EMPLOYMENT TRIBUNALS

Claimant: **Ms M Rickaby**

Respondents: **(1) Gina Corciova**
(2) Kassadox Limited

Heard at: **East London Hearing Centre (via CVP)**

On: **7 and 8 January and 13 July 2021**

Before: **Employment Judge Crosfill**
Members: **Mrs W Blake-Ranken**
Mr L O'Callaghan

Representation

Claimant: In person

Respondents: Gina Corciova, a Director of the Second Respondent

JUDGMENT

1. **The Claimant's claims for direct discrimination because of race and/or age contrary to Sections 13 and 39 of the Equality Act 2010 are not well founded and are dismissed.**

2. **The Claimant's claims for harassment because of race and/or age contrary to sections 26 and 39 of the Equality Act 2010 are not well founded and are dismissed.**

3. **The Claimant's claim of victimisation contrary to sections 27 and 39 of the Equality Act 2010 is not well founded and is dismissed.**

4. **The Claimant's claim for unlawful deduction from wages contrary to Section 13 of the Employment Rights Act 1996 is well founded.**

5. **It is declared that the Second Respondent unlawfully deducted the sum of £1037.93 from the wages due to the Claimant on 30 September 2019.**

6. **The Second Respondent is ordered to pay the Claimant the sum of £1037.93 in wages together with the sum of £54.96 making a total of £1092.89.**

REASONS

1. The Claimant was employed working as a Supervisor and Cleaner working at the Wrotham Business Park. She commenced her employment on 1 May 2019 and her employment was transferred to the Second Respondent on 1 September 2019 by virtue of the TUPE Regulations. It is common ground between the parties that the Claimant was summarily dismissed on 19 September 2019. The Claimant says this was following her doing a protected act on 18 September 2019. The Respondents say that the Claimant's dismissal was the consequence of her poor behaviour.

2. The Claimant presented complaints to the Tribunal on 9 January 2020. She brings claims of direct age and race discrimination, harassment related to age and race and unlawful victimisation. The Claimant has also brought a claim for unpaid wages and accrued holiday payments.

3. A case management hearing took place on 28 May 2020 before Employment Judge Burgher. During that hearing the issues were discussed and a schedule of agreed issues is found within the Case Management Summary produced by Employer Judge Burgher following that hearing.

4. The Claimant's claims of direct age and race discrimination relate to the allocation of work in the second week of September 2019 where the Claimant says that she was expected to undertake cleaning of 10 units whereas younger Romanian workers employed by the first Respondent were only required to do 5.

5. The claim of harassment concerns an allegation that the first Respondent Ms Corciova used a phrase to the effect that "the two old white English women were stuck in their ways".

6. The Claimant maintains that she did a protected act on 18 September 2019 for the purposes of a claim of victimisation under Section 27 of the Equality Act 2010. She says that she asked whether the first Respondent did not want to work with anyone other than people from her own country also asking whether the cause of some treatment she complained of was because she was black. The Claimant was dismissed the following day and it is the Claimant's case that her dismissal was because of the protected act.

7. Finally, there is a claim for unpaid wages. It was not disputed before us that the Second Respondent owed the Claimant some wages, there is a discrepancy of £2 in the amount that is agreed. The Claimant says that she is owed £1,039.05. the Respondent agrees that she is owed £1,037.93. The Second Respondent at the hearing before Employment Judge Burgher offered to pay that amount to the Claimant. At the time of the hearing before us the undisputed amount has still not been paid. In addition to the arrears of wages the Claimant was claiming consequential losses because of the delay in making payment.

The hearing

8. The hearing has taken place via the Cloud Video Platform (CVP). It commenced on 7 January 2021. Prior to the hearing, the parties had exchanged witness statements and a bundle of documents had been produced electronically running to 359 pages. As is commonly the case, in the course of the hearing the parties produced additional documents which were admitted into the evidence without protest by either party and we continue to receive documents such as text messages right up to the point where final submissions were made. We had some problems with connection and the original 2 days that the hearing was listed for on 7 and 8 January proved insufficient. We concluded the evidence at 5pm on 8 January 2021.

9. In the course of the hearing we heard from:

9.1. the Claimant herself; and then on behalf of the Respondent

9.2. Michelle Jackson who is a Manager of the Wrotham Business Park; and

9.3. Mihaela Lopata, who gave evidence with the assistance of but not necessarily through a Romanian interpreter. She was a colleague of the Claimant in the last few weeks of her employment;

9.4. Gina Corciova who is the first Respondent and Director of the company.

10. The matter was relisted fairly promptly to conclude the hearing but unfortunately one of the members fell ill and the matter was postponed until 13 July 2021. At the outset of the hearing we heard oral submissions on behalf of the Respondents and from the Claimant. After a period of deliberation we proceeded to give an oral judgment and our reasons. The Claimant asked for full written reasons for our decision. The Employment Judge had a considerable backlog of other cases and apologises for the time that it has taken to provide these written reasons.

Our findings of fact

11. We should make it clear that we have heard a great deal of evidence about what happened on the Wrotham Business Park after the Second Respondent took over the cleaning activities. We have been careful to limit our findings of fact to those matters which are strictly necessary for us to reach the conclusions on the list of issues. Just because we do not mention any particular fact in these reasons does not mean that we did not have it in mind.

12. The Claimant was first employed on 1 May 2019 working for Alliance Cleaning, we were provided with a copy of her contract of employment within the bundle, it is a simple

document. It shows us that she was an hourly paid worker. The rate of pay shown in the contract was subsequently increased when the Claimant was promoted to the position of a Supervisor. Within the contract of employment there is no clause which permits the employer to withhold wages in circumstances where (for example) the employee owes the Respondent some monies.

13. It is necessary to make findings as to the relationship of the Claimant with her colleagues shortly before the transfer of undertakings. We heard evidence about two colleagues in particular. These were Rosalyn and Lynda. We heard from Michelle Jackson who gave evidence before us about the Claimant's behaviour prior to the change of contractor. The Claimant's case was that Michelle Jackson had been untruthful in her evidence. We therefore set out a brief assessment of her evidence before making specific findings of fact.

14. Michelle Jackson is employed as the Manager of Wrotham Business Park; she has the managerial responsibility to contract out cleaning services for the business park. She was involved in the decision to switch cleaners from Alliance Cleaning to the second Respondent. We find that she was a neutral witness in the sense she has no particular reason to tailor her evidence to accord with the position of either party. She was not at the time and has not become a close friend of either party.

15. We find that throughout her employment the Claimant placed a high degree of trust in Michelle Jackson. She would frequently go to see her if she had any problems or difficulties at work. The Claimant told us that in return Michelle Jackson discussed matters with the her. In particular the Claimant knew there was going to be a change of cleaning contractor before her former employer Alliance Cleaning. There was, we find, a free flow of information between the two.

16. In assessing the evidence of Michelle Jackson, we have had regard to where it was consistent with the evidence of others. The Claimant in her oral submissions invited us to find that at least on one occasion in respect of the meeting on 19 September 2019 during which she was dismissed Michelle Jackson was untruthful to the Tribunal. The issue was whether Michelle Jackson had been present at the point when the Claimant was dismissed. We accept that Michelle Jackson's evidence to the Tribunal was somewhat inconsistent with her own written statement and in part it was inconsistent with the evidence of the Claimant and Ms Corciova. In answer to Mr O'Callaghan, Michelle Jackson suggested that the Claimant was dismissed after she had left the meeting. We find that she is wrong about that but do not go as far as the Claimant invites us to go and find that she deliberately attempted to mislead the Tribunal. It is unsurprising that when witnesses give evidence in the course of Tribunal proceedings there are inconsistencies in their evidence, not every inconsistency should be equated with dishonesty. The precise timing of the dismissal was not essential to anything that we needed to decide. In respect of the matters which we are about to refer which is the Claimant's relationship with her colleagues, Ms Jackson's evidence about how the Claimant behaved at work was supported by all of the Respondents' witnesses and indeed some contemporaneous text messages which we shall return in due course. We did not consider that Michelle Jackson's evidence about these matters was significantly undermined by her account of the meeting of 19 September 2019.

17. At paragraphs 3 and 4 of her witness statement Michelle Jackson described the relationship between the Claimant and her colleagues in the following terms:

> *'Prior to Lyn and Rosalyn, we had another cleaner employed by Alliance also called Marlene (Marlene'A'). Marlene 'A' gave her notice to Alliance because she found it impossible to work with Marlene B. Marlene A. told me that it was Marlene B. was the problem as she wouldn't do what was asked of her and she was causing a lot of conflict and tension, and to quote her, 'had an attitude problem'.*
>
> *Each cleaner is under the employment of the cleaning company that we employ and not under the employment of Wrotham Park. Marlene 'B' however would often come to me and moan about the other cleaners. Again, prior to moving across to Kassadox, I personally had to intervene on two very heated and hostile shouting matches between Lyn, Rosalyn & Marlene. I had comments from my tenants that there was shouting going on during business hours which was unacceptable which I had spoken to them about and I personally had to intervene on two occasions. Rosalyn told me on one of these occasions that Marlene was name calling. When I spoke to Marlene about this, she said she shouted at Rosalyn & said are you some kind of an idiot, are you stupid" which reduced lyn to tears. I told Marlene it wasn't nice or helpful to behave in this way& said that she is stupid as she can't follow a simple task and she seemed to think it was funny. I told her if she had an issue then she needed to bring it to the attention of Alliance Cleaning - she did not seem to be bothered that this upset her.'*

18. The Claimant's evidence was that she had a good working relationship with Rosalyn, but that Lynda was the person who caused her difficulties as she tended to argue when given tasks to do. We find that there may be some confusion about which of the Claimant's colleagues was involved in arguments but accept the evidence of Michelle Jackson, that arguments were so heated that she felt it necessary to intervene. When she gave her oral evidence, she told us that on one occasion the shouting was so unpleasant that her children who could overhear became upset. We accept that she was being truthful about this as sha was able to give the sort of detail that suggested a clear recollection of a surprising event. It seems to us that the Claimant ought to have recognised that she had a very poor working relationship and we found that she was somewhat reluctant to acknowledge this.

19. The cleaning contract at Wrotham Park transferred from Alliance to the Second Respondent on 1 September 2019, The Claimant accepts initially her interaction with Gina Corciova was entirely positive and that she was told that her position of a Supervisor was going to be recognised and that matters would continue as before. We find that Gina Corciova had a basic understanding of the obligations that arose under the Transfer of Undertakings (Protection of Employment etc) Regulations 2003.

20. The Claimant believes, and it had been a part of her case before us that there was a plan from the outset to get rid of the position of Supervisor and that that this was communicated to Rosalyn and Lynda. Whether that was or was not the case is not relevant to any of the claims that we had before us. In respect of the dismissal we are

solely concerned with the question of whether it was an act of victimisation. However, we do not find that there is any evidence that supports the Claimant's theory that her cards were marked from the outset in the manner she suggested.

21. Within a few days of the transfer of undertakings, the Claimant's two colleagues no longer worked within the business. During this initial period the relationship between the Claimant and Gina Corciova was good. We accept the evidence, given by Gina Corciova that the Claimant expressed her dissatisfaction with Roslyn and Lynda and tried to suggest to Gina Corciova that they were not conscientious employees. That is consistent with the evidence of Michelle Jackson who also described the Claimant complaining about her colleagues. In the early part of the Claimant's relationship with Gina Corciova there was another incident when the Claimant became involved in a heated discussion with a different employee. At the time this did not concern Gina Corciova. She took no action upon it. Given the concerns that had been raised by the Claimant about Rosalyn and Lynda, a meeting was held between Gina Corciova, Rosalyn and Lynda. Michelle Jackson was present at that meeting. We find that the purpose of the meeting was to discuss the concerns raised by the Claimant. We conclude that at the time Gina Corciova accepted what the Claimant had said at face value. She later admitted and apologised for this in a text message to Lynda sometime after the termination of the contract.

22. We accept Gina Corciova's account that during the meeting both Rosalyn and Lynda put their side of the story. They suggested that they felt that they could no longer work with the Claimant, and each of them tended a resignation. The Claimant invited us to disregard the resignation letters. She rightly pointed out that they were plainly drafted with the same wording for each employee to sign. We find that Gina Corciova is somewhat bureaucratic and believes that it was necessary for an employee to resign and to have it recorded in writing. That was the thrust of her evidence before us. In the light of that it is unsurprising that the terms of the resignation letters were effectively dictated. We do not find that any pressure was put on Rosalyn or Lynda to resign.

23. The Claimant's assertion that Rosalyn and Lynda were dismissed or driven out of the company is in our view indicative of the fact that she had a very poor relationship with Rosalyn and Lynda. Had she been on good terms with them, we have no doubt that they would have explained their reasons for leaving to her and that she would be in a position to know that they had actually resigned. The fact that she did not know that together with late text messages referred to below indicate to us that the relationship was as poor as Gina Corciova and Michelle Jackson told us.

24. We need to make findings about an incident that took place within the short period when the Claimant worked alongside Rosalyn and Lynda. The question is whether, as the Claimant says, Gina Corciova used the expression 'old white English women who are set in their ways'. We have had regard to all the evidence and to the context.

25. It is quite plain from the evidence of Michelle Jackson and indeed some photographs we have seen within the bundle, that there was a justifiably high degree of dissatisfaction with the services provided by Alliance Cleaning.

26. Ms Corciova on behalf of her company took over the contract. The evidence before us was that she took a completely different approach to the cleaning contract. Firstly, the quality of the company documentation is much better than that used by Alliance Cleaning. Secondly, when Ms Corciova took over she rolled up her sleeves along with the Claimant and all the other members of staff and got to work in addressing the concerns of the tenants. She ensured that the cleaning products and equipment could be stored outside away from the tenants' premises in a room, known as the engine room., She adopted a standard set of cleaning products and a standard set of cleaning equipment and the approach was altogether more professional. One of the changes introduced was, that instead of cleaning products being left close to the units that were being cleaned, the system that was to be adopted in the future was that the cleaning products and equipment would be kept in the engine room. Each cleaner would have to transport a hoover and a caddy (which was a plastic device for moving cleaning products) around and a mop from the engine room to the units they were cleaning.

27. The Claimant both in her evidence and indeed in her closing submissions spoke passionately about her view that this was not a sensible way of doing things because it meant having to transport these items between the engine house and the units every time that they were cleaned. She said that Rosalyn and Lynda in particular would have struggled with such a task. Whilst it is not necessary for us to comment on the wisdom or lack of it in adopting this new process we were told by Michelle Jackson and Gina Corciova that this was something that was done at the request of the client. It was something that the staff could reasonably be expected to do even if they were unhappy about it. What we take from this background evidence was that Gina Corciova was intent on improving matters by introducing changes. Not all of those changes were being welcomed.

28. In this context, it is suggested by the Claimant is that in a discussion Gina Corciova suggested that Rosalyn and Lynda, the 'two old English ladies' were reluctant to change. Gina Corciova told us that that was not what she said. However, she did accept that there had been a similar conversation where she had referred to her own mother being a person who was slow to change her habits, what do we take from that? In deciding who's account of this conversation was more reliable we have had regard to the whole of the evidence and matters mentioned elsewhere in these reasons.

29. We find that Gina Corciova did raise the issue of changes within the workplace. That is consistent with the background and context we have just set out and was common ground Secondly, as she accepts, we find that she used the example of her mother. We find that she used this example to suggest that some older people are slower to embrace change. If that was not the case, we cannot see why it would be necessary to refer to her mother rather than some other person not of that age group. Furthermore this is not an uncommon stereotype and there is nothing inherently unlikely in the suggestion made by the Claimant that Gina Corciova's language was a reference to this stereotype. It follows from our conclusions below that we have not accepted either party's account of exactly what was said on this occasion. Doing the best we can we find that the words used by Gina Corciova did imply a connection between a reluctance to embrace change and age.

30. Turning then to the other part of the phrase the Claimant attributes to Gina Corciova 'white English'. We do not consider it more likely than not that Gina Corciova used the expression 'white English', it seems to us that does not fit within the context that we have found. Whilst there is a stereotype that old people are reluctant to embrace change we are not aware of any stereotype that white people or English people are particularly reluctant to embrace. Gina Corciova herself and the other employees were white. Whilst that is not in any sense determinative it seems unlikely that she would equate skin colour with a reluctance to change. We are left with a stark conflict of evidence. Elsewhere in these reasons we find that there are some aspects where the Claimant's refusal to acknowledge any fault has damaged her credibility. When that is taken into account we find that the Claimant has failed to discharge the burden she bears of showing that the words 'white English' were used by Gina Corciova. So, we find that there was at least some language used by Gina Corciova which connected age and a reluctance to change but none to race or skin colour.

31. The Claimant did not make any complaint about Gina Corciova's choice of words at the time. As we have found above her own relationship between herself and her colleagues was so poor that it led to deeply unpleasant behaviour in later text messages. If there was any offence caused by Gina Corciova's choice of words we have concluded that it was very minor.

32. We turn to the allocation of work between the Claimant and other (Romanian) employees. Upon taking over the cleaning contract at Wrotham Business Park, the Second Respondent had agreed to carry out a different type of cleaning operation to that which that had been carried out by Alliance. In addition to what might be described as a routine daily clean of each unit periodically the unite would be subjected to a 'deep clean'. The amount of time that it took to deep clean a unit was significantly higher than the cleaning that was required on a routine basis.

33. We have been shown a number of time sheets and accept the Respondents' assertion that no Romanian member of staff was directly recruited for the purposes of carrying out routine cleaning prior to the resignation of Rosalyn and Lynda.

34. We find that the number of units which were allocated to any particular person for cleaning would depend on the nature of the cleaning task that they were expected to undertake. In other words, where an employee was expected to undertake deep cleaning, they would be allocated less units than a routine cleaning task. Generally speaking, with routine cleaning of 10 units would be the norm. With deep cleaning, that number might be as low as 2. Having looked at the time sheets that we were shown, we find that there is no evidence that any of the Romanian comparators which the Claimant compared herself (or indeed Rosalyn and Lynda) were given any more time to do the same task. Where Romanians were expected to undertake routine cleaning they are given something in the order of 10 units to clean – the same as the Claimant. Where they were expected to deep clean, and the Claimant was expected to deep clean alongside them, they were given an equal number of units to clean.

35. Whilst on our findings the initial relationship between the Claimant and Gina Corciova had been good we have concluded that the relationship started to go downhill from around 9 September 2019. On that day the Claimant was given a clear instruction by Gina Corciova that she was expected to remove cleaning products from where they were stored within the 10 units. As we have set out above prior to the change of contractor the cleaners had stored cleaning products in each unit. They were stored in what were known as electrical cupboards. We have seen numerous photographs of those cupboards and they are cupboards which have electric distribution boards mainly for the purposes of computing. but they are also full of other electronic equipment and wiring. We accept the fact that it was Wrotham Park and Michelle Jackson who had instructed Gina Corciova to ensure that these cupboards were kept clean. They were the landlord's property.

36. The Claimant was then and indeed is now of the view that this made the work of the cleaners more arduous and inconvenient it probably did. However the instruction that was given was lawful and reasonable. The Claimant's dissatisfaction with the instructions she is given led her to go and speak to Michelle Jackson on 16 September 2019 and query whether she did indeed have to obey the instruction. She was told by Michelle Jackson that she did. However, we find that notwithstanding the fact she was told 9 September 2019 and reminded in the days that followed to comply with this instruction, she failed to do so. Gina Corciova took pictures of one of the electrical cupboards which showed the hoover allocated to the Claimant in one of the cupboards. It was clearly marked with her name. The Claimant's disobedience, and the fact that she questioned the instructions she was given with Michelle Jackson, was a source of irritation for Gina Corciova.

37. On Wednesday 11 September 2019 there was a further area of disagreement. The Claimant and a co-worker (who on that occasion was Ms Lopata) had been expected to do all of the routine cleaning by themselves. As we understand it, ordinarily that work would be undertaken by 3 individuals. When it came to signing the time sheet the Claimant indicated a leaving time 1 hour later than she had in fact finished work. She believed that she had a previous agreement with Alliance Cleaning that where the cleaning staff were effectively short-handed, the cleaners on duty would have to cover the work of the cleaner who was on holiday or sick, they would be paid for the additional work. At the time of closing submissions, the Claimant was able to produce a text message which partially supported that position. The text message relied upon the Claimant shows that on one occasion her Manager at Alliance agreed that if the two cleaners on duty did an extra 1½ hours work each i.e. covered for the other cleaner they could expect to be paid.

38. In our view there is a distinction between an agreement whereby an employee covers another employee's work who is paid for any additional time taken to do that work and an agreement to pay more because the employee undertakes more work within the ordinary hours. The Claimant was at all times an hourly paid both before and after the transfer. The text message from her Manager was entirely consistent with her Manager agreeing that, if she had to do another 1½ hours work in order to complete the additional cleaning task, that if she was entitled to be paid for it. Ms Corciova accepted the same would be true after the transfer. It seems to us that this was the obvious agreement for anybody to have reached and certainly it would not have been all been exceptional and surprising. We find that that was the agreement that was in place. The Claimant

completed the work within her ordinary hours. On our findings she was not entitled to be paid any additional money.

39. The Claimant's signature on the time sheet indicated her understanding that she was entitled to extra money. We do not say she was dishonest; we find that it is something she generally believed she was entitled to but she was wrong. In contrast both the Claimant's co-workers Ms Lopata and Ms Corciova thought she was asking for something she was not entitled to and we find as a matter of fact that they were right. This caused further friction between the Claimant and Ms Corciova. The Claimant was unhappy at being told that she was not entitled to any additional payment and took this up with Michelle Jackson.

40. On Monday 16 September 2019 there was a further disagreement where the Claimant was asked to clean some windowsills within a particular property and refused to do so. At this stage there was an accumulation of events which was leading to some considerable distrust. Matters came to a head on Wednesday 18 September 2019. On that day, the Claimant went into the engine room where Gina Corciova and Ms Lopata were both present. The Claimant queried whether somebody had been using her mops, Ms Lopata recalls, and we accept her evidence, that the Claimant said that her mops had been moved and were dirty. Ms Corciova offered to replace the mop in order to dispel any tension but the Claimant continued to be upset.

41. The Claimant was not appeased by being given new mops. Both Ms Corciova and Ms Lopata told us that the Claimant threw a caddy to the floor. The Claimant does not accept that entirely but accepts at least to an extent that the caddy was on the floor during the disagreement. In resolving which account is more probable we have regard to the fact that the Claimant considered the caddy an unnecessary imposition and find that their use was a source of friction. We accept that the Claimant raised her voice and we also find Ms Corciova became irritated by the Claimant during this argument. In the course of the argument one of the matters raised by the Claimant was a suggestion that she would take matters to an Employment Tribunal. We take that to be a reference to the failure to pay her what she thought was the agreed sum for the work that she had done. Ms Corciova dismissed that in her witness statement and suggested she dismissed that very scornfully believing that the Employment Tribunal would not be interested in a disagreement about mops and caddies. It is clear that there was unpleasantness and we find that there was consistency with previous occasions where the Claimant had raised her voice.

42. The Claimant and Ms Lopata then started work but, after cleaning a couple of units, the Claimant was upset and decided that she wanted to go home. We find that before she did, she spoke to Gina Corciova. That conversation we find was relatively calm. In the course of that conversation it is common ground that the Claimant asked whether she is being treated in the way that she was because she is black. There was no immediate response from Gina Corciova. Whilst the Claimant suggested that Gina Corciova immediately reacted to that, we accept her evidence that she did not. We found her account of the incident as being more credible than the Claimant's version. However we do accept that Gina Corciova was upset by what she saw as an unjustified suggestion that she was racist. She told us that her partner is from an ethnic minority and that she found the allegation hurtful. The Claimant departed and went home, and that conversation

came to an end.

43. We find that Gina Corciova went home that night having decided that the relationship between her and the Claimant had broken down irretrievably and during the evening took a decision that she was to be dismissed. With the assistance of her Partner, who she trusted to express the content of the letter in good English. The draft that we have seen in the bundle was dated 18 September 2019 the date on which it was prepared.

44. On the morning of 19 September 2019, both the Claimant and Ms Corciova went and saw Ms Jackson and a discussion ensued. By the time that the meeting commenced a decision had already been taken by Ms Corciova that she was going to dismiss the Claimant and therefore anything that was said in the meeting has only evidential bearing on the reasons for the dismissal. A discussion was held about the working relationship and it appears Ms Jackson at this stage was persuaded that the working relationship between the parties was unsustainable. One of the issues raised was the fact that the Claimant had asked the question which she did as to whether her treatment was because of race or because she was black in her own words. The Claimant sought to explain that whilst she was not necessarily saying Ms Corciova was racist and perhaps went as far as to accept that she was not, she wanted to know the reason for her treatment. As we have explained above we find that Ms Corciova and the Claimant are correct that Ms Jackson was still present at the point the Claimant was given the letter which included reasons for her dismissal.

45. The dismissal letter provided for dismissal with one week's pay in lieu of notice. It included the following reasons for that decision:

> *Dear Marlene,*
>
> *The purpose of this letter is to discuss and review your overall work performance during your probationary employment with Kassadox Ltd.*
>
> *You were employed by Alliance on 01.05.19 with a probation period of 6 months. During these 6 months, we will be sure we follow strictly the Alliance grievance procedures.*
>
> *You were appointed to the position of Cleaning Operative on 01.09.2019 with Kassadox to work on Wrotham Business Park premises. Duties include cleaning, locking of units once finished, good communication and respect our Clients, and ALL other members of the Kassadox team.*
>
> *A Kassadox representative is required to demonstrate excellent cleaning skills, willingness to work within a team, focus on Client's requirements, keep reasonable communication with their Supervisor AND Management on job related issues, show maturity and emotional stability to be able to respond to a multitude of situations.*

So that you may understand the specific reason for this letter, I recount the following:

1. On Tuesday 3rd September 2019, 7:40pm, you were having a loud argument with your co-worker Linda Ayyad. I wanted to deal with this in private, in the office, you didn't allow anyone to speak. You continued to shout in the courtyard and a client from Unit 7 subsequently drove past and saw you shouting.

2. On Monday, 9th September 2019, you were been asked to move your cleaning equipment and products from the electrical cupboard in unit 18. This was a request from last week by Wrotham Park [WP], due to H&S issues. The cupboards contain data equipment and electrical equipment, no other items are permitted.

This was also discussed on Tuesday 10th and Wednesday 11th. As a result you went to discuss on Monday 16th directly with the client. You were told clearly that the electric cupboards (all electric cupboards) are to be cleared. You took your equipment from Unit 18 but still had equipment in Unit 24. Upon discovery, you dismissed my instruction saying 'that the client wasn't specific about Unit 24'. You continue to refuse to follow instruction.

3. On Wednesday 11th September 2019, you started work at 5pm and finished at 8pm. Your colleague, Mihaela Lopata, was assigned 10 units, and signed out at 8pm. You, decided to sign out at 9pm (which was witnessed). Your justification for this was 'because Alliance used to do this'... unfortunately, Kassadox DOES NOT follow Alliance management procedures. It is due in no small part that following Alliance procedures made them lose the contract to clean WP! We are here to serve WP, you have been given the same hours, same days and times, you are paid by hour so you have been asked to write exactly the time of sign in and sign out.

On Monday 16th September 2019, following request from Unit 20 , we asked you to clean the window sills. You refused to do this hence next day we asked another worker to do it. You seem to pick jobs that need to be done, stick to the way you think they need to be done, not what client or employer wants to be done.

5. On Wednesday 18th September 2019, you were asked to use the cleaning equipment, following Kassadox standards (as is required by ALL employees). Discussion took place in the Engine room in front of your co worker Mihaela Lopata. You ended up shouting that we, Kassadox are making your work uncomfortable, that we want to make your life difficult. ALL employees are given a caddy to carry around the products.

You took this discussion to a level of personal offence, shouting at me and throwing the caddy on the floor. You were asked to calm down, and you replied that you are shouting because you want everyone to hear how we mistreat you...

You implied later on that evening, that we discriminate against you, we make your life difficult on purpose.

You also implied that we want to release you to bring in Romanians 'your people' as you described... Kassadox's recruitment is a matter only for management to be included in.

We have a lack of personnel at present, and Kassadox is actively recruiting now.

5.[sic] You went again to discuss with the client about what we as employer are asking you to do. On return you shouted in the courtyard in front of a passing by client from Unit 4. This is totally unacceptable behaviour.

To have done this on the 3rd September (pt.I) and to be continuing this way of dealing with issues is again totally unacceptable...

MY client at WP has complained about this kind of behaviour repeatedly happening, now and with your previous employment.

6. You are required to follow a Kassadox line manager's instruction, however things were done under previous employer...

7. As a supervisor, you role is to show that you can lead by example. You can't make your own rules, or disregard company rules.

46. When Gina Corciova gave evidence she was asked by Ms Blake Ranken what exactly was in her mind which caused her to dismiss the Claimant. She said: *"on every little thing we try to say with changing this or that she was coming back with arguments. I do not have a problem with people coming with suggestions, but she want to keep wet mops next to wires, if an accident happens, it is my responsibility. I cannot have all this risk on me, I tried to say it nicely but then she exploded, I felt it was not a healthy relationship between an employee and employer, I was there to put in place what the client wanted for her to be responsible to implement the rules, I could not make her understand the new ways of standards, even the basic of health and safety so how can I put her in charge of being with others".*

47. The Claimant was dismissed on that day, there was a dispute as to whether or not when the Claimant left she handed over the keys to which she had been entrusted. The alleged failure to return keys was the initial basis for the Second Respondent withholding the Claimant's wages. Given the concession made by the Respondents that the Claimant is entitled for her wages, we do not need to make any specific finding in respect of that mater.

48. However, events post dismissal are not irrelevant. When attempting to pay the employees at the end of the month, the employees who were owed money included Lynda and Rosalyn. In respect of the Claimant it is clear that the Respondent attempted to send a text message asking her which bank account she would like to be paid into, there is no response to that. On the same day a similar message was sent to Lynda, the text messages that ensued were as follows: *"Hi Lyn, I hope you are well, I am at home and have the following bank details of everyone at the office, could you please send me your bank details so that I can pay you, I will send the payslip and p45 by post, if not I will get those out this afternoon to pay anyway, thank you"* and that is followed by an x or a kiss sign.

49. Lynda replied promptly giving an account number and sort code, Gina Corciova responded saying: *"payment was done, should be instant transfer but sometimes it takes up to 2 hours, please check and let me know, thank you"* and another couple of kisses. The response is *"will do, thanks"* with a kiss. The next text message is *"money gone in, thank you"* kiss. The text message from Gina Corciova reads *"my pleasure, I do not know if anyone told you, Marlene is not here anymore, she ended up shouting at me a couple of times and throwing a caddy on the floor, I do not have time for these tantrums, you were right, I apologise for not seeing it before".* Lynda replied *"no, I did not know about Marlene, but I will tell you now that when we left that Friday, she phoned me and withheld her number and said "bitch I've won, so kiss my arse". I would like to thank you for your apology, Lyn"* kiss. The text message exchange continues, and we notice that on New Year's Eve some time later there was a good enough relationship for each to wish each other a happy new year including kisses. We place weight on that text message exchange in assessing the parties' credibility. It seems to us that the text message set out shows that Lynda bore absolutely no ill-will towards Gina Corciova. That is consistent with Gina Corciova and Ms Jackson's accounts that those two employees left because of the conduct of the Claimant. Equally, there is no reason to doubt what is said by Lynda when she says that, when she left, she received a rude telephone message from the Claimant saying that she had *'won'*. We do not find it plausible that these text messages and/or reports have been contrived or forged. We find that the Claimant's evidence that she had acted as a champion for Lynda and Rosalyn was untrue and that she would have known that. It is quite clear to us that the relationship with Lynda must have appalling and the Claimant's attempts to underplay that in our view impact on her credibility. A further aspect of these text exchanges is the contemporaneous suggestion that the Claimant had thrown a caddy on the floor. Again that is something that the Claimant failed to acknowledge. We have set out above the findings where we placed some weight on the Claimant's lack of frankness.

The law to be applied

Equality Act 2010 - Statutory Code of Practice

50. The power of the Equality and Human Rights Commission to issue a code of practice to ensure or facilitate compliance with the Equality Act 2010 is afforded by Section 14 of the Equality Act 2006. Such a code must be laid before Parliament and is subject to a negative resolution procedure. The current code was laid before parliament and came into force on 6 April 2011. Section 15 of the Equality Act 2006 sets out the effect of breaching the code of practice. Paragraph 1.13 of the code explains that:

> *The Code does not impose legal obligations. Nor is it an authoritative statement of the law; only the tribunals and the courts can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.*

The burden and standard of proof – discrimination cases

51. The standard of proof that we must apply is the civil standard that is the balance of probabilities. In other words, we must decide whether it is more likely than not that any fact is established.

52. The burden of proof in claims brought under the Equality Act 2010 is governed by section 136 of that act the material parts of which are:

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

53. Accordingly, where a claimant establishes facts from which discrimination could be inferred (a prima facie case), then the burden of proving that the treatment was in no sense whatsoever unlawful passes to the respondent. The proper approach to the shifting burden of proof has been explained in ***Igen v Wong*** **[2005] ICR 9311** which approved, with some modification, the earlier decision of the EAT in ***Barton v Investec Henderson Crosthwaite Securities Ltd*** **[2003] IRLR 332**. Most recently in ***Base Childrenswear Limited v Otshudi*** **[2019] EWCA Civ 1648** Lord Justice Underhill reviewed the case law and said:

> *17. Section 136 implements EU Directives 2000/78 (article 10) and 2006/54 (article 19), which themselves derive from the so-called Burden of Proof Directive (1997/80). Its proper application, and that of the equivalent provisions in the pre-2010 discrimination legislation, has given rise to a great deal of difficulty and has generated considerable case-law. That is not perhaps surprising, given the problems of imposing a two-stage structure on what is naturally an undifferentiated process of fact-finding. The continuing problems, including in particular the application of the principles identified in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 93, led to this Court in Madarassy v Nomura International plc [2007] EWCA Civ 33, [2007] ICR 867, attempting to authoritatively re-state the correct approach. The only substantial judgment is that of Mummery LJ: it was subsequently approved by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37, [2012] ICR 1054. In Efobi v Royal Mail Group Ltd [2017] UKEAT 0203/16, [2018] ICR 359, the EAT held that differences in the language of section 136 as compared with its predecessors required a different approach from that set out in Madarassy; but that decision was overturned by this Court in Ayodele v*

Citylink Ltd [2017] EWCA Civ 1913, [2018] ICR 748, and Madarassy remains authoritative.
18. It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:
(1) At the first stage the claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):

> *"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*
>
> *57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. …"*

(2) If the claimant proves a prima facie case the burden shifts to the respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

> *"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."*

He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.

54. Inferences can only be drawn from established facts and cannot be drawn speculatively or on the basis of a gut reaction or 'mere intuitive hunch' see ***Chapman v Simon*** **[1994] IRLR 124** see per Balcombe LJ at para. 33 or from 'thin air' see ***Chief Constable of the Royal Ulster Constabulary*** **[2003] ICR 337**.

55. Discrimination cannot be inferred only from unfair or unreasonable conduct **Glasgow *City Council v Zafar* [1998] ICR 120**. That may not be the case if the conduct is unexplained ***Anya v University of Oxford*** **[2001] IRLR 377, CA.** Whilst inferences of discrimination cannot be drawn merely from the fact that the Claimant establishes a difference in status and a difference treatment see ***Madarassy v Nomura International plc*** **[2007] ICR 867** 'without more', the something more *"need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred"* see ***Deman v Commission for Equality and Human Rights*** **[2010] EWCA Civ 1279** per Sedley LJ at para 19.

56. Where there are a number of allegations each single allegation of discrimination should not be viewed in isolation, but the history of dealings between the parties should be

taken into account in order to determine whether it is appropriate to draw an inference of racial motive in respect of each allegation ***Anya v University of Oxford***.

57. The burden of proof provisions need not be applied in a mechanistic manner ***Khan and another v Home Office*** **[2008] EWCA Civ 578**. In ***Laing v Manchester City Council*** **2006 ICR 1519** Mr Justice Elias (as he then was) said

> *"the focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are 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 a Tribunal to say, in effect, "there is a nice 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""*

Such an approach must assume that the burden of proof falls squarely on the Respondent to prove the reason for any treatment. It is an approach that should be used with caution and is appropriate only where we are in a position to make clear positive findings of fact as to the reason for any treatment or any other element of the claim. We shall indicate below where we consider that it is open to us to follow this approach.

Direct Discrimination

58. Section 13 of the Equality Act 2010 contains the statutory definition of direct discrimination. The material part of that section read as follows:

> "(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.
> (2) If the protected characteristic is age then A does not discriminate against B if A can show that A's treatment of B is a proportionate means of achieving a legitimate aim."

59. In order to establish less favourable treatment it is necessary to show that the claimant has been treated less favourably than a comparator not sharing her protected characteristic. Paragraphs 3.4 and 3.5 of the code say:

> *3.4 To decide whether an employer has treated a worker 'less favourably', a comparison must be made with how they have treated other workers or would have treated them in similar circumstances. If the employer's treatment of the worker puts the worker at a clear disadvantage compared with other workers, then it is more likely that the treatment will be less favourable: for example, where a job applicant is refused a job. Less favourable treatment could also involve being deprived of a choice or excluded from an opportunity.*
>
> *3.5 The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have treated – another person.*

60. Section 23 of the Equality Act 2010 provides that any comparator must be in the same, or not materially different, circumstances. What is meant by 'circumstances' for the purpose of identifying a comparator it is those matters, other than the protected characteristic of the claimant, which the employer took into account when deciding on the act or omission complained of see - ***MacDonald v Advocate-General for Scotland; Pearce v Governing Body of Mayfield Secondary School*** **[2003] IRLR 512, HL**. Where no actual comparator can be identified the tribunal must consider the treatment of a hypothetical comparator in the same circumstances. Paragraphs 3.22 – 3.27 say (with some parts omitted):

> *3.22 In most circumstances direct discrimination requires that the employer's treatment of the worker is less favourable than the way the employer treats, has treated or would treat another worker to whom the protected characteristic does not apply. This other person is referred to as a 'comparator'.*
>
> *Who will be an appropriate comparator?*
>
> *3.23 The Act says that, in comparing people for the purpose of direct discrimination, there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator.*
>
> *Hypothetical comparators*
>
> *3.24 In practice it is not always possible to identify an actual person whose relevant circumstances are the same or not materially different, so the comparison will need to be made with a hypothetical comparator.*
> *3.25 In some cases a person identified as an actual comparator turns out to have circumstances that are not materially the same. Nevertheless their treatment may help to construct a hypothetical comparator.*
> *3.26 Constructing a hypothetical comparator may involve considering elements of the treatment of several people whose circumstances are similar to those of the claimant, but not the same. Looking at these elements together, an Employment Tribunal may conclude that the claimant was less favourably treated than a hypothetical comparator would have been treated.*
>
> *3.27 Who could be a hypothetical comparator may also depend on the reason why the employer treated the claimant as they did. In many cases it may be more straightforward for the Employment Tribunal to establish the reason for the claimant's treatment first. This could include considering the employer's treatment of a person whose circumstances are not the same as the claimant's to shed light on the reason why that person was treated in the way they were. If the reason for the treatment is found to be because of a protected characteristic, a comparison with the treatment of hypothetical comparator(s) can then be made.*

61. An explanation of the differing ways in which treatment might be because of a protected characteristic was given in ***Amnesty International v Ahmed*** **[2009] IRLR 884** by Underhill P (as he was). He said

'33. In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself. If an owner of premises puts up a sign saying "no blacks admitted", race is, necessarily, the ground on which (or the reason why) a black person is excluded. James v Eastleigh [Borough Council [1990] IRLR 288] is a case of this kind. There is a superficial complication, in that the rule which was claimed to be unlawful – namely that pensioners were entitled to free entry to the council's swimming-pools – was not explicitly discriminatory. But it nevertheless necessarily discriminated against men because men and women had different pensionable ages: the rule could entirely accurately have been stated as "free entry for women at 60 and men at 65". The council was therefore applying a criterion which was of its nature discriminatory: it was, as Lord Goff put it (at p.294, paragraph 36), "gender based". In cases of this kind what was going on inside the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose – will be irrelevant. The "ground" of his action being inherent in the act itself, no further inquiry is needed. It follows that, as the majority in James v Eastleigh decided, a respondent who has treated a claimant less favourably on the grounds of his or her sex or race cannot escape liability because he had a benign motive.

34. But that is not the only kind of case. In other cases – of which Nagarajan is an example – the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions) …'

62. The proper approach to deciding whether the treatment was afforded 'because of' the protected characteristic is to ask what the reason was for the treatment. If the protected characteristic had a significant influence on the outcome then discrimination will be made out see - ***Nagarajan v London Regional Transport*** **[1999] UKHL 36; [1999] IRLR 572.**

63. The reason for the unlawful treatment need not be conscious but may be subconscious. In ***Nagarajan*** Lord Nicholls said:

'I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did.'

Harassment – Section 26 of the Equality Act 2010

64. A claim for harassment under the Equality Act 2010 is made under section 26 and 39. The material parts of Section 26 reads as follows:

26 Harassment

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

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

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

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

(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.....

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are— age; disability; gender reassignment; race; religion or belief; sex; sexual orientation.

65. The Statutory Code of Practice at paragraph 7.18 says the following about when conduct should be taken as having the effect of creating the circumstances proscribed by Sub-section 26(1)(b):

7.18 In deciding whether conduct had that effect, each of the following must be taken into account:

a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.

b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including

mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.

c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended.

66. In ***Pemberton v Inwood*** **[2018] IRLR 542** Underhill LJ explained the effect of Sub-section 26(4) as follows [para 88]:

'In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.'

67. In ***Richmond Pharmacology v Dhaliwal*** **[2009] IRLR 336**, which dealt with the legislation in place prior to the Equality Act 2010 there is a reminder of the need to take a realistic view of conduct said to be harassment. At paragraph 22 Underhill P (as he was) said:

'*Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.*

68. The question of whether unwanted treatment 'relates to' a protected characteristic is to be tested applying the statutory language without any gloss ***Timothy James Consulting Ltd v Wilton*** **UKEAT/0082/14/DXA**.

Victimisation Contrary to Sections 27 and 39 of the Equality Act 2010

The law

69. A claim for victimisation is brought under section 27 of the Equality Act 2010. The material parts of that section read as follows:

27 Victimisation

(1) 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.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not

a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

70. Victimisation in the employment field is rendered unlawful by reason of Section 39(4) of the Equality Act 2010. That sub section provides, amongst other things, that it will be unlawful to victimise an employee by subjecting him to a detriment. The meaning of 'detriment' is the same as we have set out above when considering the claims of direct discrimination.

71. No comparator is required to establish victimisation - ***Woodhouse v West North West Homes Leeds Ltd*** **[2013] IRLR 733**. What is necessary is that the employee establishes that they did a protected act and that they have suffered a detriment. Thereafter the examination turns to the reason why the detriment was suffered and is subject to the burden of proof provisions which we have set out above. The question is whether the reason for the treatment was because the worker had done a protected act or that the employer knew that he or she intended to do a protected act, or suspected that he or she had done, or intended to do, a protected act? See - Baroness Hale in ***Derbyshire and ors v St Helens Metropolitan Borough Council and ors*** **2007 ICR 841, HL**, and Lord Nicholls in ***Chief Constable of West Yorkshire Police v Khan*** **2001 ICR 1065, HL** both cases decided before a change in the wording included in the Equality Act 2010 but not affected on this question.

72. The test of causation 'because' is not to be approached by asking 'but for the Claimant doing the protected act would the treatment have occurred' but by asking whether the protected act was the reason for the treatment ***Greater***

Manchester Police v Bailey **[2017] EWCA Civ 425** and ***Nagarajan v London Regional Transport*** (above).

Discussion and Conclusions

Direct discrimination

73. The manner in which the Claimant put her direct discrimination claim was carefully recorded by EJ Burgher and in our view accurately reflects the ET1. She alleged that the less favourable treatment she received was in the second week of February when she was given 10 units to clean whereas younger Romanian employees were given less units to clean. The Claimant said that she would rely on the number of units allocated to Lynda and Rosalyn to evidence her claim. The Respondents produces time sheets which showed who which cleaners were allocated to which units on each of the days in question.

74. In our findings of fact above we have accepted that there were different cleaning tasks. An ordinary clean and a deep or spring clean. The time sheets disclose that generally speaking the Claimant was allocated 10 units to clean. There are time sheets that show that the Romanian workers who the Claimant seeks to compare herself to are also allocated the same number of units. There are some exceptions to that and that is where the Romanian comparators are described as doing a deep clean or a spring clean. When the Claimant worked on a Saturday she did deep cleaning and was allocated less units.

75. We would accept that on some occasions the Claimant has established that her comparators have been allocated less units than she had been. We do not need to focus on the burden of proof. We shall assume that it is for the Respondents to show that the reason for this was nothing whatsoever to do with race or age.

76. We find that the reason for any difference in the number of units a cleaner was allocated during any shift depended only on what they were being asked to do. Where they were asked to do a general clean then around 10 units were allocated. Where deep cleaning was planned then less units were allocated. The Respondents have satisfied us that that, and only that, was the reason for any difference in treatment. We have not needed to refer to the material circumstances for any comparator. Had we done so the answer would have been the same. The proper comparator would have been a cleaner allocated general cleaning duties. Where the Claimant's chosen comparators undertook general cleaning duties only they were allocated the same number of units.

77. For the reasons set out above the claim of direct discrimination (whether based on age or race) must fail.

The Harassment claim

78. The Claimant alleged that Gina Corciova used the expression 'old white English

women'. In our findings set out above we have not accepted that there was any reference to skin colour or nationality. What we have accepted is that Gina Corciova made a reference to people being reluctant to change and illustrated that with a reference to her mother – an older person. We have accepted that there was some implication that older people were less likely to embrace change. We consider that the Claimant's belief that Gina Corciova was alluding to a stereotypical view that older people were less likely to embrace change was not unreasonable. The issue for us is whether Gina Corciova in using that language infringed Section 26 of the Equality Act 2010.

79. We are prepared to assume, without making any finding on the point, that the conduct was 'unwanted'. We note that when the conversation took place the Claimant's relationship with her colleagues was very poor. She had complained about them both to Gina Corciova and Michelle Jackson. It might be surprising if she considered any criticism of her colleagues as being reluctant to embrace change as in any way offensive. Nevertheless we shall proceed on the assumption that she did. We would accept that the language that we have found was used by Gina Corciova did 'relate to' age.

80. We must firstly ask whether Gina Corciova used the language that she did with the purpose of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment. The context of the conversation is sufficient for us to conclude that Gina Corciova did not have any intention of offending the Claimant in any way which would fall within Section 26 of the Equality Act 2010. This was a conversation between managers who, at the time, shared a common concern about the willingness of Rosalyn and Lynda to follow instructions. Gina Corciova initially viewed the Claimant as her ally in this endeavour. For the avoidance of doubt we accept Gina Corciova's evidence that she did not view what she said as amounting to anything offensive.

81. The next question for us is whether or not the words that we used had the effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment. At the highest we have found that the words used by Gina Corciova alluded to the stereotype that older people are less likely to embrace change. Had she made it clearer that she was not suggesting that all older people were reluctant to embrace change then her remark ought not have caused any offence at all. Her lack of clarity pushes the remark over the line and we accept that what she alluded to was capable of causing some offence.

82. We must apply the test set out in Sub-section 26(4). The first matter to which we must have regard is the perception of the Claimant. We would accept that the Claimant noted that Gina Corciova's remark alluded to a stereotype. As such we accept that she recognised the potential to offend. We have set out in our findings of fact our conclusion that Gina Corciova's choice of words caused little offence to the Claimant.

83. We must have regard to the context of the remark. We have set out in our findings of fact that the remark that was made was in the context of a discussion between a supervisor and manager about other cleaners that at the time neither thought were working well.

84. We then turn to the question of whether it was reasonable for the Claimant to regard the remarks as violating her dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment.

85. In our view this is a case where the words of Underhill P (as he was) in ***Dhaliwal*** are important. This was single transient, trivial remark and one which would not ordinarily be expected to cause anything other than very minor offence if that. In those circumstances where we do not find that it would reasonable for the Claimant in this context to have viewed the words used as having the effect of creating the prescribed environment. On that basis, that claim does not succeed.

The Victimisation claim

86. The first question for the Tribunal is whether the Claimant had done any 'protected act'. She relied upon the fact that she had asked Gina Corciova whether her treatment was because of race. An act will only be protected if it falls within the categories set out in sub-section 27(2). Neither party made any submissions in respect of this point and the Tribunal has been left to determine what if any of the sub-sections might be applicable. The Claimant had not brought proceedings or given evidence in any proceedings and therefore Sub-sections 27(2)(a) & (b) have no application to the present case.

87. We considered whether the Claimant's actions fell within Sub-section 27(2)(d). What is necessary to satisfy that sub-section is an allegation of an infringement of the Equality Act (whether express or implied). The words used by the Claimant are in the form of a question, 'is your treatment of me is because I am black'? It seems to us that it is wrong in this particular context to suggest that asking a question is equivalent to making an allegation. The Claimant herself during the meeting on 19 September 2019 was most reluctant to accept that she had made an allegation that somebody else was racially motivated. We have concluded that sub-section 27(2)(d) is not satisfied in this case. There was no allegation either express or implied that anybody had actually infringed the Equality Act 2010.

88. Finally we asked ourselves whether the conduct is capable of falling within subsection 27(2)(c) 'doing anything for the purpose of or in connection within this Act'. It seems to us that asking somebody whether they are acting for discriminatory motives does fairly fall within the definition of being 'in connection with' the Act. We remind ourselves that until recently an employee disgruntled with the actions of their employer could issue a statutory questionnaire it was well established that the issue in such a questionnaire would be a protected act for the purpose of a victimisation claim whether or not it led to any proceedings. Accordingly we find that the Claimant's enquiry about Gina Corciova's motivation was a protected act falling within Section 27(2)(c) of the Equality Act 2010.

89. That leads us to the more difficult question of whether the actions of Ms Corciova were because the Claimant had made a protected act. The Claimant has established that she did a protected act and that within hours of that a decision had ben taken to dismiss her. The dismissal letter makes reference to the protected act. We are entirely satisfied

that the Claimant has proven facts from which, absent any explanation from the Respondent, we could draw an inference that the protected act was a material cause of the dismissal. The burden passes to the Respondents to show that the protected act played no part in the reasons for the dismissal.

90. The reasons for dismissing an employee are the facts known and opinions held by the decision maker. Care needs to be taken with the evidence of a decision maker to reflect the fact that the decision maker themselves may not recognise that some prohibited factor was a subconscious reason for their decision. In other words finding a decision maker honest is not by itself sufficient to rule out discrimination/victimisation.

91. We have various sources of evidence to determine the reasons for the dismissal. We have the evidence of the Claimant, Michelle Jackson and Gina Corciova about what was said on 19 September 2019. We have the dismissal letter which we have quoted above. Whilst the mention of some matter in a dismissal letter might provide strong evidence that that was a matter in the mind of the decision maker that is not necessarily the case.

92. We set out above in our findings of fact a response of Ms Corciova directly to Ms Blake Rankin. We have regard to the fact that in this case neither party is legally represented, neither party is aware of the ins and outs of the law and therefore we place some weight of the fact that the answer that was given less unlikely to be manufactured con-copied or directed towards a particular outcome. The response of Gina Corciova made no reference to the Claimant questioning her about whether her actions were motivated by race. It appeared to us that that response was spontaneous rather than thought through.

93. We have carefully read the dismissal letter. The protected act is mentioned within the letter along with a large number of other complaints about how the Claimant had behaved. The letter certainly could be read as suggestion that the protected act was, together with the other matters, the or at least a, reason for the dismissal. However that is not the only possible meaning of the letter. The reference to the protected act simply describes what happened almost immediately after some unseemly behaviour by the Claimant.

94. There is no doubt however we also need to have regard to what was said at the meeting of 19 September 2019 where one of the matters that was discussed perhaps more than any other is the fact that the Claimant had questioned whether or not Ms Corciova had acted as she had because of race. Again this does provide support for the suggestion that the protected act was a factor in the decision to dismiss.

95. Having weighed up all of the evidence before us, we reach the following conclusions. These are supplementary findings of fact. We are satisfied that when Gina Corciova answered Ms Blake Ranken's question about the reasons for the dismissal she gave the reasons that actually motivated her and that these were the entirety of the reasons for the dismissal. We are satisfied that, for powerful reasons, Gina Corciova had come to regard the Claimant as difficult and unmanageable and a person who should not

be trusted to supervise other employees. Her behaviour in throwing the caddy to the floor was very much the last straw. She did not think it would be possible to retrieve the situation and did not want to work with the Claimant anymore. We accept that the fact that the Claimant made a baseless reference to discrimination added insult to injury but find that that formed no part of the reason for the dismissal. Whilst this is a case where there was evidence supporting the Claimant's case we have concluded that the reasons for the dismissal were in no sense whatsoever that she had done a protected act. There was a good ostensible reason for the dismissal that was not unlawful and we find that that was the entirety of the reasons. It follows that the victimisation claim must fail.

96. We should add the following. If we are wrong in our conclusions above and the protected act did form some part of the reasons for the dismissal we are satisfied that the Claimant would have been dismissed on the same date for the remaining lawful reasons. It was entirely open to the Respondents to regard the Claimant's behaviour in the workplace as unacceptable. We do not have to agree with them to reach that conclusion but acknowledge the evidence in support. It would have followed from that conclusion that the Claimant would not in any event have recovered any compensation for loss of wages and any injury to feelings award would have been tempered by the same finding. The dismissal in our view was inevitable. The working relationship was shattered.

<u>The claims for arrears of wages</u>

97. The Second Respondent had conceded that the Claimant was entitled to be paid arrears of wages and accrued holiday pay amounting to £1,037.93. Gina Corciova explained that that was the figure that she had been given by her accountant who undertook the calculation of wages and ran the payroll. The Claimant claimed she was owed £1,039.05. We needed to make a determination of who was correct. Such a determination would require us to make findings of fact based on evidence. The Claimant has the burden of satisfying us that she is entitled to any sum (above the minimum wage). During the hearing neither party provided us with any evidence which would have allowed us to calculate the wages for ourselves. We are therefore thrown back on the concession made by the Second Respondent. We therefore find that the sum due to the Claimant is £1037.93. That payment should have been made no later than 30 September 2019.

98. The Claimant sought an award for consequential loss. In the hearing before EJ Burgher she had been unable to identify any basis for this. However we drew the parties attention to Section 24(2) of the Employment Rights Act 1996 which does provide a route by which an employee can claim for consequential loss, that Section says as follows: Section 24(2) says: *'Where a tribunal makes a declaration under subsection (1), it may order the employer to pay to the worker (in addition to any amount ordered to be paid under that subsection) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of'*.

99. We find that the use of the word 'attributable' in subsection 24(2) means that it is necessary to show that the withholding of the wages has caused some loss.

100. It is necessary for us to make further findings of fact relating to this issue. We have seen a number of documents within the bundle that suggest that the Claimant was in a fairly dire financial predicament at the time that she was entitled to be paid the wages due to her. She had Council Tax Liability Notices, she had not insured her car and being had been fined in respect of that.

101. However, the evidential picture is not as clear as it could be. Whilst the Claimant certainly had debts that appear to far exceed the wages that were due we had no evidence that would allow us to make any findings as to whether the Claimant had any other source of funds. We do not know why she did not pay debts as they fell due or whether she could have taken steps to prevent the accumulation of additional charges by negotiation or otherwise. We need to be satisfied that the withholding of wages caused loss. In the circumstances where the Claimant has only provided a fraction of the evidence needed to make robust findings as to any losses caused by the late payment of wages we found the question of whether the Claimant had suffered any consequential loss difficult. The Claimant did not assist herself by providing a rough estimate of her consequential loss as being £400.

102. Despite our reservations about the lack of clear evidence we find that it was almost inevitable that a person in the Claimant's financial position kept out of wages of just over £1,000 would be incurring interest charges because they were borrowing money. We do not know exactly what the Claimant may have had to borrow or for how long. The discretion given to us under Section 24(2) is a broad discretion and we find that it would be equitable to take a broad-brush approach to this element of the Claimant's claim. Whilst interest rates are low at this point in time we take judicial notice of the fact that those in lower income groups are often charged higher rates of interest. Doing the best that we can, we shall assume that the Claimant incurred interest charges at a rate of 8%.

103. The next issue is the period over which we should award interest. The starting point was to consider making an award of interest for the period up to the hearing. However we have departed from that for the reasons set out below. The basis on which the Second Respondent initially claimed to be entitled to withhold wages was that it contended that the Claimant had failed to return keys causing it expense. In its terms and conditions of employment it had included a provision allowing a deduction from wages (in certain circumstances). It abandoned any claim to rely on that provision at the hearing before EJ Burgher. We consider that the Second Respondent was right to do so. Whether the Second Respondent was right to claim that the Claimant had not returned keys it could not rely on its own terms and conditions of employment because, by reason of the Transfer of Undertakings the Claimant was entitled to rely on the terms issues by Alliance which had no clause permitting a deduction from wages.

104. Despite the fact that the Second Respondent had agreed to pay the outstanding wages they were not paid. We need to make findings as to why this was. We had seen text messages where Gina Corciova had asked the Claimant to confirm her bank details. The Claimant had not done so. She had not responded to any messages from the Respondent. Whilst the parties had managed to prepare for the hearing before us (in a rough and ready way) they had not communicated about the concession that wages were due. We find that it was the Claimant who was refusing to engage on this point and not the

Respondents.

105. We do not consider that it is just and equitable to make the Second Respondent pay interest charges (at well above what it could earn on the retained money) where it was willing and able to make payment if the Claimant communicated with it about the means of payment.

106. We have concluded that the period over which the Second Respondent should be required to compensate the Claimant for consequential loss should run from the date the payment was due to the date the Second Respondent stated that it was willing to pay the wages. At that point any sensible communication from the Claimant would have resulted in her being paid. That date was the date of the Preliminary hearing on 28 May 2020.

107. Interest on the sum of £1037.93 from 30 September 2019 to 28 May 2020 at a rate of 8% is the sum of £54.96. We shall order the Second Respondent to pay that additional sum to the Claimant.

108. The Employment Judge apologises for the time taken to provide the written reasons and the judgment. The reasons were given at the hearing and the Claimant requested full written reasons. These have been delayed behind a large number of other cases and other judicial commitments. Whilst the parties have been aware of the outcome of the hearing for some time the Judge apologises for any additional anxiety.

Employment Judge Crosfill

Dated: 17 March 2022