Case Number: 3200341/2017

RM

EMPLOYMENT TRIBUNALS

Claimant:	**Miss Shumana Yasmin**
Respondent:	**Headstart Limited**
Heard at:	**East London Hearing Centre**
On:	**15, 16 and 21 November 2017**
Before:	**Employment Judge Russell**
Members:	**Mr T Burrows** **Mrs P Alford**
Representation:	
Claimant:	**Mr R Jones (Counsel)**
Respondent:	**Mr J Demeza-Wilkinson (Consultant)**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that all claims fail and are dismissed.

REASONS

1 By a claim form presented to the Tribunal on 12 April 2017, the Claimant brought claims of direct discrimination, harassment and victimisation by reason of her religion (she is Muslim) and of detriment for having made a protected disclosure. The Respondent resisted all claims.

2 In January 2017, prior to the termination of the Claimant's employment, the legal entity employing the Claimant changed from Headstart Montessorians Day Nursery (a partnership) to Headstart Limited. By consent the name of the Respondent was amended.

3 The issues were decided at a Preliminary Hearing on 12 June 2017 before Employment Judge Warren. On the first day of this final hearing, the Claimant was granted leave to amend her claim to include a complaint of constructive dismissal arising

out of her resignation on 7 July 2017. Later in the hearing, the Claimant was also granted leave to amend to include the Respondent's failure to provide her with a reference as a further alleged act of victimisation. Both amendments arose out of facts already pleaded, neither caused any prejudice to the Respondent and neither was opposed by the Respondent. In closing submissions, the Claimant withdrew her complaints of direct discrimination, harassment related to religion and all protected disclosure claims. The acts identified as harassment were still relied upon as part of the conduct entitling the Claimant to resign and treat herself as dismissed and/or as victimisation.

4 The remaining issues therefore for us to determine were as follows:

Constructive Dismissal

4.1 Did the Respondent's conduct cumulatively amount to a repudiatory breach of contract? The Claimant relies upon an express term that her place of work was Goodmayes and/or the implied term of trust and confidence and the following conduct:

4.1.1 That prior to August 2016, the Claimant's manager Ms Keeley Jones:-

(1) Several times said to her that she would shove water down her throat during Ramadan if she was ever to faint. These comments were made to the Claimant in the office, at various times throughout the time that she was managed by Ms Jones. She cannot put a date on any one occasion. She says that it was usually around about the time of Ramadan in June 2016.

(2) Would question the Claimant about why she wore long clothing, asking her if she ever tripped? Reciting to her examples of her having seen Muslim women falling over in public and laughing about it. These comments were always made to her in the office when she was alone with Ms Jones. She says that these remarks were made to her several times but she cannot put a date on any particular occasion.

(3) Questioned the Claimant as to why Muslim women wore a veil? Saying that it was not safe to not be able to see them properly. This remark was made in the pre-school unit, Ms Kim Davis was present and made the same remark. Ms Jones and Ms Davis did not say why it was not safe and the Claimant has no understanding of why they thought that might be so.

(4) Boasted and laughed about a racist television programme that she had watched on television. The Claimant cannot remember the name of the television programme. She says that the conversation took place in the Montessori room when she was sitting alone with her. The Claimant says that she told Ms Jones that it was a racist programme, Ms Jones admitted that it was racist but continued laughing.

(5) In June 2016, Ms Jones informed the Claimant that her colleague Saba's absence from work and Ms Jones' treatment of her in that respect, was none of her business and that she should not involve

herself in other people's business.

(6) In July 2015 in a staff meeting, discussing where staff would go for Christmas, upon the Claimant saying that she would not be going, that while she respected the other's religion, Christmas was not part of her religion and she did not celebrate Christmas, Ms Jones in response verbally attacked her, raising her voice and saying that she was very disappointed in the Claimant not taking part as it was a time for building team work skills.

4.1.2 On 20 May 2016, the Claimant reported to her Room Leader Ms Kim Davis that a colleague Saba (also Muslim) had been upset by Ms Jones. Ms Davis informed Ms Jones, who then in a meeting with the Claimant and Saba, shouted at her and reminded her that she was just a Nursery Nurse.

4.1.3 Ms Sarah Richard, the Claimant's new manager, held a staff meeting in October 2016 to discuss arrangements for the following Christmas. She said that the owners of the business, Mr and Mrs Lakhan would be coming in to question those who were not attending and they would have to have a good reason for not attending.

4.1.4 In September 2016, after a period of absence between 5 and 9 September, Mrs Lakhan challenged the Claimant about her absence, told her that it was not good enough and that her absence was going to be looked into. She also accused her of being the ringleader with regard to the incident on 18 May, discussed on 20 May 2016 as referred to above.

4.1.5 On 23 November 2016, in a meeting with Mr and Mrs Lakhan:

(1) The Claimant was told that she had an attitude and was creating problems.

(2) Mr and Mrs Lakhan ignored what the Claimant said, (she tried to explain about Ms Jones' racist remarks, how that had caused her anxiety and about other staff issues).

(3) Mr Lakhan manipulated the Claimant's words, (with regard to the Room Leader Ms Kim Davis, the Claimant had commented that she was not providing leadership, to which Mr Lakhan had responded that the Claimant was suggesting he could not do his job).

(4) Mr Lakhan told the Claimant that he was not interested in his employee's lives.

(5) Mrs Lakhan told the Claimant that she was a spokesperson, (by which she meant for all of the employees, not just Muslim employees).

(6) Mr Lakhan banged his desk and said to the Claimant, "You don't tell me what to do, I tell you what to do" and

(7) Mrs Lakhan told the Claimant that she should look for another job.

4.1.6 In 25 November 2016, Mrs Lakhan asked the Claimant to cover for their Cross Harbour Nursery temporarily for a week. During that following week the Claimant was absent for the Thursday and Friday through illness. The following week Mrs Lakhan asked the Claimant to go to Cross Harbour once again by text message, the Claimant asked by text message for an assurance that this was only to be temporary and Mrs Lakhan never replied.

4.1.7 Failure properly to investigate and/or address her grievance submitted on 6 December 2017 and/or her appeal against the grievance outcome submitted on 23 February 2017.

4.1.8 The Claimant relies on these individually and/or as a series of acts culminating in a last straw namely the Respondent's appeal outcome letter of 15 May 2017.

4.2 If the Respondent breached the Claimant's contract, does the Claimant's conduct indicate that she affirmed the contract (including any delay amounting to a waiver of the breach)?

4.3 If the Claimant did not affirm the contract, was her resignation in response to the breach?

4.4 In respect only of the express term, did the Respondent have a potentially fair reason for dismissal?

4.5 Was dismissal fair in all of the circumstances of the case?

Victimisation

4.6 The Respondent accepts that the Claimant did the following protected acts:

4.6.1 On 20 May 2016, the protected act is informing Ms Kim Davis about the treatment of Saba by Ms Jones.

4.6.2 On 23 November 2016, the protected act is informing Mr and Mrs Lakhan about the conduct of Ms Jones.

4.7 Was the Claimant treated unfavourably because of a protected act? The unfavourable conduct relied upon is:

4.7.1 The conduct identified above in connection with constructive dismissal.

4.7.2 On 20 May 2016 Ms Jones said in a demeaning and belittling tone "can I remind you of your position you are just a nursery nurse and I

am the manager" trying to intimidate the Claimant and make her feel inferior.

4.7.3 In June 2016 Ms Jones told the Claimant that the complaints of a colleague Ms Saba Raja did not concern her and then proceeded to attack her about her personal life saying that the Claimant needed to stop getting involved in people's business and that she would find it hard to maintain relationships in her life if she did not sort herself out.

4.7.4 Upon her return to work in September 2016 following a period of sickness Mrs Lakhan unfairly criticised the Claimant before her sickness absence and accused the Claimant of being a ring leader with reference to the first protected act and instructed the Claimant to stop getting involved in matters which did not concern her.

4.7.5 Her treatment at the meeting on 23 November 2016. Mr Lakhan became very aggressive and started banging on the desk and shouting "you don't tell me what to do, I tell you what to do, I'm paying your wages" Mrs Lakhan began calling the Claimant names saying that she was always a spokesperson and always got involved and said "I think you should look for another job."

4.7.6 Being instructed to work at the Cross Harbour nursery on 25 November 2016 and Mrs Lakhan's failure to respond to subsequent enquiries as to whether this was a permanent redeployment.

4.7.7 The Respondent's failure properly to investigate and/or address the Claimant's grievance submitted on 6 December 2017 and/or her appeal against the grievance outcome submitted on 23 February 2017.

4.7.8 Mrs Lakhan's refusal on 8 March 2017 to provide the Claimant with a reference resulting in her losing a potential new job as a learning support assistant.

4.8 Miss Yasmin also says that the Respondent never provided her with written terms and conditions of employment; the Respondent says that it did.

Time

4.9 The Respondent agrees that the claims are not out of time per se, as the last allegation of victimisation is on 8 March 2017 and there is an early conciliation period of one month. However, it is possible that earlier allegations of discrimination, if upheld, might be out of time if the later allegations are not upheld. There may also be the question of whether or not there is continuing conduct.

5 We heard evidence from the Claimant on her own behalf. For the Respondent, we heard evidence from Mr Harpal Lakhan (Director), Mrs Sabrina Lakhan (Area Manager), Ms Kim Davis (Room Supervisor) and Ms Tahmina Islam (Nursery Practitioner). We were provided with a witness statement from Ms Sarah Richards (Manager). Ms Richards did not attend the hearing but provided a medical certificate confirming that she had

undergone an emergency caesarean section on 23 October 2017 and was therefore not able to be present on medical grounds. Her statement was signed and as such we were satisfied she had good reasons not to be here and that her witness statement should be accorded appropriate weight. We were also provided with a signed witness statement from Ms Keeley Jones (former Manager). It was evident that Ms Jones did not wish to attend the hearing. Although a Witness Order was made to compel her attendance, this was subsequently discharged. We considered that her statement can be accorded little, if any, weight. We were also provided with signed written statements from Ms Gul Saba Sharib, Ms Kayleigh Giles, Ms Molly Howlett and Ms Tejinder Jagdev. None attended the hearing and their statements dealt with the single allegation with regard to Christmas parties. We read the statements but considered that they served only to confirm evidence given by the other witnesses who attended and dealt with the same allegation.

6 We were provided with an agreed bundle of documents and we read those pages to which we were taken during the course of evidence.

Findings of Fact

7 The Respondent is a nursery providing childcare to babies and pre-school children. It operates out of Goodmayes in Essex. The owners of the Respondent are Mr and Mrs Lakhan. They also own (in whole or in part) and run Montessorian nurseries in Cross Harbour and Walthamstow.

8 At Goodmayes, the Respondent has approximately 15 or 16 employees, of whom approximately nine were Muslim (including the Claimant). Mr Lakhan encouraged a workplace that was respectful of various faiths, marking a number of religious festivals including Eid, Diwali and Christmas.

9 The Claimant commenced employment on 2 December 2014 as a nursery nurse. She was allocated to the pre-school room but, as with all nursery practitioners, was expected to work in any room to provide cover. The Claimant's case is that she was not provided with a contract of employment when she started. The Respondent's case, relying upon an email from Ms Keeley Jones in spring 2017, the Goodmayes manager when the Claimant started work, is that a contract had been given to the Claimant when she started her employment but that the Claimant had failed to return it signed. No copy of a 2014 contract could be located by the Respondent, whether signed or in draft, despite it retaining extensive records on the Claimant's personnel file showing her training upon commencing employment. In November 2016, the Claimant asked for a copy of her contract. The contract provided at that time was not signed by either employee or employer and incorrectly states that employment commenced on 22 November 2016. On balance, we prefer the evidence of the Claimant and find that she was not given a contract of employment until November 2016.

10 The contract of employment provided in November 2016, and which the Claimant accepted at the time, states that her normal place of work is Headstart Montessorians, 34 Green Lanes, Goodmayes, Essex IG3 9RZ but that she may be required to travel on business for Headstart Montessorians Nursery within the United Kingdom. Mr Jones accepted in his submissions that this clause accurately reflects the terms on which the Claimant was employed.

11 The Claimant's evidence is that from very early in her employment, she was subject to racist and rude remarks, primarily from Ms Jones. These are the alleged comments set out in the issues above, relating to fasting during Ramadan, wearing of long clothes and veils by Muslim women and about a racist television programme. The Claimant was unable to give any further detail as to the dates or frequency of such comments saying only that they occurred "randomly". Her evidence appeared to us to be vague and generalised, for example only able to say that the television programme was roughly in summer 2015 and might have been a comedy programme (although she could add no further description). The Respondent, and indeed Ms Jones, vehemently deny that such comments were made. In deciding this dispute, we had regard to the evidence of Ms Kim Davis. The Claimant's case is that Ms Davis was present when a remark about the veil was made by Ms Jones and that she agreed with her. Ms Davis denies both.

12 We also had regard to the evidence we heard in relation to remarks about Ramadan in May 2016. On this occasion, another nursery nurse (Saba) told colleagues including the Claimant that Ms Jones had called fasting for Ramadan "pathetic". The Claimant was upset, in part for Saba and in part in her own right. The Claimant raised her concern with Ms Davis. There was a meeting attended by Ms Jones, Ms Davis, Saba and the Claimant to try to resolve the issue. In the course of the meeting, Saba retracted her allegation that Ms Jones had made the comment and was racist. The Claimant was unhappy that Saba had done so and, we accept Ms Davis' evidence, pressed her to maintain her allegation. The Claimant's evidence is that Ms Jones shouted at her and said that she was "just" a nursery nurse. Ms Davis' evidence is that no such comments were made, rather it was the Claimant who became aggressive and animated.

13 We preferred the evidence of Ms Davis to that of the Claimant. Whilst the Claimant was prone to generalisation and, at times, exaggeration in her evidence, Ms Davis was measured and balanced. Ms Davis accepted that the Claimant genuinely believed that Ms Jones had made the comment and was sticking up for what she thought was right and that Ms Jones had been offended. We accepted as genuine Ms Davis' evidence that she would not want to be thought a racist and her consequent denial in respect of the veil comment. As for the meeting in May 2016, we find that emotions ran high. The Claimant was frustrated that Saba was not prepared to maintain her allegation. Ms Jones was offended to be called racist for remarks she felt had not been made, which Saba had retracted but the Claimant was still pressing. Whilst we do not consider it likely that there was shouting (and we bear in mind that we have rejected below the Claimant's allegation about being shouted at in a later meeting), we accept that Ms Jones probably did say words to the effect that the Claimant was "just a Nursery Nurse".

14 The Claimant's evidence is that after the May 2016 meeting, Ms Jones' behaviour towards her worsened. She could give no example, save for an incident in June 2016 when she alleged that Ms Jones asked her again why Muslims fast during Ramadan and, when the Claimant explained, Ms Jones had aggressively told her that she would "**shove water down her throat**" if she were to faint. This incident is the first identified in the list of issues, albeit now expanded to Ms Jones having repeated the same comment several times over the course of her employment. Again the Respondent, and Ms Jones, deny that such a comment was ever made. In resolving this conflict of evidence, we took into account the fact that the Claimant did not raise any complaint at the time, whether by way of grievance or by informal discussion with Ms Davis. The Claimant's evidence was that she was fearful of doing so. We do not find this credible given her willingness to act on

Saba's behalf when a very similar allegation was made only the month before. The Claimant felt no such fear when raising concerns directly with Mr and Mrs Lakhan on 23 November 2016. We find that if such a clearly offensive comment had been made, the Claimant would have complained about it at the time.

15 In the list of issues, the Claimant complains that Ms Jones shouted at her and told her not to get involved in other people's business. This was in connection with a misunderstanding about Saba's absence from work which had caused the two women to fall out. The Claimant describes this as a verbal onslaught. In her witness statement, Ms Jones complained that the Claimant "**still decided to involve herself fully in the matter for no reason**". Whilst this was in respect of the May 2016 meeting with Saba, we consider it consistent with the Claimant's evidence of Ms Jones' attitude towards her. On balance, we accept that words to the effect of not getting involved were said. We do not, however, accept that this was shouted or amounted to a verbal onslaught given that the Claimant demonstrated in her evidence a tendency to embellish.

16 In August 2016, Ms Jones left the Respondent's employment and Ms Sarah Richards became the new manager at Goodmayes. The evidence we heard did not suggest any problem in her working relationship with the Claimant.

17 In September 2016, the Claimant was absent from work due to a short period of sickness. It is not in dispute that upon her return to work, the Claimant had a conversation with Mrs Lakhan in the staff room about the reason for her absence. The Claimant's evidence was that Mrs Lakhan told her that her reason for absence was not good enough, would be looked into, accused her of being a ringleader in connection with the Saba allegation in May and told her to stop getting involved in matters which did not concern her. Mrs Lakhan denied making such comments and said that she sought only to explore the reasons for absence so that it may be properly reported. We find that this was not a formal return to work interview (which would be undertaken by Ms Richards as the Claimant's line manager); whilst indicative of Mrs Lakhan's tendency to refer to informal matters as being matters of policy this is not a matter sufficient to render Mrs Lakhan's evidence unreliable.

18 On balance, we preferred the evidence of Mrs Lakhan to that of the Claimant and find that the alleged comments were not made. In so finding, we relied upon the evidence of Ms Davis that the Saba incident had not been raised again after the May 2016 meeting. On the Claimant's case that Mrs Lakhan knew of the incident, it would not make sense for it to be raised three months later when there had been no further consequences, Ms Jones had left employment and the purpose of the conversation was to discuss sickness. Mrs Lakhan's evidence in cross-examination about what she might have done if she had known was simple hypothesis and did not undermine her evidence that she had not in fact known about the May 2016 meeting. The Claimant did not raise any concern about the content of the September 2016 discussion until the working relationship encountered further difficulties in November 2016. We considered that with hindsight the Claimant has misremembered what was said and that her evidence is not reliable. We consider that the comment on 23 November 2016 recording that "**Sabrina reminded Shumana that she has had a previous meeting due to her getting involved in other member of staff business which must stop immediately**", refers to the original May 2016 meeting rather than any further discussion in September 2016 as the Claimant contended.

19 Shortly after becoming manager, on 10 August 2016, Ms Richards held a staff meeting which discussed (amongst other things) a proposed work outing on 10 December 2016. The contemporaneous note records the words "**full attendance**" alongside this topic. The Claimant was present at this staff meeting. Her evidence was that on this occasion, and indeed in a similar meeting the previous year, she explained politely that she did not wish to participate as she did not celebrate Christmas. The Claimant says that, on both occasions, she was put under pressure to attend and left humiliated and insulted by her line managers (Ms Jones in 2015 and Ms Richards in 2016). Ms Davis was present at both meetings. Her evidence was that on each occasion the manager asked everyone if they could attend and nobody was put under any pressure. Rather, Ms Davis' evidence (supported by the signed witness statements of four other members of staff present at the meetings) was that the Claimant over-reacted, became annoyed and was rude. We prefer their evidence and find that the Claimant was assured by the managers in each meeting that nobody was being forced to attend. The Claimant was not verbally attacked by Ms Jones in July 2015 or put under pressure by Ms Richards in August 2016.

20 On balance, we find that the Christmas outing was regarded as important by Mr and Mrs Lakhan, as a team building opportunity. The event was not intended to celebrate Christmas in a religious sense, Mr Lakhan himself being a practicing Sikh, but was arranged in December as events are more common at this time of the year. Other opportunities for team-building were equally important and Mr Lakhan would encourage staff outings after a good Ofsted inspection or at Eid. On each occasion, he would offer to contribute towards the cost of the meals with staff paying the balance. Mr Lakhan accepted that he wanted staff to attend unless they had a good reason not to do so. The Respondent regarded religious reasons for not attending as a good reason. The Claimant was not the only member of staff who did not wish to attend because it was termed a Christmas event. The Claimant's evidence on the issue of Christmas parties, taking a simple request as to whether she was attending and turning it into an allegation of harassment and pressure to do so, is one example of her tendency to exaggerate her complaints in light of the way in which her employment ended.

21 By November 2016, the out of work friendship between the Claimant and another nursery nurse, Ms Islam, had broken down. This caused such tension at work that Ms Islam told Mr Lakhan that she intended to resign. Mr Lakhan regarded Ms Islam highly and wished to retain her services. As Mr and Mrs Lakhan were present at Goodmayes on 23 November 2016, they called both women to a meeting to explore and seek to resolve the difficulties. No notice was given in advance of the meeting, however both women were asked if they were content to proceed. Both agreed. Given the nature of the workplace and the importance of good communication and professional working relationships, we think that the Respondent had good reason to proceed quickly to try to resolve these personal difficulties. Ms Richards took a contemporaneous note of the discussion.

22 There is a dispute as to what happened in the meeting. The Claimant's case is that Mr Lakhan was aggressive, dismissive of her concerns and accused her of playing "the racism card". The Respondent's case is that whilst Ms Islam expressed a desire to move forward, the Claimant was not prepared to accept her share of the blame rather she raised a number of complaints and criticisms about colleagues which caused Mr and Mrs Lakhan concern. In resolving this dispute, we had regard to the contemporaneous notes as well as the oral evidence of those witnesses who had been present. Both parties agree

that during the meeting, the Claimant made complaints about acts of harassment and discrimination which she alleged she had suffered at the hands of Ms Jones.

23 We found Ms Islam to be an impressive witness whose evidence had the ring of truth. For example, we prefer her evidence that she asked to leave the meeting as matters moved away from the issues between her and the Claimant to that of the Claimant who suggests that Ms Islam was sent out by Mr Lakhan. This was more consistent with Ms Islam feeling uncomfortable due to the Claimant's behaviour at the meeting and the fact that the remaining discussion did not concern her. Despite robust cross-examination, Mr Lakhan remained calm and consistent in his evidence. It seemed highly unlikely to us that he was prone to aggressive and hostile behaviour as alleged by the Claimant. Mr Lakhan gave a lengthy and spontaneous description of the meeting on 23 November 2016. He described behaviours of the Claimant at the meeting which were consistent with the way in which she gave her evidence to this Tribunal, in particular going off in different tangents, being unable to provide detail and responding to any criticism of her by criticising the behaviour of others.

24 Mr Lakhan volunteered in evidence that he had warned the Claimant that if she did not improve her working relationship with Ms Islam, he would consider disciplinary action against her. We considered this evidence indicative of Mr Lakhan's desire to give a truthful account of what was clearly a difficult meeting, rather than seeking to present himself in an unduly positive light. By contrast, the Claimant's evidence at Tribunal was combative and consistent with an unwillingness to accept that she may have been as at fault as Ms Islam. In the course of an answer to a question by the Tribunal, it was the Claimant's own choice of words that "people were quick to use the racism card, particularly in an environment of girls".

25 On balance, we found that Mr Lakhan asked both women to maintain professional courtesy and a good working relationship for the sake of the children whom they looked after. Ms Islam agreed but the Claimant was reluctant to accept any blame for the breakdown in the relationship, seeking to attribute fault to Ms Islam and adamant that she was in the right. This led to further disagreement between the two women. Mr Lakhan sought to explain to the Claimant and Ms Islam that whilst he had no right to interfere with his employees' personal life, he had to look at what was in the best interests of the children. The Claimant went on to criticise some of her colleagues and claimed that she had been discriminated against on grounds of race by Ms Jones and in connection with the Christmas party. We find that Mr Lakhan was frustrated that the Claimant was unable to draw a line under the problems with Ms Islam and was not prepared to be flexible. We do not accept that he referred to the Claimant "playing the racism card"; he did not raise his voice or bang his hand on the table. Nor did he conduct the meeting in the manner described in the issues. We also reject the Claimant's evidence that Mrs Lakhan called her a spokesperson or told the Claimant to look for another job. It is inconsistent with Mr Lakhan's desire to retain both employees, which we accept as genuine. It is also inconsistent with Mrs Lakhan's subsequent refusal to give the Claimant a reference.

26 Whilst operated as separate legal entities, the Cross Harbour, Goodmayes and Walthamstow nurseries in practical terms were closely associated and it was not unusual for staff to be asked to cover. Whilst there is no written evidence as to the exact nature of the staff shortage which required cover, we accepted the oral evidence of Mr Lakhan that the problem arose in late November 2016 because a number of Cross Harbour staff had

pre-booked holiday to which was added sickness absence which caused concerns about the appropriate staff to children ratio. Whereas previously employees from Walthamstow had provided cover at Cross Harbour, this was not possible as they were also busy. As a result, a member of staff was required from Goodmayes. Mr Lakhan's evidence in this respect was consistent with comments made by Mrs Anderson in the grievance appeal hearing and with which the Claimant did not disagree at the time.

27 In her role as Area Manager, Mrs Lakhan told Ms Richards that a member of staff was required from Goodmayes. We accepted as truthful and reliable the evidence of Ms Davis that Ms Richards asked her to identify a member of staff who could be provided as cover. It was Ms Davis who identified the Claimant. At the time, Ms Davis did not know that the Claimant had made allegations of race discrimination against Ms Jones at the meeting on 23 November 2016. We accepted Ms Davis' evidence that she had not been told to select the Claimant, rather it was her free choice based upon operational requirements at Goodmayes. In his evidence, Mr Lakhan speculated that Ms Davis may have chosen the Claimant in part because the problems in the working relationship between her and colleagues had not been resolved. The point was not put directly to Ms Davis, who gave evidence before Mr Lakhan, but it appears to us to be a logical inference. We accept Mr Lakhan's evidence that he would not have asked or wanted the Claimant to be moved to Cross Harbour as he was looking to start a disciplinary process given the workplace problems and the Claimant's attitude in the meeting on 23 November 2016.

28 On 25 November 2016, the Claimant was asked to cover the baby room at the Cross Harbour Nursery temporarily for a period of one week. The Claimant agreed to do so. It was common ground that the Claimant's normal place of work was Goodmayes. Her journey to Cross Harbour could be up to an hour each way on public transport, compared to Goodmayes which was a five minute walk from her home. The Claimant initially agreed to the request without complaint and the request was not, as she now contends, a matter of concern to her at the time.

29 The Claimant worked at Cross Harbour on 28 and 29 November 2016 as requested. She was then absent from work due to ill-health. The Claimant informed Mrs Lakhan by text and there then followed an exchange of text as follows (S is Mrs Lakhan, C is the Claimant).

> **"Thursday 1 December 2016**
>
> **S – I wish you a speedy recovery. Can you work at Cross Harbour from Monday onwards on a 9 to 6 shift thanks.**
>
> **C - Can I clarify, do you mean permanently?**
>
> **S – I don't know for def but I need u at Cross Harbour in the baby unit.**
>
> **C - I need more clarity than that. Can you please substantiate the reason for me being asked to go to Cross Harbour other than you 'needing' me there? Am I filling someone's job?**
>
> **I work in the preschool unit and I am being asked to cover in the baby until. Does it not make sense to take cover from the baby room, especially as Saba is off this week, rendering the preschool unit short staffed? I was asked to go there for a week, not longer than that, and**

I complied.

S – I have asked u to go to Cross Harbour to work in the baby unit. That is a reasonable request Shumana?

C - I am sorry but I do not find moving my place of employment a reasonable request, and I am therefore declining. I was asked to cover at the Cross Harbour branch as they were short staff there, and I complied.

S – We are still short staffed there I will see u at Cross Harbour at 9am a 5.12.16 Shumana.

C - I repeatedly asked you and Sarah whether it was only for a week and you both replied in the affirmative. To now want me to go there next week onwards and failing to clarify whether it is on a permanent basis or not, is unacceptable. My permanent place of work, as stipulated in my contract, is the branch at Green Lanes.

I therefore do not accept your proposal of moving to the Cross Harbour branch from next week onwards …

S – We are short at Cross Harbour as I have repeatedly stated in my previous messages. We need a workforce that is flexible and adaptable as stated in your contract. Please advice if you are attending Cross Harbour as requested. Thank you Sabrina.

C - How long are you asking me to cover at Cross Harbour?

S – I am sorry but I cannot say how long your help would be needed at Cross Harbour. Can you confirm that you will be at Cross Harbour on Monday 5.12.16 for 9am start. Thank you Sabrina.

C - I'm unable to confirm to you now, this is an important matter for me and I will consider my options and I will formally email you tomorrow.

Friday 2 December 2016

C - I need more clarity than that. Can you please substantiate the reason for me being asked to go to Cross Harbour other than you "needed me there"? Am I filling someone's job? I work in the preschool unit and I am being asked to cover in the baby unit. Does it not make sense to cover from the baby room especially as Saba is off this week rendering the preschool unit short staffed. I was asked to go there for a week, not longer than that, and I complied.

S – We are short at Cross Harbour as I have repeatedly stated in my previous messages. We need a workforce that is flexible and adaptable as stated in your contract. Please advise if you are attending Cross Harbour as requested. Than you. Sabrina.

Can you confirm that you will be at Cross Harbour on Monday 5.12.16 from 9am start. Thank you. Sabrina.

Sunday 4 December 2016

C - Hi Sabrina…. Regarding work, I will be sending you an email tomorrow discussing the matter further. I was unable to send it on Friday as I was too poorly…"

30 The Claimant submitted detailed grievance letters on 6 and 7 December 2016, raising concerns dating back to the outset of her employment. The content of the grievance is largely the same as that set out in her claim form and witness statement in these proceedings. One of the complaints as expressed in the 7 December 2016 was about "**the way in which I was asked to cover at the Cross Harbour branch and the subsequent conversation pertaining to the extension of the cover period.**" The impression given to the Tribunal is that the Claimant remained unhappy about the 23 November 2016 meeting and that her discontent caused her to revisit previous issues in her employment which, although apparently relatively minor and not leading to complaint at the time, were now developed into more serious complaints.

31 The grievance was heard by Ms Debbie Tiara an Area Manager. She met with the Claimant. The grievance outcome letter is poor and gives the impression when read overall that there had been no investigation beyond a meeting with the Claimant. However, we accept Mr Lakhan's evidence that staff were interviewed and the Respondent attempted to contact Ms Jones. Ms Tiara did not permit the Claimant to cross-examine witnesses, including Ms Islam.

32 The Claimant was dissatisfied with the grievance decision and appealed by letter dated 21 February 2017. Again the letter is detailed setting out numerous allegations of discrimination, religious discrimination, harassment, victimisation, intimidation, aggressive behaviour, abuse of power, threatening behaviour, breach of statutory rights, sick pay, breach of statutory rights, employment rights, miscalculating monthly payments, slander, tarnishing of character, insensitive behaviour and potential constructive dismissal. In essence the Claimant complained that a fair grievance hearing had not taken place and her grievances had not been dealt with adequately as Ms Tiara had failed to carry out any investigation and question witnesses both employed and those who had left.

33 The Respondent appointed Ms Tina Anderson, the Nursery Manager at Cross Harbour to hear the appeal. There was more thorough investigation undertaken by Ms Anderson. She met with the Claimant on 27 March 2017 and notes of what was clearly a lengthy and detailed meeting were taken. The content of the Claimant's investigation meeting largely mirror the matters covered in the Claimant's evidence. Ms Anderson informed the Claimant that Cross Harbour had been short of staff in December and that it was not unusual for the nurseries to support each other. The Claimant's reply was: "**yeah I understand I am happy to cover I just found it strange that it happened straight after the incident and Sabrina wouldn't tell me if it was permanent or not.**" The Claimant expressed a wish to return to work at Goodmayes. Ms Anderson did not say that this was not possible, rather she told the Claimant that it was never confirmed that she would be moving location. This we find was an assurance that the Claimant's normal place of work had not changed from Goodmayes.

34 Ms Anderson interviewed a large number of staff. She obtained an email from Ms Jones on 25 March 2017 which stated that the Claimant had received a contract within the first few months of employment and **"regarding the allegations of discrimination, I do not feel the need to respond to such lies**". Ms Davis provided a note of the June 2016 discussion with regard to Saba recording that Ms Jones had denied the allegations and that Saba had admitted that she had lied about them. Ms Davis also told Ms Anderson that Ms Jones had not shouted, had remained calm but was upset at being called racist. Rather, Ms Davis described the Claimant as becoming quite heated, with her body language quite

aggressive, but that after the meeting the matter was not brought up again. Mrs Lakhan provided a statement confirming that the meeting on 23 November 2016 was to resolve the workplace difficulties with Ms Islam; she stated that the only person in the meeting who got heated and aggressive was the Claimant. In his statement to the grievance appeal, Mr Lakhan similarly described the Claimant's behaviour as aggressive, refusing to accept or resolve the issues, trying to blame Ms Islam, being unwilling to listen and then listing a catalogue of failures of other staff. Ms Islam also provided a statement in which she described Mr Lakhan as calm and professional in the meeting whereas the Claimant was not. Other staff provided statements in connection with the Christmas party denying that the Claimant had been pressurised to attend. Ms Anderson tried to contact some other former members of staff but they did not provide a response. Copies of the statements from staff were not provided to the Claimant but the contents of their evidence was summarised in the decision letter.

35 Ms Anderson rejected the Claimant's appeal in a letter dated 15 May 2017. She found that there was insufficient evidence to substantiate the allegations. She provided reasons for the temporary request to cover at Cross Harbour, including that Walthamstow had been too busy to provide cover and that the Claimant's name was advanced by her manager Ms Davis. Ms Anderson informed the Claimant that Mrs Lakhan's evidence to her was that she had made clear that the move would definitely be temporary but that an exact number of days could not be advised. Whilst this was not so clearly expressed in the texts, we accept that this was what Mrs Lakhan genuinely intended to convey (and believed she had conveyed) to the Claimant at the time of the texts. Ms Anderson accepted that there had been a genuine reason for the temporary move to Cross Harbour. We find that the appeal outcome letter made clear to the Claimant that the move was not permanent.

36 The Claimant had begun looking for a new job from as early as December 2016. In or around February 2017, she was offered a position and requested a reference from the Respondent. Mrs Lakhan refused to provide one, stating in a text on 8 March 2017:

> "**I believe you are still in employment with Headstart Montessorians and currently on sick leave suffering from stress and anxiety as confirmed by your doctor from December 2016 to date.**
>
> **As per company policy we do not give references unless our employees have either resigned or left employment. Sabrina**"

37 In fact, the Respondent has no formal policy about references. As with her earlier evidence of a return to work meeting, Mrs Lakhan again here referred to a policy when in fact there was nothing more than an informal practice. Mrs Lakhan was asked in cross-examination about her reasons for refusing to provide the reference. We accepted as truthful her evidence that the nature of their work with children required them to be particularly careful about the provision and content of references. In the Claimant's case, whilst employment continued, there was outstanding concern about her working relationship with Ms Islam which had led Mr Lakhan to tell her that he would consider disciplinary action. This had not been resolved as the Claimant had been on sickness absence ever since. We do not accept that Mrs Lakhan gave a basic reference as she suggested but we consider that this was a question of poor memory rather than a matter adversely affecting her credibility.

38 The Claimant received an offer of employment on 7 July 2017 and resigned on the same day. The Claimant's evidence was that she had not wished to resign during the internal process, rather she wanted to have a proper investigation and come back to her previous employment but when that did not happen, she had no choice but to resign. In other words that the outcome of the grievance appeal was the "last straw". We do not agree. Seven weeks passed between the appeal outcome and the Claimant's resignation. The resignation letter repeats the complaints about events occurring from 2015, culminating in the meeting on 23 November 2016, the request to move to Cross Harbour and lack of clarity as to whether this was intended to be permanent. The three-page resignation letter does not refer to the handling or outcome of either the grievance or the appeal as part of the reasons for resignation. When asked at Tribunal why she had not referred to them, the Claimant stated "**I wrote down all that led me to resign and all that made me feel uncomfortable**". The Claimant had been seeking alternative work elsewhere since December 2016 and would have left in March 2017 had the reference been provided. On balance, we find that the conduct which caused the Claimant to resign culminated on 4th December 2016 when she considered that the Respondent had failed to give her a clear answer as to whether the Cross Harbour move was permanent or temporary. Thereafter the Claimant was settled in her intention to resign. The Claimant delayed doing so only because she wished to remain in receipt of sick pay pending confirmation of new employment.

Law

Constructive Dismissal

39 Section 95(1)(c) ERA provides that a dismissal occurs if the employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to do so by reason of the employer's conduct. Whether the employee was entitled to resign by reason of the employer's conduct must be determined in accordance with the law of contract. In essence, whether the conduct of the employer amounts to a fundamental breach going to the root of the contract or which shows that the employer no longer intended to be bound by one or more of the essential terms of the contract, **Western Excavating Ltd v Sharp** [1978] IRLR 27 CA.

40 The term of the contract which is breached may be an express term or it may be an implied one. In this case, the Claimant relies upon breach of an express term as to place of work and the implied term of trust and confidence. This requires that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. The employee bears the burden of identifying the term and satisfying the tribunal that it has been breached to the extent identified above. The employee may rely upon a single sufficiently serious breach or upon a series of actions which, even if not fundamental in their own right, when taken cumulatively evidence an intention not to be bound by the relevant term and therefore the contract. This is sometimes referred to as the "last straw" situation. This last straw need not itself be repudiatory, or even a breach of contract at all, but it must add something to the overall conduct, **Waltham Forest London Borough Council –v- Omilaju** [2005] IRLR 35.

41 The question of fundamental breach is not to be judged by reference to a range of reasonable responses, **Buckland v Bournemouth University Higher Education Corp**

[2010] IRLR 445, CA. The tribunal must consider both the conduct of the employer and its effect upon the contract, rather than what the employer intended. In so doing, we must look at the circumstances objectively, that is from the perspective of a reasonable person in the claimant's position.

42 In **Tullett Prebon Plc v BGC Brokers LLP** [2010] EWHC 484 QB, Jack J stated at paragraph 81 that the conduct must be so damaging that the employee should not be expected to continue to work for the employer and that:

> "**Conduct, which is mildly or moderately objectionable, will not do. The conduct must go to the heart of the relationship. To show some damage to the relationship is not enough**."

43 Establishing breach alone is not sufficient: the employee must also resign in response to it and do so without affirming the contract. Once an employee has affirmed the contract, the right to repudiate is at an end. The issue is one of conduct, not passage of time. Mere delay in itself is not an affirmation, particularly where the employee is off sick, but prolonged delay may be evidence of an implied affirmation, **Asghar & Co Solicitors v Habib** UKEAT/0332/16/DM at paragraphs 20-22. Nor does an employee waive a breach by seeking to remedy it.

44 The employee must satisfy the tribunal that he left in consequence of the employer's breach of duty. There may be more than one reason why an employee leaves a job; it is enough that the repudiatory breach was an effective cause with no requirement that it be the most important cause, **Wright v North Ayrshire Council** [2014] IRLR 4.

45 There is no general requirement to imply a mobility term into contracts of employment, **Aparau v Iceland Frozen Foods plc** [1996] IRLR 119.

Victimisation

46 Section 27 of the Equality Act 2010 prohibits victimisation. The Claimant does not need to show a comparator but she must prove that she did a protected act and that she was subjected to a detriment because she had done that protected act. As with direct discrimination, it is not necessary for the Claimant to show conscious motivation, it is sufficient that the protected characteristic or protected act had a significant influence on the outcome.

Conclusions

Constructive Dismissal

47 For the reasons set out above in our findings of fact, we have not accepted the Claimant's evidence that Ms Jones made the alleged comments about Ramadan, clothing, veils or a racist television programme. If there had been continuous or repeated wrongdoing by Ms Jones as the Claimant now alleges, we consider that she would have had a better recollection of the details and would have raised the matter with Mr Lakhan sooner. Nor have we found that the Claimant was verbally attacked or put under pressure for saying that she would not be going to the Christmas party, either in July 2015 or

August 2016. With the exception of June 2016 comment by Ms Jones, the conduct set out in paragraphs 4.1.1 of the issues did not occur. The June 2016 was, objectively considered, with reasonable and proper cause as the reasons for Saba's absence were not something which directly concerned the Claimant in her role as nursery nurse and a colleague of Saba. Whilst the comment could have been expressed more gently, we are not satisfied that considered objectively it is conduct which could contribute towards a cumulative breach of the implied term of trust and confidence.

48 We have found that on 20 May 2016, Ms Jones probably did say words to the effect that the Claimant was "just a Nursery Nurse" but that she did not shout. This occurred in a meeting where emotions ran high, with both Ms Jones and the Claimant upset. Such a comment is discourteous and dismissive but not so serious as to amount to a repudiatory breach per se. In the circumstances, we considered it capable of being conduct which could form part of a cumulative breach, in other words "a" straw to be considered with any other such conduct established.

49 As for the August 2016 meeting, we have found that the Respondent did expect staff to have a good reason for not attending the Christmas party, consistent with the note on the minutes. However, we have also found that the purpose of the outing was to foster good team relations, it was not religious in nature, that other religious occasions were celebrated, that the Respondent accepted religious reasons as a good reason for non-attendance and that the Claimant was not put under any pressure. In the circumstances, we do not consider that this was conduct capable of contributing to a repudiatory breach even when considered cumulatively.

50 Whilst there was a conversation between the Claimant and Mrs Lakhan upon her return to work after sickness absence in September 2016, we have not found that the Claimant was told that her reasons were not good enough, nor that her absence would be looked into, nor that she was called a ringleader. As with the other issues considered above, we consider that the Claimant's allegations have been misinterpretations or exaggerations of innocent comments through the prism of her sense of hurt and upset caused by her failure to accept any blame in the breakdown in her working relationship with Ms Islam and her poor reaction to criticism of her professionalism at the meeting on 23 November 2016.

51 As for the meeting on 23 November 2016, the Claimant has made a number of allegations of conduct which she relies upon in the issues as forming part of a repudiatory breach, see paragraph 4.1.5 above. We have not accepted her account of the meeting and have not found any of the conduct set out therein to have occurred. The meeting itself is not relied upon as part of a breach. Even if it were, it was held for an objectively proper purpose, namely the attempted resolution of a difficult working relationship in a childcare setting.

52 It was not in dispute that the Respondent asked the Claimant to cover Cross Harbour temporarily for a week nor that the Claimant agreed to do so. The issue is therefore with regard to the request the following week that the Claimant continue to provide cover and whether this was a permanent move to Cross Harbour, which the Claimant regarded was an act of retaliation for the complaints she raised on 23 November 2016. The Claimant's case is that the Respondent's failure to provide the requested clarification that the cover was only temporary led her reasonably to understand that it was

a permanent move. The Respondent's case is that it was contractually entitled to ask her to provide cover, whether due to the express term of the contract or due to custom and practice, that there was a legitimate business need for staffing cover and that they were unable to give a definitive period of time as the cover related in part to staff sickness. Read fairly, the Respondent contends that the text messages made clear that the cover was only temporary and not intended to be permanent.

53 Dealing first with the express terms of the contract, clause 6 provides that Goodmayes was the Claimant's *normal* place of work. It did not provide that it was the *only* place at which the Claimant could be asked to work and, as the Claimant appeared to accept in the grievance appeal hearing, it was not unusual for different nurseries to provide staff to cover for each other. As the Claimant made clear to Ms Anderson, her concern was whether it was an act of retaliation and whether it was intended to be permanent. So long as the cover at Cross Harbour was only temporary, and we think of short duration, it was permissible within the clause of the contract. As the Claimant was absent due to sickness after 1 December 2016, the Claimant did not in fact return to Goodmayes or to Cross Harbour. On the facts, namely an initial agreement to work at Cross Harbour followed by a disagreement about the following week, which was superseded by sickness absence and with no confirmation that the move was permanent, we are satisfied that there was no breach of the express term as to normal place of work. In terms, the Respondent did not in fact change the Claimant's normal place of work. If it had sought to do so, we do not consider that the Respondent could have relied upon the 'mobility clause' as this related only to travel rather than normal place of work. Nor would we have considered it necessary to imply a mobility clause on the basis of the evidence before us, not least as the "*normal*" place of work definition is sufficient to provide flexibility for occasional cover at other settings.

54 The request to work at Cross Harbour was also relied upon as a breach of the implied term of trust and confidence. We have accepted that the Respondent had reasonable and proper cause to make the request, namely to ensure that staffing ratios were maintained. The Claimant's initial lack of objection and her subsequent acceptance at the appeal hearing that cover would be provided between nurseries seemed to us consistent with a practice and understanding that some degree of flexibility was expected.

55 Part of the issue identified at paragraph 4.1.6 refers to the failure of Mrs Lakhan to respond to the Claimant's request for an assurance that the move was only to be temporary. It is not true to say that Mrs Lakhan did not respond to the Claimant's request, but that the responses she did send did not provide the assurance requested. We considered the text exchanges between the two women. It is evident that the Claimant was anxious that her normal place of work was being changed. It was objectively reasonable for her to be anxious as the Cross Harbour nursery was legally a different entity and was to her detriment as it required a commute which was greater in terms of time and cost. Whilst Mrs Lakhan could not have predicted when a sick member of staff might return, she could have provided the assurance that this was not a permanent move or have considered whether another member of Goodmayes staff could take a turn in providing cover. On the facts as we have found them, we do not accept that Mrs Lakhan had reasonable and proper cause to fail to give the clear reassurance that the Claimant sought.

56 As for the handling of the grievance, we accept that the initial grievance decision

letter was poor. An objective employee in the Claimant's position could reasonably have concluded that there had been little if any investigation into the matters she had raised. The appeal process was thorough, both in terms of investigation and outcome. The decision was reasoned and there was reasonable and proper cause for it on the evidence available to Ms Anderson. The Respondent had reasonable and proper cause not to provide copies of the witness statements nor permit cross-examination of witnesses as requested by the Claimant. This was a grievance brought by the Claimant, rather than a disciplinary hearing where the employee has to understand the case being made against them. It was sufficient to summarise the relevant evidence in the decision letter. To permit cross-examination risked further harm to the ongoing working relationship were the Claimant to return to work. The Respondent made reasonable efforts to obtain evidence from Ms Jones and the termination of her employment, and lack of compulsion open to the Respondent, was reasonable and proper cause for it not requiring her to attend a grievance interview or be cross-examined by the Claimant. Ms Anderson relied upon her own knowledge, not disputed by the Claimant in the appeal hearing, of the need for temporary cover at Cross Harbour. We do not accept Mr Jones' submission that Ms Anderson merely paid "lip service" to the grievance. In any event, we remind ourselves that we have found as a fact that the Claimant had a settled intention to resign by 4 December 2016 and that the handling of the grievance did not form part of the reasons which caused her to do so.

57 For the reasons set out above, we have concluded that the comment by Ms Jones in June 2016, the failure to provide a clear assurance about normal place of work in December 2016 and the grievance decision letter dated 14 February 2017 was the only "conduct" of the employer which was without reasonable and proper cause. We must therefore consider whether the cumulative effect of this conduct was such that a reasonable person in the Claimant's position may consider that it had the effect of destroying or seriously damaging the relationship of trust and confidence. We remind ourselves that this is not a test of intention nor of the range of reasonable responses. Rather we must look at the circumstances objectively, from the perspective of a reasonable person in the Claimant's position.

58 Considered objectively, we do not consider that a reasonable employee in the Claimant's position could have regarded these three items of conduct as having sufficient effect upon the contract of employment as to strike at the heart of the relationship or to have seriously damaged or destroyed the relationship of trust and confidence. No employer and no employee is perfect. There will often be conduct of one or the other which is mildly or moderately objectionable but, as recognised in **Tullet Prebon**, this is not sufficient to entitle an employee to resign and claim constructive dismissal. Ms Jones' comment was over a year earlier, she had since left and the Claimant encountered no further problems with her line manager on our findings of fact. As for the Cross Harbour cover, the Claimant was not told that the move was permanent and the texts included repeated references to short staffing as the reason for the request. In her letter dated 7 December 2017, the Claimant referred to it as being an extension of the cover period. Due to her sickness absence there was no further request for her to work at Cross Harbour and the grievance hearing and appeal made it clear that the request had only been temporary. We have found as a fact that the Claimant did not rely upon the failure properly to investigate and/or address her appeal as part of the reason for her resignation.

59 For these reasons, the claim of constructive dismissal fails and is dismissed.

60 Although we have not found a repudiatory breach, we considered in the alternative whether the Claimant had affirmed the contract in any event. The Claimant had decided to resign by 4 December 2016. We have not accepted her evidence that the handling of the grievance process was part of the conduct upon which she relied when deciding to resign. The Claimant delayed her resignation because she wished to continue to receive sick pay until new employment was confirmed. This was why there was a seven week gap between the grievance appeal outcome and the resignation. It is also why the resignation occurred on the same day that the Claimant's new employment was confirmed.

61 The Claimant did not affirm the contract by exercising the grievance procedure as she was entitled to seek to persuade the Respondent to remedy the breach. The Claimant was also absent from work throughout and was not faced with an immediate need to decide whether to accept any breach and resign or to affirm the contract and stay. However, we consider that there comes a point at which the employee must make the election or be held to have affirmed the breach. In this case, the Claimant did not act upon receipt of the grievance decision for a further seven weeks despite having had six months to consider her position. By this date, the Respondent had confirmed that the move to Cross Harbour was not permanent but had been only a temporary cover arrangement. Although any breach in December 2016 could not be "cured" as such, it was clear that there would be no further breach. By her conduct in continuing to submit sick certificates and call upon the Respondent to pay her sick pay in the period after the grievance outcome, with the intention of awaiting confirmation of a new job, we would have concluded that the Claimant had affirmed the contract in any event.

Victimisation

62 The Respondent concedes that the Claimant did a protected act on 20 May 2016 when she alleged that Ms Jones had said that it was "pathetic" to fast. The Respondent concedes that the Claimant's complaints of discrimination about Ms Jones made in the meeting on 23 November 2016 were also a protected act. The Claimant did not rely upon her grievance letter as a protected act.

63 The unfavourable treatment relied upon by the Claimant is the same as for the constructive dismissal claim, with the addition of Mrs Lakhan's refusal to provide her with a reference in March 2017. Based upon our findings of fact, the only conduct which we have found to have taken place were: (a) on 20 May 2016, at the meeting to discuss Saba's allegations, Ms Jones referred to the Claimant as being "just a Nursery Nurse"; (b) in June 2016, Ms Jones' comment about not getting involved in other people's business; (c) on 25 November 2016 the Claimant was asked to work at Cross Harbour and Mrs Lakhan failed to respond to subsequent enquiries about whether it was permanent; and (d) Mrs Lakhan refused to provide a reference resulting in the Claimant losing a new job. We note that the unfavourable treatment regarding Cross Harbour is identified slightly differently in this claim to that in the constructive dismissal claim. We considered it just also to consider as possible unfavourable treatment the failure to provide an assurance that the Cross Harbour work was only temporary. This is an issue which was extensively considered in evidence such that there is no prejudice to the Respondent whereas it would be unjust to the Claimant to take such a semantic or compartmentalised approach to the issues.

64 The claim form was presented by the Claimant on 12 April 2017. In order for the Tribunal to have jurisdiction to consider the claim of victimisation, the Claimant would have to establish that there was an act of victimisation which occurred after 22 November 2016 in order to argue a continuing course of conduct or be persuaded that it was just and equitable to extend time for the comments made by Ms Jones in May and June 2016.

65 The Claimant has proved facts showing a protected act on 23 May 2016 and a request to cover at Cross Harbour on 25 May 2016. Given the chronological proximity, we considered the reason why the request was made (alternatively, the burden of proof having passed, we required the Respondent to provide an explanation). Based upon our findings of fact, we have not found that the Claimant was asked to cover at Cross Harbour because of any protected act. Ms Davis chose the Claimant without being aware of the complaints that she had made on 23 November 2016. It was not suggested that she was motivated, whether consciously or subconsciously, by the earlier protected act. She was not instructed or pressurised by anybody else to select the Claimant. We conclude that neither protected act played any part in Ms Davis' decision to select the Claimant to cover at Cross Harbour. Whilst Mrs Lakhan's failure to provide a clear assurance that the cover was only temporary may have been unreasonable, we bear in mind that this is not sufficient for us to find that there had been victimisation. Mrs Lakhan believed that her texts made clear that the cover was intended to be temporary and the issue was only that a precise duration could not be given as it was not known for how long the sickness absence at Cross Harbour would last. We do not agree that her texts were so clear when read objectively but have found that this was her genuine intention and belief. We are satisfied that the Respondent has provided an explanation which is entirely unrelated to the protected act.

66 As for the reference, we have accepted Mrs Lakhan's reasons for refusing the reference were the nature of the work in childcare and the outstanding concerns about the Claimant's working relationship with Ms Islam which had led Mr Lakhan to tell her that he would consider disciplinary action. This had not been resolved as the Claimant had been on sickness absence ever since. We do not accept Mr Jones' submission that Mrs Lakhan accepted that the ongoing grievance process was also part of the reason for refusal. In any event, the grievance was not identified as a protected act in this claim.

67 It is not sufficient for the Claimant to demonstrate that the refusal was unreasonable or unwise (both of which we think it was) but whether it was in any sense motivated by the allegations of discrimination made by the Claimant against Ms Jones in the meeting on 23 November 2016. Ms Jones was no longer employed by the Respondent and had not been since August 2016, as such the complaints against her did not form part of the ongoing concern about the Claimant's working relationship with colleagues in a childcare setting. We accept that these historic complaints of discrimination played no part whatsoever in the decision to refuse to provide a reference.

68 As we have not found any unfavourable treatment after 22 November 2016 which was because of a protected act, it follows that the comment made on 20 May 2016 was a discrete act and that the claim was presented very considerably out of time. The Claimant has adduced no evidence and made no submissions from which we could conclude that it was just and equitable to extend time. The claim of victimisation fails and is dismissed.

69 Whilst we have found that the Claimant was not given written particulars of

employment as she should have been at the outset of employment, it is common ground that this claim is brought under section 38 Employment Act 2002. The remedy will only arise if the Claimant succeeds in at least one other claim. She has not and, therefore, is not entitled to any remedy in this respect. This claim is also dismissed.

Employment Judge Russell

17 January 2018