EMPLOYMENT TRIBUNALS

Claimant: **Mr C Olaniyan**

Respondent: **Royal Mail Group Ltd**

Heard at: **Ashford, Kent** **On: 31 July 2017 and 1, 2 and 3 August 2017**

Before: **Employment Judge Wallis**
Members: Mr D Clay
Mr S Sheath

Representation
Claimant: In person
Respondent: Mr J McArdle, legal executive

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The Respondent is ordered to pay the Claimant £1,268.80 (net) in respect of accrued holiday pay;

2. The other claims are unsuccessful for the reasons set out below, and are dismissed.

REASONS

Brief oral reasons were given at the end of the hearing to ensure that there was sufficient time to consider the holiday pay claim remedy. Accordingly, we told the parties that we would provide detailed written reasons.

Issues

1. By a claim form presented on 2 November 2016 the Claimant claimed unfair constructive dismissal; race discrimination; disability discrimination; notice pay and holiday pay.

2. At a case management discussion on 6 March 2017, at which the Claimant was represented, the issues were agreed as follows (using the case management order numbering). Some of the claims were amended slightly by the Claimant at he start of the hearing, with no objection from the Respondent:

Section 13: Direct discrimination on grounds of race

2.1 Has the Respondent subjected the Claimant to the following treatment falling within section 39 of the Equality Act 2010 namely:

2.1.1 Mr Andy Townsend, the Claimant's line manager, withdrew training from the Claimant on 6 February 2016. The training was a course for FSM operators. The Claimant relies upon section 13(5) of the Equality Act 2010 in this regard (NB amended by the Claimant at the start of the hearing, see below, in respect of each iteration of this claim);

2.1.2 On 20 February 2016 Mr Townsend replaced the Claimant with another employee on the training course entitled 'Intelligent Letter Sort Machine operators course'. The Claimant relies upon section 13(5) of the Equality Act 2010 in this regard (NB amended by the Claimant at the start of the hearing, see below, in respect of each iteration of this claim);

2.1.3 On 25 February 2016 Mr Townsend made a comment to the Claimant describing the Claimant as 'a black lazy bastard';

2.1.4 On 18 April 2016 Ms Sue Knight-Smith carried out an inefficient investigation into allegations made by the Claimant against Mr Townsend. It was inefficient in that it took too long and it failed to

properly investigate the Claimant's allegation that Mr Townsend made the comment set out in paragraph 2.1.3 above;

2.1.5 On 31 May 2016 Ms Knight-Smith provided the outcome to the Claimant's grievance hearing in which she refused to acknowledge that the Claimant had suffered discrimination;

2.1.6 On 21 June 2016 Ms Knight-Smith selected a witness to the grievance, Mr Ian Bradley, to be the chair of the Claimant's grievance appeal hearing;

2.1.7 On 5 August 2016 Mr Dave Martin refused to state which elements of the Claimant's appeal were upheld;

2.1.8 On 11 September 2016 Mr Martin dismissed the Claimant's appeal.

2.2 Has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated the comparator? The Claimant relies upon a hypothetical comparator.

2.3 If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

2.4 If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

3 Section 27: Victimisation

3.1 Has the Claimant carried out a protected act? The Claimant relies upon the following:

3.1.1 A complaint that the Claimant made in 2012 about Mr Townsend;

3.1.2 The Claimant's complaint of race discrimination in the grievance dated 8 April 2016.

3.2 If there was a protected act, has the Respondent carried out any of the treatment set out below because the Claimant had done a protected act?

3.2.1 Mr Andy Townsend, the Claimant's line manager, withdrew training from the Claimant on 6 February 2016. The training was a course for FSM operators;

3.2.2 On 20 February 2016 Mr Townsend replaced the Claimant with another employee on the training course entitled 'Intelligent Letter Sort Machine operators course';

3.2.3 On 21 April 2016 the Claimant was told by Mr Gary Ware to report to Mr Townsend.

3.3 The Claimant says that the treatment set out in paragraphs 3.2.1 and 3.2.2 was because of his 2012 complaint. He says that the treatment set out in paragraph 3.2.3 was because of the 2016 complaint.

Section 19: Indirect Discrimination on grounds of Disability

4. Does the Claimant have a physical or mental impairment namely depression?

   (It is admitted by the Respondent that the Claimant has type II diabetes and that this amounts to a disability. For the purposes of this claim, the Claimant only relies upon his depression.)

5. If so, does the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

6. If so, is that effect long term? In particular, when did it start and:

   6.1 has the impairment lasted for at least 12 months?
   6.2 is or was the impairment likely to last at least 12 months?

7. Are any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

8. Did the Respondent apply the following provision, criteria and / or practice ('PCP') generally, namely:

   8.1 attending work on a full time basis;
   8.2 retaining ongoing management contact with an employee on sick leave.

9. Does the application of the PCP put other disabled employees at a particular disadvantage when compared with persons who do not have this protected characteristic?

10. Did the application of the PCP put the Claimant at that disadvantage in that:

    10.1 the Claimant could not attend full-time. He had been absent since February 2016 and was not well enough to return to work on 4 April 2016 when he was told by the Mail Manager, Gary Ware, to come back to work;

    10.2 the Claimant was absent through illness from September 2016 and was called by Mr Ware persistently on 5 October and was sent text messages by him on that date seeking to enquire as to when he would return to work. On 25 October, Mr Ware informed the Claimant that his salary would be reduced because of his absence on sick leave.

11. Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

Unfair Constructive Dismissal – sections 95(1)(c) and 98 Employment Rights Act 1996

12. The Claimant relies upon the following alleged repudiatory breaches:

12.1 Mr Andy Townsend, the Claimant's line manager, withdrew training from the Claimant on 6 February 2016. The training was a course for FSM operators. The Claimant relies upon section 13(5) of the Equality Act 2010 in this regard;

12.2 On 20 February 2016 Mr Townsend replaced the Claimant with another employee on the training course entitled 'Intelligent Letter Sort Machine operators course'. The Claimant relies upon section 13(5) of the Equality Act 2010 in this regard;

12.3 On 25 February 2016 Mr Townsend made a comment to the Claimant describing the Claimant as 'a black lazy bastard';

12.4 On 18 April 2016 Ms Sue Knight-Smith carried out an inefficient investigation into allegations made by the Claimant against Mr Townsend. It was inefficient in that it took too long and it failed to properly investigate the Claimant's allegation that Mr Townsend made the comment set out in paragraph 2.1.3 above;

12.5 On 21 April 2016 the Claimant was told by Mr Gary Ware to report to Mr Townsend.

12.6 On 31 May 2016 Ms Knight-Smith provided the outcome to the Claimant's grievance hearing in which she refused to acknowledge that the Claimant had suffered discrimination;

12.7 On 21 June 2016 Ms Knight-Smith selected a witness to the grievance, Mr Ian Bradley, to be the chair of the Claimant's grievance appeal hearing;

12.8 On 5 August 2016 Mr Dave Martin refused to state which elements of the Claimant's appeal were upheld;

12.9 On 11 September 2016 Mr Martin dismissed the Claimant's appeal;

12.10 The Claimant had been absent from work since February 2016 and was not well enough to return to work on 4 April 2016 when he was told by the Mail Manager, Gary Ware, to come back to work;

12.11 The Claimant was absent through illness from September 2016 and was called by Mr Ware persistently on 5 October and was sent text messages by him on that date seeking to enquire as to when he would return to work.

12.12 On 25 October, Mr Ware informed the Claimant that his salary would be reduced because of his absence on sick leave. The Claimant relies upon this incident as amounting to the 'final straw'.

13. Do any of the above allegations, if made out on the facts, amount to a repudiatory breach of contract? In particular,

    i. Was the treatment without reasonable and proper cause?

    ii. Was the treatment, when objectively viewed, calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Second Respondent and the Claimant?

    iii. Did the Respondent, by its actions, indicate an intention to abandon and altogether refuse to perform the contract?

    iv. Does the matter set out in paragraph 12.12 above have the essential quality of a 'last straw'?

14. If so, did the Claimant resign in response to the Respondent's repudiatory breach of contract?

15. Did the Claimant expressly or impliedly affirm the contract by actions and / or material delay, indicating an intention to continue to be bound by it subsequent to the breach such that he 'waived' the breach and treated the contract as continuing?

16. If the Claimant was dismissed, was the dismissal fair in all the circumstances?

17. If not, would the Claimant's employment have been fairly terminated in any event and if so, when (Polkey)?

18. Did the Claimant cause or contribute to his dismissal by reason of his conduct? If so, what reductions should be made to any award to which the Claimant may be entitled?

Documents and Evidence

3. We had an agreed bundle prepared by the Respondent and during the course of the hearing we accepted one or two other documents including payslips in respect of the Claimant's employment in 2016 and his sick pay in 2016. We had written statements from each of the witnesses. We also had written submissions from the parties which were augmented by oral submissions.

4. We heard evidence from the Claimant himself Mr Charles Olaniyan.

5. We then heard from the Respondent's witnesses Mr Andrew Townsend, Work Area Manager and the Claimant's Manager; Mr Garry Ware, a Work Area Manager; Ms Sue Knight-Smith, Independent Casework Manager; and Mr Dave Martin, Independent Casework Manager.

Findings of Fact

6. The Respondent is a well-known national organisation responsible for delivering letters and parcels. The Claimant was employed as a casual worker from 2011 and as an employee from 28 October 2013. The Respondent accepted that the Claimant was disabled by reason of diabetes. There was a dispute about whether he was disabled by reason of depression, inasmuch as the Respondent questioned whether the statutory definition was satisfied at the material time, by reference to the potential length of the condition.

7. At the time of his resignation, the Claimant worked at the Medway Mail Centre, sorting letters and parcels for onward distribution by a variety of methods, both manual and by machine. There is no dispute that he worked a part-time shift pattern of around thirty hours each week.

8. From around 2014 the Claimant's manager was Mr Townsend. It was Mr Townsend's evidence that his team of forty employees, including the Claimant, was made up of around thirty percent non-white employees and seventy percent white employees.

9. The Claimant explained to the Tribunal that Mr Townsend had been helpful to him when the Claimant had become homeless and had provided references to landlords and so on. However, it was the Claimant's evidence that for much of the time Mr Townsend criticised the Claimant's performance, called him slow and lazy in front of other staff and made him feel so desperate about the situation that he felt it necessary to report his whereabouts to colleagues even when he went to the toilet. He said that Mr Townsend would regularly call him over the tannoy and suggested that he had been unable to find the Claimant, which caused the Claimant embarrassment. One of the key points in the case for the Tribunal to decide was whether or not Mr Townsend had acted in this manner. We considered this first, before we considered the specific complaint about the racially discriminatory remark.

10. We began by noting that the Claimant was off sick with depression between 9 and 15 October 2015. His evidence was that he began taking anti depressant medication then, and he stopped that medication in January 2016. In November 2015 we accepted the Claimant's evidence that he went to Mr Townsend's manager Mr Bradley and sought help for the treatment that he was receiving from Mr Townsend. He asked to be moved to a different section. Regrettably, the Tribunal noted that the Claimant had told Ms Knight-Smith about this when she investigated his complaint (see below) but she did not ask Mr Bradley about that incident. Mr Bradley simply told Ms Knight-Smith that he had "had some dealings with the Claimant". However, another witness, Mr Grewal, confirmed that Mr Bradley had come and spoken to the Claimant and Mr Townsend. Unfortunately, the treatment continued.

11. In order to decide the type of treatment, we looked at the witness evidence collected during the investigation of the Claimant's subsequent bullying and harassment complaint. We thought it worthwhile to set out in summary what the witnesses had told Ms Knight-Smith, in order to give a flavour of

the atmosphere within the team. Ms Knight-Smith interviewed eight of the witnesses named by the Claimant. Mr McLeish said that he had not witnessed anything. Ms Stacey Harris, who was the Trade Union representative within the team, said that she had not heard Mr Townsend make racial comments; she had heard him swear but not at people; she had told Mr Townsend to discuss matters about performance privately with the Claimant; she noted that Mr Townsend was "always checking on" the Claimant; she had seen Mr Townsend throw packages at the Claimant; she had not heard the Claimant called over the tannoy, although she often worked in the Trade Union Office; she did not hear him call the Claimant lazy but thought that he probably would not do so in front of her; she recalled an unpleasant comment that Mr Townsend had made in respect of a colleague's pregnancy; she said that Mr Townsend had suggested that he would remove the bonus given to her; she described Mr Townsend as having a changeable mood and she described the Claimant as a good worker.

12. Ms Pat Nelson-Corbin said that she had been upset by Mr Townsend's approach and later when she complained about it he had denied everything that he had said; she agreed that he constantly checked on the Claimant; she said that he was often looking for the Claimant but she did not hear him use the tannoy; she heard him refer to the Claimant as lazy on one or two occasions, but had not seen him do so to the Claimant's face; she did not hear any racial abuse on 25 February but the Claimant had told her about it. She said that Mr Townsend often upset people.

13. Mr Uzman Iljaz said that Mr Townsend sometimes seemed stressed but did not often swear; he had heard the Claimant described as slow but not lazy; he had seen an argument between the two of them on 25 February but did not hear the words. He said that later the Claimant had been tearful and stressed; he had never heard racist comments made by Mr Townsend.

14. Mr Sam Quartey said that Mr Townsend was "a big problem" and that he "swears a lot"; he said that the Claimant often told Mr Quartey when he was going to the toilet because he was worried about repercussions from Mr Townsend; he said that he heard the Claimant called by Mr Townsend over the tannoy once or twice each month and he had heard Mr Townsend call the Claimant lazy on one or two occasions to his face. He had also heard Mr Townsend threaten to sack the Claimant and said that he spoke to him like a child.

15. Mr Ranjit Grewal said that Mr Townsend was not a good manager; that he often saw Mr Townsend and the Claimant arguing; he said that the Claimant did sometimes disappear but that Mr Townsend handled it poorly in front of others; he had heard the Claimant called on the tannoy once or twice; he had never heard any racial comments.

16. A witness who was described as anonymous, but who then signed their statement, said that the Claimant had reported to him that Mr Townsend had sworn at him; he said that Mr Townsend was very unpredictable; he had seen Mr Townsend shout at the Claimant in a temper and that caused the Claimant to panic; he suggested that the Claimant had lied to Mr Townsend in order to get out of trouble; he said that Mr Townsend would

berate the Claimant on the floor in front of others and not privately. He had heard Mr Townsend use the tannoy once or twice to call the Claimant and that the Claimant was often in the toilet when Mr Townsend was looking for him. He described the Claimant as a "plodder" but he said he did a good job. He said that the Claimant had told him that a racist comment had been made on 26 February but he did not hear it himself and had not heard any other racist comments. He said that he had heard Mr Townsend call the Claimant lazy to his face and that he himself had told Mr Bradley that the swearing needed to stop.

17. Ms Evelyn Adekoya said that Mr Townsend had a hot temper and did not know how to speak to staff. She said that the Claimant and Mr Townsend argued nearly every day and she had seen Mr Townsend constantly monitoring the Claimant. She had not heard the words lazy or bastard. She had heard the tannoy used once or twice but had never heard any racist language.

18. Having considered all of the evidence gathered by Ms Knight-Smith, the Tribunal found that the Claimant's evidence about the way in which Mr Townsend spoke to him, calling him slow and lazy in front of others, constantly monitoring his work, using the tannoy to find him, was accurate. We come later in the chronology to the alleged racist remark.

19. The Claimant was invited to training on the FSM/T2K machine on 6 February and 13 February. An email in the bundle from the Production Supply Manager dated 15 January 2016 showed the Claimant's name as one of those selected for training. There was also an email showing that his name was on the list for training on 20 and 27 February as well.

20. The Claimant attended the training on 6 and 13 February. It was his evidence that he then received a letter saying that he was no longer to be trained on the 20 and 27 February. The Tribunal was not shown the letter, but apparently it said that the reason(s) for the cancellation was/were either that the course had been cancelled, that the Claimant or his manager had withdrawn him from the course, or that the trainer was not available. He therefore telephoned the resources office because he thought that none of the reasons applied to him. He was told that he was no longer on the course. In evidence, Mr Townsend denied that he had removed the Claimant's name from that course. The Claimant decided to attend the course and noted that everyone who had been on the course on 6 and 13 February was present, with another person there replacing the Claimant. As the Claimant was not on the list of attendees, he was not allowed to participate. The Tribunal had no documentary evidence as to why the Claimant was removed from the course list. There was nobody from the Respondent's side who could help the Tribunal about this decision.

21. In considering this allegation, the Tribunal noted that originally the Claimant's claim had been that Mr Townsend had withdrawn him from the course but he changed that on the first day of the hearing, when we were discussing the issues, to say that the Respondent had withdrawn him from the course. The Tribunal accepted that this created some difficulties for the Respondent as they had not prepared their evidence on that basis, although they did not object to that amendment. The Tribunal accepted Mr

Townsend's evidence that he was not involved in allocating training; it was clear from the email that we did have that Ms Wilmot was the person who allocated the training. However, in the absence of any other evidence we were unable to make any finding as to why or how the Claimant's name was withdrawn. We noted that Mr Townsend had suggested that it would be unusual for an employee to attend training on both machines within a short period of time. However, that evidence was not persuasive because it was clear from the Claimant's evidence of who was attending on 20 and 27 February, and indeed from the emails in respect of attendees for that course, that the same persons were on the list as had attended with the Claimant on 6 and 13 February.

22. On 25 February 2016 Mr Townsend placed the Claimant on an unfamiliar and time critical duty and the Claimant did not realise that he should deliver letters to another part of the team immediately and should not wait for the container to fill up completely. It was the Claimant's evidence that Mr Townsend was furious at the delay and called him a "black lazy bastard". The Claimant was insistent that this was the order in which the words were said.

23. The Tribunal had to decide whether Mr Townsend had said that to the Claimant. We noted that Mr Townsend vehemently denied that he had done so. The Claimant said that Mr Iljaz had overheard that comment, but when he was asked about it by Ms Knight-Smith, he said that he did not hear it. Ms Harris when she gave her evidence to Ms Knight-Smith said that the Claimant had reported the incident to her immediately and said that the comment made to him was "fucking lazy bastard" and did not mention that the word 'black' had been used.

24. Ms Nelson-Corbin and the anonymous witness told Ms Knight-Smith that later the Claimant had told them about that comment and included the word 'black' and was very distressed.

25. We also noted that Mr Townsend had made a note to himself on 19 April 2016 that a black manager, Mr Stanley Harris, had spoken to Mr Townsend on that day and told him that the Claimant had asked Mr Harris to support the Claimant's case that Mr Townsend had used that language. Mr Townsend recorded in his note that Mr Harris had said that he knew that Mr Townsend would never say anything like that and that he had never heard Mr Townsend use that kind of language. Mr Townsend told Ms Knight-Smith about this when she interviewed him.

26. Having weighed up all of that evidence, the Tribunal found that the weight of evidence was against the Claimant in respect of that comment. Although Mr Townsend told the Tribunal that he never used the word "bastard", the evidence of almost all of the witnesses was that he was hot tempered, did not speak to employees in a proper manner, and often used swear words. The Tribunal found that the Claimant was called a lazy bastard by Mr Townsend on that day and that quite possibly, in addition, the "f" word was added to that epithet, at a time when Mr Townsend was angry about the perceived delay and stressed about time constraints. The other managers interviewed by Ms Knight-Smith made a point of talking about the time critical nature of the work done by Mr Townsend's team.

27. On balance, the Tribunal was satisfied that Mr Townsend did not use the word 'black' when hurling abuse at the Claimant.

28. The Claimant rang the bullying and harassment helpline on 26 February 2016 and he was sent a form to complete. He also went to his GP and was given some new anti-depressant medication. He sent his complaint to the Respondent and it was received on 8 April 2016. The Claimant commenced sick leave on 26 February 2016.

29. On 11 March 2016 the Claimant met with a senior manager and his trade union representative and he reported his concerns about Mr Townsend. He was told that they would be investigated. As far as the Tribunal could ascertain, no action was taken. The Tribunal was in no doubt that the Claimant felt unsupported by the Respondent and it was not unreasonable for him to decide to pursue the bullying and harassment complaint by making a formal complaint.

30. He was examined by the occupational and wellbeing practitioner on 1 April 2016 by way of a telephone assessment. It was noted that he was suffering from stress and depression. The certificate from his GP did not expire until 28 April 2016 and the GP told the practitioner that he was possibly not ready yet to return to work. However, the Claimant wanted to return to work and he did so on that day. The wellbeing practitioner recommended a phased return and the Tribunal was satisfied that the Respondent provided that by starting the Claimant on reduced hours which increased gradually each week.

31. We noted that the counselling practitioner described the Claimant as suffering severe levels of psychological disturbance and moderate to severe depression. There was no doubt that he was unwell.

32. Because the Claimant had made a complaint about Mr Townsend, he was asked to report to Mr Ware on his return to work, and so it was Mr Ware who carried out the welcome back meeting and he was assigned to look after the Claimant's attendance. The Claimant was then placed to work with Mr Jason Cruikshank in a team away from Mr Townsend. The Claimant suggested that Mr Ware had insisted that the Claimant return to work on 1 April 2016. The Tribunal found that there was no evidence that he did so and that in fact the documentary evidence at the time, recorded by the wellbeing practitioner, was that the Claimant himself wanted to return to work on that date.

33. Mr Ware sent a letter to the Claimant on 11 April 2016 asking him to attend a meeting about his attendance on 14 April. It was a template letter and although the letter was signed by Mr Ware and the letter referred to meeting "me" the reply slip was addressed to Mr Townsend. The Tribunal accepted Mr Ware's evidence that this was his error and that in amending the template he had omitted or overlooked the fact that the reply slip showed Mr Townsend's name. The Tribunal found that the letter was not an instruction to the Claimant to report to Mr Townsend, as the Claimant had claimed.

34. The Claimant complained to the Tribunal that after a few days with Mr Cruikshank he was asked to work with another manager, but he was unable to do that work, he complained about that and he was immediately returned to Mr Cruikshank's team. The Tribunal found that nothing turned on that.

35. The Claimant raised seven points in his complaint to the Respondent. He said that he was ridiculed in front of his colleagues and that parcels had been slammed at him by Mr Townsend. He said Pat was present at the time. The Tribunal noted that Ms Knight-Smith did not ask Pat about that, although as noted above Ms Harris confirmed without prompting that this had happened. He also said that he was called a liar.

36. Secondly, he said he was picked on by Mr Townsend and he suggested Mr Pat Kelly would be a witness to an incident when Mr Townsend argued with the Claimant over when he had signed in and Mr Kelly had supported the Claimant. Regrettably, Mr Knight-Smith did not investigate this.

37. Thirdly, the Claimant said that Mr Townsend set the Claimant up for failure, gave him jobs suitable for two or three people, shouted at him and called him a "lazy bastard". Ms Knight-Smith asked no questions about that of the witnesses.

38. Fourthly, he said that he had had surgery on his back in October 2015 and despite telling Mr Townsend, he was still given a difficult assignment which had caused the wound to bleed. He said that Mr Quartey had helped him to re-dress his wound. Again, regrettably, Ms Knight-Smith did not ask Mr Quartey about that.

39. Fifthly, the Claimant said that Mr Townsend made comments to colleagues about the Claimant, that he had threatened his job, and in the Claimant's view his attitude was because the Claimant was black, because he did not say it to others. Again, regrettably, Ms Knight-Smith did not follow this up with the witnesses that she interviewed.

40. Sixthly, the Claimant complained that he had been to the senior manager about Mr Townsend and nothing was done, that he felt he had to tell colleagues when he went to the toilet because of the way Mr Townsend monitored him and that Mr Townsend told him that he was causing the team to fail. Ms Knight-Smith did not ask the witnesses about that in any detail either.

41. The Claimant's last point was in respect of the comment that he said had had been made to him on 25 February 2016. The Tribunal noted that the Claimant ended his complaint on a positive note and said that he "believed the issues will be resolved soon".

42. On 18 April 2016 he was interviewed by Ms Knight-Smith who had been appointed to investigate his bullying and harassment complaint. The Tribunal was able to read the notes of that meeting. The Tribunal noted that the Claimant gave a detailed account of Mr Townsend's treatment of the Claimant and he gave the names of potential witnesses. One of his additional details was that Mr Townsend had asked him if he could speak English properly and he said that Mr Quartey had witnessed that. The

Tribunal considered that that this should have rung alarm bells and should have been investigated, but unfortunately Ms Knight-Smith did not ask Mr Townsend or Mr Quartey about that allegation.

43. The Claimant was sent the notes of that investigation meeting and he added some comments which he sent back to Ms Knight-Smith.

44. On 22 April 2016 Ms Knight-Smith interviewed Mr Townsend. She summarised the Claimant's complaint into three issues. Firstly, "subjecting him to ridicule in front of his colleagues by criticising his work performance and making excessive use of the tannoy system to locate him"; "regularly calling him a lazy bastard and on 25 February calling him a black lazy bastard"; and "victimising him by subjecting him to continual negative scrutiny". The Tribunal found that this summary omitted some of the concerns raised by the Claimant and it was possibly that incomplete summary which led to a very poorly completed investigation. Having read the notes of the interview with Mr Townsend, the Tribunal found that Ms Knight-Smith did not put the Claimant's specific points to him, despite a wealth of detail being provided by the Claimant. It appeared that Ms Knight-Smith simply accepted Mr Townsend's denial that he had done anything about which the Claimant complained.

45. Meanwhile, Mr Ware finally met with the Claimant on 21 April 2016 to review his attendance and he decided not to follow any formal action under the attendance management procedure at that stage. He sent a letter to the Claimant on 25 April confirming his decision.

46. Ms Knight-Smith interviewed eight witnesses named by the Claimant and three managers, Mr Bradley, Mr Townsend's manager Mr Mole, and Mr Ware on 12 May 2016. The Tribunal were able to read the notes of those interviews. She then wrote to the Claimant on 18 May enclosing the notes of the interviews with the witnesses and allowing him to comment within five days. She also sent the notes of her interview to Mr Townsend. The Claimant set out a number of comments and sent them back to Ms Knight-Smith under cover of a letter of 23 May 2016. It was Ms Knight-Smith's evidence that she did not receive that until 31 May because she was not often in her office. The complaint to the Tribunal was that she had made her decision about the complaints before she saw the Claimant's comments. The Tribunal noted that her report was dated 27 May 2016 and it says that she reached her conclusion on 23 May 2016. However, it also sets out that she then received the Claimant's comments after she had made the decision, had read them, and had decided that they had not made any difference to her conclusion. The Tribunal accepted therefore that she had considered the Claimant's comments before finalising her report.

47. She sent the report to the Claimant under cover of a letter of 31 May 2016. She upheld two of the three summarised complaints. The "subjecting him to ridicule" complaint was partly upheld in as much as the report suggests that the tannoy was not used unnecessarily or excessively but comments may have been made about the Claimant, but not to him, and "although it would clearly be unworkable and unnecessary for every discussion between manager and OPG to take place away from the floor it seems highly likely that some discussions between the two parties might have been better to

have taken place elsewhere. From the comments made by witnesses it would appear that some of these discussions were about Mr Olaniyan's performance and as such it is reasonable to suppose that this happening within the earshot of colleagues might lead him to feel uncomfortable."

48. In respect of the second summarised complaint, she considered that comments such as lazy or slow would "not necessarily" be made directly to the Claimant but "I think it is possible that Mr Townsend had made negative comments about Mr Olaniyan and that he was aware of that." She considered that there was nothing to support the complaint that Mr Townsend had made a racially offensive comment. She upheld the complaint in part, presumably, although it is not clear, because she accepted that some comment such as lazy or slow were made to the Claimant.

49. The third summarised complaint about victimising the Claimant by subjecting him to continual negative scrutiny was not upheld. She found that Mr Townsend's close supervision of the Claimant was in the circumstances appropriate. This seemed to be based on her finding that there were occasions when Mr Olaniyan might become distracted or not fully appreciate the time constraints.

50. In her conclusions, Ms Knight-Smith noted that Mr Townsend worked under a lot of pressure, as did his team. She did not consider that the complaint had been made in bad faith. She accepted that the Claimant was genuinely distressed by the incident on 25 February and "there have been occasions where Mr Townsend has not dealt with situations in the best possible way." She considered that Mr Townsend had not deliberately sought to embarrass or harass Mr Olaniyan. "I do however conclude that certain of his actions might be interpreted in that manner and for that reason I have partly upheld two elements of the complaint". She recommended "this matter be resolved through formal counselling." She did not say who would be counselled or when, or by whom. She also recommended that if the Claimant was to return to Mr Townsend's work area then some form of mediation should take place before any move happened.

51. The Tribunal noted that the bullying and harassment policy of the Respondent provides that Ms Knight-Smith should have met with the Claimant and with Mr Townsend to communicate the outcome of the investigation and any action to be taken. She failed to do so. The Tribunal found that meeting with the Claimant, explaining the report, the evidence that she had gathered and the way in which she had come to her decision and which parts of the complaint had been upheld, and how action was to be taken in respect of counselling would have been extremely helpful to the Claimant in understanding the outcome. It was not surprising that the Claimant was not satisfied with the outcome, when it was so difficult to understand.

52. The Tribunal had a number of criticisms of the investigation and the report. The Claimant's complaints were summarised in a way that omitted a number of his concerns. The witnesses were not asked about the specific details that the Claimant gave in his written complaint and in his interview with Ms Knight-Smith. Mr Townsend was not challenged about specific

points raised by the Claimant. The bullying and harassment procedure was not followed in respect of having an outcome meeting to explain the action to be taken. The report was limited to the summary of the Claimant's concerns and did not therefore reflect the whole of his complaint. The report upheld two complaints in part. It was not clear to the Tribunal, given that some of the complaints were upheld, why further action was not taken, because the bullying and harassment policy provides that if harassment has taken place then the outcome may include restoring relationships/mediation or action could be considered as part of the conduct policy. Despite the serious concerns raised by the witnesses about Mr Townsend's approach to them, and despite upholding part of the complaint, and therefore presumably accepting that the Claimant had been either bullied or harassed, Ms Knight-Smith recommended formal counselling but did not say for whom, when, or by whom. The Respondent's answer to this at the Tribunal hearing was that they liked to try informal resolution as a first step, but the Tribunal found it surprising that the weight of evidence against Mr Townsend did not lead to a more appropriate sanction. The Tribunal noted with some dismay that at the Tribunal hearing Mr Townsend's evidence was firstly that he did not receive counselling; then he amended that and said he did receive counselling and that it was 'quite pleasant and not a telling off'. The Tribunal was surprised that the behaviour reported by the witnesses, even without any racial element, was treated so leniently.

53. The Tribunal noted that the Claimant's contract of employment referred to bullying and harassment and provided that "harassment of any kind is regarded as a form of discrimination and may be treated as gross misconduct. It will be dealt with as such under the relevant conduct policy".

54. The Tribunal found that although the complaints of harassment were partly upheld, it was not clear why that policy was not followed.

55. On 3 June 2016 the Claimant went on sick leave and never returned to work.

56. On 3 June he presented his letter of appeal. He raised concerns that his complaints had not been considered fully or at all.

57. On 14 June he again attended the occupational health wellbeing practitioner and the report confirms that he was not fit for work and that counselling had been recommended.

58. On 21 June Mr Bradley was appointed to hear the Claimant's appeal. Not surprisingly, the Claimant complained about that because Mr Bradley had already been involved in the case. The Respondent took prompt action to appoint Mr Martin instead.

59. On 19 July the occupational health wellbeing practitioner referred the Claimant to the occupational health advisor.

60. Mr Ware spoke to the Claimant on 3 August 2016. Mr Ware's note suggests that the Claimant wanted to return to work but that his GP considered that he was not fit enough to do so. The Respondent agreed to pay for CBT for the Claimant.

61. The appeal meeting took place on 15 August 2016. The Claimant attended with his trade union representative Mr Wisely. The Tribunal has read the notes of that meeting. The Claimant was sent the notes for comments which he provided. He set out in some detail in a note that he had prepared for the hearing why he was appealing against the decision and he gave Mr Martin some of the background of his case.

62. On 19 August occupational health confirmed that the Claimant was a disabled person by reason of his diabetes and he was not fit to return to work because of the current level of stress and anxiety.

63. On 29 August his counsellor described him as suffering from severe depression and that he wanted to return to work but should only do so to a different section.

64. On 8 September 2016 Mr Martin sent his decision report to the Claimant. He set out the five points that he thought the Claimant had raised with him and did not uphold any of the appeal points. The Tribunal found that this was an accurate summary of the Claimant's appeal points. The Tribunal noted that the Claimant had not complained specifically that Ms Knight-Smith's summary of his complaints was incorrect. In fact, at the meeting with Mr Martin when the summary was put to him, the note records that he had said it was correct. The Tribunal noted therefore that Mr Martin would not know that the Claimant had wanted him to consider whether the summary was correct and whether all of his complaints had been investigated. That point came out when the Claimant cross-examined Mr Martin at the Tribunal hearing.

65. The Tribunal noted Mr Martin's evidence that part of his role in hearing appeals is to see whether the procedure had been followed. The Tribunal found that he failed on that point, because as set out above the procedure had not been followed, because Ms Knight-Smith had not held a meeting with the Claimant to discuss her outcome report, but Mr Martin had apparently not noticed this and he had decided that the procedure had been followed. The Tribunal found that he was wrong about that.

66. The Tribunal noted from subsequent occupational health reports that the Claimant remained unfit for work and in September he was said to have made limited progress. In October his wellbeing practitioner said that he had had six sessions of CBT and was still unfit.

67. On 17 October Mr Ware wrote to the Claimant to invite him to a meeting to discuss his attendance. The Claimant was unable to attend because he had to go to Court, because he was behind with his Council Tax. Mr Ware wrote again on 19 October to rearrange that meeting.

68. On 21 October 2016 the Claimant wrote two letters. The first was to Mr Ware to say that he considered that Mr Ware was disregarding his health situation and that it would be difficult for him to meet with Mr Ware at the workplace. He suggested that there was no plan put in place for contact with him, nether had there been a rehabilitation plan and he said that he was still unwell. The Tribunal noted that the Claimant complained to the

Tribunal that Mr Ware had contacted him excessively by letters, texts and phone calls. He did not cross-examine Mr Ware about that. The trial bundle included a small number of texts between the Claimant and Mr Ware. On 5 October the Claimant explained in a text that he did become anxious when Mr Ware called him. Mr Ware responded to this on 17 October explaining that he was not trying to make the Claimant anxious, but was trying to support him. The Tribunal found that the tone of the texts and the letters was cordial, and was satisfied that there was no evidence that Mr Ware's contact with the Claimant was unreasonable or inappropriate.

69. The second letter that the Claimant wrote on 21 October was his letter of resignation. He sent it to the HR office in Sheffield. He said that he was resigning with effect from 31 October 2016. He suggested that his bullying and harassment complaint had come to naught. He said that the grievance process had been a sham and had condoned Mr Townsend's treatment of him and that he had not been treated with dignity. He pointed out that he had suffered with depression. He said that the words that he said were used on 25 February had never been put to Mr Townsend. He suggested that Ms Knight-Smith had been selective in her use of evidence and that other managers had supported Mr Townsend. He referred to the appointment of Mr Bradley to hear his appeal. He noted that other managers interviewed by Ms Knight-Smith had suggested that he was not suitable for his job, which he denied. He said that an atmosphere had been created which he considered to be discriminatory, hostile and condescending. He said that the last straw was that when he returned to work on 1 April there was no written rehabilitation plan and that he had been told to report to Mr Townsend in the letter that Mr Ware had sent him.

70. Mr Ware was unaware of this correspondence when he wrote to the Claimant on 25 October to explain to him that his sick pay would be reducing to half pay from 30 October. The Respondent's practice was to pay six months full pay and six months half pay.

71. Mr Ware wrote again to the Claimant on 26 October when he received his letter of 21 October (to Mr Ware, not the resignation letter). He said that he had taken on board the points that he had made and hoped to meet with him in order to discuss "a more robust contact strategy with a plan to diarise our communication. The reason for this would be to alleviate any stress or anxiety caused." He also said that the Claimant could chose where the meeting took place.

72. The Claimant sent a letter to Mr Ware on 27 October acknowledging Mr Ware's letter about the reduction in his sick pay and suggesting that the period had not been calculated properly and he also asked to be paid his annual leave pay "taking into consideration the effective date of my resignation".

73. Ms Wilmot, the production supply manager, acknowledged the Claimant's resignation in an email of 31 October and noted that he had 20 days outstanding annual leave. She suggested that his last day would therefore be 27 November. The Claimant wrote immediately to say that his resignation took effect on 31 October and he did not want to be placed on annual leave.

74. There was of course a holiday pay claim before the Tribunal and during the course of the hearing the parties made various attempts to try to settle that. It was agreed by the Respondent that 20 days was owed to the Claimant. There was a dispute about the value of a week's pay. The Tribunal heard further evidence from the Claimant about that and examined payslips produced by both parties relating to before the Claimant went on sick leave in February 2016, and payslips relating to his sick pay.

75. The Tribunal found that the Claimant had normal working hours each week and his pay did not fluctuate with the amount of work done. He had a normal week set out under his contract of employment and we decided that was the week's pay that we should use in our calculations. In other words, the pay that he received as sick pay and the pay that he received during his rehabilitation process between 1 April and 3 June 2016 were not normal weeks and did not therefore represent a normal week's pay.

76. We therefore used the January 2016 payslip to inform us of his net weekly pay of £260.83. We added to that two deductions that were made by the Respondent which were deducted at the request of the Claimant, so that the Respondent redirected part of his wages to pay off two loans that he had taken out with two different loan companies. They were in the sums of £31 and £25.37 respectively. We considered that the trade union's subscription fee should be deducted. That gave the Claimant a weekly wage of £317.20 (net) which we multiplied by 4 to give us 4 weeks, or 20 days, net holiday pay. That came to £1,268.80.

Submissions

77. Both parties put their submissions into writing and then made brief comments about the evidence.

The Law

78. Section 13 of the Equality Act 2010 deals with direct discrimination and provides that A discriminates against B if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

79. Section 23 refers to comparators and says that there must be no material difference between the circumstances relating to each case. The circumstances include a person's abilities if the protected characteristic is disability.

80. Section 19 makes provisions in respect of indirect discrimination. It provides that A discriminates against B if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

81. The PCP is discriminatory if A applies, or would apply, it to persons with whom B does not share the characteristic; it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it; it puts, or would put,

B at that disadvantage, and A cannot show it to be a proportionate means of achieving a legitimate aim.

82. Section 27 of the Equality Act refers to victimisation. A victimises B if A subjects B to a detriment because B does a protected act or A believes that B has done or may do a protected act.

83. Protected acts include bringing proceedings under this Act; giving evidence or information in connection with proceedings under this Act; and making an allegation that A or another has contravened this Act.

84. The burden of proof in respect of these provisions is contained in section 136. That provides that if there are facts from which the court could decide, in the absence of any other explanation, that A contravened the provision concerned, the court must hold that the contravention occurred. However, it also provides that that provision does not apply if A shows that A did not contravene the provision.

85. It is recognised that it is unusual for there to be clear evidence of discrimination and that the Tribunal should expect to consider matters in accordance with the relevant provisions in respect of the burden of proof and the guidance in respect thereof set out in Igen Ltd v Wong and Others [2005] IRLR 258, confirmed by the Court of Appeal in the case of Madarassy v Nomura International PLC [2007] IRLR 246 and later cases confirming the same.

86. In a claim of unfair constructive dismissal, an employee resigns in response to a fundamental breach of a term of their contract of employment by the Respondent. The Claimant must show that there had been a fundamental breach of an express or implied term of that contract. The test is whether or not the conduct of the "guilty" party is sufficiently serious to repudiate the contract of employment. In **Western Excavating (ECC) Limited v Sharp [1978] ICR 221**, Lord Denning said

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

87. In the case of **Woods v WM Car Services (Peterborough) Limited [1981] IRLR 347**, the Employment Appeal Tribunal said that it was clearly established that there was implied in a contract of employment a term that the employer would not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the

employer intended any repudiation of the contract. The Employment Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

88. That test was confirmed in the case of **Malik v BCCI [1997] IRLR 462**, by the House of Lords.

89. It is recognised that individual actions taken by an employer which do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust and confidence, thereby entitling the employee to resign and claim constructive dismissal (see **Lewis v Motor World Garages Limited [1985] IRLR 465**).

90. In the case of **London Borough of Waltham Forest v Omilaju 2005 IRLR 35**, the Court of Appeal held that a final straw, if it is to be relied upon by the employee as the basis for a constructive dismissal claim, should be an act in a series whose cumulative effect amounts to a breach of trust and confidence. The act does not have to be of the same character as the earlier acts, and nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the final straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be the final straw, even if the employee genuinely, but mistakenly, interprets it as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

91. In the case of **Bournemouth University v Buckland (EAT0492/08)**, the EAT confirmed the test in the case of **Malik v BCCI,** that to prove an alleged breach of the implied term of mutual trust and confidence, the employee must show that the employer has, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence. The Court of Appeal also confirmed that once a breach has occurred, it is not possible to remedy it. The Court endorsed the four-stage test offered by the EAT, as follows;-

(i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the 'unvarnished' Malik test should apply;
(ii) if, applying the principles in Sharp, acceptance of that breach entitled the employee to leave, he has been constructively dismissed;
(iii) it is open to the employer to show that such dismissal was for a potentially fair reason;

(iv) if he does so, it will then be for the tribunal to decide whether dismissal for that reason, both substantively and procedurally, fell within the band of reasonable responses and was fair.

92. Once a fundamental breach has been proved, the next consideration is causation - whether the breach was the cause of the resignation. The employee will be regarded as having accepted the employer's repudiation only if the resignation has been caused by the breach of contract in issue. If there is an underlying or ulterior reason for the resignation, such that he would have left the employment in any event, irrespective of the employer's conduct, then there has not been a constructive dismissal. Where there are mixed motives, the Tribunal must decide whether the breach was *an* effective cause of the resignation; it does not have to be *the* effective cause.

93. The third part of the test is whether there was any delay between any breach that the Tribunal has identified, and the resignation. Delay can be fatal to a claim because it may indicate that the breach has been waived and the contract affirmed. An employee may continue to perform the contract under protest for a period without being taken to have affirmed it, but there comes a point when delay will indicate affirmation.

94. If it has been established that there was a constructive dismissal, the last part of the test is whether it was fair or unfair in all the circumstances.

95. It is useful to note two other decisions. In **Morrow v Safeway Stores plc [2002] IRLR 10**, it was confirmed that any breach of the implied term of trust and confidence is always to be viewed as fundamental.

96. In **Croft v Consignia plc [2002] IRLR 851**, the EAT held that "the implied tem of trust and confidence is only breached by acts or omissions which seriously damage or destroy the necessary trust and confidence. Both sides are expected to absorb lesser blows. The gravity of a suggested breach is very much left to the assessment of the Tribunal as the 'industrial jury' ".

Conclusions

97. Having made the findings of fact set out above, we considered the relevant law and then returned to the list of issues agreed at the case management discussion in order to draw these conclusions.

98. We started with the claim under Section 13 of the Equality Act, direct discrimination because of race.

99. Referring to the numbering in the case management order, claim 2.1.1 had been amended by the Claimant and the allegation was that the *Respondent* had withdrawn him from training on 20 February 2016. The Tribunal noted that there was no dispute that the Respondent *had* withdrawn the Claimant

from the training on 20 February. The reason put forward by the Respondent's representative, without any evidence to support it, was that it had been an error to have put him on that course in the first place. The Claimant's evidence that when he attended the course he saw that others who had been with him on the courses on 6 and 13 February were present but his place had been taken by a different person. That contradicted Mr Townsend's evidence that employees would not be trained on both machines within such a short period of time. The Tribunal therefore received no explanation for the withdrawal of the Claimant from that training. The first question of course is whether or not the Claimant had proved facts from which we could conclude that the reason he had been withdrawn was because of his race. He would have to do so in order for the burden of proof to shift. Clearly, if the burden of proof had shifted, the Respondent had not provided any cogent explanation at all.

100. The Tribunal concluded that although it was clear from the evidence that the Claimant had been bullied by Mr Townsend, that evidence in itself was not sufficient to enable us to draw an inference that he had been withdrawn from the course because of his race. The bullying treatment from Mr Townsend seemed to the Tribunal to be because Mr Townsend perceived the Claimant as performing at a slower pace than others. There was no evidence, for example, that white employees received more training than non-white employees. The Claimant had in fact been trained on 6 and 13 February. We concluded therefore that there were no facts from which we could conclude that he had been withdrawn from the course because of his race.

101. Claim 2.1.2 refers again to the training on 20 February. The allegation is that the Respondent replaced the Claimant with another employee on that course. Again, the Claimant's evidence about that was accepted by the Tribunal and was unchallenged. The question was why that had occurred. The same considerations apply to this claim as applied to the one above. The Tribunal's conclusion was therefore the same.

102. Claim 2.1.3 refers to the alleged comment by Mr Townsend on 25 February 2016. The Tribunal had found on balance that Mr Townsend did not make that comment, or, to be clear, he certainly abused the Claimant on that day, but he did not use the word "black" as part of that abuse. The Tribunal accepted that Mr Townsend had received diversity training and had provided diversity training to staff. We accepted that there was ample evidence that on occasions he lost his temper and swore at staff and about staff, including the Claimant. Given his training and given the ethnic mix of his team, and the lack of evidence of any other complaints of race discrimination or racial harassment, the Tribunal concluded that "black" was not part of the abusive criticism levelled at the Claimant on that day.

103. Claim 2.1.4 relates to the investigation carried out by Ms Knight Smith. We were asked to consider whether it was inefficient because firstly, it took too long and secondly, it failed to properly investigate the Claimant's allegation about the comment made by Mr Townsend on 25 February. In respect of the first matter, we concluded that the investigation did not take too long. The complaint was received by the Respondent on 8 April 2016 and the report was issued on 27 May 2016, a period of 35 working days. The

Respondent's bullying and harassment policy suggests that the aim is to complete an investigation into a complaint within 35 days. The report was therefore completed within that time scale. In view of the number of witnesses, we concluded that this was not an unreasonable time for that report to have taken.

104. Next, we considered whether the investigation failed to investigate the allegation about Mr Townsend's comment on 25 February. We have already noted that Mr Townsend was not asked in terms about that incident. He had read the Claimant's written complaint, which referred to the incident, and he denied using racist language. Unfortunately, Ms Knight-Smith did not challenge Mr Townsend in any particularity. She did ask witnesses whether they had heard the comment, but she did not tell them the date of the incident or indeed even ask whether they were at work on that day. As we have already indicated in our findings, the investigation was not entirely satisfactory. The summary did not reflect all of the Claimant's concerns. The witnesses were not asked precise questions. Arguably then, the investigation did fail properly to investigate the allegation about that comment, because the methodology used was not robust enough to discover all potential evidence.

105. We considered therefore whether those failures occurred because of the Claimant's race; would the investigation have been carried out any differently for a white person making a bullying and harassment complaint against Mr Townsend. We found it unlikely, because the flavour of the report and the comments of the managers to Ms Knight-Smith were all supportive of Mr Townsend. She accepted their view. Accordingly, the Tribunal concluded that there was insufficient evidence to be able to say that the flaws in the investigation occurred because of the Claimant's race. It was poorly-handled, but not because of his race.

106. Claim 2.1.5 suggested that Ms Knight-Smith provided the outcome in which she refused to acknowledge that the Claimant had suffered discrimination because of his race. It is correct that she did provide an outcome and that she did not uphold his complaint about discrimination. She partly upheld some of his other complaints. We concluded that there was insufficient evidence to decide that Ms Knight-Smith came to her decisions because of the Claimant's race; as set out above, the report favoured the managers' view point and it was likely that this would have happened had the Claimant been a white employee.

107. Paragraph 2.1.6; this claim relates to the selection of Mr Bradley to be the chair of the grievance appeal hearing. At the Tribunal hearing the Claimant accepted that Ms Knight-Smith herself did not appoint Mr Bradley to hear the appeal; that was done by a different team. In any event, as soon as the Claimant pointed out that Mr Bradley had been a witness at the first stage of the process the Respondent promptly appointed a different person who had not been involved. The matter was therefore quickly resolved. The Tribunal concluded that this incident could not be characterised as less favourable treatment because of race.

108. Claim 2.1.7 was that on 15 August at the appeal meeting Mr Martin refused to state which elements of the Claimant's appeal were upheld. The Tribunal

noted that there was no evidence to suggest that Mr Martin refused to do so. His report refers to which complaints were upheld. In cross-examination, the Claimant suggested to Mr Martin that the Claimant had questioned whether the summary produced by Ms Knight-Smith of the Claimant's claims was fair. However, the notes of the meeting on 15 August record that the Claimant agreed that the summary was correct. Mr Martin's evidence to the Tribunal was that he had not understood that the Claimant's appeal related to that summary of his concerns. The Tribunal concluded that the Claimant had not clearly stated to Mr Martin that he was appealing, in part, about the summary itself. The Claimant's letter of appeal and the accompanying document does not in terms criticise that summary.

109. The Tribunal accepted that Ms Knight-Smith's report was not clear as to which parts of the Claimant's complaint were upheld, and as we have already set out, a meeting with the Claimant, as provided for in the procedure, to explain the report would have assisted the Claimant on this point. The Tribunal can understand why the Claimant was confused by the "partly upheld" part of Ms Knight-Smith's decision. However, the Tribunal concluded that there was no evidence from which we could conclude that Mr Martin had refused to state which claims were upheld.

110. Claim 2.1.8 refers to the dismissal of the Claimant's appeal by Mr Martin. We had to decide whether that amounted to less favourable treatment. It is right to say that Mr Martin missed the important omission in respect of the bullying and harassment procedure, in that no meeting had been held to discuss the outcome report, even though he said it was part of his job to check the procedure had been followed and indeed the Tribunal would expect an appeal manager to have checked that the procedure had been followed. It is also right to record that this omission was not drawn to his attention as part of the grounds of appeal. In all the circumstances, the Tribunal concluded that there was no evidence from which we could conclude that the reason for this failure was because of the Claimant's race, and we could not say that in dismissing the appeal Mr Martin had made that decision because of the Claimant's race.

111. These are all the claims under Section 13; that claim was unsuccessful and it was dismissed.

112. The Tribunal then turned to the victimisation claim under Section 27 of the Equality Act. The Claimant relied upon two protected acts. The first was a complaint he made in 2015 about Mr Townsend. The Tribunal accepted that in November 2015 the Claimant did approach Mr Bradley about the way Mr Townsend treated him. There was however no evidence that the Claimant told Mr Bradley that Mr Townsend, in treating him in an unreasonable manner, was discriminating against him. The Tribunal concluded that this could not be said to be a protected act given the very brief evidence that we heard about this.

113. The second protected act was the Claimant's bullying and harassment complaint. That was clearly a protected act and the Respondent accepted that it was a protected act.

114. Claim 3.2.1 was that the Claimant suffered a detriment as a result of doing a protected act when he was withdrawn from the training on 20 February. As this happened before the protected act that we have indentified, the timing does not assist the Claimant and that claim must be unsuccessful.

115. Claim 3.2.2 also refers to the training on 20 February and the Respondent replacing the Claimant with another employee. The timing as set out above also applies and this claim must be unsuccessful.

116. Claim 3.2.3 is that the Claimant was told by Mr Ware to report to Mr Townsend on 21 April 2016. The Tribunal has made findings about the letter Mr Ware sent to the Claimant dated 21 April. We found that there was an error in the reply slip which contained Mr Townsend's name and had not been amended by Mr Ware. We had accepted Mr Ware's evidence about that. In any event, the meeting that took place was with Mr Ware and not with Mr Townsend. We concluded that there was no connection between the protected act and that error.

117. The claim of victimisation was therefore unsuccessful.

118. Next, we turn to the claim of indirect discrimination because of disability under Section 19.

119. The first dispute was whether the Claimant was a disabled person by reason of depression. The Respondent accepted that he had the condition of depression from 19 August 2016 but questioned whether it was long-term at that point.

120. The Tribunal, noting that a number of reports indicated that the Claimant was suffering from severe depression over a number of months, decided to put that question to one side and consider the claims themselves.

121. The first PCP relied upon by the Claimant was that he should attend work on a full-time basis. We noted that this was not a PCP applied generally by the Respondent as the Respondent had part-time working within the organisation and indeed the Claimant himself was a part-time worker. The Tribunal found that this claim was not pleaded in a way that could be easily understood. The Respondent suggested that perhaps the Claimant (or his representative, given that he was represented at the case management discussion) meant that the PCP was that he should attend regularly and the Respondent accepted that it did indeed apply such a PCP.

122. We had to consider whether the application of that PCP put disabled persons at a particular disadvantage compared with persons who did not have that protected characteristic. We considered that perhaps it could place them at a disadvantage because they may not be able to attend regularly for reasons connected with their disability, and they may therefore be placed within the attendance procedure, although we noted of course that there would be obligations on the employer in respect of reasonable adjustments and so on.

123. We then had to consider whether it put the Claimant at that disadvantage. The disadvantage pleaded in 10.1 was that he could not attend full-time, he

had been absent since February 2016 and was not well enough to return to work on 1 April when he was told by Mr Ware to come back to work.

124. We noted that the way in which this claim is pleaded did not reflect the facts of the matter. Mr Ware had not told the Claimant to return to work on 1 April; we had made findings about that. In addition, Mr Ware had decided not to take any action in respect of the Claimant's absence record, within the attendance procedure. The Claimant had received sick pay in accordance with the sick pay policy. The Claimant suggested that disability-related absence should have been discounted when calculating his sick pay. We were satisfied that the Respondent's policy does discount such absences for the purposes of the attendance records, but that the Respondent's sick pay procedure is not affected by disability-related absences. In other words, the attendance record and the calculation of sick pay are treated separately and differently by the Respondent, and the Tribunal was unable to see that this was unlawful. Taking all of those matters into account, The Tribunal concluded that there was no disadvantage to the Claimant in respect of that PCP.

125. The second PCP was said to be that the Respondent 'retained ongoing management contact with an employee on sick leave'. Again, it was agreed by the Respondent that they did have that requirement. The Tribunal found it was not an unreasonable requirement; indeed it was good practice to stay in touch with an employee who was unwell and unable to attend work. We had already found that the contact with the Claimant was carried out at an appropriate level.

126. We had to consider whether that PCP put disabled persons at a disadvantage. We considered that it was difficult to see that it would do so, unless the contact was in some way unreasonable or inappropriate.

127. We noted that the disadvantage pleaded by the Claimant in respect of the PCP at 10.2 was that firstly, he was told to return to work on 1 April 2016; we had found that he was not told to do so. Secondly, that he was absent with illness from 3 June 2016 and was called by Mr Ware persistently on 5 October and was sent text messages on that date enquiring when he would return to work. On 25 October Mr Ware informed the Claimant that his salary would be reduced because of his absence on sick leave.

128. A number of points arise in respect of that pleaded disadvantage. We have already found that there was no evidence of excessive or unreasonable contact with the Claimant by Mr Ware. The tone of the texts that we saw was cordial. When the Claimant told Mr Ware he felt stressed by the contact, Mr Ware acknowledged that and instead wrote a letter to the Claimant after some delay. The sick pay was reduced in accordance with the sick pay policy.

129. The Tribunal concluded therefore that the Claimant was not put at a disadvantage by that PCP. Even if he was put at any disadvantage, we concluded that the Respondent's actions were a proportionate means of achieving the legitimate aims of providing a service to the public by employees attending regularly, and ensuring that the sick pay benefit for employees was financially viable for the Respondent.

130. The Section 19 claim was therefore unsuccessful.

131. Turning to the claim of constructive dismissal, the Claimant relied upon twelve alleged repudiatory breaches, many of which replicated the claims that we have already considered.

132. 12.1 related to the Respondent withdrawing him from training on 20 February. We noted that the Claimant was apparently given no proper explanation as to why this had occurred. However, on its own, we were unable to class this as a breach of trust and confidence.

133. The same considerations apply to 12.2, which related to the Respondent replacing him on that training course with another employee.

134. 12.3 relates to Mr Townsend's alleged comment on 25 February. The Tribunal had already found that the word "black" had not been said at that time. We accepted that being called names which included swear words, by a manager, would be unpleasant. We noted that this manager, according to witnesses, swears regularly. He also apparently swears at other members of the team as well as the Claimant. We accepted that this was not itself a single incident and that Mr Townsend bullied the Claimant on a regular basis. But as we are directed in this claim to that particular comment and as we have found that it did not take place in exactly the way the Claimant recalled, we concluded that in the circumstances of a manager who seemed to treat others in a similar way, in terms of the use of foul language, it was not in itself so serious as to be a breach of trust and confidence on that particular day.

135. Claim 12.4 relates to Ms Sue Knight-Smith's investigation and whether it took too long and whether it failed to investigate properly the allegation about Mr Townsend's comment on 25 February. The Tribunal has already set out in some detail our criticisms of Ms Knight-Smith's report. The pleadings themselves are specific about the timing of the report, which we concluded was not a breach, for the reasons that we have set out in respect of claim 2.1.4.

136. In respect of the failure properly to investigate the alleged comment, we considered whether the flaws in the investigation, in particular about that comment, were so serious as to amount to a breach of trust and confidence. We have found that the investigation was not entirely satisfactory, although we have accepted that the weight of evidence actually gathered was against the Claimant, and pointed to Mr Townsend not using the word "black" on that occasion. We were in no doubt that the Claimant had made a legitimate complaint and although it had been considered, it had not been considered in as much detail as it should have been. We had to consider therefore whether it amounted to a breach of trust and confidence. We returned to the test in Malik. We concluded that the flaws in the investigation were not calculated to destroy or damage the working relationship, in other words, this was not done badly in a deliberate way. We therefore had to consider whether the poor handling of the investigation was likely to seriously damage the relationship of trust and confidence. We spent quite some time considering this and we decided that although there

were obvious flaws in the investigation into that specific comment, that would not seriously damage trust and confidence because there had been at least some investigation, the complaint was not rejected out of hand and without any investigation, and the Claimant had a right of appeal.

137. The breach set out in 12.5 is that the Claimant was told by Mr Ware to report to Mr Townsend on 21 April. As we have set out above, this was an error by Mr Ware in the reply slip attached to the letter, and did not amount to a breach of trust and confidence. The Claimant was not required to report to Mr Townsend and in fact never did report to Mr Townsend after he had made his bullying and harassment complaint.

138. 12.6 refers to Ms Knight-Smith providing an outcome in which she refused to acknowledge that the Claimant had suffered discrimination. We concluded that that could not be a breach of trust and confidence, where a complaint was dismissed having considered the evidence, even though the investigation was not as satisfactory as it could have been.

139. 12.7 related to the appointment of Mr Bradley to hear the appeal. In fact, he did not hear the appeal and that was resolved very quickly. His brief appointment did not amount to a breach of trust and confidence.

140. 12.8 referred to Mr Martin refusing to state which elements of the appeal were upheld. The Tribunal could find no evidence that Mr Martin refused to do that. His report setting out his decision on the Claimant's appeal clearly set out how he had come to his decision on each of the agreed points. This was not a breach of trust and confidence.

141. 12.9 related to Mr Martin dismissing the Claimant's appeal. We concluded that the decision to dismiss an appeal, having had a hearing and having given matters raised by the Claimant proper consideration, could not amount to a breach of trust and confidence, certainly without any aggravating features, and there were none here.

142. 12.10 related to the allegation that the Claimant returned to work on 1 April 2016 while still unwell because he was told to do so by Mr Ware. The Tribunal have made findings that the Claimant was not told to return to work, and we noted the documentary evidence at the time that the Claimant had decided himself to return to work. This was not a breach of trust and confidence.

143. 12.11 related to the allegation that Mr Ware had persistently contacted the Claimant on 5 October. The Tribunal had found that Mr Ware did not do so. This was not a breach of trust and confidence.

144. 12.12 related to Mr Ware's letter to the Claimant that sick pay was about to be reduced. The Claimant relied upon this as a final straw. The Tribunal noted that the timing of Mr Ware's letter did not assist the Claimant because the letter was sent after he had decided to resign and after he had put his decision to resign in writing in a letter of 21 October. The decision to reduce his sick pay played no part in his decision to resign. It could not therefore have been a final straw.

145. The Tribunal concluded therefore that none of the alleged breaches amounted to a breach of trust and confidence. A number of them did not in fact occur in the way the Claimant described. We recognised however, that individual matters themselves may not be breaches but may have the effect, cumulatively, to amount to a breach of trust and confidence. Considering the matters pleaded on behalf of the Claimant at the case management discussion, we have to say that cumulatively none of those matters amounted to a breach of trust and confidence. There was no doubt that he had a legitimate grievance in respect of bullying and harassment. In addition, the Tribunal had no doubt that the Respondent was prepared to tolerate Mr Townsend's behaviour, as described not only by the Claimant but by a number of his colleagues, because he was committed to the business, he worked in a time critical area and presumably he got results. However, the Respondent's failures were not so grave as to amount to a breach.

146. The Tribunal considered that even if it could be said that there had been a breach of trust and confidence by the cumulative effect of the Respondent's actions, by which we mean the actions as pleaded by the Claimant and as found to have occurred by the Tribunal, the timing is against the Claimant. The Claimant was aware of the appeal decision on or about 8 September 2016 and he did not resign until 21 October 2016. We accepted that he was still unwell at that point, but arguably that delay would indicate that any such breach had been waived. We noted that he had told occupational health on 12 October 2016 that he wanted to return to work, although not in his previous workplace. It appeared therefore that he was still at that date contemplating a return to work and not resignation. Accordingly, the delay in resigning would in any event be fatal to the claim, because it indicated that he intended to continue to be bound by the contract and had waived any breach.

147. The Tribunal hoped that it had made clear its criticisms of the way in which the Respondent had handled this case, so that future complaints will be dealt with in a more professional manner and with more attention to detail. However, we are bound to consider the pleadings and the agreed list of issues, which arguably put a different slant on matters when compared with the case that the Claimant wanted to run, and having applied the law to the facts of the matter the claims must be dismissed, although not without some sympathy for the Claimant.

Holiday Pay

148. During the course of the hearing the parties attempted to settle the holiday claim. They had agreed that the Claimant was owed 20 days holiday pay but could not agree his rate of pay. We therefore heard further evidence from the Claimant and considered the payslips that he produced for January 2016 and the payslips produced by the Respondent for September and October 2016. We also noted the recent case of Dudley Metropolitan Borough Council v Willets which said that voluntary overtime would form part of the holiday pay calculation.

149. We found that the Claimant was normally paid shift allowances and other allowances when he was on holiday, although he was not paid those

allowances when he was on sick leave. We considered that it was appropriate that he receive those allowances as part of his holiday pay. In addition, the Claimant had made an arrangement that the Respondent pay two loan companies directly from his salary. The Respondent argued that those deductions should continue to be made. We found this illogical because they were deducted from the Claimant's wages at his request and sent to his creditors. As they were part of his wages, he should receive that money as part of his holiday pay. Otherwise, the Respondent would have been obliged to pay those amounts to the creditors, and the Tribunal had no power to order the Respondent to do so.

150. We were satisfied that the Claimant had normal working hours which did not fluctuate with the amount of work that he did and therefore his normal week's pay would be that done under his contract of employment and not relating to sick pay while on sick leave. We also concluded that when he was working his rehabilitation plan between 1 April and 3 June 2016, and receiving a lower rate of pay, that was not a normal week's pay and that should be disregarded.

151. The Tribunal therefore used the figures on the Claimant's January 2016 payslip which showed his net weekly pay of £260.83. We added to that the deductions made in respect of the loans of £31.00 and £25.37 respectively which gave us a weekly figure of £317.20 net. Four weeks or 20 days holiday pay was therefore £1,268.80 net.

152. Having announced the decision, the Claimant raised the fact that he had some shares in the Respondent's business and had been told that he had forfeited them when he resigned. We explained to the Claimant that we did not have a claim about that situation and had heard no evidence about it and that he would have to explore that matter further with the Respondent or use the helpline shown on the shares document that he showed us.

153. The Claimant also suggested that he was owed notice of pay of one week, although this did not appear on the list of issues. We noted however that he had ticked the 'notice pay' box in the claim form. Upon further questioning, the Claimant accepted that he had in fact been paid until 31 October 2016, which was the date of termination that he had given to the Respondent upon resignation, and he accepted therefore that there was no outstanding notice pay.

Employment Judge Wallis

Date: 7 September 2017