EMPLOYMENT TRIBUNALS

Claimant: **Ms. H Beasley**

Respondent: **C M Community Care Services Limited**

Heard at: **Birmingham by CVP video hearing.**

On: **15 & 16 February 2023 (and in chambers on 5 June 2023)**

Before: **Employment Judge Flood**
Mrs N Chavda
Mrs J Keene

Representation
Claimant: In person
Respondent: Mr Griffin (director of respondent)

RESERVED JUDGMENT

The complaints against the respondent of automatically unfair dismissal on the grounds of asserting a statutory right (contrary to section 104 Employment Rights Act 1996 (('ERA') and direct race discrimination (contrary to s 13 of the Equality Act 2010 ('EQA')) are not well founded and are dismissed.

REASONS

The Complaints and preliminary matters

1. By a claim form presented on 24 March 2020, the claimant brought complaints of automatically unfair dismissal on the grounds of asserting a statutory right and direct race discrimination. The respondent defended all the claims.

2. There was a preliminary hearing for case management before Employment Judge Kelly on 28 July 2022 where the claim was discussed, and issues identified and recorded in a list of issues ('List of Issues') (page 30 to 33 respondent bundle). The List of Issues is also set out below and was referred

to throughout the hearing.

3. At the outset of the hearing there was a lengthy discussion about issues that had arisen during the disclosure process and regarding the preparation of an agreed bundle. To ensure that all documents that each party wish to refer to were available to us, the tribunal agreed that two bundles would be admitted and could be referred to by the parties as they wished. We firstly had an indexed bundle prepared by the claimant which ran to 198 numbered pages ('C Bundle'). The claimant's witness statement also had a number of documents appended to it, with the statement and attached documents running to 135 numbered pages ('C Supplementary Bundle'). The respondent had also prepared an indexed bundle which ran to 223 numbered pages ('R Bundle'). It was made clear to the parties that the tribunal would only review those pages in each bundle that were referred to either in witness statements or during cross examination (unless a document came to the attention of the tribunal whilst cross referencing other documents). The parties pointed out specific documents which they required the tribunal to read. Where page numbers are referred to below, we indicate whether such pages are in reference to each bundle listed and defined above.

4. The claimant also indicated that she wished to pursue her application to strike out the respondent's response she made by email on 25 August 2022 (page 92 to 93 C Supplementary Bundle). The respondent had initially considered that this matter had been addressed when Employment Judge Kelly gave permission for the respondent's response to be presented outside the primary 28 day time limit. It was explained to the respondent that the rule 37 Employment Tribunal Rules of Procedure 2013 ('ET Rules') gave the tribunal the power to strike out a claim or a response in certain specified circumstances at any stage of the proceedings. We heard submissions from the claimant and the respondent on this application. The claimant applied for the response to be struck out because she alleged that the respondent had failed to comply with an order of the tribunal (which is also said to be unreasonable conduct) and that as such the respondent had not actively pursued its response. She alleged that the respondent failed to comply with the orders made by Employment Judge Kelly (pages 34 and 35 R Bundle) namely to provide a list and copies of its disclosure documents by 18 August 2022; to agree the bundle of documents by 16 September 2022; to provide the claimant with a hard and E copy of the bundle by 30 September 2022; and to exchange witness statements by 30 November 2022. The respondent acknowledged that there were some failures in complying with deadlines but contended that the issues were caused by a breakdown in communication.

5. We concluded that the respondent was in breach of orders of the tribunal but primarily this was caused by a misunderstanding of what was required and the importance of complying with your part of the order even if it is your view that there has been no cooperation from the other party. We considered the authorities set out below and have determined that any breaches of orders were not in this case unreasonable conduct having been caused by miscommunication and misunderstanding rather than persistent or wilful disobedience. We concluded that there was no failure to actively pursue because any delay was not inordinate or inexcusable and it was not intentional/disrespectful. It would have been better if the parties could have kept

each other (and where necessary the tribunal) abreast of the issues they were having. However, we have to consider whether a fair trial is impossible within the trial window, and we conclude that this was not the case. The Claimant's application to strike out was therefore refused. The tribunal indicated that if any document was referred to which the other party had not seen, then a relevant application for more time to consider that document could be made at the relevant point. The claimant also contended that the respondents conduct had been vexatious in that it had misled the tribunal at the previous hearing before employment Judge Kelly where it was stated by the respondent that it had not received a bundle submitted by the claimant. We accepted the claimant's contention that the respondent must have received that bundle as documents from it appeared in the bundle submitted in August 2022. Nonetheless we did not conclude that there was an intention to mislead, and this was not vexatious conduct but a mix-up. Again, we concluded that as a fair hearing was still possible within the trial window strike out would be refused.

6. The tribunal spent the rest of the first day reading and the evidence began on the morning of the second day (after some documents that the claimant had identified as being missing from her bundle were brought to her home address by one of the respondent's employees). The evidence concluded at 5pm on the second day of the hearing and the parties had leave to prepare and submit written submissions to the Tribunal within 7 days. Both parties sent in written submissions which were considered in full. Unfortunately, due to pressures on the Tribunal's lists and judicial availability, it was not possible for the Tribunal to meet to determine the claim until 5 June 2023. The Tribunal sends its fulsome apologies for the delay in this decision being made and sent to the parties.

7. The issues to be determined by the Tribunal were as follows:

<u>List of Issues</u>

1. *Constructive unfair dismissal*

a) Was the claimant dismissed?, ie. (a) did the respondent breach the so-called "trust and confidence term', i.e., did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant? (b) if so, did the claimant affirm the contract of employment before resigning? (c) if not, did the claimant resign in response to the respondent's conduct (to put it another way, was it a reason for the claimant's resignation - it need not be the reason for the resignation)?

b) The conduct the claimant relies on as breaching the trust and confidence term is:

(i) Her line manager telling her to leave the office and the walking her to the door.

2. ***Alternatively**, was the claimant actually dismissed?*

a) Was the claimant told to leave the office by her line manager?

b) If so, was this a dismissal of the claimant?

3. If the claimant was actually or constructively dismissed

a) The claimant can only claim unfair dismissal if she can show that she was dismissed because she asserted a statutory right. The statutory right which the claimant relies on is to receive a written statement of employment particulars. She says that she asserted this right be asking for her contract of employment on 24 Dec 2019.

(i) Did the claimant ask for a copy of her employment contract on 24 Dec 2019?

(ii) if so, was this an assertion of a statutory right under s104 Employment Rights Act 1996?

(iii) If so, was the reason for the claimant's dismissal (or if more than one the principal reason) that she asked the respondent for a copy of her contract of employment?

4. Remedy for unfair dismissal

a) if the claimant was unfairly dismissed and the remedy is compensation:

(i) The compensation will be limited to a year's pay.
(ii) The ACAS Code of Practice on grievances will be relevant if the claimant was constructively dismissed. Did the claimant unreasonably fail to raise a grievance? if so, should her compensation be reduced by up to 25%.

(iii) The respondent will say claimant has not made a proper effort to find new employment and so should not be awarded compensation for loss of income. The respondent will say that it should not have to pay compensation for loss of earnings after October 2021 since which date the claimant has been caring for her mother and claiming carer's allowance.

(iv) If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed 1 have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; [W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Credit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604];

(v) Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

(vi) Did the claimant. by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at

all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

5. EQA, section 13: direct discrimination because of race

a) The claimant identifies herself as Black British.

b) Did the respondent subject the claimant to the following treatment:

(i) Her line manager telling her to leave the office on 24 December 2022.

(ii) Her actual or constructive dismissal.

c) Was that treatment “less favourable treatment", is. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances? The claimant relies on the following comparators, Chris Gilbert (‘CG’), Jordan Moore (‘JM’) and Rebecca Parry (‘RP’) and/or hypothetical comparators.

d) If so, was this because of the claimant's race?

Findings of Fact

8. The claimant gave evidence and Ms A Zimonos (‘AZ’), the respondent’s care manager and the claimant’s line manager at the time and Ms S Tomlinson (‘ST’), Human Resources Manager at the respondent at the time, gave evidence for the respondent. We considered the evidence given both in written statements and oral evidence given in cross examination, re-examination and in answer to questioning from the Tribunal. We considered the ET1 and the ET3 together with relevant numbered documents referred to below that were pointed out to us in the Bundle.

9. In order to determine the matters, set out in the List of Issues above, it was not necessary to make detailed findings on all the matters heard in evidence. We have made findings not only on allegations made as specific discrimination complaints but on other relevant matters raised as background. These findings may be relevant to drawing inferences and conclusions. We made the following findings of fact:

9.1. The claimant is Black British and was employed by the respondent between 17 October 2018 and 24 December 2019. The respondent is a company providing home care services to the elderly and vulnerable in the Stourbridge, Wolverhampton and Dudley areas. It was clear to us that the working environment at the respondent’s office was busy and often pressured with staff having to work to tight deadlines to meet the needs of clients. Staff were required to be flexible and to an extent the respondent relied on the good will of its employees to keep to its required deadlines.

9.2. On the first day of her employment the claimant signed a contract of employment which was then taken away by a manager, Mr C Gilbert (‘CG’) and she was not provided with a copy during her employment. We saw a copy of a signed contract of employment at pages 30 to 39 C Bundle and

the claimant confirmed this was the document she signed. A job description for the role of call handler, signed by the claimant was shown at page 29 C Bundle. The respondent acknowledged that the claimant was not provided with a copy of her contract of employment but that this would have been provided to her at any time upon request. The contract contained the following relevant provision at clause 5, headed Availability (page 69 R Bundle):

"Due to the nature of the job you will be carrying out, you are required to be flexible and willing to help on occasions where your rostered work may need to be changed within your normal expected hours of work."

9.3. The job description for the Call Handler role carried out by the claimant was shown at pages 82 R Bundle. At pages 83-84 was a description that appeared to have been completed by the claimant of the key duties carried out by her in her role.

Secret Santa activity December 2018 and car park incident January 2019

9.4. In her submissions, the claimant alleges these matters were acts of direct race discrimination, but this was not part of the claim before the Tribunal identified in the List of Issues. No application to amend the claim to add new allegations of direct race discrimination was made. We have considered these matters as background to the allegations that are part of the claim. In December 2018, having participated in a Secret Santa activity organised by her colleagues, the claimant did not receive a gift from CG, who had been selected in the draw to buy a gift for her. The claimant complained verbally to Ms M Webb ('MW'), registered manager, during the week beginning 7 January 2019 about being left out. She told us that MW said to her "*If he said he'll bring it in tomorrow he will, he is a gentleman*", expressed her surprise that the claimant felt so strongly about it and then went on to immediately ban any future Secret Santa activities. The claimant also told us about the behaviour of CG more generally and the fact that he did not contribute to a "*staff kitty*" and that the claimant and a co-worker had to hide essential supplies, due to the selfishness of CG. We find that this suggests that CG behaved in a similar manner with regard to contributing financially at work on other occasions, not just on this particular Secret Santa occasion. We accepted ST's evidence that there was a related incident on 8 January 2019 where the claimant parked her car horizontally across the back row of the car park blocking a number of her colleagues from leaving. The claimant became animated in discussions with colleagues and referred to the Secret Santa event stating that she would not leave until CG paid his "*debt*" to her. In order to de-escalate the situation, the respondent's finance administrator, C Platts gave the claimant £20 from the petty cash fund (see supervision note at page 109 R bundle). ST's opinion was that this was a "*wholly disproportionate and inappropriate response*" on the claimant's behalf. MW spoke to the claimant about this on 16 January 2019 after CG wrote to MW about problems he had been having with the claimant (see page 110 R Bundle). No action of a disciplinary nature was taken against either the claimant or CG in relation to these matters.

9.5. In March 2019, the claimant started working for the respondent's red

(Wolverhampton) team with AZ being her direct line manager. This team covered approximately one hundred client calls per shift. The claimant told us of an incident where a fellow call handler who was also a carer, J Moore ('JM') gave medication to a client that had been missed from a care run which the claimant contended she was not permitted to do. The claimant told us that AZ became aware of this, but that JM faced no consequences for these actions. AZ was not asked about this matter during cross examination. Other than assertions made on this matter, we had no evidence as to whether JM's actions were authorised or not although do note that the claimant acknowledges that JM was a carer as well as call handler (so was more likely to have been involved in such matters). We were unable to draw any adverse inferences or conclusions from this event.

9.6. On 1 April 2019, the claimant received a letter about changes to her duties at work (page 54 C Bundle). This letter informed the claimant that she would no longer be required to enter times onto the respondent's computer system but would continue to include dealing with telephone enquiries and would now be based more around client services and call scheduling. This was discussed during a staff supervision on 3 April 2019 signed by the claimant which was shown at page 56 of C bundle. The claimant was of the view that this amounted to her moving from the role of call handler to the role of care coordinator and that as such from 1 April 2019 she should have been paid at the higher care coordinator rate. The respondent disputed this. We find that although there was a change to the duties to be carried out by the claimant at this time, there was no agreement that there would be a change to job title or rate of pay. This appears to have been an assumption made by the claimant without any substantive basis. At pages 90-91 R Bundle we saw the job description of the Care Coordinator role which was substantively different to that of the Call Handler job description referred to above. The claimant appears to base her assumption on the fact that the changes to the Call Handler role meant that this role was not available anymore and that she had been moved into the Care Coordinator role. There is simply no evidence that this is the case. The claimant made a number of references in her witness statement to being *"paid incorrectly*" and a number of payslips were included in C Bundle. This issue did not form part of the claim before this Tribunal identified in the List of Issues, so this matter has not been considered further.

9.7. On 16 April 2019 the claimant raised a grievance about an incident which took place on 7 April 2019 when she was unable to contact CG, who was the allocated on-call manager for that day. In that grievance the claimant raised issues about CG treating her differently to colleagues (page 65C Bundle). No reference to this being related to or on the grounds of race was made in this document. The grievance was acknowledged by ST on 17 April 2019 (page 66 C Bundle) and the claimant said she never received an outcome to this grievance. We also saw at page 94 R bundle, a copy of an email from MW to ST referencing earlier discussions with the claimant about this matter and suggesting that a supervision be held with CG to "*outline the on-call/managerial duties*". We also saw at page 98 R bundle, notes of an interview held between ST and CG and a copy of an email from MW recounting her recollection of events. At page 101 R bundle an email was shown which suggested that the response had been prepared to send to

the claimant and ST gave evidence that a response was issued to the claimant on 19 April 2019. No copy of such a response was available in any bundle before the Tribunal. We find that a response was prepared although never sent to the claimant and that although no formal action was taken against CG in respect of the claimant's complaint, it is likely that an informal discussion took place reminding CG of his responsibilities whilst on call as referred to in MW's e mail to ST. The claimant makes detailed submissions about this matter in writing, alleging that there were breaches of the disciplinary and grievance procedures, and that this was an act of victimisation. Again, such complaints were not matters that were identified issues in the claim as set out in the List of Issues and no application to amend was made. These matters have been considered as background.

9.8. We also heard about a discussion that took place on 30 April 2019 between the claimant MW, AZ, ST and another worker called Carly about DBS checks being introduced for employees. The claimant said she expressed a view that she understood why DBS checks were necessary. She then said that the respondent's director Mr L Griffin ('LG') joined the conversation late and went on to explain why a DBS check was necessary. The claimant informed LG that everyone was agreed on this point so his was a moot point, calling him "*Mr Late*" and suggested he did not jump into conversations if you did not know the topic being discussed. It was put to the claimant in cross examination that her comment on this occasion was rude. The claimant responded that she felt it was an appropriate reaction to how she was treated. We find that this was not a particularly appropriate or professional manner to address a colleague and manager in the business. No action formal or informal was taken in respect of anything that arose in this discussion.

9.9. The claimant's witness statement also contained detailed evidence about a number of issues with the work systems, equipment and processes being carried out and her raising concerns about this. However, none of this evidence directly related to the issues in dispute before us so we have not made detailed findings of fact about these matters.

9.10. The claimant referred in evidence to incidents involving a colleague, Ms M Bradbury ('MB'). The claimant attended a meeting on 4 September 2019 with MB, AZ and ST where the claimant states that she was told she was causing MB "*serious panic attacks and anxiety*". The claimant said she apologised to MB at this meeting. She suggested that the meeting that took place was based around the "angry black woman" stereotype making reference to a comment allegedly made by LG that the claimant should be "*less….less…..",* but failing to finish the sentence, with the claimant being off the belief that he was going to finish the sentence with the word "black". ST also gave evidence about the incident involving MB. She said that MB had reported feeling intimidated by claimant on 5 September 2019. As a result of this complaint a brief discussion was held with the claimant where LG suggested that the claimant consider reflecting "*on her demeanour and what perceptions others may draw from it*". She confirmed that no formal proceedings related to the allegation of bullying were pursued against the claimant or an enquiry undertaken. She described this as an attempt to "*prevent an escalation of something which could be avoided*". The accounts

of this conversation are broadly similar and whilst the claimant may have believed that the words suggested were going to be used by LG, or that the meeting related to her being unfairly stereotyped, there is no evidence that LG was going to say this or believed anything of the nature alleged by the claimant. We find that holding this meeting was indeed an attempt to smooth things over between the claimant and her colleague following a complaint and that rather than pursue a formal investigation into an allegation of bullying, they tried to resolve the working relationship. Ultimately this was not successful, but it did appear to the Tribunal have been a genuine attempt to repair a working relationship. Again, the claimant contended in her written submissions document that the events regarding this complaint amounted to her being treated differently to others due to her race which was not an identified allegation of direct race discrimination in the List of Issues. We have considered this matter as background.

9.11. The claimant emailed HR on 5 September 2019 – see page 90 C Bundle (also forwarded to MB on that date and further sent to AZ on 7 September 2019 – page 92 C Bundle) asking that until the situation was resolved that MB should not be assigned to runs putting her in direct contact with the claimant and that the claimant would leave work early to avoid contact with MB. This email went on to state that the claimant felt she was being unfairly accused and that MB was coming into work late to avoid her. The claimant said that as she had no response to this email, she missed her scheduled shift on 7 September 2019 "*as an attempt to protect herself from future unfounded allegations*". ST was asked in cross-examination about the claimant's email and agreed that she did not respond to it. ST said that this was because the requests made were not something she could implement or sanction and that because a discussion had taken place at which time the claimant had apologised, ST had assumed the matter had been resolved. The claimant completed a different shift to make up that time and no action of a disciplinary nature was taken against her about missing that shift. MB later requested to transfer to a different branch of the respondent which was agreed to. The claimant's actions in unilaterally deciding not to attend for work and informing her employer what actions she would be taking (including leaving work early) were perhaps matters that another employer might have chosen to deal with by way of a conduct disciplinary matter, but it seems the respondent again decided to deal with the issue on an informal basis.

9.12. The claimant recounted an incident where due to the collapse of the Thomas Cook travel agency, she was unable to take flight she had booked to go on holiday on 23 September 2019. The claimant attended work later that day and said that the respondent director Mr M Griffin's wife asked her why she was there and when the claimant told her what had happened, Mrs Griffin laughed vigorously. The claimant told the tribunal that she was unsure whether Mrs Griffin would have responded that way to "*anyone else affected by the Thomas Cook collapse*". We accept that an incident of this nature took place and did upset the claimant. We however do not consider this to be of particular significance to the events we have to consider. We take into account the context of the situation where the claimant attended for work on a day when she was not expected and was asked why this was the case. Mrs Griffin laughing was not the most appropriate reaction

(making light of a situation which would have been very disappointing and concerning from the claimant's point of view) but there seems to be no basis for the claimant's suggestion that a different reaction would have occurred to someone else in this unfortunate position.

9.13. The claimant also gave evidence about what she saw as regular absences from JM stating that no action was taken against JM about this absence during her employment and that she remained employed. When asked whether any action had been taken against the claimant for absence, she confirmed that she had only two days off during her entire employment but agreed that nothing was done in respect of these absences. ST admitted that there was a problem with JM's absence record and that she knew there was speculation between call handlers that she might be dismissed. ST said there was a reason behind this absence that other staff members would not have known about. The claimant also gave evidence of what she alleged to be ill treatment of another black employee, making reference to text messages between herself and that other employee about refusing to do a double shift and that employee being informed by AZ that she had to do it (page 28 C supplemental bundle). The claimant was asked whether she was aware of any instances where managers had to inform other employees who are not black that they could not refuse shifts, but she did not know of any such incidents.

9.14. The claimant also recounted an incident regarding non-attendance at training of a colleague Ms R Parry ('RP'). Both the claimant and RP were unable to attend the first occasion on which the particular training took place. The claimant stated that she then attended the training on 12 November 2019 on her day off, but she believed that RP never attended the training which left RP unable to complete the tasks related to. The claimant said this increased her workload and she believed that what she described as RP's 'refusal' to attend the training and complete the work was not addressed by AZ. The claimant also gave evidence of an occasion where she left early from work to attend family events on 24 November 2019, and was required to return to the office later that day by AZ (page 109 C Bundle). Again, we accept the claimant's evidence but are unsure what assistance this is able to provide the Tribunal in relation to the matters that are the subject of this claim.

Matters arising in December 2019

9.15. In early December 2019 AZ began work on the completion of the Christmas rota. Staff were asked to pick two preferred working days out of the four key festive dates: Christmas Day, Boxing Day, New Year's Eve and New Year's Day, with it being made clear that staff may not get their preferred shift but that she would try her best to accommodate everyone. The staff rota was issued during the week beginning 9 December 2019. The claimant had been allocated an early shift on New Year's Eve and also a shift on New Year's Day (which as a public holiday was paid at an enhanced rate). On 23 December 2019 she was asked by AZ to work a shift on either Christmas Day or Boxing Day. The claimant explained to AZ that she couldn't do that because of prior arrangements, that this would mean she had worked 10 days in a row and that she would prefer to stick to the rota

as agreed. ST's account of this conversation which she was present at the respondent's office for was similar. ST explained that the reason the claimant had been asked move shifts was that JM had suddenly left her employment on 20 December 2019 leading key shifts uncovered. ST said that AZ had asked the claimant to move her shifts and if this did result in her losing an enhanced shift on New Year's Day, that she could swap and work Christmas Day or Boxing Day instead. She acknowledged that asking the claimant to work 10 days in a row was not particularly reasonable. Although the matter was not resolved during this discussion, nothing was said to her by AZ or ST during this conversation about what consequences there might be if she refused to work these shifts on this occasion. The claimant was not informed on this occasion that she was required to work the shifts.

Meeting on 24 December 2019

9.16. The claimant gave evidence that on 24 December 2019, she was invited to attend a staff supervision meeting with AZ. She said this meeting took place in the HR room and was to discuss a report of a late call that had taken place the previous evening. The claimant told us that during this supervision she made it clear to AZ that she had an unfair workload (when compared to RP), and this was the main reason for the late call and any impact on her performance. The claimant said that a note of this supervision was taken by AZ and that the claimant signed this note, querying something the claimant.

9.17. The claimant said that AZ went on to inform her that she would now be working late on New Year's eve, locking up by herself, and that her shift working on New Year's day had been removed. The claimant said that she was upset to be losing the New Year's Day shift as it left her at a financial disadvantage and that she was also concerned about working alone late on New Year's Eve and having to lock the office on her own. The claimant said she then asked AZ for a copy of her contract of employment and that AZ informed her that she could "*get it on Friday when Sarah comes in*". The claimant then said that AZ then told her "*you know what I'm tired of you. Just leave this office. Get out. Now*" and at this point AZ walked to the door and held it open for the claimant. The claimant said she walked past AZ to enter the office to gather her belongings (car keys and handbag) and then left. The claimant admitted that just before she left the building she swore at AZ, contending that she used the phrase the phrase "*you made the little girl take the piss out of you all year and now you want to take the piss out of me – go fuck yourself bitch*". The claimant said she was referring to her colleague, JM with reference to her continued absence when using the phrase "*the little girl*".

9.18. At page 125 C Bundle we saw a document headed record conversation with AZ 24/12/2019 which was a note the claimant had prepared of the conversation together with a diagram at page C127. It is not clear when this document was prepared. It made reference to a record of supervision being taken and being signed by the claimant. It noted that AZ informed the claimant that "*AH will be finishing at 10 PM next week*" with the claimant noted as saying "*what's that got to do with me?*" with AZ further responding that the claimant would "*be working a late shift on 31/12/2019*"

and had been "*taken off shift on 01/01/2020*".

9.19. The note then records further details of the conversation as follows:

"Me: "You can't do that to me without any consultation.
AZ: "What do you think the conversation was about yesterday"
Me: "You can't do this to me Amanda"
AZ: "Yes I can, it's in your contract, maybe you should read it sometime"….
Me: "Give me a copy of my contract"
AZ: "You can get it on Friday when Sarah (HR manager) comes in. You know what, I'm tired of you. Just leave this office. Get out. Now."

The document then recounts events are set out at paragraph 9.17 above adding the detail that AZ said "*you too*" after the claimant swore at her.

9.20. The claimant said that her view at the time was that "*she had just been sacked*". She told us that she viewed AZ getting up and opening the door for her to leave was making it clear to her by way of "*international body language*" that she was not welcome. Given the findings at paragraph 9.24 below about the claimant subsequently resigning, we do not accept that this was the view of the claimant at the time.

9.21. AZ's account of the conversation on 24 December 2019 was that she raised the issue of the claimant swapping shifts around New Year's Eve/New Year's Day with the claimant during a conversation shortly after the claimant had arrived. AZ denied that a supervision was taking place at the time. AZ said she said to the claimant that she "*needed her help*" by changing shifts and was "*met with hysterical laughter*" from the claimant. AZ's evidence was that she then she suggested she and the claimant go to the HR room to carry on the conversation as she did not want a confrontation to take place in the more public area. AZ said that once in the HR room, she explained the reasoning for needing the claimant to change shift and that the claimant became agitated. She said the claimant asked for a copy of her contract and AZ said she was unable to produce a copy of the claimant's contract immediately, but said that ST would give her a copy when she was next in. AZ said the claimant was at this stage shouting and was banging on the desk. AZ said she did not think it was suitable for the claimant to continue on shift considering how she was acting, so she decided that the claimant should leave and go home to calm down. AZ's evidence in cross examination was that she said, "*You need to get your bag and go home*". AZ denies that she held the door open for the claimant to leave but contends that she and the claimant left the HR office together, that AZ then sat down at her usual desk, and the claimant walked past her to get her things. AZ alleges that as the claimant walked back past her desk, she said "*go fuck yourself Amanda, stupid bitch*" to which AZ said she replied "*okay, happy Christmas Helena*" to try and dissolve the situation.

9.22. Our findings of fact about the events of that day on the balance of probabilities are as follows:

9.22.1. Whilst the claimant has consistently suggested that a supervision took place, we find there was no formal supervision taking

place at the time of the conversation. There was no written record of this discussion, despite the claimant's suggestion that she signed a document on this day. We have seen other supervision notes in the documents before the Tribunal and there is no discernible reason why such a document, if it existed, would not have been disclosed or deliberately destroyed by AZ as the claimant suggests. It does not cause prejudice to either party as to the nature of this conversation. We find that there was a general discussion about work related matters when the claimant attended for work which took place in the general work office. This may have included events from the night before by way of handover, including possible late calls. We find that the claimant is simply mistaken about a formal documented supervision having taken place and is perhaps confusing this meeting with a different occasion.

9.22.2. AZ raised the issue again of the claimant swapping shifts to work a late shift on New Year's Eve and not on New Year's Day. Whilst this was a continuation of the conversation that had taken place the day before, AZ put the request in a more definite manner on this occasion by referring to needing the claimant's help and needing her to work a late shift on 31 December 2019. The claimant reacted badly to this, and we find that she laughed loudly at this suggestion which AZ regarded as being disrespectful behaviour.

9.22.3. At this point, AZ asked the claimant to go to the HR room with her. We find that the conversation at this time went broadly as the claimant recalls at paragraph 9.19 above (other than our findings at paragraph 9.22.5 below) with the claimant stating that AZ could not make her change her shift, which prompted a comment from AZ along the lines the claimant recalls about the respondent having the right to change shifts as it was in her contract. This then explains the claimant making an immediate request to see her contract and perhaps the escalation in the conversation from this point. This is a logical step for the conversation to take as AZ made a reference to having a contractual right to make changes and the claimant challenged her by then asking to see the contract.

9.22.4. When AZ told the claimant that she could have a copy of the contract on Friday when ST came in (which both parties accept), we find that the claimant made further requests for her contract to be provided and we accept the evidence that she became agitated and banged the table. At this stage both AZ and the claimant had become heated, and an argument was ensuing. The claimant was upset at the suggestion she would be losing out on a more lucrative day working on New Year's Day and annoyed that she felt she would be working alone on New Year's Day.

9.22.5. Having made further requests and become more agitated, AZ then said to the claimant:

"You know what, I'm tired of you. Just get your bag and leave the office now".

In general, we found the claimant's recollection of what was said reliable, but we find that the claimant has added to the alleged comment during her recollection by including the more definitive words of *"Get out"* in her later accounts of the conversation. There is no reference to this particular phrase being used in the letter sent just two days later (see below) and the claimant's recollection of the precise words used has been perhaps reinforced with time to be more definitive. We accepted AZ's evidence that she said this to get the claimant to leave the office and calm down although we find she did not say this to the claimant at the time.

9.22.6. Having asked the claimant to leave, the meeting ended abruptly, and we find that both the claimant and AZ got up to leave the HR office at the same time, with AZ opening the door and the claimant leaving just before AZ did whilst AZ held the door. We find no significance in this particular action other than both women leaving a room at the same time and then AZ opening a door whilst the claimant walked through that open door, and this is perhaps why AZ had no recollection of it. AZ returned to her desk whilst the claimant walked straight to the other side of the office to retrieve her bag and keys. The claimant then walked back across the office passing AZ's desk on her way to the door to leave the premises.

9.22.7. We find that the comment was made as recalled by the claimant at paragraph 9.17 above. AZ's reaction to the claimant saying this was "*OK, happy Christmas Helena*". The claimant may have understood this comment to have been AZ saying, "you too" but we accepted the evidence of AZ that she said Happy Christmas to her. Given the timing and context of the events (Christmas eve), this is something the Tribunal believed was likely to have been said, in a sardonic manner to attempt to lighten the mood for others present in the office, after the offensive language had been used by the claimant.

9.23. On 24 December 2019 AZ sent an email to ST entitled "contract request" informing ST that the claimant had requested of her contract and asking whether ST could have it ready for when she was in on Friday. The email further stated:

"There has been an incident with Helena today that I will need to discuss with you as we may need to arrange a meeting with her."

9.24. The claimant submitted her resignation by email to the respondent's HR email address on 26 December 2019 (shown at page 129 and 130 C bundle). This referred to the conversations between the claimant and AZ on 23 and 24 December 2019. The email suggested that during the earlier conversation on 23 December 2019 AZ also informed the claimant that if she was refusing to work late on the 31st she would have to work either Christmas or Boxing Day, with the claimant telling AZ she was unable to do this. It also recounted the conversation of 24 December 2019 as follows:

"*I arrived at work on Tuesday 24th December for my scheduled evening*

shift. After having my first ever supervision with Amanda, she then informed me that I would be working the late on Tuesday 31st December and that I had been taken off shift on Wednesday 1st January 2020. When I expressed how shocked I was that this decision had been made with no consultation, I was advised by Amanda to read my contract. When I requested a copy of my contract (as I have never been given one), I was asked by Amanda to leave the office, which I did."

The letter went on to make the following statement:

"The recent issue with Amanda is not the only thing to influence my decision, as I have found that I am consistently treated differently than my colleagues, my concerns/complaints regarding my colleagues have been ignored and some of my working practices are in breach of contract."

The claimant admitted that there was no mention of the word discrimination or an allegation racism in this email.

9.25. ST responded on 27/12/19 by email (page 129C bundle) confirming receipt and stating:
"I was under the impression that you were coming in at 12 to get a copy of your contract. Can you advise if you are coming to collect and advise me of an alternate time as I'm going to lunch now."

The claimant was asked in cross-examination whether she was aware of any other occasion of someone leaving the respondent in comparable circumstances and she confirmed it was a unique event. She was asked to agree that it was impossible to say that someone in the same position as the claimant would have been treated differently. The claimant disagreed stating that "*from what she had seen*" a white person would not have been put in that position, specifically relating to being asked to complete shifts and upon refusal being taken off a more lucrative shift, being put at risk of physical harm and that a financial disadvantage.

The Relevant Law

10. The relevant sections of the ERA we considered were as follows:

1. Statement of initial employment particulars

(1) Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.

94. The right

(1) An employee has the right not to be unfairly dismissed by his employer.

95. Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),
(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

……

(4) Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

104. Assertion of statutory right.
(1)An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—
(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or
(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

11. The relevant sections of the EQA applicable to this claim are as follows:

4 The protected characteristics

The following characteristics are protected characteristics: …

…race, …;"

13 Direct discrimination

(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".

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13....there must be no material difference between the circumstances relating to each case."

136 Burden of proof

(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.

12. In Sothern v Franks Charlesly & Co [1981] IRLR 278 the Court of Appeal approved the decision of the EAT in B G Gale Ltd v Gilbert [1978] IRLR 453, as to how Tribunal's should construe ambiguous language, in that the intention of the speaker is not the relevant test stating that *'the non-disclosed intention of a person using language as to his intended meaning is not properly to be taken into account in determining what the true meaning is*.' In Martin v Yeoman Aggregates Ltd [1983] IRLR 49 and J & J Stern v Simpson [1983] IRLR 52, the objective approach of construing the words as to how they would be understood by a reasonable listener was approved with the EAT stating in Stern that a Tribunal should "construe the words in all the circumstances of the case in order to decide whether or not there has been a dismissal".

13. It was established in the case of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 that the employer's conduct which can give rise to a constructive dismissal must involve a "*significant breach of contract going to the root of the contract of employment*", sometimes referred to as a repudiatory breach. Therefore, to claim constructive dismissal, the employee must show: -

    13.1. that there was a fundamental breach by the employer;

    13.2. that the employer's breach caused the employee to resign;

    13.3. that the employee did not delay too long before resigning, thus affirming the contract of employment.

14. Malik v Bank of Credit and Commerce International SA [1997] IRLR 462, [1997] ICR 606. The implied term of trust and confidence was summarised as follows:

    "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

15. If the act of the employer that caused resignation was not by itself a fundamental breach of contract, the employee may on a course of conduct considered as a whole in establishing constructive dismissal. The 'last straw' must contribute, however slightly, to the breach of trust and confidence (Omilaju v Waltham Forest London Borough Council [2004] EWCA Civ 1493, [2005] IRLR 35, [2005] 1 All ER 75).

16. It was confirmed by the Court of Appeal in the case of Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, [2018] IRLR 833 in an ordinary case of constructive dismissal tribunals should ask themselves:

    16.1. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

    16.2. Has he or she affirmed the contract since that act?

    16.3. If not, was that act (or omission) by itself a repudiatory breach of contract?

    16.4. If not, was it nevertheless a part…of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?

    16.5. Did the employee resign in response (or partly in response) to that breach?

17. The relevant authorities which we have considered in relation to the direct race discrimination complaint are as follows:

Anya v University of Oxford & Another [2001] IRLR 377 **-** it is necessary for the employment tribunal to look beyond any act in question to the general background evidence in order to consider whether prohibited factors have played a part in the employer's judgment. This is particularly so when establishing unconscious factors.

Igen v Wong and Others [2005] IRLR 258.
The employment tribunal should go through a two-stage process, the first stage of which requires the claimant to prove facts which could establish that the respondent has committed an act of discrimination, after which, and only if the claimant has proved such facts, the respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. In concluding as to whether the claimant had established a prima facie case, the tribunal is to examine all the evidence provided by the respondent and the claimant.

Madarrassy v Nomura International Ltd 2007 ICR 867 - the bare facts of the difference in protected characteristic and less favourable treatment is not "*without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent" committed an act of unlawful discrimination*". There must be "something more".

Nagarajan v London Regional Transport [1999] IRLR 572, HL,-The crucial question in every case was, *'why the complainant received less favourable*

treatment … Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'

Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830, [2001] ICR 1065, HL, - The test is what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously was their reason? Looked at as a question of causation ('but for …'), it was an objective test. The anti-discrimination legislation required something different; the test should be subjective: *'Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.*'

Bahl v Law Society [2003] IRLR 640 – "*where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations. But again, there should be proper evidence from which such an inference can be drawn. It cannot be enough merely that the victim is a member of a minority group. This would be to commit the error identified above in connection with the Zafar case: the inference of discrimination would be based on no more than the fact that others sometimes discriminate unlawfully against minority groups.*"

Conclusions

18. The issues between the parties which fell to be determined by the Tribunal were set out above. We have approached the issues in a different order but we set out our conclusion on each matter to be determined below.

    Unfair dismissal

19. The first issue we considered was whether the claimant was dismissed either actually or constructively. We firstly consider the issues set out at paragraph 2 of the List of Issues above as to whether the claimant was actually dismissed:

    c) Was the claimant told to leave the office by her line manager?

20. We refer to our findings of fact at paragraph 9.22.5 above and conclude that the claimant was told to leave the office on by AZ her line manager on 24 December 2019.

    d) If so, was this a dismissal of the claimant?

21. We conclude that being told to leave the office by AZ on 24 December 2019 did not amount to a dismissal within the meaning of section 95 (1) (a) ERA. We take guidance from the caselaw above that we are required to look at all the surrounding circumstances and if the words are ambiguous and ask ourselves how a reasonable employee would have understood them in the circumstances. The context here was a heated argument on Christmas Eve when the claimant had objected to being asked in a more definitive manner than previously to change shifts over the Christmas period (paragraph 9.22.4). The claimant objected vehemently to this and then demanded to see her

contract which was not available at the time. Voices became raised and the claimant banged the table. The words "*leave the office now*" were used and in all the circumstances, we conclude that a reasonable employee would have understood this to mean just that, that they must leave the office now. We do not conclude that a reasonable employee would have understood those words to mean that they had been dismissed. Significantly the claimant did not in our conclusion understand those words to mean that she had been dismissed at the time (see findings at paragraph 9.20). Although in evidence she suggested that she understood this to mean she had been sacked, she sent a letter of resignation two days after this conversation (see paragraph 9.24 above). This letter states that she was told to leave the office but does not allege she was dismissed, and the very act of resigning is entirely inconsistent with the suggestion that she had already been dismissed. The claimant had been in frank discussions with employees at the respondent before (see paragraphs 9.4, 9.8 and 9.10). We do not consider that considering the tenor of previous discussions, that the claimant believed these words to mean that she had been dismissed at the time. It was not reasonable to have understood this to mean she was dismissed in the context of what had just taken place. In our view it was clear that a reasonable employee would have understood this to mean that they should leave the office at that time but that this was not a permanent exclusion from employment. There was no termination of the claimant's contract of employment by AZ when she used these words.

22. As we have concluded that this did not amount to a dismissal within the meaning of section 95 (1) (a) ERA, we went on to consider the issues at paragraph 1 of the List of Issues above whether there was a dismissal within the circumstance section 95 (1) (c) ERA i.e. whether there was a 'constructive dismissal':

    c) Was the claimant dismissed? , i.e.. (a) did the respondent breach the so-called "trust and confidence term', i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant? (b) if so, did the claimant affirm the contract of employment before resigning? (c) if not, did the claimant resign in response to the respondent's conduct (to put it another way, was it a reason for the claimant's resignation - it need not be the reason for the resignation)?

    d) The conduct the claimant relies on as breaching the trust and confidence term is:

    (ii) Her line manager telling her to leave the office and the walking her to the door.

23. We refer to our findings of fact at paragraph 9.22.5 and 9.22.6 above that the claimant was asked to leave the office and that AZ walked with her to the door to the office, opened it and the claimant walked through. We have gone on to consider whether firstly this was conduct calculated or likely to destroy or seriously to damage the relationship of trust and confidence between the parties. We firstly do not conclude that this was conduct calculated to destroy trust and confidence as we accepted that this was said by AZ as an attempt to get the claimant to go home and calm down. She was not doing this with the

intention of destroying or seriously damaging the relationship of trust and confidence but of removing the claimant from a difficult situation. We also do not conclude that this was conduct that in the circumstances and context of what had occurred, and the nature of the overall relationship between the parties was likely to destroy trust and confidence. The respondent had on previous occasions attempted to try and resolve difficulties that had arisen on an informal basis, and it may well have been the case that they could have done this again. In any event, we find that AZ's actions in asking the claimant to leave the office did have a reasonable and proper cause, i.e removing the claimant from a tense and difficult situation to enable her to calm down. In fact, this was ineffective as in the course of leaving the premises, the claimant escalated matters further by using offensive language in the workplace. We consider that in most cases an employer would have been entitled to take some form of action against an employee who had used this language at work by way of a disciplinary investigation but ultimately the claimant subsequently resigned, and this did not take place.

24. As we have concluded that the conduct did not meet the test at paragraph 1 a) (a) above as not being calculated or likely to seriously damage/destroy trust and confidence without reasonable excuse, it is not strictly necessary to go on to determine whether the claimant then affirmed the contract after such breach or whether this was the reason for dismissal. The claimant does indicate in her resignation letter that the incident with AZ was a reason for her dismissal but also cites previous complaints. This is not the conduct pleaded by the claimant as amounting to a breach of trust and confidence as identified in the List of Issues. However, we conclude that none of the events we have referred to in our findings of fact above, either individually or cumulatively amount to conduct calculated or likely to destroy or seriously damage trust and confidence without reasonable excuse. The claimant has on occasion behaved unreasonably and unprofessionally herself (see paragraphs 9.4 in relation to the car park incident and paragraph 9.8 about the discussion with her manager). The respondent did not treat such matters as issues of conduct but tried to resolve issues informally and amicably. A complaint made about the claimant from another employee was again something the respondent tried to deal with informally (see paragraph 9.10). The claimant was frustrated with her working arrangements and things that were going on, but we do not consider that any of the events we have found to have occurred were part of or contributed to a course of conduct which viewed cumulatively was a repudiatory breach of contract.

25. Because we have concluded that there was no dismissal, we do not need to go on to determine what the reason (or principal reason) for dismissal was and whether it was on the prohibited ground. For completeness though to deal with the matters identified at paragraphs 3 a) (i) and (ii) above we did find that the claimant asked for a copy of her contract of employment on 24 December 2019 (see paragraph 9.22.3 above) and we conclude that this was an assertion of a statutory right under s104 Employment Rights Act 1996, namely the right to be provided with a written statement of particulars of employment under section 1 (1) ERA. However as there was no dismissal at all, let alone for this reason, the complaint of automatic unfair dismissal does not succeed and is dismissed.

Direct discrimination (Equality Act 2010 section 13)

26. The claimant holds a strong belief that she has been discriminated against because of her race. However, for us to reach the conclusion that the claimant have been subjected to such discrimination, there must be evidence, although it is possible that evidence could be inferences drawn from relevant circumstances. A belief, that there has been unlawful discrimination, however strongly held is not enough.

27. In order to decide the complaints of direct discrimination, we had to determine whether the respondent subjected the claimant to the treatment complained of (which is set out at paragraphs 5 b) (i) and (ii) of the List of Issues above and then go on to decide whether any of this was "less favourable treatment", (i.e. did the respondent treat the claimants as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances). We had to decide whether any such less favourable treatment was, because of her race (Black British) or because of race more generally.

28. We applied the two-stage burden of proof referred to in the relevant legal provisions above. We first considered whether the claimant had proved facts from which, if unexplained, we could conclude that the treatment was because of race. The next stage was to consider whether the respondent had proved that the treatment was in no sense whatsoever because of race. We set out below our conclusions on these matters for each allegation listed at paragraph 5 b) of the List of Issues above:

    (iii) Her line manager telling her to leave the office on 24 December 2022.

29. We refer to our findings of fact at paragraph 9.22.5 above. The facts behind this allegation are made out.

    (i) Her actual or constructive dismissal.

30. We refer to our conclusions at paragraphs 21, 23 and 24 above. The facts behind this allegation are not made out as the claimant was not dismissed actually or constructively, and this allegation and part of the claim therefore goes no further and is dismissed.

31. In relation to the claimant being informed by AZ to leave the office on 24 December 2019, we have considered whether that treatment was "less favourable treatment", namely whether in doing this the respondent treated the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the following comparators, CG, JM RP and/or hypothetical comparators. In relation to each the comparators relied upon, then neither CG, JM nor RP were in remotely similar circumstances to the claimant in relation to AZ's actions in asking her to leave on 24 December 2019. She acknowledged that the circumstances around her departure were a unique event (paragraph 9.25).

32. CG was involved in the Secret Santa incident, but we do not find this sheds any light on the decision of AZ to ask the claimant to leave. The claimant suggest that CG was selfish regarding financial contribution and whilst we accept her

submissions that CG should have opted out of the Secret Santa activity rather than join and fail to contribute, we consider this is an example of the penurious behaviour the claimant says CG exhibited, rather than evidence of racist intentions (paragraph 9.4 above). The claimant complains that CG was not subject to any formal action when he failed to respond to her calls when he was the allocated on-call manager, but again this is not a comparable situation to the one we must consider involving the claimant. There is no suggestion that CG behaved disrespectfully to his manger, and we were satisfied that he was spoken to by management about his duties when on call following the claimant's complaint (paragraph 9.7). It is unfortunate that the claimant was not provided with a formal outcome following this complaint, but we are unable to draw inferences of any less favourable treatment to AZ asking the claimant to leave during the incident in question.

33. JM is identified as a comparator by the claimant and the suggestion seems to be that she was not subject to any formal action for her poor absence record, but that the claimant was asked to leave on 24 December 2019 following a discussion about changing shifts. Againthe two scenarios were not comparable. The claimant herself took unauthorised absence on 7 September 2019 following the meeting regarding MB and no action at all was taken against her about this (paragraph 9.11). The issue leading to the claimant being asked to leave was not about absence at all but about the way the claimant behaved in the office on that day.

34. RP is similarly identified as a comparator and this appears to relate to the fact that both the claimant and RP were asked to complete training, with the claimant attending on 12 November 2019 but that RP never attended the training and was not subject to any action. This is really an entirely different set of circumstances. There is no suggestion of any poor behaviour of RP on this occasion and the claimant does not know of what discussions, if any took place with RP about this. These are materially different circumstances and do not show any less favourable treatment of the claimant in the instances we are required to consider.

35. The claimant also relies on a hypothetical comparator alleging that a white person would not have been treated the same way she had been. However, there is simply no evidence before the Tribunal, either directly or that we can rely on by way of inference that this is the case. The altercation that took place between the claimant and AZ on 24 December 2019 resulted in both becoming angry and the claimant became agitated and banged the table. AZ then asked the claimant to leave. It seems very likely to us that the same scenario would have played out in the event that any other employee had behaved in that manner in a discussion with their line manager. The claimant was clearly angry as indicated by the language used just moments after towards AZ. Leaving the situation was likely to be the most beneficial solution for both participants in the conversation. We cannot accept that this would not have equally applied had someone of a different race to the claimant been in the same situation.

36. We have gone on to consider in any event whether asking the claimant to leave on 24 December 2019 was done because of the claimant's race or race more generally. We conclude that the claimant has not met the first stage of showing a prima facie case that this was discrimination, nor indeed provided any

credible evidence that her race or race more generally was the reason she was asked to leave the office on this date. We accepted the explanation of AZ that she asked the claimant to leave to allow her to calm down. This was clear, consistent, and eminently plausible given what had just taken place. This was the 'reason why' the claimant was asked to leave the office and go home. The claimant's race did not in our view play any part at all in what took place. The claimant has pointed to various examples of what she regards as ill treatment she was subject to during her employment (albeit that no complaints of race discrimination were made at the time). We also note that on a number of occasions, incidents at work which might have led to some action being taken against the claimant, were not actioned by the respondent. However, none of this appears to have any link to the claimant's race at all. What the claimant has done is point to what she regards unreasonable treatment and her race but is unable to show us the "something more" required by the Madarassy case.

37. Therefore, as the claimant has not proved primary facts from which the Tribunal could conclude that the complaint was because of race, we do not find that this shifts the burden of proof to explain the reason for the treatment. Even if the burden had shifted it, the respondent would have discharged that burden. This treatment was not because of the claimant's race or race more generally. This allegation of direct race discrimination is dismissed.

Employment Judge Flood
6 June 2023