EMPLOYMENT TRIBUNALS

Claimant: Mrs M Green
Respondent: South Cave Kids Club

HELD AT: Hull **ON:** 20- 24November 2017

BEFORE: Employment Judge Rogerson
Mrs S Scott
Mrs L E Benstead

REPRESENTATION:

Claimant: Mr Green (Claimant's husband)
Respondent: Ms Jessica Wilson-Theaker (counsel)

JUDGMENT

The tribunal unanimously holds that:-

1. The claimant's complaint of unfair dismissal fails and is dismissed.
2. The claimant's complaint of direct race discrimination fails and is dismissed.
3. The claimant's complaint of direct age discrimination fails and is dismissed.
4. The claimant is ordered to pay the respondent costs in the sum of £10,000.

REASONS

1. The issues in this case were confirmed at the beginning of the case and are recorded at pages 47 and 48 of the bundle. In summary there were 3 complaints brought by the claimant of unfair dismissal, direct race discrimination and direct age discrimination.
2. For the unfair dismissal complaint the respondent relies on the claimant's alleged misconduct conduct or some other substantial reason (letter of no confidence and threats of resignation by colleagues) as the potentially fair reasons for dismissal (as set out in paragraphs 12 and 13 of the ET3).The claimant's case was that there was no evidence to support a conclusion that she was guilty of misconduct

and asserts the true reason for her dismissal was the mistaken belief that she had made a disclosure about a colleague to OFSTED. She complains the dismissal was unfair for three reasons:

2.1 The disciplinary appeal was not conducted in accordance with the respondent's procedure (because it was heard by a solicitor not directly employed by the respondent)

2.2 There was no attempt made to resolve the dispute between the claimant and her colleagues, in accordance with the respondent's own procedures.

2.3 Inconsistency of treatment with a colleague who 'was subject to a complaint of having left a child unsupervised in the playground and was not disciplined'.

3. For the direct race discrimination complaint, the claimant describes her 'race' for the purposes of this complaint as 'Czech republic'. She relies on the following pre-dismissal treatment which she says was less favourable treatment she was subjected to because of her race:

3.1 Suspension.

3.2 Length of suspension

3.3 Refusal to permit her to speak to colleagues during suspension.

3.4 Underpayment during suspension.

3.5 Conduct of investigatory meeting.

3.6 Failure to deal properly or at all with her grievances.

5. She also complains she was directly discriminated because of her race when she was passed over for promotion prior to her dismissal and this pre-dismissal complaint should be treated as part of a continuing act of discrimination to bring that complaint within time. Alternatively she relies on the alleged 'passing her over for promotion' complaint to invite the tribunal to draw inferences of race discrimination from this conduct to support her 6 pre-dismissal conduct complaints.

6. The list of issues identifies that there are potential time/limitation issues in relation to this complaint, because only the dismissal on 15 March 2017 is in time. She does not assert that the reason for her dismissal was her race.

7. The alternative complaint of direct age discrimination relies on the same 6 alleged acts of less favourable treatment that are relied upon for the race discrimination complaint. She complains that another reason for the 6 alleged acts of less favourable treatment was her age. She is 60 years old and states she was the oldest play worker employed by the respondent.

8. At the outset the list of issues were confirmed with Mr Green, the claimant's husband and representative and were identified as the issues to be determined. Mr Green had to be reminded throughout the hearing that those were the issues during his questioning of the respondent's witnesses and in his presentation of the case, on behalf of the claimant. We confirmed to Mr Green that although the claimant had made an application to amend her claim prior to this hearing, that application had been refused and we would not be determining any other complaints.

9. The Tribunal heard evidence for the respondent from Mr Simon Langton who is the chair of the voluntary management committee that runs the South Cave Kids Club and was the dismissing officer; Mr James Hazel, appeals officer, and Mrs Joanne Myers who is also a committee member and was the investigating officer and grievance hearing officer.

10. The Tribunal heard evidence for the claimant from Ms Hazel Stride who is a former colleague and friend of Mr Green and the claimant who had been employed by the respondent as manager.

11. We also saw documents from an agreed bundle of documents and from a supplemental bundle of documents.

12. Before we set out our findings of fact it is important to record that at the beginning of this case, before we heard any evidence, we had explained to the claimant that less weight could be attached to the evidence of a witness that did not give evidence, because that evidence was not subject to cross-examination could not be tested. This explanation was provided because the claimant wanted to rely on the witness statement of a Mr Stephen Ward, who had unfortunately passed away, since his witness statement had been prepared. Mr Green confirmed that he understood that less weight could be attached and the reason why that was the case.

4. The parties had agreed that we would hear the evidence of Mr Langton then Mr Hazel. Then we would interpose the claimant's witness evidence in the order of Ms Stride, Mr Green and then the claimant. We would then interpose Mrs Myers, the last witness for the respondent because she was not able to attend the Tribunal hearing until Thursday (day 4).

5. Accordingly, Mr Langton was cross-examined on day one/day two. Mr Hazel was cross-examined on day two and we then heard evidence from Ms Stride for the claimant on the morning of day 3. By lunchtime her evidence had been completed, and only then did Mr Green inform the Tribunal that he and his wife would not be giving evidence. I did explain to Mr Green the consequence of that would be that we could attach very little weight to their witness statement evidence which would not be tested in the same way the respondent's evidence had been tested. This was particularly significant for the claimant to consider because of her discrimination complaint where she had the burden to prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of race/age (see issue 6.2). If she chose to give no evidence this would place her in some difficulty with those complaints.

6. Additionally, Ms Wilson-Teacher invited the tribunal to draw an adverse inference from the decision made by the claimant not to give any evidence because of the timing of the decision and the evidence that had been given by Ms Stride.

7. Ms Stride had told the tribunal that Mr Green had written 30-40% of her witness statement for the purposes of these proceedings and that some of the words used were 'his words not mine'. The similarly in the content of all the witness statements for the claimant was striking. It was clear to the Tribunal from our reading of the statements and from Ms Stride's evidence that Mr Green had written all of the statements not just part of the witness statements.

8. Mr Green had also chosen not to give any evidence after Ms Stride when he was aware this was an issue he would be asked about.

9. It was also clear from Ms Stride's statement that she was giving evidence which she presented as fact, when she could not have had any direct knowledge of those matters. Her evidence could only have come from Mr Green or Mrs Green. Her evidence was exaggerated embellished and untrue.

10. This was of particular concern when very serious allegations were made alleging 'racial slurs' had been made by **all the committee members and employees.** We refer specifically to paragraph 4 onwards of Ms Stride's witness statement and paragraph 12 of Mr Green's witness statement.

11. At paragraph 4, 5 and 6 " *during my time in the role as manager I also noted and observed racial slurs coming from members of staff and senior supervisory staff towards Marie Green for example Diane Attenborough, Andrew Wray and Helen Southgate called her 'Grunting Czech*'…. "*all the staff and all the management despised the many Eastern European workers who worked in the horticultural industry around South Cave and would continually comment* ***'why don't they send them back where they come from****' or* ***'those Eastern Europeans are taking jobs away*** *from local villagers knowing full well that Marie Green was in ear shot of their comments.* ***How Marie Green withstood 19 years of continual race discrimination is beyond me****… The Race Discrimination continued after my resignation when the decision was made, as to who would replace me as manager. Instead of Marie Green being the front runner to take the job, she was conveniently suspended for 10 months while Helen Southgate was installed unopposed as the manager. And then Helen Southgate as manager signs the letter and then volunteers to be part of the panel*".

12. At paragraph 12 of Mr Green's statement he states "***you must always remember that Marie Green was suspended less than a month before the EU referendum on 16 June 2016, when South Cave and the surrounding villages voted unanimously in favour of BREXIT. No doubt this was determined*** *by the negative light in which large amounts of Eastern Europeans are seen working as they do in the local horticultural and market gardening industries.* ***The staff and management round this time, would make racist comments like 'send the eastern European workers home' or 'these eastern European workers are taking our jobs' knowing full well that Marie Green came from the Czech Republic.*** *My wife would come home* ***in fear of her life****. She would shake physically and mutter 'everybody at SKIDs hates me'*

13. Ms Stride told us racially offensive comments were made by all employees and all the management committee in the presence of the claimant throughout her 19 years of employment. Oddly the claimant's witness statement made no reference to these comments being made in her presence for 19 years by 13 individuals (all employees and management committee) which left her in fear of her life. This point was highlighted to Ms Stride at the end of her evidence so the claimant and Mr Green were on notice that they would both be questioned about this and about who had written the witness statements.

14. When Mr Green indicated at lunch time after Ms Stride had completed her evidence that he and his wife would not be giving evidence, the tribunal suggested an adjournment until the next day to allow the claimant some time to consider her position. Despite the opportunity given to the claimant to reflect Mr Green was adamant that they would not be giving evidence. He said he did not

need time and would not reconsider the decision made not to give evidence. His explanation was his wife was in a bad state she was suffering with depression she was not giving evidence but she "maybe will be back tomorrow". The decision not to give evidence was made and would not change.

15. Mrs Wilson-Theaker made it clear at the time that the respondent would ask the tribunal to draw an adverse inference from that because of the timing and circumstances. In closing submissions she did question the timing of this decision. The decision was made straight after Ms Stride's evidence during which contradictory evidence had been and a number of inconsistencies had been identified between her evidence and the claimant's witness statement, which would have been put to the claimant. The claimant clearly anticipated that difficult questions were going to be asked of her in light of that evidence, which she did not want to face. It was suggested that was the reason for the decision not incapacity.

16. Furthermore, as Ms Wilson-Theaker quite rightly observed, on the first 2 days during Mr Green's cross-examination of the respondent's witnesses, the claimant had played a very active part in assisting Mr Green, in finding documents and in giving him instructions. There was no evidence to suggest she could not participate in these proceedings before the evidence of Ms Stride.

17. There was no information before the tribunal to indicate that the claimant was unable to participate/attend the hearing for medical reasons. No application to postpone these proceedings had been made before the hearing on medical grounds. No medical evidence was provided prior to or at this hearing to say that the claimant was unable to participate in the process. No attempt was made to obtain that medical evidence when the case resumed on the 4th day even though she had the opportunity as a result of the adjournment. In fact, Mr Green had indicated the claimant 'may be back'.

18. We agreed with Mrs Wilson-Theaker that the claimant's decision not to give evidence was a deliberate decision made in order to avoid having to answer the difficulties she anticipated she would face as a result of Ms Stride's evidence and questions about who had drafted the statement.

19. There was no explanation provided as to why Mr Green could not give evidence when he continued to attend the hearing without the claimant. We concluded that he like the claimant anticipated being asked some difficult questions, which he wanted to avoid and did avoid by not giving evidence.

20. We were invited to and do draw an adverse inference from this decision in light of all the circumstances, particularly the timing of the decision.

21. Another point we want to highlight is Mr Green's presentation of the case on behalf of the claimant. Despite repeated reminders to ask questions relevant to the issues Mr Green in his cross examination failed to do this. He asked questions which were not relevant and kept putting to the respondent the evidence that he would have given in the disciplinary process not what the claimant had actually said during the process.

22. Additionally the claimant's account of events was not supported by the contemporaneous documents that we saw recording what she had said at the time. Evidence was presented during cross-examination by Mr Green in a misleading way to the respondent's witnesses. In particular during Mr Hazel's witness testimony, on at least five occasions he was asked questions based on

factual assertions which were false. When Mr Green was asked to take the witness to the contemporaneous document supporting the factual assertion that was made in the question, he could not do so.

23. We considered the consequences of the decision made by the claimant not to give evidence. If there was only a complaint of unfair dismissal that might be less significant because it is for the employer to show the reason for the dismissal and on a neutral burden of proof it, is for the Tribunal to decide whether the employer has acted reasonably or unreasonably in dismissing the claimant for that reason.

24. In the complaints of race or age discrimination that is different and the claimant has deliberately chosen not to give evidence to support her case when it is for her to adduce evidence from which a prima facie case of discrimination can be shown and she had been made aware of that before and during this hearing.

25. Ms Wilson-Theaker invites us to attach no weight to the claimant's evidence at all. We have in our decision attached very little weight to the Claimant's evidence and the weight we did attach (in light of Ms Strides evidence) did not assist the claimant.

26. As to credibility we found Ms Stride as the only witness to give evidence for the claimant was in her recollection contradictory in her answers, unreliable and untruthful. In contrast the respondent's witnesses answered all the questions directly in an open and honest way. They could explain their answers by reference to the contemporaneous documents referring to what was said at the time, they made concessions where appropriate and were consistent and truthful in their answers. In the circumstances where there were any conflicts of evidence we preferred and accepted the respondent's evidence.

27. It is important to remember that this is a small 'before and after school' club which is a charity with limited resources set up to help working parents. The club is run by a management committee of six volunteers who have other paid employment and are providing their services in a voluntary capacity to ensure that this service to parents at the school can be provided. The steps that they have taken during the course of the disciplinary and grievance process have to be considered in that context.

28. The club is not a large employer with a human resources department and a management team where different tasks and responsibilities can be delegated to different individuals. The voluntary management committee are undertaking these roles in their spare time along with the demands of their paid employment. When we are considering the size and resources of the employer for the unfair dismissal complaint we bear that in mind.

29. Having made those observations our findings of fact are as follows.

Findings of Fact

30. The claimant was employed by the Respondent as a part-time play worker, working 13.5 hours a week from 5 January 1998, until her dismissal on 15 March 2017.

31. She had by that date 19 years of service and no previous disciplinary record. In 1998 she applied for the position of deputy co-ordinator but she was unsuccessful. She never applied for any other position with the respondent again prior to her dismissal. It was difficult to see in those circumstances how she complains she was 'passed over' for promotion after 1998 when no applications

for promotion to a different job were made. She remained in the respondent's employment for 19 years instead of taking up employment elsewhere if she felt overqualified for the role of play-worker or unhappy in that role.

32. In her witness statement the claimant states that the feedback given to Mr Green from Diane Attenborough about her failed application in 1998 was that because English was not her first language it was pointless for her to make any further applications for management positions because the answer will always be the same. She states that Mr Green was told "*we will always favour applicants whose first language is English*".

33. Mr Green in his witness statement adds to that. He states that as well as being told that it was futile by for the Claimant to apply in the future the Claimant should "*be happy being a play worker* ***after all she is depriving a local villager of a job****".* Oddly this is not what the Claimant recalls was what was reported back to her by Mr Green. This is one example of Mr Green exaggerating the evidence for the purposes of these proceedings, rewriting events retrospectively to reflect his feelings about BREXIT. In his statement he goes on to state that he had asked Diane Attenborough if the Respondent had an equal opportunities policy and she had replied that they didn't have one and he did nothing about this at the time.

34. It was highly unlikely that if Diane Attenborough had said what was alleged or that Mr Green would do nothing to challenge such a statement at the time if it was said or prevented the claimant from applying for other jobs. We did not find it was said based on the inconsistency between the claimant and Mr Greens statement and our view about their credibility. Furthermore if the Claimant's case was that there was a failure to promote her in 1998 and she was told she would never be promoted in 1998, that act/failure was 19 years out of time.

35. The Claimant never applied for any positions after 1998. She refers to the time when Ms Stride left in 2017 when she believes she was the "front runner" to replace Ms Stride. Ms Stride was not replaced when she left. The respondent decided that her responsibilities would be shared amongst named staff as 'points of contact' if required to act as duty managers when required. The claimant in her statement confirms that was the position when Ms Stride left because she says staff and parents were told that if they had any enquiries the three named members of staff were to be contacted. As to the claimant's assertion that she was the 'front runner' to replace Ms Stride. Although Ms Stride uses those exact words in her statement that was not how she actually viewed the claimant at the time.

36. We accepted the contemporaneous evidence that shows that shortly before her suspension she requested a 'deputy' and recommended two other staff to act as her deputies, not the claimant.

37. This is confirmed in Ms Stride's managers report to Mr Langton dated 15 September 2015, which we accepted was accurate. At this hearing Ms Stride realising the inconsistency between the document and her statement, told us she did not send this report even though the covering email confirms it was sent from her email address. This was another example of the contemporaneous documents not supporting the case that was being advanced at this hearing and how the evidence given for the claimant was simply untrue.

38. Turning then to the dismissal events.

<u>Suspension</u>

39. The voluntary management committee was chaired by Mr Langton from 2012. There were seven members of staff at the time aged from 19 to 67. The claimant was not the oldest employee. As well as play workers there was a manager Hazel Stride appointed as manager in September 2011. Ms Stride was suspended on 15 December 2015, for allegations of gross misconduct.

40. On the same day a child who was due to attend the after club had been allowed to leave the classroom and had been seen by a parent in the playground in a distressed state. That parent then contacted the child's father Mr X. Mr X then contacted the school, spoke to the claimant and asked to speak to Ms Stride. The claimant told Mr X that Ms Stride was suspended and suggested that Mr X speak to Mr Langton. Mr X asked which play worker was supposed to have collected his child and the claimant identified the worker and put Mr X through to the worker so that he could speak to him.

41. The respondent does not criticise the claimant for anything she did on that day. It is the subsequent events that are significant and which led to the claimant's dismissal.

42. Mr Langton spoke to Mr X and the matter was resolved. Internal procedures were changed to ensure that this type of incident did not happen again. No disciplinary action was taken against the play worker involved and that was the end of the matter as far as the respondent was concerned.

43. In early January 2016, OFSTED did an unannounced visit to the club after receiving a complaint about a child being left unsupervised by staff at the club. A report was issued by OFSTED which is at pages 105 to 106 in the bundle and a warning letter was issued to the Respondent for "*the failure to report this 'significant' event to Ofsted within 14 days of it occurring as required under OFSTED'S procedures".*

44. The respondent accepted that warning and the Ofsted report and none of the findings made in the report were disputed.

45. Although Mr Green describes himself as an 'ex OFSTED' inspector and wanted this Tribunal to focus on the OFSTED procedures, rules and regulations, they were not relevant to the issues to be determined.

46. In early February 2016, Mr Langton was provided with information of a conversation that had been overheard between the Claimant, Mr Green and Mr X at Morrison's supermarket when the claimant introduced Mr X to her husband as an 'ex OFSTED inspector'. The conversation that was overheard appeared to indicate that the Claimant and her husband were discussing confidential information relating to the club and asking parents to complain.

47. Mr X had also provided emails of his communications with Mr Green in the period 16 January 2016 and 5 February 2016 and a statement of the conversation he had with the claimant and Mr Green at Morrison's. The emails from Mr Green to Mr X are headed "*re the fight to save Zel".* The reference to 'Zel' is to Ms Hazel Stride.

48. The claimant had asked her husband to represent Ms Stride in the disciplinary process. The emails are largely concerned with criticisms made of the management committee and other employees, encouragement to get rid of employees, encouragement to Mr X to assist Mrs Stride and get other parents support and encouragement to Mr X to make a complaint to OFSTED. Those

emails are at pages 101 and the contents of those emails are significant for a number of reasons.

49. Looking at page 99, an email from Mr Green to Mr X dated 16 January 2016 as a useful illustration of the type of content that was passing between Mr Green and Mr X on an email address Mr Green shared with the claimant:

> "3.*Have you recruited any parents to provide a statement of support for Zel's disciplinary enquiry.*
>
> *4. Can you raise your formal concern with Ofsted on Monday beginning your verbal statement with "the incident took place on the afternoon of 17 December 2015 after the manager Zel Stride was suspended in the morning and ordered off the premises by the chairman of the management committee". Therefore she was not responsible in any way for the incident that involved my daughter on that day.*
>
> 5. *Can the parents start to send letters to the committee* ***stating they are not happy with the suspension of a high quality manager and the dross we now have in her place".***
>
> The theme continues in the subsequent emails and the above extracts are sufficient to illustrate the point.

50. Additionally, in May 2016 Mr Langton had received complaints from members of staff that the claimant was not participating in meetings she was demonstrating a negative/rude attitude at work. The claimant's close friendship with Ms Stride, her involvement in getting her husband to represent her in the disciplinary process, encouraging parents to get involved confirms her feelings of dissatisfaction about what was happening.

51. She had distanced herself from her colleagues and the feedback the staff gave had followed a staff meeting on the 18 May 2016 when the claimant was perceived not to have engaged in the meeting and was regarded as 'disrespectful' by her colleagues. The staff provided statements to Mr Langton describing the behaviour they had observed in their own words.

52. As a result of the information Mr Langton received he decided that he would suspend the claimant on 19 May 2016, to avoid the risk of the disclosure of confidential information from the claimant to Mr Green and potentially Ms Stride and the risk of damage to the respondent's reputation.

53. By letter dated 19 May 2016, Mr Langton confirmed the claimant's suspension in writing. The suspension letter confirms that suspension did not constitute disciplinary action and it did not imply any assumption that the claimant was guilty of any misconduct. The suspension letter confirms that the claimant would be paid during the period of suspension.

54. The letter does impose conditions as to who the claimant should not contact by specifying that she must not communicate with "any of our former employees, contractors or customers unless authorised" by Mr Langton to do so. The letter leaves open the option for the claimant to make a request to Mr Langton, if she wanted to contact any particular employee or former employee so that he could authorise this.

55. In cross examination it was put to Mr Langton by Mr Green that the suspension and the conditions attached to the suspension were "inhumane". It was not inhumane to suspend/put those conditions on the claimant. It was reasonable

given the nature of the concerns the respondent had based on the information they had at the time. The letter clearly confirms to the Claimant that suspension was not an indication of guilt. It was clear that the intention was to prevent the claimant disclosing confidential information in the context of her and her husband's involvement in the "fight" to save Zel. Mr Langton had intended to arrange an investigatory meeting on 27 May 2016 but before that could happen, the claimant raised a grievance against him on 20 May 2016, alleging harassment and discrimination but without providing any details of her allegations.

56. On 22 May 2016 a second grievance was raised against a colleague Diane Attenborough again with no details provided.

57. On 31 May 2016, a third grievance was raised against another colleague Helen Southgate. On the same day the Claimant provided some further details and identifies that the first two grievances against Mr Attenborough and Mr Langton are about race discrimination and the grievance against Helen Southgate is about age discrimination.

58. On 23 May 2016, Mr Green and the claimant's union representative wrote to the Respondent requesting that the disciplinary process was put on hold while the grievances were addressed. Mr Langton agreed to this. His evidence to the Tribunal, which we accepted, was that if this request had not been made the disciplinary process would have proceeded as planned and there would not have been a delay. Mr Langton delayed the process resulting in a longer suspension period because the claimant had requested it.

59. Ironically, the Claimant complains about the delay in the process. Mr Green in his cross examination of Mr Langton suggested for the first time that the disciplinary hearing and the grievance process should have run parallel to each other to avoid delay. Ms Wilson-Theaker quite rightly reminded him that was not the pleaded case and was not what the claimant had asked for at the time.

60. The pleaded case is that the actions of Mr Langton in his decision to suspend the claimant, the length of the suspension and the conditions attached of not speaking to work colleagues are acts of direct age or race discrimination. It is clear none of those decisions made by Mr Langton were made because of the claimant's race or age. The only reason was because of the concerns he had about the claimant's conduct based on the information Mr Langton had which raised risks of potential damage to the respondent and the risk that confidential information may be disclosed. The complaint of race/age discrimination in relation to the suspension and the letter of 19 May 2016 are also out of time.

<u>Grievances</u>

61. The chronology in relation to those 3 grievances has helpfully been set out by Ms Wilson-Theaker in the annexe to the closing submissions and I am not going to re-state that here. It sets out all of the exchanges of correspondence between the claimant, Mr Green, the union representative and the respondent in relation to those grievances. In summary for the first 3 grievances identified as 'race' and one of 'age' discrimination' the sequence of events is as follows. There is a grievance investigation meeting that takes place on 23 June 2016 with the claimant and her union representative to clarify the grievances.

62. A grievance investigation report is prepared by Mrs Myers setting out the steps that were taken, the investigation and the information gathered during the

investigation. All the details are set out fully in the grievance report that she had prepared. A grievance outcome letter (page 230) was sent to the claimant on 6 July 2016 which did not uphold any of the grievances made.

63. The claimant challenged the outcome of the grievance on 12 July 2016. On 27 July 2016 the grievance appeal was heard by 2 members of the management committee and was rejected by letter dated 17 August 2016.

Underpayment

64. The fourth grievance that was made was made against the payroll administrator, Mrs Yorke about a shortfall in pay during the period of suspension in particular during the school holidays. This is an alleged act of race and age discrimination but in the grievance no protected characteristic was identified. The claimant was not alleging Mrs Yorke was discriminating against her because of her race/age at the time. This is because the payment during suspension had nothing whatsoever to do with her race or age. She was being paid for what turned out to be a lengthy period of time as a result of the grievances and the only issue the claimant had at the time was that she had not been paid the sums which she believed she was entitled to during the holidays. That issue was a dispute about calculations and was resolved with a payment made by February 2016. There was no underpayment and no further complaint for the respondent to address. That complaint is also out of time.

65. We question the timing of the grievances raising alleged discrimination and the purpose of raising them after the disciplinary process was commenced. We found the reason why the grievances were raised in 2016 and not before then was in order to divert attention away from the disciplinary process the claimant was facing. According to Ms Stride all management and all staff had continually racially harassed the claimant for 19 years. Yet nothing was said about this alleged treatment at all by the claimant in that period or in the grievances she did raise. When the claimant does raise grievances in 2016 it is against 2 named colleagues only and is made only after the disciplinary process is commenced.

66. We found all the grievances were dealt with appropriately and adequately. There was no "failure to deal properly or at all with her grievances". The claimant was provided with a final outcome by letter dated 17 August 2016 after a full and thorough investigation. There was therefore no less favourable treatment of the claimant. We accepted Mrs Myers' evidence that her handling of the grievance process had nothing whatsoever to do with the race/age of the claimant she was deciding the grievance based on the evidence she had before her at the time. There was also a time point in relation to this complaint of discrimination, for which time runs from 17 August 2016 and this complaint is in any event out of time.

67. At this point after the grievances outcome had been provided and payment of £800 had been made the claimant's union advisor accepted that the disciplinary process should not be suspended any longer. We note that his email to that effect was sent to Mr Green dated 8 December 2016 and as a consequence Mr Green and the claimant decided not to use union representation thereafter.

Investigation

68. The respondent having no reason to delay the process any longer decided to resume the disciplinary process. Mrs Myers had already been instructed to carry

out the disciplinary investigation in 2016 and had carried out an investigation into the misconduct allegations.

69. She held an investigation meeting with the Claimant and the notes of that meeting were not challenged and are at pages 284 to 290. It is clear from our reading of the notes that the Claimant was given the opportunity to put her case in answer to the allegations and present any evidence or mitigation she wished to. The observation made by Mrs Myers that the Claimant was confrontational and unhelpful in answering questions is supported from our reading of the notes.

70. After speaking to the Claimant Mrs Myers decided quite reasonably to speak to Mr X to obtain further details of the discussion that had taken place at Morrison's. Mr X provides a further statement at pages 295 where he refers to the Claimant and her husband having a 'hidden agenda'. Mr X is not supportive of the claimant and gives evidence that supports the view that was reached by the respondent about her conduct.

71. On 16 February 2017, the disciplinary invitation letter was sent to the claimant. That letter sets out the allegations of misconduct which are a breach of confidentiality, disloyal conduct, and the disrepute caused to the Respondent organisation. It sets out the basis upon which those allegations are raised. It sets out the evidence that has been obtained during the course of the disciplinary investigation and it provides the evidence of a joint staff letter provided to the respondent which suggests that there was "an irretrievable breakdown in the relationship between the claimant and her colleagues". Importantly the letter warns the claimant that the allegations "could" result in the termination of her employment if they are found to be proven. The panel due to hear the case at that stage was Mr Langton, Mr Piers and Ms Southgate and there was to be a note taker.

72. The claimant raised a number of objections in response to the letter. On 27 February 2017, Mr Langton responded to the claimant's objections. He explains why the request for Mr Green and Ms Stride to attend the disciplinary is refused because of "the lack of relevance of their evidence to the allegations". He does suggest they can provide witness statements of the evidence they want the disciplinary hearing panel to consider. He explains the purpose of having a note taker present at the disciplinary hearing and refuses to exclude the note taker. He confirms that the evidence that had been obtained by that stage had been disclosed. He agrees to remove Helen Southgate from the panel.

73. Again the response from Mr Langton demonstrates a willingness to accede to the requests made where possible, or to offer alternatives where possible, and if requests are refused to explain why. His response was to provide reasonable alternatives. Subsequent to that letter Mr Green provided a witness statement but Ms Stride did not.

74. One criticism the Claimant makes is the lack of any further evidence to support the joint staff letter. Mrs Myers confirmed in her evidence to the Tribunal that she had not investigated the staff letter issue because she hadn't seen the letter. It is a matter that should have been part of the investigation carried out by Mrs Myers but she explained why she didn't do it and we accepted that was the reason. Her failure not to investigate the staff letter further was not an act of race or age discrimination.

75. Mr Langton had simply relied at the time on his discussions with the staff members who had confirmed to him that they all stood by the joint letter stating they would all resign if the claimant returned because of "the broken circle of trust". He decided at the time to deal with the letter at the disciplinary hearing by asking the claimant to comment on it.

76. In Mr Green's cross examination of the respondent's witnesses he refers to this as the 'race hate' letter. In submissions Mr Green states "**I can only deduce that it was some kind of Race Hate Letter <u>because</u> it had been produced approximately 6 months before South Cave and the surrounding villages had strongly voted to BREXIT the EU based on the resentment for Migrant workers from Eastern Europe taking villages jobs and by implication as she was from Eastern Europe this resentment had also been applied to her".**

77. The disciplinary hearing was conducted by Mr Langton and Mr Piers on 2 March 2017. The notes of the hearing are at pages 318 to 318J and these were not challenged in cross-examination and we accepted that they accurately represent what was said at the disciplinary hearing. Mr Langton describes the claimant as defensive and evasive. He did not find her answers to be credible. He explains his approach to the disciplinary hearing and the findings he made in his witness statements at paragraph 105 to 108 which we accepted.

78. The panel decided to issue the Claimant with a final written warning for the misconduct issues and to dismiss her for some other substantial reason for the breakdown in trust and confidence. The reasons for the decision are confirmed in the letter which was sent to the Claimant dated 15 March 2017 which is at pages 358 to 359 in the bundle.

79. For breach of confidentiality the letter states "*we do not accept your explanations in this respect. We have reasonable belief that you have disclosed confidential information to your husband….we find the allegation is upheld*. For the allegation of disloyal conduct the letter states "*you did not show any remorse for your husband's actions or dissatisfaction that his actions could impact on your employment. You showed no loyalty to the Club. The allegation is upheld".* For the third allegation of bringing the club into disrepute the letter states "*By advising the parent to speak to your husband in his capacity as an EX-OFSTED inspector, rather than speaking to your manager or a member of the management committee in order to respond to your dissatisfaction, you have brought the Club into disrepute. As a current employee of the Club, to take such action against the Club is hugely damaging to its reputation. You did not, by your own admission attempt to deal with his dissatisfaction internally, but rather suggested via introduction to your husband that that should be dealt with externally. Such advice to a parent has the ability to bring the Club in serious disrepute. We therefore find that this allegation is upheld… On the basis of our findings in respect of the three allegations above we have decided to issue you with a final written warning for 12 months"*

80. The letter continues " *as you know, a letter signed by all the staff of the Club has been received, suggesting they are unable to work with you in the future, as they feel that the circle of trust has been broken. **It is to be expected that there is a high degree of trust between you and your colleagues particularly given the environment in which you work. As a result, we feel that there is no alternative but to terminate your employment, on the grounds of some other substantial reason, being that the relationship of trust and confidence***

between you and your colleagues has broken down and all have suggested they would leave their employment if you were to return. Clearly, we would be unable to continue to provide the Club facility with only one member of staff and so we have no alternative at this time but to respond to the letter and to terminate your employment.*"*

81. We accepted those were the reasons for dismissal. Those reasons did not apply to the comparator of the play worker that the C relies upon for consistency of treatment. The case of Hadjioannous-v- Coral Casinos (1981)IRLR 532 and Paul-v- East Surrey emphasises that any argument of inconsistency of treatment must be subject to close scrutiny by the tribunal to consider whether the circumstances of the claimant and the comparator are 'truly parallel'. Here the alleged inconsistency of treatment with a colleague 'subject to a complaint of having left a child unsupervised in the playground who was not disciplined' and the claimant facing the allegations she was facing were not comparable at all. There was no inconsistency of treatment.

82. In the pleaded case the claimant says she was dismissed "because of the mistaken belief that she had made a disclosure about a colleague to OFSTED" That was not the reason for dismissal and ignores all of the evidence the respondent had before it at the time. The rationale and reasons for dismissing the claimant are clearly explained in the outcome letter which we have referred to above and were the reasons for dismissal.

83. The claimant appealed against her dismissal by letter dated 17 March 2017 on essentially three procedural grounds. First the email exchange between Mr Green and Mr X should not have been used. Secondly that the Claimant was claiming 'immunity against employer sanction' in relation to the misconduct allegations and thirdly that the evidence provided was 'illegal and unfair' (page 361). It was clear that rather than mitigate or explain her actions in light of the decision made she wanted to focus on excluding the evidence obtained.

84. The Respondent having exhausted all of its available management committee members for the purposes of the disciplinary hearing, and grievance process decided quite reasonably and at considerable expense to it, to instruct an external independent person, Mr Hazel (a solicitor) to deal with the appeal. It is agreed that was outside the procedure but given the circumstances it was the most reasonable and fair thing the Respondent could do to ensure that the Claimant had an impartial and fair appeal.

85. The Claimant raises this as a complaint of unfairness simply by virtue of the fact that it was Mr Hazel who was paid by the Respondent to conduct the appeal so the appeal is unfair. We can see why there might be a complaint if the way in which Mr Hazel conducted the process was unfair but is not unfair simply because it was heard by him and he was paid by the Respondent to hear it, when no other alternative was available.

86. We note that there was a suggestion made by Mr Green during the course of cross-examination that members of the management committee should be 'recycled' for the purposes of the disciplinary appeal but we have no doubt that if those members had been recycled in the way suggested, the claimant would have complained of bias because they had been involved in the earlier processes. It was reasonable for the Respondent to take the course it did.

87. Looking then at Mr Hazel's conduct of the appeal process we note that he had full authority to make any decision he considered was appropriate without any direction or instruction. He was provided with and read all of the relevant information before the appeal hearing. He considered the letter of appeal to identify the grounds the Claimant relied upon. He addressed those grounds and any other issues which he considered to be relevant during the appeal or which the claimant wanted to raise. From our reading of the appeal minutes it is clear the Claimant was taken to all the relevant evidence and particularly the emails and was given the opportunity to provide her account.

88. By this stage she had already been dismissed. She had nothing to lose by providing an honest and open account to Mr Hazel to explain her actions but she chose not to do this. Instead we agreed with Mr Hazel that she presented as evasive and was extremely reluctant to answer questions directly. His evaluation is supported by numerous examples in the minutes of his questions and her answers. After the appeal, Mr Hazel decided to conduct some further enquiries.

89. The Claimant had at the beginning of the appeal hearing refused to indicate any wish to be reinstated if the appeal was successful despite Mr Hazel's repeated request for her to do so. The Claimant had also told him she had no idea why the staff would write the letter because she had a "positive working relationship" with all her colleagues. She did not volunteer any information about the grievances she had raised against some of her colleagues and Mr Hazel had no knowledge of that background. He decided after his meeting with the claimant, to put some questions to the members of staff and to obtain their responses before making his decision.

90. Mr Green in cross-examination did not raise any issues about the questions asked of the members of staff or challenge Mr Hazel's approach to the answers provided or suggest that mediation should have been explored. The complaint of unfairness is that there was no attempt was made to resolve the dispute between the claimant and her colleagues in accordance with the respondent's own procedures. However the claimant was not expressing any wish for Mr Hazel to explore mediation or reinstatement.

91. We accepted reasonable enquiries were made of the staff and that the responses they gave were genuine responses based on how the staff felt. All the staff clearly confirmed and stood by the letter they had sent, they would all resign if the claimant came back to work for the reason they had stated "the broken circle of trust".

92. By letter dated 18 April 2017, Mr Hazel provided his response to the appeal. The letter is a detailed response, see pages 407 to 411 of the bundle. We accepted that the reasons set out in the letter are the reasons why Mr Hazel did not uphold the Claimant's appeal. We had particular regard to paragraphs 19, 20, 29 and 30.

93. At paragraph 19 of the outcome letter he states:

"I found it very difficult to get an answer out of Mrs Green on various points. She was very selective in terms of what questions she was willing to answer. Many aspects of the situation make little sense. Why did Mrs Green not tell a member of the management committee about her conversation with Mr X? Why did Mrs Green introduce her husband to Mr X as an ex Ofsted inspector? How is it that Mrs Green did not know about the dialogue between her husband and Mr X?

Why was she unwilling to say how she reacted to finding out about that dialogue?"

Paragraph 20:

"These questions were put to Mrs Green by the disciplinary panel and by me. In all cases the answers were extremely unsatisfactory, unconvincing and evasive. It is reasonable to conclude from those circumstances that on a balance of probability Mrs Green was being disingenuous". For those reasons Mr Hazel upheld the final written warning. "

94. For the dismissal decision he states at paragraphs 29 the letter that:

"I have been provided with the results in the form of written responses prepared by members of staff concerned. I have concluded the following:

- *All members of staff stand by their original statement. Nothing has changed.*
- *The situation has been festering for a long period of time.*
- *Trust and confidence had fundamentally broken down between Mrs Green and all other members of staff at least from the perspective of those members of staff.*
- ***No member of staff is willing to work with Mrs Green and Mrs Green is unable to indicate whether she can work with them".***

Finally there is nothing that can be done to resolve the situation. The relationship has broken down irretrievably.

Paragraph 30:

"I'm not sure what else an employer can do in such circumstances. Mediating between the parties does not, in my view, have any reasonable prospect of success. The relationship has broken down irretrievably. In those circumstances I regard the disciplinary panel's decision to have been entirely reasonable and whilst it is unfortunate that Mrs Green was not able to shed any light on how this situation has developed I am not inclined to believe that she is as unenlightened as she has sought to make out. I therefore uphold the decision of the disciplinary panel and Mrs Green's dismissal remains effective".

95. By the appeal stage, Mr Hazel had conducted further investigations with the staff and any failure by Mrs Myers to do so, was addressed by Mr Hazel. It is important that when we consider these cases we remind ourselves that the tribunals function is to look at the whole process. We do not stop at the disciplinary stage and exclude the appeal stage. We have to see if any earlier procedural failures are corrected by the appeal. We found Mr Hazel's conduct of the appeal was thorough, fair and reasonable. He investigated the staff letter issue. He gave the claimant every opportunity to put forward any explanation or any mitigation she wanted to. She chose to answer the questions in the way she did and he was entitled to conclude that she was not being truthful and that the feelings the staff were expressing in that letter were genuine, the relationship breakdown was irretrievable.

96. The claimant chose not to express any wish to return to work and closed the door herself to the possibility of mediation. If that was what she wanted Mr Hazel to do as she suggests in her pleaded case, why didn't she tell him that when she had

the chance to. It was reasonable for him based on what she did say to reach the view he did at the Appeal.

Applicable Law

97. The applicable law for the Race and Age Discrimination complaints is section 13 of the Equality Act 2010 which provides that it is direct discrimination if the Respondent has treated the claimant less favourably because of her race/age. The question for the Tribunal to answer is whether the claimant was treated less favourably and if so what was the reason for that treatment? Was it because of her race/age? (Hewage-v- Grampian Health Board).

98. Section 136(2) of the Equality Act 2010 deals with the burden of proof provides that "if there are facts from which the court could decide" discrimination and it is for the claimant to establish a prima facie case. The Court of Appeal in Ayodele-v City Link has confirmed that there is no reason why a Respondent should have to discharge the burden of proof unless and until the claimant shows a prima facie case of discrimination that needs to be answered.

99. Section 123 sets out the time limit which is 3 months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable. Subsection (3) provides that conduct extending over a period is to be treated as done at the end of the period and failure to do something is to be treated as occurring when the person in question decided on it.

100. The applicable law for the unfair dismissal complaint is set out in sections 98(1) and 98(4) of the Employment Rights Act 1996. Section 98(1) provides that it is for the employer to show the reason and that it is a potentially fair reason for dismissal. Section 98(4) provides that where the employer has fulfilled the requirements of that subsection "*the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)(a) depends on whether in the circumstances(including the size and administrative resources of the employers undertaking)the employer acted reasonably or unreasonably, in treating it as a sufficient reason for dismissing the employee and(b)shall be determined in accordance with equity and the substantial merits of the case"*.

101. We have in our findings of fact dealt with each specific complaint made. The questions we are required to address for the unfair dismissal complaint are as set out in the list of issues at page 47. The first question is whether Mr Langton at the dismissal stage and Mr Hazel at the appeal stage genuinely believed that the Claimant was guilty of the alleged misconduct and whether there was a genuine belief in the existence of a substantial reason to justify the dismissal. We accepted that they did genuinely believe in both those matters and there was actually no challenge to their beliefs in cross-examination. This is important because the questions in the list of issues had been identified and Mr Green was reminded repeatedly of the importance of the list of issues. He chose not to question the genuineness of the belief of the dismissing officer and the appeals officer during the course of these proceedings.

102. The second question is then whether Mr Langton/Mr Hazel had reasonable grounds for their belief and had carried out reasonable investigations at the stage that the belief was formed. Mr Langton we found did have reasonable grounds for his belief and his grounds are set out in the reasoned letter of dismissal which was

sent to the Claimant which we accepted are the grounds for his belief. We have raised one point about the investigation and have accepted that Mr Langton didn't investigate the staff letter at the dismissal stage in a more detailed way but that failure was addressed by Mr Hazel at the appeal stage. We were satisfied that Mrs Myers had carried out a reasonable investigation into the misconduct allegations she was tasked to investigate as part of the disciplinary process.

103. In relation to the band of reasonable responses test and whether or not dismissal falls within the band of reasonable responses we have to consider this employer's decision and whether it was reasonable to treat it as a sufficient reason for dismissing the claimant. This was a case where the Claimant had been given a final written warning for misconduct involving three allegations, one alleging disloyalty. An essential component of the relationship between the employer and employee relies on loyalty and trust. The second allegation involving all the staff was also about the 'circle of trust' between employees being broken. Without trust between employer and employee and without trust between employees, this employer was entitled to conclude that the employment relationship could not continue. The Respondent was faced with the prospect of losing all of its staff and closure of the facility and the services it provided to parents if that happened. Balanced with this was an employee who was found to have committed disloyal and damaging conduct. The reasons for dismissal were genuine reasons which were substantial reason which justified the decision to dismiss.

104. During these proceedings the language used on behalf of the claimant to describe former colleagues/the employer in these proceedings: 'race hate letter' 'racist slurs'' inhumane treatment', the BREXIT related alleged comments without any thought or support for those accusations, supports the decision that was made at the time by the Respondent that the relationship between employer and employee had irretrievably broken down.

105. Context is important in deciding the reasonableness of the decision to dismiss. Here a sanction of a final written warning for misconduct had also been imposed by the employer to consider. Mr Green in his submissions does not contend the warning was unfair/inappropriate sanction. He states "what actually dismissed her and I contend was unfair was the letter". The letter with the threat of resignation and loss all of the staff employed by the Respondent was written a consequence of the staff view of a 'broken circle trust'. Mr Green deduces unreasonably that the letter is a race hate letter but there was no evidence of that. The employer was entitled to treat the letter as a genuine expression of the staffs feeling that they would resign. It was a reasonable sanction for the employer to dismiss the claimant and that dismissal is fair.

106. Finally in relation to the race discrimination allegations we have dealt in our findings with each of the six matters which are alleged to be the direct race discrimination or direct age discrimination and we have found that each one of those fails and is dismissed. The claimant has not actively pursued the age discrimination complaint but did not withdraw it either and has unreasonably continued with that complaint

107. We also found that the complaint of race discrimination has been unreasonably pursued by the Claimant during the course of these proceedings. No evidence has been presented from which the tribunal could conclude race discrimination. The questions put to witnesses in cross-examination did not put the case to them that they were motivated by race or age in the six ways alleged by the claimant in her

pleaded case or to present to them the evidence the claimant relies upon to make that assertion/inference.

108. Furthermore the claimant whilst making these very serious allegations about management and staff has chosen not to give any evidence. Her account could not be tested in the way the Respondent's account could be tested. She has continued to advance a case of race discrimination and make serious allegations against her all her colleagues and all management committee members without providing or presenting any evidence to support that case.

Costs application

109. After delivering judgement on day 5 with reasons Ms Wilson Theaker made the costs application she indicated would be made on behalf of the respondent. She had already discussed the grounds for that application with Mr Green on the previous day providing him with a copy of the rules to consider. The possibility of a costs application and of remedy if the claim was successful had been explained to the claimant and she knew the possible outcomes when judgement was made.

110. We had prior to giving judgement already explained to Mr Green that the tribunal in deciding whether a costs order should be made may have regard to the claimant's ability to pay and that any information the claimant wanted the tribunal to consider it should be made available.

111. The costs application was made on 3 grounds. The claimant and her representatives conduct in bringing and conducting these proceedings, the claim having no reasonable prospect of success, and the communications between Mr Green and the Respondent's solicitor's prior to the hearing demonstrating unreasonable/vexatious conduct. The email communications were without prejudice save as to costs.

112. The claimant had not attended the hearing and we did consider whether we should determine the costs application in her absence. Mr Green did attend as her representative and had provided a written closing statement on behalf of the claimant which we read. He told us the claimant was unwell and that was why she had not attended. We were not provided with any medical evidence to confirm that the claimant was unable to attend the tribunal hearing for medical reasons, when that evidence could have been obtained.

113. We have already found that the claimant's decision not to give evidence was a deliberate decision because she anticipated that difficult questions were going to be asked of her about inconsistencies/the author of the statement which she did not want to face. It was not because she was unable for medical reasons to give evidence. Her non attendance was in our view another attempt by the claimant to avoid dealing with matters because of the difficulties she anticipated she would face.

114. We considered the overriding objective of dealing with cases fairly and justly and avoiding delay so far as compatible with the proper consideration of the issues. We have to consider both parties positions and the need to avoid costs and save expense.

115. If we did not deal with the costs application now when we have the time to deal with it another hearing for the costs application would need to be listed. This was unfair and costly to the respondent and to the tribunal when the costs application had already been flagged up for the claimant and this was in our view

another 'avoidance' tactic. Although the claimant chose not to attend Mr Green had attended to represent the claimant and had made closing submissions on her behalf.

116. We made it clear to Mr Green that we would proceed to deal with the costs application that had already been discussed with Ms Wilson Theaker and of which the claimant had been put on notice. Whatever decision we made the claimant could apply for reconsideration and we could on reconsideration confirm our decision vary it or revoke it.

117. Ms Wilson Theaker's submission in relation to the conduct of the proceedings was to rely upon the findings made by the tribunal about the claimant and her witness evidence which went to their truthfulness and credibility. The claimant/her witnesses had exaggerated/misrepresented/misled and had given untruthful evidence in these proceedings. They had made very serious allegations of race hate letters, racist slurs against the Respondent and its employees which were unsubstantiated and on which the claimant had presented no evidence.

118. Ms Wilson Theaker referred the Tribunal to the case of Daleside Nursing Home Limited-v- Mrs C Matthew UKEAT/0519/08 in which the Tribunal had effectively found that at the heart of the race discrimination case was a deliberate and cynical lie to the effect that the management were guilty of racial abuse. Despite this finding the tribunal in that case had then not gone on to treat that as unreasonable conduct and did not make a costs order. The Employment Appeal Tribunal held that any tribunal reasonably applying themselves to the findings of fact which they made must have come to the conclusion that the claimant had acted unreasonably in bringing and conducting the proceedings and was wrong in law to reject the claim for costs. Similarly and in support of a costs order in this case Ms Wilson Theaker relies upon our findings in relation to the claimant and her representatives conduct to support her application that the claimant has unreasonably brought and conducted these proceedings.

119. Alternatively and additionally she submits that the race/age discrimination claim had no reasonable prospects of success. The age discrimination complaint was not actively pursued at all in these proceedings and for the race discrimination complaint Mr Green in his submissions relies on no more than a difference in race to support the complaint. In his closing statement he repeatedly relies on the fact the claimant was the only member of staff from another race which is not enough to satisfy the burden of proof and shows the discrimination complaints had no merits from the outset.

120. For the unfair dismissal complaint there was only one issue where the tribunal found further investigation of the staff letter should have taken place but that deficiency was corrected at appeal. The claimant would have known before these proceedings were commenced that further enquiries had been made by Mr Hazel and the matter had been investigated at appeal stage. No criticism during the hearing was made of Mr Hazel's investigation. It should have been apparent to the claimant that the unfair dismissal complaint also had no prospects of success and that complaint should not have been pursued from the outset.

121. The final ground relies on are the email communications between Mr Green and the respondent's solicitor prior to this hearing in which Mr Green's language is described as patronising, disrespectful, threatening and vexatious. We saw the email dated 25 October 2017 in which the respondent's solicitor suggests the amounts claimed in the schedule of loss were inflated. This is because 6 years

loss of earnings for the compensatory award for unfair dismissal, were claimed when the maximum amount was £5,868 based on 12 months loss. The solicitor explains the cap and why the amount claimed is unrealistic and she suggests the respondent would make a "commercial and sensible offer to avoid incurring further costs". An offer of £2000 was made and was rejected.

122. In reply the next day Mr Green sends an email stating "*The costs you describe are your legal costs. My representation of my wife is free. I totally disagree with your analysis of our claim. The race discrimination is a very strong case. And being smack in the middle of Brexit-land the Media are very interested in race discrimination in particular Eastern Eurpean discrimination. This tribunal will be open to the public so* ***be assured the media will be all over this case****. So* ***tell your client or should I say trustees that the press and television will be waiting.*** *This case could* ***cost you a fortune****-and if you cannot pay it the trustees will have to* dig into their own pockets*. So get real-and we can negotiate. A deal can be completed in a day.* ***I am waiting your offers. If not expect the worse***".

123. We asked Mr Green reading this back what he thought about the content and the description of it being threatening and unreasonable. Mr Green told us it was his "dry wit, his sense of humour and not an implicit threat".

124. The costs claimed by the Respondent and the print out of the hours of work undertaken and costs incurred were just under £20,000 plus counsels fees of £4,800 making the total costs just under £25,000 (£24,800).

125. We are invited to make an order of £20,000 today which is the maximum the tribunal can award without a detailed assessment of costs carried out by an employment judge applying the principles in the county court.

126. Ms Wilson –Theaker confirmed she had told Mr Green on at least 4 occasions about the costs grounds and she had provided a copy of the rules and information about the ability to pay so that Mr Green could consider his representations in advance. Mr Green's response to her was that he would "conduct his own research about the parameters and financial outcome"

127. Mr Green told us his wife has depression and is not well enough. He stands by the written closing statement he has given on his wife's behalf. He said his wife had no income very little savings but was unable to provide any details. The only asset they had was their jointly owned home. He was asked what the value of the house was and said he did not know. He was asked what type of house and where it was located. He said it was a 3 bedroom house in South Cave with no mortgage. My members were able to provide some information about the location.

128. We decided based on our findings that the claimant and her representative Mr Green have in bringing these proceedings and in their conduct of these proceedings acted unreasonably. We also agree with Ms Wilson- Theaker that Mr Green's email sent on behalf of his wife was unreasonable threatening and vexatious in it's tone and content. The solicitor had in a very reasonable way explained the most the claimant could achieve for the compensatory award was £5,868 and why the amount claimed was unrealistic. Mr Green's response was to threaten the 'worse' and cost the respondent a 'fortune'.

129. Mr Green did not take up the sensible offer made to the claimant to settle. Neither did he attempt to communicate with the solicitor in the measured and sensible way she was trying to communicate with him.

130. We considered what a reasonable and appropriate amount of costs should be deciding that a costs order was appropriate. The £20,000 claimed reflects the costs incurred by the respondent in defending these proceedings and they are out of pocket by that amount which for them is significant. We decided that £10,000 was a reasonable and proportionate amount of costs to award. We informed Mr Green that the claimant can apply for reconsideration of that sum if she wishes to. At a reconsideration hearing the tribunal would consider both parties' representations and can on reconsideration vary the award which could increase/decrease the amount awarded, revoke the costs order or confirm it.

Employment Judge Rogerson

Date: 12 January 2018