



EMPLOYMENT TRIBUNALS

Claimant: Mr. Simon Stewart
Respondent: Loughborough Specsavers Limited
Heard at: Leicester
On: 8th, 9th and 10th May 2018
Before: Employment Judge Heap
Members: Dr. G Looker
Mrs. B Tidd

Representation

Claimant: In Person
Respondent: Mr. M Pipkin - Solicitor

RESERVED JUDGMENT

1. The Claimant's complaints of direct discrimination and harassment on the protected characteristic of age fail and are dismissed.
2. The Claimant's complaints of direct discrimination and harassment on the protected characteristic of race fail and are dismissed.
3. The Claimant's complaint of constructive unfair dismissal contrary to Section 95 Employment Rights Act 1996 fails and is dismissed.

REASONS

BACKGROUND & THE ISSUES

1. This is a claim brought by Mr. Simon Stewart (hereinafter referred to as "The Claimant") against his now former employer, Loughborough Specsavers Limited (hereinafter referred to as "The Respondent" or the "Respondent Store") presented by way of a Claim Form received by the Employment Tribunal on 17th May 2017.
2. The claim is one of constructive unfair dismissal contrary to Section 95 Employment Rights Act 1996 and of direct discrimination and harassment relying on the protected characteristics of race and age. All claims are resisted by the Respondent.

3. Following submission of the ET3 Response Form, the matter came before Employment Judge Blackwell at a Preliminary hearing on 31st August 2017. The claims were clarified at that hearing as being the ones referred to above.

4. At the outset of the hearing before us and so as to assist the parties, but particularly the Claimant given that he appeared as a litigant in person, we set out a list of the issues that the Tribunal would need to determine in relation to this claim. We do not rehearse those matters here as a copy of that agreed List of Issues is appended to this Reserved Judgment.

THE CLAIMANT'S POSITION

5. The Claimant is of black Caribbean ethnicity and of Jamaican descent. He contends that during the course of his employment with the Respondent he was subjected to direct discrimination and harassment by one Nadine Burton, a Director of the Respondent. That treatment is said to have manifested itself in the following ways:

- (a) In or around April/May 2016 Mrs. Burton making a comment that she hated reggae music and the culture (or words to that effect);
- (b) During the latter part of 2016 commenting regularly that the Claimant was coming to rob the store or referring to him as a drug dealer (or words to that effect);
- (c) Failing to deal with complaints or concerns raised by the Claimant about two laboratory technicians, Mr. Marcin Sowa and Mr. Gergo Dudaszeg;
- (d) On dates between February 2017 and 15th March 2017 undermining and belittling the Claimant regarding his status as Laboratory Manager by saying words to the effect that Marcin Sowa and/or Gergo Dudaszeg did all the work and that they should make the decisions; and
- (e) In or around February 2017 to 15th March 2017 calling or referring to the Claimant as "old man".

6. Points (a) to (d) above are advanced as complaints of direct discrimination and harassment relying on the protected characteristic of race whilst point (e) relies on the protected characteristic of age. In respect of the direct discrimination complaints which rely on the protected characteristic of race, it is the Claimant's position that he was treated less favourably than other white members of staff were or would have been treated and that the reason for that difference in treatment was his race. The Claimant relies upon Mr. Sowa and Mr. Dudaszeg as actual comparators for the purposes of complaint (d) or, in the alternative, a hypothetical comparator or comparators for all of the above complaints.

7. The Claimant also contends that in addition to the claimed treatment by Mrs. Burton, he was also subjected to harassment and direct discrimination on the grounds of race in respect of the following:

- (a) Marcin Sowa and/or Gergo Dudaszeg being abusive and aggressive towards him in or around January 2017, undermining his authority and contriving complaints against him; and

- (b) Being called to a meeting with a floor manager, Hayley Dowd, at the end of February 2017/early March 2017 and being advised of the fact that complaints had been made by Marcin Sowa (which are said to be without foundation) and that he was directed not to give any more instructions to Mr. Sowa.

8. The Claimant further contends that as a result of the treatment referred to above and the conduct of Mrs. Burton, Mr. Sowa and Mr. Dudaszeg at a meeting on 15th March 2017, the Respondent fundamentally breached his contract of employment, that he resigned in response and that accordingly he was rendered constructively unfairly dismissed.

9. The Claimant advances an overarching case in respect of the race discrimination complaints that everyone in the Respondent organisation were inherently prejudiced (either consciously or subconsciously) against him on the grounds of his race and therefore that any adverse treatment of which he complains here was on account of that racial bias and a negative perception of him because he is black and was therefore perceived as inferior. He contends in this regard that the Respondent is institutionally racist. At more than one point, that inherent prejudice was said by the Claimant to extend beyond the Respondent to the vast majority, if not all, white Europeans, and that that therefore affected the treatment of which he complains in the context of this claim.

10. Alternatively, he contends that Mrs. Burton, Mr. Sowa and Mr. Dudaszeg were prejudiced against him because he is black and that they subjected him to the treatment of which he complains above because of his race.

THE RESPONDENT'S POSITION

11. The Respondent contends entirely to the contrary. Their position is that the matters complained of by the Claimant either did not happen or did not happen as the Claimant contends that they did. It is denied that race or age was a factor in any of the treatment of which the Claimant ultimately complains and it is denied that the Respondent fundamentally breached his contract of employment entitling him to resign and treat himself as (constructively) dismissed.

THE HEARING, WITNESSES AND CREDIBILITY

12. The claim was listed for three days of hearing time which took place between 8th and 10th May 2018.

13. During the course of the hearing, we attempted to assist the Claimant insofar as it was permissible for us to do so in order to ensure that he was placed on as equal footing as possible with the Respondent who was represented by an experienced solicitor. That was particularly the case in respect of cross-examination, where on occasion we assisted the Claimant in formulating the questions to be put to some of the Respondent's witnesses so as to ensure that he had put his case to them, and reminding him of the issues that needed to be covered and addressed.

14. During the course of hearing, we heard evidence from the Claimant on his own behalf. In addition to hearing evidence from the Claimant, we also heard from a number of individuals on behalf of the Respondent. Those individuals were as follows:

- Nadine Burton – a Director of the Respondent with whom the Claimant had worked for a number of years;
- Gergo Dudaszeg – a former laboratory technician with the Respondent who had worked alongside the Claimant at the material time with which we are concerned;
- Marcin Sowa – a laboratory technician with the Respondent who had also worked alongside the Claimant and Mr. Dudaszeg; and
- Debbie Moore – a Dispute & Resolution Officer with Specsavers Optical Group Limited who dealt with the Claimant's grievance.

15. In addition to the witness evidence that we have heard, we have also paid careful reference to the documentation to which we have been taken during the course of the proceedings and also to the written submissions made by the Claimant and the oral submissions made by Mr. Pipkin on behalf of the Respondent.

16. One matter that has invariably informed our findings of fact below is the issue of credibility and we deal here with our assessment of the credibility of the witnesses from whom we have heard.

17. We begin our assessment with the Claimant. We consider the Claimant's account to have been considerably exaggerated during the course of his evidence and that impacted invariably on our ability to accept the veracity of the evidence that he gave to us in many respects. For example, he had referred to a belief on more than one occasion that there would be physical confrontation and danger to him within the Respondent Store when it is clear that there was absolutely no evidence, even on his own account, that any such thing might have occurred. A degree of heated exchange at the meeting of 15th March (details of which we have set out below) is quite clearly entirely different to the Claimant being fearful of any physical threat as he sought to make out before us. His account was, quite simply, hugely exaggerated and again was seen through the prism of his view that all actions with which he takes issue are motivated by his race and that almost all, if indeed not all, white Europeans are against him. That, we are satisfied, has led the Claimant to conflate and exaggerate relatively innocuous events which have now taken on a new substance and meaning following his resignation and during the course of these proceedings. We have therefore treated his evidence with some caution as a result.

18. We have also considered the accounts of the Respondent's witnesses. We considered both Mrs. Burton and Mrs. Moore to be credible witnesses. Both gave straightforward accounts and Mrs. Burton particularly was able to give consistent and detailed evidence in her oral testimony. We considered both to be impressive witnesses.

19. We also considered Mr. Sowa and Mr. Dudaszeg to be essentially honest witnesses but ones whose recollection of certain events had been affected by the passage of time and they could not assist us in some areas of their evidence to a significant degree. We were assisted, however, by contemporaneous documents with regard to matters concerning both of these individuals.

THE LAW

20. Before turning to our findings of fact, we remind ourselves of the law which we are required to apply to those facts as we have found them to be below.

Discrimination on the protected characteristic of race and age

21. The Claimant's discrimination complaints all fall to be determined under the Equality Act 2010 ("EqA 2010) and, particularly, with reference to Sections 13 and 26.

22. Section 39 EqA 2010 provides for protection from discrimination in the work arena and provides as follows:

(1) An employer (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer.

(6) Subsection (1)(b), so far as relating to sex or pregnancy and maternity, does not apply to a term that relates to pay—

(a) unless, were B to accept the offer, an equality clause or rule would have effect in relation to the term, or

(b) if paragraph (a) does not apply, except in so far as making an offer on terms including that term amounts to a contravention of subsection (1)(b) by virtue of section 13, 14 or 18.

(7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

(a) by the expiry of a period (including a period expiring by reference to an event or circumstance);

(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

(8) Subsection (7)(a) does not apply if, immediately after the termination, the employment is renewed on the same terms.

Direct Discrimination

23. Section 13 EqA 2010 provides that:

“A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others”.

24. It is for a Claimant in a complaint of direct discrimination to prove the facts from which the Employment Tribunal could conclude, in the absence of an adequate non-discriminatory explanation from the employer, that the employer committed an unlawful act of discrimination (**Wong v Igen Ltd [2005] ICR 931**)

25. If the Claimant proves such facts, the burden of proof will shift to the employer to show that there is a non-discriminatory explanation for the treatment complained of. If such facts are not proven, the burden of proof will not shift.

26. In deciding whether an employer has treated a person less favourably, a comparison will in the vast majority of cases be made with how they have treated or would treat other persons without the same protected characteristic in the same or similar circumstances. Such a comparator may be an actual comparator whose circumstances must not be materially different from that of the Claimant (with the exception of the protected characteristic relied upon) or a hypothetical comparator.

27. Guidance as to the shifting burden of proof can be taken from that provided by Mummery LJ in **Madarassy v Nomuna International Plc [2007] IRLR 246**:

“‘Could conclude’ must mean that ‘a reasonable tribunal could properly conclude’ from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only

to the statutory 'absence of an adequate explanation' at this stage the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like..... and available evidence of the reasons for the differential treatment.

The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."

28. The protected characteristic need only be a cause of the less favourable treatment but need not be the only or even the main cause. A Tribunal when considering the cause of any less favourable treatment will be required to consider that question having regard not only to cases where the grounds of the treatment are inherently obvious, but also those where there is a discriminatory motivation (whether conscious or unconscious) at play (see **Amnesty International v Ahmed [2009] ICR 1450.**)

Harassment

29. Harassment is dealt with by way of the provisions of Section 26 EqA 2010, which provide as follows:

(1) A person (A) harasses another (B) if-

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) The conduct has the purpose or effect of –

i. Violating B's dignity, or

ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

30. The conduct complained of, in order to constitute harassment under Section 26, must relate to the protected characteristic relied upon by the complainant.

31. As set out by the Employment Appeal Tribunal in **Nazir & Anor v Aslam [2010] UK EAT/0332/09** the questions for a Tribunal dealing with a claim of this nature are therefore the following:

a) What was the conduct in question?

b) Was it unwanted?

c) Did it have the purpose of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant?

- d) Did it have the effect of doing so having regard to an objective, reasonable standard and the perception of the complainant?
- e) Was the conduct on the grounds of the protected characteristic relied upon?

The ECHR Code

32. When considering complaints of discrimination, a Tribunal is required to pay reference to the Equality & Human Rights Commission Code of Practice on Employment (2011) ("The Code") to the extent that any part of it appears relevant to the questions arising in the proceedings before them.

Time limits in discrimination claims

33. Section 123 provides for the time limit in which proceedings must be presented in "work" cases to an Employment Tribunal and provides as follows:

"Proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

34. Therefore, Section 123 provides that proceedings must be brought "within a period of three months starting with the date of the act to which the complaint relates or any other such period as the Tribunal considers to be just and equitable".

35. For the purpose of those provisions, conduct which extends over a period is to be treated as done at the end of that period and the failure to do something is to be treated as occurring when the person in question decided upon it. Therefore, in the event of conduct which extends over a period, time will not begin to run until the last act done in that period. The appropriate test for a "continuing" act" is whether the employer is responsible for an "an ongoing situation or a continuing state of affairs" in which the acts of discrimination occurred, as opposed to a series of unconnected or

isolated incidents (**Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686**).

36. If a complaint is not issued within the time limits provided for by Section 123 Equality Act, that is not the end of the story given that a Tribunal will be required to go on to consider whether it is “just and equitable” to allow time to be extended and the complaint to proceed out of time.

37. In doing so, the Tribunal must have regard to all of the relevant facts of the case and is entitled to take account of anything that it considers to be relevant to the question of a just and equitable extension. A Tribunal has the same wide discretion as the Civil Courts and should have regard to the provisions of Section 33 Limitation Act 1980, as modified appropriately to employment cases (see **British Coal Corporation v Keeble [1997] IRLR 336**).

38. In considering whether to exercise their discretion, a Tribunal must consider factors relevant to the prejudice that each party would suffer if an extension were refused, including:

- The length of and reasons for the delay.
- The extent to which the cogency of the evidence is likely to be affected by the delay.
- The extent to which the party sued had co-operated with any requests for information.
- The promptness with which the Claimant acted once they knew of the possibility of taking action.
- The steps taken by the Claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

39. The emphasis is on whether the delay has affected the ability of the Tribunal to conduct a fair hearing and all significant factors should be taken into account. However, the burden is upon a Claimant to satisfy a Tribunal that it is just and equitable to extend time to hear any complaint presented outside that provided for by Section 123 EqA 2010.

Constructive Unfair Dismissal

40. A dismissal for the purposes of Section 95 Employment Rights Act 1995 includes a situation where an employee terminates the employment contract in circumstances where they are entitled to do so on account of the employer’s conduct – namely a constructive dismissal situation.

41. Tribunals take guidance in relation to issues of constructive dismissal from the leading case of **Western Excavating – v – Sharp [1978] IRLR 27 CA** and, particularly, the following:-

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

employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

42. Implied into every contract is a term that an employer will 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 the employer and the employee. Breach of that implied term, if established, will almost always be repudiatory by its very nature.

43. Where an employer discriminates against an employee, then those acts of discrimination may of themselves represent a breach of the implied term of mutual trust and confidence.

44. However, not all incidents of discrimination will be repudiatory breaches of contract entitling the employee to terminate the contract and treat themselves as dismissed. A finding of unlawful discrimination will not inevitably of itself mean that the employer has breached the implied term of mutual trust and confidence (**Amnesty International v Ahmed 2009 ICR 1450**).

45. The question of whether or not there has been a repudiatory breach of the duty of trust and confidence is to be judged by an objective assessment of the employer's conduct. The employer's subjective intentions or motives are irrelevant. The actual effect of the employer's conduct on an employee are only relevant in so far as it may assist the Employment Tribunal to decide whether it was conduct likely to produce the relevant effect.

46. If there is a fundamental breach of contract, an employee must, however, resign in response to it. That requirement includes there being no extraneous reasons for the resignation, such as them having left to take up another position elsewhere or any other such reason if that is unrelated to the breach relied upon.

47. However, if the repudiatory breach was part of the cause of the resignation, then that suffices. There is no requirement of sole causation or predominant effect (see **Nottinghamshire County Council v Meikle [2004] IRLR 703**).

48. It is possible for an employee to waive (or acquiesce to) an employers breach of contract by their actions. In those circumstances, an employee will affirm the contract and will be unable to rely upon any breach which may have been perpetrated by the employer in seeking to argue that they have been constructively dismissed.

FINDINGS OF FACT

49. We should observe that we have confined our findings of fact to those matters which are necessary in order to make a proper determination of the claim. We have not therefore dealt with each and every point in dispute between the parties if those matters are not necessary for that determination.

50. The Respondent is part of a well-known chain of dispensing opticians. The store with which we are concerned and in which the Claimant worked is based in Loughborough. It is common ground that the Claimant was employed at the Respondent Store as a Lab Manager. He had, as we understand it, been headhunted to join the Respondent as a Lab Manager and had, at the time that his employment came to an end, some 35 years experience in the optical field. It is clear to us that the Claimant was dedicated to his job and performed it to the best of his ability and to a high level. He clearly took a great deal of pride in his work and rightly so.

51. The Claimant had joined the Respondent on 20th November 2006 and had continued in his employment as Lab Manager until his resignation, which took place with immediate effect on 15th March 2017. We shall come to the circumstances of that resignation later.

52. Nadine Burton also works at the Respondent Store and has done so for approximately 16 years. She had therefore worked with the Claimant for the entire period of his employment. Initially, Mrs. Burton had held a management position but she later became Retail & Dispensing Director with the Respondent when, as we understand it, she had bought into the Respondent business upon the exit of other Directors.

The Leaving Party

53. Prior to Mrs. Burton taking up a position as Director, there had been other Directors of the Respondent Store as touched upon above. It is the Claimant's case that at a leaving party for one of those Directors, which it is said took place in or around April/May 2016, Mrs. Burton had approached him out of the blue, and possibly after taking a quantity of alcohol, and had said words to the effect "I hate reggae music and the culture". The Claimant was clear before us that he had no issue with the fact that Mrs. Burton did not like reggae music but was offended that she had mentioned "the culture" and that this had been directed to him because he is of black Caribbean ethnicity and of Jamaican descent.

54. Mrs. Burton denies that this incident occurred. She accepts that she does not particularly like reggae music but denies that she had directly told the Claimant about that either as alleged or at all. She told us that whilst it is well known that she does not like that sort of music from times when it would be played on the radio in the Respondent Store, the only incident regarding a discussion of reggae music which had featured the Claimant had taken place in the tea room in the Respondent Store when she had been discussing with another member of staff a surprise holiday that her husband had booked for them to Barbados. Mrs. Burton's evidence was that the other member of staff had made a reference along the lines of "all that reggae music" as it was well known in the Respondent Store that Mrs. Burton did not particularly care for that kind of music as set out above. The Claimant had then asked Mrs. Burton upon overhearing that comment why she did not like reggae music and Mrs. Burton had replied words to the effect that it was "*just not my thing*". Mrs. Burton's position is that there was no reference at all to "culture" and it had simply been a comment made in response to a question directly asked of her by the Claimant. She denies that any discussion of the sort referred to by the Claimant took place at the leaving party.

55. There is, therefore, a stark contrast on the facts as to this incident and it has been necessary accordingly for us to determine which version of events we prefer.

56. We are satisfied, on balance, that matters occurred as Mrs. Burton described them in her evidence and we say this for the following reasons:

- (i) We found Mrs. Burton to be a candid, credible and straightforward witness. Her account of this event was consistent and plausible and she was able to unhesitatingly give considerable detail about the tea room discussion. Had she been untruthful about the reggae music incident, we find it more likely that she would simply have denied that any discussion about that form of music ever took place rather than explaining in detail the context in which the conversation in fact arose; and
- (ii) The Claimant never raised this incident, despite his contention now that it was an act of discrimination, before the commencement of these proceedings. The first reference to it was in the ET1 Claim Form. The Claimant raised a grievance, as we shall come to in due course, raising serious complaints about race discrimination and other complaints about Mrs. Burton but he did not at that stage, nor at a later grievance meeting when he was asked for examples so that they could be investigated, make any mention at all of this incident. It seems to us that that would have been a prime example to support the Claimant's discrimination complaint within his grievance but no mention was made of it at all before presentation of this claim. We did not accept the Claimant's explanation as being credible that he had made no mention of this incident because he was hoping to be reinstated. We give our reasons for that further below.

57. We are therefore satisfied that the context in which the discussion of reggae music came about was not at the leaving party as the Claimant contends but following a conversation about Mrs. Burton's upcoming holiday into which the Claimant interjected and questioned why she did not like reggae music. We are satisfied that culture was not mentioned at all and that Mrs. Burton had simply been replying to the query that the Claimant had made of her.

The robber comments

58. The Claimant also contends that during the latter part of 2016, Mrs. Burton had commented to him on a number of occasions that he looked like he was coming to rob the Respondent Store when he was wearing his black winter hat or that she had referred to him as a drug dealer. The Claimant contends that Mrs. Burton had done that as a result of stereotypical images or assumptions of black people.

59. Again, there is a conflict on the evidence on this point. It is Mrs. Burton's position that on one single occasion she had made reference to thinking that the Claimant was a "burglar" or "robber" but that had to be placed in context and in the circumstances she would have said the same to anyone, including a white member of staff. Those circumstances were said to be that Mrs. Burton had been in the Respondent Store working on the reception desk when she saw the Claimant put on his winter hat, coat and gloves to leave work at the end of the day. She had been engaged on a telephone call and had waved to him to say goodbye before continuing with the call. When she finished the call and had put down the telephone she had looked up to find the Claimant in close proximity to her and his presence, and the fact

that she had thought that he had already left and there was no one there, had therefore made her jump. Her evidence to us was that she had therefore said words to the effect of "Oh God, I thought you were a burglar" or "Oh God I thought you were going to mug me" and that that had been a reference to being surprised to find someone there, right in front of her, dressed in a coat, hat and gloves etc and not a reference to the Claimant's race.

60. Again, we have to determine whether we prefer the account of the Claimant or that of Mrs. Burton in order to deal with this particular allegation. On balance, we have again preferred the account of Mrs. Burton on this point and we say this for the following reasons:

- (i) The detailed account of Mrs. Burton is to be contrasted against the fact that the Claimant did not and could not give specifics of any of the occasions (such as when, where and in what context) Mrs. Burton had allegedly made comments about him being a robber (or, as we shall come to below, a drug dealer);
- (ii) Again, Mrs. Burton was able to give a detailed, consistent and unhesitating account of this incident and had she been seeking to mislead us over it, we find it much more likely that she would simply have contended that she had never made any comment about robbers or burglars at all; and
- (iii) Again, this incident or incidents were never mentioned at all by the Claimant until the point that he put in a claim to the Tribunal. For the same reasons as we have already mentioned above, we do not accept that the Claimant would not have raised those matters at the grievance meeting, not least when specifically asked for details of the discrimination that he complained of, so that that could be properly investigated.

61. We found Mrs. Burton a credible witness and for the reasons given above, we prefer her evidence to that of the Claimant in respect of this allegation.

The drug dealer comments

62. The Claimant also contends that Mrs. Burton frequently referred to him as a drug dealer but, again, he has not taken us to specifics of any such occasions when this is said to have taken place nor, again, was it a matter that was raised at any stage before these proceedings. Again, the rather generic allegation set out by the Claimant was in contrast to the evidence of Mrs. Burton who was able to provide a detailed account of an incident where it was accepted that the Claimant had been referred to as a drug dealer, albeit by another member of staff, in or around 2009/2010. We accepted the evidence of Mrs. Burton that this was the only incident of which she was aware where any reference to the Claimant being called a drug dealer had been made and that she had been shocked by the comment and had taken immediate steps to deal with it.

63. In this regard, Mrs. Burton told us that a member of staff at the time by the name of Melissa Luby had come to her and mentioned that she did not think that the Claimant was talking to her. When Mrs. Burton had asked Ms. Luby why that was, she had replied that she had said something to the Claimant to the effect of that "*if you live in Derby are you a drug dealer*" because he was secretive of his private life.

64. Mrs. Burton had told Ms. Luby that she was “*completely out of order*” and that she was not surprised that the Claimant was not taking to her. She had then sought out the Claimant to reiterate that the comment had been unacceptable and to ask him if he wanted to take the matter further, something which he had declined. Her evidence was that she had never made any such comment about the Claimant being a drug dealer herself and that the only comment of which she was aware was the one made by Ms. Luby which she had dealt with at the time.

65. We accept the account of Mrs. Burton as set out above and we do not accept that she at any stage called the Claimant a drug dealer or similar. Again, she was able to give a credible, consistent and unhesitating account of the incident regarding Ms. Luby and we accepted her evidence that she had been shocked by what she had been told. The Claimant in contrast was not able to provide any details about the incidents that he alleged had taken place other than to say that on a number of occasions Mrs. Burton had called him a drug dealer. We had no context, dates, details or other information about when and where such matters had been said to have taken place.

66. Moreover, again this allegation was a matter that was never raised by the Claimant prior to these proceedings and, most notably, was absent from his grievance even when he was asked for details so as to investigate his otherwise rather generic discrimination complaints. Had those incidents occurred as claimed, it again appears to us that they would have been perfect examples of the sort of discriminatory conduct which the Claimant was complaining about and which would have served as a basis for investigation of the same. However, nothing was said in this regard.

67. It appears to us that, akin to the other allegations referred to above, it is more likely than not that matters occurred in the way in which Mrs. Burton has described them and those events have simply taken on a new significance and been considerably exaggerated by the Claimant following his resignation from employment. Again, we shall come to the circumstances of that resignation in due course.

Lab Technicians

68. In or around December 2014 a Mr. Marcin Sowa joined the Respondent as a lab technician. He was followed around 16 months or so later by Grego Dudaszeg who was also a lab technician. Both of them reported in to the Claimant in his position as Lab Manager.

69. The Claimant contends that on a number of occasions in or around January 2017 both Mr. Sowa and Mr. Dudaszeg had been abusive and aggressive towards him, had undermined his authority and had contrived to make complaints against him.

70. It was abundantly clear from the interaction between the Claimant and Mr. Sowa during cross examination that there was no love lost between them. We consider that it is likely that that was also the case during the course of their employment together and, indeed, we note that Mrs. Burton had in fact taken steps to change Mr. Sowa’s shifts so that the times that they were required to work together were limited.

71. However, we are entirely satisfied from the evidence before us that the evident difficulties in the working relationships between the Claimant on the one hand and Messrs. Sowa and Dudaszeg on the other were caused by the fact that both technicians had come in with new ideas that they thought could improve things at the Respondent Store but that the Claimant did not want to entertain such suggestions and saw the pair as seeking to usurp his authority. That, in turn, led to frustration and resentment on the part of the technicians who felt that they were not being listened to. Whilst the evidence before us of Mr. Dudaszeg was clear that he and Mr. Sowa had simply been making suggestions, the Claimant viewed this, unreasonably in our view, as being “overruled by the technicians”. The Claimant could not appear in this regard, even in the hearing before us, to grasp the fact that the making of a suggestion was not the same as imposing something upon him and usurping his authority.

72. The type of suggestions made in this regard had included what might be seen as relatively minor issues such as the thickness of nib of pen that was used to write on trays in the Lab – a matter which the Claimant dealt with in detail in cross examination of Mrs. Burton and asserted would “make things worse” if implemented. We are satisfied that this is demonstrative of the fact that the Claimant had a particular way of doing things which he was highly reluctant to change. That is reinforced by a comment made by Natalie Webster during the later grievance process that the Claimant found it “hard to accept” Mr. Sowa and Mr. Dudaszeg and “didn’t respond well to their ideas” (see page 64 of the hearing bundle). The Claimant accepted during cross examination that Natalie Webster was a person at the Respondent Store with whom he had a good relationship and therefore it appears to us would be unlikely to be unfair about the Claimant and that what she had said in this regard was a genuine reflection of what the situation was within the laboratory.

73. Perhaps understandably, the technicians became frustrated with that position and the suggestions they made being consistently refused by the Claimant. We have no doubt that that reluctance to consider change, particularly emanating from subordinate members of staff, was a feature in the Claimant’s later request to Mrs. Burton to “back him” against the two technicians. We shall come to that further in due course.

74. We do not accept the evidence of the Claimant that either Mr. Sowa or Mr. Dudaszeg had ever been abusive or aggressive towards him and there was, quite simply, nothing at all in that allegation. There were differences of opinion but it went no further than that and that is not unusual in a working environment. The Claimant, however, it is clear to us found any suggestion made to be such as to suggest a challenge to his authority and reacted badly to it. Doubtless, this was a change of approach from that adopted by an earlier technician who worked under the Claimant, Leslie Stewart, who according to the evidence of Mrs. Burton had had some problems initially but had then effectively toed the line.

75. We also find that there was no undermining of the Claimant’s authority by Mr. Sowa or Mr. Dudaszeg but that again this was simply a matter of them making relatively minor or straightforward suggestions for how they saw the potential for improvement – such as Mr Dudaszeg suggesting that he glaze lenses for a customer who he had personally seen so as to create a holistic service – but that the Claimant reacted negatively to those matters as he did not see the need to implement such a suggestion. The process of making a suggestion does not amount to a challenge to authority despite the fact that it was abundantly clear through the Claimant’s cross

examination of the Respondent's witnesses that this is how he viewed any suggestion by a subordinate member of staff.

76. We are satisfied that the complaints which were raised – by Mr. Sowa particularly – about the Claimant were not contrived nor were they unfounded. They were borne from frustration about the Claimant's refusal to consider suggestions made and the way in which the technicians felt undervalued and belittled. Those, we accept, were genuine concerns and the reason that they were raised was as a result of frustration and nothing at all to do with the Claimant's race. There is nothing at all to suggest that the technicians would not have raised the same concerns in respect of a white Lab Manager who they perceived had undervalued them and ignored their suggestions.

77. Indeed, the Claimant has not drawn to our attention any fact or evidence whatsoever to begin to suggest that Mr. Sowa or Mr. Dudaszeg had raised complaint because of his race. He asserted in general terms that they had a problem working under a black member of staff as they viewed themselves, consciously or subconsciously, as superior but there is nothing whatsoever before us to support that contention other than the Claimant's belief that that was the case. It is a matter denied by both Mr. Sowa and Mr. Dudaszeg. In all events, as we have already said above, we are satisfied that both Mr. Sowa and Mr. Dudaszeg were genuinely frustrated and that their complaints were borne from that and nothing else.

Attitude of Nadine Burton and "Old Man" comment

78. As set out above, it is the Claimant's case that Mrs. Burton on unspecified dates between February 2017 and 15th March 2017 undermined and belittled him regarding his status as Lab Manager by saying words to the effect that Marcin Sowa and/or Gergo Dudaszeg did all the work and that they should make the decisions.

79. Again, there is a conflict of evidence on those matters. Whilst the Claimant has given a relatively generic account, his evidence when asked by the Tribunal was that Mrs. Burton would make such comments approximately 60% of the time that she came into the Lab.

80. The evidence of Mrs. Burton was that she had on one occasion made a passing comment to Mr. Sowa and Mr. Dudaszeg when the Claimant was still in his motorcycle gear after arriving for work in the lab that "*obviously you two are doing the work today*". We accept that the evidence of Mrs. Burton that that was the only occasion when anything at all was said about Mr. Sowa and Mr. Dudaszeg doing the work. Both Mr. Sowa and Mr. Dudaszeg supported that position that nothing adverse was said and it is notable that Mr. Dudaszeg no longer works for the Respondent Store and therefore has a greater deal of independence of evidence than if he remained there. Again, we consider that this is a comment which was simply Mrs. Burton interacting in a jocular fashion with staff (in the same way that she told us she might say "good afternoon" rather than good morning to a member of staff who was late) but that since his resignation this has again taken on new significance for the Claimant as part of these proceedings and the fact that he genuinely considers that the majority of white Europeans view him differently because of his race and that he inherently mistrusts white people as a result. Indeed, he tells us that he no longer has any white friends as a result of that mistrust.

81. The Claimant further contends that he was referred to be Mrs. Burton on a number of occasions between February 2017 and 15th March 2017 as "old man".

82. Again, that is a comment denied by Mrs. Burton. She denies ever referring to the Claimant's age and her evidence was that there were, in fact, a number of individuals who were older than the Claimant at the Respondent Store and that the only individual who there was ever had any potentially age related matter referred to was a former lab technician, Leslie Stewart, who was affectionately known by the staff as Uncle Leslie and who at 57/58 years was older than the Claimant. Again, we preferred the evidence of Mrs. Burton on that point for the same reasons as with regards to the other matters above. Again, the alleged "old man" comments were not matters raised by the Claimant at any stage before the course of these proceedings.

83. The Claimant makes much of the fact that during the later grievance process Mr. Dudaszeg referred to "banter" from Mrs. Burton and the Claimant contends that that is demonstrative of the fact that she was acting in the manner that he complains of before us. We do not accept that. Whilst Mr. Dudaszeg could not particularly assist with any sort of example of such "banter" he was clear in his evidence that the Claimant and Mrs. Burton "joked around each other all the time". That was supported by earlier evidence given by Mrs. Burton (at a time when Mr. Dudaszeg had not been present in the hearing) that she would attempt to engage in light-hearted banter with those in the Respondent Store and again had given the examples of when someone was late, for instance, she would say good afternoon rather than good morning. A further example had been the joke that she had made to the Claimant as described above when he had still been in his motorcycle gear. We do not therefore find that single reference therefore to support the Claimant's position and we prefer the evidence of Mrs. Burton on the point, supported also by that of Mr. Dudaszeg and Mr. Sowa that they had witnessed nothing untoward.

84. We should also say on a final note here that we were struck by what appeared to us to be the genuine views of Mrs. Burton given in her, at that point emotional, oral evidence that she had considered that she had a good and strong working relationship with the Claimant and that she "really regarded [him], very much so". We considered that to be the genuine position as Mrs. Burton saw it and it reinforced our view that she did not treat the Claimant in the derogatory fashion that he contends in these proceedings.

Complaint to Hayley Dowd

85. The frustration which we have referred to above led to Mr. Sowa making a complaint about the Claimant to Hayley Dowd, one of the Shop Floor Managers at the Respondent Store.

86. The Claimant accepted in cross examination that it was correct for Ms. Dowd to raise the complaint with him (even if he ultimately considered it to be unfounded) and that he did not think that she was discriminating against him. Although we have not heard from Ms. Dowd, we consider that it would have been wholly wrong for her not to share with the Claimant what she had been told by Mr. Sowa and to try to deal with those matters informally. We do not accept that she instructed the Claimant not to give any more instructions to Mr. Sowa, particularly given that it was made clear by Mrs. Burton at a later meeting on 15th March 2017 that the Claimant was the Lab Manager and needed to be respected by the technicians.

Complaints to Nadine Burton

87. The Claimant contends that he had reported the conduct which he alleges that Marcin Sowa and Gergo Dudaszeg had perpetrated to Mrs. Burton but that she did

nothing to assist him. We do not accept that position. For example, we accept the evidence of Mrs. Burton that when the Claimant had told her that Mr. Sowa had told Mr. Dudaszeg that he had wanted him to glaze a certain pair of lenses she had taken that up with Mr. Sowa and instructed and reminded him that the Claimant was the Lab Manager. She had also, as indicated above, arranged Mr. Sowa's shift patterns so that he did not work with the Claimant as frequently as he had previously so as to alleviate any tensions.

88. The Claimant had also gone to see Mrs. Burton on 11th March 2017 to complain about the fact that Mr. Sowa had complained to Ms. Dowd about him earlier that week. We accept that Mrs. Burton made notes of that meeting after she got home that evening and that the notes at page 28 of the bundle broadly reflect her discussions with the Claimant.

89. During the discussion, the Claimant asked Mrs. Burton to "back him" which we take to be a reference to backing him up over the technicians. We accept that Mrs. Burton did not agree to do so as she thought that it was necessary to first listen to what other people in the lab said as they may have genuine concerns; that they might also have good ideas and that this might assist in the running of the lab. She agreed instead to hold regular lab meetings, which would commence on 15th March 2017, as a way of dealing with the emerging issues and at the suggestion of the Claimant that there should be a meeting to deal with his concerns.

90. We see nothing wrong in the approach that Mrs. Burton elected to take in this regard. It was clear that there was unrest in the lab with Mr. Sowa complaining about the Claimant and the Claimant in turn complaining about Mr. Sowa having complained about him. Mrs. Burton took a reasonable stance that she would hear them both out before taking a position. That was not, however, what the Claimant wanted to hear as we are satisfied that he had expected and wanted Mrs. Burton to immediately back his position as Lab Manager without question. Mrs. Burton had, not unreasonably given the position outlined above, made it clear that she wanted to hear both sides of the story however.

91. The discussion between the Claimant and Mrs. Burton was clearly not a difficult one given that it is common ground that the Claimant gave Mrs. Burton a lift home from work after it ended. We find such an occurrence supportive of Mrs. Burton's evidence that she considered, prior to the Claimant's later resignation, that they had a very good working relationship.

92. We would also observe that it would seem to us to be unusual for the Claimant to seek assistance from Mrs. Burton if, as he contends, it was accurate that she had been constantly discriminating against him, belittling him and undermining him whilst actively treating Mr. Sowa and Mr. Dudaszeg more favourably. It would appear somewhat curious to us in such circumstances that the Claimant would have asked Mrs. Burton to "back him" against those individuals if the catalogue of discrimination of which he complains was accurate. Again, this reinforces our finding that events occurred not as the Claimant described them to us but as Mrs. Burton did.

The Lab meeting on 15th March 2017

93. As indicated above, on 11th March 2017 it had been agreed by Mrs. Burton that she would hold a lab meeting to discuss the concerns that the Claimant had raised with her. The Claimant is critical of many aspects of that meeting but one particular issue is that this meeting was not arranged with the sole purpose of

discussing the matters that he had raised with Mrs. Burton and instead also dealt with general laboratory matters such as results against targets (see pages 29 and 30 of the hearing bundle).

94. However, we accept the evidence of Mrs. Burton that the intention of the lab meetings was that these would thereafter be a regular occurrence and that she wanted to set a form of agenda which would be followed not just for that one meeting but for all those that followed. That would naturally include discussion of results, targets and the sort of issues that were discussed at the beginning of the meeting. We also accept that the idea of starting off on a positive note and praising the lab staff for the excellent results that they had achieved was an appropriate way of starting the meeting so that it was not just all doom and gloom. The issues that the Claimant had raised were discussed and the fact that the meeting was not convened for that sole purpose is not something that leads us to believe that Mrs. Burton was not taking the Claimant or his concerns seriously.

95. The Claimant contends that during the course of the meeting, Mrs. Burton, Mr. Dudaszeg and Mr. Sowa were aggressive and abusive towards him.

96. He contends that that is obvious from a reading of the notes of the meeting and that any reasonable person considering them would accept that he was faced with aggression and abuse. We accept that the notes that appear in the bundle at pages 28 to 43 are an accurate reflection of what occurred at the meeting but having read these more than once we simply cannot agree with the Claimant that they are demonstrative of him being abused or that those presented acted aggressively towards him. Particularly, we note the following:

- (i) Whilst it is accepted that Mr. Dudaszeg swore (either uttering “for fuck sake” or telling the Claimant to “fuck off”) that we accept was out of frustration given that the Claimant continued to block any suggestion that was made by him or Mr. Sowa about how they felt that the lab might be improved. Prime examples of this are when Mr. Dudaszeg had suggested starting a Whatsapp group, including the Claimant, to notify those in the lab of any issues that had arisen. He had made that suggestion based on what he had seen work well at a different branch of Specsavers where he had worked. The Claimant point blank refused that suggestion and said that Mr. Dudaszeg and Mr. Sowa could only contact him when he was not in the lab via Mrs. Burton. Equally, the Claimant refused to countenance a suggestion made by Mr. Sowa that he be permitted to glaze lenses of customers who he had seen and who he had promised that he would see the job through and made it clear that he would only permit that to take place if he were given a direct order to do so by a Director;
- (ii) Whilst Mrs. Burton agreed that she would consider some of the ideas raised by the technicians at the meeting, those were not accepted without question. For example, in respect of a suggestion that larger lens sizes should be stocked (a matter with which the Claimant vehemently disagrees) Mrs. Burton did not immediately agree that proposal but indicated that she would look into the costings, a matter which we accept that she later did. Similarly, whilst she agreed the suggestion of Mr. Sowa that he be permitted to retain the glazing of lenses for customers whose orders he had promised that he would see through, that was qualified by the fact that it would be monitored and in the event that there was any disruption then it would be reviewed. The disruption point had been an

objection raised by the Claimant (despite the fact that we understand that he had, in fact, allowed this process to operate with the previous lab technician, Leslie Stewart – a matter of which Mrs. Burton was aware) and it is clear therefore that Mrs. Burton was not dismissing but was taking on board his concerns. Equally, Mr. Dudaszeg had raised his preference to keep jobs to complete in a box rather than in trays and Mrs. Burton had agreed to that (in fact the Claimant had already allowed Mr. Dudaszeg to use a box) but again had qualified that by making it clear that jobs were not to be left to be completed (see page 46 of the hearing bundle);

- (iii) At a point when Mr. Sowa had asked the Claimant what he thought teamwork meant (a great part of Mr. Sowa's complaints about the Claimant being that he made him feel devalued), Mrs. Burton had been quick to stop him and to inform him that he must respect the Claimant as Lab Manager. That was not the action of a person seeking to undermine, devalue or act aggressively or abusively towards him;
- (iv) Equally, Mrs. Burton had intervened when Mr. Sowa had accused the Claimant of discriminating against him in respect of an instruction that he had given to him to write numbers in a certain way, to say that the Claimant had not been discriminatory. This was a fact that the Claimant himself acknowledged during the course of a later grievance meeting (see page 54k of the hearing bundle). We should observe from the evidence of Mr. Sowa that, quite frankly, we are entirely unsurprised that he was dissatisfied with the Claimant instructing him to write numbers on trays in a different way. His evidence, which we accept, is that the Claimant had written numbers on a large piece of paper and then had run his finger along underneath each whilst explaining to Mr. Sowa that that his how he should write numbers in the future. We have little hesitation in accepting that for a grown man and experienced lab technician, that was demeaning and Mr. Sowa took it as a slight as to what he had been taught at school. We are frankly concerned that the Claimant still now cannot understand Mr. Sowa's position in that regard and that, in his words, he needed to "*write like the rest of us*";
- (v) Whilst the Claimant places great stock in the fact that the meeting concluded at 5.00 p.m. and he felt that that was done to undermine him, we have found it difficult to ascertain the basis upon which he holds that apparent assertion. We do not accept that there was anything in the timing of the meeting which was intended to undermine the Claimant or otherwise cause him angst.

97. The Claimant contends that at the meeting he was instructed by Mrs. Burton to apologise to Mr. Dudaszeg and that she had said words to the effect "*apologise to him, go on apologise*". Mrs. Burton denies that and said that all that was said is that the Claimant could perhaps display more empathy towards his colleagues and express regret if they had had a bad day. That was in the context of a relatively heated incident that had occurred between the Claimant and Mr. Dudaszeg regarding the Claimant taking him to task for having broken a beaker in the lab. It is clear from the contemporaneous notes of the meeting and the evidence of Mrs. Burton, which we prefer to that of the Claimant who has a somewhat slanted view of the events of the meeting, that she did not instruct the Claimant to apologise but simply to try and find a way forward and to suggest a more empathetic approach for the Claimant to take with colleagues with whom, it is clear, he had a difficult working relationship.

98. It appears to us that the cause of the Claimant's dissatisfaction with how the meeting progressed was the fact that Mrs. Burton did not "back him" in the way that he had asked her to on 11th March 2017. We are satisfied that what he wanted in this regard was for Mrs. Burton to tell the lab technicians that they must do things his way and that their suggestions would not be implemented. Mrs. Burton had, however, made it very clear to the Claimant on 11th March that she would not simply do that and that she wanted to listen to what the technicians had to say because they may have had some good ideas. The approach taken cannot therefore have realistically come as a shock to the Claimant.

99. Whilst it is abundantly clear that the Claimant believed, and continues to believe, that Mrs. Burton should have immediately closed down any suggestions from the technicians with which he did not agree on account of his experience and status as Lab Manager, we accept that Mrs. Burton was keen to explore proposals that might ultimately be to the benefit of the laboratory. Whilst the Claimant argues strenuously that none of the ideas that the technicians had were good ones and would simply cost the Respondent time and money and/or would not work, we accept Mrs. Burton's evidence that she saw potential benefit in the ideas and was prepared to trial or look into them in the event that they may yield positive results.

100. That, we are satisfied, was the reason that the Claimant was dissatisfied and took umbrage at the way in which the lab meeting went. That was no doubt intensified by the fact that there was clearly no love lost between the Claimant and Mr. Sowa particularly and the Claimant was unimpressed that Mr. Sowa had approached Hayley Dowd the previous week to complain about him.

101. However, we are satisfied that the meeting was not aggressive or abusive as the Claimant contends and that Mrs. Burton did her best to smooth things over and try to promote a more positive way of working between the Claimant and the lab technicians.

The Claimant's resignation

102. We accept that after the meeting, Mrs. Burton did not consider anything to be amiss and that as she understood matters, the Claimant had gone to take lunch with his colleagues. However, at 20.41 that evening Mrs. Burton received a WhatsApp message from the Claimant tendering his resignation. The message said this:

"Dear Mrs Burton

After today's meeting I feel physically sick and disappointed that my position and long service to the company was held with such disregard to the extent you were asking me to apologise to a member of staff barely out of his probationary period, simply because he had a bad day??? i asked for the backing of the directors to stop the situation regarding mainly ridiculous contrived complaints against me (they hardly knew themselves what they were complaining about) getting any worse, but I felt that behind the scenes discussions have all gone against me for whatever reasons... and to ridicule my position was a step to solving the problem.... And yet I am too proud to have worked many really directly discriminatory and abusive years at a basic level to reach the level of lab manager to have this constant psychological battle I have to face daily because of the lack of support for my position. Many will be happy at this long awaited outcome and as there is plainly little confidence shown in my ability to manage the lab I have no will to i have no

will to fight as i stand little chance when those above me are against me, therefore my immediate resignation is my chosen solution as I am sure otherwise the drive to terminate my employment will only increase with greater vigour from all sides.

Yours Sincerely

S. Stewart”

103. We accept the evidence of Mrs. Burton that when she received that message from the Claimant she was “blindsided”. At that stage she still, in her words, considered herself and the Claimant to have a long working relationship ahead of them and that she was shocked by the content of what the Claimant had written, none of which she considered to have any basis.

104. We accept particularly that Mrs. Burton was shocked at the reference to discrimination and behind the scenes discussions as nothing of that nature had ever been mentioned by the Claimant before and the only behind the scenes discussion that she had had was with the Claimant about Mr. Sowa. Moreover, as far as she was concerned the only issue of discrimination that had been referenced was by Mr. Sowa at the 15th March meeting concerning the Claimant’s insistence that he write numbers in a different way. We have already touched upon that matter above.

105. Mrs. Burton spoke to her fellow director and as a result of the fact that she did not see where they could go from there with the Claimant given the feelings that he had expressed in his message, she wrote to the Claimant the following day accepting his resignation with immediate effect (see page 48 of the hearing bundle). We accept that prior to writing the letter Mrs. Burton did attempt to telephone the Claimant. She did so the following day from the office given that the Claimant’s message had only been received at 20.41 the previous evening and she had not thought it sensible or appropriate to attempt to call him at that time.

106. The question of whether Mrs. Burton made the telephone call is hotly contested. The Claimant contends that Mrs. Burton is lying about this issue and that that calls her credibility and the whole of her evidence into question. The Claimant raises in support of his contention that Mrs. Burton is lying his telephone records for 15th and 16th March 2017 which do not show any incoming calls from either Mrs. Burton’s mobile or landline number. We accept, however, Mrs. Burton’s account that there is an intermittent fault on the landline which leads some calls not to connect and that the Respondent’s telephone providers, 5G, have informed her that this fault may have resulted in her call to the Claimant not connecting and her belief (prior to having seen the telephone records) that the Claimant had hung up the telephone on her. We consider that to be a plausible explanation for the lack of a call featuring in the Claimant’s telephone records if the landline call had never connected. Moreover, we accept the submission of Mr. Pipkin that had Mrs. Burton been minded to lie, then it might well be assumed that she would be untruthful about a rather more serious matter given that the question of whether she made the telephone call or not would have little or no bearing on the issues in the claim before this Tribunal.

107. We therefore accept that Mrs. Burton did attempt to call the Claimant but that that call did not connect and that at the time she believed that he had hung up on her. Coupled with the content of the WhatsApp message and the fact that the

Claimant did not attend work on 16th March 2017, Mrs. Burton accordingly wrote the letter to which we have already referred above to accept his resignation.

The Claimant's Grievance

108. Following on from his resignation, by letter dated 16th March 2017 (but, we accept, hand delivered received by the Respondent on 20th March 2017 – see page 54 of the hearing bundle) the Claimant raised a grievance. We have read in detail his grievance letter at pages 49 and 50 of the hearing bundle. We do not set it out fully here but the letter made the following points:

- a. Mr. Sowa had, after completion of his probationary period, become disrespectful to the Claimant and had had an increasing number of outbursts;
- b. His behaviour had been reported to Mrs. Burton but she had completely dismissed his concerns;
- c. That Mrs. Burton would ridicule the Claimant referring to Mr. Sowa and Mr. Dudaszeg as the lab manager and saying that they did all the work;
- d. That Mr. Sowa had made unfounded complaints to Hayley Dowd and that he had been degraded and insulted;
- e. That Mr. Sowa and Mr. Dudaszeg had been on a “slandering mission” at the meeting of 15th March 2017 and Mrs. Burton had encouraged them in this behaviour and that he had been victimised;
- f. That he had faced hostility and racism in his career and that the meeting of 15th March 2015 had “relived the core of [his] experience” and that there had been a blatant and unprovoked attack on his character which had been endorsed by Mrs. Burton;
- g. That it was a fact that a black person had to perform three times greater than a white person to get the same recognition and justice and that the treatment to which he had referred had been an endorsement of that fact;
- h. That technicians were offended to take simple basic instructions from a black manager;
- i. That the level of hostility and underlying tone and abuse would make it dangerous for him to remain in the environment physically and mentally and that it had been necessary for him to remove himself from the volatile situation via a resignation text sent in desperation;
- j. That he had no one to turn to as racial issues could never be addressed, only dismissed, and “laughed under the carpet”; and

- k. That is was unacceptable that he had been forced out of employment; that there was a denial of evident racial hostility and that black people had a right to demand the same level of respect in the work environment as white people.

109. The Claimant also wrote to the Respondent by email on 22nd March 2017 titling that email “discrimination in the workplace” and complaining of, amongst other things, “blatant racism” which had cost him his employment (see page 53 of the hearing bundle).

110. Despite the clear and strident terms of both his resignation letter and grievance, it is clear that the Claimant later had a change of heart about the termination of his employment and thereafter sought to retract his resignation. This he did on 23rd March 2017 and his letter in this regard said this:

“In regards to my letter dated 16.03.2017, which I hand delivered to the Specsavers Loughborough store on the 20.3.2017. This was an official letter following my ‘constructive dismissal’ forced resignation because of racial discrimination under extreme duress, sent via text message on the 15.3.2017.

I further stated in this official letter that if there was no resolution under the Specsavers grievance policy I would take the matter further, I therefore suggest that you reinstate my position without prejudice.”

111. Given the events as the Claimant described them in his grievance letter and in his evidence to us, it is difficult to see what had changed so that he was able to countenance a return to the Respondent Store by 23rd March. That is not least given his assertion that the Respondent is institutionally racist. The Claimant has not been able to assist us on that point, save as to say that he had hoped that the issues could be resolved in order for him to return to work. However, as we shall come to, the Claimant in fact failed to divulge during the course of a later grievance investigation any details of the discrimination that he alleged that he had been subjected to and it is somewhat difficult if not impossible to ascertain how he believed that anything might in those circumstances “be resolved”. The fact that the Claimant did not provide any details when asked to do so and the fact that he took steps soon after his resignation to attempt to retract it, give further weight to our findings above that the acts complained of by the Claimant as acts of discrimination did not occur in the way that he has described it to us in his evidence. If they had, it is somewhat inconceivable that he would want to return to such an environment where not only his subordinates but Mrs. Burton as a Director and his line manager were regularly subjecting him to a catalogue of discrimination and which he felt may manifest itself in physical harm. The fact that the Claimant sought reinstatement also, it appears to us, somewhat flies in the face of his contention that he had been constructively dismissed given that the very notion of a constructive dismissal is that the employment relationship has irretrievably broken down on account of the conduct of the employer.

The grievance process

112. Debbie Moore, a Dispute & Resolution Officer with Specsavers Optical Group Limited was assigned to deal with the Claimant’s grievance at the first stage and she wrote to him on 11th April 2017 to invite him to a grievance meeting (see page 54a of the hearing bundle).

113. The Claimant attended that meeting and we accept that the notes that appear in the bundle at pages 54b to 54q are a broadly accurate account of what was discussed at the meeting. The Claimant disputes the accuracy of the meeting and that he was not offered the notes to consider. We accept the account of Mrs. Moore, who we considered to be a consistent, credible and straightforward witness, that he was offered the option to consider the notes at the end of the meeting. The only part of the meeting notes which the Claimant appears to materially dispute is a reference at the top of page 54o that he had said that Mr. Sowa and Mr. Dudaszeg, coming from Poland and Hungary respectively, had never seen a black man. Nothing material ultimately turns on this point.

104. During the meeting, the Claimant informed Mrs. Moore of incidents where he felt that he had been disrespected by Mr. Sowa and Mr. Dudaszeg despite his attempts to assist them to improve their skills and that they should not have been allowed to raise their complaints about him because they were “too fickle” (see page 54g of the hearing bundle). The Claimant also told her that Mrs. Burton had commented that Mr. Sowa and Mr. Dudaszeg did all the work every time that she had come into the lab when showing people around but that there were no witnesses to those events.

105. The Claimant did not make mention of any incidents regarding Mrs. Burton which are now complained of as the other acts of race and age discrimination. No example was given in this regard of the events that are now alleged at the leaving party, the robber/drug dealer comments or the “old man” references. When asked about details of alleged discrimination by Mr. Sowa and Mr. Dudaszeg, the Claimant had given no details other than his generic belief that the colour of his skin was an issue for the two technicians. When asked by Mrs. Moore if this was his assumption, the Claimant had replied “I am not going to go into that” (see page 54o of the hearing bundle).

106. As we have already touched upon above, we do not accept the Claimant’s evidence that he did not mention the acts on which he now relies because he was concentrating on resolving matters and getting his job back. Firstly, it is difficult to see how any discriminatory treatment could be resolved via a grievance process if the Claimant failed to give the details about that. Secondly, he had made accusations of discrimination and had raised complaints about Mrs. Burton and it is difficult to see against that backdrop what failing to put the meat on the bones of those complaints would have achieved. Thirdly, this was not a case where the Claimant had been dismissed and might therefore be seen to be fighting for his job but one where he had taken the decision to resign. As such, we do not accept that those incidents now complained of had occurred and that there was a rationale explanation for the Claimant not having referred to them during the grievance process.

107. At the close of the meeting, the Claimant again expressed a wish to be reinstated to his post.

108. Following the meeting, Mrs. Moore conducted interviews with Mrs. Burton, Mr. Sowa and Mr. Dudaszeg, Hayley Dowd and Natalie Webster, a retail manager for the Respondent. The Claimant had not provided details of any other witnesses who he wanted to be interviewed by Mrs. Moore and we are satisfied that she identified the relevant individuals to speak with as part of the grievance process.

109. Mrs. Moore wrote a very detailed outcome letter to the Claimant on 6th June 2017 ultimately rejecting his grievances (see pages 55 to 66 of the hearing bundle). We do not produce the contents of that letter here but it is clear that Mrs. Moore did a very thorough job of both investigating the grievance and of setting out her conclusions and the reasons for those conclusions to the Claimant. She summarised the evidence that she had collated in her letter in respect of each of the allegations set out in the grievance and provided cogent reasons for rejecting the same.

110. The Claimant was offered the right of appeal against the decision that Mrs. Burton had reached and that he should direct any appeal to Jess Cannings within the Legal Department of Specsavers. The Claimant replied on 10th June 2017 to say, amongst other things, that he would not be appealing the outcome of the grievance on the basis that he considered that Mrs. Burton had *“observed the blatant discriminatory facts presented to you and representing Specsavers company brand you have chosen not to uphold justice but only to seem ‘ammunition’ for your future defence of this case”*¹.

111. That therefore ended the consideration of the Claimant’s grievance in respect of the internal processes and the matter thereafter came before us for determination.

CONCLUSIONS

112. Insofar as we have not already done so within our findings of fact above, we deal here with our conclusions in respect of each of the complaints made by the Claimant.

Allegation 1

113. The first allegation relates to the claim that in or around April/May 2016 Mrs. Burton made a comment that she hated reggae music and the culture (or words to that effect) whilst at a Directors leaving party.

114. As we have set out above, we do not accept that the incident that the Claimant described in his evidence occurred as it did. The only comment made by Mrs. Burton in this regard was in response to an interjection by the Claimant in a conversation that she was having with another member of staff when he raised with her why she did not like reggae music and she had said that it was “not her thing” or words to that effect. That was nothing at all to do with the Claimant’s race but simply Mrs. Burton explaining to the Claimant, at his request, why she did not care for a particular sort of music. It cannot reasonably on the facts that we have found by an act of direct discrimination nor could such a response amount to harassment on the Claimant’s own case which was that he had no issue with Mrs. Burton saying that she did not like reggae music. His issue was a reference to “the culture” and we have found that no such reference was ever made by Mrs. Burton.

115. We are therefore entirely satisfied that this allegation should be dismissed as both a complaint of direct discrimination and of harassment.

Allegation 2

116. The second allegation is that it is said by the Claimant that during the latter part of 2016 Mrs. Burton had regularly commented that the Claimant was coming to

¹ That being a reference to these Tribunal proceedings.

rob the store or that she had referring to him as a drug dealer (or words to that effect).

117. Again, this is a complaint which we dismiss on the facts. As we have found above, Mrs. Burton did not regularly refer to the Claimant coming to rob the Respondent Store. On one occasion only she said words to the effect that she thought that he was going to mug her or rob the Respondent Store because he had made her jump by standing in close proximity to her whilst wearing winter outdoor clothing and when she had thought that he had already left for the evening. The reason for her reaction was simply that the Claimant had made her jump. It had nothing to do with his race and the Claimant has taken us to nothing at all to suggest to the contrary. We accept the evidence of Mrs. Burton that she would have said the same to any member of staff, irrespective of their race or the colour of their skin, if they had been similarly attired to the Claimant and had made her jump in the circumstances that we have described above.

118. Equally, we are satisfied for the reasons that we have already given above that at no time did Mrs. Burton ever refer to the Claimant as a “drug dealer” or similar and that when she discovered that such a comment had been made by Ms. Luby in 2009/10 she immediately took steps to deal with it.

119. We are again entirely satisfied that this allegation should be dismissed as both a complaint of direct discrimination and of harassment.

Allegation 3

120. This complaint arises from the Claimant’s contention that Mrs. Burton had failed to deal with his complaints about Mr. Sowa and Mr. Dudaszeg. Again, we are satisfied that this complaint is factually inaccurate and we dismiss it on those grounds.

121. As we have set out above, Mrs. Burton dealt with concerns raised by the Claimant and, particularly, she had called the lab meeting on 15th March 2017 to try and work through the issues that he had raised. The real bone of contention is that she had not unequivocally “backed him up” against the lab technicians but for the reasons that we have already given above, that was a perfectly reasonable stance for Mrs. Burton to have taken.

122. There is nothing at all to suggest that Mrs. Burton would have done anything differently in relation to a white member of staff nor that she favoured Mr. Sowa or Mr. Dudaszeg over the Claimant.

123. Again, therefore we are entirely satisfied that this allegation should be dismissed as both a complaint of direct discrimination and of harassment on the facts.

Allegation 4

124. This complaint is, of course, the allegation that on dates between February 2017 and 15th March 2017, Mrs. Burton had undermined and belittled the Claimant regarding his status as Laboratory Manager by saying words to the effect that Marcin Sowa and/or Gergo Dudaszeg did all the work and that they should make the decisions.

125. As we have found above, these incidents quite simply did not on the balance of probabilities occur. We accept that the only occasion any comment of the nature suggested by the Claimant was made was as a passing joke of the type which often took place in the Respondent Store because the Claimant was still in his motorcycle gear and Mrs. Burton had joked that it looked like the technicians would be doing the work that day because the Claimant was not ready for work. That is no different to other comments that Mrs. Burton had made to others – such as saying Good Afternoon rather than Good Morning if they were late to work – and there was nothing at all untoward about it.

126. There is nothing at all, other than the Claimant's belief that that was the case, that Mrs. Burton made that innocuous comment because of his race or that she would have treated a white member of staff differently. We are entirely satisfied that Mrs. Burton did not treat or view the technicians in more favourable terms and, indeed, such a suggestion goes entirely against her reinforcement with them (including at the meeting of 15th March 2017) that it was the Claimant who was the Lab Manager and that he was to be respected as such.

127. We are again satisfied for those reasons that this complaint should be dismissed as both a complaint of direct discrimination and of harassment.

Allegation 5

128. This allegation concerns the contention of the Claimant that in or around the period February 2017 to 15th March 2017 Mrs. Burton had called or referred to him as "old man".

129. Again, this is a matter which we are able to deal with in fairly short terms given that we are entirely satisfied that Mrs. Burton never made any such comment or comments to the Claimant nor had she referred to him as "old man" at any time.

130. This complaint therefore fails as a complaint of harassment and direct discrimination on the facts as we have found them to be.

Allegation 6

131. This allegation concerns the contention that Marcin Sowa and/or Gergo Dudaszeg were abusive and aggressive towards the Claimant in or around January 2017, undermined his authority and contrived complaints against him.

132. Again, we are satisfied on the basis of the evidence that we have heard that these events did not occur as the Claimant has described them.

133. Whilst it is clear that there were difficulties in the relationship between the Claimant and the two technicians in the period prior to the Claimant's resignation, there is nothing at all to suggest (other again than the Claimant's belief to that effect) that that was because of his race. The reason for those difficulties and the complaints made by the technicians, and Mr. Sowa particularly, was on the basis that the Claimant's refusal to consider or implement suggestions made and the frustration that the technicians had about that position and his attitude towards them generally (for example with regard to the writing of numbers issue).

134. The complaints of direct discrimination and harassment relating to these events are therefore dismissed.

Allegation 7

135. This allegation related to the Claimant being called to a meeting with Hayley Dowd relating to the complaints that Mr. Sowa had made to her.

136. We should observe that even on the Claimant's own account in cross examination he did not appear to believe that Ms. Dowd had discriminated against him in informing him of the complaint that had been made to her by Mr. Sowa. There is no dispute that such a complaint was made and the Claimant accepted in cross examination that it had not been unreasonable for Ms. Dowd to have raised it with him. We do not accept that he was ever given any direction not to give any more instructions to Mr. Sowa and, as we have observed, that would have been in direct contradiction to Mrs. Burton's reinforcement at the meeting of 15th March 2017 that the Claimant was the Lab Manager and that he should have respect for him.

137. The informal raising of the concerns that Mr. Sowa had raised with her by Hayley Dowd was therefore a perfectly normal and reasonable action for her to have taken. The Claimant has shown nothing at all to even begin to suggest that that was done on account of his race or that a white member of staff would not have had those concerns shared with them.

138. For those reasons, we therefore dismiss this allegation as both a complaint of direct discrimination and of harassment.

Jurisdiction

139. As a result of the findings that we have made in regards to the discrimination complaints, it is not necessary for us to determine the issue of jurisdiction and therefore we say no more about it.

Constructive unfair dismissal

140. We turn finally to the complaint of constructive unfair dismissal. The Claimant relies upon the above acts of which he complains as being acts of discrimination along with the way in which he says that the meeting of 15th March 2017 was conducted as, either singularly or cumulatively, being such to fundamentally breach his contract and that his resignation in response rendered him constructively dismissed.

141. As we have already concluded above, the acts of which the Claimant has complained did not occur as he contends and were perfectly innocuous events. They were not acts of direct discrimination nor harassment and when viewed in the context of how the incidents actually occurred (in accordance with the facts as we have found them to be) it cannot possibly be said that those matters amounted to anything approaching a breach of the implied term of mutual trust and confidence or any other implied or express term of the Claimant's contract of employment.

142. Moreover, the catalyst for the Claimant's resignation, it is clear to us, was the fact that he was not unequivocally supported by Mrs. Burton at the meeting of 15th March 2017 and that he was dissatisfied that she was prepared to listen to the ideas

of the two technicians and trial some of what they had suggested. The Claimant was steadfastly against such matters – even when they were of a relatively trivial nature such as the size of the nibs on pens and the setting up of a WhatsApp group – and it is clear to us that the outcome that he wanted from the meeting was that Mrs. Burton should not entertain any such suggestions and effectively tell the technicians to simply do as they were told by the Claimant. That was what the Claimant had clearly been seeking when he asked Mrs. Burton to “back him” and requested that she call a Lab meeting.

143. However, we are satisfied that that was an unreasonable stance for the Claimant to have taken. Mrs. Burton did support the Claimant where necessary – such as when Mr. Sowa had made his comment about teamwork and what it meant – but in our view she was perfectly entitled to make a decision to trial suggestions made by the technicians where she believed that those might be beneficial for the Respondent Store. That in no way undermined the Claimant’s authority – indeed she had made it clear to the technicians at the meeting and previously that he was the Lab Manager and should be respected– but it was simply a perfectly normal management decision to trial ideas which may be beneficial and to include all members of the laboratory team in that process. Given that the technicians had expressed concern that they were being undervalued, that appear to us to be a perfectly appropriate and sensible way forward, particularly where we accept that Mrs. Burton could see a potential benefit in the ideas and suggestions raised.

144. There was nothing, therefore, abusive, inappropriate or undermining towards the Claimant at that meeting and his perception of those matters is in our view completely skewed.

145. It therefore follows that the acts relied upon by the Claimant as being causative of his resignation were nothing other than innocuous matters and they are nowhere near significant enough to have breached his contract, let alone fundamentally breached it, whether in respect of the implied term of mutual trust and confidence or otherwise.

146. Our conclusion in that regard is reinforced by the Claimant’s attempts to be reinstated to his previous position during the course of both these proceedings and the internal process.

147. It follows that the claim of constructive dismissal fails and is dismissed and for all of the reasons that we have given above, the claim is therefore dismissed in its entirety.

Employment Judge Heap

Date: 25th May 2018

JUDGMENT SENT TO THE PARTIES ON

Date: 2nd June 2018

FOR THE TRIBUNAL OFFICE

Note:

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Claimant

v

LOUGHBOROUGH SPECSAVERS LIMITED

Respondent

DRAFT LIST OF ISSUES

Section 26 Equality Act 2010: Harassment on grounds of the protected characteristic of race

- 1.1. Did Nadine Burton in or around April/May 2016 engage in unwanted conduct by way of comments that it is said that she made to the Claimant that she hated reggae music and the culture (or words to that effect)?
- 1.2. Did Nadine Burton during the latter part of 2016 engage in unwanted conduct when the Claimant wore a black hat by commenting that the Claimant was coming to rob the store or referring to him as a drug dealer (or words to that effect)?
- 1.3. If Nadine Burton acted as set out at paragraphs 1.1 and/or 1.2 above, was that conduct related to the Claimant's protected characteristic of race as a black Caribbean person of Jamaican descent?
- 1.4. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
- 1.5. If not, did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Section 13 Equality Act 2010: Direct discrimination because of the protected characteristic of race:

- 1.6. Has the Respondent subjected the Claimant to the following treatment falling within section 39 Equality Act, namely:
 - 1.6.1. Nadine Burton acting as described at paragraphs 1.1 and 1.2 above;
 - 1.6.2. Marcin Sowa and/or Gergo Dudaszeg being abusive and aggressive towards the Claimant in or around January 2017 and undermining his authority and contriving complaints against him;
 - 1.6.3. Nadine Burton failing to act upon the issues set out at Paragraph 1.6.2 above when those were drawn to her attention by the Claimant;
 - 1.6.4. By Nadine Burton, on dates between February 2017 to 15th March 2017 undermining and belittling the Claimant regarding his status as Laboratory Manager by saying words to

the effect that Marcin Sowa and/or Gergo Dudaszeg did all the work and that they should make the decisions; and

- 1.6.5. Being called to a meeting with Hayley Dowd at the end of February 2017/early March 2017 and being advised of without foundation complaints by Marcin Sowa and being directed not to give any more instructions to Mr. Sowa.
- 1.7. Has the Respondent in regards to the matters set out at paragraph 1.6 above treated the Claimant as alleged less favourably than it treated or would have treated an appropriate comparator? The Claimant relies upon a hypothetical comparator in respect of complaints 1.6.1 to 1.6.2 and 1.6.5 and the actual comparators of Mr. Sowa and/or Mr. Dudaszeg or, alternatively, a hypothetical comparator in respect of complaint 1.6.4.
- 1.8. If the Respondent has treated the Claimant in the manner set out at paragraph 1.6 above, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic of religion or belief?
- 1.9. If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Section 26 Equality Act 2010: Harassment on grounds of the protected characteristic of age

- 1.10. Did Nadine Burton in or around February 2017 to 15th March 2017 engage in unwanted conduct by way of comments that it is said that she made to the Claimant calling him, or referring to him, as "old man"?
- 1.11. If so, did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
- 1.12. If not, did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Section 13 Equality Act 2010: Direct discrimination because of the protected characteristic of age:

- 1.13. Has the Respondent subjected the Claimant to the following treatment falling within section 39 Equality Act, namely referring to him as "old man"?
- 1.14. If the Respondent has treated the Claimant in the manner set out at paragraph 1.13 above, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic of age?
- 1.15. If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Jurisdictional issues

1.16 The Claim Form was presented on 17th May 2017. The Claimant entered into ACAS Early Conciliation on 7th April 2017. Accordingly any act or omission which took place before 8th January 2017 is potentially out of time, so that the Tribunal may not have jurisdiction to entertain the complaint unless:

- (i) the earlier conduct forms part of a course of conduct extending over a period; or
- (ii) the Claimant persuades the Tribunal that it is just and equitable to consider the complaint out of time? In determining that latter question if required to do so, the Tribunal will have regard to the factors set out in **British Coal v Keeble & Ors 1997 IRLR 336, EAT.**

Section 95 Employment Rights Act 1996: Constructive unfair dismissal

1.17 Did the Respondent fundamentally breach express or implied terms of the Claimant's contract of employment in respect of:

- (i) the treatment complained of above as acts of race and age discrimination; and/or
- (ii) the conduct of the meeting on 15th March 2017?

1.18 If so, did the Claimant resign in response to that breach or breaches?