



# EMPLOYMENT TRIBUNALS

**Claimant**

Mr G Yildiz

**Respondent**

British Broadcasting Corporation

**Heard at:** London Central

**On:** 18 – 26 October and in chambers on  
27 and 30 October 2017

**Before:** Employment Judge Auerbach  
Mr T Robinson  
Mr S Ferns

**Representation**

**For the Claimant:** Ms N Cunningham, Counsel

**For the Respondent:** Ms I Shrivastava, Counsel

## RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

1. The Claimant was constructively unfairly dismissed.
2. All of the claims of direct discrimination, harassment and victimisation pursuant to the Equality Act 2010 fail and are dismissed.

## RESERVED REASONS

### Introduction

1. The Claimant was employed by the Respondent from June 2007 until his resignation in January 2017.
2. The first claim form was presented on 16 December 2016. In it the Claimant claimed race discrimination during employment, by reference to his Kurdish ethnic origin, by way of direct discrimination, harassment and victimisation.
3. That claim form also included a claim for wages in respect of an item of shift pay, but upon it being accepted that the payment had belatedly been made, that claim was withdrawn and dismissed upon withdrawal. However, the handling of that matter was relied upon by the Claimant as background to his discrimination claims.
4. A response in respect of the first claim was entered on 2 March 2017.
5. A preliminary hearing (PH) took place on 23 March 2017 before Employment Judge Grewal. In anticipation of a second claim being presented, the hearing dates originally set in respect of the first claim were postponed, it being envisaged that both claims should now be heard together over eight days from 18 – 27 October 2017.
6. A list of issues prepared by the Respondent's counsel was tabled at that PH, but EJ Grewal noted that this required further consideration by the Claimant. The parties were directed in due course to file an agreed list of issues. A further list, described in a covering email as agreed, was then sent to the Tribunal by the Claimant's solicitors on 12 April 2017. That list related only to the first claim.
7. The second claim was presented on 4 May 2017. The complaints were described in it as being of victimisation and constructive dismissal. On 22 June 2017 a response was entered in respect of the second claim. The two claims were then ordered to be heard together on the October hearing dates previously earmarked.
8. A further version of the list of issues was contained in the bundles prepared for trial, which was essentially the 12 April 2017 version, but updated to include the complaints and issues raised in the second claim form. At the start of our hearing time was spent reviewing that list of issues. A number of points of correction and clarification were agreed. The Tribunal spent the remainder of the first day reading. At the start of day two the Tribunal raised some further points with both counsel, in light of its reading, and some further points of clarification of the issues were agreed.
9. It was also identified in discussion that, in respect of his claim that he was constructively dismissed, the Claimant wished the Tribunal to adjudicate whether, if so, such constructive dismissal was not only unfair but also unlawful treatment (whether by way of direct discrimination, harassment or victimisation) pursuant to the **Equality Act 2010**. However, Ms Shrivastava's stance was that a constructive

*discriminatory* dismissal claim (as opposed to a constructive *unfair* dismissal claim) was not pleaded, and required an application to amend, which she opposed.

10. After hearing argument, and for reasons which we gave orally, we permitted the claim of constructive *discriminatory* dismissal to be added. In summary, this was because such a complaint implicitly flowed from the factual case advanced in the two claim forms, and the complaints of discrimination during employment, and assertion that the Claimant had been constructively dismissed (the definition of which is the same in the **Employment Rights Act 1996** and the **Equality Act**), which the two claims undoubtedly contained. Further, its consideration would require no additional evidence to be adduced, or cross-examination to be conducted, on the part of the Respondent; and the balance of prejudice favoured the amendment being granted.

11. The other point of dispute concerned allegation 3(i). This alleged that the Claimant's manager, Mr Nisancioğlu, failed, in the period June – September 2016, to “offer the Claimant as a possible contributor to BBC news programmes when a request was made for a contributor from the Turkish Service.” In opening discussions Ms Shrivastava indicated that, whilst this allegation had featured in the list tabled in April, it had only become fully clear to the Respondent's team what it was actually about, after the Claimant's solicitors had identified certain documents as relevant to it, and his statement had been received, setting out his evidence on this matter at paragraph 31, and cross-referring to those documents.

12. In response to this material, Mr Nisancioğlu had then made a second witness statement, which had been served, and which Ms Cunningham accepted should be admitted into evidence. While Ms Shrivastava was also able to cross-examine the Claimant on this issue, she indicated that the Respondent had had only a short time to assemble its evidence on it and was still investigating whether there was further relevant documentary evidence, and that she might yet apply to strike-out issue 3(i).

13. The Claimant's evidence having been completed on days two and three, at the start of day four Ms Shrivastava tabled a second supplementary witness statement for Mr Nisancioğlu, together with various schedules, further addressing issue 3(i). She also tabled a written strike-out application. It was proposed by Ms Cunningham, and agreed by Ms Shrivastava and the Tribunal, that we should proceed at present on the basis that this remained an issue in the case, on which Ms Cunningham might cross-examine the Respondent's witnesses; and we would hear the strike-out application argued at the end of evidence, and consider it as part of our overall decision.

14. We heard evidence for the Respondent from: Vanessa Twigg, Sarah Gibson, Saleem Patka, Ian Bent, Alper Balli, Nicky Goldberg and Murat Nisancioğlu. Evidence was completed during the afternoon of day six and we then heard argument on the strike-out application. On the morning of day seven a final corrected version of the list of issues, taking on board all of the points that had arisen during the course of the hearing, was tabled. This included the fact that one complaint, concerning alleged treatment in relation to a request made by David Mazower on 21 July 2016, had been withdrawn by Ms Cunningham during the course of the hearing.

15. It was agreed by both counsel that the final list of issues accurately reflected the live issues that fell to be determined by the Tribunal, subject to our decision on the strike-out application in relation to issue 3(i). That list is appended to this decision.

16. It was also agreed in opening discussions that we would, as part of our present decision, potentially decide any **Polkey**<sup>1</sup> or contributory fault type issue that might arise, should some or all of the claims succeed. However, any other matters relating to remedy might require a further remedy hearing.

17. We spent the bulk of day seven reading written submissions from both counsel and hearing oral submissions. We were also furnished with a number of authorities. We then began our deliberations in chambers, continuing on day eight and on a further, ninth, day added for this purpose. We now provide our reserved decision.

### **The Facts**

18. The Claimant is a journalist. He is of Turkish nationality but ethnically Kurdish.

19. In June 2007 the Claimant began employment as a producer with the Respondent's Turkish Language Service. This is one of around 30 language services which, together with World Service English, make up the BBC World Service, broadcasting globally in the languages concerned.

20. The Turkish Language Service (TS) is a small unit. It had, in 2016, 17 staff based in London as well as two employees and some freelancers in Turkey. During the Claimant's employment he was the only Kurdish employee on the permanent staff in London. For a time, his wife worked for the service on a 12-month fixed term contract. Mr Nisancioğlu said in evidence that he understood her to be Kurdish, although the Claimant observed that she had not publically so identified herself. The TS also uses Kurdish freelancers in Turkey from time-to-time.

21. At the time when the Claimant joined, journalists employed to produce programmes were called Producers, but they are now all more strictly called Broadcast Journalists. A grade above them are Senior Broadcast Journalists (SBJs), who have some management and editorial responsibilities.

22. When the Claimant applied in 2007 to join the TS he was interviewed by the then Head of Service, Huseyin Sukan, and by Murat Nisancioğlu, who was at that time an SBJ.

23. The Claimant's evidence was to the effect that the interview lasted much longer than anticipated because, during the course of it, Mr Nisancioğlu subjected him to a grilling on his opinions on Kurdish issues. Mr Nisancioğlu's evidence was that there was some discussion of the topic, but no grilling. He also said that he had not actually known that the Claimant was ethnically Kurdish until Mr Sukan mentioned it to him at the end of the interview.

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<sup>1</sup> **Polkey v AE Dayton Services Limited** [1988] AC 344.

24. We found that the interview was structured around a set of standard questions that were asked of all candidates, but with some room allowed for supplementary questions or development of any line of discussion that might emerge. In the Claimant's case this led to some extended discussion of Kurdish issues, because they came up in the discussion. We note that the Claimant told us in evidence that he did not find the discussion of such issues to have been hostile or disturbing at the time; indeed, he took the interest shown in them to be a positive sign. It was only with hindsight, he said, that he had come to view this aspect of the interview differently.

25. We concluded that we were not persuaded there was any "grilling": if there had been, the Claimant would have viewed this part of the discussion differently at the time. Nor did we find sufficient basis to infer that Mr Nisancioğlu's approach to this (or any) aspect of the interview, was reflective of any antipathy to the Claimant at all.

26. It was also suggested by the Claimant in evidence, that Mr Nisancioğlu had announced the Claimant's appointment to other team members in a manner which unduly highlighted his Kurdish ethnic origin. However, we accepted Mr Nisancioğlu's evidence that any formal announcement would have been handled by the then Head of Team, Mr Sukan; but that he, Mr Nisancioğlu, did mention to some members of the team the Claimant's Kurdish ethnicity, because he regarded it as of positive note.

27. We found that the Respondent jealously guards and cultivates its reputation for objective, impartial and fair reporting. It has the status, as Mr Bent told us, of a "trusted source"; that is, its news reports may themselves be cited with confidence by other news organisations as reliable and accurate, as though it were a primary source. This culture permeates the news-related activities of the Respondent, and what is expected of its editors and journalists. In any particular news service the editors (or those performing that role) have responsibility for taking editorial decisions informed by those standards, and individual journalists are expected to follow them. In line with this, the Claimant's job specification included reference to the duty to maintain professional journalistic standards of accuracy, impartiality and fair dealing.

28. In or around August 2009 Mr Nisancioğlu became Planning and Commissioning Editor within the TS and assumed some line management responsibility for the Claimant.

29. Having initially been employed on successive fixed term contracts, the Claimant was given a permanent contract with effect from 1 November 2009. This included at clause 1 a requirement to follow all reasonable instructions given to him. Clause 16 included provision that he would not without the previous explicit permission of his senior manager "during your employment write for any publication or speak in public about the BBC or its affairs." Clause 20 provided that he would not allow his outside interests or private activities to interfere with his BBC work, or permit any actual or potential conflict to arise, or place the BBC in a position "whereby it is brought into disrepute or its reputation for impartiality is likely to be affected (irrespective of whether or not its reputation is actually affected)."

30. In July 2011 Mr Nisancioğlu became Turkish Service Editor.

31. When the Claimant first joined the TS, it was engaged in radio, TV and internet broadcasting; but during 2011 radio broadcasting ended.

32. The BBC operates an attachment scheme, whereby an employee will be given the opportunity to work in a different role within his own team, or some other team, for a fixed period. In most cases, attachments do not last more than twelve months, but in some cases they will originally, or by later extension, last longer.

33. From 1 April 2012 the Claimant was appointed to a six-month attachment as an SBJ within the TS, following interview by Mr Nisancioğlu and by Mr Nisancioğlu's immediate boss, the Near East Hub Editor, Saleem Patka.

34. In 2012 the TS began piloting a new business television programme called Dünya Ekonomisi. The programme began to broadcast live in June 2012. Although the TS was at the time based in Bush House in London's Aldwych, the broadcasts went out from a studio in New Broadcasting House in Portland Place. Mr Nisancioğlu appointed the Claimant to be the on-air presenter of the programme when it went live. We found, from all the evidence available to us, that this presented a major opportunity for the Claimant but also a major challenge. His previous experience of this type of work was not on this scale, and he needed, and received, considerable support from Mr Nisancioğlu and other TS colleagues. We also found that there arose some undercurrent of resentment amongst colleagues, who felt that the Claimant had benefitted from being given the limelight, whilst being heavily dependent upon, but not sufficiently appreciative of, their behind-the-scenes support.

35. In August 2012 a member of the team, Aylin Bozyap, informally complained that the Claimant had bullied her during the course of an editorial meeting for the business programme. She set out his alleged remarks, including one in Turkish which she said was "incredibly rude and threatening". She said that she had felt really stressed and harassed and demanded an apology. Mr Nisancioğlu spoke to the Claimant about the matter. Ms Nisancioğlu was inclined to believe Ms Boyzap's account, and he encouraged the Claimant to apologise. However, the Claimant disputed her account and he declined to do so. The matter was not further pursued.

36. Shortly after this episode the Claimant emailed Mr Nisancioğlu that he was resigning from the position on the Dünya Ekonomisi programme.

37. It was the Claimant's case before us that working on this programme had been highly pressurised and stressful, and required a level of support that he did not get. His evidence was that, when he raised this with Mr Nisancioğlu a month or so before he resigned, Mr Nisancioğlu commented, in English, that it was "tough luck to be at odds with your manager". Mr Nisancioğlu denied making any such remark.

38. Drawing on all the evidence available to us our further findings about this were as follows. Being given the role of presenting and producing this programme was a considerable step up for the Claimant. It was a major challenge and was particularly stressful for him. By the time of his resignation a significant difference of perspective between him and Mr Nisancioğlu had emerged. The Claimant felt that he had not been given sufficient resource or support to do this job, which had caused him stress, the blame for which he laid at the door of Mr Nisancioğlu. From Mr Nisancioğlu's point

of view, however, the Claimant had failed to rise to the challenge *despite* considerable support from him and colleagues, and then had unjustly complained about this. In that context we were inclined to think that Mr Nisancioğlu *did* at some point make a remark along the lines alleged by the Claimant. Relations between them were also further soured by Mr Nisancioğlu's perception that there was merit to Ms Bozyap's complaint, and that the Claimant ought to have apologised, and then by what he saw as the Claimant's peremptory and unwarranted resignation from the programme.

39. The whole episode caused, we concluded, significant, and what proved to be long-lasting, damage to the relationship between the two. The Claimant felt profoundly that he had been badly treated by Mr Nisancioğlu, while Mr Nisancioğlu felt profoundly that he had been badly let down by the Claimant, including (as he saw it) by conduct that was not in the collegiate spirit of the TS being a single team.

40. Immediately following his resignation from the business programme, the Claimant was off sick from 14 – 31 August and then again from 10 September to 28 October 2012, with what was described as work-related stress.

41. During the second period of sick leave an article written by the Claimant for World Service English was published online, and circulated to colleagues, provoking a backlash from two of them in particular. Selin Girit sent Mr Nisancioğlu an angry email, demanding to know what this meant, questioning whether the Claimant was on sick leave, commenting that "we work like a donkey and try to make good the guy's shortcomings", saying that this had really demoralised her and asking Ms Nisancioğlu what he was going to do. She added that it was a shame and an injustice. Ebru Doğan also emailed him, in less outspoken terms, but asking: "How can an employee of yours who said that he could not do work for others, while at the same time we're doing his work?" She complained that they were owed an explanation "[o]therwise we will think that you consider us to be fools."

42. This episode, we found, re-enforced Mr Nisancioğlu's concerns that there were divisions between the Claimant and some other TS colleagues, because of their perception (with which Mr Nisancioğlu felt some sympathy) that the Claimant did not fully pull his weight within, and was not sufficiently committed to, the TS.

43. Around this time, on 21 September 2012, the role of World Duty Editors (WDEs) was launched. An email from the News and Deployments Editor explained that the WDEs were intended to act as a clearing house for requests for assistance or contributions from bilingual reporters within the Language Services. It explained "WDEs Languages are the first point of contact for bilingual reporters; they will be looking after their daily plans on breaking stories, identifying priorities and placing requests. They will also be the first point of contact with reporters and editors in Languages who may be wanted by programmes for two ways or rants on the day's stories". Further on he added: "They will also help manage requests coming to your service from various programmes and we will be asking programmes to place their requests for contributions through the WDEs."

44. On 2 October 2012 Mr Nisancioğlu emailed all members of the Turkish Service as follows:

Let me remind you about an issue that has created problems a few times.

Whatever the size and the location, those who want to be accredited for activities, conferences, summits, sporting events, art events, etc., must first inform me or senior members and get approval.

Likewise, whatever the matter, interview bids, projects, programme proposals, etc., must be reported to me or senior members beforehand.

Again, you do have to ask me or senior members first before asking for any articles, photographs, videos etc from any of them.

And finally, if you are asked to do work anywhere in the BBC or if you plan such a thing, you must inform me or the seniors beforehand.

Those who have questions in these matters can talk to me.

45. We found that the immediate catalysts to Mr Nisancioğlu writing this email were what he saw as the problems that had been created by the publication of the Claimant's World Service English article, and the launch of the WDEs process. But this also reflected his more general feeling that he needed to maintain a firm grip on any activities of members of the TS in other parts of the BBC. He had two concerns: first, that, if unregulated, such activities were liable to give rise to allegations of favouritism and disloyalty within the TS; and secondly that such contributions, even though not for the TS as such, were liable to impact on the image of the TS, by association. He therefore regarded this as both a legitimate and a necessary area of activity for his editorial control and sanction.

46. In late September 2012 the Claimant was referred, through the HR team, for an Occupational Health (OH) report, which was then produced in early October. The Respondent was, in taking this action as such, following its ordinary processes in relation to an employee who had been signed off for a number of weeks with work-related stress. However, Mr Nisancioğlu also fed into the process, for comment from the OH doctor, the matter of the online article. From the framing of the particular question on the referral form, we inferred that this was because he considered that there was an issue as to whether the Claimant had been not sufficiently fit to be at work with TS, at a time when he had been fit enough to complete this article.

47. After the OH report was tabled, Mr Nisancioğlu took issue with two aspects of its contents in respect of which he sought corrections. The first was its suggestion that engaging in writing activity of this sort might itself be therapeutic; and the second was the suggestion that the Claimant's stress had been caused by ill-treatment by him, which he was unhappy to see raised, even as a matter of the Claimant's perception. The episode of the OH report, was, we found, reflective of the fact of the continued strength of feeling on both sides: on the part of the Claimant that he had not been properly supported, at a time of stress, by Mr Nisancioğlu; and on the part of Mr Nisancioğlu that the Claimant had caused division in the team, and wrongly tried to lay blame at Mr Nisancioğlu's own door.

48. Following his return to work at the end of October 2012, the Claimant's appraisal took place. In the appraisal document Mr Nisancioğlu identified that the Claimant had met his objectives, and that the year had started well with his six months attachment, regular involvement in live two-ways on radio programmes and involvement in presenting the business programme. He wrote that the Claimant had worked very hard on this and helped to make the project a success.



49. He then continued: “Unfortunately, the year did not end on a high note. Güney first started to leave his role in the business programme, then had to take first a two-week, then a four-week sick leave. He was referred to OH and he expressed that he was suffering from work related stress, especially because of a lack of support from his line manager. Even though I do not agree with this claim, the task now is to make sure that Güney, who has finished his six months SBJ attachment, returns back to his usual level of performance.”

50. At the beginning of November 2012, the Claimant emailed the then Head of World Service Languages, Liliane Landor. At this time the Claimant was also the NUJ representative for the TS. He referred to problems that he said he and some other colleagues had been experiencing. “The problems revolve around discouragement and hindrance of the staff in contributing to other areas of the BBC (even in their own time); and arbitrariness of editorial or managerial decisions, which I believe are against BBC policies and guidelines.” He wrote that his efforts to reach an understanding with Mr Nisancioğlu had ended in failure, and asked if they could have a brief informal chat. This prompted Ms Landor to see Mr Nisancioğlu (although it appears she did not specifically refer to the Claimant’s email), and he explained to her his understanding of how such matters were now regulated by the WDE system.

51. Pausing there, although the Claimant referred in that email to problems that both he and other colleagues had, it was clearly reflective of the Claimant’s own abiding concerns that Mr Nisancioğlu was unfairly restricting his ability to engage in other activities outside the TS; and it was reflective, it seemed to us, of a further undercurrent of differences of editorial view, which was a harbinger of things to come.

52. In December 2012 the Claimant applied for further SBJ attachment. The interview panel consisted of Mr Nisancioğlu, Mr Patka and a member of the HR team. The Claimant was unsuccessful, and the position went to Selin Girit.

53. In January 2013 the Claimant emailed Alper Balli, who had by this time been appointed as an SBJ in the TS. The Claimant queried why, having regard to his “expertise and insight on the Kurdish issue”, he had not been asked to provide coverage of certain recent stories with a Kurdish angle. Mr Balli sent a long response referring to the range of expertise and experience they had in the team on such issues and explaining his reasoning in relation to particular instances. At the conclusion of his email he turned to raise “some issues about your contribution to the daily operations of the section”. He gave an example, and suggested that they have a conversation in person. Also in January the Claimant emailed Mr Nisancioğlu asking if he could apply for an Oxford scholarship. Mr Nisancioğlu replied that he could, “but I need to talk to you about this first”.

54. It appeared to the Tribunal that these various exchanges reflected a continued feeling on Mr Nisancioğlu’s part, shared by Mr Balli, that the Claimant was not pulling his weight on the section and was (in their view) unjustifiably seeking to maintain a superior claim, over his colleagues, to be involved in coverage of Kurdish issues.

55. In May 2013 it was agreed that the Claimant would go for a short attachment to the News Hour programme at some point. This eventually went ahead in November 2013. In the meantime, between July and October 2013, he went on attachment to

the Global Video Unit (GVU). In December Zoya Trunova of that unit provided Mr Nisancioğlu with what she said was feedback she had had from the GVV Desk Editors. This described the Claimant as having worked hard and been friendly and polite, but said that his effort was inconsistent, that he could become resistant to feedback and that he had a lot of other commitments and interests, including doing work for other outlets, which sometimes took his attention away from GVV work.

56. In the event the Claimant's attachment to News Hour, which began in November 2013, was further renewed at intervals over the next 2½ years, and eventually ran all the way through to the spring of 2016. During this period the Claimant also continued to look for other opportunities, and consulted Mr Patka from time to time as something of a mentor in relation to his career options.

57. During this period, in January 2014, the Claimant secured an interview with a prominent figure, Fethullah Gülen. From the email exchanges, it was clear that Mr Nisancioğlu in principle supported running this interview, and the Claimant receiving due credit; but he was concerned, in view of Mr Gülen's role in Turkish affairs, that care needed to be taken, about how he was portrayed and described, so as to avoid any allegation that the BBC was not neutral with respect to him and his activities.

58. In October 2014 a further issue arose regarding the Claimant's raising in an internal BBC information forum, but also on Twitter, unconfirmed reports of an alleged chemical attack. We found that Mr Nisancioğlu was jittery about this in view of the seriousness of the allegation and the reports being unconfirmed. The Claimant maintained, when challenged in evidence about his handling of this, that he had acted responsibly, given that he had always indicated that the reports were unconfirmed. However, Mr Bent observed, when taken to this material during *his* evidence, that the allegations were so serious and high profile, and given the BBC's trusted status, that he would have been concerned, had the material been put out on Twitter without editorial oversight. That, in turn, lent credence to Mr Nisancioğlu's stance.

59. We found that these were examples of instances where Mr Nisancioğlu considered that he had legitimate editorial concerns regarding activities of ~~the~~ the Claimant, and how they might reflect on the TS; but which the Claimant did not accept, and which he perceived as instances of unwarranted criticism and denigration of his own journalistic integrity.

60. As of December 2015, the Claimant was planning a trip to Vienna between January and March. It was anticipated that, after that, his long attachment at News Hour would come to an end. At this time the Claimant emailed Ms Landor, asking to meet her to discuss his options and possibilities. She, however, steered him back to Mr Nisancioğlu and the two of them then had a discussion in December. During the discussion the Claimant indicated that he was considering his options outside of the TS, either in another journalistic role within, or possibly outside, the BBC, or in an academic or think tank role. Mr Nisancioğlu gave the Claimant his thoughts as to how these various options might be broken down, and investigated and pursued by him.

61. The work that the Claimant had done on the Fethullah Gülen interview in January 2014 had involved him doing extra shifts for which he was entitled to receive

a payment of around £700. In August 2014 he raised with Mr Nisancioğlu that this was outstanding, and emailed him further details.

62. There was then a further sequence of emails in December 2015. The Claimant noted that the payment had not been resolved and asked if it now could be, as two years had gone by. Mr Nisancioğlu replied agreeing to raise it with the relevant administrator, Alex. The Claimant chased again later in the month, stating that if he did not receive the money in January he would go into the red, and sent a further reminder a couple of days later. Then, on 15 January 2016, while in Vienna, the Claimant sent a further email asking when it would be paid. He then sent another a few hours later, questioning why it had taken so long and saying: "Do I need to beg? I do not know what you are trying to do but you are sure making a mistake."

63. Ms Cunningham put it to Mr Nisancioğlu, that the Claimant had been treated disgracefully over this payment, with his requests being deliberately ignored until he was forced to beg. Mr Nisancioğlu responded that the matter had simply been overlooked for some time, and had proved not straightforward to sort out, because of the Claimant having been in a different team when the work was done. He also said that, when the Claimant had raised it again in December 2015, he had wanted to pass it to Alex, but it turned out that she was away, and then, in January, still away. He then had to get someone else to sort it out, by which time (though he did not know it at the time) the January payroll had been missed. So, it was on account of these various difficulties that the Claimant only finally got the payment in February.

64. It appeared to us that this matter *had* fallen off the radar of both the Claimant and Mr Nisancioğlu for a time in 2014 and then, after August 2014, again for another long period. We accepted, as such, that when chased again at the end of 2015 Mr Nisancioğlu did take steps to get the payment processed and that the delay until February was, in essence, for the reasons that he described. However, nor was he moved to offer the Claimant any reassurance or sympathy, and he did not trouble to reply to his emails. It was clear from his evidence that he also took offence at the Claimant's second email of 15 January. All of this was consistent with a picture in which relations between the two of them had not particularly thawed or warmed during the period of the Claimant's long secondment at News Hour.

65. After his trip to Vienna in January – March 2016 the Claimant also took some further leave to travel to Turkey to see family and for medical treatment. Meantime, during February Mr Nisancioğlu had exchanges with his opposite number at News Hour, Lucy Walker. The context was that further piecemeal extensions of the attachment were no longer tenable. Mr Nisancioğlu suggested that News Hour might, instead, wish to take the Claimant on permanently, but Ms Walker declined that.

66. Pausing there, it seemed to us that the reality at this point was that the Claimant did not particularly wish to return to the Turkish Service and Mr Nisancioğlu did not particularly wish to have the Claimant back. However, they both recognised that the Claimant *would* be returning, unless he could find some other opportunity. Both recognised that they needed to make the best of it, but each had real misgivings, hoping that the other would turn over a new leaf, but suspecting that he would not.

67. It was the Claimant's case that Mr Nisancioğlu briefed other members of the team that he had been "sent back" to the TS by News Hour for some unspecified reason. Mr Nisancioğlu denied that. We found that Mr Nisancioğlu had concerns that (as he saw it) the Claimant had in the past proved on occasion to be a divisive presence. We found that Mr Nisancioğlu felt the need to say something that would insulate him against any bad feeling about the Claimant's return, or any fallout that might ensue; and so he did say something to convey to members of the team that the Claimant's return was not entirely of his choosing.

68. Following the Claimant's return in mid-May, he and Mr Nisancioğlu had a further discussion about his plans, and what his options might be in terms of a move elsewhere; the context being that each, for their own reasons, would regard it as a good outcome if the Claimant were to move on. In addition, Mr Nisancioğlu wanted some further feedback from the Claimant on his intentions at this point, because he was about to embark on a recruitment exercise for the TS. In the discussion, Mr Nisancioğlu indicated that he could provide the Claimant with suggested names of think tanks, and he emailed a list of these the next day. However, nothing further came of this at this point, and so the Claimant remained in the TS team. We found that Mr Nisancioğlu remained concerned as to whether the Claimant would (in his eyes) prove a better team player than before, and he also believed that he needed to maintain a close control and editorial oversight over any external activities.

69. At the end of June 2016 the Claimant was approached to contribute to the BBC World News Impact Programme. He contacted Mr Balli, who told him that he should take the matter through the WDE process. In the event there were difficulties with getting it processed in that way, but the Claimant went ahead, relying on his conversation with Mr Balli as implicit authority. Mr Nisancioğlu was not aware of this contribution, at the time, but in July it came to his attention. He then spoke to the Claimant about it, asking whether he had obtained permission. The Claimant then invited Mr Balli to join the discussion. Mr Balli's position was that he had *not* given implicit permission: he would have decided what to do, had he been approached by the WDEs. But he accepted that there may have been a misunderstanding. Mr Nisancioğlu reiterated that the Claimant must get *express* consent for any such appearances. He made a comment to the effect that everyone wants to be a star, his point being about the need for fairness in sharing opportunities of this sort.

70. In July 2016 the Claimant asked Mr Nisancioğlu whether he could support him studying for a PhD, by rostering him at weekends where possible, so enabling him to attend college during the week. Mr Nisancioğlu replied that he could not offer him any guarantees. It was the Claimant's case that when Mr Balli had made a similar request some time before, Mr Nisancioğlu had been more supportive. We accepted Mr Nisancioğlu's evidence that, in substance, what he had said in both cases was that he could not offer any guarantee; but we also found that there was a difference in tone between the two occasions. Mr Nisancioğlu had left Mr Balli with the impression that he *would* see what he could do to support him, but the Claimant was left with the impression that no special effort would be made to assist him at all.

71. On 13 July 2016 the Claimant emailed Mr Patka, asking if he could meet to discuss "a critical concern of mine before starting a formal grievance process and other processes related to separate editorial policy issues." They indeed met, and the

Claimant outlined his concerns about Mr Nisancioğlu's treatment of him and about his editorial stewardship of the TS. He indicated that he believed that his treatment had to do with his Kurdish ethnicity. Mr Patka indicated that if the Claimant had such a serious concern, he should follow the grievance procedure.

72. On the evening of Friday 15 July 2016 an attempted military coup began in Turkey. Mr Nisancioğlu and a number of other TS employees headed in to work at the TS. The Claimant also headed in to work, but went to the Newsroom. At about 11.00pm Mr Nisancioğlu had cause to go down to the Newsroom. There he encountered the Claimant, who he had not known was in the building. In one form of words or another Mr Nisancioğlu angrily told the Claimant that he should go up and join his colleagues who were working on the breaking coup story in the TS.

73. We found that Mr Nisancioğlu was surprised to find the Claimant in the Newsroom, and felt that this was yet another instance of his disloyalty to the team, in pursuit of a higher profile involvement elsewhere in the BBC. The Claimant, for his part, felt that this was another instance of Mr Nisancioğlu wrongly seeking to control and restrict what he did, at a time outside of his TS shift. Mr Nisancioğlu, however, considered that any dedicated TS journalist would want to come in and support the TS at such a momentous time, regardless of whether they were rostered on shift or not.

74. Mr Nisancioğlu worked until 6.00 am, went home for a time, and then returned to work during the Saturday afternoon. When he did so, he saw an email from the Newsnight editor, Rachel Jupp, asking if the Claimant could join a team that she was sending to Ankara that night. He replied, beginning: "This is totally unacceptable." He continued that the Claimant was expected to be in the TS on the Monday to carry out his duties there, and that such arrangements should not be made without the prior knowledge of himself and planning editors, and that he was in any event sending one of his BJs to Ankara already. In evidence to us, Mr Nisancioğlu explained that another member of the TS team, Cagil Kasapoglu, had, the night before, offered to cut short a holiday, and returned to the UK, in order then to head out to Turkey for the TS. It therefore would have made no sense, he said, to let the Claimant go as well.

75. The Claimant argued, in evidence, that this was another example of Mr Nisancioğlu deliberately suppressing him. He noted that, even when he returned to shift at the TS the following week, he was not in fact put to work on any coup-related stories: so he was either not really so badly needed, or was being effectively punished. Mr Nisancioğlu denied this, maintaining that, on the Saturday, he had no idea how the fast-changing events in Turkey would unfold from day to day.

76. We found that Mr Nisancioğlu's reaction to the email from Ms Jupp was coloured by a mixture of things. Knowing that he already had a team member heading to Turkey was part of it. However, we found that the particular tone of the email indeed reflected the fact that he did genuinely feel the Claimant had his priorities wrong; and, from Mr Nisancioğlu's evidence, this was coloured by what he saw as the presumptuousness of a more high-profile BBC team. In further emails about this episode, Ms Gibson and Mr Patka both gave Mr Nisancioğlu their support. We found they did, indeed, genuinely support him, although they also were seeking to smooth matters over with Ms Jupp, in view of the tone of his initial response to her.

77. Mr Nisancioğlu considered that the events of that weekend involved the Claimant once again seeking to circumvent what he regarded as a clear and legitimate requirement, that the Claimant obtain prior permission from himself or an SBJ before engaging in any BBC activity outside of the Turkish Service. He considered that he needed to reiterate his instructions to that effect. We also found, in light of how matters subsequently unfolded, that, at this point, Mr Nisancioğlu was minded to give the Claimant some form of warning about his conduct that weekend.

78. On the evening of 19 July Mr Nisancioğlu messaged the Claimant asking to meet. The Claimant was reluctant to come without knowing what it was about and because he was about to go off shift. Mr Nisancioğlu responded that they should meet the next morning at 11.00 am. He then emailed, referring to the meeting on 12 July, in which they had discussed the matter of (in English translation) doing work for other workplaces. He continued: "We told you that are some things which you should not do, and also informed you about the procedures. I am of the opinion that as of last Friday night you have not complied with this request of ours. I want to discuss this issue once more tomorrow (Wednesday) at 11". He copied in Mr Balli.

79. Later that night the Claimant sent Mr Nisancioğlu a long email. He began by complaining that he had for the third time in two months asked him to a meeting after finishing shift. He said this had affected his work life balance and caused him sleepless nights and stress. He referred to the 12 July meeting, by which he had been "disturbed, disappointed and saddened." He set out a detailed account of the discussion at that meeting. He then gave his account of the events of the evening of Friday 15 July, indicating how well received the work he had done on the coup through that night had been and expressing his disappointment that he had received no praise or thanks from Mr Nisancioğlu for this. He then went on to give his account of Mr Nisancioğlu's reaction to the Newsnight request and the failure to give him any useful work to do on the coup following his return to work the following week. He went on to state that since 2012 he had repeatedly raised the issue of not being given enough opportunity in the department; and he referred to his medical leave at the time. He also questioned why Mr Balli needed to be present at the meeting the next day.

80. The Claimant concluded his email: "I also have to let you know that I've already spoken to HR and your line manager about my concerns and will be raising Discrimination and Bullying Harassment grievance with you as I increasingly find it extremely difficult to work in such an environment. There I will make more comprehensive points about the issues that have been going on since 2012."

81. Mr Nisancioğlu forwarded that email to Mr Balli with a brief message, mostly in Turkish. In the translation in our bundle this read "Confidential! Here is a rock. Lean against it whatever you want ... We have to deal with a psychopath like this." There was some debate among witnesses as to whether "psychopath" was a fair translation of the corresponding Turkish word. We concluded that it may have been the nearest available English word, but that the English word is rather more pejorative than the Turkish word used, which conveys more of a tone of someone being mentally unwell, and to be pitied or sympathised with on that account.

82. Mr Nisancioğlu, when cross-examined, said that this email comment to Mr Balli was borne out of a sense of deep frustration. We found that was essentially true. As

Mr Nisancioğlu saw it, the Claimant was stubbornly refusing to comply with his legitimate instructions, or even to meet with him when required to do so. His email to Mr Balli reflected his feeling of frustration, and conveyed that he simply did not know what to do next, or how to manage the Claimant any more.

83. The Claimant did not attend work for the meeting on 20 July 2016.

84. On 21 July 2016 Mukul Devichand emailed Mr Nisancioğlu asking if the Claimant could participate in a 20 minute “lunch with” slot live on Facebook the next day. Mr Nisancioğlu sought to forward this to Mr Balli asking for his comment (in English translation) reading: “Here you are. Shooting is still going on. Do you think we should let him go or should we tell him that they should speak with the senior member of department who monitors social media?” (In fact, initially he accidentally sent that email to Mr Devichand). However, it transpired that the member of the Turkish Service specialising in social media, Ebru Doğan, would not be available; and the request for the Claimant was agreed. However, in his reply Mr Nisancioğlu also reminded Mr Devichand of the WDEs procedure, and asked that this be followed.

85. We found that Mr Nisancioğlu’s reference to “shooting” might perhaps be better conveyed in English as this being “another round”. He remained frustrated that the Claimant was continuing, as he saw it, to defy his instructions, in the wake of their exchanges on 19 July and his non-appearance on 20 July.

86. Feeling at an impasse, Mr Nisancioğlu sought advice from a specialist HR team available to managers called Manager Advice. He indicated that, had the meeting on 20 July gone ahead, he would have been minded to give the Claimant a formal warning. However, they suggested that instead he write to the Claimant indicating that any repetition could potentially be dealt with under the formal disciplinary policy. Mr Nisancioğlu also sought their advice about the Claimant’s long 19 July email. The advice was that he should not respond to it in substance himself, but should direct the Claimant to the Bullying and Harassment procedure and the HR team.

87. Mr Nisancioğlu then prepared an email which he sent to the Claimant on 22 July. This referred to the meeting on 12 July, and to the WDEs process, and indicated that if any member of the TS was contacted directly by another department then they should ask them to go to the WDE. He added: “This applies to out of shift times, off days and leave periods.” He indicated that it appeared that the Claimant was “still not working within these guidelines” and re-emphasised that he must do so. He indicated that were this to happen again “it may be appropriate to investigate and deal with this more formally and under the BBC disciplinary policy. I hope we do not get to this point, and we can continue to work together to resolve the situation.” In a concluding sentence he wrote: “If you wish to pursue the comments made in your email in relation to Bullying and Harassment concerns please can you submit any formal Bullying and Harassment grievance to Vanessa Twigg (HR Business Partner, WS Group).”

88. During July 2016 there was an episode in which the Claimant obtained an interview with Graham Fuller of the CIA and Mr Nisancioğlu and Mr Balli declined to run the accompanying piece on the basis of that interview alone. We found that this was because, in disagreement with the Claimant, they considered that the piece would be editorially unbalanced without the Claimant having obtained another interview from

someone else perceived to come from a different perspective. We accepted that this was their genuine editorial view, but also found that the Claimant did not agree with it and thought they were wrong and simply once again seeking to suppress him.

89. On 26 July 2016 the Claimant raised at an editorial meeting, and subsequently in an email to the WDEs, unconfirmed reports of suicides among leaders of the attempted military coup being held in prison. The WDE sought to obtain verification of the story both from the Claimant and others in the TS. There was also an email from Ms Gibson expressing concern, as the story was unconfirmed. Mr Nisancioğlu was also concerned that the Claimant had jumped the gun in disseminating the story.

90. In evidence to us the Claimant maintained that he had done nothing wrong as he had always indicated that the story was unconfirmed, and that once again this was an instance of Mr Nisancioğlu, without good cause, attempting to stifle him. We accepted, however, that Mr Nisancioğlu was concerned that this was an extremely serious and high-profile allegation, which the Claimant had prematurely set running at the editorial meeting and with the WDEs as part of the day's news agenda. We also found that those concerns were genuinely shared by Ms Gibson.

91. On 26 July 2016 the Claimant emailed Ms Twigg indicating that he was planning to raise a discrimination, bullying and harassment case against Mr Nisancioğlu, and he then met with her. We accepted Ms Twigg's evidence that, as part of the account he gave her, he conveyed, in one form of words or another, what he believed to be the unique contribution he could make to reporting on Turkish affairs for the benefit of the wider BBC, and which he felt was being wrongly stifled.

92. The Claimant also arranged to meet Ms Gibson. This meeting was scheduled for up to 30 minutes but in the event lasted around 90 minutes. He raised his complaints regarding treatment by Mr Nisancioğlu, including his belief that this was influenced by his Kurdish ethnicity. He gave examples of instances where he felt that he had been wrongly prevented from contributing to other parts of the BBC, including the Newsnight request. He went on to indicate that he also had concerns about the editorial line and standards being adopted in the TS. Ms Gibson put it to the Claimant that the examples he was giving did not appear on their face to involve discrimination. She suggested potential alternative explanations might be a reasonable management instruction, a humorous remark or some miscommunication. The Claimant was concerned by this, that she was not taking this allegation seriously.

93. As the Claimant had indicated that he would be raising a formal grievance about his alleged treatment, Ms Gibson did not think it appropriate or necessary for her to take any further action of her own in relation to that. However, his editorial concerns would not be covered by that grievance process. She considered that these were also serious and that the appropriate way forward in relation to them might be for her to set up some form of independent investigation.

94. In the aftermath of this meeting, and further events, the Claimant emailed Ms Gibson seeking clarification on what particular policy required him to seek permission to appear on other programmes in his own time. He also later emailed Mr Patka.



95. On 28 July 2016 Albana Kasapi of World Update emailed Nassim Hatam of WDEs asking if they could interview the Claimant the next day on the subject of the coup. In forwarding this to Mr Nisancioğlu, Nassim Hatam commented: "He keeps offering himself to programmes, but I worry about the accuracy of his reporting and would like to get your advice on how to proceed." Mr Nisancioğlu sought the thoughts of the SBJs, Mr Balli and Ms Doğan. Ms Doğan's reply was to the effect that the editorial concerns were a matter for the editors who had made the request. Mr Balli replied that he thought the Claimant was using Albana Kasapi, and attempting to show that he was following procedure, but being refused, as "he wants to collect evidence about discrimination". Mr Nisancioğlu replied asking what they should say and commenting "the case has also an editorial side". It appears that, ultimately, the requested contribution was in fact provided by Mr Nisancioğlu himself.

96. We concluded that Mr Nisancioğlu *did* have genuine editorial concerns about this request. He did not find the replies of either Mr Balli or Ms Doğan helpful, because they did not address those concerns, and he disagreed with her view that this was not his concern, as it would not be a TS programme. This reflected his continuing genuine concern about the reliability of the Claimant editorially on the subject of the coup, following on from the episode of the rumoured suicide of coup leaders. It was reinforced by the cautious reaction of Nassim Hatam. We found that, once again, Mr Nisancioğlu was concerned that any deviation from what he regarded as the right editorial line, would be potentially damaging to the reputation of the TS.

97. Later that day Farhad Tayeb of the WDEs emailed asking if the Claimant would be available to appear on World Service Radio to talk about the coup at 5.00 pm that afternoon. Mr Nisancioğlu replied: "No. From now on, nobody can request individuals. Turkish Service Editor and in his absence Alper and/or Ebru decide who is going to contribute to other programmes."

98. Once again, we found that Mr Nisancioğlu considered that the Claimant was seeking the limelight outside of the TS, and that he had genuine editorial concerns about the line that the Claimant might take on the subject of the coup. Mr Nisancioğlu remained of the view that he was entitled to expect the Claimant to get clearance from him or one of the SBJs before putting himself forward for any programme outside the TS. While the Claimant *had* used the WDE process, Mr Nisancioğlu considered that the Claimant was nevertheless deliberately getting editors specifically to ask for him, as a way of making it harder for him to refuse. Hence his firm insistence that "from now on" no requests for named individuals from the WDEs would be accepted.

99. Following exchanges between the Claimant and the Editor concerned, David Mazower, Mr Mazower emailed Mr Nisancioğlu. He thanked him for making Ms Kasapoglu available, but asked if there was anything he could do to make it possible for the Claimant to appear on their programmes in the future. This prompted Mr Nisancioğlu to go to see Mr Mazower. A few days later Mr Mazower put what he described as a "rough transcript" of their discussion into an email to himself. We found that this was indeed a fair, although not precisely verbatim, record.

100. The discussion started with Mr Nisancioğlu asking what was going on with the Claimant and commenting that he kept asking to go on air with other programmes, that there was a procedure under WDEs that needed to be followed and that there

were other programmes where this had happened. They were happy to help, but he had a service to run and had to be able to control which of his staff were on air with other programmes. Mr Mazower accepted this but noted that they had approached the Claimant, not the other way around. Mr Nisancioğlu continued that he had some editorial concerns about the Claimant. "It's a very sensitive time in Turkey and we in the Turkish Service are being very closely watched. I have to be responsible for everything that my journalists report, whether it is for our service or English TV and radio". He then referred to the example to the suspected suicides of coup leaders' story, which proved not to have been true. He continued that "I can't let those things happen. So, I have to have control over which of my staff go on other programmes".

101. Pausing there, we found that this was a candid, editor to editor, discussion and that these passages captured exactly what Mr Nisancioğlu genuinely thought.

102. Mr Mazower then recorded Mr Nisancioğlu saying at the end of the meeting "He's going around stirring things up. He's more or less told me that he plans to take out a grievance against me. I hope he does. It will allow us to deal with some of this stuff. He's comeback from Newshour and he decide if he wants to be part of this service or not. He has spoken about doing a PhD; I have no problem with that. But he needs to be part of the Turkish Service, if he's working for me."

103. In evidence to us, Mr Nisancioğlu accepted that as a fair summary of what he said at the end of the meeting, save that he did not agree that he had said "stirring things up", which was an English phrase that he said he would not have used.

104. We found that, having, as he saw it, explained to Mr Mazower why his requested had been refused, Mr Nisancioğlu went on, in this part of the discussion, to vent his more general feelings that the Claimant was not a team player and needed to commit to the TS, if, indeed, he intended to stay with it. He regarded the grievance as illustrative of that. We did not, however, agree with Ms Cunningham's submission that this passage showed that the grievance had, itself, influenced Mr Nisancioğlu's decision in relation to Mr Mazower's request. Rather, those had been accurately conveyed in the earlier part of the discussion, and, as we have described, reflected longstanding concerns on Mr Nisancioğlu's part.

105. Ms Gibson emailed the Claimant on 29 July 2016, following up on their meeting and his subsequent emails to her and Mr Patka. She noted that he intended to submit a bullying and harassment grievance and identified his concerns about the editorial line of the TS and about the processes for working on other programmes both during and out of allocated hours. She also expressed some concern about the Claimant asserting that he regularly briefed external stakeholders on Turkish issues and at his account of his actions on the night of the attempted coup. She stated that she would expect all external activity to be conducted with the sign off of his line manager. If Newsnight had approached him personally, she would have expected him to let his line manager know before discussing his availability with them. Out of hours requests needed to be cleared in advance by the line manager. The Claimant's substantive job was with BBC Turkish and he needed to do what was required of him there, whether that was working on its outlet or providing resource to other BBC areas. Regarding the editorial issue she proposed to start an investigation, but asked the Claimant to confirm that he was happy with that.

106. The Claimant replied on 1 August 2016 expressing concern at Ms Gibson's lack of serious engagement with his discrimination concerns, and pressing to be told what BBC policy prevented staff from helping out other programmes at off-shift times. He referred to the distress and harm which ongoing bullying by Mr Nisancioğlu was causing him and suggested that this was also "costing the BBC by making a BBC journalist who is highly resourceful on Turkey and the Kurds in the Middle East practically unworkable." He did not agree with her proposed editorial investigation. In reply Ms Gibson indicated that it was not appropriate to discuss the grievance, which would be heard or by HR. She referred the Claimant to the Employee Assistance Programme and raised the possibility of an OH referral. She asked him to think again about the right process for addressing his editorial concerns.

107. Ms Gibson copied in Ms Twigg, who said she would arrange an OH referral. She also advised that working for other services was not a problem from a working time point of view unless or until the Claimant hit the 48-hour limit. Ms Gibson remained concerned that his manager needed to know what additional hours he was doing so that overall working time could still be monitored. Having heard Ms Gibson's oral evidence, we were also satisfied that she did support Mr Nisancioğlu's stance that the Claimant's external contributions were a matter of legitimate editorial concern, because of the potential repercussions for the TS. However, this was not something that Ms Gibson felt she needed to justify to Ms Twigg in their exchanges, as it was not an HR matter.

108. On 3 August 2016 the Claimant was signed off sick for a day. It later came to Mr Nisancioğlu's attention that on that day the Claimant had attended a meeting in London convened by a visiting AKP member of the Turkish Parliament. Mr Nisancioğlu considered that, as the Claimant was signed off sick that day, he would have been entitled to regard this as a disciplinary matter. However, he refrained from raising it, in part, we found, because he was concerned that nothing he did should be portrayed as an adverse reaction to the Claimant's threatened grievance.

109. From around 10 August 2016 the Claimant was signed off sick for a period. He emailed Ms Gibson indicating that he wanted to focus on his discrimination and bullying case, was being referred to OH and did not want to pursue the editorial investigation. Ms Gibson indicated that the two things could have been done simultaneously, but in view of this, decided not to pursue the editorial investigation.

110. On 15 August 2016 the Claimant emailed HR submitting a formal grievance document. This began by stating that Mr Nisancioğlu had discriminated against him based on his Kurdish ethnicity, and victimised him, since mid-2012. It stated that he was the only ethnically Kurdish journalist in the department. It described the behaviour as having taken the forms of not acknowledging his achievements, actively blocking him from doing work with other programmes, even on out-of-shift times, treating him less favourably and not offering him opportunities offered to other colleagues, actively trying to undermine him with other BBC editors, spreading rumours, not fulfilling his duty of care in relation to the Claimant's work-related stress, not responding to his efforts to resolve issues and gradually pressuring him to leave the BBC after he returned to the TS following a period of attachment.

111. The document then set out, over several pages, the matters relied upon by the Claimant in relation to each of these themes, giving his account of various episodes since 2012, many of which have been covered in our findings of fact. In an addendum the Claimant referred to various legislation and case law, and indicated that he was requesting that “my harasser and myself be separated with immediate effect”.

112. The Respondent has a specialist team, Support at Work, which manages the handling of such grievances. So, Fiona McLeod of that team became involved at this point. Ian Bent, Head of Radio Production North for the Respondent, and Caroline Prosser, an outsider, were appointed to consider the grievance.

113. On 26 August 2016 the Claimant saw OH and also returned to work. The OH report was produced on 30 August. It referred to the Claimant’s perceived difficulties with his line manager and deputy line manager. He had said he was keen to look at other roles within the BBC. It recommended that he was medically fit to return to work but advised on a phased return. There were no issues affecting management’s normal actions under attendance, performance or capability processes if so required. In line with this report a phased return was implemented from the start of September.

114. On 8 September 2016 Mr Balli emailed a number of present and former members of the TS team regarding a proposed picnic in Regents Park the following Monday evening, 12 September. This idea had been mooted some days before at a farewell drink for Ms Doğan, who was being assigned elsewhere. Neither the Claimant nor Mr Nisancioğlu were included on the email. On the evening in question the Claimant found himself alone in the office at a certain point without knowing why. He emailed Mr Nisancioğlu that he had a story to handover, but could not. “Nobody told me anything and I don’t know where they are or when they will be back. I felt that a get together was arranged but no one told me about it or invited me.” Mr Nisancioğlu forwarded this to Mr Balli commenting, in Turkish: “A complaint is raised.”

115. As people were departing for the picnic an old friend and colleague of Mr Nisancioğlu’s persuaded him to come along, which he did, at least for a short time.

116. On 13 September 2016 the Claimant followed up with Ms Twigg on his request to be moved to a different department while his grievance was being considered. There was then further consideration between HR members and managers as to where the Claimant might in practice be moved.

117. On 21 September 2016 the Claimant emailed Ms McLeod adding an addendum to his grievance concerning the picnic, complaining of overt social isolation and humiliation, and of having received no reply to his email to Mr Nisancioğlu about it.

118. On 23 September 2016 a grievance hearing took place. Those present were Mr Bent and Ms Prosser, Ms McLeod and the Claimant, accompanied by his NUJ representative. The meeting lasted almost three hours. The discussion worked methodically through the different points of the original grievance document, with Mr Bent mainly asking the Claimant for further comment and clarification. Towards the end Ms Prosser asked the Claimant what resolution he was seeking. He said that he wanted to be an SBJ in the TS but doubted that this would happen. His ideal would be to remain in that service without Mr Nisancioğlu there. Going to another

department would be his second choice. Ms Prosser noted that it was not in the gift of the panel to make him an SBJ. Expanding on his complaint that he had been discriminated against because of his Kurdish ethnicity, the Claimant said he had not immediately jumped to this conclusion. He offered a political analysis of why Mr Nisancioğlu might harbour anti-Kurdish attitudes, despite being professedly left-wing.

119. From around 26 September to 20 October 2016 the Claimant was off sick. There were further exchanges about where he might be assigned during the course of his grievance, involving Ms Gibson, Mr Patka and others. It was clear to us from the various exchanges that Ms Gibson and Mr Patka were both concerned that, during the period of his assignment elsewhere, pending the conclusion of the grievance process, the Claimant should not appear on air. This, we found, was because they were aware of Mr Nisancioğlu's editorial concerns, and that the Claimant himself regarded those professed concerns as contentious. They wanted to avoid any further issues or episodes blowing up, pending the grievance conclusion. It was in this spirit that Mr Patka commented that, if the Claimant went to news online or news gathering "that will just open up the can of worms about him appearing on air".

120. It was proposed that the Claimant join the Television Video Unit (TVU). Ms Gibson had concerns, in particular because its editor, David Goldberg, had been in his role little more than a month, and faced many demands and challenges. However, a project to which she had hoped the Claimant might be assigned had run its course, and she reluctantly accepted that the TVU was the best available temporary home for him, while the grievance continued. In an email of 10 October she confirmed that the Claimant could join the TVU the following week, but said that it would be good if someone could talk to him about his skill levels for the work in question. She added: "He will need to be a good team player. And this is not a reporting role." Mr Patka subsequently discussed the Claimant joining the TVU with Mr Goldberg.

121. On 20 October 2016 the Claimant returned from sickness absence and began working in the TVU.

122. Mr Bent and Ms Prosser, with Ms McLeod, interviewed Mr Nisancioğlu in relation to the Claimant's grievance. In giving his side of the story, he indicated that he resented the suggestion that the Claimant had been treated adversely because of his Kurdish ethnicity. He referred to his own activism from age 16, including for Kurdish rights. Further on, he indicated that the Claimant thought himself to be the only person knowledgeable about Kurdish issues, but he was not the only Kurdish team member, nor the only one with the capability to cover Kurdish stories.

123. In October 2016 the Foreign Affairs Committee of the House of Commons informed the Claimant that he had been appointed as a Specialist Advisor in relation to its enquiry into Turkey. However, he did not take up that appointment at this time.

124. On 4 November 2016 the Claimant wrote to Ms Twigg and Ms McLeod raising concerns about the length of time the grievance process was taking and also indicating that he regarded appointment to the TVU as a form of punishment.

125. On the afternoon of 4 November 2016 the Claimant approached Mr Goldberg saying that he had been asked to do a two-way for World Service TV. Later that afternoon Mr Goldberg made a note about this encounter including the following:

I said that I didn't know all of the circumstances but that I understood that his reporting on air was one of the questions involved in his current situation. I said that as I didn't know enough about the situation, I wanted to find out more about it and that until I was able to do that I would prefer that he did not do a 2way today. He said that the quality of his on air reporting had not been in question and that he was upset that it was now being questioned with other editors like myself. I reiterated that the situation today was that I didn't have enough information and that I would prefer that he not do a two-way until I had more info.

From all of the evidence available to us we found that to be a fair note.

126. Our further findings about this were as follows. Mr Goldberg was aware that the Claimant had raised a grievance, as such, but he did not know the details. He was also aware that there was an issue about the Claimant appearing on air and that this was contentious, but he did not know any more about that either. He did understand that this issue also, somehow, featured in the subject matter of the grievance, but again he did not know how. We considered that, in his conduct in response to the Claimant's request, what influenced Mr Goldberg was his awareness that the matter of the Claimant appearing on air was potentially contentious, together with his own lack of knowledge of any more detail than that. That was why he was concerned not to grant the request at present, until or unless he was able to find out more about what the issue might be. Whilst Mr Goldberg was *also* aware that this issue somehow featured in the grievance, that was not a contributing reason for his reaction as such.

127. It was put to Mr Goldberg that, if he needed more information in order to decide whether or not to let the Claimant appear on air, it would have been a simple matter to pick up the phone to Ms Gibson. However, we accepted Mr Goldberg's evidence that he had a number of other matters he was dealing with that afternoon, being new to his role, he did not want to give Ms Gibson the impression that he constantly needed to look to her for on-the-hoof guidance, and he did not consider it of great importance that the Claimant be able to take up this particular request, as these were a commonplace thing. We accepted that he genuinely considered that his approach, which was to put the issue, as he saw it, on hold, and then (which he in fact did) to raise it at his next routine meeting with Ms Gibson, was sensible and proportionate.

128. On 7 November the Claimant emailed Mr Goldberg, giving his account of the discussion, and questioning Mr Goldberg about it. He also referred to having seen Mr Nisancioğlu speaking to Mr Goldberg later that day, and asked if any part of the conversation was about him. On 9 November the Claimant emailed that the whole situation, including what happened on the previous Friday, was making him ill, and he would be going off sick. On 10 November Mr Goldberg emailed the Claimant, giving his account of the events of 4 November, indicating that his later conversation with Mr Nisancioğlu was on an entirely separate matter, and suggesting that they "have a chat when you are next in the office about how we can best handle any future two-way requests while you're with the TVU."

129. On learning that the Claimant had gone off sick with stress, Ms Gibson emailed Ms Twigg, beginning: "This is really unacceptable. I am concerned that now the TVU is being pulled into the whole situation. Vanessa, can we look at alternative locations for Güney please, there is just too much on at the moment for Nicky in view of 2020 to deal with this. If he is too sick to work or follow a reasonable management instruction, he should not be at work." Ms Gibson advised against taking the Claimant out of the TVU before his grievance was concluded as this could bolster the Claimant's view that he was being victimised and that Mr Nisancioğlu's influence went wider than the Turkish Service.

130. In the second half of November, a series of interviews were conducted by Ms McLeod in connection with the Claimant's grievance, with Alper Balli, Artyom Liss and Mahmut Hamsici.

131. On 24 November 2016 the Claimant emailed Mr Goldberg regarding his health situation indicating that he was at "an all-time low" and contemplating adding events of 4 November to his grievance. Mr Goldberg sought assistance from Oliver Rivers, who had by this time taken over from Ms Twigg. The next day the Claimant emailed to Ms Twigg and Ms McLeod his account of the 4 November episode, asking for this to be added to his grievance and indicating that his main concern was that this had been influenced by him having raised a grievance against Mr Nisancioğlu and amounted to victimisation. He followed up with an email on 28 November asking Mr Rivers whether he should continue working at the TVU in light of this latest incident. Mr Rivers replied that he did not think it appropriate for the Claimant to change departments at this stage, and indicated that whilst the incident would be investigated under the grievance procedure, he also encouraged the Claimant to discuss it with Mr Goldberg upon his return. He indicated that he would continue to assess the possibilities for a move.

132. Ms McLeod had planned to meet the Claimant at the end of November to discuss further issues arising from his grievance, but because of ill health she was unable to do so and instead emailed him a series of questions. The Claimant emailed his replies on 2 December 2016. On 5 December Ms McLeod interviewed Mr Goldberg in connection with the grievance.

133. On 16 December 2016 the Claimant presented his Claim Form to the Tribunal.

134. On 12 January 2017 Ms McLeod emailed the Claimant a letter from Mr Bent setting out the outcome of his grievance. Their decision was that they did not consider any of the complaints amounted to bullying and harassment nor did they consider Mr Nisancioğlu's behaviour to have been inappropriate in any of the situations raised. They also concluded that he had not been motivated by the Claimant's ethnicity when making any management decision and that there was no evidence that he was coordinating others in the team to behave in an inappropriate manner.

135. They went on to set out reasons for their decision both by way of general background and in relation to the individual matters complained of, over a number of pages. They did not find the complaint substantiated, that there was a lack of acknowledgement of the Claimant's achievements. They referred to Mr Nisancioğlu's response to the suggestion that he was influenced by the Claimant's Kurdish ethnicity. They reviewed the attachments that the Claimant had enjoyed and concluded that Mr

Nisancioğlu had not inappropriately blocked these. They set out their various conclusions in relation to various episodes, which they concluded all involved legitimate and appropriate management and editorial decisions. They considered that Mr Nisancioğlu had been right to remind the Claimant of the WDE process in June 2016 and that there was a proper and appropriate system in place for allocating work, regardless of how the request was initially made, that had been correctly used by Mr Nisancioğlu and Mr Balli. They did not find Mr Nisancioğlu to have approached other editors to undermine the Claimant, but in response to concerns about his actions. Mr Nisancioğlu had made attempts to resolve matters informally following, in particular, events in mid-July 2016. They did not accept that Mr Nisancioğlu had pressured the Claimant to leave the BBC but concluded that the Claimant had initiated discussions to which he had responded with supportive advice. They did not accept that the Claimant had been deliberately excluded from the picnic. Regarding events of 4 November, they found Mr Goldberg's explanation to be a reasonable one.

136. In a section headed "Recommendations" he wrote that they would be confirming to Mr Nisancioğlu that as there was no case of bullying and harassment nor discrimination "he is able to return to managing you." However, he added that as "you and Murat have issues in your working relationship that need to be resolved, I am recommending that you should both be encouraged to take advantage of the free mediation service offered by the BBC." He also wrote: "I would add that we have seen from your evidence that you are a very passionate journalist and that you are keen to engage in opportunities wherever possible. However, there are protocols that need to be followed. Managers have to allocate staff and resources in order to satisfy the conflicting demands on the service. The WDEs are there to ensure that work is properly allocated in order to satisfy these competing demands. It is crucial that you engage with this process and with your manager for all other aspects so that the team is able to work well together and so you can continue to grow and develop and be a successful BBC Journalist." The Claimant was informed of his right to appeal.

137. Separately, Mr Nisancioğlu was notified that the grievance against him had not been upheld.

138. On 13 January 2017 the Claimant emailed Mr Goldberg that he was not well enough to come to work due to severe work-related stress.

139. On 16 January 2017, the Claimant emailed Mr Rivers attaching a letter dated 15 January. This stated that he was resigning with immediate effect. He wrote that he had no choice but to resign because the Respondent had acted in breach of the duty of mutual trust and confidence. He continued:

I have not been provided with a reasonable opportunity to obtain redress from my grievance and have no faith in the grievance procedure. The BBC has failed to provide me with a safe working environment that is free from victimisation, harassment and discrimination. The outcome of the grievance process and its recommendation that I should return to being managed by the individual against whom I raised the discrimination and harassment claim is the last straw.

140. Mr Rivers forwarded that letter to Mr Patka, who emailed the Claimant that afternoon recommending that he take more time to consider the matter before making such a big decision and offering to discuss it with him. He also indicated that the



Claimant had in any event been paid until the end of January, and if he decided that he did not want to return to work he could be treated as employed up that date. On 17 January the Claimant replied that he had no trust in the BBC's grievance procedure as it had been applied in his case and could not contemplate returning to work under the terms of the decision. He stated that he regarded his termination date as 16 January 2016.

### **The Law**

141. Section 4 **Equality Act 2010** identifies various protected characteristics, including race, defined in section 9 as including colour, nationality and ethnic and national origins.

142. Section 13 defines the concept of direct discrimination, including, at section 13(1), that "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others." Section 23 includes provision that, on a comparison of cases for these purposes, there must be no material difference between the circumstances relating to each case.

143. Section 24(1) provides that: "For the purpose of establishing a contravention of this Act by virtue of section 13(1), it does not matter whether A has the protected characteristic."

144. Section 26 provides, so far as relevant:

- (1) A person (A) harasses another (B) if—
  - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
  - (b) the conduct has the purpose or effect of—
    - (i) violating B's dignity, or
    - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
  - (a) the perception of B;
  - (b) the other circumstances of the case;
  - (c) whether it is reasonable for the conduct to have that effect.

By sub-section (5), relevant protected characteristics for these purposes include race.

145. Section 27 provides, so far as relevant:

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
  - (a) B does a protected act, or
  - (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act—
  - (a) bringing proceedings under this Act;

- (b) giving evidence or information in connection with proceedings under this Act;
- (c) doing any other thing for the purposes of or in connection with this Act;
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

146. Section 39, among other things, prohibits discrimination by employers against employees, by dismissing them or subjecting them to any other detriment. As for dismissal, sub-section (7) provides that this includes a reference to the termination of the employee's employment "by an act of [the employee's] (including giving notice) in circumstances such that [the employee] is entitled, because of [the employer's] conduct, to terminate the employment without notice."

147. Section 123 concerns time limits. The starting point is that a complaint must be presented within three months starting with the date of the act complained of. However, section 140B provides for an extension of this period to facilitate the EC process. Section 123 also provides for the Tribunal to substitute such other period as it thinks just and equitable and that conduct extending over a period is to be treated as done at the end of the period.

148. Section 136 includes the following.

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

149. We were referred to **Efobi v Royal Mail Group Limited**, UKEAT/0203/16, 10 August 2017, which held that section 136 does not place any burden on a claimant to show that sub-section (2) applies. Since our hearing, this has been overruled in **Ayodele v Citylink Limited** [2017] EWCA Civ 1913; but we have concluded, as we will explain, that in any event we were satisfied that the reasons for all the conduct complained of did not involve any contravention of the 2010 Act.

150. We reminded ourselves of a number of established principles that emerge from the authorities in relation to claims of direct discrimination. First, in order for such a claim to succeed it is not necessary that the Tribunal conclude that race was the sole or even principal reason for the treatment complained of. It is sufficient if the Tribunal concludes that it was a material contributory reason. Secondly, direct discrimination can occur both consciously and subconsciously. Thirdly, particularly where it is alleged that there have been a number of instances or episodes of discriminatory conduct, the Tribunal needs to look at the wider picture, drawing on all its findings of fact, as well as on the particular facts or circumstances attending each incident. In what follows, we will of necessity set out our conclusions in relation to each of the distinct complaints set out in the List of Issues in turn, but they draw on all our findings of fact and the overall picture emerging from them as a whole.

151. As to harassment, there is a body of case-law guiding the Tribunal in relation to various aspects of the statutory definition. It is sufficient to note at present, that it is an essential component that the impugned treatment be in some sense “related to”, in this case, race, albeit that this is a looser connector than the direct discrimination test of treatment being “because of” race.

152. Section 94 **Employment Rights Act 1996** confers the right on employees (ordinarily with sufficient qualifying service) not to be unfairly dismissed. Section 95 provides that the concept of dismissal includes a case in which “the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”

153. Where there has been a dismissal, section 98(1) provides that is for the employer to show the reason, or principal reason, and that it falls within section 98(2) or is of a kind such as to justify the dismissal of an employee holding the position which the employer held. Where the employer has done that, section 98(4) sets out the test to be applied by the Tribunal to determine whether the dismissal is fair or unfair, having regard to the reason shown.

154. The possibility that a resignation may occur in circumstances that amount to what lawyers call constructive dismissal is thus common to the definitions of dismissal in both the 1996 and 2010 Acts. As to that concept, the authorities establish a number of points. First, there are three components to it. The employer must have acted in a manner that amounts to a fundamental breach of the contract of employment; the employee must not have affirmed the contract thereafter, waiving the right to accept the breach as terminating it, by resigning; and the breach must contribute materially to the decision to resign, though it need not be the sole or main reason. Secondly, the fundamental breach may be of an express or an implied term. Implied terms include the implied duty of trust and confidence, being the duty of the employer, not without reasonable and proper cause, to conduct itself in a manner that is calculated or likely to destroy or seriously damage the relationship of confidence and trust. Third, where that term is relied upon, the breach may come about through the cumulative effect of a number of incidents. In such a case, the so-called last straw, and earlier individual incidents, may each, by themselves, be relatively minor, though not utterly trivial. The test is whether they each do, in some way, contribute something to the overall breach.

### **The Tribunal’s Further Findings and Conclusions**

155. We consider first, some general points about the claims and the issues. First, for the purposes of the victimisation claims, there were three claimed protected acts, being the Claimant’s email of 19 July, his grievance of 15 August and the presentation of his claim form on 15 December 2016. It was accepted, and we found, that each of these amounted to a protected act.

156. Secondly, there was said to be a series of acts, or conduct on the part of the Respondent, each of which was said to be an act of direct discrimination and/or harassment and/or (where in point of time after the first protected act) victimisation. These were those listed at paragraphs 3(a) – (k) of the final list of issues. In addition

the grievance outcome, and associated recommendation that the Claimant return to Mr Nisancioğlu's line management, was said to be a further act of victimisation.

157. Next, in relation to all of these matters, the discriminator was said to have been Mr Nisancioğlu, save in relation to the picnic, where Mr Balli was also identified, the conversation with Mr Goldberg on 4 November, where he was also identified, and the grievance outcome and recommendation, which was laid at the door solely of Mr Bent.

158. All of these same matters were said, individually or cumulatively, to contribute to a fundamental breach of the implied duty of trust and confidence, or, alternatively, to a breach of the implied duty to care for the Claimant's health and safety. The Respondent accepted the existence of that second implied term; but in practice we did not think that reliance upon it added anything of substance to the issues in this case. That is because the breach of it was said to arise through the same treatment complained of as contributing to the undermining of trust and confidence, on the basis that such treatment caused the Claimant stress and injury to his mental health. There was no independent complaint of treatment said to be injurious to health (mental or physical) but *not* to have contributed to an undermining of trust and confidence.

159. In the course of closing submissions, there was discussion of section 24 of the 2010 Act. It was common ground that its effect in this case, where the discrimination is alleged to be because the Claimant is Kurdish, is that whether or not the alleged discriminator is also Kurdish must be treated as irrelevant. Ms Cunningham said that, in any event, the Claimant had not sought to suggest that the fact that Mr Nisancioğlu (and the other alleged discriminators) are *not* Kurdish had any bearing on the claims.

160. However, Ms Cunningham did, it appeared to us, invite us to attach some significance to the fact that Mr Nisancioğlu is of Turkish nationality.<sup>2</sup>

161. In his first witness statement the Claimant gave an account of what might be described as the historical and present situation of the Kurds in Turkey. The Respondent did not challenge or dispute that as a fair account. He described there how the Kurdish people make up 18 to 20% of the Turkish population. He stated that the international community is in agreement that the Kurds in Turkey have suffered a long history of discrimination and massacres since the formative years of the Turkish Republic, and that successive Turkish Governments have denied political rights to the Kurds and criminalised cultural expressions of Kurdishness. This in turn has had an impact on their educational and job opportunities and created a culture in which there have been persistent episodes of discrimination, harassment, physical attacks and human rights violations documented by the United Nations Human Rights Office.

162. Ms Cunningham submitted that this context offered an important insight into how it might be that someone raised in Turkish society might potentially, albeit subconsciously, treat someone of Kurdish ethnicity less favourably.

163. However, whilst it may or may not be, in a given case, that, *if* someone *did* behave in that way, this context might or might not form part of the explanation of *why* they had done so, we accepted Ms Shrivastava's submission that these matters

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<sup>2</sup> As to ethnicity, Mr Nisancioğlu told us that he is ethnically part Greek and not ethnically Turkish.

concerning the situation of the Kurds in Turkey could *not* be viewed as, in some *generalised* way, making it more likely that someone of Turkish nationality or upbringing, *would* (consciously or not) discriminate against someone of Kurdish origin, nor as making the Tribunal more ready to draw such an inference. To make that prior assumption would involve the Tribunal *itself* stereotyping an individual, simply according to their nationality or national origins, as more likely to harbour a conscious or unconscious racial bias, in a manner that would itself be wholly contrary to the principles underpinning the 2010 Act.

164. Before turning to consider each of the particular matters of alleged treatment of which the Claimant made complaint, we summarise some of the general matters of background or context which emerge from our foregoing findings of fact.

165. First, there was an immense weight and importance attached within the BBC to the practice and culture of editorial independence and fair and accurate reporting. The weight attached to this was enhanced by the BBC's worldwide reputation as a trusted source. As part of this, the culture demanded that reporting not only be accurate and independent, but that stories should, so far as possible, demonstrably be seen to have been investigated, verified and reported even-handedly.

166. Secondly, the way the BBC operated was that, where there might be legitimate difference or debate as to the approach which the principles of neutrality and fair and accurate reporting required to the sources, content or presentation of a story, the arbiter would be the editor concerned, or the person performing that role.

167. Thirdly, the TS, along, no doubt, with a number of other language services, faced particular challenges to its reputation for independence, because of aspects of the culture, history and politics of the country concerned, and to which its output would constantly relate. We accepted, that, during the period with which we were concerned, Mr Nisancioğlu was acutely mindful of, and sensitive to, the possibility of attacks upon the impartiality of the TS. Further, he genuinely believed that the TS was vulnerable to such attacks, both in relation to its own output and, by association, in relation to the contributions of TS reporters made through other BBC outlets. While he would not have editorial responsibility for such contributions, he considered that he therefore had a legitimate interest in the activities of TS employees in the wider BBC.

168. Next, Mr Nisancioğlu's outlook and approach was also influenced by his perception that the TS and its work lacked the profile of some other programmes and news services within the BBC, and was not always accorded the recognition and respect that it deserved, and that he was engaged in an ongoing battle to ensure that it was not treated as a poor cousin. These perceptions also informed the high value that he placed on what he regarded as the values of team spirit and loyalty to the TS and its work, within the wider BBC.

169. Next, it was clear to us from the picture that emerged from all the evidence, that the difficulties in the relationship between the Claimant and Mr Nisancioğlu, traced their roots back to the events of 2012. Mr Nisancioğlu, we found, *did* consider the Claimant to be a talented, knowledgeable, and well-connected journalist. However, during the course of that year he also developed strong concerns about what he

perceived to be the Claimant's preoccupation with other interests, lack of team spirit, and work ethic, as well as, on occasions, concerns about his editorial reliability.

170. Further, as matters evolved, and because of his concerns as to the impact that contributions outside the TS could have on its reputation, and with the issue of fair distribution of opportunities among the team, Mr Nisancioğlu came to believe that it was necessary and legitimate to require that all contributions outside the TS had express sign off from him or an SBJ. He also considered that the WDE mechanism provided safeguards up to a point, but that it was open to abuse and manipulation, and therefore needed to be reinforced by such directions from him from time to time.

171. The Claimant, for his part, felt that his talent and expertise were not sufficiently recognised by Mr Nisancioğlu. He felt that Mr Nisancioğlu had badly let *him* down over the DÜnya Ekonomisi episode. He plainly did have interests and ambitions to develop his career, inside or outside the BBC, beyond the confines of the TS, but he saw nothing wrong with that. His contributions to other parts of the BBC were generally well-received, and he resented the fact that Mr Nisancioğlu did not regard these as *enhancing* the TS's own reputation. It was also apparent that the Claimant considered that, among all his TS colleagues, he had unmatched expertise, knowledge and contacts when it came to the coverage of Kurdish issues. Again, he thought this should be regarded as an asset. However, Mr Nisancioğlu considered that there were other members of the team, both in London and on the ground, who also had comparable expertise, knowledge and contacts, and that the Claimant was wrongly failing to recognise that.

172. The Claimant did not at any point accept that Mr Nisancioğlu had *any* legitimate cause for concern in relation to his journalistic judgment, or that there might be a legitimate difference of view. He regarded any such suggestion as a significant slur, and concluded that Mr Nisancioğlu was simply seeking to stifle, and at worst, deliberately damage, him at every turn. Further, the occasions on which Mr Nisancioğlu showed concerns about the Claimant's editorial reliability were not confined to those concerning Kurdish stories; but the Claimant was particularly sensitised in respect of those which did. It does not *necessarily* follow that the expression of a concern about the handling of a Kurdish story must have been influenced by antipathy towards the Claimant's Kurdish ethnicity; but we had no doubt that as, in his mind, he could see no other justified explanation for such treatment, the Claimant came to believe that Mr Nisancioğlu did harbour such an antipathy.

173. It was against the background of a significant breakdown in the relationship going back to the events of 2012, and the Claimant's wider ambitions, that the Claimant sought, and Mr Nisancioğlu was willing to support, the successive extensions of his Newshour attachment between 2013 and 2016. The Claimant's return to the TS in the Spring of 2016 was not the preferred scenario of either of them. Both hoped that things would be different, but both doubted that they would. Both of them regarded the other as effectively on trial as to whether they would turn over a new leaf. Both of them considered that the events of the weekend of the attempted coup demonstrated that the other had not changed, and had failed that trial.

174. As the power struggle between them escalated in the aftermath of that weekend, Mr Nisancioğlu felt that it was necessary for him to seek to take further

steps to assert his authority. The Claimant, for his part, thought it necessary to take matters up the management chain, and then into a grievance process.

175. As for Mr Balli, he regarded it as part of his role to support Mr Nisancioğlu as his SBJ, but was, in any event, broadly in sympathy with his outlook and approach.

176. We turn, then, to the individual episodes identified in the final List of Issues. For each (save for the grievance outcome and decision) we had to consider whether it involved detrimental treatment amounting to direct race discrimination and/or harassment related to race. In relation to those said to have occurred after 19 July 2016, including the grievance outcome and recommendation, we also had to consider whether each amounted to an act of victimisation.

177. We also had to consider whether these matters, separately or cumulatively, gave rise to a breach of the implied duty of trust and confidence (and/or the implied duty of the Respondent to take care for the Claimant's health and safety). If there was such a fundamental breach, we then had to consider whether there was any waiver of it by the Claimant, and whether it was one of the effective causes of his resignation. If we found that the Claimant was constructively dismissed, we then needed to consider whether such dismissal was unfair and/or whether it was discriminatory.

178. The first matter complained of was Mr Nisancioğlu asking whether the Claimant would be staying with the Turkish Service, following his return in May 2016, and, on 18 May, emailing the Claimant links to external organisations.

179. As we have found, it was not the preferred option of either the Claimant or Mr Nisancioğlu that the Claimant remain in the Turkish Service. The Claimant had a selfish interest in getting any advice or assistance that Mr Nisancioğlu could offer him, in relation to other career options inside or outside the BBC. It equally suited Mr Nisancioğlu to offer him any assistance in that endeavour that he in fact could. Mr Nisancioğlu also genuinely wanted to have an update on the Claimant's thinking and plans (following their discussion the previous December), because he was planning a recruitment exercise. Consistently with all of that, Mr Nisancioğlu did not go out of his way to encourage the Claimant to abandon his thoughts of moving on, and to stay with the Turkish Service. However, that is not the same as saying that, in their discussion, or by emailing the Claimant the think tanks list, Mr Nisancioğlu was thereby trying to undermine the Claimant, or drive him out. We did not think that he was. He recognised that the Claimant had returned to the Turkish Service, and would remain with it unless or until he himself decided to move on elsewhere.

180. The foregoing aspects fully explained Mr Nisancioğlu's conduct in this aspect. We concluded that there was not treatment here because of race, nor related to race. So, there was neither direct race discrimination nor race-related harassment here. (We add that, although the list of issues referred to Ebru Doğan and Cagil Kasapoglu as actual comparators, it was not suggested that there had, in fact, been any comparable scenarios in which either of them had returned after an absence to the TS, but been treated differently).

181. As to whether Mr Nisancioğlu's handling of this matter was treatment that might, together with other treatment, potentially contribute to an undermining of trust

and confidence, the matter was more finely balanced. This was not, we repeat, an attempt by Mr Nisancioğlu to force the Claimant out. However, there was an absence, in these communications, of any expression of positive enthusiasm or welcome back, on the part of Mr Nisancioğlu, which we had no doubt was picked up on by the Claimant. That was capable – albeit marginally – of making some small contribution, if followed by other matters, to an undermining of trust and confidence.

182. The next matter complained of was Mr Nisancioğlu's response in July 2016 to the Claimant's request to be rostered at weekends to enable him to pursue his studies for a PhD. Mr Balli and Ms Girit were named as comparators. We did not hear about any similar circumstances relating to her. However, as we have found, there had been a similar request by Mr Balli, and the tone of Mr Nisancioğlu's response to him had been subtly different. But, in light of our foregoing findings, we concluded that this was because Mr Nisancioğlu was not particularly sympathetic to the Claimant at this time, for various reasons that had nothing to do with race. Nevertheless, the lack of warmth in his response was real, and enough to be registered by the Claimant. Once again, though it was close to the margin, this was something that could, in some not wholly insignificant way, if potentially added together with other treatment, make some small contribution towards an overall undermining of trust and confidence.

183. The next matter complained of, was Mr Nisancioğlu's rejection of the approach from Ms Jupp of Newsnight on 16 July 2016. Ms Kasapoglu was named as a comparator. Once again, in light of all our findings as to why Mr Nisancioğlu reacted to this request as he did, we were satisfied that this conduct was not because of, or related to, race. Ms Kasapoglu was also sent to Turkey because she had volunteered, and was embarked on this by the time the Newsnight request came in. However, while Mr Nisancioğlu was actuated by genuine reasons for declining the request, the terms of his response to Ms Jupp were particularly brusque and abrupt. This once again, conveyed back to the Claimant a lack of sympathy in Mr Nisancioğlu's attitude towards him, that potentially could, along with other treatment, contribute something to an undermining of trust and confidence.

184. The next matter complained of was Mr Nisancioğlu's email to the Claimant of 22 July 2016, raising the possibility of future disciplinary action. Again, Cagil Kasapoglu was named as a comparator, but her circumstances were materially different. Once again, in light of all our findings about how this came about, we were satisfied that this was not treatment because of, or related to, race.

185. This matter was alleged also to involve victimisation. In point of time this email came not long after the Claimant's email of 19 July. However, as we have found, following his initial reaction to that email, expressing frustration to Mr Balli, Mr Nisancioğlu took advice from the relevant team, and then carefully followed the advice he got. We were satisfied that the content of his email of 22 July was not in any way adversely influenced by the Claimant's email of 19 July. It was simply a continuation, with the benefit of advice, of Mr Nisancioğlu's attempts to have the Claimant comply with his directions and wishes in relation to work outside the TS, which had been renewed following the attempted coup weekend, beginning prior to the Claimant's 19 July email. In fact, in light of the advice he got, Mr Nisancioğlu took a softer line on that matter, than he otherwise would have. He also followed the advice that, so far as



the 19 July email was concerned, the Claimant should simply be directed to HR and to his rights to raise a formal grievance. That was not, itself, detrimental treatment.

186. Nor do we consider that this email went beyond the bounds of proper and legitimate management action, in terms of tone or content, and given the concerns that we accepted Mr Nisancioğlu genuinely had. Therefore, even though the content inevitably was not well received by the Claimant, there was some proper cause for it, and we therefore did not regard it as something that could potentially contribute to a breach of the trust and confidence term.

187. The next matter complained of was Mr Nisancioğlu's refusal on 25 July 2016 to publish the Claimant's article on the attempted coup in Turkey drawing on the interview with Mr Fuller. In light of all our findings about that matter, we were satisfied that this was not in any way treatment because of, or related to, race. Nor was it victimisation because of the Claimant's email of 19 July. Further, it arose from a genuine and legitimate editorial decision and was a proper exercise of Mr Nisancioğlu's editorial authority. This was therefore not a matter which could in any way contribute to a breach of the implied duty of trust and confidence.

188. The next matter relied upon was Mr Nisancioğlu declining, on 28 July 2016, the request that came from Albana Kasapi. Ms Kasapoglu was again cited as a comparator, although it appeared to us that Mr Nisancioğlu himself did this piece. In any event, in light of our findings about what happened and why, we were satisfied that this did not involve treatment because of, or related to, race. As to victimisation, as we have found, Mr *Balli's* reaction was to suspect that the Claimant was using this request to advance his allegations of discrimination. But that was not the reaction of Mr Nisancioğlu, whose focus was on what he considered to be a genuine editorial issue that he needed to grasp. We did not find sufficient basis to infer that there was any act of victimisation by Mr Nisancioğlu on this occasion. Nor, given that Mr Nisancioğlu acted from genuine managerial concerns, was this treatment that was capable of contributing to a breach of the implied duty of trust and confidence.

189. The next matter complained of was Mr Nisancioğlu's rejection, the same day, to the request originating from Mr Mazower conveyed via Farhad Tayeb. Cagil Kasapoglu, whose services were offered, was cited as a comparator. However, once again, in light of all our findings, we did not find Mr Nisancioğlu's handling of this to involve treatment in any way because of, or related to, race. Nor was it influenced by the Claimant's prior protected act. However, whilst this was a decision that Mr Nisancioğlu was, as such, fully entitled to take, the abrupt tone in which it was conveyed was unnecessary; and it did convey a degree of hostility towards the Claimant which was – just – capable, along with other things, of making some contribution towards a potential undermining of trust and confidence.

190. The next matter complained of was Mr Nisancioğlu's communication with Mr Mazower, when he went to see him later on 28 July 2016. Specifically, the precise complaint was of "MN's advice ... that MN did not want the Claimant on air, as the Claimant was raising a grievance against MN, because MN was not happy and did not trust the Claimant, and because the Claimant had 'personal issues.'" Cagil Kasapoglu was cited as a comparator. As we have found, the reasons given by Mr Nisancioğlu to Mr Mazower, for his decision on Mr Mazower's request, were those captured in the

first two paragraphs of Mr Mazower's note recording Mr Nisancioğlu's side of the conversation. Those did not include the Claimant's threatened grievance. We were also satisfied that Mr Nisancioğlu gave Mr Mazower a true account of those reasons.

191. Ms Cunningham, however, relied upon the final paragraph of Mr Mazower's note which recorded Mr Nisancioğlu's remark that the Claimant had "more or less told me that he plans to take out a grievance against me." She submitted that this could not sensibly be severed from the rest of the note; and that the realistic interpretation of the evidence was that what the Claimant having threatened to raise a grievance (in his 19 July email) was part and parcel of the explanation that Mr Nisancioğlu gave Mr Mazower for why he had not been prepared to agree Mr Mazower's request.

192. However, we did not so find. Mr Mazower had indicated that he wanted to understand Mr Nisancioğlu's decision. Mr Nisancioğlu went to see him. He then specifically, and in some detail, explained his thinking to Mr Mazower about why he was unhappy to grant Mr Mazower's request. This he did candidly. Mr Mazower was a fellow editor, and our sense of the matter was that Mr Nisancioğlu wanted Mr Mazower to actually understand that he had (as he saw it) legitimate editorial concerns about the Claimant's contributions anywhere in the BBC at a particularly sensitive time for the TS. The gestation of these concerns went back long before the Claimant's protected act. Nor did the reasons for the explanation that he gave to Mr Mazower for his decision have anything to do with the Claimant's race.

193. Having responded to Mr Mazower's specific request for an explanation of the decision about contributing to his programme, Mr Nisancioğlu then went on, separately, to refer to the Claimant's threatened grievance, when venting more generally at the end of the conversation about the Claimant and his behaviour. But, we concluded, that did not form part of the explanation that he had given Mr Mazower, nor, indeed was it, in truth, part of the explanation for his actions. Accordingly, we were not persuaded that there was victimisation, as claimed, on this occasion.

194. More generally, the Claimant suggested that this conversation amounted to talking behind his back improperly and in a manner designed to undermine him. However, Mr Nisancioğlu was responding to a fellow editor's request to explain his thinking, which we did not think was necessarily an improper thing to do. All of that said, we did consider that, in the general tone he adopted in the conversation, Mr Nisancioğlu did convey to Mr Mazower a general lack of sympathy towards the Claimant, which may have done something, marginally, to contribute to an undermining of trust and confidence.

195. The next matter complained of was said to relate to the period June to September 2016 and was described as Mr Nisancioğlu's "failure to offer the Claimant as a possible contributor to BBC news programmes, when the request was made for a contributor from the Turkish service." It was this complaint that was the subject of the contested strike out application, and we therefore now address that first.

196. We concluded that the complaints relating to this matter *should* be considered by the Tribunal insofar as they related to the specific episodes or occasions to which the documents referred to in paragraph 31 of the Claimant's witness statement related. Our reasoning is as follows.

197. Ms Cunningham acknowledged that there was only at best a glancing reference to this topic in the original particulars of claim, and that the matter was not properly pleaded at that point. However, it was subsequently accepted by the Respondent as forming part of the agreed list of issues tabled on 12 April 2017. We were mindful that the authorities indicate that introduction of matters through the medium of a list of issues is not a proper substitute for a properly pleaded complaint and/or application to amend, but the inclusion of this matter in the list of issues by this point placed the Respondent on notice that this was a topic about which the Claimant sought to complain, and the Respondent did not, at that stage, protest, but, rather agreed to the list of issues which included it. The Claimant was entitled to rely on this as a tacit acceptance that this topic was now, if not before, (literally) on the agenda for trial.

198. Further, to the extent that Ms Shrivastava's objection was that the formulation in the list of issues was not sufficiently clear as to what it was intended to cover, the subsequent cross-referencing to particular documents, and the contents of the Claimant's witness statement, gave a more precise picture of that. Ms Shrivastava very fairly submitted that this, however, came very late in the day, and the Respondent and its team had had to scramble to gather evidence in response. When deciding whether a pre-trial application to amend is so very late that it ought for that reason to be refused, one touchstone is indeed whether granting it would generate significant work, such as might put the trial dates at risk, or undermine orderly preparations for, or conduct of, the trial.

199. However, in this case, as a matter of fact, the Respondent's team had been successful in those efforts, gathering, and serving, not one but two supplemental witness statements from Mr Nisancioğlu, and further supporting material as well. Ms Shrivastava fairly acknowledged in discussion that there was no further or other evidence relating to the particular episodes referred to by the Claimant in his witness statement, that the Respondent would have produced with more time. Further, the Tribunal voiced its concerns that this matter should not disrupt the orderly progress of the hearing, counsel took that on board, and that did not, in fact, happen.

200. Whether this be treated as an application to strike out a pleaded case, or to amend to introduce a pleaded case, it seemed to us that the balance of justice or injustice was therefore in favour of allowing this matter to be considered insofar as it related to those particular episodes. The Respondent had in fact been able to present its evidence and advance its case in relation to those matters with no prejudice to it, whereas the Claimant would potentially be prejudiced by the exclusion of this from our consideration, as it would not then be adjudicated upon its merits.

201. We turn then to the substance. The material in Mr Nisancioğlu's supplemental witness statements and attached tables, showed that in relation to a number of the occasions relied upon by the Claimant, there was a clear explanation for why he was not put forward as a potential point of contact in the Turkish Service for colleagues wanting to cover the story concerned: for example because he was not rostered on the day in question, was off sick at that time, or because another TS colleague had attended the morning editorial morning meeting at which the story was mentioned, or was already working on it.

202. However, in relation to two or three of these occasions, Mr Nisancioğlu acknowledged that the Claimant *might* potentially have been put forward. However, he did not spell out whether he had any particular editorial or other concerns about putting him forward on those particular occasions. Placing the matter in the wider context, as we have described it in this decision, we considered it fair to infer that, given the choice, Mr Nisancioğlu would have chosen to avoid putting the Claimant forward for work external to the TS, if someone else could be offered, for a combination of the various reasons that served to explain other treatment complained of, and the overriding context of a general breakdown in the relationship. In short, this did not strike us as out of kilter with the other things happening during this period. It was all of a piece with treatment, the explanations for which were not to do with the Claimant's race nor his protected acts. We saw no sufficient reason to infer that this particular treatment was different in that respect.

203. However, we accepted that the Claimant was conscious that, during this period, his name was not ever put forward, in a way that was not always or wholly a matter of happenstance, but reflected, on occasion, at least, his poor relations with Mr Nisancioğlu. This was something that was capable, along with other matters, of contributing to an overall breach of the implied duty of trust and confidence.

204. The next matter complained of was the Claimant's exclusion from the 12 September 2016 picnic. The complaint identified Mr Nisancioğlu and/or Mr Balli as responsible for this.

205. In evidence, Mr Balli's explanation for not inviting the Claimant was that he was mindful that Ms Bozyap (who had left the Turkish Service some time before) would be there, and, given her allegations against the Claimant from 2012, Mr Balli said he thought it better not to invite the Claimant along. We were prepared to accept that this was *part* of the explanation, but, in light of all our findings, we also concluded that Mr Balli generally agreed with Mr Nisancioğlu's longstanding concerns about the Claimant, and regarded him as somewhat semi-detached from the team. It appeared to us that the Claimant was not at the event at which the picnic idea had been hatched, and Mr Balli, we concluded, was not disposed to include him in a social event to which he did not *have* to be invited. However, this combination of reasons had nothing to do with race, and their gestation long predated the Claimant's protected acts; so, we did not find sufficient basis to infer victimisation, either.

206. As for Mr Nisancioğlu, he pointed out that he had not organised this event and indeed was only told of it himself at the last minute. He told us that he did not actually notice that the Claimant was in the office, when he was leaving to go to the park; but his explanation that this was because he would not be able to see the Claimant on the other side of the computer screens dividing them was unconvincing. Again, we inferred that Mr Nisancioğlu was not disposed to invite the Claimant along, but this was in keeping with the general state of their relationship at this time, for reasons that we have described. Once again, in light of our overall findings about that, we did not find this treatment to be because of or related to race or an act of victimisation.

207. However, we had no doubt that the Claimant realised that the others had disappeared because of something that he had not been told about. He felt deeply

that he had been deliberately ostracised from some occasion involving work colleagues; and the way that this was handled was, we found, treatment that was capable of contributing to a breach of the implied duty of trust and confidence.

208. The next matter complained of was Mr Goldberg's conduct in relation to the request to go on air, on 4 November 2016. The complaint identified Mr Nisancioğlu and/or Mr Goldberg as responsible for this, although no complaint of direct race discrimination or harassment was pursued against Mr Goldberg.

209. We did not find Mr Nisancioğlu to have been involved in this conduct. The decision was taken by Mr Goldberg, by way of immediate reaction to the request presented to him, and without consulting anyone else at that point. The fact that Mr Goldberg was aware of an issue about the Claimant appearing on air, in which Mr Nisancioğlu was involved, did not make this particular treatment the latter's conduct.

210. As for Mr Goldberg himself, Ms Cunningham suggested that this was a straightforward act of victimisation by him: the Claimant's "situation", of which Mr Goldberg knew, was that he was pursuing a grievance (which was a protected act), and Mr Goldberg, she submitted, was influenced by the fact that he knew that the issue of the Claimant going on air featured in that grievance. Therefore, she said, refusing this request plainly penalised him for having raised that grievance.

211. However, we did not agree with that analysis. Our conclusions were as follows.

212. It was a contributing reason for Mr Goldberg's decision, that he was aware that there was an issue about the Claimant going on air. He was, as a matter of fact, also aware that this issue in some way featured in his grievance. But it does not follow that Mr Goldberg's decision was influenced by the fact that the issue featured in the grievance. What actuated Mr Goldberg was his general awareness that there was an issue about the Claimant appearing on air, combined with his lack of understanding in any detail as to the nature of that issue, and his desire not to take the wrong decision, when he saw no compelling reason why the matter could not be put off until he could find out more. We saw no reason to suppose that, had Mr Goldberg not been aware that the issue also featured in the grievance, his approach would have been different. We saw no basis to infer that this was a material contributing reason for his actions.

213. In light of all our findings we also considered that this conduct by Mr Goldberg was a proper exercise of Mr Goldberg's managerial discretion, when called upon to take an immediate decision on the information he had at that point, and given the nature of the request. Accordingly, though the Claimant was much aggrieved by it, we did not regard it as something that could be treated as potentially contributing to a cumulative breach of the implied duty of trust and confidence.

214. Finally, complaint was made of the grievance outcome and recommendation that the Claimant return to work in the TS under Mr Nisancioğlu. The complaint identified Mr Bent as the person responsible. This was said to have been an act of victimisation and to have contributed to the undermining of trust and confidence.

215. Ms Cunningham invited us to conclude that the grievance was treated simply as an attack to be repulsed. We did not agree. We accepted, in light of all the

evidence available to us, including having heard Mr Bent cross-examined, that Mr Bent, together with Ms Prosser, sought genuinely to give serious and careful consideration to the Claimant's grievance and all the elements of it. Considerable time and resource was devoted to its investigation through reviewing documents, hearing witnesses and so forth. Mr Bent plainly applied his mind actively to what he made of each of the complaints. We did not accept that Mr Bent (or, on any evidence we had, Ms Prosser) was not in good faith in the approach they took to this grievance.

216. A more particular criticism was that not everyone was interviewed who should have been. As to that, the evidence showed that active consideration was given to who to interview; and we did not think the panel was necessarily bound to agree with all the Claimant's requests: they were entitled in principle to take a view about who might have relevant evidence to give, proportionality, etc. However, a particular point was raised regarding Mr Mazower, who the Claimant specifically asked be interviewed. Mr Bent acknowledged when cross-examined that, for his part, he would have expected that, but he deferred to the advice of Ms Prosser that there was no need. However, we could see why the Claimant was troubled about that, given his account to the grievance panel, of the incident in question and Mr Mazower's role.

217. As to the outcome, Ms Cunningham acknowledged that the Tribunal might be disinclined to expect an internal grievance panel to have sifted and analysed the evidence before it with the same degree of forensic skill and rigour as the Tribunal itself would bring to bear. However, she noted that Mr Bent was, by his own account, a seasoned investigative journalist. As such, she submitted, he could and should have brought his investigative skills more rigorously to bear on this task than he did. However, we did not accept that the degree of care, attention and reflection given by this panel to the matter fell below what the Claimant might reasonably expect of them.

218. This complaint focussed, in particular, on the concluding recommendations of this report. We have described the contents of this section earlier in this decision. It was the Claimant's case that, being told that he had to return to being managed by the very person about whom he had complained was the final straw.

219. The Tribunal's view was this. Subject, perhaps, to a different approach being required were the Claimant to appeal, the conclusion that the allegations that had been the subject of the grievance did not any longer provide an impediment to the Claimant being once again managed by Mr Nisancioğlu followed, as such. However, the grievance decision itself identified that there plainly was, on any view, a serious problem in the working relationship; and if the Claimant was to be returned to the TS, and being managed by Mr Nisancioğlu, then the Respondent had a responsibility to consider what concrete steps needed to be put in place to ensure that the relationship was supported and successfully rebuilt.

220. We did not consider that referring the Claimant to the possibility of mediation (which was also not specifically mentioned in the letter written at this time to Mr Nisancioğlu) was sufficient to address this aspect; and this was compounded by the letter to the Claimant immediately going on to set out what it was "crucial" that the Claimant needed to do, in terms of his relations with Mr Nisancioğlu. While we accepted that this advice was genuinely expressed (and indeed had some justification) there was a failure here to consider in a more positive fashion, the

establishment of concrete support mechanisms, in which past shortcomings of the behaviour of both parties might be addressed, and the relationship rebuilt.

221. We did not find that the grievance outcome or recommendation, were adversely influenced by the Claimant's protected acts (including the raising of the grievance itself). There was nothing to suggest, for example, that the fact that the Claimant had alleged discrimination itself drew an adverse reaction from Mr Bent (or Ms Prosser) or was not treated seriously. This complaint of victimisation therefore failed.

222. However, having regard to the foregoing features, the grievance outcome and recommendation, the latter being expressed and handled in the particular way that it was, did make a further contribution to the undermining of trust and confidence in the employment relationship, which crossed the threshold of the last straw test.

223. Standing back, and reviewing all of our findings about how events unfolded, we had to consider whether those matters that we had found were each capable of contributing to a breach of the trust and confidence duty, did together cumulatively establish such a breach. Ms Shrivastava properly reminded us that the cumulative effect must be serious enough to be fundamental, and so breach this implied term. However, we note that the classic and oft-repeated definition refers to conduct "calculated *or likely*" to either destroy or seriously damage the relationship (our italics). It is not therefore essential to a fundamental breach of this particular term that the employer have acted with the *intention* of fundamentally harming the relationship, or bringing about its end. It is sufficient if the cumulative conduct is *likely* to have the requisite serious effect (and lacks reasonable and proper cause).

224. In this case we concluded that the overall effect of those various matters, of which complaint was made to us, and which we found were capable of contributing to a breach of the implied term, was, cumulatively, sufficiently serious to establish a breach of it, the grievance outcome and recommendation being the last straw. Given how events then played out, the Claimant did not do anything that could be said to amount to a waiver of his right to rely on that breach by affirming the contract. As we have recorded, he had hoped for some time to find something else inside or outside the BBC and he did receive the House of Commons Select Committee offer in the autumn. However, he did not take it up at that time and he pursued his grievance to an outcome. Given the sequence of events in this case, we were satisfied that the Respondent's repudiatory breach did materially contribute to the decision to resign.

225. Accordingly, the Claimant was constructively dismissed. A constructive dismissal is not necessarily automatically unfair. The reason for the treatment which placed the employer in breach is treated as the reason for dismissal, and the employer may seek to show that this was a fair reason. If so, the Tribunal will go on to consider whether the dismissal was fair in all the circumstances, applying the section 98(4) test.

226. In this case, Ms Shrivastava submitted that the Respondent acted out of the legitimate wish to ensure proper editorial controls and that the WDE processes were followed; and were we to find a constructive dismissal, pursuit of those business objectives would amount to a substantial fair reason. However, although these were, indeed, strands of what actuated Mr Nisancioğlu, the range of reasons which explained the conduct which overall undermined this relationship, went far beyond

that; and, viewing the bigger picture, we did not think it could be said that the principal reason, or combined reasons, were fair. Accordingly, this was an unfair dismissal.

227. However, we did not find there to have been any conduct by way of direct race discrimination, race-related harassment or victimisation, as pleaded, at all, nor contributing to the constructive dismissal. Accordingly, all of the complaints brought pursuant to the **Equality Act** failed on their merits, so it was not necessary to consider the potential time points that arose in relation to the earliest alleged matters.

228. Ms Shrivastava submitted that, should we find the Claimant to have been constructively unfairly dismissed, we should consider as a **Polkey** scenario the possibility that he would or might have been dismissed in any event for his conduct in not complying with WDE Requirements and/or Mr Nisancioğlu's instructions regarding work outside the TS. However, on the evidence we had, while Mr Nisancioğlu considered that there were some matters that had occurred, which he would have been entitled to treat as warranting disciplinary process, that was a course which he had hitherto eschewed. While the authorities indicate that a **Polkey** finding may properly, in its nature, involve an element of speculation, that must still have some sufficient foundation in the evidence before the Tribunal, and the facts found. In this case Ms Shrivastava's suggested scenario was simply too speculative, and no **Polkey** adjustment to any compensatory award would be warranted.

229. A different issue is whether there was any conduct on the part of the Claimant such as might lead to some reduction in any basic and/or compensatory award (under sections 122(2) or 123(6) of the 1996 Act), or need to be taken into account when considering an application for reinstatement or reengagement (under section 116). This is a matter about which the Tribunal must make its own finding. The authorities indicate that such conduct must be viewed as in some way culpable or blameworthy. Save in relation to the basic award, such conduct must be found to have caused or contributed to the dismissal. The authorities recognise that there can, doctrinally, be a finding of contributory conduct within these provisions in a case of constructive unfair dismissal. Where such conduct is found, the Tribunal must decide what reduction to each of the basic and compensatory awards would, in all the circumstances, be just and equitable.

230. Where an issue of contributory conduct appears to arise from the facts of the case, it is incumbent on the Tribunal to address it. It was identified at our hearing, that, were we to find that the Claimant was constructively unfairly dismissed, then this aspect of remedy was one that we might address as part of this present decision. Ms Shrivastava submitted that there was such conduct on the part of the Claimant, in particular by his failing to follow the appropriate procedures. Ms Cunningham submitted that, on a correct reading of the WDE requirements, there were only one or two occasions on which the Claimant had not followed them. More generally, she was content to leave this matter to the judgment of the Tribunal.

231. We concluded, in light of all our findings, that there was an aspect of the Claimant's conduct that could be described as culpable or blameworthy, and did cause or contribute to the conduct of Mr Nisancioğlu, and also the recommendations of the grievance panel, which themselves formed part of the deemed reasons for dismissal. It was, in our view, a legitimate exercise of his management authority and



editorial responsibility, for Mr Nisancioğlu to require that BBC activity outside the TS be approved by him or an SBJ, whether or not undertaken in TS shift time, and he was entitled to exercise his editorial judgment, and to have his editorial rulings followed, where there was disagreement about the appropriate approach to take. These were things which the Claimant, however, adamantly would not accept, even when reinforced by Ms Gibson; and his approach that no such authority could be exercised over him, unless an express provision of a written policy sanctioned it, was not a reasonable or tenable one.

232. This conduct on the part of the Claimant was, in the Tribunal's view, culpable and blameworthy, and did have a contributory impact on his dismissal. In all the circumstances we considered it just and equitable that any compensatory award be reduced by 20% to reflect it. While any reduction to a basic award and to a compensatory award will often be in the same amount, this is not necessarily bound to be so in every case. The two awards have different functions, and are calculated in a different way. In particular, the basic award reflects, in part, the length of an employee's past service. In this case, taking into account of the length of that service, and everything we heard about it overall, and the different test under section 122(2), we did not think it would be just and equitable for any basic award to be reduced on account of this conduct.

### **Next Steps**

233. It may be that the parties will be able to agree the final remedy for unfair dismissal. If not, the outstanding remedy issues will need to be identified (including whether there is any contested application for re-instatement or re-engagement), and a further remedy hearing will be convened, and appropriate directions given.

Employment Judge Auerbach on 12 December 2017