EMPLOYMENT TRIBUNALS

Claimant: Mr A Achor

Respondent: Stockport Metropolitan Borough Council

Heard at: Manchester **On:** 20, 21, 22, 23 and 24 March 2018

Before: Employment Judge Franey
Ms C S Jammeh
Mr A J Gill

REPRESENTATION:

Claimant: In person
Respondent: Ms A Del Priore, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of harassment related to race fails and is dismissed

2. The complaint of unfair dismissal fails and is dismissed.

REASONS

Introduction

1. On 8 May 2017 the claimant, who is black, presented his claim form complaining of unfair dismissal and race discrimination arising out of his resignation in February 2017 from his post as a Senior Officer – Business Support for the respondent local authority. He alleged that there had been a course of conduct by his managers amounting to bullying and harassment which resulted in periods of sick leave prior to his resignation.

2. By its response form of 23 June 2017 the respondent resisted the complaints on their merits. It denied any race discrimination or that his resignation should be construed as a dismissal. It was alleged that the claimant's own aggressive behaviour had been the cause of difficulties during his employment.

3. The matter was listed for a case management hearing on 22 August 2017 to identify the complaints and issues. Prior to that hearing the claimant's then representative withdrew the direct race discrimination and victimisation complaints and they were dismissed in a judgment sent to the parties on 16 August 2017.

4. At the same time his representative provided further and better particulars of the complaint. These particulars set out in paragraph 3 twelve different incidents drawn from the grounds of complaint. All of those matters were relied upon as contributing to a fundamental breach of contract in the unfair dismissal complaint; a number of them were also relied upon as harassment related to race.

5. At the case management hearing the complaints and issues were clarified and recorded in Annex B[1]. In paragraph 3 of the Order the parties were invited to consider Annex B carefully to make sure that it accurately recorded such matters, and to apply promptly in writing to amend it if that was not the case. Neither party made any such application.

6. The respondent amended its response form on 12 September 2017.

7. In October 2017 the claimant indicated that he was no longer represented in these proceedings. That remained the case until February 2018 when his brother became his representative.

8. On 20 February 2018 the claimant applied for reconsideration of the judgment dismissing his direct race discrimination complaint in August 2017. The withdrawal of that complaint was described as a “clerical error”. That application was made out of time and was refused. Judgment and reasons were sent to the parties on 23 February 2018.

9. The claimant applied on 26 February 2018 for reconsideration of that judgment. This time he provided some medical evidence to account for why there had been no application to correct Annex B when it was issued. That application was also refused: the medical evidence did not assist him on time limits and the reasons sent to the parties with the judgment on 14 March 2018 pointed out that it was the withdrawal of the complaint of direct race discrimination which caused it to come to an end under rule 51, not the subsequent dismissal judgment.

10. Shortly before the hearing the claimant began representing himself again. On 12 March 2018 he attached what he described as a “schedule of less favourable treatment”. This set out several allegations: most appeared in Annex B but some did not.

11. We discussed this document with the claimant at the start of our hearing on 19 March 2018. He confirmed that he was not seeking to amend Annex B, but simply to rely on the other matters as evidential background. The respondent confirmed it had no difficulty with this. After the initial discussion, the Tribunal spent the rest of the day reading the witness statements and documents.

12. Prior to the start of the evidence on Tuesday 20 March 2018, however, the claimant made two applications.

[1] Allegations 4 and 11 were not actually allegations about the respondent’s conduct so were omitted but the numbering from paragraph 3 of the Further Particulars was retained.

Application to Adjourn

13. Ms Del Priore informed the Tribunal that the claimant had sought to lodge an appeal with the Employment Appeal Tribunal against the refusal to reconsider the dismissal of the direct race discrimination complaint. The claimant confirmed that this was so.

14. After discussion he said he wanted this hearing to be postponed until his appeal had been determined.

15. After hearing submissions from both sides we refused this application. We applied the overriding objective in rule 2, which is to deal with cases fairly and justly, but avoiding delay so far as compatible with proper consideration of the issues. Although the Tribunal understood the claimant felt strongly that his former representative had acted in error in withdrawing the direct race discrimination complaint, postponement of this hearing would cause a significant delay of several months to no purpose, since even if the appeal succeeded and the dismissal of that complaint was overturned, it remained a withdrawn complaint upon rule 51 upon which this hearing could not adjudicate.

16. We observed that in any event the causation test for a harassment complaint (whether the conduct was "related to race") was wider than that for a direct discrimination complaint (whether it was "because of race"). From our reading it appeared that the causation test would be the main issue in the harassment complaints. Broadly if the claimant succeeded on harassment he could not pursue direct discrimination in relation to the same allegations[2] and if he lost on harassment the direct discrimination complaint would be very unlikely to have succeeded.

Amendment to List of Issues

17. The second application made by the claimant was to amend the List of Issues in Annex B in two ways:

(a) To re-label allegation 12 so that it was an instance of harassment related to race as well as an alleged breach of trust and confidence; and

(b) To add allegations 13 and 14, being the actions of Sue Shore in inviting the claimant to a disciplinary interview by a letter of 27 January 2017, and in sending him written questions to be answered on 8 February 2017.

18. These matters both appeared in the grounds of complaint attached to his claim form, but had not been identified as allegations in the further particulars of August 2017. That explained why they did not appear in Annex B to the Case Management Order.

19. The Tribunal applied the overriding objective again, and the guidance given by the Employment Appeal Tribunal in **Selkent Bus Co Ltd v Moore [1996] IRLR 661**. The Tribunal had to take into account all relevant circumstances including the

[2] Conduct which amounts to harassment cannot also be a detriment for direct discrimination: Equality Act 2010 section 212(1).

nature of the amendment, the applicability of time limits, and the timing and manner of the application. The key question was to balance the prejudice to the claimant if permission to amend were refused against that to the respondent is it was granted. Unusually the application was made after the Tribunal had read all the evidence on both sides.

Nature of the Amendment

20. We considered firstly the nature of the amendment. That in respect of allegation 12 was in one sense simply a re-labelling, but an allegation of harassment related to race is quite different from an allegation that the treatment formed part of a breach of trust and confidence. The former is likely to require consideration of the mental processes of the alleged discriminator, whilst the latter is an objective test. It was a significant amendment.

21. In relation to allegations 13 and 14, these matters were factually part of the evidence already (and appeared in the claim form) were but not previously identified as either a breach of trust and confidence or related to race. They were consequences of allegation 10 which concerned the decision to start the disciplinary investigation: Miss Shore's subsequent actions were simply progressing that investigation whilst the claimant was off sick. Adding them to the list of breaches of trust and confidence was not significant; relabeling them as harassment was.

Time Limits

22. We considered time limits. The amendment was well out of time. The time limit for these matters expired more than 12 months before the date of the application to amend. However, these matters had been raised in the claim form and therefore time limits did not count as much as if they had been new factual allegations.

Timing and Manner of Application

23. The timing and manner of the applications was very unsatisfactory. The claimant and his representative had been invited in August 2017 to check Annex B carefully to make sure that it was accurate. No application to amend Annex B had then been made until the second day of the final hearing, some eight months later.

24. Further, there was no explanation for why the application had not been made in writing at the time when the claimant sought to reconsider the decision to dismiss his race discrimination complaint.

Balance of Prejudice – Allegation 12

25. We turned to consider the question of prejudice.

26. In relation to allegation 12 the suggestion that this amounted to harassment related to race caused a significant problem for the respondent. The allegation concerned a decision that the claimant's grievance would not be considered as a grievance but rather addressed in the disciplinary investigation. It was made by the Deputy Chief Executive, Ms Donnan. Her email of 9 December 2016 set out the rationale for that decision, and the respondent had decided not to call her as a witness to defend the allegation that this amounted to a breach of trust and

confidence. As Ms Del Priore pointed out, however, if that allegation were to be re-labelled as harassment related to race, Ms Donnan would be required to give evidence as to her mental processes. That would cause significant further work for the respondent and raised a serious risk that this hearing might have to be adjourned. There would therefore be significant prejudice if we allowed the application.

27. In contrast, we noted that although the claimant asserted in the grounds of complaint that this decision was a discriminatory act against him due to his race, nowhere in his witness evidence or the documents we have read did there appear anything which provided an evidential basis for that assertion. There was no suggestion of any previous involvement by Ms Donnan in his case. It appeared to be a point which the claimant had not himself addressed in his own witness evidence and we concluded that he would not suffer significant prejudice if not allowed to pursue that argument by way of an amendment. Accordingly, we refused permission for him to amend allegation 12 in Annex B to make it part of the complaint of harassment related to race.

Balance of Prejudice - Allegations 13 and 14

28. The application to introduce these as allegations of harassment related to race seemed pointless: the claimant had not set out in his witness statement or in any documents any basis for that allegation. Further, if he succeeded in showing that the decision to start the investigation was harassment related to race (Allegation 10), these subsequent steps would be tainted too. If he failed on that point it was difficult to see how steps subsequently taken by Miss Shore could amount to harassment. He was not prejudiced by refusal of the application.

29. The application to rely on them as a breach of trust and confidence was different. The respondent had no difficulty dealing with these matters evidentially. They featured in the witness statements which we had already read. In contrast the claimant might be substantially prejudiced if we refused permission. It was clear from the original claim form that the letter inviting him to a meeting and the request for answers to written questions both played a part in the sequence of events leading to his resignation. Indeed, in paragraph 23 of the original claim form he placed great emphasis on the effect on him of the request for answers to written questions. If the claimant was not allowed to amend Annex B so to rely on these matters as contributing to a breach of trust and confidence, he ran the risk of losing his constructive dismissal complaint because his representative had failed to label these matters as contributory factors in his Further Particulars. We therefore decided that permission to amend in relation to these matters should be granted.

30. The effect of this was that allegations 13 and 14 were added to Annex B as further examples of breaches of trust and confidence, albeit not as allegations of harassment related to race. Allegation 12 remained an allegation of a breach of trust and confidence only.

Issues

31. Following that exercise the issues for the Tribunal to determine (i.e. Annex B with the additional allegations 13 and 14) were as follows:

Unfair dismissal – Part X Employment Rights Act 1996

1. Has the claimant established that the respondent committed a fundamental breach of the implied term of trust and confidence and/or the implied obligation to take reasonable care for the health and safety of the claimant in relation to any or all of the following allegations taken from paragraph 3 of the Further Particulars, either individually or cumulatively?

(1) 18 January 2016 – the scheduling and conduct of a meeting by Helen Milne about flexi leave authorised by the claimant for a member of his team.

(2) 29 January 2016 – the conduct of Helen Milne in confronting the claimant at his desk and in front of his subordinates asking him to write down everything he was working on.

(3) 5 February 2016 – the conduct of a dignity at work meeting by Geraldine Gerrard.

(4) *[This appeared to be a record of an email sent by the claimant rather than an allegation of inappropriate behaviour by the respondent].*

(5) The failure of Ms Milne and Mrs Gerrard to act on issues raised following a stress risk assessment on 13 April 2016.

(6) The conduct of a meeting with Ms Milne and Mrs Gerrard on 4 May 2016.

(7) The conduct of a return to work meeting with Ms Milne and Mrs Gerrard on 9 June 2016.

(8) The conduct and outcome of a disciplinary investigation between 19 July and 5 August 2016.

(9) The conduct of a one-to-one meeting with Helen Milne on 26 October 2016.

(10) 11 November 2016 – Mrs Gerrard informed the claimant that he would be undergoing a second disciplinary process.

(11) *[This appeared to be a record of the effect of the above on the claimant not an allegation of inappropriate behaviour by the respondent].*

(12) The failure properly to investigate or to address the grievance submitted by the claimant on 8 December 2016.

(13) The issue of a letter by Sue Shore on 27 January 2017 inviting him to an investigatory interview on 8 February 2017.

(14) A request by Sue Shore on 8 February 2017 that the claimant answer written questions.

2. If the claimant establishes that there has been a fundamental breach of contract, was that breach a reason for his resignation?

3. If so, had the claimant lost the right to resign by delaying or otherwise affirming the contract?

4. If the claimant establishes that his resignation should be construed as a dismissal, can the respondent show a potentially fair reason for that dismissal, namely a reason relating to the claimant's conduct?

5. If so, was the dismissal fair or unfair under section 98(4)?

Harassment related to race – section 26 Equality Act 2010

6. Are the facts such as would enable the Tribunal to conclude that in relation to allegations (1), (2), (3), (6), (7), (8) and (10) in paragraph 1 above the respondent:

(a) subjected the claimant to unwanted conduct,

(b) which was related to race, and

(c) had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

7. If so, can the respondent nevertheless show that it did not contravene section 26?

8. Given that all the allegations of harassment related to race occurred more than three months prior to the presentation of the claim form, even allowing for the effect of early conciliation, can the claimant establish that:

(a) earlier matters formed part of conduct extending over a period ending with later matters; and

(b) it would be just and equitable for the Tribunal to allow a longer period for bringing proceedings?

Remedy

9. If any of the above complaints succeed, what is the appropriate remedy? Issues likely to arise include:

(a) The basic award for unfair dismissal, and whether it should be reduced on account of contributory fault.

(b) The compensatory award for unfair dismissal, and whether it should be reduced on account of contributory fault.

(c) An award of compensation for injury to feelings.

(d) An award of compensation for injury to health.

(e) Interest on awards for unlawful discrimination.

Evidence

32. The parties had agreed a bundle of documents in two volumes which ran to approximately 700 pages. A number of documents were added to that bundle by agreement during the course of the hearing and given page numbers. Any reference to page numbers in these reasons is a reference to that bundle unless otherwise indicated.

33. We heard from seven witnesses, each of whom had prepared a written statement in advance. The claimant gave evidence himself but did not call any other witnesses. The respondent called Helen Milnes, the claimant's line manager at the relevant time; Geraldine Gerrard, Head of Business Support (People Services) who was the claimant's Head of Service; Susan Shore, a manager in Human Resources

who conducted a disciplinary investigation; Janine Amans, a senior Human Resources officer who attended some of the relevant meetings; Daniel Brazil, a senior Health and Safety officer who attended the risk assessment meetings; and Mary Newton, a former colleague of the claimant.

Relevant Legal Framework

Unfair Dismissal

34. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed, and the circumstances in which an employee is dismissed are defined by Section 95. The relevant part of Section 95 was Section 95(1)(c) which provides that an employee is dismissed by his employer if:

> **"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."**

35. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only 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.

36. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation that the employer shall not:

> **"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."**

37. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A:

> **"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."**

38. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

39. In **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908** the Court of Appeal confirmed that the test of the "band of reasonable responses" is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in **Malik**.

40. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15/LA** 21 July 2015 the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-15):

> **"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:**
>
> **"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."**
>
> **13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.**
>
> **14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.**
>
> **15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see Hilton v Shiner Builders Merchants [2001] IRLR 727). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach."**

41. In some cases the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial.

42. There is an implied duty in every contract of employment requiring the employer to take reasonable care for the health and safety of employees, including mental health. **Walker v Northumberland County Council [1995] ICR 702.** It imposes the same obligation as in tort. A duty to act will arise if psychiatric injury is

reasonably foreseeable. Guidance was given by the Court of Appeal in **Sutherland (Chairman of the Governors of St Thomas Becket RC High School) v Hatton [2002] ICR 613**, subsequently approved by the House of Lords in **Barber v Somerset County Council [2004] ICR 457.**

43. The law relating to the reason for a resignation after a repudiatory breach of contract was reviewed by the EAT (Langstaff P presiding) in **Wright v North Ayrshire Council [2014] IRLR 4.** If an employee has mixed reasons for resigning it is enough if the repudiatory breach played a part in that decision. It need not be the sole, predominant or effective cause.

Equality Act 2010

44. Harassment during employment is prohibited by section 40(1)(a) of the 2010 Act.

45. The protected characteristic of race is defined by section 9(1) as including colour, nationality or ethnic origins.

46. The definition of harassment appears in section 26 which so far as material reads 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…**
>
> **(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -**
>
> **(a) the perception of B;**
>
> **(b) the other circumstances of the case;**
>
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5) The relevant protected characteristics are…race".**

47. We were mindful of the Code of Practice on Employment issued by the Equality and Human Rights Commission which came into force on 6 April 2011, particularly chapter 7 which deals with harassment. Paragraph 7.9 makes it clear that the unwanted conduct does not have to be because of the protected characteristic. Examples are given in paragraph 7.10 and in paragraph 7.11 it is said to be enough if there is "a connection" with the protected characteristic.

48. The burden of proof provision appears in section 136 and provides as follows:

> **"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".**

49. Finally, the time limit for Equality Act claims appears in section 123 as follows:

> **"(1) Proceedings on a complaint within section 120 may not be brought after the end of –**
>
> **(a) the period of three 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) …**
>
> **(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".**

Relevant Facts

50. This section of these reasons sets out the broad chronology of events to put our decision into context. We will identify in this section the events which gave rise to the individual allegations but address any factual issues about those allegations as part of our discussion and conclusions section.

Background

51. The claimant was employed by the respondent in August 2014 on a graduate entry scheme, and after induction was placed in a role as a hub manager in Adult Social Care Business Support. He was the only black manager in that part of the service.

52. Initially he was paid as a graduate not as a substantive hub manager, but this was addressed by means of a retrospective honorarium in October 2014 and with effect from 1 March 2015 he was promoted to Senior Officer grade on a permanent basis (page 145). The claimant's area of responsibility was disability services, which included a wide range of matters extending to the protection of property where there was a death on the part of a service user, and administering the disability "blue badge" scheme. He was responsible for managing a team of people, and reported to Mark Lax as his direct line manager. Mr Lax reported to the Head of Service, Geraldine Gerrard.

53. It was standard practice for managers to have monthly one-to-one sessions with those whom they managed. At a one-to-one session with Mark Lax on 16 March

2015 (page 148a) there was reference to the detrimental impact of having staff on sick leave.

54. The respondent had a Code of Conduct for Officers which made clear that a high priority was placed upon health and safety (page 611) and that managers were responsible for exercising a duty of care to employees, ensuring health and safety requirement were met (page 599).

16 September 2015

55. On 16 September 2015 the claimant and other managers were in a meeting with Mrs Gerrard. He later alleged (9 February 2016 page 238) that during that meeting she had used inappropriate language when she had said:

> **"Maybe I am not cracking the whip hard enough."**

56. The claimant was upset by this phrase. He felt it was directed at him. He spoke to Mark Lax about it but did not pursue a complaint or speak to HR. In our proceedings he alleged that it was the connotation with slavery which he found upsetting. He had not said that in his letter of 9 February 2016.

57. Mrs Gerrard said in her witness evidence that she had no recollection of using this phrase, and thought it highly unlikely she had said it. She would consider use of such a phrase as poor judgment. She accepted that she might have said "Let's crack on" or words to that effect.

58. We were concerned that the claimant later said (when interviewed on 19 July 2016 at page 390) that the words Mrs Gerrard used were that she was "not flogging the horse hard enough", which appeared to have a different connotation. We accepted, however, that the claimant was upset at the comment made in this meeting.

59. Putting these matters together we concluded that Mrs Gerrard had used the phrase about "cracking the whip" and that her view of this phrase in her evidence to our hearing was affected by the knowledge that the claimant was now saying it had racial connotations.

60. We will return to the significance of that matter in our conclusions.

Special Leave Issue October 2015

61. In October 2015 the claimant had some special leave authorised by Mr Lax when his father was in hospital in London. On his return Mrs Gerrard queried whether the leave had been properly authorised. There was a series of emails between the claimant and Mrs Gerrard between 19 and 22 October 2015 in which Mrs Gerrard sought to clarify the nature of his father's hospitalisation. These emails appeared between pages 159-167. The claimant was aggrieved that he was being challenged about something which his line manager had already authorised.

62. The policy on special leave (page 670) was potentially misleading. The first paragraph gave that authority to his line manager, but a later paragraph said that the Head of Service needed to countersign the form.

63. Mrs Gerrard was concerned that the information provided by the claimant about the issue did not show that it fell within one of the examples of when special leave should be granted. Eventually she conceded that the leave could be paid, but in the course of that the claimant sent an email on 22 October 2015 at page 159 which ended as follows:

> **"I do not wish to antagonise you but you have to understand my train of thought as well. I have been fighting an uphill battle since joining this establishment. I have had to fight for equity/parity of pay from the beginning. Then there was the issue during the staff expression of interest, when I had to fight to be included in the process. I now find myself in another battle as regards to an entitlement within your governance policy.**
>
> **It is very logical to see a trend emerging in my situation. How can I function under such conditions? How long can I continue to endure?**
>
> **I am distressed and do not know what else I am meant to do, where do I run, to whom do I turn to? I can't seem to find solace neither in senior management nor in governance policies.**
>
> **I am a person that strongly believes that action speaks louder than words. Having taking [**sic**] all things into account, I come to one conclusion, maybe I am not wanted, maybe I am the problem, maybe it would be best for all involved if I tender my resignation."**

64. On 23 October 2015 Mrs Gerrard responded (page 158) dealing briefly with each of the background issues and making clear that staffing problems were a consequence of a finite level of resource. She ended her email by inviting the claimant to speak to her face to face to clear the air if he wanted.

Meeting 23 October 2015

65. On the day of that email the claimant had a meeting with Helen Milnes, who was not technically his line manager at that stage. In early December Mrs Milnes made a note of what happened which appeared at page 169. It was a discussion about a staffing decision made by the claimant which Mrs Milnes overruled. Her note recorded that the claimant said in a loud voice "normally I am a calm man" then walked out of the room. She followed him out and said that she did not think that was appropriate behaviour. The claimant later accepted that he had walked out of that meeting.

66. The claimant went off sick that day certified unfit for work due to work related stress (page 173). His fit note was extended for four weeks in early November (page 176). An Occupational Health referral resulted in a report of 11 November 2015 (pages 178-180) which recorded that his main issue was the special leave matter, although there were "some issues with other managers" which he would not disclose. A stress risk assessment was recommended, together with regular one-to-one reviews, a phased return, and access to counselling.

Return to Work December 2015

67. The claimant returned to work on 7 December 2015 and had a return to work meeting. Mrs Milnes had been his acting line manager since 27 October and she conducted that meeting. After the meeting she made the note which appeared at page 169. That was a personal note not shown to the claimant or placed on his file.

Her concern at this behaviour led her to retrospectively write her note about the meeting on 23 October 2015 and to keep her notes going forward.

68. The signed return to work interview form appeared at pages 183-186. It recorded that the claimant's absences had been due to his perception of inequity with other employees. The personal note kept by Mrs Milnes recorded that the claimant began the meeting by aggressively asking where Mark Lax was, and that he showed a lack of eye contact with Mrs Milnes and responded to her very abruptly.

69. The claimant's absence had triggered the sickness management procedure, which appeared at pages 675-698. By a letter of 7 December he was invited to a stage one meeting on 15 December (page 188). That meeting resulted in a letter of 17 December 2015 (pages 203-204) which warned him that his sickness absence would be monitored for 12 months and that he would move to stage two if he hit certain trigger points.

70. In the meantime Mrs Milnes and the claimant had a couple of meetings. They spoke on 11 December 2015. The note at page 191 recorded that Mrs Milnes would need to spend some time with the claimant in the New Year to get a better understanding of his role. Arrangements for his phased return were discussed.

71. On 16 December 2015 the stress risk assessment was conducted with Daniel Brazil, the Senior Health and Safety officer, present. The completed document appeared at pages 206-219. The precautions to be taken included looking at job design and working practices, reviewing workloads and staffing, and (page 212) the claimant was encouraged to talk to managers at an early stage if he felt he could not cope. Mr Brazil said in evidence to our hearing that at that meeting he noticed that the claimant was reluctant to interact with Mrs Milnes. The claimant did not challenge that evidence. He accepted he had been “withdrawn” around this time.

January 2016

72. On 5 January 2016 Mrs Milnes and the claimant had their first regular one-to-one meeting. The notes appeared at pages 221-222. The two of them were to discuss and agree priorities.

73. On 6 January 2016 the claimant appeared as a character witness for Mr Lax at a disciplinary hearing.

Allegation 1: 18 January 2016

74. On 18 January 2016 there was a meeting between the claimant, Mrs Milnes and Mary Newton which formed the basis of allegation 1. An issue arose about a member of staff whom the claimant had authorised to leave early. He had not told Mary Newton. The claimant's case was that he was demeaned and undermined by being called to a meeting with Mrs Newton present to explain what he had done. He felt his position as hub manager was undermined. In contrast Mrs Milnes felt that it was a routine matter discussed in a meeting which had been already arranged to discuss a range of matters. We will return to that in our conclusions. What was clear, however, was that it caused a deterioration in the claimant's view of Mrs Milnes as a manager.

Allegation 2: 29 January 2016

75. On 29 January 2016 there was a meeting arranged at 9.00am. It was an important meeting which Mrs Gerrard attended. Everyone was in the meeting room on time save the claimant.

76. The claimant sent an email at 9.05am saying that he was unable to attend "due to other commitments". Mrs Gerrard asked Mrs Milnes to go out and speak to the claimant to see why he had not come to the meeting as planned. An exchange ensued at the claimant's desk which was the basis of allegation 2.

77. The claimant later acknowledged that he told Mrs Milnes on that occasion that she invaded his space and that to engage someone the way she did was asking for trouble ("fuelling a fire") (9 February 2016 page 237). Mrs Milnes' evidence was that she simply accepted what the claimant told her as to why he had not attended the meeting and went back into it.

78. We found that Mrs Milnes did not ask the claimant to make a list of all his work on this occasion. That allegation was made for the first time in the Further Particulars (and adopted by the claimant in his witness statement). Yet it was not mentioned in the claimant's letter of 9 February 2016 (page 237), in his account given to Mr Owston in July 2016 (page 390), or in his original grounds of complaint. Mrs Milnes was needed back in the meeting herself and would not have broadened the discussion. We concluded that was a misunderstanding in the Further Particulars.

1 February Staff List Issue

79. On 1 February 2016 Mrs Milnes emailed the claimant asking him to complete a list of staff members and their home postcodes (page 227). The claimant had asked Mary Newton to do it but she was out of the office for a few days. The claimant refused to do the task. He said that Mary Newton had the list and in an email at 11.22am (page 228) he said:

> **"I would think that this should be obvious from my last email."**

80. Mrs Milnes told the claimant that the way he dealt with the issue was not appropriate. Mrs Gerrard had been copied into the emails and she advised Mrs Milnes to make a note of all incidents and to keep HR informed of the difficulties.

3 February One-to-One

81. The claimant and Mrs Milnes had a one-to-one meeting on 3 February 2016. Mrs Milnes kept a personal note at page 231. It recorded that the claimant told her "stop crossing the line otherwise you will know about it". There was discussion of the meeting he had missed and the emails about the staff list. Mrs Milnes told the claimant that his behaviour was not acceptable and he said "you cannot tell me what to do".

82. The claimant later said in his letter of 9 February (page 238) that he had felt that her approach sometimes "crossed the line", and that he had said that "for every action there is a reaction". He also said that she was "poking the bear" to emphasise the point.

83. Immediately after the meeting Mrs Milnes went to see Janine Amans of HR. Ms Amans recalled that Mrs Milnes was in tears and said the claimant had been aggressive and made her feel intimidated.

84. The claimant was also concerned at how that meeting went and he emailed Mrs Gerrard asking for a meeting about dignity at work because of several incidents with Helen Milnes which he perceived as bullying. He said his tolerance was running thin.

Allegation 3: 5 February 2016

85. On 5 February 2016 the claimant met Mrs Gerrard and Ms Amans to discuss his dignity at work issue. This formed the basis of allegation 3. There was no note of the meeting kept, although Mrs Gerrard wrote to the claimant on 8 February (pages 235-236) to record what had happened. She recorded the concerns raised by the claimant about the way he was being treated. He mentioned that Mrs Milnes had invaded his space on 29 January. The claimant had said he did not want to be alone with Helen Milnes again in a one-to-one and Mrs Gerrard said she would attend the next two one-to-one meetings.

86. Mrs Gerrard's letter went on as follows:

> **"From my observations during the meeting today you seemed very angry and used some concerning language. For example you stated you were 'an alpha male' and 'intimidation makes you angry' and that if Helen keeps coming to your desk you 'will not tolerate it' and 'it is like poking the bear'. I consider this type of language in relation to meetings and conversations with Helen to be aggressive, intimidatory, provocative and unacceptable and not conducive to satisfactory professional relationships at work. I would ask you to refrain from using this language to any employee or manager or in relation to the any council's business."**

87. Her letter ended with an expectation that the claimant would conduct himself in a professional manner.

88. The claimant's response of 9 February 2016 at pages 237-238 said that her letter did not reflect the conversation on the day. He went through the background issues with Mrs Milnes and acknowledged that he did feel her behaviour sometimes crossed the line and that he had used the expression "poking the bear". His letter went on:

> **"You cannot expect to keep pushing someone and for them not to react. I said some personalities would not react but I am an alpha meal** [sic] **and will not stand for intimidation or bullying. I did say that this situation 'makes me angry' and upsets me.**
>
> **From your perception Helen acted appropriately on all accounts. Your stance is to be expected, it was you that sent Helen to approach my desk on the day in question. I did not know this until our conversation on Friday. You also stated that from your observation I seemed angry and used some concerning language. I believe that I have addressed some of the misconceptions in your letter…**
>
> **Taking all things into consideration, I will not object to your suggestions. Like I said on the day, I am in the minority here, I also feel intimidated. I will have to explore other options going forward."**

March 2016 Blue Badge Remuneration Issue

89. On 16 March 2016 the claimant sent an email to Mrs Gerrard saying that he would no longer be prepared to cover the blue badge team work without additional remuneration. His position was that he had been doing it to cover for the absence of a colleague. He was critical of what he termed "ivory tower planning and procedural justice". He followed it up with a further email (page 244) saying that he expected full remuneration for services rendered to date. That was to be paid in his next payslip.

90. The response from Mrs Gerrard of 24 March (page 242) referred to a discussion about it which ended abruptly, and said the claimant had appeared intensely angry in that meeting. She made clear there would be no additional pay and that what he was doing was within the scope of his job role. She said if he refused to undertake duties there would be disciplinary action.

91. The claimant responded on 29 March (page 241). He explained why he thought additional remuneration was appropriate. He said other managers had received extra payment for different work. He said the ivory tower comment was not directed at Mrs Gerrard, and he reiterated his commitment to the service.

Allegation 5: Stress Risk Assessment April 2016

92. On 5 April 2016 the claimant emailed Helen Milnes about the level of work he had to deal with, saying that it was increasingly detrimental to his wellbeing. He asked for a further stress risk assessment. That took place on 13 April 2016, but in the meantime Mrs Milnes took on some responsibility for the blue badge work (page 265) and she confirmed in an email of 13 April at page 260 that the claimant was able to delegate more to members of his team.

93. Mr Brazil was present again at the stress risk assessment meeting. The previous form was reviewed and additional comments made (pages 288-304). The claimant eventually approved the assessment with one slight amendment. The measures envisaged included Mrs Milnes and him looking at the process and volume of certain areas of work, for Mrs Milnes to liaise with workforce development about a tool to analyse workload, and there was discussion about the impending recruitment of new members of staff to ease the resource pressure. The claimant was advised to flag up any workload issues with Mrs Milnes. He had access to Occupational Health and to counselling. There was to be a two way dialogue where he informed Mrs Milnes of any key pressures, and priorities would be discussed and agreed.

94. Allegation 5 concerned the stress risk assessment. The complaint was that the agreed actions did not happen. We will address that in our conclusions.

95. On 14 April 2016 (page 266) Mrs Milnes emailed the claimant seeking to schedule a one-to-one meeting to discuss the issues in more detail.

Allegation 6: One-to-One Meeting 4 May 2016

96. That one-to-one meeting occurred on 4 May 2016. The claimant added some comments to the original notes of the meeting, and Mrs Milnes responded to those comments. The composite note appeared at pages 317-319. Mrs Gerrard was present. Mrs Milnes told the claimant about a workload tool she had used before

(page 318). The conduct of this meeting formed the basis of allegation 6 and we will return to it in our conclusions.

97. After the meeting Mrs Milnes made a personal note (pages 170-171) recording that the claimant had shown a disrespectful attitude in his tone and manner, and had become confrontational. Her note recorded that at one point the claimant said "I will not be doing any more monitoring". He made a comment about there being cultural differences. Mrs Gerrard had to emphasise that Mrs Milnes was the claimant's line manager and he had to follow her instructions.

98. In contrast the claimant regarded both managers as focussing on trivial issues, and demanding that he sign off the second risk assessment. He regarded himself has having signed it under duress.

Disciplinary Investigation June 2016

99. Concerns about the claimant's behaviour on the part of Mrs Milnes and Mrs Gerrard were passed to HR and resulted in a disciplinary investigation. The precise way in which Mr Owston was appointed was not clear from the evidence before us. The claimant was not told until 6 July that there was an investigation under way, but Mr Owston interviewed Mrs Gerrard and Mrs Milnes on 9 June, and Ms Amans and Mrs Milnes again on 16 June. The notes of the 9 June meetings appeared between pages 329 and 351, and the 16 June notes between pages 354-362.

100. Mrs Milnes and Mrs Gerrard each gave Mr Owston a summary of how the claimant had been behaving based on their perception. Mrs Gerrard prepared a timeline of events (page 560)

Allegation 7: 9 June Return to Work meeting

101. In early June 2016 the claimant had been off sick for two days with migraines. This was the first time he had been on sick leave since his return to work in December 2015.

102. A return to work interview was conducted on 9 June in the afternoon. The claimant did not know that Mrs Milnes and Mrs Gerrard had been interviewed by Mr Owston that morning.

103. The pro forma appeared at pages 325-328. There was to be no Occupational Health referral. The form recorded a comment by him that if the right requirements were in place to meet business needs it would contribute to general wellbeing (page 327).

104. Mrs Milnes made a personal note after the meeting, at which Mrs Gerrard was also present. Her note recorded that the claimant asked her in an aggressive manner to read out what was written at the bottom of page 326, pointing to the printed bit which was a reminder to managers to discuss whether reasonable adjustments were needed. The position of Mrs Milnes was that no such discussion was needed because he had only been off sick for two days with migraines, and there was no confirmation that the migraines were work related. She recorded the claimant saying aggressively that he did not want to continue any one-to-one meetings. Mrs Gerrard

told the claimant that he came over as angry and aggressive and his behaviour was intimidating.

105. This meeting formed the basis of allegation 7 and we will return to it in our conclusions.

Allegation 8: Disciplinary Investigation July – August 2016

106. On 6 July the claimant was informed of the disciplinary investigation.

107. Mr Owston interviewed the claimant on 19 July. The typed notes appeared at pages 386-398. The claimant was accompanied by his union representative, Mr Goldman. The claimant was informed that two managers had made allegations of aggressive behaviour towards them from October 2015 onwards.

108. In relation to Mrs Gerrard he said the "boiling point" was the special leave dispute when his father had been in hospital in October 2015.

109. He accepted he had walked away from two meetings with Helen Milnes, saying in one of them that he did not like her tone. He emphasised the pressure of work and its impact on him. He did not feel the measures put in place after his return to work in December 2015 had been successful. He felt that Mrs Milnes had an ulterior motive and he felt uneasy due to her engagement method. He said he should be the one raising a grievance against the two of them. He recalled being "a bit withdrawn" on the day of the first risk assessment, and he emphasised that he felt Mrs Milnes was pushing him for a reaction. He acknowledged that sometimes he spoke passionately and used hand gestures. He said English was not his first language and that he used the "alpha male" comment to make the point that he would not be bullied. He recalled telling Helen Milnes that she should focus on managing the workload rather than trivial issues.

110. He thought ultimately it was a case of perception on the part of the managers: he was communicating passionately not being aggressive. He said:

> **"In conclusion, I don't feel I'm being aggressive. I've made a threat or moved towards anyone. I am sometimes emotional and passionate. I am also not afraid of telling someone how I feel, when I perceive injustice or lack of equity/parity. When emotional I speak with tone with a certain level of gravitas. It could be this that GG and HM perceive as aggressive."**

111. The outcome of the investigation was that there would be no disciplinary charges, but the claimant was given advice as to his behaviour. That was contained in a letter from Mr Owston of 5 August 2016 at pages 409-411. He concluded that the claimant had shown conduct in meetings which was overly aggressive and could be perceived as threatening. He referred to the meetings on 29 January, 3 and 5 February, and 4 May. The letter acknowledged that the claimant considered he had been passionate rather than aggressive, but cautioned him that what he considered to be passionate others may perceive as aggressive and upsetting. The claimant should consider what impact his behaviour may have on others before reacting in that way. He was warned that if there were any incidents of such behaviour there would be disciplinary action. The letter would be retained on the file. It said that this approach had been discussed with Helen Milnes and she believed the approach was

the best way forward[3]. The claimant was reminded about the availability of counselling. The letter gave him no right of appeal because there was no formal sanction.

112. The claimant was very concerned at this letter. It reached a conclusion that he had behaved in a way which was aggressive, yet gave him no means of challenging it. It would be on his file fir future reference. He thought this was fundamentally unfair, although he did not pursue a grievance about it.

113. This disciplinary investigation formed the basis of allegation 8 and we will return to it in our conclusions.

August - October 2016

114. Mrs Milnes made enquiries of HR and became aware of a process known as a "restorative discussion", a form of mediation. She spoke to the claimant about the possibility of this in August but he did not think it would be worthwhile.

115. In late September 2016 an issue arose about blue badge reviews where information was outstanding from an external organisation, Access Independent. The claimant was asked by a colleague to contact a particular person at that organisation to chase up the information but the claimant refused to do it. Mrs Milnes made clear her view that it was a reasonable request with which he should have complied. The claimant disagreed.

116. There was further friction between them on 13 October 2016 when Mrs Milnes formed the view that the claimant was declining to give appropriate priority to a protection of property issue following a death. She made a note at page 419 which recorded the claimant saying he was not going to take it from her. The conversation was heated.

Allegation 9: One-to-One Meeting 26 October 2016

117. There was a further one-to-one meeting on 26 October 2016. Notes appeared at pages 427-429. The claimant was to produce a list of the work he was involved in on a daily basis before the next one-to-one meeting. There was discussion about the Access Independent issue and a dispute about whether the claimant should be doing safeguarding meetings or covering protection of property issues in Mary Newton's absence. These were all matters of discord during the meeting.

118. The notes recorded the claimant expressing the opinion that the working relationship with Helen Milnes was not workable and that for both their sanity one of them should leave. Mrs Milnes asked the claimant if he wanted a transfer and he confirmed that was so. She pursued that after the meeting but no transfer was possible.

119. Mrs Milnes recorded in a personal note (page 426) that the claimant had mimicked how she spoke in that meeting.

[3] In fact Mrs Milnes had not spoken to Mr Owston directly but there had been communications through another senior manager, Sue Williams.

120. The conduct of this meeting formed allegation 9 and we will return to it in our conclusions.

Allegation 10: Second Disciplinary Investigation November 2016

121. Events in October 2016 caused Mrs Gerrard to consider that there should be a second disciplinary investigation. This formed the basis of allegation 10 and we will return to it in our conclusions.

122. Mrs Gerrard asked Sue Shore to investigate the new complaints. The claimant had previously had a very good relationship with Miss Shore (page 250d).

123. On 11 November 2016 Mrs Gerrard told the claimant there would be a further disciplinary investigation. Miss Shore invited the claimant to an investigation meeting on 22 November, but that morning he sent an email saying he was unwell and could not attend (page 433). In fact the claimant suffered a serious mental breakdown in November 2016 and was not to return to work. A later report from a clinical psychologist (page 576k) recorded that he had intense feelings of anxiety and saw hallucinations when he returned home, fearing for his life during that incident. He was certified unfit for work because of work related stress between 28 November and 12 December (page 442) and was referred for counselling in early December.

Allegation 12: Grievance Rejection December 2016

124. On 8 December 2016 the claimant submitted a grievance. It appeared at pages 447-465. It was about the way Mrs Gerrard and Mrs Milnes had neglected their duty of care towards him. He set out a chronology of events from August 2014, beginning with the pay issue and then dealing with the special leave dispute in October 2015. He queried why he was being treated differently from other colleagues. He said that he had been unable to raise issues with management after the stress risk assessment in April 2016 because when he did so he was bullied and victimised. He made clear his concern at the conclusion of the Owston investigation, and the pressures resulting from lack of capacity within his team. He said he had been the victim of discrimination, bullying and harassment, although his grievance did not expressly identify why he thought that was. He proposed an amicable settlement agreement to bring his employment to an end. Copies of relevant documents were attached.

125. The grievance was sent by email to the Chief Executive and Deputy Chief Executive (page 456). The Deputy Chief Executive, Laureen Donnan, responded on 9 December 2016. She said she understood that the claimant had started sickness absence after being informed of a disciplinary investigation, and that the allegation concerned his behaviour towards his line manager. She referred to section 2.1 of the employee relations policy which set out the grievance procedure (page 632). The policy said that the grievance procedure did not apply to a matter in connection with which the employee had been notified of the date of a disciplinary interview. Her email concluded:

> **"Clearly, both the disciplinary allegations and your grievance are centred on relationships between you and your managers. As such the above clause means that the grievance procedure cannot be invoked. However, you will have the opportunity to provide your perspective during the disciplinary investigation meeting. I am not, therefore, able to progress your grievance any further. I hope you are soon well**

> **enough to engage with the investigation process so that we can reach a speedy conclusion."**

126. The claimant was very concerned by this response. He felt there was no way of his concerns being addressed. He made his concerns clear to Ms Donnan in an email of 10 December 2016 at page 465. His email said he had lost all confidence in the organisation.

127. This formed the basis of allegation 12 and we will return to it in our conclusions.

December 2016 – January 2017

128. On 12 December 2016 the fit note was extended to 16 January 2017 (page 467) and subsequently a further fit note of 14 January was issued taking him to 16 February (page 480). The investigatory interview with Miss Shore was rearranged for 21 December but again the claimant was unable to attend.

129. An Occupational Health referral was made and a report of 11 January at pages 476-478 said that he was not fit for work but that he would be fit for a meeting within one or two weeks as long as there was support in place.

130. On 17 January 2017 Mrs Milnes issued an invitation to a stage two sickness absence meeting on 26 January 2017. That took place in the absence of the claimant and the outcome was confirmed in a letter of 30 January 2017 at pages 495-496. There was going to be a further stress risk assessment, a new Occupational Health referral, and then a stage three meeting in approximately two months.

Allegation 13: Letter 27 January 2017

131. In the light of the Occupational Health advice Miss Shore wrote to the claimant on 27 January 2017 inviting him to an investigatory interview on 8 February 2017. That letter appeared at page 498. The issue of it formed allegation 13 and we will return to it in our conclusions.

Allegation 14: Written Questions 8 February 2017

132. The claimant declined to attend this interview and therefore on 8 February 2017 Miss Shore emailed him the written questions she wanted him to answer (pages 515d-515e).

133. This formed the basis of allegation 14 and we will return to it in our conclusions.

Resignation 16 February 2017

134. The claimant did not answer the questions. Instead on 16 February 2017 at just after 9.30am he resigned by email at page 514. He said that it was because of the unfair treatment received and the impact on his health and wellbeing. There had been a constructive dismissal and he would progress matters through the Tribunal. He sent his regards to his former colleagues. He subsequently confirmed that his resignation took effect immediately.

135. The timing of this was explained by the fit note expiring on 16 February 2017. The claimant said in evidence that he did not feel it appropriate to get a further sick note because he knew he would not be coming back.

136. He was not influenced by the fact that the same day a letter was issued (pages 515f-515g) confirming that he would go onto half pay in early March 2017.

Submissions

137. At the end of the evidence each party made an oral submission. Ms Del Priore had also provided a helpful written submission (six pages) on the relevant propositions of law. There was no dispute as to the applicable law.

Respondent's Submission

138. In her oral submissions Ms Del Priore addressed three background matters before the numbered allegations. She invited us to conclude that if the claimant had been upset by what Ms Milnes said on 16 September 2015, that was because he was over sensitive. He had overreacted to the special leave issue in October 2015, and the recommendations of the Occupational Health report of November 2015 were all implemented.

139. She then went through each of the allegations in turn, addressing any factual issues and submitting that there was no basis for the conclusion that any of these matters could constitute harassment related to race, or could amount to or contribute to a fundamental breach of an implied term. Allegation 1 concerned a meeting for a different purpose in which a minor matter regarding communication between managers was raised. Allegation 2 was an appropriate course of action when the claimant had failed to attend a meeting at which he should have been present. Mr Gerrard had conducted the Dignity at Work meeting on 5 February (allegation 3) entirely properly, and it was appropriate to deal with the matter informally under that stage of the grievance procedure. The claimant knew that if he wanted to take it further he had to lodge a formal grievance but never did so. The adverse view of his conduct was warranted by the matters he himself accepted in his letter of 9 February 2016.

140. In relation to allegation 5, all the steps recommended by the risk assessment had been implemented save for those which required the claimant to engage. He had failed to do that. His conduct at the meeting on 4 May 2016 (allegation 6) had been inappropriate and justified Mrs Milnes and Mrs Gerrard taking the matter to a disciplinary investigation. The conduct of the return to work meeting on 9 June (allegation 7) was also appropriate: the claimant had been off for only two days with migraines and did not suggest that his condition was linked to stress. Mrs Milnes did discuss the matter with him when he aggressively pointed out that reasonable adjustments had not been considered.

141. In relation to the first disciplinary investigation (allegation 8) it resulted from an accumulation of behaviour by the claimant since the previous October, and it was reasonable to take the matter to that stage at that time. The outcome letter was informal action under paragraph 10.2 of the disciplinary policy, and a reasonable step to take as the alternative was formal disciplinary action. If the claimant was unhappy with it he could have pursued a grievance or simply made that point in

writing. There were reasonable grounds for the conclusion that to pursue the matter through formal discipline would have a toxic effect on working relationships. Mrs Milnes had to be persuaded of that by Sue Williams.

142. In relation to allegation 9 concerning the meeting on 26 October 2016, we were invited to accepted Mrs Milnes' account. The second disciplinary investigation (allegation 10) was justified by the claimant's conduct since the letter of 5 August. The rejection of his grievance (allegation 12) was entirely in line with the respondent's own policy and the email rejecting his grievance said that he could raise those issues in the disciplinary investigation. There was no breach of the substance of the ACAS Code of Practice. The claimant failed to take the opportunity of sending the grievance to Miss Shore.

143. As for allegations 13 and 14, they were simply steps taken by Miss Shore in the investigation, and were in line with Occupational Health advice (allegation 13) and designed to get the claimant to give his version of events (allegation 14).

144. Overall, submitted Ms Del Priore, there had been no unwanted conduct related to race. Further, neither individually nor cumulatively did any of these events amount to a fundamental breach of trust and confidence, or a breach of the implied duty in relation to health and safety.

145. Ms Del Priore also argued that even if there had been a breach earlier on the claimant had affirmed matters after December 2016 by remaining in employment. If a constructive dismissal were found to have occurred, it was a fair dismissal by reason of conduct, and any compensation should be reduced by 100% because of contributory fault. The harassment allegations were out of time in any event.

Claimant's Submission

146. The claimant began by emphasising that the respondent had broken Case Management Orders in relation to exchange of witness statements and reiterated his concerns about the two versions of Mrs Milnes' note of the meeting on 26 October 2016.

147. He then addressed each of the individual allegations by reference to the constructive dismissal complaint. Allegation 1 amounted to a breach of trust and confidence because he was taken to task by Mrs Milnes in front of Mary Newton. It undermined him. Allegation 2 was also a breach because he was spoken to by a manager in front of the people that he managed. If he was going to be spoken to with that tone it should have been done in private. As for allegation 3, his emotions were running high in the discussion on 5 February and he realised quickly that Mrs Gerrard had been the person who sent Mrs Milnes about to speak to him on 29 January. He knew he would not get a fair hearing from Mrs Gerrard. The phrases which he admitted using in his letter of 9 February had been misconstrued. He was not being insulting but trying to communicate properly. His reference to being an "alpha male" was simply making the point that as an alpha personality he would be sad or upset if threatened, bullied or intimidated. The problem was his directness which was misconstrued.

148. In relation to allegation 5 he submitted that the recommendations of the stress risk assessment had not been implemented and that he had been forced into signing

it in the meeting on 4 May. There was a failure to accept that he was ill simply because he had not been off work. He was the one who requested the stress risk assessment. As for the meeting on 4 May itself (allegation 6) he was not listened to and the meeting never got to the real issues because trivial matters against him were raised. He pointed out how misleading the notes would be if his own comments had not been added to them afterwards.

149. In relation to allegation 7 (return to work meeting 9 June 2016) the claimant submitted that the failure to discuss reasonable adjustments was unjustifiable given that he had requested a stress risk assessment in April. He had been left under pressure for a long time by the extra work which Mr Lax had deceived him into doing.

150. In relation to the disciplinary investigation (allegation 8) his main concern was the way the information had been collated and collected by Mrs Milnes in her personal notes which she did not show to him at the time. He queried whether those notes were authentic. The outcome of that investigation was also a concern. Its purpose was not to help him but to enable the respondent to arm itself to take action against him in future. He felt that he could not challenge the outcome without being invited to do so and therefore had nowhere to go with it. It was a breach of the ACAS Code of Practice to hold the matter against him in that way without allowing him an appeal.

151. Allegation 9 concerned the meeting on 26 October 2016. By that stage he was breaking down and everything that he said was perceived in the wrong way by Mrs Milnes. There had been a failure to make reasonable adjustments and he had been allocated more work. Nevertheless those matters were used against him.

152. In relation to the second disciplinary investigation (allegation 10), the intention behind it was very upsetting. He was making a cry for help but faced discipline as a consequence. He was still trying to cope with the effects of the outcome of the previous discipline and this contributed to his breakdown.

153. Allegation 12 concerned the rejection of his grievance. This was a breach of trust and confidence and of the duty to take reasonable care for his health and safety because it failed to recognise that health and safety was given a high priority in the Code of Conduct at page 611. The real reason Ms Donnan refused to accept his grievance was because she knew that Mrs Milnes and Mrs Gerrard would have to be investigated. It was a breach of the ACAS Code.

154. This fed into allegations 13 and 14. It was a combination of the blocking of his grievance and the pursuit of the disciplinary investigation which caused him concern. Sue Shore knew that there was a grievance from the Occupational Health report in December 2016 but failed to stop her investigation knowing that his grievance was till outstanding. The duty to look after his health and safety meant that his grievance should have been resolved first. Ultimately he was forced into resigning by the knowledge that he could not continue. Nothing would be done to look after his health: instead the disciplinary process would carry on. He emphasised how difficult a decision it was to take a step which meant he would no longer be paid.

155. The claimant then moved to the harassment allegation. He accepted he could not identify any factual matter which clearly showed that it was related to race but he maintained there was unconscious bias on the part of the managers. They

subconsciously supported their white managerial colleagues. This had kicked in after the meeting on 5 February 2016 when Mrs Gerrard chose to listen to Mrs Milnes not to him. It was around that time she advised Mrs Milnes to start documenting everything. Both of them had an agenda and he was the only black manager and the only person treated in this way. It was clear that diversity training was needed.

156. In relation to time limits on the harassment complaint the claimant submitted that the decision to start the disciplinary investigation in November 2016 had continuing consequences which rendered it an act extending over a period, but failing that that it would be just and equitable to extend time given his state of health at the relevant period. He resisted any suggestion there should be contributory fault. He had received only advice in respect of his conduct up to August 2016, and the way he behaved after that had to be seen in the light of his medical state and the employer's responsibility for matters.

157. At the conclusion of submissions the Tribunal reserved its judgment.

Discussion and Conclusions

Introduction

158. In discussing the matter and reaching our conclusions as summarised below the Tribunal took account of the fact that the case as pleaded in the further and better particulars was not exactly as set out in the original claim form. Bearing in mind the matters summarised above we concluded that where they conflicted it would be appropriate to take account of what was said in the claim form rather than in the further particulars. The claim form was a document produced by the claimant himself, whereas his former representative had prepared the further particulars which the claimant now did not entirely endorse.

159. The Tribunal decided to approach each allegation in turn, firstly resolving any factual issues and then deciding whether it amounted to or could contribute to a fundamental breach of either of the implied terms relied upon. We would also consider whether that allegation amounted to harassment related to race before moving to the next allegation.

Applying the Law

160. We reminded ourselves of the legal framework set out above. There was no dispute as to the scope of the implied terms of trust and confidence and in relation to health and safety, but we reminded ourselves in particular that when considering a breach of the implied term of trust and confidence the Tribunal must take an objective view rather than simply rely upon the employee's subjective interpretation of events. It is also important to bear in mind that it is not enough if the conduct of the employer can be properly criticised: it must be likely to destroy or seriously damage trust and confidence. Those are strong words that should not lightly be applied. Further, conduct cannot breach trust and confidence if the employer has reasonable cause for acting as it did.

161. In relation to the implied term concerning health and safety, the obligation is only to take reasonable care for health and safety. There is no absolute requirement to refrain from doing anything that impacts adversely upon an employee's health. If

injury to health is not reasonably foreseeable it is unlikely there is any breach of this duty, let alone a fundamental breach.

162. In relation to the harassment complaints, there was no challenge to the allegation that the conduct was "unwanted. The issue was whether it was related to race. We considered the statutory formulation and the assistance to be derived from the Code of Practice, and also took into account that it is not sufficient for an employee to perceive that actions are related to race in order for the test to be satisfied. The Tribunal has to form its own view on whether the conduct is related to race in a broad and objective manner having regard to all the evidence in the round, including the context of the interaction. The perception of the employer or the employee on this point is not conclusive, although it may be part of the relevant circumstances.

The Allegations Individually

1. **18 January 2016 – the scheduling and conduct of a meeting by Helen Milne about flexi leave authorised by the claimant for a member of his team.**

163. Having heard the evidence the claimant accepted in submissions that this was not a meeting called specifically to discuss this issue, but rather a meeting arranged a few days earlier to discuss matters more generally. The essence of his complaint, however, was that he was required to explain in front of Mrs Newton why he had authorised flexi leave for a member of staff for whom she was a team leader. It was the fact that this was done in front of Mrs Newton which undermined him.

164. The note of the meeting appeared at page 224. Communication about staff leaving early appeared as one of the agenda items and it was recorded in the body of the note that all leave and flexi leave should be put on the team calendar but that staff could request leave from another manager if their manager was absent. To that extent it was clear there was no challenge to the authority of the claimant to grant leave when Mrs Newton was absent, but the issue was simply about communication. It may have been that the claimant took this badly because he was concerned about his meeting with Mrs Milnes on 23 October 2015 about the staffing decision that she had overruled, but we were satisfied that he overreacted in seeing this as a matter of significance. The purpose of the meeting was to discuss how the two mangers would interact and to make sure that expectations were clear going forward. There was reasonable cause for Mrs Milnes to deal with this relatively minor communication issue in the course of a meeting with both of them. This conduct neither amounted to nor could contribute to a breach of trust and confidence, and nor did it amount to any breach of the implied term as to health and safety.

165. The claimant also alleged, however, that this was treatment related to his race. From the evidence he gave and the position he took in submissions we understood his case to be as follows. He was the only black manager; Mrs Milnes and Mrs Gerrard were both white managers. Mrs Gerrard had made a comment about "cracking the whip" in September 2015 which had upset him because of the connotation with slavery, even though he had taken no formal action at the time. He then found himself in conflict with Mrs Gerrard over the special leave issue, resulting in his email of 22 October 2015 at pages 159-160 where he described himself as having an "uphill battle". That was swiftly followed by conflict with Mrs Milnes in late October which resulted in him being off work for six weeks. The return to work

discussions appeared to be unremarkable, but now in early January he had found himself in conflict with Mrs Milnes once again. Although he did not make any overt allegation of race discrimination he did refer to himself being "in the minority" in his letter of 9 February 2016 to Mrs Gerrard (pages 237-238), and in the one-to-one meeting on 4 May 2016 he referred to "cultural differences". In his submissions after the evidence he explained that he believed there was unconscious bias, and that the white managers would tend to support each other rather than the black person challenging their authority. He relied on the lack of any recent diversity training. He accepted that he could not point to any direct evidence that showed that there was a racial element in the treatment he received, but submitted that looking at the treatment as a whole over the period the Tribunal should conclude that it was related to his race.

166. We took account of those arguments. We also considered the related point that the fact that English was not the claimant's first language may have affected the view taken of how he expressed himself, and that his direct manner was misinterpreted as aggressive in relation to later exchanges. That was, we understood, what he meant by "cultural differences".

167. Even given those arguments, however, the Tribunal was satisfied that on 18 January 2016 the conduct of Mrs Milnes was not related to race. She was new to her managerial position involving the claimant and Mrs Newton and was keen to see that they had effective communication between them. One of the issues she wanted to discuss was the claimant's failure to tell Mrs Newton that he had granted leave to someone who was in her team. That was a minor matter and the way in which Mrs Milnes chose to deal with it had no relation to the claimant's race. It simply reflected the situation as she saw it.

168. We noted, of course, that the claimant was aggrieved by this and that it built upon his existing concerns about Mrs Milnes from their dealings on 23 October, and his concerns about Mrs Gerrard following the "cracking the whip" comment and her handling of the special leave issue. We could see that the special leave issue in particular was not handled well: the problem lay not with the claimant but with his manager, Mr Lax, who had authorised the leave without making it clear to the claimant that a counter signature was required. Those matters explained the claimant's subjective perception of this event, but viewed objectively they were not sufficient to enable us to conclude that this conduct was in any way related to race. Even of the burden of proof shifted on that issue the respondent had established that there was nothing related to race in the conduct which the claimant found unwanted. The allegation of harassment in relation to this matter therefore failed.

2. 29 January 2016 – the conduct of Helen Milne in confronting the claimant at his desk and in front of his subordinates asking him to write down everything he was working on.

169. As explained above, we found that the Further Particulars were in error in alleging that the clamant was asked on this occasion to write down everything he was working on. However, that did not affect the core of this complaint: that Mrs Milnes spoke to him at his desk when his colleagues and subordinates were present, thereby demeaning him and undermining him.

170. We noted that this was an important meeting to discuss significant changes to the service. The claimant was discourteous in not attending on time and in not sending an email saying he would not be coming until five minutes after the meeting was due to start. Mrs Gerrard and the rest of the attendees were waiting for him to arrive. Mrs Gerrard instructed Mrs Milnes to go and speak to the claimant to see what he was doing that was so important that meant he could not come to the meeting. The meeting was already delayed and there was clearly some pressure of time. In those circumstances it was entirely understandable and appropriate for Mrs Milnes to go and speak to the claimant in that way. It would have been disproportionate for her to have taken up further time by taking him aside to speak to him in private. Although the claimant genuinely perceived that he was undermined by this conduct, viewed objectively it was something for which there was reasonable cause. It neither constituted not could contribute to a breach of trust and confidence or any breach of the implied health and safety term. Contrary to the claimant's case, Mrs Milnes' purpose was not to demean and undermine him but to find out quickly why he was not at an important meeting.

171. We also rejected the contention that this was in any way related to his race. The facts did not enable us to reach that conclusion. He was a manager who should have been in the meeting and who had not adequately explained in a timely way why he was not present. Mrs Milnes would have acted in exactly the same way for a white manager in the same position. The harassment allegation failed.

3. 5 February 2016 – the conduct of a dignity at work meeting by Geraldine Gerrard.

172. The gist of this allegation was that Mrs Gerrard failed to act properly on the complaints the claimant made to her during the meeting, instead accepting the version of events given by Mrs Milnes and taking no action. That case evident from consideration of the claim form, the Further Particulars (page 59) and paragraphs 13-15 of the claimant's witness statement. He was not happy with the letter of 8 February which misconstrued some of what he said, and responded on 9 February.

173. We noted that Mrs Gerrard did not come to this issue "cold". She had dealings with the claimant over the special leave matter when he had challenged her involvement. That resulted in her email of 23 October 2015 at page 158 which ended with her inviting him to come and speak to her face to face. He had not previously taken up that invitation.

174. More recently she had been in the meeting on 29 January 2016 which the claimant had failed to attend, and she had sent Mrs Milnes out to speak to the claimant. She had been copied into the exchange of emails on 1 February about the staff list issue, which had ended with her asking Mrs Milnes if she was needed to step in (page 227) and advising Mrs Milnes to make a note of all incidents because "it could get messy very quickly" (page 226).

175. Further, Mrs Milnes explained in her oral evidence that after her one-to-one with the claimant on 3 February (at which the "crossing the line" comment was made), she had been upset and went to see Mrs Amans in HR and then had a meeting with Mrs Amans and Mrs Gerrard. That was around the same time as the claimant emailed Mrs Gerrard asking to meet. To that extent Mrs Gerrard had already had some input from Mrs Milnes before she met the claimant on 5 February.

176. Bearing in mind her experience of dealing with the claimant in the week leading up to this meeting, and bearing in mind the phrases which he admitted having used during his discussion with her, we concluded that there was reasonable cause for the approach Mrs Gerrard took. Her letter carefully recorded the matters about which the claimant had told her during the meeting, and also his request that there be no further one-to-one meetings with Mrs Milnes and that Mrs Milnes seek permission before approaching him at his desk. Mrs Gerrard was right to reject these two matters as unworkable and inappropriate. Her suggestion that she attended the next one-one-one was a sensible suggestion. She was also justified in warning the claimant about how the type of language he used in her meeting might be perceived and that it was unprofessional and inappropriate. The warning that he should conduct himself in a professional manner with which her letter concluded was an attempt to ensure there were no similar problems in future.

177. As there was reasonable cause for dealing with the matter in this way it could not amount to or contribute to a breach of trust and confidence. There was also no basis on which we could conclude that it amounted to a breach of the duty to take reasonable care for the claimant's health and safety.

178. We moved to consider the complaint of harassment related to race. For reasons set out above we found that on 16 September 2015 Mrs Gerrard had used the phrase "maybe I'm not cracking the whip hard enough" in a meeting of managers which included the claimant. The claimant raised this in his letter back to Mrs Gerrard on 9 February 2016 (page 238), although he raised it as an example of inappropriate language rather than suggesting overtly that it had been related to race. We accepted as genuine his evidence to our hearing that he regarded it as having a connotation of slavery, but the issue for us was not simply how the claimant perceived such matters. It could equally well have been perceived as a metaphor drawn from horse racing, not slavery. We were satisfied that although Mrs Gerrard used that phrase on that occasion, it simply reflected a sense on her part that she should have encouraged greater productivity from her managers on the issue. It was part of an exhortation for the future and not directed at the claimant or in any way related to race.

179. As for allegation 3 itself, we concluded that Mrs Gerrard's actions were not related to race. She was faced with a difficult situation in which her immediate reporting manager had serious concerns about the claimant's behaviour, and he too then made a complaint to her about that manager. Her position was reinforced by her own observations as to the way in which the claimant had been behaving in relation to issues such as special leave and the staff list. Her conclusions during the meeting were also affected by the language he used during that meeting. None of this was related to race and the harassment allegation failed.

5. The failure of Ms Milne and Mrs Gerrard to act on issues raised following a stress risk assessment on 13 April 2016.

180. The gist of this allegation according to the claim form was that although Mrs Milnes took some work off the claimant, none of the other actions agreed upon were followed up. This allegation was made against a background whereby the claimant regarded himself as having agreed to the risk assessment document under duress at the meeting on 4 May. However, he did not identify any additional steps which should have been taken which were not recorded in that document.

181. The risk assessment with the April 2016 amendments appeared at pages 288-304. We considered each of the four main areas discussed and whether management followed through on those matters.

182. Firstly, there was an agreement that the claimant and Mrs Milnes would look at the process and volume of work and collate data around volumes of emails and phone calls. There was a similar step identified on page 290, albeit Mrs Milnes was to liaise with Workforce Development to see if there was a tool to help assess workload. After the meeting Mrs Milnes emailed the claimant (14 April 2016 page 266) to say that those matters would be discussed at the next one-to-one meeting on 4 May, when the risk assessment would also be signed off. There was indeed a discussion of these matters at the meeting on 4 May (page 318) and the action point was for Mrs Milnes to spend time with the claimant in the week of 16 May to look at those matters. However, it took some time to agree the notes of the one-to-one meeting on 4 May: the claimant added his comments and Mrs Milnes then responded to them. We saw that he claimant emailed some information to Mrs Milnes on 20 May (page 323) although it was unclear precisely what. It appeared that no real progress was made about this matter prior to the claimant going off sick in early June, leading then to the return to work interview on 9 June (see below). Nevertheless, it was clear from the meeting on 4 May (page 318) that Mrs Milnes did follow up on the analysis tool: suggesting that both of them meet with Workforce Development to see if there was a similar tool to one Mrs Milnes had used in the past. It did not seem that that meeting ever took place, although it was evident to our hearing that the claimant was resistant to the suggestion that a tool to analyse his workload would have been of any use. We concluded that it was the claimant who refused to cooperate with this aspect of what was recommended.

183. Secondly, the risk assessment also identified resources as an issue but recorded the recruitment that was then pending. Although the induction of new members of staff would initially create a greater burden for managers, once they were settled into the role their presence would help.

184. Thirdly, there was recommendation that the claimant flag up issues with Mrs Milnes, and he had the opportunity to do this at one-to-one meetings or otherwise. Of course, in reality he regarded Mrs Milnes as a person who was bullying him by this stage but even so the opportunity to raise concerns was there.

185. Fourthly the risk assessment drew his attention to the availability of an Occupational Health referral and/or counselling, but he did not pursue either of those at this stage.

186. Putting these matters together we concluded there was no breach of the implied term of trust and confidence. Some matters were progressed by managers but some matters were not progressed because the claimant failed to engage. He was resistant to putting together a list of everything he was doing in order to help Mrs Milnes assess his workload. He did not believe that use of an analysis tool would help. He did not take up the suggestion of an Occupational Health referral or counselling. It was difficult to see what more management could have done at this stage given his approach to the situation.

187. Nor did this represent any failure to take reasonable care for his health and safety. By this stage the claimant had not had any sick leave since December 2016,

and there was no information of a medical nature provided to the respondent to put them on notice that his health might be suffering. He did refer to his wellbeing in his email of 5 April 2016 at page 256 requesting the stress risk assessment, but that assessment was arranged and held within eight days. The handling of this neither amounted to nor contributed to a fundamental breach of contract.

6. The conduct of a meeting with Ms Milne and Mrs Gerrard on 4 May 2016.

188. The one-to-one meeting on 4 May was attended by Mrs Milnes and Mrs Gerrard. The notes incorporating the claimant's subsequent comments and Mrs Milnes' responses appeared at pages 317-319. There was also a personal note prepared by Mrs Milnes at pages 171-172. Mrs Gerrard did not include this meeting in her subsequent chronology at page 560.

189. The core of the claimant's allegation, according to his claim form, was that the meeting was conducted in an intimidating manner by the managers and that he agreed to sign off the stress risk assessment due to duress. The main points concerning the claimant were that he suggested he should receive training if undertaking performance reviews for a member of staff employed by Pennine Health Care Trust, that he was pressured into signing the risk assessment, that he was criticised for not being in the office at lunchtime when a new member of staff was starting, and that he was criticised for having previously told Mrs Milnes that he would not be doing any more monitoring. The note of the discussion recorded that the conversation became rather heated after that.

190. Mrs Milnes' personal note at page 170 recorded that the claimant displayed an attitude that she felt was disrespectful during the meeting, and that he became emotional when criticised and told her that she could manage his workload but not his practice. Her authority as line manager had to be reinforced by Mrs Gerrard. Her note recorded that at the end of this discussion the claimant said that there were cultural differences.

191. It was apparent to the Tribunal that by this stage both sides had become further entrenched in their positions and frustrated with the other. The claimant perceived there to be a succession of criticisms made of him when he was under great stress and felt he was not getting the support he needed. In contrast the managers could see that they had a senior officer who was resistant to being managed himself and who would display an insubordinate attitude in his words and behaviour. These problems became further exacerbated in the course of this meeting. Although the discussion about the monitoring of the Occupational Therapist folder might itself be a relatively minor issue, it was significant to management because it was another example of the claimant refusing to do what he was told. That was a particular concern to Mrs Gerrard because she had been required to attend one-to-one meetings between Mrs Milnes and the claimant, which she would not ordinarily have to do.

192. Applying the **Malik** test, however, we concluded that there was reasonable cause for the way in which the respondent dealt with this meeting. Even though it was bound to lead to further conflict it was appropriate for Mrs Milnes to take issue, for example, with the fact the claimant had not been available when a new staff member began, and to make her expectations clear for the future – particularly because there were going to be further new starters. It was also reasonable and

appropriate for management to press the claimant to sign off the risk assessment which was already three weeks old. Accordingly we concluded that the conduct of this meeting did not cause or contribute to any breach of trust and confidence.

193. Nor did it breach the implied duty in relation to health and safety. As indicated previously, there were no indications that the claimant's health was suffering other than the reference to his wellbeing in his request for the risk assessment, which had been actioned and was now to be agreed and implemented.

194. In relation to harassment there was no evidence to support the contention that this was related to race. The difficulties in the meeting reflected the deteriorating working relationship between the claimant and his managers, and for reasons set out above we did not consider that this in itself was related to race in any way. It was a consequence of the claimant's behaviour and the language he used in meetings. The harassment complaint failed.

7. The conduct of a return to work meeting with Ms Milne and Mrs Gerrard on 9 June 2016.

195. This return to work meeting occurred after two days of sick leave due to migraines. The return to work form appeared at pages 325-328. Personal notes kept by Mrs Milnes appeared at pages 171-172. The claimant did not know that Mrs Milnes and Mrs Gerard had complained about him and that Mr Owston had interviewed them that very morning about those complaints.

196. The claimant made two central complaints about this meeting.

197. The first complaint was that there was no discussion of what reasonable adjustments ought to be made despite him pointing out the pre-printed bit of the return to work form (page 326) which said that such a discussion should happen. The claimant put forward a strong argument that this absence should have been seen in context. He had requested a stress risk assessment in April and it had been carried out but (in his view) not fully implemented. There was no formal trigger point for consideration of reasonable adjustments: the form indicated that it should be discussed at each return to work interview. However, from the perspective of the managers the position was rather different. The risk assessment had been undertaken and was being implemented. This was a short absence of two days due to a specific medical condition not previously a problem. As Mrs Gerrard explained in her evidence to our hearing, managers had no reason to think it might recur. There was no record of the claimant arguing that it was a consequence of the underlying problems. The evidence from the managers was that he said he did not think it was related. There was no medical evidence of any link. At page 326 the form recorded the claimant saying he was taking painkillers and had returned to work feeling better. In those circumstances we concluded there was reasonable cause for managers to take the view that a discussion about reasonable adjustments was not required in this meeting as a consequence of two days of absence due to migraine headaches. On this matter there was no breach of trust and confidence or any breach of the health and safety obligation.

198. The second complaint was that he was told that the place to raise those wider issues was in one-to-one meetings when those meetings were plainly not working. There was some force in this criticism. Mrs Gerrard was sitting in in the recent one-to-one meetings because of the conflict between the claimant and Mrs Milnes.

Although he did not know it, they had complained about him to HR and had been interviewed that morning. However, it remained the case that those one-to-one meetings were an appropriate forum in which to discuss his behaviour, and as before the claimant's wish to avoid one-to-ones with his line manager could reasonably be viewed as something that could not appropriately be granted. There was no breach of trust and confidence or of the implied health and safety obligation there either.

199. Overall, given the circumstances of the absence and the fact of the recent stress risk assessment and resulting actions, there was no breach of contract in the way this meeting was handled.

200. Further, we rejected the contention that this was in any way related to race. The difficult situation which had arisen was not related to the claimant's race but rather a consequence of the deteriorating working relationship due to other factors.

8. The conduct and outcome of a disciplinary investigation between 19 July and 5 August 2016.

201. Although this allegation was put in relation to the period from 19 July, which was the date the claimant was interviewed by Mr Owston, in fact he had two complaints about this. The first concerned the decision to start a disciplinary investigation at all, and the second the way in which that investigation concluded.

202. Dealing with the way in which the investigation started, although the mechanics were not entirely clear to us it was apparent that Mrs Milnes and Mrs Gerrard made complaints about the claimant's behaviour which resulted in Mr Owston being appointed to investigate.

203. We concluded there was reasonable cause for those managers to make those complaints and for a disciplinary investigation to ensue. There had been a consistent pattern of behaviour by the claimant (through use of language and body language, and a refusal to follow management instructions) demonstrating that he was not prepared to be managed in the way in which the respondent expected. Mrs Gerrard had not only heard of this from Mrs Milnes, but seen it for herself in her meetings with the claimant on 5 February, 13 April and 4 May 2016. Even on the claimant's own acceptance of the language he had used (his letter of 9 February 2016 at pages 237-238), there were grounds for considering whether he had breached the Code of Conduct. The decision to make the complaints and start an investigation neither caused nor contributed to a breach of trust and confidence or of the implied term as to health and safety.

204. We also rejected the contention this was related to race. It was a consequence of the deteriorating working relationship between the claimant and his managers which had nothing to do with his race.

205. The second element was the outcome letter. The letter of 5 August 2016 appeared at pages 409-411. In submissions Ms Del Priore accepted that it amounted to informal action under paragraph 10.2 of the policy at page 641, rather than "no further action" under paragraph 10.1. The concern of the claimant was that it amounted to a finding that he had behaved aggressively but he had no formal means of challenging this. His case was that he would have preferred disciplinary charges to have been brought so that he could have defended himself against those allegations and prove that he had not behaved aggressively.

206. The claimant explained his frustration with this eloquently in his oral evidence and his submission to us. He had reached the end of the procedure with an adverse finding but no apparent way forward. His view was based in part on his conviction that disciplinary proceedings against him would have resulted in an exoneration. From his perspective it was understandable why he was so aggrieved. Looked at objectively, however, it was far from clear that disciplinary proceedings would result in that outcome. There was a significant risk of an adverse disciplinary finding resulting in a formal punishment by way of a warning or worse. Some of the conduct in which he had engaged could reasonably have been seen as a breach of the examples of gross misconduct in the Code of Conduct. Objectively, therefore, the respondent was acting in favour of the claimant in not pursuing a formal disciplinary matter at this stage even though he was unhappy with the view which Mr Owston took.

207. The letter could be criticised for not drawing to his attention the fact that even though there was no right of appeal under the disciplinary procedure, he could challenge the decision by means of a grievance. Mrs Amans accepted in her evidence that if a grievance were successfully brought on that point the letter would be removed from the personnel file. As it was, it remained available for use by managers in future, and was amongst the documents provided to Miss Shore when she began the second disciplinary investigation in November. Looked at broadly, however, there was reasonable cause for management to take a lenient view of the appropriate course of action in the context of this dysfunctional management relationship, and to consider that it would be more appropriate to warn the claimant about how his behaviour might be perceived in future rather than to proceed straight to discipline on this occasion. Although with hindsight one can see that this was simply postponing the inevitable, because the claimant did not accept that his behaviour could properly be criticised, at the time this was a decision made in the interests of preserving the working relationship and in the hope that it could be repaired. It is only with hindsight that it became apparent that was a forlorn hope.

208. We noted that the decision to deal with the matter in this way was in accordance with the respondent's own policy. We disagreed with the claimant's argument that it was a breach of the ACAS Code of Practice. The Code of Practice recognises (paragraph 7) that the purpose of the investigatory meeting is to decide whether there should be disciplinary action, and therefore implicitly a decision not to proceed to formal disciplinary action is within the Code.

209. Accordingly, we concluded that this did not amount to a breach of trust and confidence, and nor could it contribute to such a breach. On the contrary it was conduct which showed an intention to abide by the terms of the contract, not to disregard them.

210. Nor did it amount to a breach of the health and safety obligation. It could not reasonably be anticipated that deciding not to pursue disciplinary action would cause any injury to the health of the employee: just the contrary.

211. Further, there was no basis on which we could conclude that Mr Owston's decision was related to race. Even though Mrs Milnes had some input indirectly to that decision by means of consultation by Ms Williams, we accepted Mrs Milnes' evidence that she had to be persuaded that this was the right course of action. In

any event her own view of the situation was not related to race. The harassment allegation failed.

9. The conduct of a one-to-one meeting with Helen Milne on 26 October 2016.

212. In the period between receipt of the disciplinary outcome letter in August and his one-to-one with Mrs Milnes on 26 October 2016, the claimant took a number of days of leave to help him cope with the situation. He had two further instances of conflict with Mrs Milnes in that period. One was about his refusal to contact someone at Access Independent in September 2016, and the second was the protection of property issue which arose on 13 October 2016. That resulted in yet another heated conversation between them.

213. The one-to-one meeting on 26 October was the subject of the note prepared by Mrs Milnes at pages 427-429. There was a different version of this disclosed to the claimant when he later made a Data Protection Act subject access request. As well as having the identity of third parties redacted, that version of the note omitted the last paragraph which referred to the discussion about a possible transfer. In his submissions the claimant said that this amounted to a serious breach of data protection by Mrs Milnes and to a criminal act, and it should count against her in these proceedings. We rejected that. Mrs Milnes explained that the note had been saved in two different places and it was clear to us that it was an inadvertent error rather than anything more sinister. It did not reflect adversely on her credibility.

214. Mrs Milnes also kept a personal note of this one-to-one meeting at page 426. It recorded that the claimant raised his voice and appeared angry, and that he mimicked her at one point during the meeting. Her note recorded that the claimant interrupted her and appeared to be ending the meeting prematurely when there was a discussion about the possibility of transfer.

215. The complaint the claimant made about this meeting, according to his claim form, was that he was to be burdened by additional work in relation to safeguarding meetings. That discussion was recorded on page 429. Mrs Milnes explained that looking at the figures on paper there was an appropriate workload, and that the claimant would receive training. It was also agreed (page 428) that he would produce a list of the work in which he was involved on a daily basis before the next meeting.

216. We concluded this was yet another occasion in which the position of the two sides to this dispute had become even more polarised. The claimant perceived himself as overworked and was conscious that his health was deteriorating. He viewed with dismay the prospect of another area of work being required of him. However, from Mrs Milnes' point of view the service was facing a significant reduction in resources and yet the work had to be done. An analysis of workloads did not show that he was substantially overworked. He had rejected the suggestion of using a workload tool. The claimant was not cooperating even when training and support was being offered. All this was against the background of their still deteriorating personal working relationship.

217. The question for us was whether the way in which Mrs Milnes approached this meeting amounted to a breach of trust and confidence or a breach of the implied duty to take reasonable care for the claimant's health and safety. We concluded not. There was reasonable cause for the way in which she approached this meeting. The

note showed a concern for workload even against a background of reduced resources. There was no indication from the notes that she was ignoring the concerns he raised: she explained there would be training for the safeguarding work. In contrast the way in which the claimant behaved, perhaps attributable at least in part to his deteriorating mental health, was treatment to which a manager could legitimately object. This was neither a breach of contract in its own right nor could it contribute to such a breach.

10. 11 November 2016 – Mrs Gerrard informed the claimant that he would be undergoing a second disciplinary process.

218. This allegation concerned the decision to start a second disciplinary investigation. It was a decision taken by Mrs Gerrard who approached Miss Shore to investigate.

219. It was evident from the respondent's witnesses that this was a decision taken because of a perception that the advice and warning given by Mr Owston in early August had not borne fruit. The claimant had refused to engage in a restorative discussion with Mrs Milnes in August. There had been further friction between them in September and on 13 October, and then yet another heated meeting on 26 October which ended with the claimant saying that for both their sanity one of them had to leave. There was reasonable cause for management to take the view that "soft" measures had failed and that the matter needed to be considered in a disciplinary context once again. We rejected the contention that the complaints and the appointment of a disciplinary investigator amounted to a breach of trust and confidence or a breach of the health and safety obligation, and nor was it in any sense related to the claimant's race. It was a consequence of his continuing inappropriate behaviour and challenge to managerial authority over him. The harassment complaint failed.

12. The failure properly to investigate or to address the grievance submitted by the claimant on 8 December 2016.

220. We did not hear evidence from Ms Donnan in person. The respondent took the view that her email explained her decision adequately.

221. The Tribunal was concerned by the email of 9 December 2016 at page 458. It recorded that Ms Donnan had considered the grievance, in which the claimant made clear that he had suffered a mental breakdown and how ill he had been. Although the conclusion that the grievance procedure was not open to him was in accordance with the respondent's own procedure, because he had been invited to a disciplinary interview in connection with the matters raised in his grievance, the way in which the email set matters out failed to take any heed of the position the claimant was in and his recent poor mental health. It ended by saying that Ms Donnan was not able to progress his grievance any further.

222. It was entirely understandable that the claimant took that as a door closing. The reference to him having the opportunity to provide his perspective in the disciplinary investigation meeting could easily be missed, and fell short of saying that the substantive content of his grievance would be investigated by Miss Shore. It would have been easy, for example, for Ms Donnan to have said in the email that she was concerned to read the contents of his grievance and that she would pass it to Miss Shore and ask her to investigate it as part of the disciplinary investigation.

The onus was left on the claimant to feed that information in. That was regrettable, and reflected a lack of appreciation of the situation in which he found himself at this stage.

223. However, the Tribunal had to apply the **Malik** test and the conduct should only be viewed as a breach of trust and confidence if it is likely when viewed objectively to destroy or seriously damage trust and confidence. We did not consider that it represented any significant breach of the ACAS Code. Although the ACAS Code envisages either that a disciplinary procedure will be halted pending the grievance, or that the two procedures will run concurrently, substantively the intention of the respondent was the latter. The criticism was that it was not explained clearly enough for someone in the claimant's position. That ultimately represents a failure of communication rather than a decision that his grievance should go no further and that the issues he raised could not be considered. Had the final sentence of the penultimate paragraph (about his perspective being provided in the disciplinary investigation) been missing, we would have found this response to have been a breach of trust and confidence. However, the insertion of that sentence, however opaque, was sufficient to mean that the respondent had left the door open for the claimant to pursue his concerns, even if he might not have appreciated that to be the case.

224. It is right to record, however, two further factors. Firstly, in his immediate response of 10 December at page 465 the claimant made a technical point about whether his interview was a disciplinary interview or not, otherwise saying that he appreciated and understood the stance of Ms Donnan even though he did not agree with it. Secondly, it was clear from the written questions prepared by Miss Shore (pages 515d-515e) that she would have been prepared to consider the terms of the grievance had the claimant wished to put that forward.

225. There was no medical evidence before Ms Donnan indicating that the claimant was likely to have his health further injured through an indication that he should pursue his concerns in the disciplinary investigation not by way of a separate grievance. She could not reasonably have foreseen that her response might have an adverse impact on his health. We therefore concluded unanimously that this email fell short of amounting to a fundamental breach of the implied term of trust and confidence or of the implied health and safety duty.

13. The issue of a letter by Sue Shore on 27 January 2017 inviting him to an investigatory interview on 8 February 2017.

14. A request by Sue Shore on 8 February 2017 that the claimant answer written questions.

226. These were steps taken by Miss Shore to pursue the investigation once the Occupational Health report indicated that the claimant would be fit for a meeting in two weeks with appropriate supportive measures. Miss Shore took this seriously. She arranged for the meeting to be back at Stopford House rather than the Town Hall so that those measures could be put in place. When the claimant did not attend she sent him the questions that she wanted him to answer. Those questions were open questions encouraging him to provide his account of events. We rejected the contention that either her letter inviting him to a meeting, or her suggestion that he answer written questions instead, could be construed as amounting to a breach of trust and confidence, or a breach of the health and safety obligation, or contributing

in any way to such a breach. Indeed, it was clear from the claimant's own evidence that it was really the decision of Ms Donnan that his grievance could not be progressed which was the final straw that caused him to resign, even though the resignation was timed to coincide with the end of his fit note in February 2017.

227. Considered individually, therefore, we rejected the claimant's case in relation to each allegation.

The Allegations Cumulatively and Our Conclusion

228. Even looking at matters cumulatively the Tribunal was satisfied there was no breach of trust and confidence. This was a difficult situation for the managers because of the claimant's behaviour in resisting managerial authority, and behaving in ways which could reasonably be construed as aggressive in the series of meetings that unfolded.

229. Similarly the whole sequence of events disclosed no breach of the implied term as to health and safety: even though management actions contributed to the deteriorating health of the claimant, managers either could not reasonably have foreseen this or were still acting reasonably even if they did.

230. Accordingly we concluded there was no fundamental breach of contract. Issues 2 and 3 fell away. The resignation was not a dismissal. Issues 4 and 5 also fell away. The complaint of unfair dismissal failed and was dismissed.

231. Similarly, after a consideration not simply of the matters individually but of the whole sequence of events, we rejected the contention that there was any conduct related to race, even though we acknowledged that was the claimant's genuine and strongly held perception. The circumstances which prompted the claimant to resign were not in any sense related to his race but were related to other matters. The complaint of harassment related to race also failed and was dismissed. That meant we did not have to deal with time limits (issue 8)

232. The question of remedy (issue 9) did not arise.

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Employment Judge Franey

6 April 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

9 April 2018

FOR THE TRIBUNAL OFFICE