EMPLOYMENT TRIBUNALS

Claimant: **Ms J Wilks**

Respondent: **Nottingham University Hospitals NHS Trust**

Heard at: **Nottingham** **On:** **23 to 25 October 2018**

Before: **Employment Judge Legard**

Members: Mrs C Brown
Mr C Tansley

Representatives

Claimant: **Mr Townend, Lay Representative**
Respondent: **Mr Cooksey of Counsel**

JUDGMENT having been sent to the parties on 03 December 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Issues

1.1 The issues in this case had previously been canvassed before two Employment Judges at two Preliminary Hearings and they were further clarified by way of a Scott Schedule.

1.2 At the outset of the hearing, following further discussion between the representatives, the issues were narrowed even further so that in essence they were as follows:-

Direct race discrimination and harassment related to race.

In support of both the above allegations the Claimant now seeks to rely on one specific event namely an alleged 'slave' comment attributed to a work colleague Alex Wild a comment that she alleges was directed at her on 29 March or thereabouts. The Claimant does not now seek to advance a complaint of direct race discrimination or harassment in respect of the earlier incident involving her then line manager Mark Thorley arising out of the cancellation of a clinic, nor in respect of the overall conduct of the Respondent in terms of how it subsequently managed both incidents and/or the complaints arising thereof.

Constructive unfair dismissal.

The Claimant's case, insofar as constructive dismissal is concerned, is relatively straightforward. In essence she maintains that the Respondent failed to manage the complaints in a timely or supportive way; that there was a failure to adequately investigate the same or actively engage with the Claimant and/or take any robust or any adequate action. Her case therefore is that these alleged failings when taken together with the two specific events in question caused her to lose all trust and confidence in her employer and ultimately led her to resign her employment.

1.3 The Respondent denies that it acted in a manner calculated or likely to destroy or seriously undermine the relationship of trust and confidence, let alone without reasonable or proper cause. It denies the majority, albeit not all, of the factual allegations made and contends that the Claimant had a settled intention to leave the Respondent's employ before any of the matters about which she now complains arose. The Respondent also argues that the surviving direct discrimination and/or harassment complaint is out of time and the Tribunal lacks the jurisdiction to hear the same.

2. Evidence

2.1 We heard evidence from the Claimant in person. She also produced a witness statement from Ms Lisa King in support of her case but did not call Ms King to give evidence. Although that statement was alluded to in cross examination by Counsel for the Respondent because we have not heard

from Ms King and because her evidence has not been tested under cross examination we are unable as a Tribunal to attribute any weight to the contents of the same. On the Respondent's behalf we heard from Mr Thorley, the Claimant's line manager; from Ms Ashley Quinn, an HR Manager; from Mr Matsell who was Equality and Diversity Director; from Mr Russ Clark, Senior Manager and from Ms Wooley, the Head of HR.

2.2 We found all the witnesses to have given broadly credible evidence and to have done their best to assist the Tribunal in making necessary findings of fact. However where there have been any discrepancies or concerns with recollection we have noted those in our judgment below. We were referred to an agreed bundle of documentation comprising approximately 225 pages.

3. Findings of Fact

3.1 These findings of fact are reached on the balance of probability and after a very close and careful consideration of all the evidence, both oral and documentary, put before us.

3.2 The Claimant was employed by the Respondent as a Service Administrator, latterly in the Ophthalmology department from 2007 or thereabouts until her resignation which took effect on 30 June 2017. She is black and of Afro-Caribbean origin.

3.3 The Respondent NHS Trust is a substantial undertaking with its own dedicated HR department. That said, in common with NHS Trusts the length and breadth of the country, there are severe pressures on staffing and that includes within the HR department itself. At all relevant times the Claimant's line manager was Mark Thorley, a Programme Manager for Ophthalmology. He was new to the management role and inexperienced in managing staffing issues. He had never before encountered any alleged incident of racial discrimination or similar and accordingly was heavily reliant upon HR advice and guidance.

3.4 The department itself ran regular screening clinics. Within the department there were 11 screeners and 5 admin staff of which the Claimant was one.

Clinics were generally split into morning and afternoon sessions.

3.5 In or around December 2016 shortly after Mr Thorley had taken up his post a complaint was made about him to HR by Melanie Edwards. This never materialised into a formal complaint and was resolved informally at a relatively early stage. We do not find that the circumstances pertaining to the handling of this internal complaint to be comparable to the Claimant's own complaints to which we refer below.

3.6 Clearly the Claimant was also not particularly happy about the appointment of Mark Thorley to a managerial role. She had previously enjoyed a positive working relationship with Sarah Cooper (Mr Thorley's predecessor) and she considered Mr Thorley to be somewhat out of his depth. Her opinion of Mark Thorley to some degree subsequently influenced her interaction with him as well as her interpretation of events going forward.

3.7 On 2 February Mr Thorley found himself under some pressure. He was In a meeting with his immediate boss (Joan Black, General Manager for Ophthalmology) at the opposite of Nottingham to where the clinics were held, he was also under time pressure to produce an action plan for the screening service itself and during the course of that meeting he was informed that the screener for the afternoon clinic would be unavailable and that he would have to cover. That was not in itself unusual. However he decided that, on this occasion, it would not be possible. He therefore e-mailed the admin staff which included the Claimant to that effect. The e-mail correspondence reads simply as follows:

From Mr Thorley:

"Can you cancel clinic 2:00 pm please."

When questioned by the Claimant as to when he repeats his request, to which the Claimant replies:

"No Mark. Too short notice, patient I have already left out. Can you not do this clinic?"

He replies:

"Can't."

3.8 The Claimant then took it upon herself, not unreasonably we find, to see whether the morning screener could cover the afternoon. What of course she did not know was that this particular screener had various personal health issues at the time and accordingly it would not have been appropriate for him or her to extend their working day into the afternoon. The Claimant was doing what she could to preserve the appointment list so as to avoid disappointment and inconvenience to pre-booked patients.

3.9 The following day Mr Thorley called the Claimant into his office and upbraided her for failing to carry out a reasonable managerial instruction, namely to cancel the clinic.

3.10 Although Mr Thorley may have been a little abrupt we do not find that his actions, words or behaviour on that occasion were particularly unpleasant or unkind or certainly not so as to amount to a breach or even contribute towards a breach of the implied term. It is not for us the Tribunal to second guess whether it was right or wrong to cancel a clinic. That is a clinical or managerial decision that falls four square within the prerogative of the Respondent. What we as a Tribunal have been concerned with, however, is the Respondent's subsequent reaction to and handling of the Claimant's complaint that arose in consequence of this, what we have termed the 'dressing down' incident.

3.11 Following the above incident, on or about 7 February, the Claimant sent a complaint addressed to Ms Quinn (p160). It sets out her version of events. She describes Mr Thorley as speaking to her in an unprofessional manner, undermining her and speaking to her in a demeaning manner. She seeks an outcome.

3.12 At this juncture it is important to highlight the fact that a meeting designed to address this complaint did not in fact take place until 26 May, some three and a half months later.

3.13 The Respondent is to a large degree a policy driven organisation. Amongst other things it has a dignity at work policy and procedure. I set out some of the relevant extracts. For example it states that, in connection with bullying, harassment and victimisation, it has a "zero tolerance approach" and that all complaints (where the complainant is identifiable and is willing to provide information to support a complaint) will be investigated in line with the Trust's disciplinary policy and associated procedures. It talks about there being clear and effective procedures for dealing with negative behaviours but it also says at 3.4:

"The Trust will make every effort to resolve all matters relating to dignity at work in an informal manner in the first instance for the benefit of all parties. Managers are expected to treat complaints of harassment promptly and seriously. To make every effort to support members of staff in resolving any complaints informally in the first instance. To keep complainants and the accused party informed of the progress of any investigation and offering support to either party where required and they must offer support to known victims of harassment as well. As part of the policy relevant training and development which is deemed necessary can be provided and it is clear that where an informal resolution cannot be found all complaints will be investigated."

3.14 Complaints from employees experiencing harassment:

"…should be considered and hopefully resolved as quickly as possible and if the complaint cannot be resolved informally then all complaints again should be confirmed in writing. On receipt of a complaint form a case investigator is appointed and investigation carried out. In some circumstances particularly where harassment has been found to have taken place, consideration may be given to the voluntary transfer of one of the members of staff concerned if it's feasible within service demands rather than requiring them to work together against their wishes."

And at paragraph 7.1:

"Awareness sessions and awareness training can be undertaken or prescribed where necessary."

There is also a flow chart (p127) which informs managers as to how to manage complaints of this nature.

3.15 It seems to us that the Respondent would do well to look again at its dignity at work policy in order to ensure that it reads and is implemented consistently. The clinic cancellation complaint was e-mailed by Ms Quinn to Mr Thorley's manager Joan Black on 13 February. Whilst it is fair to say that there are a number of explanations for the Respondent's failure to deal with this complaint in a timely manner (eg Joan Black works part time; Mr Thorley was on leave for a week or so in early February and the Claimant herself had sickness absence in March) we have no hesitation in concluding that the delay and perhaps just as importantly the lackadaisical approach to this complaint as a whole was, when judged objectively, entirely unjustified and unreasonable. For example Mrs Black did not meet with Mr Thorley until 3 March, almost one month later. Meanwhile the Claimant, quite understandably we find, was feeling wholly unsupported. She had no information as to how or when her complaint would be dealt with. She e-mailed Ms Quinn on 28 February for an update saying as follows:

"I sent you a dignity at work form 3 weeks ago, posted recorded delivery. I've yet to receive a response."

There was no response to this e-mail, a matter conceded by Ms Quinn who described it as an administrative oversight.

3.16 On 3 April the Claimant e-mailed Ms Quinn once again. Two months had now elapsed without the Claimant having received any response or information. She said as follows:

"This will be my third e-mail regards my form I sent to you earlier this year.

Please could we arrange a time that we discussed my concern. I also tried to call last Tuesday but no success."

3.17 Meanwhile on or about 29 March (the Tribunal is not entirely clear given the lack of any contemporaneous account as to precisely when the incident took place) the Claimant was subjected to what she describes as racial harassment. On the day in question the Claimant was in the admin office together with colleagues Alex Wild and Julie Lane. The Claimant asked if either or both colleagues wanted a hot drink. Ms Wild said she would. The Claimant duly obliged. On handing Ms Wild her drink Ms Wild said "thanks slave". The Claimant was, we accept, stunned by that comment and replied with words to the effect "I am nobody's slave". She went back to her work station in a state of shock.

3.18 Very shortly thereafter another work colleague, Lisa King, entered the room. Several days later Ms King e-mailed Ms Quinn saying that she had witnessed racism in the office. In broad terms Ms King repeated what the Claimant has described; namely that the Claimant had been called a slave by Ms Wild. It is fair to say that, even on Ms King's own account, she had not herself witnessed that remark. However she did witness the follow up remark from Ms Wild, namely "she is not my slave then. She is my assistant" and describes Ms Wild as laughing. She also described in that e-mail (the most contemporaneous written account of the incident before the Tribunal) Mark Thorley coming into the office, biting his lip, looking at Alex Wild but saying nothing. Ms King records the Claimant as being very withdrawn, upset and sad about the whole situation.

3.19 The Respondent sought to question whether or not Ms King was in fact present on the occasion of this particular incident and in support of that provided some tabulated work schedules which they say demonstrated that on 29 March Lisa King was on a so-called 'phased return' indicating that she may not have been present.

3.20 We found those schedules to be of limited assistance. We have no doubt whatsoever that Ms King was present. No one on the Respondent's side has sought to suggest for one second that Ms King was dishonest or that what she set out in her account on 7 April was anything other than what she had in fact witnessed. We find that Mr Thorley did enter the room and we also find, on the balance of probability, that the Claimant and/or Ms King did inform him of the comment and that he chose to do or say nothing about it either because he genuinely did not place any particular importance upon it or because as a new manager without any equality or diversity training (a matter he conceded) and indeed precious little training at all, he effectively shied away from confronting it. At first the Claimant herself elected not to complain. Indeed it was Ms King who first brought the incident to the attention of management. This was not because the Claimant considered the remark to be inoffensive. On the contrary the Claimant did not immediately complain because she was concerned about the consequences of so doing including the risk of not being believed.

3.21 Ms Quinn met with the Claimant on 12 April. Approximately 2 weeks had elapsed since the incident in question and it struck us that whatever the pressures upon individuals may have been, this somewhat laissez-faire approach to this incident characterised the Respondent's handling of it throughout, up to and including the Claimant's resignation. The Claimant was clearly very upset at this meeting, something conceded by Ms Quinn. It ought to have been recognised at this stage that this was a potentially serious employment relations matter that required escalation. With every passing day recollections are bound to fade and the opportunity to fairly investigate and for witnesses to provide an account so that the context in which remarks are said, if said at all, could be properly understood, diminishes as does the opportunity to take any action. As it was nothing happened until 3 May, another 3 weeks later, on which occasion both the Claimant and Ms Wild were told to attend an informal meeting. This was an attempt at mediation. Of note is that this meeting appears to have come about only because of Mark Thorley's intervention on 25 April as follows:

"Alex Wild has been to see. Concerned that the Claimant hasn't spoken to

her and is finding this very upsetting… Alex concerned that she is unaware of the complaint made against her… Can Alex be made aware of the complaint. Can we organise this meeting asap to allow Janet and Alex to discuss things?"

To which Ms Quinn replied:

"Okay. Let's try to resolve this asap."

3.22 So it was Mr Thorley's intervention that triggered this meeting and, but for Mr Thorley's effective cry for help, it seems to us clear that nothing would have happened. Throughout this time both the Claimant and indeed Ms Wild were left completely in the dark.

3.23 The informal meeting was not a success. It was presided over by Russ Clark in the place of Joan Black and Ms Quinn. Neither the Claimant nor Ms Wild had had any forewarning or an opportunity to prepare for it. Ms Wild was seen first and independently. She was described as becoming upset when the accusation was put to her. Ms Wild went on to say that her actions or words were not malicious and the consequences unintended. The parties were then brought together. Ms Wild offered a qualified apology to the Claimant but it was clearly a difficult meeting. Neither Ms Quinn or Mr Clark were trained mediators. The meeting was punctuated by long silences. There was a lack of eye contact and there were shrugs from both in answer to questions as to whether they would be happy to continue working together. We do not find that Mr Clark asked them to necessarily become friends. In any event no notes were taken of this or indeed of any meeting (save for the 26th May meeting to which reference is made below) which seems to us a remarkable oversight from an HR perspective.

3.24 It was also alleged by the Claimant that, during the course of the incident on 29 March, the word 'ghetto' had been used. We find that that word was not in fact used or said by Ms Wild on the day in question but we do accept that at some indeterminate point in the past that word had been used in conversation with the Claimant and Ms Wild. At the time the Claimant had not considered it to be a reference to her race or in any way

racially motivated at all. We do however find that that word had been said in the past and may have contributed to her perception of the slave comment later in the narrative. We also do not find that Ms Wild called the Claimant a liar during the course of the meeting on 3 May.

3.25 The following day, 4 May, Mr Thorley e-mailed both Ms Quinn and Mr Clark saying as follows:

"I don't think the resolution from yesterday has worked. I've had a couple of members of staff asking what's happening because the atmosphere was that bad. Alex [Wild] has spoken to me, she doesn't feel there has been any resolution. Judging by Janet's demeanour I would guess she feels the same way too. Is there anything else we or more importantly I can do. I want to support them both."

To which Mr Clark replied:

"… I would wait. Give it a few days. See how it is next week… If there's no improvement then I can't see any other way forward than proceeding with more formal, fully documented meetings. However we have to be very careful with the allegations Janet has made because this could get very serious for Alex if she wants to press charges (which she is within her rights to do), the laws around hate speech are very clear."

Mr Thorley responded:

"… I fear it might be heading in the formal direction… I hope it doesn't come to this."

Then Ms Quinn replied:

"Just to keep you in the loop. We are going to see how things go over the coming days and take it from there."

3.26 It is abundantly clear that the 3rd May meeting had failed in its purpose. The relationship had not been repaired. The atmosphere had become excruciatingly uncomfortable within the department. Still the Respondent (be it HR or senior management) did nothing. This was not only a flagrant breach of their own policy but more importantly a failure to support not only the Claimant but also the alleged perpetrator and an inexperienced manager whose responsibility it was to try and run his department.

3.27 On 9 May the Claimant sent Ms Quinn a formal complaint (p186). She says amongst other things:

"I am writing to you as I have no other option other than to register a formal complaint… I have recently been subjected to racial harassment in the work place…"

She referred to being given no notice about meetings; about having to meet with a person who she claims to have racially harassed her; that she was not being supported but being left to try and sort out the issue by herself. She also referred to a lack of support and the impact that all of it was having upon her health.

3.28 It is abundantly clear, on any objective view, that the Claimant was crying out not only for support but for a full formal investigation and for the Respondent to get a grip on what had become a festering sore. For reasons unexplained, once again the Respondent elected to do nothing on receipt of that complaint. Their case appears to be that nothing needed to be done unless and until they received a formal 'dignity at work' complaint form. We find that to be an absurd proposition and an affront to common sense. The duty of an employer in these circumstances is to exercise common sense and where necessary to interpret their policies flexibly and in a way that properly safeguards the health of their employees. Inaction, lack of communication and delay can have debilitating and sometimes devastating consequences upon an individual whatever the merits or otherwise of their original complaint might be.

3.29 At the same time the Claimant also raised the same complaint with the

Head of Equality and Diversity, Mr Matsall. Although we found his evidence to be somewhat poor it was nevertheless clear where his sympathies lay, namely with the Claimant. Unlike others he was sympathetic to her when he met with her and also took notes of the meeting that he had with her.

3.30 In any event, and in addition to 9 May written complaint, the Claimant did fill out a dignity and respect complaint form (p193). She sent it in internal mail. It is dated 10 May but unfortunately not received until 2 June. Candidly Ms Wooley accepted that it may have been one of many items that go missing in internal post every year.

3.31 Meanwhile the clinic cancellation complaint finally came to a meeting on 26 May. That was also chaired by Mr Clark who was accompanied by Ms Quinn. The Claimant was also represented. Mediation was suggested there and then but the Claimant's trade union representative pointed out that neither Mr Clark or Ms Quinn were formally qualified and they agreed to postpone.

3.32 The Claimant also raised during the course of that meeting once again her unhappiness at the manner in which the slave incident had been handled. She asked to move departments. She was told that that would require a referral to and recommendation from occupational health, which would take approximately 4 weeks. According to the Respondent that is standard practice. That is not our interpretation of the respondent's policies. No one has brought to our attention any specific provision stating that an individual can only move departments upon the recommendation of occupational health. It must be possible, in our judgment, to consider moving a person from one department to another where there has been an irreconcilable breakdown in working relationships irrespective of whether the health of any one individual has been impaired. Indeed that is what we believe the dignity at work policy itself to allow for.

3.33 Following the meeting the Claimant took the view that she simply had had enough. In her words "she was done" and by letter dated 30 May 2017 she resigned.

3.34 It is right to say that on 24 May before the meeting had taken place she had been interviewed and subsequently offered an alternative role with Nottingham City Mapperley Practice. Her case, which we accept, is that she did not formally accept that role until after the 26 May meeting. Her resignation was on notice expiring on 30 June.

3.35 The Claimant contacted ACAS in accordance with the requirement to enter into early conciliation on 18 July there was a relatively lengthy period of conciliation which ended on 1 September. The Claimant issued her claim form on 14 September. Her case, until the first day of this hearing, was that both the slave incident itself and the handling of that and the clinic cancellation complaint were acts of direct race discrimination and/or harassment as well as contributing factors to her decision to resign. That case can be gleaned not only from the ET1 but from the further and better particulars and the Scott Schedule. That also appears to be the understanding of the Respondent as to the basis upon which she was advancing her claims.

4. Relevant Law

Constructive dismissal

4.1 The law relating to constructive dismissal is well rehearsed. Put simply, in order for the tribunal to find in favour of a Claimant, it must be persuaded that a) the employer acted in a way such as to fundamentally undermine the contract of employment often by acting in breach of the implied term of trust and confidence; b) that the employee left in response to that breach, and c) in so doing, she did not waive the breach by, amongst other things, delaying her departure – the so called ***Western Excavating*** principles.

4.2 The ***Malik v BCCI [1997] IRLR 462*** formulation is that the employer must not conduct itself in a manner calculated or likely to destroy confidence and trust. It may also be significant in many cases that the employer's conduct in question must have been without reasonable and proper cause – see ***Hilton v Shiner Ltd [2001] IRLR 727***. Conduct which breaches the term of trust and respect is automatically serious enough to be

repudiatory, permitting the employee to leave and claim constructive dismissal – see ***Morrow v Safeway Stores Ltd [2002] IRLR 9***.

4.3 In ***Goold v McConnell***, the EAT accepted that there was an implied term in a contract of employment that "*the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they have*".

4.4 Whether the conduct complained of destroyed or serious damaged the relationship of trust and confidence is a matter for the tribunal and it is to be judged objectively. Even if the employer's act which was the proximate cause of the resignation was not by itself a fundament breach of contract, the employee may be able to rely on a course of conduct considered as a whole under the last straw principles (see ***Lewis v Motorworld Garages***). However, the last straw must contribute to the breach of the implied term, it cannot be innocuous – see ***Waltham Forest v Omilaju*** and also ***Kaur v Leeds Hospitals NHS Trust*** to which I have referred above.

Harassment

4.5 Section 26 Equality Act 2010 provides:-

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

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

(b) the conduct has the purpose or effect of:-

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) ….

(3) ….

(4) 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.

4.6 The definition of harassment has a wide scope. It covers harassment which relates to a relevant protected characteristic. The test as to whether the conduct has the relevant effect is not subjective. Conduct is not to be treated for example as violating a complainant's dignity merely because he or she thinks it does. It must be conduct which could reasonably be considered as having that effect. It is well established that the simple fact that the employer has behaved badly will not by itself prove anything, a principle articulated by the then Underhill J in ***HM Prison Service v Johnson [1997] IRLR 162***.

4.7 In giving general guidance on harassment in ***Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336*** the then President Underhill P said that it was a healthy discipline for a Tribunal to go specifically through each requirement of the statutory wording. He set out a staged process and towards the end he said this:

"While harassment is important and not to be underestimated it is "also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase"."

Many of the points articulated by Underhill P, particularly the 'hypersensitivity' point have been applied in other cases such as ***Heathfield v Times Newspaper*** (the so-called "fucking Pope" case) and subsequently in ***Quality Solicitors v Tungstall*** amongst others. Although a complaint of harassment carries the implication of conduct persisting over a period of time there is no requirement that this be so. A single act if

of sufficient seriousness can be enough - see ***Bracebridge Engineering v Derby***.

Direct (race) discrimination

4.8 Direct (race) discrimination is taken to occur when one person is treated less favourably than another is or has been or would be treated in a comparable situation because of race. It follows that the key question in a direct discrimination complaint is one of causation; was race the effective if not the sole cause of the treatment when judged objectively?

4.9 It remains for the Claimant to prove her case. The first stage is that she must raise a prima facie case. That means that she must prove that the facts actually happened and that there is sufficient evidence upon which a Tribunal could decide absent any explanation to the contrary that the reason why she was subjected to the conduct in question was because of her race*, see* for example ***Wong v Igen Ltd [2005] IRLR 258*****; *Barton v Investec Henderson [2003] IRLR 332*** and ***Madarassy v Nomura International [2007] IRLR 246*** and so on. A Tribunal faced with alleged discrimination must be careful to link any finding or discrimination with specific evidence presented to it.

Time limits

4.10 So far as time limits are concerned, s123 of the Equality Act provides quite clearly that proceedings must be brought within a period of 3 months from the date of the act complained about or any such other period as the Tribunal thinks just and equitable. In other words a Tribunal may consider a complaint which is out of time if in all the circumstances of the case it considers it just and equitable to do so.

4.11 In considering such an application the correct approach is for the Tribunal to bear in mind that time limits are generally enforced strictly and to ask whether a sufficient case has been made out to exercise its discretion in favour of an extension. It is not a question of extending time unless a good reason can be shown for not doing so, see ***Robertson v Bexley Community Centre [2003] IRLR 434***. The discretion is not at large and the time limit will operate to exclude otherwise valid claims unless the Claimant can displace it. This does not however mean the discretion has to be used sparingly. The Tribunal must take care to consider the reasons why the complaint was brought out of time and why it was not presented sooner than it was. All relevant factors including balance of prejudice and the merits of the claim must be considered. The Tribunal can often be assisted by considering the s33 Limitation Act factors. It is not obliged to do so but one of the most significant factors that the Tribunal should consider is whether a fair trial is still possible, see ***DPP v Marshall***. However it does not automatically follow that merely because a fair trail is possible that time should be extended.

5. Submissions

5.1 We have had the benefit of written submissions from Mr Cooksey and oral submissions from Mr Townend. To both we are extremely grateful. I do not propose to rehearse those submissions in any significant detail within the context of this judgment. Mr Cooksey concentrated on alleged factual discrepancies, casting doubt upon the credibility of the Claimant and he also drew our attention to a number of legal principles and, is so doing, contending that the case for harassment was not, nor could it be, made out on the facts. Finally he argued that the discrimination/harassment claims were in any event out of time.

5.2 I paraphrase Mr Cooksey perhaps unfairly given the extremely detailed submissions that he presented. However, on the issue of constructive dismissal, he argued that the Claimant had failed to show (the burden being upon her) that the matters about which she complained, and whether considered independently or cumulatively, amounted to a breach of the implied term justifying her resignation. Furthermore, he argued, the

Claimant clearly left for an ulterior purpose having a settled intention so to do from the early part of 2017.

5.3 On his part Mr Townend concentrated on what he described as the seriousness of the complaint of harassment itself, maintaining that it should properly have been considered as a potential gross misconduct allegation and contended that the delay, lack of support and general failure by the Respondent to investigate the allegations, (both the clinical cancellation and slave allegations), when taken together amounted to a breach of the implied term justifying resignation and it was for that reason and for no other reason that the Claimant resigned her employment.

6. Conclusions

Harassment related to race (the 'slave' allegation)

6.1 The Tribunal find that this allegation sits much better within the ambit of s26 than it does s13 as indeed Counsel for the Respondent himself accepted. In determining this issue we have been very careful to consider the context in which the words were said and we have been particularly conscious not to stray into what is often termed to be 'political correctness.'

6.2 We have also taken on board the comments of, amongst others, Underhill J (as he then was) when he refers to the culture of hypersensitivity. Having done so we find that the word "slave" said not once but twice; that is was deliberately directed towards the Claimant and to no one but the Claimant; that it was unwanted and did relate to her race.

6.3 We were not much assisted by the Respondent's dictionary definitions or indeed any Google research or the like. It seems to us plain and obvious that the word "slave" can not only be interpreted as a pejorative term but can also be intended as such. In particular, when the word is directed towards a black person of Afro-Caribbean origin. It is (or ought to be) common knowledge that the slave trade was largely the importation of black slave labour from Africa via the Americas and the Caribbean.

6.4 Because the Respondent failed to carry out any investigation, because we have no contemporaneous account from any of the witnesses save perhaps for the Claimant and possibly Ms King and because we have not heard any evidence from the perpetrator herself it is extremely difficult for the Tribunal to know precisely what caused Ms Wild to use the term she did not only once but twice. There is clearly sufficient evidence from which we could decide that the remarks were motivated by the Claimant's race and the Respondent has real difficulty in discharging any evidential burden to counter a prima facie case in the absence of any evidence contemporaneous or otherwise.

6.5 We are not assisted by Mr Clark's own opinion that the remark was merely "stupid" or that Ms Wild may have said during a meeting on 3 May that she did not mean anything by it. We are satisfied (and we have considered with care the context in which the remarks were said) that although the word was only used on 2 occasions, it is nevertheless sufficiently serious to amount to harassment. The Respondent did not seek to persuade us that more was required by way of a course of conduct. We are equally satisfied that that conduct had the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. We also conclude that it was reasonable for that unwanted conduct to have had that effect and we have taken into account, in coming to that conclusion, not only her own perception but the entirety of the circumstances of the case. We have been extremely cautious not to apply a culture of hypersensitivity. The claim is therefore made out subject, of course, to the time point.

Direct (race) discrimination

6.6 Given our findings above we are not sure we are necessarily assisted by examining this same allegation by reference to s13. We were nevertheless hampered by the failure on the part of the Claimant or her representative to adduce any evidence and/or address us on the issue of less favourable treatment. There was no indication as to whether for example the Claimant was seeking to rely upon a flesh and blood comparator or a hypothetical comparator for the purposes of establishing less favourable treatment. Given our findings on the harassment

complaint it may well have been, had the Claimant or her representative done so, that we would have been persuaded. Indeed it is likely that we would have been. We also would and could have repeated our findings as to the failure on the part of the Respondent to discharge its evidential burden. As it is however we find that the Claimant has not established on the evidence, nor has she sought to argue that the treatment to which she was subjected was necessarily less favourable when compared to someone of a different race in circumstances where there was no material difference. We therefore reject that claim.

Time

6.7 We accept the Respondent's primary submission that the complaint is out of time; that is to say that it was presented more than 3 months after the date of the act complained of, the act being on or about 29 March 2017. There was no continuing act or course of conduct (per ***Hendricks*****)** and therefore it is a simple question as to whether or not we elect to exercise what is often called our just and equitable discretion.

6.8 We note that the basis upon which the Claimant advanced her complaint throughout this case (up until the morning of the hearing) was that the handling of the complaints was also an act of discrimination. Therefore we do not find that the Respondent was prejudiced or caught by surprise by this change of tack. The resignation of Alex Wild in August could not nor should it have had any impact upon or give rise to any prejudice to the Respondents in terms of case preparation because, as far as the Respondents were aware, they were here ready to meet those complaints that were potentially in time on the morning of the hearing. We also take into account the fact that the Claimant was pursuing throughout an internal process, seeking a full investigation. We also take into account the conduct of the Respondent. In the narrative above we have set out our findings in respect of their failure to keep the Claimant informed; to provide her with necessary support and their failure to deal with any of her complaints in a timely manner. We consider that there was no threat to the fairness or otherwise of this hearing. We find an absence of any prejudice. The only prejudice referred to by the Respondent was the potential failure to bring Ms Wild as a witness. We have not seen any

evidence from the Respondent as to what efforts, if any, they made to call her here. We recognise, of course, that the burden of persuading us to exercise our discretion rests firmly on the shoulders of the Claimant. We find that she has done so, albeit by a narrow margin.

6.9 In all the circumstances of the case and having given the matter some considerable thought we have determined that it would be just and equitable for time to be extended in this case and we so extend it until 14 September which means that her complaint for race discrimination, (inclusive of both the harassment and direct discrimination complaints) is within time and accordingly we have jurisdiction to hear the same.

Constructive dismissal

6.10 Delay and/or a failure to deal with a legitimate grievance in a timely manner is not necessarily by itself sufficient to amount to a breach of the implied term. Much depends upon the facts of an individual case. However this case is about much more than mere delay. It is about a conspicuous failure by the Respondent organisation to get a grip of not only one but two legitimate complaints; a failure to provide support to a vulnerable employee; a failure to communicate with that same employee, either their intentions or the state of play and a wholesale failure to apply their own written policies. The Claimant was woefully let down.

6.11 The Claimant was legitimately entitled to have her complaints dealt with and considered at an early stage potentially when they may have been capable of resolution and she was entitled to have those complaints escalated to a formal investigative process when she asked for them to be so. As it was the Respondent not only dragged its feet but in our judgment hoped that this uncomfortable allegation or allegations could either be brushed aside through dialogue or would die a death if left untouched.

6.12 We find that the Respondent's inaction taken together with the harassment above (the Respondent did not seek to avail itself of the statutory defence and is, of course, vicariously liable for the actions of Ms Wild) together did amount to a fundamental breach of the implied term of trust and confidence and was without proper or reasonable cause.

6.13 Did she resign in response to that? This particular matter caused us considerable difficulty. On balance we conclude that the Claimant, whilst exploring options of pastures new from a relatively early stage in this process (perhaps as far back as February) nevertheless resigned on 30 May in direct response to the breach of contract complained of. Put another way - but for the cumulative failings on the part of the Respondent the Claimant would not have resigned when she did.

6.14 That said we do find that the Claimant was looking over her shoulder and, irrespective of any breach of contract, would have left the Respondent's employ at some, albeit indeterminate, time in the future. We will hear from both representatives in due course as to when they say that time would be but our preliminary view is that it would have been, without putting a particular time on it, at the conclusion of a relatively short period post resignation. That is in part because irrespective of the complaints it is clear in our view that the Claimant did not take kindly to Mr Thorley as her new manager and the fact that from being equal colleagues he was now her superior. Her comments about him not being a team player for example speak for themselves. We will hear from both parties on the subject of **Polkey** at the remedy stage.

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Employment Judge Legard

Date 15th January 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE