EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr D Joao **v Red Rum Operating Company Limited**

Heard at: Watford **On**: 26, 27, 28 and 29 June 2017

Before: Employment Judge Skehan
Members: Mr Ramgolam
Mr Jewell

Appearances

For the Claimant: In person
For the Respondent: Mr D Stevens - Solicitor

JUDGMENT

1. The claimant's claim for constructive unfair dismissal fails and is dismissed.

2. The claimant's claim for direct race discrimination fails and is dismissed.

REASONS

The issues

1. The issues that we had to decide in this case are the issues as set out by EJ Lewis on page 36, paragraph 4 of the Employment Tribunal bundle.

2. The claimant who is black and of Angolan origin was employed by the respondent as a cleaner from March 2010 until his resignation with immediate effect on 19 February 2016.

<u>The Floor Incident.</u>

3. The claimant relies on an incident with a colleague, Mr Pearson on 11 June 2014 during which they had an argument. The claimant subsequently made a complaint of this incident to Ms Rice of management on 15 June 2014. Mr Pearson made a report of the matter. The claimant asserts that on grounds of his race Ms Rice, the then Operations Manager, responded to Mr Pearson's report of complaint but took no action in response to the

claimant's complaint. His case is that the two employees had both made complaints but that the complaint of the white employee was dealt with and the complaint of the black employee was not dealt with. The claimant identifies Mr Pearson and/or hypothetical comparators as the relevant comparator. The respondent raises a statutory limitation issue in respect of this complaint of race discrimination.

The Holiday Leave Incident.

4. The claimant complains that in April 2015, as is common ground, he received a final written warning for taking leave which was said not to be properly authorised. The claimant clarifies that this event is not relied upon as a claim of racial discrimination but as part of the factual matrix underpinning his resignation and therefore his claim of constructive dismissal.

The Cleaning Cupboard Memo.

5. The claimant complains of the terms, language and decision of Mr Pearson in writing a memorandum on 20 April 2015. He asserts that Mr Pearson acted improperly in submitting the memo and that when, on 24 August 2015, he complained in writing about it, no action was taken. This event is not relied upon as a complaint of racial discrimination but part of the factual matrix underpinning his resignation ad therefore his claim of constructive dismissal.

The Incidents with Ms Popescu.

6. It is common ground that on 2 and 6 October 2015 the claimant had two disagreements with Ms Popescu who held a post in a supervisory or managerial role over the claimant. The disagreements related to operational matters. The claimant and Ms Popescu both made complaints or reports of what the other had said or done. The claimant asserts that as a consequence he was invited to attend a meeting to give an account, and as a consequence, and thereafter a disciplinary meeting leading to a disciplinary sanction. He asserts that no such action was taken against Ms Popescu in response to his complaint against her which was not investigated.

7. The claimant does not complain of racial discrimination by Ms Popescu. The claimant asserts that the respondent's decision to act upon Ms Popescu's complaint and not act upon his complaint was a decision taken on the ground of race and constituted direct discrimination. His case is that the two employees had both made complaints, but the complaint of the white employee was dealt with in the complaint of the black employee was not dealt with. The sequence of events also forms part of the factual matrix underpinning his resignation and therefore his claim for constructive dismissal.

The Mobile Phone Incidents

8. The claimant complains of a mobile phone incident that occurred on 22 July 2015. The claimant and Mr Pearson had an argument on or about 19 October 2015 when Mr Pearson instructed the claimant not to charge his

mobile phone on company premises and, on the claimant's account, did so in an aggressive language. The claimant made a formal complaint of this in a written grievance of 27 October 2015. The claimant does not complain of racial discrimination by Mr Pearson in the argument.

9. The above event coincided with other disputes and the claimant's perspective is set out in a letter of 28 December 2015.

The Grievance Letter of 27 October.

10. For the purposes of the present proceedings the claimant asserts that his grievance of 27 October was never investigated and no steps had been taken to address it by the time of his resignation on 19 February 2016. The respondent claims that this letter had not been received.

11. The claimant asserts that the fact that the grievance letter was not dealt with in accordance with the ACAS code of practice constitutes direct race discrimination. In addition, the allegation is said to form part of the factual matrix which underpinned his resignation and therefore his claim for constructive dismissal.

The Changing Room disciplinary matter.

12. The final matter before the tribunal is well documented and summarised briefly here. The claimant refused to work in the ladies changing area for what he considered to be legitimate, professional reasons. He was in due course suspended and subject to a disciplinary process which led to a final written warning.

13. Very shortly after receipt of the respondent's rejection of his appeal against the final written warning the claimant resigned with immediate effect.

14. Accordingly, the claimant's claim of constructive dismissal is whether the matters above constitute conduct of the respondent, when viewed objectively, were calculated or likely to destroy of seriously damage the relationship of trust and confidence between employer and employee and which led him to resign.

15. The claimant's claim for racial discrimination, as set out above, ie the failure to act on the complaints of June 2014, the Popescu conflict and the grievance letter, were acts of racial discrimination and which were part of the factual matrix leading to his resignation, and as such, constitutes constructive unfair dismissal and direct race discrimination under s.13 of the Equality Act 2010.

The law

16. Section 95(1)(c) of the ERA provides that:-

> "if an employee resigns in circumstances in which they are entitled to terminate their contract of employment by reason of an employer's conduct that amounts to a dismissal".

17. The case of Western Excavating v Sharp [1978] is still good law in this area. Western Excavating provides:-

"If the employer is guilty of conduct which is a significant breach going to the root of a contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any other performance. If he does so, then he terminates the contract by reason of the employer's conduct and he is constructively dismissed."

17. The case of Malik v BCCI [1997] as clarified by the EAT in Baldwin v Brighton & Hove City Council [2007] was considered. It is an implied term of the contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee.

18. The test is an objective test as set out in Eminence Property Developments Ltd v Heaney [2010] and Tollett Prebon PLC and Ors v BGC Brokers LP [2011]**.** The employer's decision must not be capricious or single out any employee for unfavourable treatment in accordance with the provisions as laid down in Transco PLC v O'Brien [2002]. The employee must resign in response to the breach or breaches and the repudiatory breach or breaches must have played a part in the dismissal (Wright v North Ayrshire Council [2013]).

19. In dealing with cases relating to the last straw, in JV strong and Co v Hamill [2001] All ER (D) 18. The EAT said of the normal last straw scenario where there is a series of incidents that usually means the employee is carrying on working notwithstanding the occurrence of those events, that

19.1 it seems to us that a tribunal confronted with this sort of situation must look to see if the final incident is sufficient of a trigger to revive the earlier ones. This will, it seems to us, involve looking at the quality of the incident themselves, the length of time both overall and between the incidents, and it will also involve looking at any balancing factors which may have, at any point, been taken to constitute a waiver of the earlier breaches.

20. In Walton Forest v Omilaju [2004] EWCA Civ 1493 the Court of Appeal gave the following guidance:

- the final straw must contribute something to the breach, although what it adds might be relatively insignificant
- the final straw must not be utterly trivial
- the act does not have to be of the same character as the earlier acts complained of
- it is not necessary to characterise the final straw as unreasonable or blameworthy conduct in isolation, though in most cases it is likely to be so
- an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the act is hurtful and destructive of their trust and confidence in the employer. The test of whether the employees trust and confidence has been undermined is objective.

21. For the sake of completeness, we note s.13 of the Equality Act 2010 (EqA) in relation to the definition of direct discrimination being that: A person (A) discriminates against another (B) if because of the protected charteristics, in

this case race, A treats B less favourably than A treats, or would treat others. S 23 EqA provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

22. S123(1) of the EqA provides that a claim "may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. It is also the case that conduct extending over a period is to be treated as done at the end of the period. The tribunal is entitled to take into account anything that it deems to be relevant when considering whether or not it is just and equitable to extend the statutory limitation period (Hutchinson v Westward Television Ltd *[1977] IRLR 69*). The tribunal's discretion is as wide as that of the civil courts under section 33 of the Limitation Act 1980 (LA 1980) (British Coal Corporation v Keeble *[1997] IRLR 336*. A tribunal has a wide discretion when considering whether it is just and equitable to extend time, and an appeal against a tribunal's decision should only be allowed if it had made an error of law or its decision was perverse (Bexley Community Centre (t/a Leisure Link) v Robertson *[2003] EWCA Civ 576*). The court also held that time limits are applied strictly in employment cases, and there is no presumption in favour of extending time. In fact, tribunals should not extend time unless the claimant convinces them that it is just and equitable to do so. The burden is on the claimant, and the exercise of discretion to extend time should be the exception, not the rule. This was followed by the Court of Appeal in Department of Constitutional Affairs v Jones *[2008] IRLR 128*.

The Evidence

23. We heard evidence from the claimant, on his own behalf. We heard evidence from Mr Pearson, the Leisure Club Supervisor; Ms Humphris, the Hotel HR Manger; and Ms Rice, the Leisure Club Manager on behalf of the respondents. The witnesses gave evidence under oath or affirmation. Their witness statements were adopted and accepted as evidence in chief. The witnesses, apart from Mr Pearson, were cross examined. We were provided with an employment tribunal bundle in excess of 300 pages and the page references within this judgment are references to that bundle unless otherwise stated.

24. As is not unusual in these cases, the parties have referred to a wider rage of issues than we deal with in our findings. Where we fail to deal with any issue raised by a party or deal with it in the detail in which we heard, it is not an oversight or omission but reflects the extent to which that point was of assistance. We only set out our principle findings of fact and we make findings of fact on the balance of probability, talking in to account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents.

25. By a claim form received at the employment tribunal on 13 April 2016 the claimant brought a claim for constructive unfair dismissal. The claim was amended to include a claim for race discrimination on 4 January 2017 and the claims were defended by the respondent.

26. The claimant commenced employment with QMH UK Limited on 19 March 2010 as a Public Area Cleaner. The claimant's employment was transferred to the respondent. On 1 November the claimant became a Public Area and Leisure Club Cleaner. On 2 January 2011 the claimant requested a variation to his contractual working hours as he wished to undertake a course and this variation was granted.

27. At some time prior to 31 March 2014 Ms Rice, the leisure club manager, decided to reduce the leisure club cleaning from five days a week to 3 days a week. The claimant considered that this made his job more difficult. On 31 March 2014, the claimant sent a letter to Ms Rice purporting to resign from the Leisure Club Cleaner component of his role. The claimant wrote a long letter to Ms Rice, contained at page 94 to 98 of the bundle. Following receipt of this letter the claimant had a conversation with Ms Humphris who explained to the claimant that the claimant was unable to resign from part of his role. Ms Humphris explained that she considered the claimant had one job, not two and used examples of her responsibility for both Elstree and Luton in explaining that she could not resign from undertaking her Luton duties. The claimant continued to undertake the whole of his role following this time.

28. For the avoidance of doubt, we note the handbook as provided by the claimant to the employment tribunal during submissions. In particular, we note that the definition in respect of gross misconduct includes:

    - Serious insubordination:
    - Refusal to carry out a reasonable instruction from a more senior job holder or manager;
    - A failure to comply with the provisions of the Company's Health and Safety Policy, Fire Safety Policy or Food Safety Policy,
    - Abusive of aggressive behaviour, fighting or threatening or attempting to injure another team member, customer or supplier. Wilful refusal to comply with a lawful instruction.

The Floor Incident

29. We now turn to the Floor Incident. It is common ground between the parties that on 11 June 2014 there was an incident between the claimant and Mr Pearson. The claimant was rostered to scrub the floor on that day. However, the machine that he used to scrub the floor was out of use. The claimant mopped the floor and, when finished, Mr Pearson asked him if he had scrubbed the floor. The claimant explained that he had not because the machine was broken and it was hard work and would have taken a long time to finish manually. Mr Pearson asked the claimant if he was refusing to do his job. Mr Pearson raised his voice and the claimant responded with a similar loud voice. Mr Pearson told the claimant to "Keep your fucking voice down". Thereafter the claimant asked Mr Pearson three times "are you offending me?". He asked Mr Pearson to repeat the offensive word. Mr Pearson responded " I do apologise for using that word: I was stressed. I did not intend to offend you". The claimant acknowledged that Mr Pearson

apologised twice. At the time of the incident the claimant accepted Mr Pearson's apology and both parties considered the matter closed.

30. Mr Pearson's evidence was that sometime after the incident, Ms Rice asked him what happened on 11 June. He told Ms Rice that he had become frustrated and sworn at the claimant but he had not intended that the claimant to hear him. Ms Rice told Mr Pearson that his behaviour was inappropriate and he agreed. He told Ms Rice that he had already apologised to the claimant and the claimant appeared to have accepted his apology. Mr Pearson thought that was the end of the matter. Ms Rice asked Mr Pearson to keep the matter confidential. Thereafter Mr Pearson was asked about the incident by a colleague. Mr Pearson assumed that the claimant had discussed the incident with a fellow staff member. As Mr Pearson had been asked to keep the matter confidential, he mentioned this to Ms Rice. Mr Pearson's evidence was that he does not know what happened after this.

31. The claimant claims that following the incident, he was invited to a meeting on Friday 2 June 2014 along with Mr Pearson, the Operations Manager, and Ms Rice. The claimant says that during this meeting he was told that should he continue to comment about the incident to people or to any team member, the company's policy and disciplinary procedures would be used. None of the respondent's witnesses have any recollection of this particular meeting. The claimant complains that during this meeting he was seen as guilty and Mr Pearson was seen as a victim.

32. We refer to the claimant's letter to the respondent of 15 June 2014 contained at page 112 relating to the floor incident at page. This sets out the claimant's recollection of the incident. The claimant confirms that there were no witnesses to the incident as set out above. The final paragraph states:

> "Of course, it is my own choice to do cleaning job here. I do this job for my living. I know that I have to do my job as requested by the managers because - at the end of the month- I get paid hundreds of pounds; that is why I have to do the work to the best of my abilities.
> Nevertheless, I do not think this should justify some people's behaviour. I would make it clear that I am no longer taking any rubbish from anyone in the club. Anyone coming with his rubbish to me I will deal with as rubbish. I will rubbish him back. I am not going to allow any abusive behaviour."

Annual Leave Incident.

33. The claimant's evidence was that prior to the incident in question, Oana, who normally dealt with the claimant's holiday leave, did so not by filling in the official holidays forms, but by requesting that the employees put their requested holiday dates on a sheet of paper on the notice board in the linen room. On 3 March 2015, the respondent confirmed that the claimant had 12 days holiday remaining to be taken prior to the end of March which was the end of the respondent's holiday year. On that day, the clamant booked annual leave between 9 and 13 March 2015 and 23 and 31 March 2015. When Oana received the claimant's request, she said that she did not have enough staff to cover the Public Area as the claimant's colleagues were still

off sick and it would be difficult for her to find someone to cover for the claimant. The claimant attempted to help by diving his holiday in two stages. However, Oana told the claimant that he should start his holiday from 16 March instead of 9 March to cover the expected staff shortages. The claimant considered that he had requested his annual leave in the same way of his previous annual leave since Oana had become Head of Housekeeping in 2011 and he considered that she had authorised this leave in the normal way.

34. On Friday 13 March 2015 Oana filled in two former holiday leave forms with different annual leave dates, one from 16 to 20 March and another from 23 to 31 March. Oana asked the claimant to sign the form of annual leave starting from 16 to 20 March and informed the claimant that she was putting the remaining days on hold due to staff shortages. She told the claimant that if the staff who was off sick returned, she would let him know and he could continue his holiday. In response, the claimant requested confirmation that his holiday would be paid and the remaining days would be carried over to the new year. However Oana refused to guarantee or confirm. On 19 March the claimant was informed that a colleague was still off sick and would not be returning. The claimant had a discussion with Oana to clarify what was going to happen to his remaining days. The claimant's position was that unless he received confirmation or clarification from her before the weekend of what was going to happen to his remaining seven days holiday, he would not be returning to work until he finished his holiday.

35. The claimant confirms within his own letter at page 147 that on Thursday, 19 March, Oana told him that he was required to come into work from Monday to 23 March because she had no one to cover the public area. Oana said that she could authorise the claimant to take Monday 30 and Tuesday 31 March holiday, but for the remaining days he would need to speak to Angela for clarification as to carrying over the days. The claimant responded, "I'm not going to speak to Angela, I'm speaking to you because you are the one who was asking me to come into work." The claimant's employment contract at page 103 of the employment tribunal bundle at paragraph 7.2 includes inter-alia "…holiday taken without prior authorisation will not be paid and will leave to disciplinary action…." The claimant did not return to work during that second period.

36. The respondent commenced disciplinary proceedings and that process was dealt with by Ms Humphris. Ms Humphris confirmed during cross examination that she was not aware of the practice followed by Oana in respect of booking holidays. Ms Humphreys said that: "I considered the two formal holiday forms, one which had been authorised, and one which had not." We note that some of the information recorded by Ms Humphris in respect of contact with the claimant was inaccurate both in respect of the claimant's contact with the respondent prior to the unauthorised absence and the previous less formal process used by Oana for booking annual leave. The end result of the disciplinary process was that the claimant was issued with a formal final written warning. The claimant appealed the decision. Following the appeal hearing on 24 April 2015, the respondent confirmed that the final written warning was upheld.

37. On 17 May, the claimant raised a grievance with Angela Fairgrieve relating to seven days holiday that had been put on hold by Oana back in March 2015. In response the respondent offered a one-off gesture of goodwill for the claimant to carry over five days of his holiday entitlement to the next year.

The Cleaning Cupboard Memo.

38. It is common ground that on 20 April Mr Pearson found the cleaning cupboard open with the key in the lock. He immediately closed the door and locked it. A short time later the claimant approached the cupboard and began searching for his key. Mr Pearson told the claimant where the key was and informed the claimant that he was obliged to lock the cupboard. Mr Pearson said he was giving the claimant a verbal warning as it goes against the Control of Hazardous Substance Regulations which the claimant had been trained on and if such a slip happened again Mr Pearson would have to make it official.

39. Mr Pearson confirmed this verbal warning in a memo sent to the claimant which is contained at page 151 of the bundle. The memo was copied to Ms Rice to ensure that she was aware of the matter. The claimant considered that Mr Pearson was not allowed to write such a warning memo. The claimant does not dispute that his error in failing to lock the cleaning cupboard warranted a verbal warning. The claimant wrote to Ms Rice asking her whether she knew about the memo and whether she had given permission for it. The claimant considered the memo, written by Mr Pearson, to be insulting. The claimant wrote to the Leisure Club Manager asking her whether she knew about the memo at page 178. He brought the issue to the attention of the Operations Manager by letter on page 179 to 180. On 1 October 2015 he further wrote to the respondent in respect of the memo as contained at page 181, and on 11 October 2015 the claimant wrote a further letter about the same issue at page 198. The claimant says in his witness statement at paragraph 75 that the reason he wanted a written response to be provided by the Leisure Club Manager was because he knew that Ms Rice was aware of the memo, she had seen it and read it. However, she had allowed Mr Pearson to insult the claimant. She did nothing to stop it. The claimant wanted her reaction and wanted to see what she was going to say and he wanted that reaction in writing so that he could have evidence of the manager's complicity and cover up of what he considered to be Mr's abusive behaviour.

Incidents with Ms Popescu.

40. On 2 October the claimant had an incident with his supervisor, Ms Popescu. The claimant accepts that Ms Popescu was his Supervisor. The claimant's evidence in relation to the background to this incident was difficult to follow during the hearing and we refer to the respondent's notes of the meeting taken on 6 October at page 186 with both the claimant and Ms Popescu present. The background was that Ms Popescu received a complaint from a guest in relation to the ladies toilet; the toilet was blocked. The claimant had not cleaned the toilet because it was blocked. Ms Popescu checked the toilet and told the claimant that both toilets were very dirty and during this

exchange with the claimant, the claimant became angry and commented along the lines that the night porters were placing too much toilet paper on the shelves in the toilet. The notes record the claimant as saying "This is too much and I said to Sharon that the paper kept on top it's not me its Nights. I suggested to Sharon to speak to the Nights re the toilet paper".

41. The claimant alleged that MS Popescu spoke to the Night Manager and deliberately misinformed the Night Manager that the claimant was upset and reused to clean the toilet because the Night Porters had left too much toilet paper on the shelf in the toilet. The claimant believed that because of the information provided to the Night Manager, he [the claimant] had been accused of making trouble. Ms Popescu asked the claimant to clean the toilet straight away to prevent more complaints. However, the claimant argued with her. Ms Popescu, who was heavily pregnant at the time, became upset and said she did not want to argue about the issue. She reminded the claimant that she was pregnant and asked the claimant to stop shouting at her as she was not feeling well. The claimant was speaking in a raised voice also laughed. Ms Popescu thought that the claimant laughed at her. The claimant said he did not laugh at her but was laughing at the situation. Ms Popescu walked away.

42. A further incident occurred between Ms Popescu and the claimant on 6 October. The claimant's explanation of the incident that happened on 6 October was that Ms Popescu wanted the claimant to agree with her about something which the claimant considered was not correct. Ms Popescu told the claimant that she thought the female toilets were disgusting and requested that the claimant clean those toilets. The claimant objected to the use of the word disgusting. The claimant disagreed with Ms Popescu and refused to clean the toilets. Ms Popescu became upset and asked the claimant not to argue with her because she was pregnant.

43. The claimant asked on of his colleagues, Brenda, to go and make an assessment about the condition of the toilets. Brenda returned and told both the claimant and Ms Popescu that the toilets were okay, they were not disgusting and only had bits of tissue on the ground. The claimant told Ms Popescu that the fact that she was pregnant and not feeling well did not mean that the claimant was obliged to agree with her about something which was not correct. The claimant accused Ms Popescu of taking advantage of her pregnancy to provoke him and invite him in to unnecessary argument and that Ms Popescu was looking for something to report. The claimant confirms within his witness statement at paragraph 85, that following the incident both Ms Popescu and the claimant were called to the Operations Manager to present their account of events of the two incidents. Within their accounts, they both make allegations against each other. Ms Popescu alleges that the claimant raised his voce, shouted and laughed at her and accused her of bullying. The claimant had alleged that Ms Popescu had deliberately misinformed the Night Manager and lied to him about the toilets in order to get the claimant in to an argument. The notes of this meeting conducted by the respondent on 6 October are contained within the bundle at page 186.

44. Following the meeting of 6 October the respondent commenced disciplinary proceedings against the claimant. The claimant sent a further letter to the General Manager on 29 November 2015 and within this letter the claimant refers to the allegations against Ms Popescu. He also accuses her within this letter of bullying and being racist. The allegation of racism against Ms Popescu has not been pursued. The claimant complains in this letter that his allegations against Ms Popescu have not been investigated and he requests that they are given the same treatment according to the company's policies and procedures as the complaints made against the claimant. However, no action was taken against Ms Popescu. The claimant was subsequently invited to a disciplinary hearing that was held on 4 December 2015 and was issued with a written warning for his conduct in respect of the above incidents. The claimant did not appeal.

The Grievance Letter of 27 October.

45. The claimant said that he submitted a letter of 27 October 2015 (the Grievance Letter) contained at page 202 to 208 of the bundle, by hand to the respondent's HR Manager and copied it to the General Manager. The letter referred to two incidents the claimant had with Mr Pearson. The first incident was that mobile phone incident of 22 July where the claimant complained that Mr Pearson had told him that he was not permitted to charge his mobile phone in the male changing room. When Mr Pearson entered the changing room, he asked who was charging their phone. The claimant responded that it was his phone. Mr Pearson said "You shouldn't be charging your phone in the hotel premises and the hotel policy does not allow members of staff to charge their phone in the hotel". The claimant said that he did not argue as he was unsure of the policy but he claimed that Mr Pearson acted aggressively towards him. Mr Pearson agrees that he informed the claimant that he cold not charge his phone but denies acting aggressively towards the claimant. Mr Pearson said that he was simply pointing out the policy and would have acted similarly had the phone belonged to a hotel guest, a club member or any other team member.

46. The second incident related to 19 October where Mr Pearson informed the claimant that He must not charge his phone on the respondent's reception desk. The claimant approached the reception desk where Mr Pearson was sitting and unplugged his phone which had been charging. Mr Pearson asked the claimant not to charge the phone and the claimant informed Mr Pearson that he was allowed to charge his phone as long as it was switched off and not in the public area. Mr Pearson told the claimant that the reception desk was a public area and he, Mr Pearson, did not charge his phone on the desk, nor would Mr Pearson let any other member of staff charge their phone on the reception desk. There were a number of private areas in the hotel however the only private area in the hotel leisure club is Ms Rice's office. The claimant did not accept Mr Pearson's comments. He told them that he had the wrong information and that he [the claimant] had correct information from a manager. The claimant refused to tell Mr Pearson the name of the manager to whom he referred. The claimant argued with Mr Pearson in respect of whether or not the reception desk was

a private or public area. The claimant alleged that Mr Pearson became rude and aggressive. Mr Pearson denied that he was either rude or aggressive to the claimant.

47. The respondent has no record of receiving the grievance letter which was sent by the claimant. Ms Humphris said that she did not see the letter prior to the preparation for this claim. She gave evidence that she had daily meetings with Ms Fairgrieve. She concluded that should Ms Fairgrieve have received the letter she would have been informed about it. The claimant's evidence was that he was called to a meeting on 30 October 2015 with the Operations Manger to discuss his grievance. The notes of the meeting of 30 October 2015 in the bundle, at page 2010, are generally illegible. Ms Humphris has attempted to decipher the notes and provide a 'best guess' typed interpretation as contained at page 214(a). The notes use the word grievance and refer to the two issues the claimant raised within his grievance letter relating to Ian Pearson. The respondent's evidence is that the Operations Manager was aware that the claimant had an issue with Mr Pearson. He had expected to discuss issues that the claimant had raised previously in respect of Mr Pearson and this was supported by a handwritten note by Ms Fairgrieve on the claimant's letter of 11 October 2015 as contained within 198 of the bundle. The respondent's evidence was that it was most likely that the claimant informed the Operations Manager during this meting of the additional allegations and that they were thereafter discussed.

49. Ms Humphris' evidence was that the meeting between the claimant and the Operations Manager was held on 30 October 2015 had been called in response to numerous letters that the claimant had sent to the respondent. These letters mainly related to complaints about Mr Pearson and the chemicals memo. The claimant received no follow up from this meeting with the Operations Manager on 30 October 2015. We note that within the claimant's Grievance Letter, the final paragraph reads,

> "I would make it clear, I am not accusing any particular individual or any manager of being a racist. I do not think there is any manager in this hotel as racist. Not as I am aware of. But the way they handle the issues, it makes some group of people to be in favourably position over others. Or it has created a first and second-class employee. This is the issue here and this is the reason of my grievance"

50. The claimant sent a further letter to the respondent dated 28 December 2015 and the respondent had no record of receiving this letter either. Throughout the claimant's employment the claimant had a tendency to write long letters to his employer where there were issues with which he was concerned. We have only referred to a small number of these letters in our judgement. The claimant's evidence was that he considered the respondent did not like matters to be put in writing because they did not want any evidence of any issues that may exist. The respondent tried to encourage the claimant to speak directly to his supervisors in the first instance in relation to any issues and try to discourage him from writing long letters.

Ladies Changing Room Signage.

51. When Ms Rice became the Leisure Club Manager there was a sign n the ladies changing room as contained on page 278 of the bundle. That sign said:

> "Importance notice. Ladies please be aware that between 14:00 and 14:30 Monday to Friday there will be a male cleaner in the ladies changing area. We would like to apologise for any inconvenience caused".

52. Ms Rice changed this sign to one, at page 279, that said:

> "Caution male cleaner at work in the ladies changing area. He will leave the area while you get changed".

53. Later this sign was changed to include the company logo and said:

> "Please be aware that these facilities are cleaned by a male team member. He will leave the area for you to change and shower."

54. Ms Rice's evidence was that the original sign with a time restriction was too restrictive for the cleaner and Ms Rice removed this time restriction. She stated that none of the signs had indicated that the changing rooms would be closed when they were being cleaned. During Ms Rice's employment with the respondent, the changing rooms remained open to guests and members during cleaning. It was not the industry norm to close changing rooms while they were being cleaned. The claimant accepted during cross examination that at no time during his employment with the respondent were the female changing rooms closed to allow cleaning.

55. Ms Rice also gave evidence during cross examination that all of the Leisure Club Team undertook cleaning. Ms Rice cleaned the men's changing rooms as part of her duties and used a similar sign to that provided by the respondent. Ms Rice confirmed that when a man wished to shower or change she would simply and quickly pack up her cleaning products and leave the changing room and return at a later time. Ms Rice said that it was unreasonable to expect a guest, for example, who had been in the pool to wait half an hour on the poolside while the changing rooms were being cleaned.

56. The claimant wrote to Ms Rice on 15 November 2015. This four page letter was contained at page 215 of the bundle. At this time, the claimant had cleaned the female changing room for approximately five years. The claimant had worked by leaving the female changing rooms when a female entered. The claimant told Ms Rice that unless a sign was displayed on the changing room door to prevent any females entering while he cleaned, he would not be entering the changing room to do any work. This letter also stated inter alia:

> "….It is ridiculous to suggest to me that I should be cleaning the female changing room whether or not there is ladies having their shower or changing

> their clothes….. You want me to continue cleaning the female changing room whether or not there were females having shower or changing clothes.
>
> I would make it clear in this letter from Monday, 16 November 2015 should you provide me a sign for the females changing room stating either:
>
> a. Changing room out of order. Please do not enter; or
> b. Changing room is in the process of being cleaned by a male attendant. Please do not enter
>
> This sign will be displayed on the females changing room door to prevent any female from entering the changing room while I am doing the cleaning. …..Unless one of these kinds of signs provided and displayed on the female changing room door, I will not be entering there to do any work…

57. Following this time the claimant stopped cleaning the female changing rooms and refused to do so when Ms Rice asked him to. We heard a considerable amount of evidence in relation to missing signs. We do not consider this evidence relevant to the issues we are required to determine. The claimant was invited to a disciplinary meeting and the outcome of this disciplinary meeting was that the claimant was issued with a final written warning on 5 January 2016. This warning was issued because the claimant had repeatedly failed to carry out the cleaning of the ladies changing rooms on the leisure centre despite this being a significant part of his job and being reminded to do so on more than one occasion. The full reasons for the disciplinary warning are contained at page 265 of the bundle. The claimant appealed this decision. Within the claimant's grounds of appeal he stated that:

> ..In relation to the female changing room the arrangement was that I would be allocated a specific period of time half an hour to clean the changing rooms. During this time no female club member hotel guest will be able to use the changing room while I am carrying out my duties.

58. The claimant states that there had been complaints since the signage on the changing room had been changed. This was denied by the respondent. The claimant complained that the current signage makes them vulnerable to be accused of something that did not happen. He did not feel protected by the signs. Therefore to protect himself and to avoid the risk of being brought to a criminal court for something that did not happen, he decided to stop cleaning the female changing room until a sign that protects him is put in place. An appeal hearing was held on 20 January 2016 and the respondent's decision was upheld. The reasons for the appeal decision is set out on page 271 of the bundle. The claimant resigned by letter dated 18 February 2016 at page 274 of the bundle. The resignation letter says:

> Following receipt of your letter on Friday, 12 February 2016 in relation to the outcome of the appeal hearing held on 28 January 2016, I am today submitting- in direct response - my resignation with immediate effect.
>
> The reasons of resignation are unfair treatment and less favourably treatment.
>
> During the period of my employment in this hotel I have not only been treated unfairly but also receive less favourable treatment in incidents and/or complaints involving other employees and I

> I have been brought to unfair disciplinary hearings and disciplined unfairly. The hotel management behaviour is in breach of part of my contract of employment. Your conduct has destroyed the basis of our working relationship therefore I have no alternative than to resign. I have been forced to leave my employment as a result of the hotel management's behaviour.

59. The claimant confirmed during cross examination that his position was and remains that he refused to undertake any cleaning of the ladies changing room in the absence of a sign that prevented ladies using the changing room while he was carrying out his duties.

Deliberations and Findings

60. We heard submissions from both the claimant and Mr Stevens. We also reviewed the evidence carefully in its entirety. For ease of reference we address each incident separately below.

The Floor Incident

61. There is no dispute in respect of the issues giving rise to the floor incident. The claimant confirms that there was no witness to the incident. Mr Pearson confirmed that he swore at the claimant had accepted that this was inappropriate. Mr Pearson apologised immediately and repeated that apology. Both the claimant and Mr Pearson raised their voices. Ms Rice told Mr Pearson that his behaviour in swearing at the claimant was inappropriate. No further disciplinary action was taken in respect of Mr Pearson. While swearing within the workplace is always inappropriate, Mr Pearson was open and apologetic in respect of his use of the swearword. Mr Pearson was asked to keep the matter confidential. The claimant was not informally reprimanded or disciplined in any way for raising his voice to Mr Pearson.

62. There is a dispute in respect of the meeting that the claimant claims happened on Friday, 20 June 2014. The claimant claims that this meeting was attended by Mr Pearson, the operations manager and Ms Rice. The respondent's witnesses have no recollection of that meeting. Considering the evidence as a whole, we find it more likely than not that no formal meeting occurred but that Ms Rice asked the claimant to keep the matter confidential. We consider that the respondent treated the claimant and Mr Pearson similarly in requesting that both employees keep the matter confidential.

63. It is correct that no formal disciplinary action was taken against Mr Pearson following the initial incident. We consider that the respondent's decision not to take disciplinary action against Mr Pearson was a reasonable one considering his immediate admission of using the swearword and immediate and repeated apology to the claimant. We do not accept that the claimant was treated less favourably than Mr Pearson. We have seen no evidence whatsoever that would suggest that this incident is in any way connected with the claimant's race or race discrimination.

64. We also address the limitation issue is raised by the respondent. And the sake of completeness we note that this part of the reasons was initially omitted from the judgment but added at the request of the respondent on the

day. A complaint of unlawful discrimination must be presented to an employment tribunal before the end of the three months beginning with the date of the act complained of in accordance with S123(1)(a) EqA. The time limits are applied strictly in employment cases, and there is no presumption in favour of extending time. We have found no evidence to support this allegation and the incident occurred in June 2014 nearly 2 years prior to the issue of the ET1 April 2016. We have had no explanation as to why the claimant failed to bring this allegation to the attention of the employment tribunal prior to this time. We are concerned that the passage of time and this particular scenario detrimentally affected the cogency of the evidence to the extent that it would not be possible to carry out a fair trial. The claimant has not convinced us that it is just and equitable to extend statutory time limit. From our review of the documentation available to us within the employment tribunal bundle, we do not consider that it would be just and equitable to do so. We conclude that the allegations are brought to our attention outside the statutory time limit and we have no jurisdiction to determine them.

The Leave Incident

65. We have considered the issues in relation to the leave incident carefully. There appears to be some inaccuracies within the respondent's correspondence and investigation. For example, the claimant had been in contact with the respondent during his period of leave. The claimant was willing to return to work as requested by the respondent but wished Oana to confirm that his leave would be carried over to the next holiday year. The claimant confirms within his own letter at page 147 that on Thursday, 19 March, Oana told him that he was required to come into work from Monday to 23 March because she had no one to cover the public area. Oana said that she could authorise the claimant to take Monday 30 and Tuesday 31 March holiday, but for the remaining days he would need to speak to Angela for clarification as to carrying over the days. The claimant refused to speak to Angela.

66. The claimant knew that the second part of his holiday leave had not been authorised by the respondent. The claimant's contract of employment provides that holidays taken without prior authorisation will not be paid and will leave to disciplinary action. We acknowledge the claimant's concerns in relation to the carryover of the holiday that he was unable to take and consider this to be a mitigating factor. We acknowledge that some of the circumstances in the lead up to the claimant taking his leave and his actual contact with the respondent are not accurately reflected within the respondent's notes. Again, we consider this to be a mitigating factor. However, we are of the view that the claimant breached the respondent's rules and as such we consider the respondent acted reasonably and following its disciplinary procedure. It is for the respondent to determine the weight given to the mitigating factors that the claimant raised. We consider that the correct course of action for the claimant in these circumstances would have been to attempt to discuss the matter with Angela as informed, rather than fail to return to work. While different employers may take a different view of the claimant's mitigating circumstances, we do not consider the respondents approach to be unreasonable in the circumstances or to constitute conduct on

the part of the respondent capable of contributing to a constructive unfair dismissal scenario. In reaching the decision we have noted that while a final written warning was awarded in respect of the leave incident, that warning was not relied upon during later disciplinary processes. We conclude that the respondent's actions in relation to the leave incident cannot reasonably be classified as action on the part of the respondent going to the root of the contract of employment which shows that the respondent no longer intends to be bound by the essential terms of the contract. These actions show that the respondent wants the parties to abide by the terms of the contract and the reluctance to rely upon cumulative disciplinary warnings following this incident, sure further desire on the part of the respondent to maintain the employment relationship.

The Cleaning Cupboard Memo

67. The claimant admitted in cross examination that he accepted Mr Pearson was his supervisor and that he respected Mr Pearson's position as his supervisor. However it is clear from the claimant's behaviour in relation to this memo that he did not accept Mr Pearson's position as his supervisor. We can identify nothing incorrect or unreasonable in respect of Mr Pearson's actions in forwarding this memo to the claimant. We consider the claimant's characterisation of Mr Pearson's actions as abusive and improper difficult to understand. We acknowledge that the claimant put his concerns in respect of Mr Pearson's actions in writing on at least four occasions and received no response to his letters. We can identify substance to the claimant's complaint in respect of Mr Pearson. In light of the subject matter of those letters and our view of Mr Pearson's actions, we do not criticize or consider it unreasonable for the respondent not to wish to become bogged down in written correspondence in respect of this issue. The respondent's proposal to deal with this matter by speaking to the claimant and the proposed meeting of 30 October appears to us to be a reasonable and sensible way for the respondent to seek to resolve the claimant's issues. We do not consider that this is an issue that can constitute or contribute in any way to any breach of the claimant's contract of employment or a constructive unfair dismissal scenario.

Ms Popescu

68. On 2 October the claimant had an incident with his supervisor miss Popescu. The claimant accepts that Ms Popescu was his supervisor. It is our opinion that the allegations raised by the claimant against Ms Popescu are unreasonable. The claimant's allegation that Ms Popescu had either deliberately lied and misrepresented the claimant's position to the night porters with a view to getting the claimant into trouble is unsupported by the evidence. It appears to us that if anything, Ms Popescu simply became confused as to what exactly the claimant was saying. It should be noted that the tribunal found it difficult to follow the claimant's rationale behind his complaints against Ms Popescu as the claimant had complained about the night porter.

69. The claimant acknowledged that Ms Popescu was his supervisor however it is clear that the claimant was unable to take direction from Ms Popescu. We

consider that the claimant's behaviour in alleging that Ms Popescu was somehow using her pregnancy to be unreasonable. The claimant's behaviour in laughing either at Ms Popescu or at the situation in the circumstances was undermining of Ms Popescu's position as supervisor and unkind.

70. In relation to the incident on 6 October, the claimant's behaviour in asking a colleague to question Ms Popescu's opinion, was in our view inappropriate and undermining of Ms Popescu's position as supervisor. We consider the use of the word disgusting not to constitute unreasonable behaviour. The claimant appears to become fixated on the use of the word 'disgusting' and attempts to debate. The claimant fails to recognise that even when his colleagues unnecessary input, that there are bits of paper on the floor, the end result is that the claimant should revisit and clean the toilets as requested by supervisor. There is no evidence that Ms Popescu was using her pregnancy in any way to disadvantage the claimant. We consider these allegations to be unreasonable and unkind on the claimant's part. We have seen no evidence that would support any allegation that Ms Popescu's actions could reasonably be classified as bullying. It is the case that disciplinary proceedings were taken against the claimant and no disciplinary proceedings were taken against Ms Popescu. We find that the respondent acted reasonably in meeting with both employees to gain an understanding of the circumstances. From reading the notes of this meeting it is obvious to us that there is no reason to pursue any disciplinary action against Ms Popescu as she was merely trying to do her job under difficult circumstances. However, the claimant actions appear unreasonable and in our opinion warrant further investigation under the disciplinary process.

71. Ms Popescu and the claimant were treated differently by the respondent because of their job roles and their conduct. There is no evidence whatsoever to support any claim that the claimant was less favourably treated than Ms Popescu on the grounds of race. We note that the claimant cannot be compared directly to miss Popescu as there is a material difference in their circumstances in that Ms Popescu is the claimant's supervisor and it is her job to ensure that the cleaning is carried out correctly.

72. We note that there is no evidence to suggest that any hypothetical comparator would be treated in any different way to the claimant. The reason for the claimant's treatment related to his job role and his conduct towards his supervisor Ms Popescu. We do not consider that the circumstances are capable in any way of constituting less favourable treatment on the grounds of race or, causing or contributing to a breach of the claimant's contract of employment or any factual matrix that could result in the claimant's constructive dismissal.

<u>The Grievance Letter</u>

73. We consider it more likely than not that had Ms Humphris been aware that the claimant had submitted the Grievance Letter she would have responded to the same. We find it more likely than not that while the claimant submitted his Grievance Letter, this somehow became lost within the respondent.

74. We note that by the time the claimant submitted his Grievance Letter the claimant had submitted a large volume of letters to the respondent complaining about Mr Pearson. We consider these previous complaints to have had no substance. It is possible that these previous letters complaining about Mr Pearson added to the confusion whereby the Grievance Letter, again complaining about Mr Pearson may have been lost.

75. In light of our findings that the Grievance Letter was somehow mislaid by the respondent, it follows that we find that the respondent's omission in dealing with this letter was not caused by any conscious decision not to deal with the claimant's grievance but because the relevant people within the respondent, had not had sight of that Grievance Letter. We acknowledge the confusion in respect of the meeting of 30 October. It is clear to us, from listening to the claimant's evidence and in light of the volume of correspondence and the number of complaints in respect of Mr Pearson that the subject matter of the Grievance Letter (being complaints about Mr Pearson) may have been discussed without reference to or knowledge of the actual grievance letter on the part of the respondent.

76. We comment on the subject matter of the Grievance Letter as it is said to constitute part of the factual matrix culminating in the claimant's constructive unfair dismissal . The grievance letter relates to two mobile phone incidents.

77. There is a difference of interpretation between the claimant and Mr Pearson in respect of constitutes a public space. In our view the claimant has misunderstood the respondent's position. In our opinion, the reception desk is clearly within a public space. This can be distinguished from a desk within a private office. The claimant behaved unreasonably then he refused to inform Mr Pearson of the identity of the manager told him otherwise.

78. The real matter of contention on the claimant's part in respect of both of these incidents complained of within the Grievance Letter is the behaviour of Mr Pearson. The claimant complains that Mr Pearson was aggressive. Mr Pearson was not cross-examined on this point as the claimant considered it was simply one word against the other. However we note that in relation to the floor incident, where Mr Pearson's behaviour was inappropriate, regardless of the fact that the appeared to be no witnesses to his behaviour, he admitted his behaviour and apologised immediately. We also note that Ms Rice's evidence was that Mr Pearson was even-tempered and "it would take a lot to wind him up". For these reasons, on the balance of probability, we prefer Mr Pearson's evidence that he did not behave aggressively or inappropriately towards the claimant during the two mobile phone incidents complained of by the claimant within the Grievance Letter.

Signage

79. The claimant admitted during cross examination that he had previously cleaned the ladies changing rooms during an allocated time, however when ladies wish to use the changing rooms he would leave. The claimant was clearly of the opinion that the allocated time give the impression to the ladies that the changing room was closed and the ladies in turn tended to avoid that

time. We accept that when the sign was changed to remove the allocated time, that more ladies may well have used the changing while the claimant was trying to clean it. However, at no time when the claimant was required to clean the ladies changing room was that changing room closed to guests and members wishing to use it.

80. The respondent's consistent position was that should a guest remember wish to use the changing room while the claimant was cleaning it, the claimant was obliged to quickly pack his cleaning materials and leave the changing room. This was normal procedure within the respondent and Ms Rice acted similarly when cleaning the male changing rooms. We heard from Ms Rice that this was standard practice across the industry. We can see no basis for the claimant's allegation that he was expected to remain in the changing room when ladies were changing or having their shower. This was simply not the case as the respondent expected the claimant to leave the changing room when it was being used. We heard no evidence to adequately explain why the claimant, having worked under the system for a long period of time decided the signage was now insufficient to protect him. We do not accept as reasonable, the claimant's claim that the respondent's instructions leaves him unprotected or open to some form of criminal prosecution.

81. The claimant was contractually obliged to clean the leisure club. The respondent's stance was reasonable in that it would be unreasonable to expect leisure club members to wait by the poolside while cleaning was undertaken. Regardless of the nuances of the issue, the respondent reasonably refused to allow any sign that effectively closed, or in practice prevented or discouraged women from using the changing rooms at any specific time. The claimant made clear in both his written evidence and his evidence to the employment tribunal that he refused to clean the ladies changing rooms unless they were closed to ladies to allow him to clean. The sign, objected to by the claimant, that was in use by the leisure club clearly announced to the members that the claimant was present and would leave should they wish to use the facilities. While this may well have caused inconvenience to the claimant and slowed his cleaning, it was a wholly reasonable request from the respondent. We accept the respondent evidence that they had not received any complaints due to the claimant cleaning the female changing rooms. We note that we heard a considerable amount of evidence in relation to missing signs however we consider that evidence to be an irrelevance to the issues we were required to determine.

82. The claimant's evidence in respect of his refusal to work unless the respondent change the signage was very clear. The respondent's refusal to change signage to that requested by the claimant was reasonable. The parties had reached an impasse and we cannot see how the claimant could have continued within his position. It was open to the claimant to resign from his position, and he did so. Had the claimant not resigned from his position, we consider it very likely, in light of the claimant's clear evidence that he would have continued to refuse to clean the ladies changing rooms using the respondent's current signage, that the respondent would have proceeded with

further disciplinary proceedings that, in the absence of a change of heart on the claimant's part, would have resulted in his dismissal.

83. While the claimant was entitled to resign from his position, considering the evidence in this matter carefully we are unable to identify any matters that would either individually or cumulatively amount to any breach of contract or repudiatory breach of contract on the part of the respondent. There is no evidence of any action or omission on the part of the respondent that could lead us but to believe that the respondent is guilty of conduct which is a significant breach going to the root of the contract of employment or indeed any breach of the claimant's contract. There is no evidence to show that the respondent no longer intended to be bound by one or more of the essential terms of the contract. Indeed, we have noted that there were potential opportunities for the respondent to escalate the disciplinary process, however it chose not to. We appreciate that the claimant holds genuine views to the contrary however the test in respect of a constructive unfair dismissal is an objective one not a subjective one. In the circumstances, the claimant's claim for constructive unfair dismissal must fail.

84. Within the claimant's Grievance Letter, the final paragraph reads, "*I would make it clear, I am not accusing any particular individual or any manager of being a racist. I do not think there is any manager in this hotel as racist. Not as I am aware of. But the way they handle the issues, it makes some group of people to be in favourably position over others. Or it has created a first and second-class employee. This is the issue here and this is the reason of my grievance".* The claimant was insistent during the hearing, as can be seen from the wording of the issues, that it was not the individuals working within the respondent organisation that he considered to have treated him less favourably on the grounds of his race but the respondent itself. We have examined all of the circumstances and the evidence in this matter carefully and we are unable to identify any circumstances or evidence that would support any allegation that the claimant was less favourably treated by the respondent or any individual within the respondent on the grounds of race. We conclude that the claimant's claim for direct race discrimination must fail.

_____
Employment Judge Skehan

Date: ……7 August 2017……..
Sent to the parties on: .....
.....
For the Tribunal Office