EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs A Healy	and	Slough Borough Council

Heard at Reading on: 2-12 July 2018 (hearing)
1-2 August 2018 (in chambers)

Appearances
For the Claimant: Mr O Hyams, counsel
For the Respondent: Mr S Cheetham QC, counsel

Employment Judge: Mr SG Vowles
Members: Ms A Brown
Mr N Singh

RESERVED UNANIMOUS JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents provided by the parties and determined as follows.

Direct Race Discrimination – section 13 Equality Act 2010

2. The Claimant was not subjected to race discrimination. This complaint fails and is dismissed.

Victimisation – section 27 Equality Act 2010

3. The Claimant was not subjected to detriments on the grounds that she had done a protected act. This complaint fails and is dismissed.

Protected Disclosure Detriment – section 47B Employment Rights Act 1996

4. The Claimant was not subject to any detriment on the ground that she had made a protected disclosure. This complaint fails and is dismissed.

Unpaid Wages – section 13 Employment Rights Act 1996

5. The Claimant was not subject to unauthorised deductions from wages. This complaint fails and is dismissed.

Unfair Constructive Dismissal – sections 95(1)(c) and 98 Employment Rights Act 1996

6. The Claimant was not the subject of unfair constructive dismissed. This complaint fails and is dismissed.

Reasons

7. This judgment was reserved and written reasons are attached.

REASONS

SUBMISSIONS

1. On 10 May 2007 and 2 October 2017 the Claimant presented ET1 claim forms to the Tribunal with complaints of race discrimination, religion/belief discrimination, sex discrimination, victimisation, protected disclosure detriment, equal pay, unpaid wages, and unfair constructive dismissal.

2. On 12 July 2017 and 8 November 2017 the Respondent presented responses and denied all the claims.

3. The claims were clarified at a Case Management Preliminary Hearing on 1 August 2017 and a case management order was produced.

4. The complaint of equal pay was withdrawn by the Claimant and dismissed on 24 February 2018.

EVIDENCE

5. The Tribunal heard evidence on oath on behalf of the Claimant from Mrs Amardip Healy (Claimant and Head of legal Services), Mrs Elaine Simpson (Chair Slough Children's Services Trust), and read the witness statements of Mrs Carol Clegg (former manager), Mr Richard Stokes (former Councillor) and Mr Trevor Allen (Parish Councillor) who did not give evidence on oath at the hearing.

6. The Tribunal heard evidence on oath on behalf of the Respondent from Mrs Linda Walker (Interim Monitoring Officer), Mr Mike England (Interim Strategic Director), Mr Hugh Peart (Director of Legal and Governance Services, Harrow Council), Mrs Hayley Norman-Thorpe (investigating officer for disciplinary investigation) and Mrs Surjit Nagra (Human Resources Manager).

7. The Tribunal also read documents in folders provided by the parties. The documentary evidence was extensive. The 10 witness statements ran to 180 pages and the 4 folders of documentary evidence ran to 3,400 pages. In addition, there were 2 written closing submissions and several case reports to consider.

ORDER UNDER RULE 50

8. A copy of the rule 50 order applicable to these proceedings is attached at the end of this judgement.

FINDINGS OF FACT

Background

9. During the period covered by the evidence adduced in this case the Respondent, Slough Borough Council, was a local authority with multiple problems. There were several disputes between various senior officers, including the Claimant, the former Chief Executive (Employee 1) and the later Interim Chief Executive (Mr Roger Parkin). Several officers issued formal grievances against other officers and on some occasions a grievance was answered with a counter-grievance.

10. There was also a string of anonymous complaints about various senior officers sent to the Respondent.

11. The environment was described variously as “fraught” and “tense”. After a failed Ofsted report in 2011 and a second failed Ofsted report in 2014 the Respondent’s Children’s Services was subject to an intervention by the Secretary of State under the Education Act 1996 and a Children’s Commissioner was appointed. In March 2015 Slough Children’s Services Trust Ltd was established to carry out most of the Respondent’s children’s social care services functions.

12. It was against this background that many of the events described in the evidence before the Tribunal took place.

The Claimant

13. The Claimant was employed from 1 December 2011 as the Respondent’s Head of Legal Services and Deputy Monitoring Officer. She had sole responsibility for leading the Respondent’s legal service, commissioning from outside any legal advice that could not be given by her team in relation to which a second opinion was sought, supporting the Respondent’s officers and ensuring, so far as possible, that the Respondent was protected from risk.

14. In her witness statement at paragraph 5 the Claimant said:

“5. As a local authority, the Respondent is required by legislation to have the following officers, usually referred to as “statutory officers”:-

5.1 a paid head of service. That role is held by the Chief Executive;

5.2 a Monitoring Officer (paid at SML13 of the Respondent's pay scale), whose role includes ensuring that the Respondent acts lawfully; and

5.3 an officer appointed under section 151 of the Local Government Act 1972 to have responsibility for the Respondent's financial affairs. This post is usually called that of the Section 51 Officer, or that of the Chief Financial Officer. That role was also at SML13 on the Respondent's pay scale."

15. At the start of her employment on 1 December 2011, until June 2015, the Claimant's line manager was Mr Kevin Gordon, Assistant Director Professional Services and Monitoring Officer. He was made redundant in June 2015 whereupon Roger Parkin became the Claimant's line manager until her resignation on 17 July 2017.

July 2016

16. On 11 July 2016 the Claimant applied for and was offered the post of Head of Legal and Constitutional Services and Monitoring Officer at London Borough of Redbridge. She later decided not to take up the appointment and the circumstances in which she did so formed the basis for her claim for unauthorised deduction of wages which is dealt with later in this decision.

17. On 15 July 2016 the Chief Executive (Employee 1) was suspended by the Council leader, Councillor Munawar, whereupon Mr Parkin became the Interim Chief Executive.

18. Mrs Linda Walker had been appointed to the role of Interim Monitoring Officer in June 2015. She was an experienced solicitor specialising in Corporate Governance, Member Engagement and the resolution of complaints. She had previously worked in both the public and private sectors in senior positions including as Head of Legal Services at Durham County Council. In December 2013 she joined Harrow Council's Legal Department as a locum carrying out a governance role.

19. The Legal Department at Harrow Borough Council also operated as an Alternative Business Structure (ABS) which provided 'paid for' legal services to other local authorities and was known as HB Public Law (HBPL). Although employed by HBPL, Mrs Walker at first carried out the Monitoring Officer function at the Respondent from July to October 2015. Thereafter, another Monitoring Officer was appointed but in August 2016 she returned as Monitoring Officer at the Respondent because the appointed Monitoring Officer had been removed from role. It was arranged that she would work two days a week although this later increased due to the amount of work that she needed to carry out.

20. Mr Mike England was also employed by HBPL. In June 2016 he was asked by the Respondent to investigate concerns regarding the conduct of the Claimant under the disciplinary procedure. There were three issues.

Firstly, she had wanted to act as workplace colleague to Vijay McGuire in respect of a grievance. Secondly, there were issues in respect of emails to another employee. Thirdly, allegations that the Claimant was interfering with reorganisations in the Chief Executive's Directorate. Shortly afterwards, Mr Parkin was appointed as Interim Chief Executive and Mr England reported to him. After a preliminary investigation, there was not enough in these issues to warrant any further investigation and Mr Parkin agreed. The matter was therefore closed on 28 July 2016.

21. Additionally, at the end of July 2016, Mr England was asked to deal with a grievance from Employee 4 against the Claimant, complaining of a pattern of behaviour consistent with bullying and harassment towards him, an allegation that he said Mr Parkin had failed to take any action about it. Mr England met with Employee 4 on four occasions in August and September 2016 and took evidence from him. He also invited the Claimant to a meeting to discuss Employee 4's complaint and she then alleged bullying by Employee 4 against her. Mr England met with the Claimant on 6 and 9 November 2016. Eventually, because Employee 4 was absent from work, and it was unlikely he would return to work, the investigation into his allegations against the Claimant was dropped and her cross-complaint against him was also dropped.

August 2016

22. In the meantime, on or about 16 August 2016, an anonymous complaint had been received complaining about the Claimant's conduct. It was alleged that the Claimant was purchasing roles for legal adviser engagement contrary to the Council's purchasing rules, that she had given significant commissions to Sharpe Pritchard Solicitors, and in particular to a close friend, Tim Farr, in exchange for him providing her son with work experience and then permanent employment with Sharpe Pritchard, and that she was bullying, harassing and intimidating her staff who said nothing because they were fearful of losing their jobs. The complaint was expressed to be a *"whistleblowing complaint".*

23. Mrs Walker was appointed by the Respondent to investigate the anonymous whistleblowing under the Council's whistleblowing policy which allows for the investigation of anonymous complaints at the Council's discretion.

November 2016

24. On 15 November 2016 the Claimant presented a grievance to Mr Parkin complaining that she had been subjected to bullying and intimidation. It included:

"The sad reality is that the nature of your behaviour towards me has amounted to bullying and has been designed to undermine me. I believe I am being treated differently based on my race, as I see no other evidence

that anyone else that is the subject of any investigation treated as poorly as those of an ethnic origin."

January 2017

25. During January 2017 the Claimant had conversations with Councillor Munawar in which she reported to him that the Respondent's Mayor, Councillor Dhaliwal, had told her that he wanted to see the Claimant as a Director of the Respondent but that in return she had to support Mr Parkin as Chief Executive. The Claimant said that she had made it clear that she would not support Mr Parkin in return for personal gain as that would be improper. She said that if she was seen as being capable, then she would expect a fully competitive process to be followed in an appointment process. She said that what was being suggested could be seen as bribery of an officer.

February 2017

26. On 8 February 2017 the Claimant presented a grievance to Mr Parkin complaining of bullying and harassment generally, direct race/religious discrimination, direct race discrimination relating to equal pay, detriment for having blown the whistle, detriment for having asserted a statutory right not to be bullied (health and safety), and victimisation for having alleged race/religious discrimination. The grievance was investigated by Sarah Johnson, team leader for the Barnet Childcare Team, part of HBPL.

27. Between then and the production of Mrs Walker's report on 24 February 2017, there were various disputes between Mrs Walker and the Claimant regarding the conduct of the investigation, in particular the manner in which it was being conducted and the delay in completing it. During the course of this dispute, Mrs Walker and the Claimant made various complaints about each other's conduct. Both blamed each other for bullying them.

28. During the course of the investigation, Mrs Walker asked her associate, Steven Thursby, to carry out some of the interviews with employees regarding the alleged bullying of staff by the Claimant. Four of the employees who were interviewed wished to remain anonymous for fear of reprisals.

29. Mrs Walker finally produced a copy of her report to Mr England who had been asked by Mr Parkin to consider the report. He received a hard copy of the report at the end of February 2017 and met with Mrs Walker to discuss her findings. He could not recall the exact date of the meeting.

30. The report produced by Mrs Walker was lengthy and detailed. It contained a summary of findings and recommendations as follows:

"6. SUMMARY OF FINDINGS

6.1 Finding: There is a degree of flexibility in the instruction of external legal firms and I do not consider that there has been any breach of procedures.

6.2 Finding: There is clear dependence on external legal firms to supplement the provisions of Legal Services. The cost of this is substantial as demonstrated by the figures.

6.3 Recommendation: Steps need to be taken as a matter of urgency to reduce the external legal spend and deliver a more cost effective service for the Authority.

6.4 Finding: It is difficult to ascertain whether there is a link between the instruction of Sharpe Prichard and the work experience, but on balance I consider there is not. …

6.5 Finding: Taking this at face value, I am unable to conclude that there was a close friendship which would have needed to have been disclosed.

6.6 Finding: There is no evidence to support the allegation that there was a close friendship between the Head of Legal Services and the former Monitoring Officer and Section 151 Officer.

6.7 Finding: The Head of Legal Services' MSO appears to have been subjected to demeaning and demoralising behaviour. The Head of Legal Services has provided me with no evidence to the contrary, therefore, I uphold this complaint, which I consider is a breach of the Dignity at Work Code of Practice and the Employee Code of Conduct and as such merits consideration of disciplinary action.

6.8 Finding: I have been provided with sufficient evidence for me to be able to conclude that there have been several instances of bullying behaviour by the Head of Legal Services and these are sufficient to indicate a serious contravention of the Dignity at Work Code of Conduct and the Employee Code of Conduct and these breaches, I consider merit consideration of disciplinary action. However, I am conscious that I have been unable to include the evidence to substantiate this in my report as the members of staff who have provided the information fear retribution from the Head of Legal Services. In order to encourage staff to come forward on an open rather than anonymous basis, for staff to be protected and to allow an investigation to proceed unimpeded, I consider that the Head of legal Services should be suspended as a matter of urgency. This will also send a strong message to all concerned about how seriously the Authority views the situation.

7. RECOMMENDATIONS

7.1 I have carried out as much of the investigation as I am able whilst the Head of Legal Services remain in post. I am unable to include evidence relating to particular members of staff who have felt bullied by the Head of Legal Services as they have refused to let me include it as they fear retribution. I consider that the authority should consider whether the disciplinary procedure should be instigated. If so, given the fears which have been expressed to me regarding retribution from the Head of Legal Services immediate suspension appears to me to be appropriate."

31. The Respondent's "Disciplinary Policy and Procedure for Directors, Assistant Directors of Service and Other Officers Employed Under JNC Conditions for Chief Officers" contained the following section on suspension:

"SUSPENSION

8. Suspension may be necessary in serious cases where it would be detrimental to allow the employee to remain at work pending completion of an investigation and any disciplinary hearing. This is not a sanction in itself and is a neutral act. Consideration should be given to whether there is a viable suitable alternative to the suspension, e.g. a temporary transfer to another location or post. Employees will normally be suspended in cases of potential gross misconduct but depending on the nature of the gross misconduct it may be possible to find alternative work as suspension should be avoided if at all possible. …

10. Suspension may need to continue beyond the period of the investigation. However, it must be subject to regular formal reviews. This must be confirmed in writing to the employee who will retain the pay they would have received if at work during the period of suspension. A nominated employee with no involvement in the case will provide the employee with regular support and communication through this period."

March 2017

32. Mr England considered Mrs Walker's report and concluded that the bullying allegations against the Claimant would, if proven, amount to gross misconduct and that there were grounds to suspend her. He sought advice from Sergit Nagra (Human Resources) and then met with the Claimant on 1 March 2017 and handed her a letter of that date which included the following:

"Dear Amardip

Re Disciplinary Investigation – Notice of Suspension

As you are aware the Interim Monitoring Officer (IMO) has been investigating a number of serious allegations in relation to your conduct

made in an undated anonymous letter. The IMO has concluded that in her view there has been a serious contravention of the Employee Code of Conduct and Dignity at Work Code of Practice by you and that a formal disciplinary investigation needs to take place. I have read the report and believe that such an investigation needs to commence under the Council's Disciplinary Policy and Procedure for Directors, Assistant Directors and Heads of Service (the Disciplinary Procedure).

The allegations that this disciplinary investigation will consider are as follows:

(1) That you have bullied and harassed members of staff (including the Interim Monitoring Officer) in serious breach of the Dignity at Work Code of Practice and Employee Code of Conduct.

(2) That you have failed to comply with a reasonable request by the Interim Monitoring Officer for information relating to the disciplinary procedure followed in relation to the former Chief Executive. This is a serious breach of the Employee Code of Conduct.

(3) That you have deliberately given incorrect legal advice in that you have advised that potential breaches of procedure should not be dealt with prior to an employment tribunal and that a Monitoring Officer has 'personal liability'. This is a serious breach of the Employee Code of conduct.

These allegations will need to be formally investigated in line with the Disciplinary Procedure. You have lodged a grievance raising a number of issues, one of which is the IMO's conduct in compiling her report, and these will continue to be investigated under a separate process.

The allegations outlined above potentially constitute gross misconduct and may result in you being required to attend a formal disciplinary hearing. If the allegations are proven this could lead to you being summarily dismissed. The IMO has found it difficult to be open in her report about the details of the first allegations as the members of staff making the allegations come into contact with you in the work place and were reluctant to come forward. In view of the serious nature of these allegations and to enable a fair and transparent formal investigation under the Disciplinary Procedure I have decided that it is necessary to suspend you from your duties.

During your suspension you will receive full pay, however you must not report for work or enter your place(s) of work, or make contact with work colleagues unless instructed to do so or unless prior agreement has been given by myself.

During your suspension you will continue to be bound by the terms and conditions of employment.

You must remain available to participate in any management interview(s) in connection with the investigation and be available to attend these meetings at any time during normal working hours. However you are not otherwise required to carry out your duties and must not make contact by email, writing or in person with Council officers or staff, third parties or Councillors in your capacity as Head of Legal Services without my permission. …

Barry Stratfull, Head of Corporate Finance has been appointed as your contact person with Slough Borough Council, his telephone number is […….] If you wish to make contact with work colleagues during this period of suspension you must make this request via your contact person or me.

Suspension from work is a neutral act and should not be taken to indicate that the allegations against you are considered to be proven. You will have every opportunity to state your case during these proceedings.

Ms Hayley Norman-Thorpe, Assistant Director, HB Public Law, has been appointed as the investigating officer and she will establish the facts of the case and gather evidence. She will also interview and take appropriate witness statements as required. Following this she will provide a written report on the outcome of the investigation and recommend if there is a case too answer at a formal hearing.

Ms Hayley Norman-Thorpe will arrange an investigatory meeting with you as part of the management investigation at which you have the right to be accompanied by a trade union representative or work colleague. The purpose of this meeting is to discuss and investigate the allegations with you and to consider any information that you put forward."

33. Mr England had asked Mr Hugh Peart (also an employee of HBPL) to appoint an investigating officer and he in turn appointed Hayley Norman-Thorpe (also a lawyer at HBPL). Mr England sent a copy of the allegations and a copy of Mrs Walker's report to Mrs Norman-Thorpe on 2 and 3 March 2017.

34. Mrs Norman-Thorpe spoke to Mr Peart on 2 March 2017 and he confirmed to her that a disciplinary investigation was to take place into the conduct of the Claimant. Mrs Norman-Thorpe had agreed to undertake the investigation. She put in place a number of safeguards to maintain the integrity of the investigation by setting up a separate electronic case management system which was restricted solely to her. Also, she largely worked from the Aylesbury office and the majority of her work would be undertaken there except for interviews with the Respondent's staff which took place at the Respondent's offices. Also, she had not had any contact with any member of staff at the Respondent or undertaken any work previously for the Respondent. Her line of reporting in HBPL was directly to the Head of Legal Services, Jessica Farmer, rather than to Mr Peart. Prior to commencing the investigation, Mrs Norman-Thorpe had not worked with Mrs Walker or with the Claimant.

35. On 1 March 2017 the Claimant e-mailed Mr England to ask if she could e-mail the Leader and Deputy Leader of the Council to inform them of her suspension or for him to do so.

36. On 3 March 2017 the Claimant sent an e-mail to the Leader and Deputy Leader of the Council, copying in another councillor, with a whistleblowing complaint. It concerned changes in council recruitment policy, a smear campaign against Councillor Dar (the Labour Party Whip), financial advantages being given to Slough Town Football Club, and bullying and threatening of staff and lack of challenge.

37. On 5 March 2017 the Claimant again e-mailed the Leader and Deputy Leader of the Council with a grievance alleging bullying and harassment generally, direct race/religious discrimination, detriment for having blown the whistle, detriment for having asserted a statutory right not to be bullied, and being victimised for having raised a grievance. On the same date, the Leader of the Council, Councillor Munawar, replied to the Claimant pointing out that members must not get involved in grievance issues and said that neither he nor his deputy would take any action in relation to the grievance.

38. When Mr England became aware of the e-mail to the Councillors on 5 March 2017, he regarded this as a breach of his instructions in the suspension letter and wrote to the Claimant on 13 March 2017 and added this as an allegation of gross misconduct to add to the investigation.

39. Mrs Norman-Thorpe met with Mrs Walker on 16 March 2017 and it was confirmed by Mrs Walker that all four witnesses who had sought anonymity were willing to speak with Mrs Norman-Thorpe but were not agreeing to waive their anonymity.

40. Mrs Norman-Thorpe made contact with the Claimant on 31 March 2017 to introduce herself as the investigating officer. She wrote to the Claimant to advise her of the progress of the investigation. Thereafter she conducted interviews with the members of staff who had made complaints in the course of Mrs Walker's investigation, including those members of staff who had requested anonymity. Mrs Norman-Thorpe had taken the decision, in order to secure the independence of her own investigation, not to read Mrs Walker's report. At no point during the investigation did she have any contact with or from Mr Parkin.

41. She met with the Claimant on 29 June 2017 and the meeting lasted 7 hours. They then met again on 3 July 2017 and the meeting lasted for 5 hours.

42. In the meantime Mr England had become aware of the Claimant's emails to the councillors dated 3 March 2017, and he wrote to the Claimant on 13 April 2017 as follows:

"Dear Amardip

I have been made aware that, in addition to sending a grievance dated 5 March 2017 to Councillors Munawar and Hussain, you also sent a whistleblowing complaint to Councillors Munawar, Hussain and Nazir on 3 March 2017. In doing this you were in clear breach of the explicit instruction not to contact councillors in the letter of suspension dated 1 March 2017.

I will ask Hayley Norman-Thorpe to add the following allegation of potential gross misconduct to her investigation:

"That you contacted Councillors Munawar, Hussein and Nazir on 3 March 2017 by email attaching a whistleblowing complaint. This was an explicit breach of the reasonable management instruction in your letter of suspension dated 1 March 2017 not to contact councillors".

I repeat the instruction not to contact members in the strongest possible terms and must warn you that if you act in breach of any instructions in my letter of 1 March I will consider this to be another act of potential gross misconduct.

43. The Claimant responded on the same date, 13 April 2017, with an e-mail which included the following:

"Dear Mike

I refer to your email received this afternoon, with letter attached.

I will not deal with the issue of the extra charge, as I have already confirmed I believe your email to be yet a further example of the Council's victimisation. You will be aware of the protected acts of raising both complaints and grievances, where I have quite clearly alleged racial discrimination by the Council's interim MO, Linda Walker and Roger Parkin.

From the confirmations, your letter now contains, it is clear that you should have been advised by Ms Walker, that I had made some very serious allegations against her in November 2016. Some of those complaints resulted in a grievance lodged in February. This was before the alleged preliminary investigation to which you now refer. As such you have, I would suggest failed to abide by the Acas code on conducting workplace investigations, as indeed had Ms Walker. It appears that only Asian staff are subjected to this sort of treatment and not white staff."

44. Mr Peart was aware that the Claimant had submitted a further grievance on 5 March 2017 but he was not aware that she had also submitted a whistleblowing complaint on 3 March 2017. This had been overlooked. Accordingly, Mr Peart appointed Ms Noopur Talwar (an HBPL lawyer) to investigate the whistleblowing complaint. Ms Talwar drafted a report for Mr

Peart and having considered the matters raised, Mr Peart did not find any grounds to uphold any of the whistleblowing complaints.

45. A grievance appeal hearing was held on 7 June 2017. The appeal panel members were Cate Duffy (Director of Children Learning and Skills), Neil Wilcox (Assistant Director of Finance and Audit), and Lola Makinde (OD/HR Business Partner).

46. On 26 June 2017 Mr Peart wrote to Mr England complaining about the Claimant's conduct towards the Appeal Panel as follows:

"Dear Mike

During the recent grievance process serious allegations have arisen against Amardip Healy which you may consider should be investigated under the disciplinary procedure as a serious breach of the code of conduct. Mrs Healy sought to cast doubt on the integrity of the whole panel but her allegations and other remarks about Neil Wilcox were particularly serious. …

It seems to me that these remarks are on the face of it serious contraventions of the Slough code of conduct which under paragraph 4.2 requires employees to avoid language which is offensive, abusive or designed to intimidate. It also requires that employees avoid 'unreasonable derogatory remarks … and malicious gossip'.

Documents are attached except the letter to you dated 19 May which you of course have.

47. On 27 June 2017 Mr England wrote to the Claimant as follows:

"Dear Amardip

It has been brought to my attention by the Council's Deputy Monitoring Officer that during the recent grievance process you engaged in conduct which I consider should be investigated under the disciplinary procedure as a potential gross misconduct.

In the circumstances I will ask Hayley Norman-Thorpe to add the following allegation of potential gross misconduct to her investigation.

'That you have used language which is offensive, abusive and/or designed to intimidate, made unreasonable derogatory remarks and engaged in malicious gossip. This is in serious breach of paragraph 4.2 of the code of conduct. These allegations are made in respect of your conduct towards Neil Wilcox …

The relevant documents are your letter to Mike England dated 19 May 2017, your letters to Cate Duffy dated 24 and 26 May 2017 and your submissions to the grievance appeal panel dated 30 May 2017."

July 2017

48. On 11 July 2017 the Claimant wrote to Mr England as follows:

"Re: Disciplinary Investigation/March Grievance/ Whistleblowing Complaint

I write in relation to the above matters.

I summarise below a chronology of the Council's conduct towards me which I believe to be a series of breaches of contract by the Council and a course of conduct which, when taken together cumulatively, amounts to a breach by the Council of the implied duty of mutual trust and confidence, which the Council owes me as my employer. This conduct leaves me in an untenable position, whereby I appear to have no choice but to resign from my position and seek legal redress at the Employment Tribunal. Before taking this step, I am writing to set out my concerns and give you an opportunity to seek to repair the relationship of trust and confidence.

1. *I made a Subject Access Request in respect of my personal data held by Linda Walker, in December 2015. To date, despite me having made a formal complaint to the ICO, the Council has not complied with my requested data. The ICO has recommended that I seek a Court Order against the Council.*

2. *On the 1st March 2017, I was suspended from work, to enable the Council to investigate 3 disciplinary allegations against me, which I have been told could amount to gross misconduct. No preliminary investigation was carried out as required by the Council's Disciplinary Policy. The investigation is now complete and although it is clear to me that there is no evidence of gross misconduct on my part. I remain suspended and no decision has been taken with regards to the disciplinary process. This delay has caused me considerable stress and uncertainty, which could have been avoided if the matter had been dealt with in a fair and timely manner.*

3. *On the 3rd March 2017, I lodged a whistleblowing complaint, concerning matters I had already raised prior to my suspension. To date, there has been no investigation into this complaint by the Council. This is in breach of the Council's policy.*

4. *On the 5th March 2017, I lodged a grievance against you, Roger Parkin and Linda Walker, in respect of your behaviour towards me. I was first interviewed about this grievance on the 2nd July 2017. This delay is in breach of the Council's policy and the ACAS Code of Practice. The grievance should have been dealt with quickly, especially given that it raised issues regarding the appointment of HB Public Law to investigate my February grievance and to conduct the disciplinary investigation. Failing to give me a reasonable opportunity to obtain redress in respect of the grievance is a serious breach of contract.*

5. *I wrote to you on the 3rd April 2017, requesting that my suspension be reviewed, as required by Council Policy and you unreasonably refused my request, in breach of Council Policy. Any objective review of my suspension and the allegations put to me, would find both to be manifestly unreasonable, given the lack of evidence to support the Council's case against me.*

6. *On 27.6.2017, you brought further allegations against me, arising out of my February grievance in relation to Neil Wilcox sitting on the Grievance Appeal Panel. However, you failed to inform the Disciplinary Investigator that there was a finding of bullying against Linda Walker in respect of that Grievance and also that the Panel expressed criticism of the fact that my March grievance was still outstanding. Your withholding of key relevant information to the investigator shows that you were not acting in an impartial or fair manner. This further undermines the employment relationship between me and the Council.*

7. *To date, you have provided no explanation as to why all my emails to and from Linda Walker in relation to the RB matter have been removed from my inbox on the Council's email system. Given the lack of explanation by the Council, it is sadly clear to me that they were removed by the Council in an effort to prevent me from being able to respond to the disciplinary allegations 2 and 3. This unfair treatment has hampered my ability to properly prepare for the hearing, and defend myself in respect of those allegations.*

8. *Despite my many attempts to enter into a dialogue with you, you have steadfastly refused to reply to any substantive correspondence from me' leaving me in a position whereby I feel unfairly isolated and disrespected.*

I have set out above some key breaches of Council policies, processes and procedures, on the part of my employer and some examples of the unfair course of conduct I have been subjected to by the Council. The Council has made many additional breaches and treated me unfairly in many other ways (for example as set out in my various grievances). However, I do not seek to go into all of the detail of all of the unfair treatment towards me in this letter.

I am deeply disappointed by the unjustified processes which have been and are being followed. I have broader concerns around why these processes were commenced. I cannot escape the conclusion that the reason why I have been treated in this way is that I blew the whistle. The impact of all of this on me has been enormous. I believe that unless you take prompt action to remedy the situation my position at the Council will be untenable, and under the circumstances, I would be entitled to resign without notice by reason of the Council's conduct.

I reserve all of my legal rights in this regard.

Despite the conduct set out above, I would like to preserve my employment at the Council and repair the employment relationship as far as possible. To this effect, in order to remedy the breaches set out above, I request the following from the Council, by 4.00pm on Friday 14th July 2017:

a) My suspension to be lifted for me to return to work, as Head of Legal with immediate effect; and

b) The disciplinary proceedings to be withdrawn in their entirety.

If terms a) and b) above are agreed to within the timeframe provided, then I will agree to withdraw my existing grievances and subject access requests, in the interests of repairing what is, under present circumstances, becoming an irreparable employment relationship.

However, if the Council does not agree to my two requests and continues to treat me in this hostile and degrading manner, then, for the sake of protecting my health and wellbeing, I will have no choice but to resign in response to the breaches of contract and course of conduct set out above, which taken together cumulatively amount to a repudiatory breach of contract on the part of the Council.

I look forward to hearing from you by Friday 14th July 2017.

Please preserve all documents, communications (electronic, hard copy, or otherwise) relating to the content of this letter."

49. On 14 July 2017 Mr England replied to the Claimant as follows:

"Dear Amardip

Thank you for your letter of 11 July.

I understand that Miss Norman-Thorpe is currently in the process of drafting her report. I understand that your view is that there is no evidence of gross misconduct on your part, but I have not yet received Miss Norman -Thorpe's report so am unable to comment. Given the stage in the procedure we are at, I do not think it is appropriate to carry out a review of your suspension at this time. However, I will do so immediately that I am in receipt of the disciplinary investigation report.

I therefore cannot agree to lift your suspension and withdraw the disciplinary proceedings with immediate effect.

I note that you believe that the Council's conduct amounts to a breach of the implied duty of trust and confidence. I do not accept this. However, there are several matters in your email which I wish to look into, including what you say about your whistleblowing complaint not having been investigated.

I understand that the disciplinary process is stressful for you and would like to remind you that support is available to you to assist with this if you wish. Please let me know if this is the case.

50. On 17 July 2017 the Claimant sent a letter of resignation to Mr Parkin as follows:

"Dear Roger Parkin

Resignation with Immediate Effect

Please treat this letter as formal notice of my resignation from my position as Head of Legal at Slough Borough Council (the Council), with immediate effect. I am resigning by reason of the Council's conduct towards me, which, as set out in my letter to Mike England dated 11 July 2017, has put me in an untenable position whereby the Council has given me no choice but to resign from my position in response to a series of breaches of my employment contract by the Council.

Mike England's email to me dated 14 July 2017 confirms the Council's refusal to remedy the breaches set out in my letter dated 11 July 2017. This was the 'last straw' in a continuing course of conduct towards me, by the Council (as set out in my letter to Mike England dated 11 July 2017), which taken together cumulatively constitutes a repudiatory breach of the implied contractual term of mutual trust and confidence.

For the sake of my own health and wellbeing, I cannot tolerate this conduct and accept the Council's breaches of my employment contract any longer.

For the avoidance of doubt, today will be the last day of my continuous employment with the Council."

51. The resignation letter was sent by post but the Respondent did not become aware of it until 24 July 2017 when she sent an email to members which included the statement: *"I have however resigned as I feel no other choice"*.

52. In the meantime, the Claimant had been seeking alternative employment since March 2017. In fact, unknown to the Respondent, the Claimant had secured a post as Senior Planning Lawyer with Newham Council. The Tribunal was shown a contract of employment between the Claimant and Newham Council which stated: *"This agreement is made on the 30th day of June 2017"* although the Claimant did not sign the contract until 20 July 2017. However, her start date was 17 July 2017, the same date as her letter of resignation.

53. On 25 July 2017 Mrs Norman-Thorpe emailed Mr England to tell him that her report was complete subject to formatting and indexing. On 31 July 2017 she sent the complete report to him. It was a lengthy and detailed

report running to some 1,400 pages overall. The executive summary of the report included the following:

"ALLEGATION 1

FINDING:

That the Head of Legal Services has bullied and harassed members of staff (including the Interim Monitoring Officer) in serious breach of the Dignity at Work Code of Practice and the Employee Code of Conduct.

The Head of Legal Services has acted in breach of paragraphs 3.4 and 4.2 of the Employee Code of Conduct.

RECOMMENDATION:

In light of the Head of Legal Services' senior position in the organisation and her professional standing, I recommend these actions amount to Gross Misconduct.

ALLEGATION 2

FINDING:

The Head of Legal Services did provide information relating to the disciplinary procedure followed in relation to the former Chief Executive to the IMO. I therefore do not find that the Head of Legal Services breached section 6.2 of the Employee Code of Conduct.

RECOMMENDATION:

I consider the breach of paragraph 3.4 of the Employee Code of Conduct to amount to Misconduct. ….

ALLEGATION 3

FINDING:

The Head of Legal Services did not deliberately give incorrect legal advice when she advised that potential breaches of procedure should not be dealt with prior to an employment tribunal.

RECOMMENDATION:

I consider the Head of legal Services' actions amount to professional misconduct. This is a serious breach of the standards of behaviour expected with this area of work and in light of her senior position as Head of Legal Services in SBC I recommend this amounts to Gross Misconduct.

ALLEGATIONS 4 & 5

FINDING:

- *That the Head of Legal Services did seek to involve members in her personal employment matters by sending a grievance to Councillors Munawar, Hussain and Nazir on 5 March 2017. This was in serious breach of the Local Code Governing Relations between Elected Members and Council Employees and failure to follow a reasonable management instruction.*

- *That the Head of Legal Services did contact Councillors Munawar, Hussain and Nazir on 03 March 2017 by email attaching a whistleblowing complaint. This was an explicit breach of the reasonable management instruction in the letter of suspension dated 01 March 2017 not to contact Councillors.*

- *That the Head of legal Services is in breach of the Employee Code of Conduct paragraph 3.4 relating to disobedience of orders and insubordination.*

RECOMMENDATION

In light of the serious breach of the Local Code Governing Relations between Elected Members and Council Employees and taking into account the serious circumstances the Head of Legal Services was in having been suspended from work I recommend this is Gross Misconduct.
…

ALLEGATION 6

FINDING:

That the Head of Legal Services has used language which is offensive, abusive and/or designed to intimidate and made unreasonable derogatory remarks. This is in serious breach of paragraph 4.2 of the Employee Code of Conduct and paragraph 3.4 of the Employee Code of Conduct.

I do not find that AH has entered into malicious gossip taking into account that the allegations were raised within the Grievance and Disciplinary process and I have no evidence to suggest that AH has raised these matters generally.

RECOMMENDATION:

Taking into account the seriousness of the allegations that AH has made and her own senior position within the organisation I consider this serious breach of the Employee Code of Conduct to amount to Gross Misconduct."

CLAIMS

54. The following claims were identified and clarified in a case management order made during the case management preliminary hearing on 1 August 2017 in respect of case number 3324770/2017.

19 Direct Race / Religion & Belief / Sex Discrimination – section 13 Equality Act 2010

19.1 The less favourable treatment was the Claimant's suspension on 1 March 2017.

19.2 There are 9 comparators set out in the ET1 claim form. Also, a hypothetical comparator is relied upon.

20 Victimisation – section 27 Equality Act 2010

20.1 The protected acts were the grievances dated 15 November 2016 and 9 February 2017 referred to in paragraphs 9 and 17 of the ET1 claim form.

20.2 The detriment was the Claimant's suspension on 1 March 2017.

21 Protected Disclosure Detriment – section 47B Employment Rights Act 1996

21.1 The protected disclosures were made in 3 conversations in January 2017 and a complaint made on 3 March 2017 referred to in paragraphs 11, 13, 14 and 21 of the ET1 claim form.

21.2 The detriments were the Claimant's suspension on 1 March 2017 and the email dated 13 April 2017 referred to in paragraph 27 of the ET1 claim form.

22 Equal Pay - section 66 Equality Act 2010

22.1 This claim is set out in paragraph 38 and Table A of the ET1 claim form.

23 Unauthorised Deduction from Wages – section 13 Employment Rights Act 1996

23.1 This claim is set out in paragraph 39 and Table B of the ET1 claim form.

24 Unfair Constructive Dismissal – sections 95(1)(c) and 98 Employment Rights Act 1996

24.1 Mr Hyams confirmed that the Claimant has now resigned and intends to present in the near future a complaint of unfair constructive dismissal which is likely to be consolidated with the above claims and dealt with at the same hearing.

55. The claim of Unfair Constructive Dismissal in case number 3328198/2017 was presented after the preliminary hearing. The Claimant set out the basis of the unfair dismissal claim as follows:

"1. My claim is for unfair constructive dismissal. I resigned with immediate effect pm 17 July 2017 via a letter of that date addressed to Mr Roger Parkin, my line manager, of the Respondent. My reasons for resigning were stated in that letter, which itself referred to my earlier letter of 11 July to Mr Mike England of the Respondent, who reports to Mr Parkin.

2. I believe that, for the reasons stated in those letters and the matters which are the subject of Claim Number 3324770/2017, the Respondent was on the 17 July 2017 in breach of the implied term of trust and confidence and that I have therefore been dismissed within the meaning of section 95(1)(c) of the Employment Rights Act 1996. It is my claim that the dismissal was unfair and contrary to the provisions of the Equality Act 2010 which are the subject of Claim Number 3324770/2017, with which I ask this claim to be joined."

56. The Equal Pay claim was withdrawn by the Claimant and dismissed on 24 February 2018.

57. In respect of the claims of Direct Religion/Belief Discrimination and Direct Sex Discrimination, Mr Hyams confirmed at the end of the hearing that these claims were not being pursued. Only the claim of Direct Race Discrimination was being pursued.

Direct Race Discrimination

58. Equality Act 2010

Section 13 – Direct Discrimination

(1) 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.

Section 136 – Burden of Proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

59. There is guidance from the Court of Appeal in Madarassy v Nomura International plc [2007] IRLR 246. The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination, they are not without more sufficient material from which a Tribunal could conclude that on the balance of probabilities the Respondent had committed an unlawful act of discrimination. The Claimant must show in support of the allegations of discrimination a difference in status, a difference in treatment and the reason for the differential treatment.

60. If the burden of proof does shift to the Respondent, in Igen v Wong [2005] IRLR 258 the Court of Appeal said that it is then for the Respondent to prove that he did not commit or is not to be treated as having committed the act of discrimination. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof and to prove that the treatment was in no sense whatsoever on the prohibited ground.

61. In Ayodele v Citylink Ltd [2017] the Court of Appeal held that the burden of showing a prima facie case of discrimination under section 136 remains on the Claimant. There is no reason why a Respondent should have to discharge the burden of proof unless and until the Claimant has shown a prima facie case of discrimination that needs to be answered. Accordingly, there is nothing unfair about requiring a Claimant to bear the burden of proof at the first stage.

62. Section 23 - Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14 or 19, there must be no material difference between the circumstances relating to each case.

63. In Shamoon v Chief Constable of the RUC [2003] ICR 337 it was said that:

"By attempting to identify an appropriate actual or hypothetical comparator, tribunals run the risk of failing to focus on the primary question, namely why the complainant was treated as he or she was? If there were discriminatory grounds for that treatment then there will usually be no difficulty in deciding whether the treatment was less favourable than was or would have been afforded to others. The issue boiled down to a single question - did the complainant, because of a protected characteristic, receive less favourable treatment than others? This is often referred to as the "reason why" approach.

64. In Law Society and others v Bahl [2003] IRLR 640 EAT it was said that:

"Tribunals may find it helpful to consider whether they should postpone the question of less favourable treatment until after they have decided why the particular treatment was afforded to the claimant. Once it is shown that the protected characteristic had a causative effect on the way the complainant was treated, it is almost inevitable that the effect will have been adverse and therefore the treatment will have been less favourable than that which an appropriate comparator would have received. Similarly, if it is shown that the protected characteristic played no part in the decision-making, then the complainant cannot succeed and there is no need to construct a comparator.

65. In Geller v Yeshurun Hebrew Congregation [2016] ICR 1028 EAT it was said that:

"An act which was not in itself discriminatory as it did not by its nature strike out the protected characteristic, it might be rendered so by a discriminatory motive, either conscious or unconscious and that in such cases, the employment tribunal had to ask what was the reason for the treatment complained of and, if the reason was that the claimant possessed the protected characteristic, direct discrimination would be made out.

66. The alleged less favourable treatment was the Claimant's suspension on 1 March 2017. The comparators were employees E1 - E9 set out in the ET1 claim form. Also, a hypothetical comparator was relied upon.

67. The protected characteristic of 'race' relied upon by the Claimant was her Asian ethnic origin.

68. Of the nine comparators, E1, E7, E8 and E9 were also suspended. The Claimant's suspension cannot therefore amount to less favourable treatment than those comparators.

69. The relevant comparators are therefore employees E2, E3, E4, E5 and E6. These employees were not suspended.

70. Section 24 of the Act states:

"For the purpose of establishing a contravention of this Act by virtue of section 13(1), it does not matter whether A has the protected characteristic."

71. The circumstances of these comparators were set out in the ET1 claim form at pages 1639-1641. The comparisons were repeated almost verbatim in the Claimant's witness statement and we have taken the Claimant's witness statement as the Claimant's evidence on the comparators. It is as follows:

"Comparators

294 As the Tribunal will know, proving that one has been discriminated against, or victimised, or treated detrimentally, for whistle-blowing, is hard because of the need to prove on the balance of probabilities that the relevant persons' motivation was tainted. I have referred to some of the evidence on which I rely in that regard above. Further evidence is as follows. The circumstances of Mr Parkin have arisen since I made my claims to the Tribunal, but they are evidentially important.

…

Employee 2

297 Employee 2 is a white, female, former Assistant Director of Human Resources/Organisational Development. At the end of July 2016, the Respondent appointed Ms Edwards to investigate a complaint of inappropriate conduct on the part of Employee 2. As described in paragraphs 53-70 above, the complaint related to the fact that a senior manager in Employee 2's team was appointed to her post without having applied formally for it, which was in breach of the Respondent's recruitment procedures, which were designed to ensure equality of opportunity and that the best available candidate was appointed to the post. Ms Edwards was appointed after an internal investigation undertaken by Employee 4 found no fault on Employee 2's part. Ms Edwards was appointed by Mr Parkin to carry out an independent investigation because concerns remained and it was determined by him to be appropriate to organise a further (and now independent) investigation. Given Employee 2's role and seniority, if the complaint had been well-founded then she would have committed gross misconduct in accordance with the Respondent's policies. Employee 2 was not suspended at any point during the first investigation. She refused to take part in the second (and now independent) investigation. Ms Edwards found against Employee 2, but Employee 2 was not subjected to disciplinary action. Instead, she was allowed to take leave until her exit from the Respondent's employment was agreed. She refused to accept any fault on her part and sought a £30,000 settlement to leave the Respondent. I do not know whether she received it. She had less than two years' employment with the Respondent by the time she left its employment.

Employee 3

298 I have already referred (in paragraphs 55, 152-153 and 166 above) briefly to the circumstances of Employee 3. She is a white, female, former Data Protection and Freedom of Information Officer. In 2016 she was investigated for allegedly trying to blackmail a Council contractor, i.e. a person or company which provides services to the Respondent.

299 At page 1327 there is a document showing that she asked a Council contractor for £160k to keep quiet or she would get their contract

with the Respondent terminated. The company complained to the Respondent. The matter was sent to Employee 3's line manager, who said that Mr Parkin did not want to take any action. At page 1324, there is an email (dated 4 November 2016) showing the approach of some the senior management of the Respondent to the matter at the time: the email bears careful reading, especially when it is read with the reply from Charan Dhillon at page 1323, stating what risks the Respondent was taking in not taking action against Employee 3. I endorsed the content of that email in my email of 4 November 2016 at page 1322.

300 The relevant Service Area's Director, Mr Parkin, did not want the matter to be investigated. Only after pressure and complaints from both the Legal and Procurement Teams was an investigation permitted by him to proceed. An investigation was given to an officer who had never conducted an investigation before, and she (Ms Julia Wales, to whom I refer in paragraph 153 above) spoke to me at length about the issues. She told me that there was real pressure on her not to do anything. She completed her investigation, but then no action was taken with the report. At page 1321, there is an email from the contract manager Ms Jamila Ibrahim, chasing on 7 March 2017 at page 1320 shows that Employee 3 was sent a copy of the report long after it was completed only because of the need to obtain the consents of all the persons referred to in it.

301 Employee 3 was not suspended during the investigation during which time she continued to contact the Contractor who had made the allegations. She was not suspended despite the gravity of the allegations against her. It was then alleged that she had previously been involved in this kind of behaviour, at which point the Respondent caused her to leave her employment under a compromise agreement. This was now the second time she had displayed the same kind of behaviour. However, following a disciplinary hearing, the Chair of which was Mr Joe Carter, she was only given a warning (albeit a final, formal, written one: see page 141 of the comparator bundle).

<u>Employee 4</u>

302 Employee 4 is an Asian male, and was Assistant Director of Procurement. In August 2016, allegations of bullying were made against him. His behaviour was also alleged to have fallen short of the standard expected in an investigation he had conducted into the whistleblowing allegations against Employee 2 to which I refer above, and Councillors and staff complained about his lack of impartiality. However, Mr Parkin was so afraid of a male Asian making complaints about him that he failed to cause any investigation into Employee 4's behaviours to be carried out. Mr Parkin had failed to complete the probation reviews for Employee 4 and this gave Employee 4 additional leverage over the Respondent.

303 Mr Parkin also allowed Employee 4 to bully female members of staff with impunity. Mr Parkin would not appoint an Asian female investigator for fear of Employee 4 complaining.

Employee 5

304 Employee 5 is a white, male, former Assistant Director of Housing. In mid-2016, Mr Parkin made allegations of gross misconduct against Employee 5. At first the then Chief Executive, Employee 1, refused to cause an investigation to be carried out into those allegations. However, Mr Parkin's conduct was so aggressive towards Employee 1 about the matter that she relented. Mr Parkin had for some time wished to see Employee 5 removed from his post as a result of his (Mr Parkin's) personal animosity towards Employee 5. That personal animosity had arisen because Employee 5 had challenged Mr Parkin's poor behaviour as part of the Assistant Directors Group. Despite the seriousness of the allegations, Employee 5 was not suspended. Following a disciplinary investigation, he exited his employment with the Respondent under a compromise agreement on the basis there was no case against him.

Employee 6

305 Employee 6, who is a white, male, former Assistant Director of Professional Services, who was also the Respondent's Monitoring Officer. Mr Parkin removed Employee 6 from his Directorate as a result of personal animosity towards Employee 6, because Employee 6 would challenge Mr Parkin's poor behaviour. Only after threats of legal action were made by him was Employee 6 found a new role in a different Directorate. Employee 6 was then made redundant in June 2015, at which time Mr Parkin asserted to me that he had finally "got rid of" Employee 6.

72. The less favourable treatment relied upon was the Claimant's suspension on 1 March 2017.

73. The Tribunal found that the genuine reason for Mrs Walker's recommendation and Mr England's decision to suspend the Claimant were as they described in their witness statements, namely the alleged misconduct of the Claimant as set out in Mrs Walker's report.

74. There was very limited challenge in the cross-examination of Mrs Walker and Mr England by way of assertion that the recommendation and the decision to suspend were acts done because of the Claimant's race or in any way motivated by the Claimant's race. Both of them strongly denied being influenced by the Claimant's race.

75. At paragraph 75 of her witness statement, Mrs Walker said:

"My investigation and conclusions, including the recommendation to suspend, were not influenced in any way whatsoever by any of Mrs Healy's personal characteristics or the claim against me in her email of 15 November 2016 that I was discriminating against her."

76. In cross-examination, it was suggested to her that she was influenced by Mr Parkin and Mr Parkin was white and the Claimant was not. She said that it was quite wrong to make the allegation, she found it offensive and an affront. She said that she had done a lot of work on equality and diversity charters and matters and had monitored in an ethnic minority scheme.

77. It was put to her that she could be subconsciously prejudiced and she denied that. That was the extent of the cross-examination of her on this matter.

78. In his witness statement, at paragraph 16, Mr England said:

"These were the reasons that led to my decision to suspend. My decision had nothing to do with any of Mrs Healy's personal characteristics. I would have acted the same way whoever was facing those allegations."

79. In cross-examination, the only challenge on this matter was when he was asked: *"If the Claimant had not been of her ethnic origin you would have been more careful"* and he disagreed with that suggestion. That was the extent of the challenge on this matter.

80. Although both Mrs Walker and Mr England were cross-examined extensively on the act and process of suspension and the reason for it, it was not put directly to either of them during questioning that the suspension was motivated by the Claimant's race.

81. There was no direct evidence of race discrimination. On the contrary, the Tribunal found positive evidence of a non-discriminatory reason for suspension, namely the alleged misconduct of the Claimant which was investigated by Mrs Walker and acted upon by Mr England by way of suspension.

82. The Claimant invited the Tribunal to consider the circumstances of the comparators make findings upon which the Tribunal could infer that there was a difference in treatment because of race.

83. However, as stated above, the tribunal considered that only employees E2, E3, E4, E5 and E6 could be considered as true comparators. Account was also taken of section 23 of the Act as set out above.

84. The circumstances of employees E2, E3 and E6 were dealt with in the witness statement of Mrs Nagra. Employee 4's circumstances were dealt with in Mrs Walker's witness statement and E5's circumstances were dealt with in Mr England's witness statement.

85. Employee 2: White female former Assistant Director. The Claimant was heavily involved in the matters surrounding this employee. She provided advice to Mr Parkin and appointed Susan Edwards as the investigator. The Claimant was proposing to take advice as to whether a disciplinary

process should be commenced. She was not suspended or subjected to disciplinary action but resigned. The Tribunal found that her circumstances were materially different from those of the Claimant.

86. Employee 3: Female former DP and FOI Officer. She was investigated for allegedly trying to blackmail a Council contractor. The employee's senior manager, Mr Pallett, commissioned an investigation and suspension was discussed but Mr Pallett felt this was not necessary as the issues appeared to be centred around a personal matter that the employee had with the contractor. Eventually, Employee 3 left due to redundancy and there was no compromise agreement suggested by the Claimant. The Tribunal found that her circumstances were materially different from those of the Claimant.

87. Employee 4: Asian male Assistant Director of Procurement. He shares the Claimant's protected characteristic of Asian ethnic origin and he was not suspended. Employee 4 was accused of bullying and Mrs Walker investigated. She interviewed Employee 4 and others. Employee 4 was not suspended and eventually in January 2017 it was clear that the employee was not going to return to the Council and negotiations regarding a settlement agreement took place and Employee 4 left the Council in June 2007. Mrs Walker's investigation was paused during the negotiations and never completed. The Tribunal found that Employee 4's circumstances were materially different to those of the Claimant.

88. Employee 5: White male former Assistant Director. Employee 5 was accused of sending an inappropriate email to his staff. Mr England decided to commission a formal investigation. Eventually, Employee 5 wished to leave the Respondent and the Human Resources department drew up a settlement agreement and he left their employment. The Tribunal found that Employee 5's circumstances were materially different from those of the Claimant.

89. Employee 6: White male former Assistant Director. There were no allegations of misconduct against Employee 6. He was not removed from his directorate. His post was changed as a result of a restructure and he was eventually made redundant following a restructure in mid-2015. The tribunal found that Employee 6's circumstances were materially different from those of the Claimant.

90. The Tribunal could find nothing in the circumstances of any of the relevant comparators which was sufficiently similar to the Claimant's circumstances as to draw an inference that the treatment of the Claimant by way of suspension was because of race. The notes on "suspension" in the Respondent's Disciplinary Policy (quoted above) clearly allow a substantial degree of discretion depending upon the individual circumstances of the case being considered. Each of the comparator cases were different to each other and to the Claimant's circumstances. There was no obvious pattern of suspension such as to point to race, or any other specific factor,

playing a part in the decisions to suspend, or not to suspend, as the case may be.

91. Additionally, there was nothing in the way of findings of primary fact from which the Tribunal could draw an inference that there had been subconscious motivation on the part of Mrs Walker or Mr England.

92. The complaint of direct race discrimination therefore fails.

Victimisation

93. Equality Act 2010

Section 27 - Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

94. The relevant law on burden of proof is set out above.

Protected Acts

95. The first protected act was the grievance dated 15 November 2016 made by the Claimant sent to Mrs Walker and copied to Mr Parkin follows:

"Linda

Raising my legitimate concerns in writing around my treatment has prompted your allegations, to which I take great exception. I would be grateful on what evidence you base this assumption.

I have never said that there should not be an investigation, but I do expect and am entitled to due process.

You are very aware that I have been subjected to bullying and intimidation ever since Ruth was suspended. I have been threatened with losing my

job, been the subject of false and malicious allegation for months, with little or no regard from my employer.

The sad reality is that the nature of your behaviour towards me has amounted to bullying and has been designed to undermine me. I believe I am being treated differently based on my race, as I see no other evidence that anyone else that is the subject of any investigation treated as poorly as those of an ethnic origin.

I will write further to you but will raise the breaches of duty elsewhere."

96. The second protected act was the grievance dated 8 February 2017 addressed to Roger Parkin which is referred to above in the background findings of fact.

97. The Respondent did not dispute that these two grievances each amounted to a protected act within the meaning of section 27 of the Act.

Detriment

98. The alleged detriment was the Claimant's suspension on 1 March 2017.

99. In her witness statement, Mrs Walker said:

"I was not aware that she had made allegations of discrimination in her grievance of 9 February [should read 8 February] *or in any subsequent conversations she had with Roger Parkin although I was aware that she had submitted a grievance."*

100. Mr England dealt with the matter in his statement as follows:

"Mrs Healy also claims that I suspended her because of protected acts, namely an email to Linda Walker dated 15 November 2016 and her grievance submitted in February 2017. The email to Linda Walker was attached as an appendix to Linda's report but the fact that she had said that she alleged discrimination based on her race had no part in my decision making. I am certain I did not see the February grievance. I think I was aware at the time of suspension that she had submitted a grievance but I did not know what it was about. In any event, it had no influence on my decision. I was also not aware of any conversations that she may have had with Roger Parkin about the grievance or the appointment of Sarah Johnson."

101. Neither Mrs Walker nor Mr England were asked during cross-examination whether the protected acts were the reason for the suspension which is the only detriment alleged under this head of claim.

102. The Tribunal could find no evidence of any causal link between the protected acts and the detriment, even in the Claimant's witness statement.

103. Nor was there anything in the Claimant's closing submissions pointing towards any evidence that the protected acts and the detriment were linked in any way. The Claimant had failed to show a prima facie case of victimisation.

104. In cross-examination, the Claimant was asked why she said that Mr England suspended her because of the protected acts. She said:

"Because that's how the Respondent acts. It is a pattern, see the comparator evidence, if there is whistleblowing on senior management, a person is suspended especially if the person is not white. This happened from 2011 onwards."

105. This assertion was however unsupported by any direct or indirect evidence of a causal link.

106. In the absence of any supporting evidence, the claim of victimisation fails.

Protected Disclosure Detriment

107. Employment Rights Act 1996

Section 43A - Meaning of protected disclosure

In this Act a protected disclosure means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

Section 43B - Disclosures qualifying for protection

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

Section 47B - Protected disclosures

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker (W) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done -

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

Section 48 - Complaints to employment tribunals

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(2) On a complaint under subsection …. (1A) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

108. In Ministry of Defence v Jeremiah [1980] ICR 13, the Court of Appeal said that "detriment" meant simply "putting under a disadvantage" and that a detriment exists if a reasonable worker would or might take the view that the action of the employer was in all the circumstances to his detriment. What matters is that, compared with other workers (hypothetical or real) the complainant is shown to have suffered a disadvantage of some kind. Someone who is treated no differently than other workers, even if the reason for an employer's treatment is perceived to arise from, or be connected to, the act of making a protected disclosure, will find it difficult to show that he or she has suffered a detriment.

Protected Disclosures

109. The Respondent conceded that the three conversations with Councillors in January 2017 were capable of amounting to protected disclosures.

110. The first conversation was with the Council's Mayor, Councillor Dhaliwal, on 4 January 2017 and is referred to in the Claimant's witness statement at paragraphs 131 to 133. In paragraph 132, she said:

"I was really upset that the Mayor brought this matter up with me. I explained that Mr Parkin had promised me the role of Assistant Chief Executive with all the benefits that went with that on the proviso that I endorsed a process for his appointment as the Chief Executive. I explained that it was not part of my role to be involved in such a recruitment process and that what I was being asked to do was wrong. I

explained that Mr Parkin was trying to draw me in to his way of doing things which we all knew was wrong."

111. The second conversation took place on 5 January 2017 and is dealt with in the Claimant's witness statement at paragraphs 134 to 140. There was a conversation with Councillor Munawar at the Mayor's house. The Claimant said:

"He asked me whether Mr Parkin had spoken to me about the Chief Executive and Assistant Chief Executive roles. I said that he had and that what he was proposing was both ethically unacceptable and wrong in law. I said that I was being offered a bribe to corrupt a process which would result in Mr Parkin being appointed as Chief Executive."

112. The third conversation was dealt with in the Claimant's witness statement at paragraph 145 as follows:

"Several days later, I received an invitation to meet with Mr Parkin and Councillor Munawar, the leader, on, I believe, 9 January 2017. I went to the meeting. At it, they made what I saw as yet another attempt, this time made by both of them together, to intimidate me into making sure Mr Parkin was appointed as the Chief Executive and into agreeing that I would be rewarded for my efforts. I made it clear that it was wrong on every level to do this. I reminded them both that I was a solicitor and of my professional Law Society duties."

113. The Tribunal found that these conversations amounted to protected disclosures within the meaning of section 43B(1)(a) and (b) above.

114. The Respondent also conceded that the Claimant's complaint made on 3 March 2017 was capable of amounting to a protected disclosure. This complaint is referred to above in the findings of fact. It included an allegation that Roger Parkin colluded with Sergit Nagra and Linda Walker to avoid transparency over the future appointment process of the Council's Chief Executive and to set up a process to enable Roger Parkin to be appointed to the post.

115. It also contained allegations that Roger Parkin was attempting to circumnavigate the Council's "Best Value" process to do Slough Town Football Club a financial favour. It was alleged that the Club had not been paying the full running costs to the Council of using the stadium since August and that they had thus far failed to produce any financial information as originally required during the testing phase.

116. There was also an allegation that Linda Walker, as Interim MO, had failed to investigate allegations of bullying against Roger Parkin with any degree of seriousness. Also, that Roger Parkin had bullied staff for many years.

117. The Tribunal found that this amounted to a protected disclosure within the meaning of section 43B(1)(a) and (b) as set out above.

Detriments

118. The first alleged detriment was the Claimant's suspension on 1 March 2017. Suspension was recommended by Mrs Walker in her report and the suspension was implemented by Mr England on 1 March 2017.

119. Mrs Walker said in her statement:

"I am also aware that she claims that the suspension was linked with conversations that she had with Councillors Munawar and Dhaliwal. I was not aware of any such conversations."

120. The Tribunal found no evidence that Mrs Walker was aware of the three conversations referred to above.

121. Mr England said in his statement:

"I note that Mrs Healy alleges that I suspended her because of a protected disclosure that she claims to have made in a conversation with Councillors Munawar and/or Dhaliwal. I can say with absolute certainty that I did not know that Mrs Healy had even had any meetings or discussions with these Councillors and if she did have such meetings, I had no knowledge of what took place. I had no discussion with these Councillors about Mrs Healy. Although I had regular contact with Councillor Munawar since he was leader of the Council and my role as Interim Director demanded this, he had no reason to talk to me about Mrs Healy and he did not do so. My only contact with Councillor Dhaliwal at this time was in committee meetings that he and I attended. Again, he had no reason to speak to me about Mrs Healy and he did not do so."

122. The Tribunal found no evidence to support the allegation that the suspension was because of the protected disclosure made in the three conversations. During cross-examination, the Claimant said that Mr England would have been told about the conversations at the Central Management Team attended by Mr Parkin and the Strategic Directors, one of whom was Mr England. She said Mr Parkin would have related the content of conversations but she did not herself witness any such conversation between Mr Parkin and Mr England. She said the allegation was based upon her assumption because such matters were normally discussed at the Central Management Team and she said that Mr England was lying if he denied it.

123. The whole of this allegation was based upon the Claimant's assumption. It was not put to Mr England in cross-examination that he knew about the conversations and there was no basis upon which the Tribunal could find any link between the suspension and the three conversations.

124. There was no reason to doubt the evidence of Mrs Walker and Mr England that they were unaware of the three conversations. Further, the Tribunal was satisfied that the genuine reason for Mrs Walker's recommendation

and Mr England's decision to suspend the Claimant were as they described in their witness statements, namely the alleged misconduct of the Claimant as set out in Mrs Walker's report. The Respondent had therefore satisfied the burden of proof set out in section 48(2) of the Act.

125. The second alleged detriment was Mr England's email dated 13 April 2017 which is quoted in full in the findings of fact above.

126. Mr England dealt with this allegation in his statement as follows:

"I referred earlier to a complaint sent to members by Mrs Healy on 3 March 2017 and the fact that I had not been aware of this at the time. As mentioned above, she sent it to me on 3 April. On 13 April 2017, I asked Hayley to add this to her investigation and wrote to Mrs Healy to inform her. The allegation did not concern the fact that she had made what she described as a whistleblowing complaint. It was purely about the fact that she had contacted members."

127. Again, this was not put to Mr England in cross-examination that the real reason was because the letter of 3 March 2017 was a protected disclosure.

128. The Tribunal took account of the decision of the Employment Appeal Tribunal in Panayiotou v Chief Constable of Hampshire Police [2014] IRLR 500 in which it was said that existing case law recognises that a factor which is related to the disclosure may be separable from the actual act of disclosing the information itself.

129. Taking account of the content of the email of 13 April 2017 and the evidence of Mr England, the Tribunal found that the fact of sending the e-mail to the Councillors, and not the content of it, was the reason why Mr England had added this to the list of allegations. The Claimant had been specifically forbidden from contacting the Councillors and it was clear that the Claimant could have sent her whistleblowing complaint to some other person or authority which would not have breached the terms of the suspension letter. For example, it could have been sent to the Claimant's contact officer, her local MP, or to Mr England himself. The Claimant had said in her covering email of 3 March 2017:

"Whistleblowing Complaint

From: Amardip Healy 3 March 2017 at 13:45
To: Cllr Sohail Munawar, Cllr Sabia Hussain
Cc: Mohammed Nazir

Dear Cllrs

In the absence of an appropriate officer at the Council to send this to, please find attached my whistleblowing complaint. I have included the Chair of Scrutiny because of his role.

Please could it be forwarded to the Council's internal audit team, rsm."

130. However, this clearly was not the case in view of Mr England's evidence detailing several other appropriate persons to whom the whistleblowing complaint could have been sent, and the Claimant would have known that.

131. The Tribunal had no reason to doubt Mr England's evidence regarding the reason for the email of 13 April 2017 which discharged the burden of proof set out in section 48(2) of the Act.

132. The complaints of protected disclosure detriment therefore fail.

Unauthorised Deduction from Wages

133. Employment Rights Act 1996

Section 13

(1) An employer shall not make a deduction from wages of a worker employed by him unless -

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) ……

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions) the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

134. In paragraph 39 of the ET1 in case number 3324770/2017 the Claimant stated:

"The Claimant claims as an unlawful deduction from her wages the difference between her actual salary and the salary which she would have received if she had been employed by Redbridge. The claim is conditional on a number of factors, and is best stated in a tabular form. It is stated in Table B below."

135. Table B set out the difference between the Claimant's salary in her employment with the Respondent and the salary she would have received had she taken up the post at Redbridge Council. The shortfall related to the period September 2016 to the end of her employment in July 2017.

136. The test for assessing what is the correct amount of wages for a worker is what is "properly payable" under the worker's contract of employment.

137. The Claimant's evidence was that on 11 July 2016 she was offered the post of Head of Legal and Constitutional Services by Redbridge London Borough Council at the rate of £88,899 p.a. and that it was going to be increased to £91,065 p.a. on 1 April 2017 subject to satisfactory performance. She said that on 20 or 21 July 2016, she told Mr Parkin that she had accepted the offer of the job at Redbridge and that she wanted to leave the Respondent's employment as soon as she could.

138. She said that Mr Parkin would not accept her resignation as he needed her to stay and support him. He suggested that the Claimant was expected to be appointed to a senior role after a restructure had happened but that for now there was the offer of a position as Deputy Chief Executive and that he was expecting her to perform that role in addition to her existing role in return for her salary being matched with the salary that Redbridge were offering. Accordingly, the Claimant said that she decided not to resign but to stay at the Respondent on the basis of Mr Parkin's promise of an increase in salary to match the Redbridge salary. She referred to an email exchange with Mr Parkin.

139. On 31 October 2016 she wrote to him to complain that to date there had been no adjustment to her salary and said: *"If it's not your intention now to do a salary match, please could you confirm"*. She said that he then responded by saying that he had discussed with her a review to her job description to reflect a change. The Claimant queried this and he asked the Claimant to confirm what had been agreed in July 2016. The Claimant responded on 1 November 2016 as follows:

"Roger

You would match as far as possible the offer I had on the table from Redbridge.

I asked for this on 23rd July, and you confirmed this was agreed, so I stayed. I turned down an initial 30k increase because this was being met, so there was no need to leave. I provided evidence of proposed salary so there was no argument as to what was on the table.

Despite raising this over several months with assurances that have not materialised, I do not propose to raise it again."

140. Mr Parkin replied shortly afterwards: *"In the same message you agreed to be MO. I'm on the case will sort out asap."*

141. The Tribunal was satisfied that in July 2016, Mr Parkin, who was then the Interim Chief Executive, said that he would match the offer she had from Redbridge and on that basis, she decided to stay in employment with the Respondent. The difficulty that the Claimant faces in this claim is that Mr

Parkin had no authority as the Chief Executive of a local authority to unilaterally award a salary increase to an officer of the authority, and as the Respondent's Head of Legal Services she would know that.

142. In her statement, Mrs Nagra said that pay in the Council, as for all local authorities, is subject to strict processes and that a local authority is obliged by law to have a pay policy setting out how it remunerates its employees. The Respondent's pay policy states: *"No remuneration may be made to officers outside of the Pay Policy Statement"*. In paragraph 2.3 of the policy, it states: *"The pay of all employees including chief officers, is based on job evaluations undertaken through the Hay Job Evaluations Scheme"*. She accepted however that there was also provision for one-off honoraria payments, acting up allowances and market supplements.

143. Mrs Nagra was aware that the Claimant had raised the issue of her pay prior to the job offer from Redbridge and Mrs Nagra had spoken to Roger Parkin about this and told him the only way that he could increase the Claimant's pay was to re-evaluate her post or to make a case for a market supplement. She said:

"It is not credible that the Claimant would think that Roger could have given her a pay increase without a re-evaluation of the post and/or a change in duties or a business case being put forward for a market supplement. It is not within the gift of an officer, even a Chief Executive, to simply hand out a pay increase."

144. No offer of a pay increase was ever put in writing nor was the Claimant's contract of employment varied to allow for an increase. No formal process was ever followed. Even an honoraria payment or an acting up payment would have to be approved by the appropriate authority in the Council and documented as such so as to ensure there was accountability regarding use of public funds.

145. When interviewed by Sarah Johnson as part of the Claimant's grievance investigation, Mr Parkin said:

"I said we would do what we could, but it needed to be within our power to do it at all. It had to be based on process."

146. The Claimant pointed to a pay rise offered to a locum in June 2016. However, that related to a locum, i.e. someone not covered by the pay policy and not an employee.

147. The Tribunal found that the Claimant had been paid all that was properly payable under her contract of employment and there was no unauthorised deduction of wages. This complaint fails.

Unfair Constructive Dismissal

148. Section 95 Employment Rights Act 1996 sets out the circumstances in which an employee is dismissed. Constructive dismissal is defined as follows:

> *(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.*

149. Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27 - An employee is entitled to treat himself as constructively dismissed 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. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. … 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.

150. Hilton v Shiner Limited [2001] IRLR 727 - The implied term of trust and confidence is qualified by the requirement that the conduct of the employer about which complaint is made must be engaged in without reasonable and proper cause. Thus in order to determine whether there has been a breach of the implied term two matters have to be determined. The first is whether ignoring their cause there have been acts which are likely on their face to seriously damage or destroy the relationship of trust and confidence between employer and employee. The second is whether there is no reasonable and proper cause for those acts. For example, any employer who proposes to suspend or discipline an employee for lack of capability or misconduct is doing an act which is capable of seriously damaging or destroying the relationship of trust and confidence, yet it could never be argued that the employer was in breach of the term of trust and confidence if he had reasonable and proper cause for taking the disciplinary action.

151. London Borough of Waltham Forest v Omilaju [2005] IRLR 35 - In order to result in a breach of the implied term of trust and confidence, a "final straw", not itself a breach of contract, must be an act in a series of earlier acts which cumulatively amount to a breach of the implied term. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial. Thus,

if an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence but the employee does not resign and affirms the contract, he cannot subsequently rely on those acts to justify a constructive dismissal if the final straw is entirely innocuous and not capable of contributing to that series of earlier acts. The final straw, viewed in isolation, need not be unreasonable or blameworthy conduct. Thus, the mere fact that the alleged final straw is reasonable conduct does not necessarily mean that it is not capable of being a final straw, although it will be an unusual case where conduct which has been judged objectively to be reasonable and justifiable satisfied the final straw test. Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

152. Kaur v Leeds Teaching Hospital NHS Trust [2018] CA – The point being made in Omilaju was that if the conduct in question is continued by a further act or acts, in response to which the employee does resign, he or she can still rely on the totality of the conduct in order to establish a breach of the implied term. To hold otherwise would mean that, by failing to object at the first moment that the conduct reached the threshold for breaching the implied term of trust and confidence, the employee lost the right ever to rely on all conduct up to that point. Such a situation would be both unfair and unworkable. Underhill LJ disagreed with the view expressed by HHJ Hand QC in Vairea: provided the last straw forms part of the series (as explained in Omilaju) it does not 'land in an empty scale'. He recommended that tribunals put Vairea to one side and continue to draw from the pure well of the Omilaju judgment, which contains all that they are likely to need.

153. The Claimant's resignation letter dated 17 July 2017 is set out in full above. It refers to the Claimant's letter dated 11 July 2017 (also set out above) and Mr England's response dated 14 July 2017 (also referred to above).

154. In the Claimant's letter dated 11 July 2017, she refers to eight matters which she said amounted to fundamental breaches of contract which breached the implied term of trust and confidence. However, she offered to withdraw her existing grievances and subject access requests and that would include alleged breaches number 1 to 8, if Mr England would comply with her request to:

"(a) My suspension to be lifted for me to return to work, as Head of Legal with immediate effect; and

(b) The disciplinary proceedings to be withdrawn in their entirety."

155. In his reply dated 14 July 2017 Mr England refused to lift the suspension and withdraw the disciplinary proceedings as he was awaiting Mrs Norman-Thorpe's report which was due imminently.

156. In these circumstances, it was clear from the contents of the Claimant's letters dated 11 July 2017 and her resignation letter of 17 July 2017 that she resigned in response to Mr England's refusal to lift the suspension and withdraw the disciplinary proceedings rather than any of the matters which had gone before. She was prepared to put those matters behind her if her request was granted.

157. The decision in London Borough of Waltham Forest v Omilaju, as confirmed in Kaur v Leeds Teaching Hospital NHS Trust, that it will be an unusual case where conduct which has been judged objectively to be reasonable and justifiable satisfied the final straw test.

158. In this case, the Tribunal found that the suspension and disciplinary proceedings had a reasonable and proper cause, as also did the decision by Mr England not to lift the suspension or withdraw the disciplinary proceedings until he had received Mrs Norman-Thorpe's report.

159. Mrs Walker's report contained detailed allegations of wrongdoing supported by apparently reliable evidence, which in turn supported the suspension, continuation of the suspension and the continuation of the disciplinary process to await receipt of Mrs Norman-Thorpe's report.

160. Accordingly, the Tribunal found that, viewed objectively, there was no breach of trust and confidence in response to which the Claimant resigned and that her alleged "last straw" had a reasonable and proper cause and could not amount to a breach of trust and confidence.

161. In considering the reason for the Claimant's resignation, the Tribunal also took account of the fact, as described above, that the Claimant started a new appointment at Newham Council on the same date as she submitted her resignation to the Respondent.

162. During cross-examination, it was put to her she had mentioned nothing about a new appointment in her witness statement and she replied that there was "no need to do so". It was put to her that the reason for her leaving was because she had a new job. She denied this and said that she was hoping a "light bulb" would come on regarding how she was being treated. When asked whether she would have left on 17 July if she had not had the job at Newham Council to go to, she replied that she would not have left on 17 July in that event.

163. Additionally, in her witness statement, Mrs Nagra said that in August 2017, the month following her resignation, the Claimant applied to the Respondent for the post of new Chief Executive. However, she was not shortlisted.

164. In these circumstances, the Tribunal could not accept that there had been a breakdown of the term of trust and confidence between the Claimant and the Respondent, nor could she have thought that there was such a breach. The Tribunal considered that the test of whether the employee's trust and confidence had been undermined in an objective sense, was not satisfied.

165. The complaint of unfair constructive dismissal therefore fails.

.....
Employment Judge Vowles

Date: 6 September 2018

Sent to the parties on:

.....

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For the Tribunals Office

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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs A Healy	and	Slough Borough Council

ORDER

Made under rule 50 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

1. On application by the Respondent, and in the interests of justice, and in order to protect Convention rights, it is ORDERED as follows:

2. The identities of the 9 comparators referred to in paragraphs 35.1 to 35.9 of the Claimant's ET1 claim shall not be disclosed to the public, by the use of anonymization or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record.

REASONS

3. I have considered the Respondent's application dated 1 February 2018 for an order under rule 50 of the Employment Tribunals Rules of Procedure that the full merits hearing be held in private to protect the identities of the 9 comparators cited by the Claimant. The claim involves allegations that all the comparators were involved in wrongdoing of some sort but were treated differently from the Claimant. It is said that none of them are involved in the claim, most have left the Respondent some as long ago as 2010, and none are aware they have been referred to in the proceedings.

4. The Claimant objected on 13 February 2018 to the application for a private hearing on the grounds that there is a lack of justification or necessity. It is conceded that private information can be redacted to provide protection but there is a fundamental principle of hearing cases in public.

5. I have taken account of the circumstances described by the Respondent and to the terms of rule 50. In considering whether to make an order under rule 50 the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression. There is also the individual right to respect for private and family life.

6. There appears to be no reason why, for the purposes of this case, the identities of the 9 comparators need to be disclosed in public. If they were the subject of investigation for alleged wrongdoing and/or subjected to a sanction by their employer, such internal proceedings would ordinarily take place in private and rightly be regarded as confidential matters between

the employee and the employer. If their names and identities were anonymised and redacted from any relevant documentation disclosed for the purposes of the case (for example referred to as "Employee A") then this confidentiality can be preserved and protected without detriment to the proper conduct of the case or the principle of open justice. An order to this effect is, in my view, both appropriate and necessary in this case.

7. It is not necessary for the hearing to be conducted, or partly conducted in private. That is too extreme a measure when the necessary protection can be achieved by an anonymisation order as described above.

_____
Employment Judge Vowles

Date: … *1 March* …… 2018

Sent to the parties on:

…… *7 March 2018*…....

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For the Tribunals Office