgow City Council v Zafar [1998]** unreasonable conduct by itself is not sufficient. However, where it is said that the unreasonable conduct is displayed ubiquitously an employee would need to provide proof of that, i.e. A was treated badly not because of his race but because the employer treated all employees badly. There must be some evidence of this, and it not just be an assertion, and likewise with unexplained unreasonable conduct.
109. Inference can be drawn from other matters such as breaches of policy and procedures, statistical evidence, breach of the EHRC Code of Practice, failure to provide information.

Harassment

110. Harassment is defined in section 26 of the Equality Act 2010, which states:

- “(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 –
 - (ii) Violating B’s dignity, or
 - (iii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) ...
- (3) ...
- (4) In deciding whether conduct has the effect referred to in subsection 1(b) each of the following must be taken into account:
- (a) The perception of B;
 - (b) The other circumstances of the case; and
 - (c) Whether it is reasonable for the conduct to have that effect.”

Victimisation

111. Section 27(1) of the Equality Act 2010 states that:

- “A person (A) victimises another person (B) if A subjects B to a detriment because –
- (a) B does a protected act, or

(b) A believes that B has done or may do a protected act.”

112. A protected act for the purposes of section 27(1) are:

- Bringing proceedings under the Equality Act;
- Giving evidence or information in connection with proceedings under the Equality Act;
- Doing any other thing for the purposes of or in connection with the Equality Act;
- Making an allegation, whether or not express, that A or another person has contravened the Equality Act.

113. Therefore, it needs to be established that the protected act comes within the definition, then that the claimant was subjected to a detriment of less favourable treatment, and finally that that detriment or less favourable treatment was because the claimant had done a protected act or because the employer believed he or she had done or might do a protected act.

114. The types of detriment situations which arise are set out in section 39(3) and (4). Section 39(4) states that:

“An employer (A) must not victimise an employee of A’s (B) – as to the terms of B’s employment; in the way A affords B access or by not affording B access to opportunities for promotion, transfer or training, or for any other benefit, facility or service; by dismissing B, or by subjecting B to any other detriment.”

Conclusions

Time limits

113. The claimant relied on there being a continuing course of conduct by the respondent and did not put forward any just and equitable reasons for the Tribunal extending their discretion. In respect of conduct extending over a period we accept that actions taken by Teresa McArdle could be regarded as continuing course of conduct if we found they were discriminatory ending with actions which were in time. In relation to other specific individuals the claimant complained about, in particular Steve Bottomley we find these were discrete actions. The claimant relied on two specific events in June 2018 and February 2019 and accordingly we find those matters are out of time as they are not continuous with Ms McArdle’s actions.. In addition, the Office Manager roles event took place in January 2018 and accordingly we find that was a one-off event and that is out of time although in any event we found it was not discriminatory. Again, in relation to the local charity ball in August 2018 that was not a matter in which Ms McArdle was involved, it was a one-off event and accordingly that also is out of time. Likewise the laptop request in January 2019. However we have considered these claims nevertheless.

115. In relation to the derogatory comment made by JR in December 2018 and raised by the claimant the following January the investigation into this lasted

some time, we did not have an end date for that investigation, but we find that the comment was not continuing conduct, it was a one off event, although the investigation itself was. The claimant relied on the comment itself, although in evidence and in the appeal she seemed concerned about not knowing what the outcome was which arguably is a continuing act up to her resignation although we have found below the respondent did not know that the claimant had raised this matter with Mr Morrison. Accordingly, insofar as the claimant's claim relates to her not being advised of the outcome that claim is in time. We would extend time in that case on an obvious just and equitable basis in that the claimant did not know the outcome until October .

Direct discrimination on the basis of race

116. The claimant's claims:-

- (a) That the claimant was never given appraisals or personal development plans compared to the situation with her comparator. We accept the respondent's evidence that the white male comparator Mr David Ogden asked for appraisals and that is why he received them. There was no company wide system of appraisals or personal development plans. Accordingly, there was no connection with the claimant's race in this decision.
- (b) 16 May 2018. Comment re "they took your hair". Whilst this is a strange thing to say we do not accept the context the claimant has put on. It was simply a random rather obtuse comment. It can be seen Ms McArdle had a pattern of making obtuse comments – some of which she thought were light-hearted. We cannot see that the fact that Ms McArdle referred to the fact that the claimant had had an operation has anything to do with the claimant's race intrinsically and there was nothing the claimant could point to for us to draw inferences at this point or later that Ms McArdle made the comment because of her race.
- (c) May 2018. This comment that the claimant relied on "I bet yours is even lower". The claimant had a witness to this Emma Howard; however, we have found her evidence unreliable. The claimant herself accepted she did flit around the office quite a lot obviously during work and whilst it is a potentially rude thing to say there was no specific element of race discrimination and again there is nothing at this stage we could draw inferences from. All Ms McArdle could remember was that it was a radio programme about millennials concentration, and she did not recall making any specific comments to the claimant, only general ones.. Indeed, the comment could have been directed as Ms Howard, the younger person involved. Accordingly, there is no evidence we can rely on to suggest that the comment was made directly at the claimant or that it was made at the claimant because of her race.
- (d) June 2018 the Steve Bottomley email. Whilst it was potentially embarrassing for the claimant to have had a matter pointed out to senior management by Steve Bottomley. He was a relatively new Managing Director and as the claimant otherwise had an amicable

relationship with him the claimant pointed to nothing which suggested he had done this because of the claimant's race. The claimant also agreed in cross examination that Steve Bottomley had nothing against her and vice versa. In addition, this was significantly out of time, it was a one-off event and was not part of a course of continuous conduct.. Steve Bottomley had left the organisation and there was no cogent reason why the claimant could not have brought a claim in time. On balance we believe she did not as she did not believe this was based on race and because she had an amicable relationship with him.

- (e) June 2018 Office Manager role inability to apply. We accept the respondent's evidence that no one was able to apply for this job and that JR was slotted into it. In any event it was a one-off event which was out of time.
- (f) 12 June 2018 training in maths was requested. There was no written evidence as to what the claimant had asked for in relation to maths, she had skills in Excell, she asked for training in Word and Sage but there was no evidence she specifically asked for maths. There was also evidence that Teresa McArdle had obtained the claimant a place on a course with the aim of improving her skills. There was no comparator here to say that someone else had asked for such specific training and not been provided with it. The course appeared to include maths and English and as the claimant left quite soon after it started she would not have been fully aware of what was to be provided. Accordingly, there was no less favourable treatment.
- (g) August 2018. Tickets were purchased to attend a local charity ball. Following evidence and cross examination it appeared that Joanne Rolska was given the tickets to distribute without any management involvement and she unsurprisingly decided that she and her friend DR would go. Obviously, a lot of other members of staff were not invited to go, again, there was nothing to indicate this was because of the claimant's race as a lot of white staff were not invited. Whilst the claimant says it was obvious because of her role that she should be invited it appears that the matter was decided in a somewhat irrational and random way with no specific thoughts being given to who should go. There was nothing suggested as to why there was any race element to this.
- (h) November 2018. Despite holding a Fire Marshall certificate. the claimant was not selected as a Fire Marshall. The respondent's evidence which we accept was that they did not want first aiders being fire marshals as they needed them to be separate members of staff and accordingly fire marshals were appointed from non-first aiders and the claimant was a first aider. This was a similar situation with Teresa McArdle and the claimant could not point to anybody who was a first aider who was appointed as a fire marshal and accordingly there was no differential treatment here.
- (i) 17 January 2019. Complaint raised with Rob Morrison in relation to a derogatory comment made by Joanne Rolska, they can't drive because

they are black. The claimant was not present when this was made, it was related to her by another member of staff and she eventually complained about it. The actual comment and it being related to the claimant was out of time. It was not part of a continuing course of conduct. The company did an investigation and the feedback was that JR whose English was her second language had not meant this as starkly as it sounded and that she was given counselling and advice on these matters. In respect of how the complaint was handled which seemed to be the claimant's primary concern in evidence Ms McArdle said she was unaware that the claimant was involved in raising the issue and therefore had not seen the need to feedback to the claimant what the outcome of the complaint was. This was potentially race discrimination (even though the claimant didn't hear it) however the claimant's complaint was that the company didn't investigate it properly and we accept that the claimant had this perception because she was not advised of the outcome or involved in the investigation. However, we accept the respondent's explanation that the reason was this was that Ms McArdle was unaware that the claimant even knew about the comment and that she had raised concerns with a manager. This was unconnected with the claimant's race.

- (j) January 2019. The claimant expressed she needed a laptop to complete her work, but this was not provided. The claimant did name some men and women who had been given laptops. She did not say when She did not state what their race was in her pleadings only in cross examination when she stated they were white. Ms McArdle's evidence was that when the claimant requested it she could have been provided with one of Ms McArdle's laptops, It was also said that the respondent was struggling financially in January 2019 and would not have bought a new laptop then. However there was no cogent evidence that the claimant had requested one or that she had been turned down for financial reasons. We find on the balance of probabilities that this request was not made specifically enough and we accept the respondent's evidence that there were financial reasons operating in January 2019. We did not know when the others had been provided with laptops so could not make a valid comparison nor, from the evidence provided, which was simply (eventually) that white men and women had been given laptops. Without more detail we cannot find that the burden of proof has moved to the respondent any event we have accepted the respondent's explanation. Therefore, we find that there was no race discrimination in it not being provided. In addition this claim is out of time. Whilst there was a continuing failure to provide it the claimant relied on a specific request in January which was a one off act (theoretically as we have been unable to corroborate a request). There was no reason to extend time.
- (k) April 2019. New job roles created splitting the work between David Ogden and the claimant when Mr Ogden did not complete work, he would put pressure on the claimant. There was nothing to suggest that the reason the claimant if this scenario was correct had to complete or was put under pressure when Mr Ogden did not complete work because of her race. Whilst Mr Ogden was white and the claimant was

not white this was irrelevant to the scenario, it was obvious that the reason if she was put under pressure and if Mr Ogden did not complete his work this was because they did the same role, one in the North and one in the South.

- (l) August 2019. Ms McArdle offered David Ogden and the claimant a business course but support to improve functional skills was not offered by the business i.e. Maths, English and IT. There was no evidence the claimant had asked for this type of training; she was skilled compared to others in IT and the course was to deliver further training relevant to her job. The course was expected to help in the areas of concern anyway. There was no evidence that anybody who was white was offered such training. Accordingly, we find the claimant did not ask for it sufficiently clearly to make the respondents understand that she wanted something different from what was offered through the course, that if she did there was nothing to suggest the reason it was not offered was anything to do with her race, she alleged others had been given this training but we had no details – David Ogden a white male was offered the same course as the claimant therefore we cannot establish a comparator.
- (m) Re appraisals. This has been decided above.
- (n) August 2017 to October 2019. The claimant made constant requests to go on site whilst the job was being done, she was never sent on site, but David Ogden was. The respondents had a number of explanations for why this happened, it was partly because the claimant was part time and at times she was not managing to finish her work and therefore there was no time for her to do site visits whereas this was not a problem with Mr Ogden. In addition, there was very little evidence about whether Mr Ogden made site visits, but it should be also noted that Mr Ogden was involved in the change project at the company which the respondent said was part of the reason he did site visits.. Accordingly, we find that there were none race related reasons for the respondent's failure to offer this to the claimant.
- (o) 16 October 2019. The claimant's notice was accepted without discussion whereas when David Ogden had handed in his notice on two occasions in January and May 2019 this was discussed, and he was allowed to work through his issues. There was a text message exchange regarding this, but it was not clear why he had changed his mind about resigning. However, the claimant had also resigned on a different occasion and had had her mind changed. The respondents whilst they had no information regarding the alleged events with Mr Ogden stated the claimant made it extremely clear in her resignation letter that she was not intending to change her mind. In addition, there was a different Managing Director by this stage who did not see any reason why they should not accept her resignation letter at face value
- (p) At the grievance hearing Diane Cheeseborough stated she could not understand why the comment made by JR circa 17 January 2019 had offended the claimant when the claimant was not present. We find this

is race discrimination as the comment was intrinsically racist and ultimately it did not matter whether it had been relayed to the claimant second hand or not (although this may make a difference to injury to feelings). We also note that whilst the claimant was offended by it she did say she thought JR was not racist and her main complaint was how the respondent had handled the investigation rather than just the comment. This is issue 16 in relation to which therefore we have found in the claimant's favour.

Harassment

117. (a) May 2017 The claimant complained when she was requested to become a first aider she was advised there would be no bonus or pay but when others became fire marshals, they were given IDs, lanyards and a rota and their appointment was formally announced whereas that did not happen with the first aider role. As this did not happen with any of the first aiders there was no prima facie evidence that there was any link whatsoever to the claimant's protected characteristic, Ms McArdle said she was a first aider she wasn't made a fire marshal and she didn't receive any additional payment and there was no "fanfare". Accordingly, this claim fails.
- (b) 16 May 2018. Hair comment. Having heard Ms McArdle's explanation of what she agreed was a rather random comment it was her attempt at humour. There was nothing intrinsically to suggest the comment was based on the claimant's protected characteristic nor anything from which we could draw an inference that the reason she made this somewhat obtuse attempt at humour was related to the claimant's race. If we are wrong on this and we would find that it would not be reasonable of the claimant to be offended by this statement it was simply a comment on the fact that she had had her hair cut.
- (c) Lack of concentration comment. See our earlier comments above. Accordingly, we find that it was a general comment and not directed at the claimant.
- (d) Office Manager role. See comments above in relation to there was no evidence anyone else was treated any differently from the claimant nor was the situation intricately racist.
- (e) Stephen Bottomley email. There has been no explanation for why this email was connected to the claimant's race, there was nothing intrinsically racist about it and that whilst it may have humiliated the claimant it was not something beyond the normal run of management styles and there was nothing to link it to the claimant's race as we have explained above. The claimant in this section had stated that David Ogden was not treated the same way when he had made a serious mistake, there was no evidence in relation to this incident in order for it to be considered to determine whether the reason the claimant was upbraided was because of her race. Further this is out of time.
- (f) Maths training. See previous comments.

- (g) Charitable Ball. See previous comments.
- (h) Fire Marshall. See previous comments.
- (i) 17 January 2019 . 'They can't drive because they are black' comment. The claimant actually, in evidence complained about the process undertaken to investigate this. We accepted the explanation from Ms McArdle that she didn't give any feedback to the claimant because she didn't know the claimant had any involvement in raising the complaint. Further, as a stand- alone allegation this allegation is considerably out of time and nothing to suggest it should be considered out of time or that it was a course of conduct. Whilst this could constitute harassment even though it was a an indirect comment we find it is it is considerably out of time no reason has been given why a claim in relation to this could not have been brought earlier and no reason why we should exercise our just and equitable discretion .

- (j) January 2019 Laptop issue.

We have dealt with this issue above .

- (8) (the numbering in the list of issues went astray here but we retain it for ease of reference). The claimant raised an issue regarding Steve Bottomley complaining about how long she had been on her dinner after Dave Ogden had given the wrong information, she was on a work related event, she said Margaret Newlove would often do that and was never challenged in relation to the length of time she was away from her desk. Again, there was no evidence that this was connected to the claimant's race. If Mr Bottomley had been given incorrect information, then his chastisement was understandable. The claimant did not expand on why David Ogden had given the wrong information and did not suggest that he had given the wrong information deliberately. An inherently more plausible explanation is simply that he did not know where she was and accordingly a chastisement resulted. This occurred in February 2019 and therefore was out of time. It was not linked to any later event and therefore there was no continuous conduct to being it in time.
- (j) April 2019. New job roles commenced increased pressure on the claimant when Mr Ogden did not complete his work. This was a very vague contention as described above and there was no specific incidents cited to us which could be examined, given that the claimant did not complain about it either it could not be examined to see whether the reason the situation was not resolved was because of her race. Accordingly, it cannot be related to the protected characteristic on the evidence provided.
- (k) August 2019. Not offered Maths, English and IT skills. There was no evidence this was related to the claimant's protected characteristics as we have examined above.

- (l) 11 October 2019. Appraisals. We have accepted the explanation that Mr Ogden asked for appraisals and one presumed he had read the requirements of the course and therefore was aware before the claimant was that appraisals were required by the course.
- (9) August 2017 to October 2019. Request to go on site. We have dealt with this above – there is nothing additional to suggest it should succeed under harassment..
- (10)Withdrawal of discussion before notice accepted. The respondent stated they did try and speak to the claimant immediately after she had walked out but she failed to answer her telephone. Accordingly, Mr Christian made the decision to accept her resignation as on the face of it she was adamant about it. Therefore, there wasn't an attempt to discuss the situation with the claimant nevertheless the evidence that there was nothing intrinsically racist about the situation and the evidence of the comparator was weak in that there was nothing in any detail about Mr Ogden having been persuaded not to resign.
- (16)Diane Cheesborough comment. We find this was racial harassment as it was offensive to suggest a black person should not be offended by a racist comment just because they were not present at the time ,it was linked to a protected characteristic namely race, and it was in all the circumstances reasonable of the claimant to feel offended and humiliated. It undermined her as it suggested she had no right to complain about it. Diane Cheeseborough did not give evidence so obviously we have decided the matter on the basis of the claimant's evidence which was not undermined in any way.
- (m) Failure to follow the ACAS code of practice January 2020. It is not clear what this relates to and therefore, we cannot find in the claimant's favour.

Victimisation. The claimant relies on her complaining to Rob Morrison about the Joanne Rolska driving comment in January 2019 and relies on the following incidents as victimisation:-

- A. August 2019 to October 2019. Teresa McArdle making constant remarks about the claimant leaving her desk on one particular day commenting she would chain the claimant to it. Ms McArdle stated that she believed she may have commented that she needed to tag the claimant as the claimant was always disappearing, but she denied that she made the chain comment. We found that Ms McArdle had said she needed to chain the claimant to her desk , in September 2019. We find that it was intrinsically racist to someone of African-Caribbean heritage and could have been harassment, but the claimant did not bring this claim as harassment only as victimisation.

- i. However we find there was no causal connection with the complaint in January because: the passage of time makes it less likely there would be a causal connection (this was 9 months later); the fact that we have accepted Ms McArdle's evidence that she did not know the claimant had complained about the incident,; the fact that Rob Morrison said TM already was dealing with JR and that David Ogden also said he had complained about the remark; finally Rob Morrison left quite soon after the conversation with the claimant and in the absence of any evidence that he did pass on the claimant's complaint it is inherently more likely that he did not as he believed it was already being dealt with.
- B. That Ms McArdle said to the claimant in September 2019 that she hoped the claimant had not seen a particular email singling her out when there were other colleagues present who may have seen the same email. As we have accepted Ms McArdle's evidence that she did not know the claimant was involved in the complaint to Rob Morrison any action Ms McArdle took was not related to the protected act.
- C. On 9 October 2019 stating that the claimant's daughter had the most common girls name and when the claimant replied Ms McArdle cut her off saying I didn't ask for your life story. Whilst this was quite a rude comment Ms McArdle stated that the claimant launched into a long explanation which led Ms McArdle to regret opening up the conversation, she didn't mean anything derogatory by it. It could however constitute a detriment – it was rude however there was nothing to connect to the claimant's complaint as we have explained above.

Direct Sex Discrimination

- (a) February 2017 to October 2019. No appraisals etc. We have accepted the respondent's evidence as to why Mr Ogden obtained appraisals and the different treatment was unconnected with the claimant's sex.
- (b) April 2019. The pressure issue. Nothing specific was cited, there was no comparator and even if the allegation was true it was more plausible that the reason the claimant was under pressure was because she mirrored Mr Ogden's job than because she was a woman.
- (c) Laptop. We have addressed this issue before. In the context of sex discrimination, the claimant named females who had received laptops therefore if there

was less favourable treatment it was not on the grounds of sex.

- (d) Complaint in July 2019 that the claimant's workload was making her late collecting her daughter from school and that Ms McArdle simply said she needed to manage her time more effectively whereas David Ogden was allowed flexible working. The respondent's case is that everybody was under pressure and there was no evidence that Mr Ogden was allowed more flexible working hours than the claimant. Accordingly, there was no evidence of differential treatment
- (e) 12 June 2018. Functional skills training. She says that Matthew Almond, David Ogden, Igly Petchy and Nicky Marsh were supplied with the training they requested. The claimant obtained the same training as Mr Ogden and it was not clear what other training Mr Petchy and Mr Marsh received. There was nothing in the claimant's witness statement about these two individuals and again she did not refer to functional skills, just that her English was holding her back and that was one of the issues the course was intended to address. Accordingly, there was no evidence that males were treated any differently than the claimant.
- (q) The issue regarding the appraisals. Again, we have accepted the respondent's evidence in this and although the treatment was different it was not because of sex.

Constructive Unfair dismissal

- 118. (a) Making it impossible for employees to do their work by giving them too much work or not responding to requests for help with their workload. There was absolutely no specific information given by the claimant in relation to this so accordingly we could not make any findings that this proposition was true.
- (c) 12 September 2019. The claimant booked half a day off to attend a friend's funeral but received numerous calls from a member of staff in relation to a broken-down vehicle and she felt forced to leave the wake early to aid and recover the vehicle. The respondent said the claimant was under absolutely no obligation to answer calls whilst attending a funeral, while she may have left her phone on in order to cope with any family emergencies once she saw that it was a work colleague she was fully entitled to ignore it and she chose to give him her personal number and she chose to assist in the situation, she was not required by the company to do anything, accordingly there was no breach of any implied term.

- (d) 18 September. The claimant gave a colleague a lift to work and discovered that he had got a life-threatening blood born virus. She had previously administered first-aid to this colleague without PPE during an accident and she was not made aware of the dangers of potential exposure. The respondent had made enquiries in relation to any dangers which may arise to other members of staff from this employee's condition and the information they received was that no specific steps were necessary, in the light of this and the need to protect and balance the confidentiality of the individual the company decided that this employee's condition would not be publicised. In addition, the claimant should use PPE during first aid. We find there was no breach of the implied term to protect employees' health and safety here as the respondents had acted responsibly and balancing the individual and the collective risks.
- (e) 7 October 2019. Alleged secret talks. After hearing the evidence of Mr Christian, we were satisfied that there were no secret talks and that Mr Ogden was involved in change management and that was what the meetings were about.
- (f) 14 October 2019. David Ogden was given authority to reschedule work for the claimant and the claimant would have to ask permission for her work to be rescheduled. No formal discussion about this change was had with the claimant. The respondent's evidence was that this was related to the change project Mr Ogden was involved in and that it was also a job that needed doing in a timely fashion and therefore he simply went ahead and did it. If this was a significant change to the claimant's work, it is possible that the claimant would have felt humiliated by this and that it could be a breach of the implied term of trust and confidence as it was undertaken without any warning to the claimant. However, without more it was not a fundamental breach of contract.
- (g) 14 October 2019. Staff failed to cooperate with producing figures required by senior management. If the claimant had escalated this matter, then senior management would have dealt with this however she resigned and walked out before the matter could be attended to. In a busy office these issues are likely to arise and therefore we do not see it as a breach of the implied term of trust and confidence that her colleagues ignored her request on this one occasion.
- (h) 15 October 2019. Delivery of chemicals without the data sheet attached. If it was the claimant's job, she was required to sort the situation out, if it was not, she should have passed it on, there was no breach of any implied term.
- (i) 15 October. Operatives were informed they must report to David Ogden on their return to the unit. This was previously a key responsibility of the claimant; the change was not discussed with the claimant. This was a step in the change management situation, and we can understand that if it was a key responsibility of the claimant that she would be upset by not having this change discussed with her

before it was implemented. This would be a breach of the implied term of trust and confidence. However, we do not consider it a fundamental breach. If the claimant had complained about it and the respondent had completely ignored her then this may have escalated this into a fundamental breach but not at this stage.

- (j) 15 October. The claimant refers to trying to get information from her colleagues, but she was being fobbed off. A colleague AF tried to help her, and he got frustrated because the information was not provided. The claimant however confirmed that the information was eventually provided. There was no breach here just as referred to above the normal tussles of priorities in a busy office.
- (k) She then refers to David Ogden having to arrange when a job would be completed however this was not mentioned in the claimant's witness statement nor in the list of issues. Therefore, we cannot consider it. It is not a fundamental breach of contract in that situation.
- (l) The final straw. That it took her colleagues two hours to realise she was missing. However, the claimant said she had already drafted her resignation, so she was thinking of this beforehand so on that ground it would not be a last straw. If we are wrong on this in fact Teresa McArdle tried to ring her, but the claimant deliberately did not answer means that this was not a last straw as she was not being ignored.. We do not think colleagues not realising you are missing for two hours means that you are not a valued member of the team but rather that you had a considerable amount of autonomy. In any event this is not a fundamental breach of contract given that Ms McArdle did try to contact her.
- (m) We have considered whether cumulatively the issues the claimant was concerned about did constitute a fundamental breach of contract, but they are matters the respondent could justify or which were incidental to a busy office. The claimant referred to a toxic atmosphere, but she was very vague when matters are examined, they are explicable or consequential to a busy office. We do not accept there was a toxic atmosphere.
- (n) Accordingly, we find that the claimant was not constructively dismissed, and that claim fails.

Summary

119. The claimant's claims fail save in respect of issue 16 which we find to be direct discrimination and harassment on the grounds of race.

Employment Judge Feeney

22 November 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

22 November 2021

FOR THE TRIBUNAL OFFICE

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