EMPLOYMENT TRIBUNALS

Claimant: **Mr L. Bali**

Respondent: **Listers Group Limited**

Heard at: **Birmingham** **On: 23-27 April and**

(in chambers) 30 May 2018

Before: **Employment Judge Broughton**

Ms. S. Campbell and Mr P. Talbot (Members)

Representation

Claimant: Miss N. Owen (Counsel)

Respondent: Miss K. Swann (Solicitor)

JUDGMENT

1. The Claimant's claim of direct race discrimination in relation to some of his allegations of race related "banter" succeed.
2. His claim of victimisation in relation to the handling and outcome of his grievance and appeal also succeed.
3. The claimant's claim of constructive unfair dismissal fails as does his claim for notice pay.
4. All of the Claimant's other claims of race discrimination, victimisation and harassment fail and are dismissed.

REASONS

The Facts

1. The Respondent operates a large number of car dealerships and employs in excess of 2,000 people.

2. The Claimant commenced employment with the Respondent as a Sales Executive in their Coventry Audi showroom on 1 August 2011. He described himself as "Asian".

3. In his witness statement the Claimant raised a number of historic matters which had not been pleaded and were not directly relevant to the issues in the case. These allegations were disputed by the Respondent. It was agreed between the parties that it was not proportionate for us to consider these matters in any detail as the Claimant's case was reliant on the principal allegations before us as set out in the agreed list of issues annexed to this judgment.

4. In 2015, following a separation in his personal relationship, the Claimant secured a Court Order for contact with his daughter on Fridays. He informed the Respondent of this and, whilst there was no evidence of a formal agreement, the Claimant was generally allowed Friday as his day off thereafter.

5. Having started work on the new car sales team, at all relevant times the Claimant worked as part of the Respondent's used car sales team.

6. In or around the autumn of 2016, Craig Jenkinson joined that team.

7. On 26 October 2016, the Claimant arranged the sale of a vehicle to a customer, Mr McFadzean.

8. Mr McFadzean wanted to take delivery of the car that Friday, 28 October 2016, which was, as was customary, scheduled to be the Claimant's day off.

9. It appeared that sales executives would often attend on their day off to facilitate vehicle handovers not least because, if they failed to do so, this could potentially have an adverse effect on their commission payments. The Claimant admitted doing so himself, although he suggested that, since the Contact Order in relation to his daughter was put in place, he would not do so

on a Friday. He would, however, attend on Saturdays that he was not otherwise scheduled to work for such a purpose. There was some evidence to suggest that, latterly, he was prevented from doing so because his paperwork was not always in order.

10. It appears that the Claimant asked the retail manager, David John, if he or somebody else could cover for him to arrange the handover of Mr McFadzean's car. It also appears that this request was refused.

11. We saw evidence of a text message from Mr John to the Claimant on the morning of 28 October 2016 which suggested that if the Claimant did not attend work to carry out the handover, it would potentially be treated as a matter of gross misconduct.

12. We saw two sets of printouts of those text message exchanges between the Claimant and Mr John. Mr John's printout was apparently produced for the subsequent internal grievance investigation, although he omitted the text with the threat of disciplinary action from those messages, albeit it was the first message in the exchange.

13. The Claimant's printout appeared to have two messages deleted from it, one of which strongly suggested that the Claimant had agreed to come into work, albeit only after the threat of disciplinary action if he did not.

14. Ultimately, as the Claimant's partner was not available to assist with childcare, the Claimant attended work with his two daughters, aged 2 and a few months. The Claimant arranged the handover of Mr McFadzean's car.

15. Mr McFadzean subsequently made a formal complaint to the Respondent because he considered that it was unprofessional for the Claimant to have been required to attend work with his two young children when, in his view, there were other staff available who could have conducted the handover.

16. The Claimant suggested that he had informed the Respondent and, specifically, Mr John, that, if he was required to attend, he would have to bring his children with him. We accept this evidence. The Claimant had said the same to Mr McFadzean. It was apparent that the Claimant had asked for somebody else to cover for him as this was evidenced by the text messages. It was also clear that the Claimant had a discussion with Mr John on the morning of Friday 28 October and Mr John was purportedly attempting to arrange cover, although it was far from clear why he was unable to do so.

17. Moreover, the text messages appeared to confirm that the Claimant had explained to Mr John that he needed to take his partner to the hospital that afternoon. As a result, by implication at least, he would have had no provision for childcare. In addition, it appears that the Respondent's management raised no issue with the Claimant bringing his children in to work until the customer complaint was subsequently received.

18. Mr McFadzean was an important corporate customer of the Respondent and so his complaint was a serious matter. In their response to his complaint, the Respondent, unjustifiably in our view, put most of the blame on the Claimant, notwithstanding the fact that Mr McFadzean felt that the Claimant was the one member of staff that was doing everything he could to assist him.

19. It was the Claimant's case that, following this incident, the attitude of certain members of the Respondent's management and staff changed towards him. His case was that this event triggered the events that ultimately led to his resignation.

20. On 5 November 2016, the Claimant complained that Abid Rahman, the Respondent's Retail Manager, refused to sign off one of the Claimant's files. That was not in dispute, although whether he had good grounds for such a refusal was far from clear. The Claimant alleged that Mr Rahman said, "I'm not signing this fucking file off, as all you do is stitch us managers up". Mr Rahman denied saying this in the internal investigation, although we did not hear from him personally.

21. One witness to this incident acknowledged that there was a situation where Mr Rahman refused to sign a file off. The witness, Simon Dunn, New Car Sales Manager, said that he could not recall whether Mr Rahman had sworn at the Claimant, but he acknowledged that Mr Rahman did, on occasion, swear. As a result we are prepared to accept the Claimant's version of events.

22. The Respondent had sent out their rota for working over the Christmas period in October 2016. On this rota the Claimant was required to work on Friday 30 December 2016. He was to receive an additional day off in lieu the previous week.

23. The Claimant alleged that he had repeatedly raised his inability to work on Friday 30 December 2016 since the rota was first published. The Respondent denied this suggesting that the Claimant made no mention of it until after Christmas..

24. On this issue we prefer the Respondent's evidence. Firstly, if the Claimant had repeatedly raised the issue, we imagine that he would have

done so, at least once, by email. Furthermore, if he knew there was an issue then he would not, and should not, have taken his lieu day the week before.

25. The Claimant also suggested that he had put in a holiday request for December 30th but that appeared inconsistent with his evidence that he had raised the matter with management and they had said they would "sort it". Furthermore, the Respondent clearly needed to plan for Christmas absences and could easily have rearranged shifts had the Claimant raised the matter sooner.

26. Whilst the notes of the meeting to discuss this issue were disputed, those notes were consistent with the Respondent's position. In those notes the Claimant did not suggest that he had repeatedly raised the issue. That meeting was conducted by Alex H. Smith, General Sales Manager. He was the individual that the Claimant claimed he had repeatedly raised the issue with. As a result the claimant would surely have raised this as a defence at the time were it, in fact, the case.

27. Our view in relation to this incident is further confirmed by what the Claimant wrote in his initial grievance. In it he stated that on 28 December 2016 he had informed Alex H. Smith that he was unable to attend work on 30 December 2016 as it was normal practice for him not to work Fridays. Had the Claimant repeatedly raised this matter with Alex H. Smith and/or made a holiday request, then he would surely have said so in his grievance.

28. This, therefore, appears to suggest that, at times, the Claimant simply made things up to support his narrative. That is further confirmed in the notes of the Claimant's grievance hearing, when the Claimant stated that "the Christmas rota was distributed in October and it didn't occur to me that they had put me in for a Friday at the end of the year". If it hadn't occurred to him then he couldn't have raised it.

29. It is also worth noting that at the original meeting on 29 December 2016, the Claimant simply stated that he had assumed he would be off on 30 December because it was a Friday. This also suggests that, at that stage, he acknowledged that he had not previously raised the issue with the Respondent.

30. In any event, the Claimant was apparently informed that if he failed to attend on 30 December 2016 it could be treated as potential gross misconduct.

31. The claimant did not attend on 30 December 2016 and a meeting was held between him and Alex H. Smith on 4 January 2017 to discuss this absence.

32. We consider that it was reasonable for the respondent to hold such a meeting in all the circumstances, given that we accept that the Claimant did not inform the Respondent of his inability to attend until the last minute. Nonetheless, the Claimant maintained that he could not work Fridays due to his childcare commitments and, at the end of the meeting, Alex H. Smith said that he would look into matters further and get back to the Claimant.

33. The Claimant contended that Alex H. Smith did not revert to him about this issue. As a result he felt it was hanging over him thereafter.

34. It appears that Alex H. Smith did speak to Stephen Kerby, the Respondent's Group HR Manager, about the issue. Given the potential confusion over the Claimant's normal day off and childcare responsibilities, Mr Kerby's view was that the Claimant should be given the benefit of the doubt on this occasion. That appears to us to have been entirely sensible.

35. Regrettably, however, it appears that this decision was never communicated to the Claimant. To confirm this, Philip Graddon, the Respondent's Head of Human Resources, when subsequently investigating the claimant's grievance, seemed to believe that this investigation remained "live".

36. We consider that the respondent, in not informing the Claimant of the outcome of this investigation, acted unreasonably.

37. On 18 January 2017, the Claimant alleged that he approached David John to conclude a contract of sale with one of the Claimant's customers. The Claimant alleged that Mr John said, "shut the fuck up or I'll smash your face in".

38. The Claimant suggested that this was in front of certain members of the management team.

39. David John admitted saying "shut the fuck up" but denied the threat. The managers alleged to have been present denied having heard such a threat and Mark Taplin, Head of Business, expressly said that, if he had heard such a thing, he would have acted on it.

40. It is worth noting that the Claimant's initial evidence at the grievance hearing was that the reason he was sure that Mr Taplin must have heard the threat was because the Claimant had caught his eye immediately thereafter.

Subsequently, however, the Claimant alleged that Mr Taplin must have heard it because he reacted and told everyone to "calm down". That seems to us to be an important inconsistency.

41. The Claimant subsequently alleged that he had a recording of this incident but he failed to produce the same either before the grievance appeal or before us. We do not believe that he had such a recording.

42. In addition, there was no suggestion in the Claimant's original grievance that Mr John was not working at the relevant time. Subsequently, the Claimant alleged that Mr John was actually texting his partner. It seems to us that, again, this is a detail that the Claimant was likely to have included in his original grievance as it was relevant to whether or not Mr John was busy when the Claimant approached him. It appears to us to have been an embellishment added at a later stage.

43. Similarly, the Claimant alleged before us that, when making the threat, Mr John had stood up and squared up to him. He had not made that suggestion before at any time during the internal proceedings or, indeed, in his claim form or witness statement. It seems to us, therefore, that this was also an embellishment after the event.

44. As a result of the above, we find that the Claimant's evidence in relation to this matter was unreliable and we do not accept that the alleged threat was made. That said, it was admitted that the Claimant was sworn at and that was inappropriate.

45. On 19 January 2017, the Claimant submitted a holiday request for the period 14 to 21 August 2017. This request was apparently to enable him to attend the wedding of one of his partner's relatives. The holiday request was refused. The Respondent has a policy that prohibits employees from taking leave during the last two weeks of August because this is one of their busiest times due to new car registrations.

46. We heard evidence relating to two previous exceptions to this general rule, one of which related to another Asian employee.

47. Thereafter, an issue arose with another of the Claimant's customers, Mr Wallace. It appeared that there had been some delays in forwarding certain paperwork to the customer and that the Claimant had then not responded to messages and emails in relation to this. The customer then complained that a couple of accessories were missing from his vehicle and his heated rear windscreen didn't work.

48. The customer escalated the matter to Alex H. Smith because he was not getting a response from the Claimant.

49. The customer then made complaints about a number of matters and a number of individuals but his principal complaint appeared to be against the Claimant.

50. Alex H. Smith agreed with the customer that someone would collect his vehicle in order to carry out the necessary repairs. On the morning of 26 January 2017, Mr Smith asked the Claimant to go and collect the car. The Claimant was initially reluctant, saying that he wanted time to consider the request and suggesting that he had other appointments that day.

51. The Claimant was, again, told that if he refused this request it would be treated as potential gross misconduct. In any event, he ultimately agreed to collect the vehicle.

52. The Claimant called the customer and asked for his address. In the course of that call, the customer accused the Claimant of having lied to him about the car he had purchased. Specifically, the customer alleged that he had been given a false reason regarding why the Respondent needed to sell the car quickly. The Claimant responded that he didn't want to talk about it and, when the Customer reiterated that he felt he had been lied to, the Claimant replied, "you know what, I'm bored". Unsurprisingly the Customer subsequently complained about being spoken to in such a manner and the incident generally.

53. This phone call was recorded on the Respondent's systems.

54. Later that same day, the Claimant was called into a meeting to discuss both the customer complaint and the Claimant's initial reluctance to go and collect the vehicle.

55. Whilst there were a number of matters discussed, it was clear that there was, at least, a case to answer in relation to some of the allegations.

56. Simon Dunn conducted that initial meeting with the Claimant and seemingly relied on a script that had been produced for him by Mr Kerby. The Claimant apparently found a copy of that script on the printer in the office. He believed that other members of staff had also seen it, although there was no evidence to support this. It seemed to us unlikely that there would have been several copies circulating as claimed.

57. Nonetheless, the script was originally prepared to be delivered by Alex H. Smith and some of the language appeared to be unduly robust. For

example, it directly accused the Claimant of lying to Mr Smith. We observe that it would have been inappropriate for Mr Smith to have conducted the meeting as he was effectively one of the principal witnesses but, as it turned out, he was unavailable and so the meeting was conducted by Mr Dunn.

58. The script also included certain references to the Claimant's alleged behaviour, for example, referring to him as a "petulant child". The Claimant took exception to this and it did appear to us to be somewhat premature.

59. On 28 January 2017 the Claimant was signed off as unfit for work. He did not return until the termination of his employment.

60. The Respondent did not pay the Claimant company sick pay during any of his sickness absence. This was because they considered that he was under investigation for a disciplinary matter and, in those circumstances, their policy provided that company sick pay was not payable.

61. The Claimant submitted a lengthy grievance letter dated 28 January 2017.

62. He alleged bullying and harassment, sex and race discrimination, breaches of health & safety and a failure to make reasonable adjustments. The Claimant made a number of allegations which included allegations A – E, L and M from the list of issues in this case.

63. It was not in dispute that the Claimant's grievance amounted to a protected act under Section 27 Equality Act 2010.

64. On 2 February 2017 the Respondent acknowledged receipt of the Claimant's grievance. The Claimant subsequently raised a number of issues, including objecting to his grievance being heard by Mr Kerby because he did not consider him to be impartial given his involvement in preparing the script for the earlier investigation.

65. As a result the matter was passed to Philip Graddon, Head of Human Resources, and on 8 February 2017 the Claimant was invited to a grievance meeting. On 9 February 2017 the Claimant requested notes from some of the earlier meetings and these were provided.

66. The grievance meeting commenced on 16 February 2017 and the Claimant was accompanied. The meeting was very lengthy and during its course the Claimant sought to add new allegations, being those found at G and H in the list of issues before us. The meeting ultimately adjourned and reconvened on 23 February 2017.

67. Apparently, between those two meetings, Mr Graddon spoke informally to Mark Taplin who stated he had no recollection of the alleged threat from David John, although that alleged discussion was not noted.

68. Mr Graddon then held a few seemingly brief investigation meetings on 27 and 28 February 2017. He spoke at more length with Simon Dunn, New Car Sales Manager, who the Claimant said had witnessed the alleged threat from David John. Mr Dunn, however, was able to prove that he was not in the showroom on that day.

69. In relation to the alleged comment by Abid Rahman, Mr Dunn recalled that there was an issue with signing off one of the Claimant's files. He also said that he did not find this surprising as there were often problems with the Claimant's paperwork. He said that he couldn't recall if there was any swearing but he acknowledged that Mr Rahman was defiant. When Mr Dunn was asked whether Mr Rahman tended to swear at sales executives, he acknowledged that there was a bit of swearing in the office, albeit not aimed at any particular individual.

70. Mr Graddon interviewed another Sales Executive, Amar Bassi, described as Asian, who also did not recall the alleged comment by Mr Rahman. He also acknowledged that there was swearing in the dealership and that managers would refuse to sign off handovers if something was missing. He said that, whilst there was occasional banter, he had not witnessed anything that he considered to be racist, nor did he consider that the Claimant was treated in any way differently from anyone else.

71. Mr Rahman denied swearing at the Claimant. He also said that he had previously tried to help the Claimant with promotion interviews. That was not disputed. Mr Rahman was also of the view that, whilst the Claimant was good at sales, he often had issues when it came to handovers and completing all the necessary paperwork.

72. It was Mr Rahman's view, as a fellow Asian employee, that the Claimant was playing the "race card" and that he would say and do whatever it took to get himself out of trouble.

73. Mr Graddon's notes of his meeting with Alex H. Smith were not recorded and were incredibly brief. That was surprising given the nature of the Claimant's allegations. A number of the allegations were not even put to Mr Smith. In fact he was only asked about whether he had conducted any reviews in January 2017 and whether the Claimant had ever attended work on a Friday. He was not, therefore, asked directly about any of the allegations that formed the subject matter of these proceedings. Specifically, he was not

asked about the investigation into the Claimant's absence on Friday 30 December, nor the general allegations of bullying and harassment, nor the investigation on 26 January 2017. Incredibly he was not even asked about the alleged "Ma Chaud" and "Pane Chaud" comments. Indeed, no witnesses were seemingly asked about that.

74. As previously mentioned, during the course of the investigation, David John admitted telling the Claimant to "shut the fuck up" but said this was out of frustration at the Claimant interrupting him. He also claimed to have apologised to the Claimant later that day.

75. Mr Graddon did not seemingly speak to David John in relation to the McFadzean incident, despite the fact that he was the other main protagonist. He did not deal with the 30 December incident as a grievance issue at all. In relation to the denied holiday allegation, Mr Graddon admitted that he did not check the holiday rota, speak to Alex H. Smith about it, or address the matter in his outcome.

76. In relation to the "chaud" comments, Mr Graddon admitted the comments were potentially highly offensive and that he had failed to look into the issue. He did not even put it to the perpetrators, nor did he put the specific alleged wording to any witnesses.

77. On 5 March 2017, Mr Graddon sent the Claimant his grievance outcome. The only allegation that was partially upheld was that which was admitted by David John.

78. As already mentioned, a number of the allegations were not formally or properly investigated and, as a result, they were not properly addressed in the outcome. For example, there was no mention of the "chaud" comments, nor of the Claimant's refused holiday request, nor was there any mention of his sick pay.

79. There were also no findings in relation to the Claimant's allegations regarding him not attending work on 30 December 2016 and, specifically, that he had not received an outcome from the investigation or any confirmation that the matter had been dropped. Whilst this was not mentioned by Mr Graddon, it was apparent from his evidence that he considered that this matter was still "live". Mr Graddon knew, or at least ought to have known, that this was not the case. It seems to us that the reason for this was most likely that he wanted to keep pressure on the claimant in the hope of shifting the focus away from the claimant's complaints and back on to the claimant himself.

80. The Claimant appealed the grievance outcome at considerable length on 16 March 2017. He included some additional details that, if true, would make it, at best, surprising that he hadn't mentioned them sooner.

81. The Claimant attended his grievance appeal meeting on 18 April 2017. It was conducted by Tim Bradshaw, the Respondent's Operations Director.

82. In an email on the following day, the Claimant seemingly alleged that he had a recording of the alleged threat made by David John or, if he did not have the same, he suggested that the relevant witnesses be falsely informed that he did. Ultimately, such a recording was never forthcoming.

83. Mr Bradshaw conducted twelve investigatory interviews, considerably more than at the first stage grievance. He did not, however, speak to Alex H. Smith as he had apparently left the business. No attempt to contact him was made notwithstanding the failings at first instance in relation to the investigation with Mr Smith. Mr Bradshaw also did not speak to Mark Jones who had seemingly resigned but, nonetheless, remained employed at the relevant time. He could offer no credible explanation for that failing.

84. It is worth noting at this stage that the Claimant did not pursue the allegations of sex discrimination or disability discrimination, raised internally, before us. He did, however, make reference to allegations that he classed as sexual orientation discrimination although, again, they were not pursued. At times it appeared to us that he was throwing around as many allegations as he could to deflect from his own conduct and failings.

85. In relation to the Wallace incident, Mr Kerby had apparently told Alex H. Smith to send someone else to collect the customer's car. It was unclear why he did not do so and continued to insist on the Claimant collecting it.

86. Mr Bradshaw admitted that he didn't investigate whether David John had done handovers for others. He admitted that he did not ask David John at all about the McFadzean incident, nor did he ask Matthew Hill, Retail Manager, about handovers nor did he interview Mr Rahman about the allegations against him.

87. He acknowledged that he could have interviewed Alex H. Smith notwithstanding the fact that he had left.

88. He admitted that he did not investigate or provide any outcome to the Claimant's grievance in relation to his absence on 30 December 2016 including leaving the inappropriate threat of gross misconduct proceedings hanging over him.

89. Mr Bradshaw did not interview Simon Dunn, nor did he ask anyone about the allegations against Mr Rahman, including Spencer Eke, who the Claimant had specifically referenced as a potentially more independent witness.

90. Mr Bradshaw rejected the allegation that the "Chaud" comments had been used against the Claimant. He appeared to ignore or overlook the evidence of Samya Ahktar who had said that she had heard the phrases being aimed at the Claimant and that they appeared to affect him.

91. Mr Bradshaw, instead, seemed to suggest in his outcome that the Claimant had been complicit in this situation although the only evidence to support that was from Craig Jenkinson, the main protagonist. That allegation was never put to the Claimant.

92. Mr Bradshaw did not put allegation "I" to Mr Jenkinson.

93. Mr Bradshaw did not acknowledge any of the failings identified with regard to the first stage grievance.

94. We note that Mr Jenkinson was effectively dismissed for gross misconduct in relation to the "Chaud" comments yet, in the grievance appeal outcome, these allegations were effectively dismissed as banter.

95. That outcome was sent to the Claimant on 10 May 2017. The Claimant identified this outcome as the "last straw" upon which he ultimately relied in the context of his constructive unfair dismissal claim.

96. The Claimant resigned on 31 May 2017 and the Respondent accepted his resignation on 2 June 2017.

97. The Claimant suggested that he started applying for alternative jobs from around the middle of April 2017. The Claimant had suggested in his witness statement that he had been offered a position at BMW Coventry but that offer was subsequently retracted. In oral evidence the Claimant suggested that he received this offer prior to his resignation. He suggested that he did not resign on receipt of this offer because he wanted certainty and to be sure that he could still deal with the pressures of the job.

98. The Claimant subsequently produced the documentary evidence which suggested that he only applied for the BMW role after his resignation and, more tellingly, that he did not receive an offer of employment from them.

99. It seems to us, therefore, that either the Claimant received an earlier offer of employment that he did not disclose (as it may have influenced his decision to resign) or his claim that he received a job offer that was subsequently withdrawn was a fabrication.

100. The Claimant did secure alternative employment with Inchcape in Coventry commencing early in July 2017. We note that the Claimant in his schedule of loss significantly under declared his income from that employment. He had been ordered to produce an updated schedule of loss by no later than 9 April 2018, by which time he had secured another position on even higher pay.

101. The Claimant did make certain other allegations that became part of the issues in this case. We address those, in turn, in our decision.

102. The Claimant also made a number of other allegations before us. We also note that he made a number of other allegations in the grievance and/or appeal which were not pursued before us.

103. It was agreed that it was not proportionate for us to address any historic matters but we feel it is appropriate for us to briefly address a few of the Claimant's other more contemporaneous background allegations that he suggested could potentially support his claims for race discrimination and/or constructive dismissal.

104. The Claimant suggested that he was denied a review in January 2017 whilst white employees received the same. On this point we accept the Respondent's evidence that no employees had such a review. They should have done and, as a result, there was no reason for Alex H. Smith to admit this failing if it was untrue. Moreover, we note that during the internal proceedings, the Claimant claimed to have copies of the documentation for the other Sales Executives, yet he never produced the same. We suspect that this was another example of him saying whatever came into his head to support his narrative.

105. The Claimant also suggested that he was denied promotion opportunities or that he failed when applying for the same. He suggested that this was, in part, because of his race.

106. The Claimant referenced a couple of applications that he had made for management positions. He certainly was not denied the opportunity to apply but those applications were unsuccessful. We had very little detail in relation to one of those applications but the other was, apparently, for a management position at the Respondent's Solihull Honda Showroom.

107. The Respondent's evidence was that the reason the Claimant was unsuccessful in relation to this application was because he had failed a maths test. That did not appear to be disputed before us and, as a result, the Claimant's assertions were seemingly without merit.

108. In relation to this application, we note that the Claimant asserted that he had never met Jamie Miller, the Site Manager at Solihull Honda. He suggested, forcefully, that the evidence from Mr Miller about his application was a fabrication because he had never met the man. In his grievance meeting, however, when asked whether the Claimant had seen Jamie Miller, he stated that he could not recall. That seems to us far more likely than his more confident, but misplaced, assertions subsequently.

109. The Claimant further suggested that he was denied development opportunities but there was evidence before us that managers, such as Mr Rahman, had sought to assist the Claimant. The Claimant did not deny this. Moreover, we note that Mr Rahman was in a management position and the Claimant identified himself as being of the same race as Mr Rahman.

110. The Claimant did reference a white employee, Alec Smith, who was offered access to management information at a particular point in time but we are satisfied with the Respondent's explanation that this was due to a unique operational requirement and numerous white employees were not offered the same opportunity along with the Claimant.

111. Finally, in terms of the background allegations that we see fit to mention, the Claimant suggested that he was denied opportunities to go for product training in Germany. On this we accept the Respondent's explanation that this opportunity was primarily offered to the New Car Sales Team, for obvious reasons. The Claimant was unable to provide any clear evidence of any white male employees on the Used Car Team who had been sent to Germany since he had last had a similar opportunity.

The Law

112. The first claims were brought under s.13 Equality Act 2010 ("EqA") for direct race discrimination. This occurs when an employer treats an employee less favourably than an actual or hypothetical comparator and the difference in treatment is by reason of a protected characteristic. In this case the protected characteristic was alleged to be the claimant's race. It appeared that thirteen allegations of less favourable treatment were made.

113. It is for the claimant to show an identifiable disadvantage and we are reminded that mere difference of treatment is not enough. There has to be

"something more" linking the treatment to the protected characteristic. In addition, in considering the reason for the relevant treatment, the explanation for the less favourable treatment does not have to be a reasonable one.

114. We have to establish whether or not there was sufficient material from which we could conclude, on the balance of probabilities, that the respondent had committed an unlawful act of discrimination.

115. We reminded ourselves that with regard to the burden of proof under the Equality Act it is for a claimant to prove facts from which we could conclude, in the absence of adequate explanation, that the respondent has committed an unlawful act of discrimination, harassment or victimisation. If successful in doing so, the burden shifts to the employer to show a non-discriminatory reason for the treatment and it is for them to show that the treatment was in no way whatsoever tainted with discrimination.

116. The claimant also brought claims of harassment under s.26 EqA. We have to consider whether or not any of the claimant's treatment amounted to

i. unwanted conduct
ii. related to his race

that had the

iii. purpose or
iv. effect of
v. violating his dignity or
vi. creating an intimidating, hostile, degrading, humiliating or offensive environment.

117. With regard to the alleged effect we have to have regard to all the circumstances including the perception of the complainant and whether or not the alleged acts or omissions could reasonably be considered to have had that effect.

118. Section 27 of the Equality Act 2010 deals with the law in relation to victimisation complaints and we needed to consider whether the claimant had carried out a protected act and/or whether the respondent believed that the claimant had done or may do a protected act? The claimant relied upon his grievance of 28 January 2017. It was not disputed that this amounted to a protected act.

119. If there was a protected act we need to consider whether the respondent subjected the claimant to any of the alleged detriments because the claimant had done a protected act.

120. For a constructive unfair dismissal claim under s95(1)(c) and s98 Employment Rights Act 1996 we need to consider

i. What was the reason for the resignation? The claimant asserted that he considered that the respondent had breached the implied term of trust and confidence entitling him to resign. Specifically he referenced his above complaints.

ii. Has the claimant proved the matters relied on? The burden is on him.

iii. If so, were they serious enough to amount to a breach of the implied term of trust and confidence?

iv. If so, were they the reason for the claimant's resignation?

v. If so, did the claimant delay too long or otherwise affirm the contract?

vi. If there was a dismissal, was such dismissal fair in all the circumstances? The respondent did not advance a potentially fair reason.

Decision

127. The Claimant claimed direct race discrimination in relation to the specific allegations identified in the list of issues. He relied on the same allegations for the purposes of his claim of harassment related to race, although in relation to both, he dropped allegation (I) with that matter only being relied on as background.

128. The Claimant also claimed victimisation in relation to allegations J-M, although allegation L was dropped as an allegation of victimisation.

129. The Respondent conceded that the Claimant's grievance of 28 January 2017 was a protected act.

130. The Claimant was also claiming constructive dismissal relying principally on Acts A-M. If the constructive dismissal claim succeeded the Claimant was also claiming notice pay for a breach of contract.

131. As previously mentioned with regard to the historic allegations, we merely record that they were made and they were disputed by the Respondent. It was agreed that it was not proportionate for us to delve into them as the Claimant's case could only succeed or fail on the principal allegations before us.

132. The Claimant was employed by the Respondent from 2011 as a Sales Executive and had moved to selling used cars by the relevant dates in these

proceedings. He was line managed by Alex H. Smith. Another Sales Executive called Craig Jenkinson moved over from New Cars to Used Cars in or around the Autumn of 2016.

133. It is worth noting that whilst the Claimant did raise some historic allegations in his witness statement, it was also his evidence that all was largely well at work until what became known as the "McFadzean incident". The Claimant suggested it was only after this incident that he started to suffer "abuse" at work. It seems, therefore, that the Claimant was offering up a reason for his alleged subsequent treatment that was not related to his race. Nonetheless, we have considered each allegation in turn.

A

134. The Claimant alleged that he was forced to attend work on 28 October 2016.

135. The Claimant had agreed the sale of a vehicle to Mr McFadzean on 26 October 2016 and the customer wanted the vehicle to be handed over on the Friday, 28 October 2016.

136. That was the Claimant's normal day off and we heard that the reason for this was because the Claimant had Court Ordered contact with his eldest Daughter (then aged 2) on Fridays. We saw rotas that suggested that the Claimant normally had Fridays off and we accept that his daughter appeared to be the reason.

137. The Claimant's evidence was somewhat inconsistent in relation to when and whether he might have gone into work on his days off, including Fridays. It certainly appeared that he and others would often go in on their days off to hand over vehicles and there was some suggestion that they may have lost commission if they did not.

138. There was also evidence that sometimes staff would cover for people on their day off.

139. What was clear was Friday 28 October was the Claimant's scheduled day off and he had childcare responsibilities on that day. This was exacerbated by the fact that his partner (the mother of his second daughter) was seemingly unavailable to assist.

140. It was clear that the Claimant didn't want to come into work and wanted someone to cover for him. It was also clear that Mr John threatened him with a gross misconduct disciplinary if he didn't attend.

141. The Claimant then asked if he needed to come in and it seems he deleted that message from his phone. Given that deletion, the Respondent

had accused the Claimant of seeking to fabricate documents in legal proceedings. The Claimant suggested that he would endeavour to bring his mobile phone to the hearing in his witness statement, but it was not produced and the Claimant suggested that the reason was that it had been damaged by his daughters around Easter 2017. Clearly if the phone was already broken he would not have offered to bring it to the tribunal.

142. There are clear inconsistencies in that explanation and it seems to us most likely that the Claimant did delete a couple of messages from his phone and seek to hide that fact.

143. The Claimant explained to Mr John that he would come in after dropping his partner at the hospital and that suggests to us that the Claimant had discussed the need to bring in his children. That appears to be further confirmed by the fact that nobody seemed to raise an issue on the day with regard to the Claimant bringing his children in.

144. The customer was far from pleased that, in his view, the Claimant had been forced to come in with his children on his day off when there were others who were seemingly available and who could have done the handover for him. As a result, he complained to the Respondent.

145. It is clear to us that the Claimant was put under pressure to come into work on his day off when he had childcare responsibilities. That was unreasonable.

146. However, there was no evidence before us that race played any part in this decision.

147. The Claimant's clear evidence was that both he and others had come in on their days off to conduct handovers prior to this event, albeit the procedure apparently changed thereafter.

148. The Claimant said that Mr John often did handovers for Mark Jones but Mr Jones was Mr John's brother-in-law and so it seems to us that such preferential treatment, if any, was due to that relationship and not race.

149. The Claimant also suggested that Mr Jones had performed a handover for Craig Jenkinson although he was less clear about this and there was no evidence to support it. It appeared that Mr Jenkinson had only relatively recently joined the Used Car Department.

150. Moreover, there were two other white Used Car Salesmen and no suggestion that handovers were done for them. As a result, on the evidence,

we can only conclude that they came into work on their days off and we imagine they did so because they felt compelled to.

151. It also appears on the evidence that the Claimant did come in on other days when he didn't have childcare responsibilities. It is clear, therefore, that it was the Claimant's childcare responsibilities that were the distinguishing factor in this case and so his treatment was not related to his race, nor was it less favourable because of his race.

152. Nonetheless, it was clearly unreasonable to put the Claimant under pressure to come in on his day off when he had explained that he had childcare responsibilities. Additionally it was unreasonable to threaten him with gross misconduct proceedings in those circumstances.

153. Those were matters which could potentially contribute to a breach of trust and confidence, although we note that ultimately the Claimant carried out the handover, received his commission on the sale and was not subjected to any disciplinary proceedings.

154. Another incident arose with regard to the Claimant being required to come into work on a Friday and this was in relation to the Respondent's Christmas rota, which required the Claimant to work on Friday 30 December 2016.

155. We saw evidence that the Claimant had been on the rota to work this Friday from June 2016 and the Christmas rota was confirmed in October 2016.

156. The Respondent said that the Claimant didn't raise this as an issue until on or around 29 December when he had already taken his day off in lieu the previous week.

157. The Claimant's evidence before us was that he had raised this issue numerous times with management and it had been agreed that it would be "sorted". He also suggested that he had put in a holiday request to cover having a day off on that Friday. His own evidence, therefore, was inconsistent because if he had raised the issue and management had agreed to resolve it, there was no need for him to put in a holiday request.

158. For all the reasons given in our findings of fact, we do not accept the Claimant's version of events. It appears that the Claimant did not raise the issue until he had already taken his day off in lieu and, indeed, he left it very much to the last minute. When asked at the time why he had not raised the issue before, he merely said that he assumed that he would have the day off.

159. It was not unreasonable for the Respondent to have put the Claimant on the rota to work on a Friday with so much notice when it was entirely possible that his childcare arrangements may have been different over Christmas.

160. It was unreasonable for the Claimant not to raise this until the day before he intended to be off.

161. The Claimant was not, in any event, forced to attend work as he didn't attend on 30 December 2016. He was, however, threatened with gross misconduct proceedings if he did not attend.

162. It was not surprising that the Respondent was concerned about the Claimant not having raised this issue until the day before, particularly as it was necessary for them to ensure minimum staffing cover over the Christmas period. The Claimant should have raised it sooner and must have been aware of the Christmas rota because he had taken his lieu day the previous week.

163. It seems to us that the Respondent would have reacted in the same way for any employee seeking to alter the agreed Christmas rota at such short notice. There was no evidence that the Claimant's treatment was related to his race, or less favourable because of his race. In any event the Claimant's own evidence was that his treatment in relation to this matter was caused by the McFadzean incident.

B

164. In light of our findings in A above, it seems to us that it was reasonable for the Respondent to commence an investigation to understand why the Claimant had not raised the issue of his day off sooner, why he had taken his lieu day and why he didn't attend for work when instructed to do so.

165. That said, contrary to the allegation, the Claimant was not disciplined in relation to this incident. It was confirmed in evidence that the reference to a "petulant child" was not actually made at this investigatory meeting but at the investigatory meeting on 26 January 2017, a point to which we shall return.

166. The Claimant did suggest that others who turned up to work late or not at all would be treated differently, but all those circumstances described were different from one where an employee notifies his employer that he is not going to come in at the last minute and has no good reason for not raising the issue sooner.

167. We are satisfied that the Respondent would have investigated any employee in similar circumstances and it was reasonable for them to do so.

168. That said, once the Claimant had given an explanation and explained again about his childcare responsibilities, the issue, it seems to us, became more one of late notification rather than being absent without leave or defying a reasonable management instruction.

169. Nonetheless Alex H. Smith ended the investigation meeting suggesting that the incident was potentially gross misconduct.

170. Alex H. Smith said he would get back to the Claimant about what would happen next but there was no evidence that he did so. The Claimant said that he didn't.

171. The evidence of Mr Kerby was that he had advised Mr Smith to drop the matter, giving the Claimant the benefit of the doubt as there was a clear pattern of Fridays off and it could potentially have been a genuine misunderstanding. He couldn't say, however, whether or not this advice was heeded, nor whether it was conveyed to the Claimant.

172. Mr Graddon, when later hearing the Claimant's grievance, clearly suggested that this matter was still "live", so we accept the Claimant's evidence that he was not informed and it was unreasonable and unfair to leave such a serious potential disciplinary issue hanging over him. It seems to us to have been opportunistic on the part of Mr Graddon to attempt to maintain this as a "live Issue" probably as retaliation for, or defence to, the claimant's grievance.

173. Strictly speaking the failure to conclude this matter was not how the Claimant put his case but, in any event, there was no evidence to suggest that race had played any part in the Respondent's actions. There were no comparable comparators and no evidence that a hypothetical white employee in similar circumstances would have been treated any differently. The claimant was principally responsible for the situation in which he found himself.

174. Again, the Claimant suggested that the reason for his treatment was as a result of the McFadzean incident and so, even if he was less favourably treated, that was the reason and not his race.

C

175. The Claimant alleged that on the 5 November 2016 Abid Rahman, Retail Manager, refused to sign off one of his handover files and swore at the Claimant.

176. We did not hear from Mr Rahman but note that he denied this allegation in the internal proceedings. There was supporting evidence for the fact that Mr Rahman did refuse to sign a file off but the specific comment was denied and no witnesses interviewed seemingly overheard it, although we note that the most independent potential witness, Spencer Eke, was inexplicably not asked this in the internal proceedings.

177. The Claimant raised this issue in his initial grievance and was consistent about it throughout. It seems to us that the event did happen and it appears to have been based on a diary entry of the Claimant as he was able to be very precise about the date and time. Simon Dunn recalled the incident but couldn't recall if Mr Rahman had sworn but accepted that he did sometimes swear and was "defiant" on this occasion.

178. As a result, notwithstanding the other considerable inconsistencies in the Claimant's evidence, and in the absence of hearing from Mr Rahman himself, we prefer the Claimant's evidence that he was sworn at on this occasion.

179. Again, however, we do not consider that there was any evidence that his race had played a part in this. There was clear evidence that managers would not sign off handover files if there was a problem with them and that would be the case for all employees. There was also evidence that there was a culture of swearing at times and nothing to suggest that this was particularly targeted at any one individual.

180. We note that Mr Rahman was Asian, as described by the Claimant, so there was nothing from which to infer race discrimination or harassment either.

181. The Claimant clearly linked this incident to the McFadzean incident and affirmed in evidence that it was his belief that the McFadzean incident was the reason for his treatment. As a result, his treatment was not related to race, nor was it less favourable because of race.

D

182. The Claimant alleged that on 18 January 2017 David John told him to "shut the fuck up or I'll smash your face in".

183. Mr John admitted swearing at the Claimant but denied the threat.

184. For all the reasons in our findings of fact, we do not consider that the Claimant's evidence in relation to the alleged threat was credible. He was inconsistent throughout and sought to embellish and exaggerate the allegation as time went on. If it was a serious as he suggested before us, we

have no doubt that he would have raised it at the time and been explicit about a physical threat in his grievance.

185. We also note that the Claimant suggested, seemingly falsely, that he had a recording of the incident.

186. It seems to us that he would also have made reference to the alleged physical threat in his claim form and witness statement. By physical threat we mean the allegation that Mr John stood up, and squared up, to the Claimant, which he only mentioned in oral evidence before us.

187. We find the Claimant's evidence unreliable in relation to the alleged threat and thus he has failed to establish that this occurred. There was no supporting evidence for the allegation from those who allegedly witnessed it and, indeed, the Claimant's evidence in relation to when, or whether, Mr Taplin became involved and what he said was inconsistent throughout.

188. That said, we note in the grievance appeal outcome that the Respondent had suggested there was an inconsistency in the Claimant's evidence in relation to the alleged threat by, on the one hand, saying the specific words but elsewhere suggesting that Mr John responded in a foul mouthed way that the Claimant could not make out what he was saying. That was not actually an inconsistency as the Claimant was alleging the specific comment was followed by a further foul mouthed rant. It suggests, however, that the respondent was seeking to undermine the claimant's claims, sometimes but not always, without just cause.

189. The Claimant has only established, therefore, that Mr John swore at him. That was inappropriate. There was no evidence to support the suggestion that the Claimant was being annoying.

190. That said, there was clear evidence before us that there was swearing in the workplace and there was no evidence that this was targeted at any particular individual. The Respondent acknowledged that swearing went on and that this was inappropriate but found no evidence of any employee being treated differently in this regard.

191. As a result, the Claimant may have suffered inappropriate treatment but, as with the previous allegations, he has failed to establish facts from which we could conclude that he was treated less favourably than others, nor that his treatment was because of or related to his race.

192. Accordingly, even if the Respondent's treatment of the Claimant did create an intimidating and hostile working environment (and, in context, we do not accept that it did) it was not related to the Claimant's race.

E

193. There was no dispute that the Claimant made a holiday request in January 2017 to take leave in the latter half of August 2017. It was also not disputed that this request was refused.

194. The Claimant's contract made it clear that no holiday would be authorised during the last two weeks of August. It appears clear that this was the reason that the Claimant's request was refused.

195. The Claimant acknowledged that the rule was ordinarily complied with but he did reference an alleged comparator. He said that a white sales executive had been allowed to take holiday the previous year in a restricted period. The reason was that the employee had apparently booked his holiday before getting his leave approved.

196. The Claimant suggested that there was a considerable argument over whether that leave should be granted, which suggests that it was initially refused just like the Claimant's request.

197. Moreover, the Respondent adduced evidence of an Asian employee who had been permitted to take leave in the restricted period in a previous year.

198. For all those reasons, the Claimant has failed to establish facts from which we could conclude that he has been treated less favourably because of his race, or that the test for harassment was met. The Claimant's holiday request was refused in accordance with his contract.

F and G

199. The Claimant suggested that, after the McFadzean incident, he began to be subjected to inappropriate racial remarks. He said that he was, thereafter, referred to by Mark Jones, David John and Craig Jenkinson as "Apu" an Indian character from the Simpsons TV programme. He said that whenever he was spoken to, or spoken about, this name was used.

200. The Claimant also alleged that these individuals would speak to him in a thick Indian accent whilst nodding their head from side to side. He also suggested that they made jokes about him being better off in a corner shop or selling curries.

201. This, of course, is a very serious allegation and would amount to clear discrimination and harassment if the allegation were made out. We do not, however, accept that the Claimant has established the facts on which he seeks to rely.

202. The Claimant made no mention of these allegations in his original grievance and in his lengthy grievance hearings. It seems to us highly unlikely that, if the allegations were true, the Claimant would not have mentioned them. Indeed, they were only mentioned in passing in his appeal.

203. These allegations were investigated fairly extensively during the appeal and there was not one witness to support the "Apu" allegation. Given that the Claimants allegation was that this term was used every time he was spoken to, or spoken about, he must have been suggesting that it was used every day, often several times per day, and it is inconceivable that others would not have heard this.

204. We note that a number of internal witnesses were independent, some were Asian, and some did support the Claimant in relation to some of his allegations. If any of them had heard the use of this term, they would surely have had said so. There was no reason for them to lie. We do not accept that, following such frequent alleged usage, some, or all, of them would not have heard such a comment had it been made.

205. In addition, the Claimant's allegation was that this only started after the McFadzean incident. That made no sense. If the relevant individuals were as racist as claimed, they would have been engaging in such behaviours from the outset and their conduct would not be triggered by any particular work event.

206. The Claimant also suggested that he was referred to as Apu in front of customers and it seems to us highly unlikely that none of them would have complained.

207. In addition, to support this allegation, the Claimant called his brother to give evidence. However, Mr Ram's evidence was so unreliable as to further undermine the Claimant's assertions.

208. Mr Ram suggested that he had attended the Respondent's showroom in January 2016 to give the Claimant a lift home. He said that he arrived at the reception area and Mark Jones said to him "oh you must be Apu's brother" and, when challenged about this, Mr Jones repeated that the Claimant's name was "Apu".

209. Mr Ram alleged that David John would have overheard this and that he complained to Mr John about the racially motivated banter, but was told it was just a bit of fun.

210. He suggested that Mark Jones continued to reference corner shops and Apu as they were leaving.

211. We found Mr Ram's evidence to be entirely unconvincing. Firstly, he suggested the incident occurred in January 2016, many months before the Claimant alleged that this abuse commenced. The Claimant suggested that his brother must have got the date wrong and that he meant January 2017, but we note that Mr Ram checked his statement in front of us, and affirmed it, even making one small amendment.

212. Moreover, he suggested in oral evidence that a few months before this alleged incident he had called the dealership enquiring about purchasing an Audi. He put that date in 2015, confirming the 2016 date in his evidence.

213. In addition, we find it highly unlikely that Mr Ram would have called the dealership to enquire about purchasing an Audi without first speaking to his brother who worked there.

214. We also consider that it is highly unlikely that a Sales Executive, when approached in a car showroom by an Indian gentleman who he did not know and who, therefore, was likely to be a potential customer, would act in an overtly racist way, however racist the individual may have been.

215. We also consider it highly unlikely that Mr Ram would have noted the names of the two individuals that he spoke to from their name badges but, if he did, he would have had no reason to confirm this with his brother in the car thereafter as he claimed.

216. Finally, we do not think it conceivable that, if this event had occurred, the Claimant would not have mentioned it as a specific example of his allegations in the grievance process or, at least, referenced the specifics of the incident allegedly witnessed by his brother sooner.

217. For similar reasons we do not accept the Claimant's evidence that he was always spoken to in an Indian accent, nor that there was a culture of repeated racist jokes. The Respondent employed a number of Asian staff and only one supported an assertion that they had overhead banter related to an Indian racial stereotype.

218. We are prepared to accept, therefore, that there may have been occasional inappropriate race related banter, but this is best considered in conjunction with allegation H. Beyond that the claimant has failed to establish the facts on which he sought to rely.

H

219. The Claimant alleged that Craig Jenkinson and Mark Jones used offensive remarks such as “ma chaud” and “a pane chaud”. These are apparently north Indian phrases that mean something like “mother fucker” and “sister fucker”.

220. It was common ground that these phrases were used between Mr Jones and Mr Jenkinson and there was some supporting evidence, ignored or deliberately overlooked in the internal proceedings, that they were occasionally directed at the Claimant and had a noticeable, but mild, adverse effect on him.

221. The Claimant suggested that these phrases only started being used after the McFadzean incident. That seems to us to be improbable. It seems more likely that they started when Mr Jenkinson joined the Used Car Team at around the same time.

222. Whilst Mr Jenkinson suggested that the Claimant had used these terms first, there was no other supporting evidence that the Claimant had ever used such language and we are willing to accept that he did not. We did not hear from Mr Jenkinson and his evidence at the grievance appeal on this issue was inconsistent.

223. That said, we do not think that the use of these comments was as distressing as claimed for the Claimant mainly because he did not raise them at all in his initial written grievance and he only mentioned them in passing in his grievance hearing.

224. As with many of his allegations, over time, they appear to have been exaggerated and embellished as was the alleged effect that they had on him.

225. In the grievance hearing, it appeared that the Claimant only mentioned this allegation because he had been reminded of it by a customer he met whilst out shopping. That suggests to us that this issue did not have anything like the major impact on the Claimant that he asserts. We refer to our earlier findings on his credibility in this regard.

226. We do not accept that the Claimant had previously raised objections to this behaviour with management. It seems to us that, if he had, it would certainly have made it into his written grievance, but it did not at that stage. Also, if the Claimant was as offended as claimed, he could, and should, have raised a grievance sooner.

227. Nonetheless, these were highly offensive remarks. Whilst it appears that they were largely used between Mr Jones and Mr Jenkinson, there was

supporting evidence to suggest that they were occasionally used towards the Claimant.

228. The Respondent suggested that this was just banter, was not racially motivated and was, effectively, no different from other forms of banter and swearing in the workplace. Whilst acknowledging that it was inappropriate, they did not consider that race played any part in the situation.

229. That is a position which we can not accept and which appears to be almost wilful blindness on the part of the respondent. It seems to us that if individuals swear in a particular language that can only be understood by those of a particular race and those individuals take offence, then that must be less favourable treatment because of race. It is targeted in terms of the audience, whether consciously or not.

230. Indeed, on some occasions, the comments were targeted at the Claimant, a point unjustifiably rejected in the appeal outcome, and we do not think that they would have been had he been a white English employee. That is partly because white English employees would not understand the phrase. As a result there would be no detriment to them in hearing it and that further confirms our findings on less favourable treatment. For example, some heard the phrase “pane chaud” as “Ben George”.

231. Accordingly, we are satisfied that the Claimant was subjected to these remarks and that this did amount to direct race discrimination. The Claimant has established facts from which we could conclude that and the Respondent could offer no cogent explanation to the contrary.

232. We note in terms of the effect on the Claimant, however, that he initially referred to these matters as silly or stupid and only subsequently magnified their alleged effect on him. In relation to the somewhat academic question of whether or not this also amounted to harassment under the Equality Act we are less convinced.

233. We note the relatively high hurdle of the strong language used in Section 26 of the Equality Act and specifically that conduct must have the purpose or effect of violating the Claimant’s dignity or creating an intimidating hostile, degrading, humiliating or offensive environment.

234. We are not sure that such a finding could be supported given that the Claimant only raised this issue in passing at his grievance hearing, having been reminded of it by a customer outside of work.

235. Accordingly, whilst we consider that the conduct was certainly capable of amounting to harassment, we are not convinced that, in the circumstances

of this case, it did. Specifically, we do not accept that the claimant's perception was as claimed.

236. We would acknowledge, however, as mentioned above, that there was some supporting evidence to suggest that inappropriate banter based on racial stereotypes may also have occasionally taken place in the showroom but far less often than claimed. We acknowledge that this too would amount to direct race discrimination as only those from an Asian or Indian background were likely to be offended by such stereotypes or rather they were more likely to be offended and/or more likely to be more offended than others.

I

237. This allegation was dropped as an allegation of race discrimination and harassment. It was suggested that in December 2016 when the Claimant had challenged Craig Jenkinson's behaviour he had responded "I am only fucking about, listen I think you'll find that since I am a better performer than you, they would be reluctant to say anything to me."

238. We note that this allegation was inexplicably not put to Mr Jenkinson in the internal proceedings and, of course, we did not hear from any of the alleged discriminators or abusers.

239. We note that the Claimant had initially suggested to us that he was one of the top performers. As a result, it seems to us unlikely that he would manufacture an allegation that included insight into the fact that, at the relevant time, Mr Jenkinson was out performing him.

240. The comment does seem to accord with Mr Jenkinson's general response to the allegations when they were put to him in the grievance appeal investigation and, as a result, we are prepared to accept that this comment was made, although we are less clear about the likely context.

241. As an aside, we note at this stage that the claimant claimed that when he had appealed his grievance outcome, Mark Jones was effectively given a resign, or be dismissed, ultimatum. That seemed unlikely given the timeline and the fact that Mr Jenkinson was not spoken to until much later. It also did not accord with Mr Jones' resignation and leaver documentation. Perhaps more telling was the fact that the Claimant, in oral evidence, suggested that Mr Jones had telephoned him and had been threatening and abusive, calling him a "Paki", and blaming him for the fact that he had lost his job. The fact that this had never been mentioned in the internal proceedings, the claim form or the claimant's witness statement suggests to us that this was another embellishment.

J

242. We have highlighted in our findings of fact numerous failings in the handling of the Claimant's grievance and appeal. That list was not exhaustive, but included significant failings in the investigation processes and also in the outcomes.

243. We would acknowledge that the Claimant was making numerous allegations, including many of those pursued before us and, indeed, several others. Moreover, he seemed to take an approach of adding and embellishing as he went along. That made it difficult for the Respondent. That said, the failings were sometimes glaring and inexcusable. In those circumstances one or two failings may have been understandable, but the many failures to interview key witnesses, ask about core allegations and make findings in relation to a number of central allegations was, at best, inadequate.

244. The question for us is whether or not this was less favourable treatment because of the Claimant's race or victimisation because he had raised a race grievance.

245. We do not consider this allegation amounts to harassment as the Claimant raised his grievance after he had gone off sick and he never returned to work. As a result, whilst we would accept that failing to properly investigate or uphold relevant grievances could, potentially, be part of a failure to address an intimidating, hostile, degrading or humiliating environment that does not appear to be the best way to address this issue.

246. There was no specific evidence of a white comparator receiving a more thorough grievance investigation or outcome although we would like to think that an employer of this size would, ordinarily, do much better. It may well be that some unconscious race related bias impacted the numerous failings in the grievance and appeal process but there was insufficient evidence for us to conclude the same.

247. It seemed to us, however, that a number of the failings were linked to the fact that the claimant had raised allegations of race discrimination.

248. At the first stage grievance, the only overtly racist allegation, the "chaud" comments were completely overlooked or, potentially, deliberately brushed under the carpet. The allegations of differential treatment were not properly examined. The focus appeared to be on disproving the claimant's allegations and putting the blame back on him.

249. There was also the attempt to resurrect, or at least maintain, the investigation into the claimant's absence on 30 December 2016. This

appeared to us to be an attempt to subject the claimant to a detriment and the most likely explanation was that he had raised a discrimination grievance.

250. Then, at the appeal, it was suggested that there was no evidence of race related banter when there was. It was suggested that there was no evidence that this was targeted at the claimant, when there was.

251. Whilst there was an acknowledgment that the “chaud” comments were made there was no acknowledgement that the claimant may have been upset by this, despite some evidence in support. Instead the respondent sought to suggest, based solely on the inconsistent evidence of one of the perpetrators, that the claimant had been complicit in such comments, despite no other supporting evidence and not even giving the claimant the opportunity to respond to this allegation.

252. All of the above painted a picture of a respondent running scared of the race allegations, seeking to ignore them, downplay them or blame the claimant for them. That is further confirmed in our findings in K below.

253. As a result, we are satisfied that the claimant has established facts from which we could conclude that the at least some of the failings in the grievance and appeal process were because he had made allegations of race discrimination. The respondent could offer no cogent alternative explanation. The claimant’s victimisation complaint succeeds on this issue.

K

254. The Claimant complained that the offensive comments directed at him were labelled as “banter”. It was clarified that this related to the “chaud” comments. It may well be that the intention of those responsible for making these comments was misplaced humour but the respondent was, at best, insensitive to label them as such.

255. The comments were, potentially, very offensive. They were sometimes directed at the Claimant. There was some supporting evidence that they had an adverse effect on him. The Respondent failed to even speak to Mark Jones about the allegations and went on to say, wrongly, that there was no evidence to support the fact that he was involved.

256. Moreover, the Respondent dismissed Mr Jenkinson for his actions in this regard and yet they then seemed to attempt to downplay the seriousness of the allegation in their responses to the claimant's grievances. They only partially upheld the allegation and offered no sound reasons for doing so.

257. That said, the Respondent did not completely dismiss the issue as banter. They referenced the fact that both the Claimant and witnesses had referred to it as such and, ultimately, concluded that it was misplaced/unacceptable banter. Their principal failing, it appears to us, is that they failed to acknowledge, even before us, the inherent racial connotations.

258. The Respondent also seemed to suggest that the Claimant had, in fact, been the first to use this term and was complicit in its use. This was not an allegation that was ever put to the Claimant, although the appeal outcome seemed to inappropriately threaten a possible disciplinary in this regard on the Claimant's return.

259. It seemed that the only evidence on which the Respondent relied was that of Craig Jenkinson. He obviously had a motive for saying that the Claimant was complicit and his evidence in the appeal investigation was inconsistent. For example, he initially stated that the Claimant had first aimed the term at him. Subsequently he acknowledged that it had never been directed at him but he claimed that he had overhead the Claimant saying it to others. He was vague about this, alleging that the Claimant was communicating with customers or friends as opposed to fellow employees so the Respondent would be completely unable to corroborate it in any event.

260. None of the other internal witnesses seemed to support Mr Jenkinson on this. It was, therefore, in our view inappropriate to allege that the Claimant was complicit in the use of this phrase, let alone to potentially threaten action against him in the grievance appeal outcome.

261. We do not think that the respondent's actions in this regard were because of the claimant's race but they were because the claimant had made allegations of race discrimination. Our rationale flows from our findings in J above

262. Within allegation K, the Claimant also alleged that within the grievance and the appeal process he was told that he had been acting in an annoying manner. It seemed that this allegation related to allegation D and his approach to David John.

263. We note that the Claimant acknowledged that he had been insensitive to Mr John and that he could be intolerant of people who used their mobile phones at work.

264. There was some evidence from other witnesses that suggested that the Claimant could be a difficult employee and it was not unreasonable for the

Respondent to seek to get the Claimant to acknowledge his part in the situation. That is not, in any way, to excuse Mr John's response.

265. It seems to us that the Claimant was more than willing to throw numerous allegations around, including ones for which he had no evidence and others which were considerably embellished, yet throughout he was unable to accept any responsibility for his own conduct and failings.

266. Accordingly in relation to this part of the allegation, whilst the choice of language may have been ill advised, we do not consider it could possibly amount to less favourable treatment or a detriment and, in any event, it adds little or nothing to allegation J in the wider sense in which we have considered it.

L

267. The Claimant made allegations about the Respondent invoking an unreasonable investigation without foundation. It was confirmed that this related to the investigation meeting held with him on 26 January 2017. In relation to that meeting, he raised a number of points including reference to the somewhat robust script provided by Mr Kerby, which included the claimant being accused of being a "liar" and a "petulant child" and what he considered to be an inappropriate threat of gross misconduct proceedings.

268. The Claimant also alleged that the script had been circulated amongst staff, although there was no evidence to support that. It seems to us that a copy may well have been inadvertently left on the printer and, if so, that was unfortunate.

269. Whilst we have some sympathy for the Claimant's concerns as expressed above, it was clear to us that, looking at the situation as a whole, the Respondent had received a customer complaint and a significant part of that related to the Claimant's actions and omissions.

270. Specifically, there was clear evidence of the Claimant failing to reply to messages from Mr Wallace and, more tellingly, the Respondent had a recording of the Claimant responding to an allegation of having lied to the customer (which he did not deny) by saying "I am bored".

271. Those are circumstances in which any reasonable employer would have commenced an investigation and, we are sure, ultimately these matters would have progressed to a disciplinary hearing and, possibly, a dismissal.

272. Those allegations alone were potentially gross misconduct even before considering the Claimant's initial reluctance to comply with the management request to collect the car.

273. The investigation was not, therefore, without foundation or unreasonable and the allegation must fail, notwithstanding the fact that the Respondent could, and should, have handled the matter more objectively. There were no facts from which we could conclude race discrimination or harassment had occurred and the claimant, rightly, dropped this as an allegation of victimisation.

274. In fact, we consider that the claimant was well aware of his own misconduct in relation to this issue and knew he had little or no defence. It was this which we consider triggered his sickness absence, which also caused him to raise his grievance and which, ultimately, was the principal reason for his resignation.

M

275. The Claimant suggested that the failure to pay him sick pay was race discrimination, harassment, and/or victimisation. We fail to see how this allegation could work as harassment and, in any event, the Respondent was merely following its contractual policy.

276. The Policy stated that company sick pay would not be paid when an employee went off sick during an investigation and the Claimant was under investigation when he went off sick. In those circumstances, the reason he was not paid company sick pay was because of the Respondent's policy and was not in any way related to his race or his protected grievance.

277. We are sure that the Respondent would have treated a white employee in similar circumstances in exactly the same manner, although there was no evidence either way on that.

Constructive Dismissal

278. In light of all the above, the allegations that we have upheld and, in noting those allegations which were upheld in part or upheld but not deemed to amount to discrimination, we are satisfied that the Respondent had breached the implied term of trust and confidence implicit in every employment contract.

279. There were a number of inappropriate actions, swearing and some race related abuse. There was a failure to close off a disciplinary investigation and then a deeply flawed grievance and grievance appeal.

280. It seems to us that those were matters which, when considered together, were calculated or likely to breach the implied term of trust and

confidence and the Claimant would have been entitled to rely on them to resign and claim constructive dismissal.

281. That is not to say that we accept that this was the reason for his resignation. We do not. We consider that, for the reasons already given, the effective cause of the claimant's resignation was the fact that he knew he was facing disciplinary allegations in relation to the Wallace incident and that he had no defence to the same.

282. It was made clear in the appeal outcome that the investigation into these matters would need to continue and, it seems to us that this was the effective cause of the claimant's resignation. His attempts to deflect from his own failings by raising his grievances, even those that were well founded, had failed.

283. It seems likely that the 3 week delay between the outcome of the appeal and the resignation was a period in which the claimant was attempting to find a way to avoid the inevitable consequences of his actions and, when unable to do so, he was left with no alternative but to resign. He gave us unconvincing and inconsistent evidence in relation to his actions during this period.

284. Accordingly his claims for constructive dismissal and for notice pay must fail.

Time Limits

285. For completeness we should address the time limit jurisdictional points. There was no dispute that the victimisation complaints were in time.

286. There were no specific dates put on the incidents of a race related banter or the "chaud" comments but it was clear that they formed part, albeit only a small part, of a continuing working environment that continued up until the claimant went off sick. The claimant first entered early conciliation on 19 April 2017 and so did so within 3 months of those matters occurring.

287. In any event, it was reasonable for him to pursue the internal processes first and it would have been just and equitable to extend time for those matters to be considered.

Remedy

288. It should be clear from our findings that the only possible award to which the claimant is entitled is one for injury to feelings. In that regard, we note that most of his claims failed.

289. It should also be clear that, even in relation to his successful claims, we consider that the claimant exaggerated their significance and impact on him.

290. We would hope that the parties would able to resolve the outstanding matters between themselves but, if not, a provisional remedy hearing has already been listed. If the parties are able to resolve matters they should notify the tribunal as soon as possible.

Employment Judge Broughton

Date: 1 June 2018

ANNEX

The Issues

Taken directly from the agreed document.

Jurisdiction – time bar

1. Does the Tribunal have jurisdiction to hear the Claimant's complaints which extend beyond three months prior to the early conciliation process?

2. Does the conduct complained of amount to a continuing act as set in Section 123 (3) Equality Act 2010?

3. If they are not considered continuing acts, is it just and equitable for the Tribunal to hear the complaints in according with Section 123 (1) (b) Equality Act 2010?

Constructive Dismissal – Section 95 Employment Rights Act 1996

4. Did the Claimant terminate his contract of employment under which he was employed in circumstances in which he was entitled to terminate it by reason of the employer's conduct during his employment culminating in a breakdown in the trust and confidence of the Claimant in the Respondent under **s.95, (1) (c) ERA 1996**?

5. In this regard the Tribunal will need to consider whether :

i. the employer has breached the employment contract;
ii. the breach was sufficiently serious to be repudiatory;
iii. the Claimant resigned at least in part, in response to the breach;
iv. the Claimant did not affirm the contract prior to resignation; and
v. The Claimant did not delay too long in submitting his resignation.

6. The Claimant relies upon a breach of the implied term of trust and confidence to establish the fundamental/repudiatory breach of contract.

Direct Discrimination – Section 13 EqA 2010

7. Did the Respondent, because of the Claimant's race, treat the Claimant less favourably than the Respondent treats or would treat others in respect of the less favourable treatment alleged by the Claimant?

8. The Claimant's case is that the following acts amounted to less favourable treatment:

See acts A to M below

9. Is there a real or hypothetical comparator? If a real comparator, who is the Claimant referring to?

Harassment by way of unwanted conduct – Section 26 Equality Act 2010

10. Did the Respondent or those set out in the statement of case act in a manner which would be perceived as unwanted conduct?

11. The Claimant relies upon Acts A-M below

12. Did that conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, degrading, offensive, humiliating or hostile environment for the Claimant?

13. What was the perception of the Claimant in relation to the alleged unwanted conduct?

14. What were the other circumstances of the case?

15. Was it reasonable for the conduct to have that effect?

Victimisation – Section 27 Equality Act 2010

16. Did the Claimant undertake a protected act? If so, when?

a. The Claimant relies upon the grievance he raised in January 2016 together with the appeal process as amounting to a protected act.

17. Did the Claimant receive a detriment in consequence of raising the protected act?

a. The Claimant relies upon the Respondent's conduct as set out at J-M below

18. If so, did the Respondent subject the Claimant to this detriment because of the protected act?

19. Did the Claimant raise these allegations in bad faith? [this did not appear to be pursued by the respondent]

Personal Injury

20. The Claimant maintains that he has become unwell suffering with stress, anxiety, depression, insomnia and hypertension in consequence of the Respondents actions.

21. Can the Claimant show he suffers with the above complaints and that they amount to a personal injury?

22. Has the conduct complained of caused the injuries as referred to above?

23. If so, does this amount to a personal injury?

24. Does the Claimant suffer from any pre-existing condition in respect of the psychiatric injury alleged?

25. If not, can it be shown that the Respondent was directly responsible for such injuries?

26. If there was a preexisting condition, to what extent, if any, is the Respondent directly responsible for such injuries?

Notice Pay

27. Has the Respondent failed to provide the Claimant with his notice pay?

29. If deemed appropriate should this be provided to the Claimant?

Aggravated Damages

30. What was the aggravating act?

31. Is it linked to the injury suffered by the Claimant?

32. If so, has the Respondent's conduct, if so found, had an aggravating effect on the Claimant's injury to feelings?

Remedy

33. What remedy is the Claimant entitled to? Specifically:

34. What loss has the Claimant suffered as a result of his dismissal by the Respondent?

35. Should any award of compensation be reduced pursuant to the principles contained within Polkey or Section 123(6) of the Employment Rights Act 1996 for contributory fault?

36. Should an award be given for the injury to feelings suffered by the Claimant? If so, using which band of Vento?

37. If so, should an uplift be applied to include consideration of Simmons and Castle.

38. Should an award of compensation be given for the personal injury complaints, if so how much?

39. Should an award be given for aggravated damages, if so how much?

40. Interest in such sums for a period deemed reasonable.

41. Was the Claimant entitled to company sick pay? If so, should he be awarded the difference between Statutory Sick Pay and Company Sick Pay from January 2017- May 2017?

42. **The Nature of the Acts:-**

A. The Claimant was forced to attend work on his days off, namely 27 October 2016 and 30 December 2016.

B. Being formally investigated and disciplined for not attending work on his day off, whilst being called a petulant child 3 January 2017. [It was confirmed that the actual date was 4 January 2017 and the "petulant child" allegation related to 26 January 2017.

C. Not signing off the Claimant's handover and making the comments "I'm not signing this f**king file off, as all you do is stitch us managers up"

D. Comment made on 18 January 2017 by David John "shut the f**k up or I'll smash you fact in".

E. Failing to agree and allow annual leave in August 2017.

F. Referring to the Claimant as "Apu".

G. Making racial jokes, gestures and accents when speaking to Claimant or nearby him.

H. Offensive remarks such as "a ma chaud" and "a pane chaud".

I. Comment made when the Claimant challenged the behaviour "I'm only f**king about, listen I think you'll find that since I am a better performer than you, they'd be reluctant to say anything to me mate".

J. Failure to take the Claimant's grievances [seriously] and not undertaking a meaningful investigation;

K. Labelling the offensive comments directed at the Claimant as banter, and telling the Claimant that he had been acting in an annoying manner when seeking help.

L. Invoking an unreasonable and without foundation investigation.

M. Failure to pay company sick pay