EMPLOYMENT TRIBUNALS

Claimant: Mrs H Chadwick

Respondent: Agenda Management Services Ltd

HELD AT: Leeds **ON:** 8 to 11, 14-15 May 2018

BEFORE: Employment Judge Wade
Mr T Downes
Mr K Lannaman

REPRESENTATION:

Claimant: In person
Respondent: Ms C Urquhart (counsel)

Note: A summary of the reasons provided below was provided orally in an extempore Judgment delivered on 15 May 2018, the short written record of which was sent to the parties on 22 May 2018. An oral request for written reasons was received from the respondent on the day of the hearing. The reasons, corrected for error and elegance of expression, are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 15 May 2018 are repeated below:

JUDGMENT

1 The claimant's complaint of indirect discrimination is dismissed having not been pursued through case management.

2 The claimant's complaint of a failure to make reasonable adjustments succeeds: from 11 May 2017 the respondent ought reasonably to have allowed paid time off to attend medical treatment and arranged that such absences would not result in any objective setting pursuant to its absence management procedure.

3 The claimant's complaints of acts of racial harassment and direct discrimination because of race do not succeed and are dismissed.

4 The claimant's complaint of constructive unfair dismissal is well founded and succeeds.

5 The respondent shall pay to the claimant by way of remedy the following sums, to which the recoupment regulations do not apply:

Basic Award:	£978
Compensatory Award	£2788.54
Injury to Feelings	£8000
Interest	£1280
Total	£13046.54

REASONS

Introduction

1. The claimant in this case was employed by the Respondent service company, and worked as a senior officer in a firm of solicitors specialising in debt recovery. She holds a law degree and the legal practice qualification ("LPC") and has worked in the sector for many years. She has not undertaken the final professional stage of her training, either in pupillage or as a trainee solicitor, but has conducted her case before this Tribunal with as much preparation, skill and attention to detail as the fully professionally qualified advocates who appear before us.
2. Her complaints were made in a claim form presented on 10 November 2017 following ACAS conciliation between 5 September and 11 October 2017. Those complaints (and the issues arising) were clarified at a case management hearing as: unfair constructive dismissal; harassment and direct discrimination on grounds of race; and disability discrimination by a failure to make reasonable adjustments.
3. The claimant was ordered to check that the summarised complaints accurately reflected those in the claim form. A complaint of indirect discrimination was not pursued. The Tribunal determined the complaints identified during case management.
4. It was accepted at all material times that the claimant met the Equality Act definition of a disabled person and the respondent had the requisite knowledge. The claimant identifies as mixed Afro-Caribbean race. The person that she alleges engaged in acts of direct race discrimination and harassment was her former boss, Miss Biglin. The respondent relied on the statutory defence in relation to any race discrimination or harassment, if it were to be found.
5. The dispute concerning the facts has been less than might otherwise have been the case because there was an internal investigation of the claimant's allegations through a grievance and appeal. Many of the matters were examined through that process.
6. We were very grateful for a chronology of largely undisputed matters, and for background facts that were set out in the respondent's written submissions, which

were invited to be provided in writing in order that the claimant would know the respondent's case on affirmation, which was a late permitted amendment.

7. In these written reasons we adopt those background facts with some chronological additions, save for: anonymisation of those individual colleagues from whom we did not hear; duplication; where they included matters which were not necessarily accepted. References to numbers in square brackets are to pages in our bundle, and references to letters and numbers in round brackets are to witness statements.

8. The hearing had been subject to a timetable and that was largely observed, save that a seventh day was not required:

   Day 1: Tribunal reading time, claimant evidence;

   Day 2 : Claimant evidence continued.

   Day 3: Miss Biglin; Mrs Pearson

   Day 4: Mrs Kaznowski; Mr Hadfield; claimant re-sworn; submissions

   Day 5: Tribunal deliberations;

   Day 6: Judgment; remedy.

Undisputed factual background

9. The Respondent is a wholly owned subsidiary of Drydens Ltd, trading as drydensfairfax solicitors, an independent law firm, solely focused on the recovery of debt for UK lenders, debt purchasers, central Government and commercial businesses.

10. The Respondent carries out the administrative functions for drydensfairfax (but is not itself a firm of solicitors). The Claimant was a Senior Officer in the Respondent's 'unsecured' department, which provides a debt recovery litigation service in respect of unsecured consumer debts. The Legal Services team, in which the Claimant worked from September 2016, deals with high volume, low value claims including dealing with the County Court bulk claims centre where necessary.

11. The Claimant is a 31-year-old (d.o.b. 15 July 1986) woman of mixed black Caribbean and white British descent and was employed by the Respondent as a senior litigation officer on 13 October 2014 on a salary of £25,000pa. She had completed the LPC in 2008. She had previously worked for the Respondent from 10 October 2011 to 31 May 2013 as a paralegal recoveries agent on £18,000pa and she was invited back to rejoin the firm by Mr X, head of litigation, in 2014. She returned without undertaking a formal application process (HC@3).

12. The Claimant is disabled for the purposes of the Equality Act 2010 by virtue of her aplastic anaemia, a bone marrow disease, and the Respondent knew of this disability at all relevant times: [182A-187]. It is accepted that exhaustion is a side-effect of this disease. The Claimant did not take any sick leave in respect of this disability during her employment with the Respondent [139A].

13. The Claimant worked a 35-hour week and oversaw more junior colleagues. She moved into Miss Biglin's team, which dealt with unsecured debt, from 1

September 2016 and her pay increased to £26,250pa [62]. The Respondent considered that the Claimant was good at her job and she had no capability issues or disciplinary matters on her record.

14. The Sickness Absence policy [175A-G] and the Other Absence from Work policy [169-175] applied to the Claimant. Her contract [142-151] provided that she did not receive sick pay for the first three days of sickness absence, but thereafter would receive SSP. On 6 September 2016 the Claimant told Miss Biglin of her health problems and need for regular hospital appointments [222-3].

15. On around 9 September 2016, the Claimant heard Miss Biglin telling colleagues how she (Miss Biglin) had sometimes been dressed up as a golliwog when she was a child. The Claimant was out of the room when this conversation began and returned part way through it. The Claimant says she told Miss Biglin why she considered it to be an offensive topic of conversation. In February/March 2017, Miss Biglin brought in to the office some childhood photographs, including one of her dressed as a golliwog, and showed them to some colleagues. The Claimant was not present and only found out about this incident after she had resigned [945].

16. On 16 September 2016, the Claimant found a lump in her breast and asked Miss Biglin for permission to visit the GP that morning, which was granted [254]. Between September 2016 and August 2017, the Claimant frequently asked for time off for medical appointments and other reasons (eg dentist, child care), often at very short notice, and on every occasion Miss Biglin approved the requests. The Claimant was also granted compassionate leave twice in spring 2017 [648; 674].

17. The Claimant had a biopsy on 28 September 2016 [36], booking the day off as annual leave. She had surgery to remove the breast lump on (Friday) 21 October 2016, which she also booked as annual leave [981-2]. She returned to work on (Monday) 24 October 2016 (despite her doctor telling her to take two weeks off to recover). Miss Biglin was not in the office on 24 October (MB@8). On 25 October, the Claimant appeared very ill and Mr X asked her what was wrong. When she explained, he escalated the matter and the Claimant was sent home, and offered two weeks' discretionary sick leave at 50% pay [139A]. She took one week off but returned to work in the second week for financial reasons. On 26 October Miss Biglin emailed the Claimant at home and said she should take as much time off as she needed [381].

18. In November 2016 the Claimant considered raising a grievance against Miss Biglin. On 23 November, she emailed the HR department saying she had informally raised issues with Mr X about the way Miss Biglin treated her but that she was nervous of escalating matters [401-2]. Mr B, HR Officer, gave her encouraging advice about asking Mr X to help her find an informal resolution [401]. The Claimant drafted an undated but contemporaneous note of her concerns [136] which included complaints about Miss Biglin's management style, but there was no reference to racism or to the 'golliwog' conversation. She did not raise a grievance at this time.

19. On 30-31 January 2017, Miss Biglin told the Claimant and Ms Y, another senior officer, that the three of them would have to work late on a rota system because Mr X had asked for longer hours of cover in the office. The three of them agreed to do this, albeit they were understandably cross about it (the Claimant had to pay for extra childcare) [492-5]. This arrangement continued until the Claimant left the Respondent's employment. On 31 January, the Claimant grumbled about the change to a colleague and said she will "*do it till I find another job*" [487].

20. On 28 February 2017, there was a discussion in the office about a Primark T-shirt bearing a racially offensive message [957]. Neither the Claimant nor Miss Biglin were present but Ms A, one of the Claimant's reports, allegedly said "*black people need to get over slavery*" (HC@39). During an investigation Ms Z, another of the Claimant's reports who was present, said Ms A did not say that but that it "*was inferred. It was more meaning 'it happened such a long time ago so why is it still in the news'*" [956]. Ms Z was offended by the remark [956]. Ms A and Ms Z had an argument.

21. Later, Miss Biglin asked the Claimant to speak to Ms A about this. Miss Biglin said, in reference to Ms A's remark, something like, "*everyone is entitled to their opinion*" (MB@9). This comment was said in the Claimant's presence. The Claimant was offended by this but did not say anything to Miss Biglin or raise a complaint about it (HC@39}. Neither did the Claimant speak to Ms A, saying she considered this to be an insensitive request from Miss Biglin (given the claimant's ethnicity).

22. In March 2017 the Claimant found out that Ms C was joining her team without her having been told (which she said also happened once before involving Ms C). She raised this with Mr B in HR on 10 March 2017 [555], indicating that she would resign if she could afford to [556]. At that time, Miss Biglin apologised to her for not letting her know in a timely fashion [547]. The Claimant again considered taking out a grievance against Miss Biglin, but did not do so despite having support from Mr B [552-555].

23. In March 2017 Miss Biglin relayed an instruction from Mr X that some orders were not to be served on creditors by first class post due to a spike in those costs; the claimant provided her with information that the rules required it; the claimant also raised it with Mrs Pearson (in her compliance and risk role) and others. Miss Biglin subsequently told the team to hang fire on that instruction until Mr X had made a final decision, but she did not publicly credit that change as being down to the claimant's intervention (and knowledge of the rules).

24. On 11 May 2017, the Claimant had an email exchange with colleague Mr W (another senior officer) about a work matter. He said, referring to the two other senior officers, Ms Y and Ms D, "*we are the black sheep and [Y/D] are the prodigal children*" and the Claimant replied: "*Very true. If only I could actually get her to call me that outright then maybe I could get the hell out of here on a nice discrimination payout! BAAAAHHHH!*" [685-6]. These senior officer colleagues (Mr W, Ms Y, Ms D) all reported to Miss Biglin and were identified as white comparators by the claimant.

25. On 5 June 2017 the claimant learned that Miss Biglin had recruited a member of staff (Ms V) for the Claimant's team but had not told the Claimant about this. The Claimant heard about this on 5 June and immediately decided to resign, telling Mr W, "*Think it's time to hand my notice in!*" [708]. Later that morning Miss Biglin apologised for not having told her earlier but said that she had not yet decided whose team Ms V would join [718].

26. The Claimant resigned, giving notice, on 5 June 2017 by letter to Mr X [712], stating "*Until recently I had enjoyed being part of the team and am grateful for the opportunities you have given me during my time here. Unfortunately, over the past few months it has become increasingly difficult for me to continue to work here as I feel that I am treated differently to my peers and feel undermined in my position*". She added that she had considered raising a grievance but has not done so "*out of fear that I would be made even more of an outsider for doing so*". She does not mention Miss Biglin by name. She does not explicitly mention discrimination on the basis of race or disability either, although there is a reference to different treatment.

27. Following her resignation, the Claimant did take out a grievance against Miss Biglin, and it was agreed that her notice period was put on hold while that took place [1003].

28. In the grievance [769] the Claimant raised 11 issues including Miss Biglin making racially offensive comments, micro-managing the Claimant, failing to give her appropriate training, communicating in a rude and passive-aggressive manner and failing to conduct return-to-work meetings.

29. The grievance was heard on 20 June 2017 by Mrs Pearson, Head of Risk and Compliance (FCA), assisted by Mrs Kaznowski from HR [783-791]. Mrs Pearson and Ms Kaznowski then interviewed Miss Biglin, 11 other employees, and considered a number of emails that the Claimant provided (JP@4-8).

30. On 7 July (received by the Claimant on 11 July) Mrs Pearson provided the outcome [829-838] in which she upheld two of 11 issues raised: point 8 (failing to provide training to the Claimant impacting on performance rating) and point 11 (not conducting return to work meetings or being supportive when unwell). Mrs Pearson did find other points in the Claimant's favour (particularly allegations of discriminatory remarks (race and disability) but identified other issues such as around poor communication in the department. She asked the Claimant to reconsider her resignation.

31. The Claimant discussed the grievance outcome with Ms E, an external trainer who was mentoring both the Claimant and Miss Biglin for an NVQ [850-2]. To that mentor the claimant said …" I literally don't need the hassle" and that she was "in pain and exhausted all the time".

32. Nonetheless on 18 July 2017, she decided to appeal the grievance outcome [855]. On 19 July 2017 she asked Mrs Kaznowski for notes of the grievance interviews, and was given them on 20 July [858-860]. She complained that she

was not given enough time to appeal, but the time was extended and the Claimant was then happy that she had enough time [922] to present her appeal.

33. Mrs Kaznowski offered the Claimant a complete rehearing of the grievance but the Claimant rejected this as giving the Respondent "*a second bite of the cherry*" [922]. She also objected to the appeal being heard by Ms T (Head of Compliance – SRA) [923] so the Respondent agreed that it would be heard by Mr Hadfield, Director of Collections, Strategy and Analytics [921]. He considered her appeal document [895-915], and he held meetings with the Claimant on 10 and 23 August 2017. Mr Hadfield also interviewed a number of colleagues including Miss Biglin.

34. Mr Hadfield provided his appeal outcome on 24 August 2017 [996-1001] and upheld points 1, 5, 7 and 9. It seems that point 10 was no longer pursued and points 8 and 11 had previously been decided in the Claimant's favour by Mrs Pearson. The Claimant had previously agreed with him that point 1 (making racially offensive comments) was the most important to her. Mr Hadfield invited the Claimant to reconsider her decision to resign but she did not.

35. As a result of his findings, Mr Hadfield said he intended to set in motion various actions such as improving training and feedback, and said he would initiate disciplinary action against Miss Biglin. The Respondent, which already had equality training at staff inductions [106-121], introduced further training for its staff [1054A-P].

36. Once the appeal was concluded, on 25 August 2017, the Claimant asked Mr B to take her notice period 'off hold' and her final day of service was 21 September 2017 [1003]. She worked up until that date.

Evidence

37. We heard from the claimant herself of course at some length, and then from Miss Biglin, Mrs Pearson who determined the grievance, Mrs Kaznowski in human resources and Mr Hadfield who determined the appeal. The bundle of relevant documents runs to some 1200 pages or thereabouts. We were invited to read relevant material during the course of the hearing.

38. The area of evidence that has been the most challenging, is the assessment that we can properly make of the oral evidence, in comparison with the contemporaneous documents during the material period[1]. In this case there has been an unusual mis-match on some occasions between the impression given of a state of mind at the time (in circumstances where one might otherwise regard those as faithfully reflecting a state of mind) and the oral evidence suggesting otherwise. We have given ourselves a lengthy direction about fact finding as follows:

- Is the account consistent with contemporaneous material, including increasingly, social media, smart phone and meta data based evidence?
- Is the account consistent with subsequent investigations or witness statements given?

[1] **Gestmin v Credit Suisse Uk Limited and others** 2013 EWHC 3560 paragraph 22

- What evidence is there from others about the witnesses' conduct and demeanour at the time**,** both before and after any allegations?
- What other evidence is there about the way the witnesses behaved on other occasions, perhaps not in dispute?
- What was the Tribunal's impression of the witnesses when questioned: was the impression that they were telling the truth?
- What was the Tribunal's assessment of the witnesses' reliability on relevant matters: were they generally consistent with other material and good historians or were they mistaken in their recollections or beliefs?
- What does the totality of the chronology or circumstances tell the Tribunal about the inherent likelihood of the accounts?
- An initial impression or assessment of a witness has to be checked against all the other factors;
- Placing too much significance on demeanour can be unsafe: a confident witness is not necessarily a truthful witness and a nervous one is not necessarily lying;
- A genuinely held belief which is wrong, or one untruth told, does not necessarily render other evidence from that witness unreliable;
- People often deny unlawful acts ("well she would, wouldn't she");
- Generally good historians still tell untruths; people do, on occasions, behave in unexpected ways, whatever the overarching likelihood;
- Skilled cross examination can demolish an otherwise cogent case;
- The Tribunal has a duty to put the parties on an equal footing during a hearing as part of the overriding objective;
- The formal rules of evidence do not apply to the Tribunal;
- Justice requires witnesses to have the opportunity to comment on disputed matters in, what is still, an adversarial process.

39. To these directions we add the following caution: it is very rare that there is direct evidence of conscious discrimination; and sub-conscious bias is, by its nature, only to be found by inference from behaviour. These matters are, of course, at the heart of making decisions in Equality Act cases.

Further findings including concerning the failures to make adjustments

40. The claimant was first employed on a salary of £25,000 with the respondent on 13 October 2014. Mr X had asked her to re-join the respondent (having worked there previously) and they agreed that salary would secure her re-joining. It was nevertheless absolutely clear that she wanted career progression in the respondent's business[2].

41. The claimant worked initially for Mr X. She was acknowledged to undertake many of the functions of a "team leader" because there was not that position in her team at the time. She was on the team leader email distribution list, for example. She undertook holiday and absence management for more junior staff. She was an acknowledged high performer: one in around twenty five staff of some three hundred or so at the time, who received an "exceeds" bonus in her May 2016 salary of 5% (or £1250).

42. In January or February 2016 the claimant was diagnosed with her disabling bone marrow condition. Exhaustion was a side effect, and it required drug treatment

[2] 1015, 1002 to 1007.

by cyclosporine necessitating out-patient appointments on a regular basis. This was weekly initially from April 2016, and was either weekly or fortnightly thereafter, but with a pause after the claimant's breast surgery. The claimant was also aware that because of the condition and treatment she might be at an increased risk of cancer, and that was a source of anxiety for her. In May 2016 she provided full disclosure to the respondent's Human Resources ("HR") department of the condition, the treatment and schedule, the side effects, and that she was working the treatment time back or taking annual leave to cover longer appointments. Treatment was expected to continue for one to two years. In 2016 the claimant took a week's leave in April and a week in August; otherwise her annual leave was used for appointments.

43. In discussions the claimant mooted home working with Mrs Kaznowski as an adjustment, but it was reasonably concluded that home working would not be feasible as a regular working pattern. HR offered instead to explore the claimant working shorter hours, or a different shift pattern, and invited the claimant to put in a flexible working request.

44. The claimant concluded that she did not want to lose pay by doing that, and she did not pursue it. The claimant similarly did not want her treatment appointments treated as sick leave absences, because she was aware from her de facto team leader duties, and familiarity with the respondent's policy, that such absence could trigger an attendance objective under attendance management policy and management scrutiny and visibility. There was no suggestion of payment for treatment absence from HR.

45. The tone of the May 2016 communications were indicative of the claimant coping with the situation she then faced. She chose to use her holiday to make up the time to attend longer appointments, and she suffered the effects of the exhaustion that she was experiencing in her own time, essentially being unable to do all the usual parenting and cooking activities at home, in addition to working. We accept entirely her evidence about that.

46. The claimant's financial circumstances were such that she was saving for a house at the time. That was the explanation for her reluctance to have a pay reduction from reduced hours because of her health. From May she did not take any sick leave arising out of her treatment or illness, or at all in fact, apart from one day for food poisoning on 10 October 2016 and one day for flu on 1 August 2017, for which under the respondent's policy she received no pay. She then had a surgical procedure appointment on 21 October 2016, and then five days' absence for recovery after that.

47. The respondent's "Other Absence from Work" policy provided that absence for medical appointments of less than half a shift should be "made up"; half a shift or more must be taken as holiday (with no "return to work" meeting) or as sickness absence. Sickness absence would be unpaid unless it was for long enough to qualify for Statutory Sick Pay – in practice then often unpaid. (This policy was relied upon as a provision, criterion or practice which was said to put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled).

48. The respondent's sickness absence policy required a "return to work form" to be completed and a meeting to take place between manager and employee after

such absence. The claimant herself completed that form entering food poisoning as the reason on the first occasion of her absence, asking Miss Biglin to sign it.

49. That form asks the manager to explain if discretionary sick pay is not being paid and the reasons for not doing so, which suggests that the respondent's default position was that pay would be discussed on return to work and payment would be made for absence unless there was a reason not to do so. On the other hand the claimant's experience (and we accepted her evidence about that) and the two or three occasions where the respondent evidenced that it had made payments for sickness absence, suggested the opposite happened in practice. The claimant therefore reasonably believed that she had no entitlement to sick pay for her treatment absences, and if taken as ill health absence, she would not be paid.

50. We also accept the claimant's account (it was not challenged) that over the relevant period (May 2016 to her resignation in September 2017) there was a mixture of both longer and shorter appointments in her treatment, and that she took holiday where necessary to address both exhaustion and longer appointments. These matters were at the outset within knowledge of HR and Mr X as her manager, and then Miss Biglin's knowledge as every occasion of working back time or taking leave had to be approved. The holiday records were not before us, but they had been requested by the claimant (SAGE records) but were not provided.

51. A consequence of using holiday or working back time for treatment appointments was also that no "return to work" meetings took place. Even when the claimant did have the week's sickness absence with half pay in October, Miss Biglin did not have a return to work discussion with her and Miss Biglin had not told HR or Mr X about the claimant's surgery appointment before going on leave herself.

52. Neither Mr X initially, nor Miss Biglin, nor HR sought to discuss with the claimant what the respondent could do in regards to her treatment, apart from inviting her to make a flexible working request to work fewer hours (for less pay), nor as these events were unfolding, the unwise consequence of using holiday or making up time while undergoing the type of treatment and circumstances that she faced.

53. Equally there is no evidence that those matters, or the claimant's concerns about an inability to carry out caring duties at home, were formally raised by the claimant at the time.

<u>Discussion and conclusion: the reasonable adjustments complaint concerning treatment absences</u>

54. Having recorded those findings it is convenient to announce our decision in relation to the complaint of a failure to make reasonable adjustments.

55. The relevant legal framework is to be found in sections 19 and 20 of the Equality Act 2010, and in the Employer Code guidance, and in Schedule 8 of the Act. There is no onus on the disabled employee to ask for or raise adjustments.

56. The respondent did not challenge that the claimant has made out "relative disadvantage" from the "other absence" policy in comparison with people who are not disabled. The Tribunal considered for itself the hypothetical person with the injury, broken leg, or otherwise, who also requires treatment appointments, but is not a disabled person. She too would face the prospect of using annual leave for appointments, or face an attendance objective or disciplinary sanction if treatment

appointments were taken as sick leave. Nonetheless, we have concluded that there remains substantial disadvantage faced by the claimant in comparison with such a person, in regard to a relevant matter, because the claimant's treatment period and the consequences of her serious condition were unknown, and far less certain than the person diagnosed or treated for a break or injury or issue of a kind not amounting to disability, and the condition and treatment generated fatigue, exacerbated by the policy. We therefore concluded that the policy put the claimant at substantial and relative disadvantage giving rise to the duty to make reasonable adjustments.

57. The adjustments contended for by the claimant were: allowing her paid time off to attend medical appointments; not treating the absence as sickness absence but "disability related absence" thereby removing her from the risk of triggers or warnings; adjusting the trigger point for attendance monitoring or warnings in her case.

58. The question for us is whether it was reasonable for the respondent to have to make these adjustments.

59. We note that the respondent made none of them, but it did, in relation to limited surgery recovery time off, pay half pay, and it allowed the claimant to make up her hours, or in effect, it approved the choices the claimant made pursuant to the policy. She was able to preserve her pay, but at the loss of her holiday, or by working longer days to make up time, with the consequent impact on her levels of fatigue.

60. We have considered whether it is reasonable for the financial burdens of disability to be shared, taking into account that this was a business in decline in a difficult market and exercising tight financial control (we accepted Mr Hadfield's evidence about that).

61. We take into account the very limited number of occasions on which the respondent had exercised its discretion to pay full pay for sickness absence to anyone, despite the impression given by its return to work form.

62. We take into account the claimant's reason for feeling under financial pressure, saving for a house (and unconnected with disability) and making a choice to use holiday rather than ill health absence, as opposed to a different choice which might have resulted in lower earnings but less fatigue. However, the fact that none of the adjustments were made through the material period meant that she also had the reasonable concern of warnings or disciplinary meetings if she chose treatment appointments to be treated as sickness absence.

63. We take into account the number of pay decisions that were made in favour of the claimant in respect of her performance, which involved considerably more cost than pay for a number of medical appointments. And we take into account the size of this employer: it is not very small, nor is it very large.

64. Taking all matters into account we do consider that it was reasonable for the respondent to have had to put in place some paid time off for treatment appointments and, to have modified its procedure to ensure that any treatment absences taken as paid absence would not trigger warnings or other management discussions. These adjustments ought reasonably to have been made at the point at which the claimant made the respondent aware of her diagnosis, disability, treatment, and side effects, namely from May 2016.

65. For these reasons and to this extent the claimant's complaint of a failure to make reasonable adjustments succeeds.

The reasonable adjustment complaint concerning time for entering an appeal

66. It is convenient also to record our decision in relation to a fourth reasonable adjustment contended for by the claimant, in relation to the time required to submit a grievance appeal. The respondent's grievance policy required a grievance appeal to be submitted within seven days. The relative disadvantage said to arise from the policy was that the claimant required longer to submit her appeal (and therefore had to request an extension in the time available) because of her disability.

67. It is evident from the undisputed chain of events that the respondent did make adjustments to the time for entering a grievance appeal. There was no failure to do so. More fundamentally, the relative disadvantage (or need to request an extension) arose not because of the claimant's fatigue, or otherwise connected to her disability, but because of the time she wanted to take to read the witness statements involved in the grievance investigation.

68. This reasonable adjustment complaint does not succeed.

Limitation as it concerned the reasonable adjustments complaint

69. Applying the time limit for presenting Equality Act complaints in Section 123 (1) of the Act, and taking account of early conciliation, complaints about discriminatory acts prior to 6 June 2017 (that is shortly before the claimant resigned) would be out of time. The claimant's last day at work was on or around 21 September 2017. Sub-sections 123(3) and (4) of the Act provide:

    (3) For the purposes of this section -

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

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

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

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

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

70. It follows from our conclusions that the claimant has made out conduct extending over a period (Section 123 (3)(a) of the Equality Act 2010) concerning the failure to make adjustments for treatment absences. On each occasion that the claimant attended treatment, Mr X, or Miss Biglin, had to approve holiday or working time back, which was frequently through the material period, when the respondent had the requisite knowledge (May 2016 to 21 September 2017). The failure in May to address potential adjustments to deal with the impact of the respondent's policy, and the frequent decisions of her managers on each occasion endorsing the choices available under that policy, in our judgment amounts to a discriminatory state of affairs throughout[3]. The last such act was also, on the balance of

[3] See Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686

probabilities, within the primary limitation period. We are not prevented from determining this complaint for limitation reasons.

The legal framework in relation to the harassment, discrimination and constructive dismissal allegations

71. The provisions and relevant principles were set out in the respondent's submissions, and the Tribunal directed itself as follows.

72. Section 26 (1) relevantly provides:

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 (**together in these reasons "the prohibited effect")**.*

73. Section 26(4) provides

In deciding whether conduct has the effect referred to in subsection (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.

Direct Discrimination

74. Section 13(1) of the Equality Act 2010, relevantly provides:

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

75. Section 136 relevantly provides that if there are facts, in the absence of any other explanation, from which the Tribunal could conclude a contravention of the Act has occurred, it must do so unless a respondent shows that there has not been a contravention.

Constructive unfair dismissal

76. The Employment Rights Act 1996 relevantly provides:

94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.

95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if …

> *(c) 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.*

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -

> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -

> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

77. The following relevant principles concerning Section 95(1) (c) can be derived from the authorities.

78. **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**: If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all, or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains, for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

79. **Courtaulds Northern Textiles Limited v Andrew [1979] IRLR 84**: A term is to be implied into all contracts of employment that the employer will not, without reasonable or proper cause, conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee.

80. **Woods v WM Carr Services (Peterborough) Limited [1981] ICR 666**: To constitute a breach of the implied term of trust and confidence, it is not necessary to show that the employer intended any repudiation of the contract. The Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, was such that the employee cannot be expected to put up with it.

81. The "last straw" doctrine means that if a person resigns in response to a series of actions which, together, constitute a fundamental breach, the last of the actions (the "last straw") must be more than trivial: *London Borough of Waltham Forest v Omilaju* [2004] EWCA Civ 1493. It must contribute, however slightly, to the breach of the implied term of trust and confidence.

82. The principles of affirmation were examined in **Cockram v Air Products** EAT 0038/14/LA and were helpfully summarised. Mrs Justice Silber said this (paragraph 25): "The question whether a party has affirmed the contract is fact sensitive and context dependent. It does not generally lend itself to bright lines or rigid rules." At paragraph 15 she says: "It is undoubtedly the case that an employee faced with an employer's repudiatory breach is in a very difficult position, as the courts have repeatedly recognised. Most recently, Jacob LJ described the difficulties in these circumstances in **Bournemouth University Corporation v Buckland** [2011] QB 323 at para. 54 as follows:

> **"..there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation."**

83. The relationship of affirmation to the last straw doctrine has posed difficult questions. In Dr I Gibson and Partners v Mrs SA Hughes UKEAT 0371/06 His Honour Judge McMullen QC said this at paragraphs 19 and 20:

> "First this is not a last straw case. The difficultly in using metaphors, as Lord Hoffmann warned recently in **Lawson v Serco** [2006] ICR 250 para 19, is there is a great danger in spending too long on a metaphor and a striking metaphor may lead to distraction. The last straw indicates that a very substantial weight be placed upon the back of a camel which it will bear with fortitude. But there comes a stage when any addition to the load will cause the camel's back to be broken, even if the addition is of something as trivial as a straw. That is the language used throughout the cases from **Lewis v Motorworld** to **Omilaju**. What is plain is that for this doctrine to be engaged there must be more than one event. True it is that none of them needs to be serious and none needs to be a breach of contract, provided cumulatively they amount to a fundamental breach.

> In this case a line was drawn under the events of June 2004 by the Claimant's affirmation of her contract and so none of the events, including a disputed matter of 4 June which occurred before her affirmation, can contribute to the load placed upon the camel's back."

84. The tension between "last straw" and affirmation has recently been addressed in the Court of Appeal in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978. At paragraph 51, Underhill LJ holds: "*I cannot agree with* [the above] *passage. As I have shown above, both Glidewell LJ in* Lewis *and Dyson LJ in* Omilaju *state explicitly that an employee who is the victim of a continuing cumulative breach* is *entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation; provided the later act forms part of the series (as explained in* Omilaju*) it does* not *"land in an empty scale". I do not believe that this involves any tension with the principle that the affirmation of a contract following a breach is irrevocable. Cases of cumulative breach of the* Malik *term… fall within the well-recognised qualification to that principle that the victim of a repudiatory breach who has affirmed the contract can nevertheless terminate if the breaches continues thereafter… the right to terminate depends on the employer's post-affirmation conduct."*

Further findings relevant to context and inferences to be drawn

85. In the summer of 2016 Mr F and Mr X managed two separate legal teams within the firm. Miss Biglin reported to Mr F and the claimant to Mr X. Mr F left the respondent's employment and the teams were to be merged. Mr X told the claimant that a re-organisation might mean a team leader post was available, which of course was the progression that the claimant sought, having undertaken many of the team leader functions for some time.

86. The claimant came back from a week's holiday in August 2016 and Mr X explained at that point that a team leader post was not available, but that she would be receiving a pay rise to £26,250 which was, unknown to the claimant at the time, at the top of the pay bands for senior officers. As part of the merger of teams, she was deployed to Miss Biglin's team from 1 September, joining her three white senior officer colleagues, Mr W, Ms Y and Ms D. Within a few weeks of joining Miss Biglin's team the claimant was describing her in disparaging terms to Mr X and expressing that she was likely to leave.

87. During the material period the claimant herself engaged in "banter", or unfortunate email exchanges, which were found by Mrs Kaznowski when she was undertaking disclosure searches in the case, and included in our bundle.

88. Examples of the type of material unearthed by Mrs Kaznowski included: the claimant's reference on 13 September 2016 to those who work in Citizens' Advice Bureaux ("CAB") as "hairy legged do gooders" (in the context of a candidate for appointment); on 29 September 2016, the day after her own breast biopsy, the claimant was referring to a former colleague as "Twin Peaks" and criticising her in connection with alleged breast surgery – that was in an email conversation between the claimant, Miss Biglin and Ms Y; in March 2017 "venting" to Miss Biglin that she wanted to "smack a colleague in the face" because of her work performance, saying "hasn't she been here since biblical times?".

89. These sorts of comments made by the claimant are relevant, but we also pause to note that a similar search was not, to the Tribunal's knowledge, undertaken by

Mrs Kaznowski in relation to anybody else in this chain of events, for example Miss Biglin, Mr B in HR or Mr X. We cannot know whether the claimants emails were typical, but they were certainly not discouraged by her boss Miss Biglin or by Mr X, which suggests they were not out of the ordinary.

90. The partial seeking of material in this way, and the use of adverse material only as a deterrent to the claimant pursuing her case, is a matter from which the Tribunal could draw an inference of a discriminatory state of affairs or which might inform any remedies if they come to be awarded.

91. In this case we have not drawn an inference of a discriminatory mind: it was Mrs Kaznowski unearthing these communications, not Miss Biglin, and it was Miss Biglin's conduct towards the claimant which was said to be influenced by matters of race. What Mrs Kaznowski does, or is instructed to do, in defence of these proceedings does not inform us at all about Miss Biglin's state of mind at the time in our judgment. There are no allegations of discrimination or harassment on grounds of race made against Mrs Kaznowski, nor Mrs Pearson, who conducted a grievance investigation, nor Mr Hadfield in connection with the appeal.

92. There are two allegations made against the respondent (implicitly its senior management - sensibly Mr X or more senior managers) in connection with appointment to a trainee solicitor post, and promotion and pay. Again, seeking material about the claimant only is more likely evidence of a willingness to deploy a "gloves off" approach to litigation in a financially strained environment, as opposed to any indication that that approach would not have been adopted for litigant ex employees of other ethnicity.

93. The relevance of "ordinary" communications and interactions between the claimant and Miss Biglin and others, is the insight they provide into their day to day states of mind and the environment, taking into account the partial nature of the search.

94. Ordinary communications included day to day approvals by Miss Biglin of the claimant's leave requests, promptly, whatever the cause. Those ordinary communications are not indicative of any hostility at all to the claimant, nor any difference in treatment to that of her colleagues.

95. Some of the email communications showed a sad lack of respect for colleagues and for others: those communications do not put any of the communicators in a favourable light, again bearing in mind the partial nature of the search.

96. Some communications also showed reasonably frequent open communications by email between peers (including the claimant) about leaving the respondent's employment, and commentary about working for the respondent which indicates a shared poor view of their employer.

97. The claimant's explanations for the "banter" or "unfortunate" communications were that they were largely bravado, and "joining in" with a particular culture, or tongue in cheek, and that we should not draw anything from them about her real feelings and state of mind at the time. Certainly we have concluded that this was a fast paced, constantly changing and financially pressed environment where demonstrating respect for colleagues and others was, at times, a low priority, and where people might frequently look to leave. We accept the claimant joined in with that, but at times, privately, there were other feelings and thoughts in her mind. They included that her career and salary progression appeared to have

stalled in the face of Miss Biglin, whereas previously she had been progressing well. Mrs Kaznowski's evidence, which we entirely accepted, was that the claimant was genuinely upset about the matters in her grievance. Nevertheless it is not surprising Miss Biglin took the claimant's outward, bullish and resilient personality, at face value.

98. Positive interactions included on or around the Christmas break in 2016/2017, Miss Biglin vaguely recalled putting bottles of prosecco on the desks of her senior officers as a gift – it was her usual practice - the claimant bought Miss Biglin a gift in return. There were occasional social events at local bars and a Christmas party. There were also day to day email interactions about recruitment and various operational matters, and amongst all this, and amongst bouts of ill feeling, there was, no doubt, a great deal of work being done. In September 2016 the claimant described some of Miss Biglin's emails as "passive aggressive", but that was not a description we could discern from the evidence.

99. One further matter from which the claimant drew support for her allegation of continuing discriminatory conduct, was the alteration in disclosure for these proceedings of a chain of emails in June 2016 between herself and Mr B. The respondent accepted there had been alteration; Mrs Kaznowski had asked how that had happened and Mr B in HR said he did not know. No allegations were made by the claimant that Mr B had engaged in discriminatory conduct – in fact it was to Mr B that the claimant frequently went for support.

100. The alterations involved removing "emojis" – happy and sad faces - and a handful of words on a couple of occasions, including "looks less furtive that way", in relation to a meeting in a bar or restaurant between the claimant and Mr B.

101. What we make of these alterations is this: not that they are evidence of a discriminatory mind controlling the respondent, or the litigation, but that someone, in all likelihood Mr B himself, has seen the potential embarrassment from the obvious conclusion to be drawn from the exchanges and sought to moderate that by editing them prior to the respondent's disclosure search. The obvious inference is that Mr B liked the claimant, and wished her grievance well, in addition to providing her support, and whether with or without the support of management, was not acting entirely neutrally between colleagues (Miss Biglin and the claimant).

102. Against these conclusions, it was convenient for the Tribunal to address the claimant's further allegations chronologically, taking into account the allegations of cumulative conduct giving rise to a constructive dismissal.

<u>Discussion and conclusions concerning the claimant's race discrimination, harassment and constructive dismissal case: (paragraphs 10.1.1 to 10.1.2 and 11.1.1 to 11.1.10 of the case management summary)</u>

<u>On about September/October 2016 Miss Biglin telling colleagues in the claimant's presence how she dressed up as a golliwog (subsequently bringing in photographs she shared with the claimant's colleagues confirming her views (paragraph 14 above).</u>

103. This discussion took place very soon after the merger on 9 September 2016, or thereabouts. It was not recorded as an example of poor treatment in the claimant's November 2016 draft grievance. The account of it first emerged in the

claimant's written grievance after resignation in June 2017, and she relied upon her memory of it to make that allegation. We make additional findings as follows.

104. The claimant came back to her desk and overheard a conversation with colleagues in which Miss Biglin was telling them about her mother's upbringing of her, her attendance at gymkhanas, and the costumes in which she was dressed, including "a golly wog, a red Indian and lady luck".

105. The claimant interjected at that point to say that her favourite book as a child had been "the three golly wogs", and that her mother did not want her to take it into school {*in case she was bullied*}. Whether or not the words in italics were said (which was the claimant's case), the claimant was not explicit or direct about the potential for offence in the discussion, or that she **was** offended: her hope was that the interjection would indicate to Miss Biglin that those sorts of references could cause offence. That intervention was relatively subtle and went over Miss Biglin's head. The claimant formed no view at the time about Miss Biglin's state of mind in engaging in that conversation. She gave her the benefit of the doubt because she had only just joined her team and continued on with her work, albeit soon after she was disparaging for Miss Biglin to Mr X.

106. We apply the statutory framework to the comment by Miss Biglin, and its context. Accepting that the comment was unwanted (the interjection from the claimant would indicate it was unwelcome) and could relate to race, because of its nature, we have to decide whether it had the purpose of creating the prohibited effect and/or whether it did create that effect. In our judgment it did not have the prohibited purpose; that is apparent from the context: it was not aimed at the claimant, and even with the lens of hindsight, it is highly unlikely that was so in the context of other normal and friendly communications. We accepted Miss Biglin's evidence that she did not intend offence and could barely remember it. Did it have the prohibited effect, taking into account the claimant's perception at the time? The claimant's own preparedness, on occasions, to be unkind about others, was not indicative of a particular sensitivity to feelings of humiliation at the time. She may have come to look on this conversation differently later, but there was no contemporaneous evidence that the comment violated her dignity, or created the prohibited effect. We do not accept that it had the prohibited effect, and it was not an act of harassment.

107. Equally, it was not an act of direct race discrimination: the claimant has not established factually that there was any detriment which could amount to less favourable treatment (within Section 39). These complaints fail, albeit the circumstances form part of the landscape generally.

108. The claimant did not know about the February/March photographs including with Miss Biglin dressed up as a gollywog, until she was provided with statements of colleagues who had been aware, for her grievance appeal (around 20 July 2017). We accept Miss Biglin's conduct in February or March was unwanted by the claimant, given her intervention on the first occasion. Nevertheless we do not, in its context, consider that Miss Biglin's conduct in bringing in the photographs related to race – it related to her childhood and dressing up. We did not consider likely the claimant's portrayal, with hindsight, of Miss Biglin's actions as a Machiavellian conspiracy rooted in racism and a wish to put the claimant down because of her race. That is not the balance of the evidence.

109. We did accept the claimant's evidence that she was, when she learned of the photographs, offended; but the pleaded act in February or March does not succeed as an act of harassment or direct discrimination. This incident may further be relevant to the respondent's affirmation case but it formed no part of the claimant's decision to resign - she did not know of it.

110. It is convenient to deal with the following allegations together.

In the period September 2016 to September 2017:

1) Miss Biglin failed to provide adequate training, support and information to assist the claimant in her new role with a new client base. This includes not providing relevant information about the client requirements/mandate, reporting procedures, billing, relevant documents and failing to carry out handovers (see paragraphs 10,11 and 12). The claimant relies on the other white senior litigators as comparators (Ms Y, Mr W, Ms D)

2) Miss Biglin's interaction with the claimant in the office and by email (dates to be provided) compared to the treatment given to the white senior litigators (see paragraphs 13 &14).

3) Miss Biglin ignored the claimants communications/contributions. She never gave praise or recognised her good work. She undermined the claimant and was unwilling to listen to her in management meetings. The claimant reported regulatory concerns to senior managers in emails because she was being ignored by Miss Biglin (dates to be provided) (see paragraphs 27 & 28).

4) Miss Biglin failed to show any empathy or understanding towards the claimant when she was told about the requirement for a biopsy for a lump in her breast. She relies on an email exchange (date to be provided) with Miss Biglin to demonstrate her approach.

111. The respondent accepted that the claimant was not provided with adequate training by Miss Biglin in the material period – the claimant was not trained to undertake billing for a particular client which she had understood was her role, and instead it was done by Ms Y or Ms D. There were also other failings in the department, including one to one meetings between Miss Biglin and the other senior officers being missed.

112. When the relevant emails were identified, there was nothing discernible which differed to our general finding above as to a lack of hostility or less favourable treatment of the claimant by Miss Biglin in email communications.

113. There was however certainly more face to face contact and communication with Ms Y and Ms D than with the claimant: Miss Biglin approached their desks to talk far more frequently. On this we prefer the balance of the witness statement evidence from the grievance investigation, which describes Miss Biglin going to other senior's desks rather than to the claimant's. Generally Miss Biglin was more friendly in her dealings with them.

114. Miss Biglin did not ignore the claimant's emails or contributions on more than one or two occasions due to pressure of work. There was not disclosure of all operational emails (which would in any event have been disproportionate), but the context was sufficient to conclude there was nothing in it. There was an occasion where a colleague allocated work to one of the claimant's team because the team member asked for work, but that was entirely innocuous.

115. When the claimant raised her concern about medical examination for a breast lump and swiftly arranged biopsy, there was no pastoral or other discussion instigated by Miss Biglin. This is not evidence of a lack of empathy or sympathy: she approved matters promptly and removed obstacles for the claimant. A lack of discussion could equally reflect that she was the claimant's boss (as opposed to her friend), she was busy, and did not want to intrude on her privacy. We have already discussed Miss Biglin's part however in a failure to make adjustments.

116. In March 2017 the claimant was not praised by Miss Biglin for raising the first class post issue, when she might have expected praise or thanks. We were not taken to examples of praise or thanks for other seniors, save for the Christmas gifts, but Miss Biglin might reasonably have thanked her. On the other hand the claimant's actions thwarted the instruction of Mr X to save money and, albeit that might have ensured compliance with the relevant rules.

Miss Biglin failed to carry out any return to work interviews for the claimant. The claimant asserts this was less favourable treatment because of her race and believes her white colleagues were treated more favourably/or a hypothetical comparator would have been treated more favourably than she was in similar circumstances.

117. Miss Biglin did not carry out return to work interviews with the claimant on two or three occasions. Firstly, on a short absence, the claimant filled out the form herself (this cannot possibly amount to detriment; the claimant could have asked for a meeting; she understood the procedure very well; it was a sickness bug or flu). Secondly, on the week's absence, there was an omission to complete the form, but on this occasion Miss Biglin asked the claimant how she was and when the claimant said "Okay", Miss Biglin went on to talk about work matters and did not complete a return to work form.

118. Miss Biglin had completed return to work forms for other, white, members of her team. Her explanation for the reason why she had done so for other colleagues was that HR, Mr B in particular, had reminded and chased her for those forms.

In October 2016, Miss Biglin failed to report the claimant's ill health (biopsy) to senior managers, or offer support, or time off with pay at the time of the biopsy to aid her recovery. It was only when the claimant raised this with Mr Ali on 26 October that action was taken which Ms Bigin should have taken when she was first informed of the biopsy (see paragraphs 19 - 22)

119. The unfolding of events concerning the claimant's breast lump removal is set out above. The claimant did not ask Miss Biglin for longer time off for recuperation, or for particular arrangements. The reason Miss Biglin did not address it in advance was because the claimant did not request it of her and she was busy. We repeat our conclusions about the alleged lack of empathy from Miss Biglin. We are asked to consider, the hypothetical situation of Ms Y, Ms D or Mr Y being in similar or truly comparable health difficulties – would Miss Biglin have conducted herself differently? In all likelihood she would. She would certainly have engaged in more discussion with Ms L and Ms D; she may well have sought to make arrangements for them because of their historic bond. As to Mr Y, we cannot say that matters would have unfolded any differently.

On 28 February 2017, when a colleague said "black people need to get over slavery" Miss Biglin replied "well everyone's entitled to their opinion". This comment was not made in the presence of the claimant but reported to her – alleged to be an act of harassment by Miss Biglin

120. The situation was more nuanced than the case management summary: on 28 February 2017, there was a discussion in the office about a Primark T-shirt bearing a racially offensive message and the press reaction to that. Neither the Claimant nor Miss Biglin were present but Ms A, one of the Claimant's reports, allegedly said "*black people need to get over slavery*" – this was reported to her by Ms Z, another colleague who also reported to the claimant. During the later grievance appeal investigation Ms Z said Ms A did not make the remark precisely, but that it "*was inferred. It was more meaning 'it happened such a long time ago so why is it still in the news'*". Ms Z was offended by the remark. Ms A and Ms Z had an argument, but later cleared the air.

121. Later that day, at the end of a meeting held by Miss Biglin with her senior officers, the claimant brought up what had been said by Ms A. Closing down that discussion, Miss Biglin said "everyone is entitled to their own opinion" and asked the claimant to speak to Ms A and Ms Z and the meeting then ended. The claimant then did not then speak to Ms A or Ms Z (her case was it was only to Ms A she was asked to speak, but we considered it likely it was to both). She alleged Miss Biglin's remark was harassment or direct discrimination in the context of being asked to speak to Ms A. Mr Hadfield considered that in all likelihood Miss Biglin was insensitive and off hand, or words to that effect and we too consider that likely.

122. The claimant later had a "whatsapp" group including Ms Z and Ms A, and considered Ms A, a lovely person, who just did not often realise she was saying things which might cause offence; in fact the claimant, on leaving the respondent, described her colleagues apart from Miss Biglin as a "lovely bunch".

123. Applying the harassment analysis, was the comment, "everyone is entitled to their opinion", it having been reported that someone had said "black people need to get over slavery", unwelcome conduct? Yes, it was and we accept the claimant's evidence on that. Did the comment in that context relate to race? Its content does not relate to race, but to freedom of expression; the context, however, does, and on balance, in the round, the remark did so relate – it was capable of being understood as an endorsement of the remark.

124. Did the remark have the prohibited effect? Like many of the claimant's complaints, this remark was not raised until the grievance meeting with Ms Pearson in July 2017, some five months later. It was one of two alleged racial remarks, the first in September 2016. Was it intended to create the prohibited effect? In our judgment it was not; it was intended to close down a meeting, which the claimant had extended by discussing conflict between two other colleagues. Miss Biglin's purpose was to allow colleagues to get back to work without engaging in a lengthy discussion, but it was dismissive of the issues the claimant was trying to raise.

125. Did the remark have the prohibited effect taking into account all the context? We bear in mind that if Miss Biglin had asked one of her other seniors to speak to Ms A, appreciating that the claimant might feel uncomfortable, the claimant would

have said she was undermining her. This was the second unwelcome but unreported remark in six months. Given the work culture generally, the claimant's ambition and apparent resilience, her ordinary communication with Miss Biglin, and Miss Biglin's recognised ability to be abrupt at times, we have concluded that it did not have the effect and the complaint of harassment fails, taking into account, the claimant's perception, the circumstances and whether it is reasonable for the conduct to have the prohibited effect,.

126. As a complaint of direct discrimination, there are no facts from which we could conclude a contravention. We would have to construct a hypothetical comparator. Given Miss Biglin's apparent inability to pick up the nuances of how offence might be caused, we consider she would have treated any other senior officer in exactly the same way, if they had sought to introduce discussion of an alleged offensive remark between others; had she been more engaging with other seniors raising issues, it would not have been because of race, but because of her longstanding friendship with them.

127. In this conclusion we take into account that Miss Biglin had on occasion deployed imagery on her screen as office humour. "Thick skinned" and enjoying "bravado" and expecting others to be equally so, whilst having clear friendships which did not include the claimant, is probably a fair summary of the position.

128. In the period September 2016 to September 2017 on 3 occasions Miss Biglin recruited a member of staff for the claimant's team without informing the claimant. Other white senior litigators were fully involved in recruitment for their team (paragraph 29).The third time this happened on 5 June 2017 was the last straw for the claimant who tendered her resignation on that day.

129. At times there was clear involvement of the claimant by Miss Biglin in discussions about recruitment of new colleagues and they considered applications in the round (an example is the claimant characterising one such applicant in the unfortunate way she did). On the other hand, in 2016, and in March and June of 2017 Miss Biglin did not engage the claimant or inform her in a timely way about two joiners to the claimant team team (Paragraph 21 and 24 – Ms C in 2016 and March 2017, and Ms V in June). We accept entirely that the claimant felt isolated and humiliated by such conduct, particularly when on the June occasion Mr W, her other senior officer colleague, knew about the appointment. In 2016 the claimant found out because Ms C walked onto the floor with Mr X; and in March 2017 she found out because IT were setting up Ms C's work station.

130. The recruitment decisions were taken with Mr X's knowledge. In 2016 we accept the claimant's evidence that he was surprised that the claimant had not been told of the appointment by Miss Biglin. In the round we accept that there was less favourable treatment in comparison with the treatment of the claimant's white colleagues in this respect by Miss Biglin, and amounted to detriment by the third occasion.

The reason why question, as it applies to allegations of discriminatory conduct by Miss Biglin

131. Albeit not all of the claimant's allegations amount to less favourable treatment than her white senior office colleagues, some of them do. When we look for the "something more", or further facts, which, in addition to differential treatment

could lead us to conclude a contravention of the Act, we do consider that given the nature of the September and February remarks by Miss Biglin, albeit we have found them not to amount to acts of harassment for the reasons above, they could be indicative of sub conscious racial bias, and can, in our judgment amount to the "something more". Similarly the bringing in of photographs even after the claimant has sought to indicate such references were unwelcome in a modern workplace (if we disregard our conclusion that the intervention passed Miss Biglin by).

132. We ask ourselves is it more likely than not that Miss Biglin's mind was influenced by race, or is it more likely than not that she was being influenced by other matters. Her own evidence of course was that none of her treatment or interactions with the claimant were influenced by race, but were just ordinary interactions including ordinary management failings. She did not claim to be the perfect manager, but she denied any racially discriminatory state of mind.

133. The claimant questioned Miss Biglin at length about her educational attainment and approach to professionalism. Certainly the claimant had greater educational attainment, and greater knowledge of the relevant practice rules at work. Equally relevant were the bonds between Miss Biglin and Ms Y and Ms D, with whom Miss Biglin had worked for some years. The context includes the historic merging of two teams, the imposition of people on people, as it were, by virtue of that merger, and a heavy workload. Perhaps most importantly, the claimant's demonstrable achievement within this environment, her ability and her career ambitions were clear to see (and her frustration at being managed by someone she considered her inferior).

134. In our judgment, asking what is more likely than not, these matters, are far more likely to have been the influences on Miss Biglin's mind than the claimant's race, such that we find race was no material influence. For these reasons, the above complaints of direct race discrimination also fail.

135. In August 2017 the Respondent appointed Ms S as a trainee solicitor without advertising the role or giving the claimant and others the opportunity to apply. Ms S is white and completed her LPC in 2017. The claimant completed her LPC in 2008 but was denied the opportunity given to Ms S (paragraph 34 -36).

136. The further facts in connection with this allegation are as follows. The respondent employs very few trainee solicitors, if any, in any particular year. It has no rolling programme and does not advertise for trainees. Any member of staff can in theory submit a proposal to be employed as a trainee, but they are not to know that other than through one to one discussion.

137. Ms S had been a client relationship manager and with the firm for some years. Senior management suggested she undertake the professional exams and offered a training contract. Prior to Ms S, the last trainee solicitor had been Ms G, who had been a paralegal in the firm's technical team and undertook a traineeship in 2014. Both individuals were paid their salaries in their previous roles whilst undertaking the training contract. In Ms G had a pay rise when she qualified as a solicitor.

138. These facts are not such that we could conclude less favourable treatment of the claimant, nor less favourable treatment because of race. Had the claimant approached the respondent and asked if she could undertake a training contract

and was not permitted to do so, then this complaint might, with something more, amount to such facts.

139. The claimant's comparator would be Ms G, and the something more could be the diversity statistics of the firm, which, using the firm's categories, indicated 10 black or mixed employees (out of 135 employees), but no black senior, trainee solicitors or solicitors. There were 30 Asian employees of whom five were in senior positions, three team leaders, head of legal (Mr X) and head of compliance (Ms T). Had the claimant been appointed a team leader she would have been the most senior black/mixed employee. Nevertheless the claimant did not ask for a training contract and this complaint cannot succeed.

140. The claimant had been expected to perform team leader duties without extra salary/benefits and was denied the opportunity to obtain a more senior role. She complains that few black employees are employed in senior roles within the Respondent's business demonstrating a lack of equal opportunity (34-36).

141. The claimant was the highest paid of the senior officers. There was no advertisement of a team leader position for which she applied and was not appointed. Her real comparator therefore had to be a hypothetical white or Asian colleague, who, instead of performing team leader duties (as she did when working directly for Mr X) until September 2016, had secured promotion to that post. There were no such examples in the material before us. It was apparent that recruitment and promotion in the firm was not always formal and not always transparent. Had Mr X been able to secure an additional team leader post in the restructure or merger, or had someone left, on the balance of probabilities he would have appointed the claimant without competition from other candidates. Securing advantage through informal channels was as likely as open competition in this firm, and the claimant's history had shown she had benefitted from that too.

142. For these reasons, these last two complaints of direct discrimination could not succeed.

Limitation as it applies to the complaints of direct discrimination and harassment

143. Adopting the analysis above, the last alleged act of discrimination on grounds of race concerned the appointment of trainee solicitor, Ms S in August 2017. The claimant could not have presented the complaint concerning the photograph brought in by Miss Biglin until she had knowledge in July 2017. These matters are both in time. Had we upheld her case of harassment and discriminatory treatment between September 2016 and September 2017 as conduct extending over a period, then the limitation issue would not have arisen. Equally if we had upheld some complaints but not others and found those upheld did not amount to conduct extending over a period, we might have had to consider whether to grant a just and equitable extension. As all the complaints fail on the facts and after analysis, we do not come to consider whether it is just and equitable to extend the time limit to permit any single, out of time, allegation.

Constructive dismissal

144. Taking into account our analysis of the alleged discriminatory treatment and harassment by Miss Biglin and the firm, we ask ourselves whether the treatment of the claimant was otherwise: cumulatively, conduct without reasonable and

proper cause, calculated or likely to destroy or seriously damage trust and confidence.

145. It will perhaps not surprise the parties that we have concluded that the matters above did cumulatively do so.

146. The claimant was subject to poor treatment (which we have found to include a failure to make reasonable adjustments) in connection with her illness and insensitive conduct in the light of her ethnicity. We have not found the latter to amount to contraventions of the Act, but viewed objectively, those matters add to the cumulative total of treatment likely to seriously damage trust and confidence. There was the lack of training with its impact on the claimant's rating (she went from routinely exceeding expectations to meeting them); the lack of face to face or friendly contact with her boss in comparison with Ms T and Ms Y, creating an impression of favouritism or clique, and worse for the claimant, a lack of recognition for her technical contribution. Finally on three occasions there was a failure to inform her of an appointment to her team in a timely way. Apology for a first or second omission in these circumstances renders it innocuous; by the time it happens a third time it is unsurprising that the claimant would reasonably conclude that enough was enough, particularly when Mr W knew of the June appointment of Ms V.

147. This last straw is of the right quality and calibre of conduct when cumulated with the other matters which we have found. The claimant resigned promptly and without a plan: she had no other job to go to; she had not discussed matters with her husband, but she had justifiably had enough and was entitled to resign in response to the repudiatory breach at the point that she did.

148. In reaching these conclusions it will be apparent that we have rejected the respondent's primary submission on constructive unfair dismissal: in effect that there was a golden thread running back to the claimant's first complaint about Miss Biglin as early as September 2016 indicating that she would not stay with the respondent and would "leave on a package" by making complaints of discrimination. This was supported by a much later "whatsapp" message indicating that she would "go Hiroshima" on the respondent firm, and in between there were the exchanges with Mr B and Mr W, indicating unhappiness and a wish to leave.

149. On balance, we do not accept the claimant always had in mind lining up a resignation and complaint; the Hiroshima remark was after her resignation; her evidence was that it referred to her wish to report the firm to the SRA for alleged breaches of rules; even if she really meant both (ie a regulatory complaint and her tribunal proceedings), it does not tell us that she always intended a complaint, and that her characterisation of treatment by Miss Biglin was exaggerated. We have not upheld all her complaints, but we accept that her treatment in the round by Miss Biglin over a lengthy period was not innocuous, and ordinary management. She put up with it with bravado and adopting a "thick skin", but ultimately, she reached her limit.

150. As to the analysis of the "resignation on hold" period, we have applied **Cockram.** We have had to decide whether the claimant's conduct after her resignation amounted to an affirmation.

151. The entirety of an email exchange on this matter[4] is the relevant dialogue between the parties. In our judgment it is absolutely clear that when the claimant agreed, following a conversation instigated by HR, but between the claimant and Mr X, about putting her resignation on hold, the limit of the claimant's agreement was that there be an investigation of the matters that had caused her to resign; in essence the respondent asked for an opportunity to look into the claimant's concerns and she agreed, and continued working, but subject always to the ability to re-activate her concerns. Her conduct in preparing the grievance and appeal was in no way the conduct of someone letting bygones be bygones: quite the reverse. She was challenging the events with vigour. In our judgment that can in no way be said to be an affirmation of her contract in these circumstances.

152. There is a considerable difference between this case and Cockram. The claimant was not seeking to reserve for her own convenience a lengthy notice period, but was responding to the respondent's request to let the firm investigate a grievance. Sometimes matters are done the other way around, and employees raise grievances and then resign when the outcome is not as they would wish. Acknowledging that these matters are very fact sensitive, we do not consider there is a general rule that agreeing an employer's request to investigate a grievance, and pursuing vigorously to a grievance appeal outcome, amounts to affirmation such that the paused resignation cannot amount to a dismissal under Section 95.

153. In those circumstances, although we have to apply the section 98 analysis – what was the reason for dismissal – the respondent did not assert a fair reason. The reason for the dismissal was Miss Biglin's treatment of the claimant. Was it reasonable for the respondent to dismiss the claimant in these circumstances? No, it was not taking into account all the matters to which we have referred. The unfair dismissal complaint therefore succeeds and is well founded.

154. Given these conclusions it is not necessary for us to deal with allegations that the grievance investigation and outcome conducted by Mrs Pearson, and the appeal with Mr Hadfield, amounted to, or added anything to, the breach of the implied term which we have found. We accepted Mrs Pearson's evidence that she had done her best and approached matters genuinely; we consider Mr B in HR was not in full possession of all the knowledge when he communicated with the claimant. The claimant's scepticism about the investigation was unfortunate albeit understandable, given what she was told and the clear need to interview further witnesses on appeal.

155. The claimant's reaction to the prospect of Ms T addressing her appeal (she considered that was an entirely cynical proposal by the respondent because of Ms T's ethnicity), further demonstrated the claimant's unshakeable belief that her treatment had been influenced by race, whatever the respondent was to conclude (or indeed whatever the outcome of this Tribunal). It does not support the respondent's golden thread case; it is simply reflective of the entrenchment of belief when there is poor treatment and a difference in race. In our judgment this chain of events would not have happened were it not for poor treatment of the claimant by Miss Biglin at times, which we have decided amounted to a breach of the implied term.

[4] 1002 to 1007

Remedy in respect of unfair dismissal

156. The unfair dismissal basic award and some elements of the compensatory award were agreed by the Respondent. The relevant provisions are Sections 118 to 126 of the Employment Rights Act 1996.

157. The claimant asserted an ongoing loss of earnings because she had secured new employment in a different field, at a salary of £25,000, from 30 October 2017.

158. The only issue in dispute was the time it will take the claimant to return to her previous salary of £26250. That is a matter on which no evidence was led by the respondent, and the claimant says she thinks it is reasonable that she might return to her previous salary after a year with her new employer.

159. We consider that the best evidence for what is probable in the future is what has happened in the past. We know from the claimant's salary with the respondent that it took two years to lift from a salary of £25,000 to £26, 250.

160. We therefore consider entirely likely that it might take her that time again, to recover her previous salary and is not therefore unjust or unsound to award the £420 she seeks, calculated as the net difference over the period.

161. As to her loss of statutory rights, this is a matter for the Tribunal's industrial knowledge and discretion and we have awarded £350. That is a sum to compensate for the loss of the accumulated service, which engages entitlements to statutory rights, including the right to claim unfair dismissal. The latter is a valuable right, but we also take into account that the claimant had accrued two years' continuous service with this employment. We consider £350 is the just sum.

162. The total compensatory award in respect of unfair dismissal constructive dismissal is therefore £2788.54.

Remedy in respect of the failure to make reasonable adjustments

163. There was no financial loss asserted in connection with this aspect of the claim. Aggravated damages and a personal injury award have not been pursued. An award for injury to feelings has been pursued.

164. We have directed ourselves that there are two matters that we have to consider when assessing whether to make award for injury to feelings. The first is the degree of seriousness of the contravention of the Equality Act: the most serious lengthy campaigns of harassment and the like, often resulting in loss of employment and sometimes psychiatric injury over a very lengthy period, are typical of awards in the highest Vento band. The lower band is reserved for typically one off incidents, where there are perhaps mitigating or less serious factors. The middle band is for those which are not so serious as to fall into the highest band, but nevertheless serious.

165. The second matter is to assess the degree of injury to the claimant's feelings, in terms of assessing an appropriate compensatory sum, reminding ourselves that the principle is one of compensation, and not retribution or punishment of a respondent which has engaged in a contravention of the Equality Act. Applying a compensatory approach involves recognising the value of particular sums to the claimant; there should be no sense of windfall or disproportionate award.

166. Taking these directions into account we have made some further findings of fact (or we express them again here).

167. The claimant's family time and her family experience (she has a child and a husband), and her life outside work bore the brunt of the fatigue and exhaustion that she experienced by virtue of her condition, and working alongside it, without respite that leave would have afforded. In her words, at work, she just kept going. She took two separate weeks' holiday in 2016 (in April and August), but we did not hear of any holiday (other than for treatment) in 2017.

168. The impact of these arrangements included disagreements with her husband, lack of interaction with her family because she had to rest, lack of cooking and the other activities that were important to her in maintaining the quality of that family life.

169. We take into account that she had been a highly rated performer in all her time at the firm and she set herself high work standards. She had no expectation of sick pay being granted (and that was a reasonable conclusion) in these circumstances.

170. We also take into account that we have to separate from our analysis the degree of injury to her feelings which we have no doubt arose from some of the treatment she experienced from Miss Biglin, that was unrelated to her health, but which we have found did not amount to discrimination or harassment because of race. We have to focus on injury which we find was caused by the failure to make reasonable adjustments.

171. In that we have noted that the alleged "failure to make reasonable adjustments" in terms played no part in the contemporaneous documentation at the time, or in her resignation letter, albeit she had highlighted the difficulty of the respondent's policy.

172. We do consider and find, however, that the claimant's general dip in resilience, and in particular resilience to treatment at work which she found difficult, was in all likelihood caused by her treatment and condition, and the fact that she was using holiday and making up hours, as a way of addressing that condition. She was bearing all the strain of the condition mostly in silence and mostly kept private from her colleagues, bravado being a coping mechanism and ill feeling sometimes a consequence.

173. As to the degree of seriousness of the contravention, we take into account that the adjustments that we have found ought reasonably to have been made should have been made at a time when homeworking was discussed in meetings with Mrs Kaznowski.

174. The respondent's failure in these circumstances was not a deliberate act of discrimination, but it was an omission in circumstances where the equalities training of the respondent's staff was, at the very least, potentially out of date: it was only conducted at induction, which entirely omitted long serving staff such as Miss Biglin. In addition to a lack of training, the culture was that the sharing of the cost of ill health (whether through disability or otherwise) only arose in exceptional circumstances through discretionary sick pay provision, and where other alleviating means to avoid fatigue (such as being able to work from home) were not available.

175. In those circumstances, although not a deliberate act, it is, in our judgment, a serious omission given the consequences for an individual's health, family life and resilience. We assess it to be appropriately in the middle band of the Vento bands.

176. We have taken into account the matters in her life that were affected by the respondent's omission, and her feelings of upset about those matters, and we have assessed the injury to her feelings at £8,000.

177. It follows that there should also be an award of interest and the relevant Order mandates that we apply an interest rate from the date of the contravention to the date of the hearing and in these circumstances that produces a sum, adopting an interest rate at 8%, of £1,280.

178. In undertaking that calculation we have identified the date from which the reasonable adjustments should have been made as the discussion point with Mrs Kaznowski on 11 May 2016, when exhaustion was clearly established and the knowledge was there that the claimant had been using holiday and working back time to deal with her treatment appointments.

179. From 11 May 2016 to 15 May 2018 is not precisely two years, but it is so close that it is not in the interests of justice to do the additional calculation. We have limited the interest element to two years at the court rate of 8%, which is the rate we are required to apply.

Summary of remedy decisions

180. The grand total of awards is therefore £13,046.54; the injury to feelings element of that is £8,000; interest £1280; the basic award at £978; and the compensatory award at £2788.54.

Employment Judge JM Wade

Date 7 August 2018