EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss M Zvenyika	v	NOA Healthcare Limited and Others

Heard at: Cambridge On: 1, 2, 3 and 4 April 2019

Before: Employment Judge Finlay

Members: Mr C Davie and Mrs L Gaywood

Appearances:
For the Claimant: In person
For the Respondent: Mr Isaacs, Counsel

JUDGMENT having been sent to the parties on **22 May 2019** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The case was heard over four days from 1 – 4 April 2019. The claimant is a litigant in person and the respondents were represented by Mr Isaacs of Counsel.

2. The claimant claimed discrimination because of race against all three respondents and also made a claim of breach of contract relating to the alleged non-payment of a bonus. The breach of contract claim was withdrawn during the hearing and the claimant agreed for it to be dismissed following that withdrawal.

3. The claimant identifies as black African.

4. The issues to be determined in relation to the race discrimination claim were identified by Employment Judge Laidler at a Case Management Preliminary Hearing in August 2018. Following a discussion at the outset of this hearing, it was confirmed that the less favourable treatment relied on was:

i. the claimant being refused an appraisal meeting;
ii. the failure by the respondents to offer the claimant the role of Operations Manager;
iii. the claimant alleged that she had been constructively dismissed as a result of the two above matters and that this dismissal was itself an act of discrimination. A complication arose during the hearing in relation to the constructive dismissal allegation to which we will refer later.

5. The respondents denied all the allegations and contended throughout that the claims had no reasonable prospect of success or, alternatively, little reasonable prospect of success. They had applied for a preliminary hearing at the (case management) preliminary hearing in August 2018 to determine whether the claims should be struck out or a deposit order made, but their application had been refused for the reasons set out in the Case Management Orders.

6. During the hearing, we heard evidence from the claimant and from the second and third respondents. Mr Michael Burch also attended on the first day and provided a witness statement. Unfortunately, Mr Burch was not able to attend on any of the other days (when he would have given evidence in person) due to ill-health. The respondents did not seek a postponement to be able to call Mr Burch, but instead asked the Tribunal to admit his witness statement in evidence. We indicated that if we did so, the weight we attach to it would not be the same as for a 'live' witness and on that basis the claimant did not object to Mr Burch's statement being admitted. In the event, we did not need to rely upon Mr Burch's statement to any great extent and neither the claimant nor the respondent directed us to it specifically.

7. An agreed bundle of documents had been prepared (running to some 240 pages). The claimant had prepared a second bundle, although for the most part, the documents in her bundle did not relate to liability and were therefore not considered. We read and considered those documents in the bundles which were referred to in the witness statements, or to which we were specifically taken during the hearing.

8. In addition, the respondents had prepared a chronology which was agreed save for one addition which did not relate to the issue of liability. The respondents also produced an opening note and closing submission in writing and both parties made helpful oral submissions after the evidence had been completed. Immediately prior to Judgment being given, the claimant asked if she could make additional submissions, but it was explained to her that it would not be proportionate to allow her to do so, having been given the opportunity on the previous day.

Facts

We make the following findings of fact:

9. The first respondent is a relatively young company, having been set up in about 2014. It is in the business of recruiting and supplying healthcare workers to the NHS and to the private sector.

10. The second and third respondents are Directors of the first respondent. The second respondent deals with IT and software and the third respondent is a qualified nurse and provides healthcare experience. Both have other business interests and indeed the third respondent has a full-time job as a nurse. There is one other Director who is the third respondent's wife and who deals primarily with payroll and is not as involved in the major strategic decisions as the second and third respondents.

11. Mr Burch is a retired Healthcare Professional who provides management consultancy services to the first respondent on a self-employed basis. Both the second and third respondents can properly be described as being 'entrepreneurial' by nature and they rely on Mr Burch's advice in relation to the direction and, to some extent, the running of the business.

12. The claimant was first involved with the business in 2015. At that time, she was part way through a BA Honours degree in International Business Management at Oxford Brookes University. She joined the first respondent in October 2015 as a Procurement Consultant working part-time and flexibly. She was not an employee at that point, her engagement being through a personal services company.

13. The claimant's main brief was to assist the first respondent to tender for a place on the NHS Framework for Provision of Healthcare Workers. With the claimant's help, the first respondent was successful in that tender.

14. By June 2016, the claimant had completed her undergraduate studies and had graduated. Discussions followed between the parties which resulted in the claimant accepting a full-time employed position with the first respondent.

15. At that stage, the first respondent had only one other employee apart from its Directors. The claimant's role was multi faceted and included office management, HR, client contracts and other elements which are listed in a structure chart dated 19 August 2016 (page B50 in the bundle). Different titles were discussed and eventually the parties agreed upon 'Business Process Manager'. There were negotiations about terms and the parties settled on a salary of £30,000 together with commission of 0.2% of turnover. The claimant was presented with a contract of employment which she did not sign but equally did not object to. We are satisfied she worked under that contract which is at page B24.

16. The contract provided for a probationary period of six months, at the end of which the company could extend the period, terminate the claimant's employment or confirm that she had completed the probationary period to the satisfaction of the company.

17. The claimant made no secret of her wish to continue with her studies. At the end of 2016 and the beginning of 2017, she made a number of applications for post graduate courses. These can be found at pages 73 – 78 of her bundle. Indeed, the third respondent gave a positive reference in November 2016 in relation to her application for a full-time post

graduate course at Warwick University in International Development.

18. In December 2016 the respondents began the process of restructuring the business. The catalyst was the desire of the second and third respondents to take a step back. Mr Burch assisted in designing a revised structure and he presented a talk to the respondent's employees in December 2016.

19. The slides for his presentation were available to us at pages 206 – 223 of the bundle. The final slide is an organogram showing the proposed structure. It shows a vacant post of Operations Manager immediately below the Directors. Below that position are four Managers in Business Development, Recruitment, Client Support and Performance Management and Human Resources Management. All of these positions reported to the Operations Manager. The claimant was named in the organogram as the holder of the HR Manager post.

20. The context for this is that the second and third respondents had been impressed with the claimant's handling of employee issues and perceived that the claimant had shown a genuine interest in HR. However, she had not demonstrated to them a real flair for client acquisition. The successful tender for the NHS Framework had not resulted in a significant increase in turnover for the first respondent, for a combination of factors including the capping of rates in the NHS and changes in the IR35 tax rules for contractors in the public sector. The second and third respondents were ambitious for the first respondent with aspirations to increase turnover from around £3 million to £10 million. If those ambitions were to be realised, there was a need to concentrate on client acquisition in the private sector and they perceived the claimant not to be the person best suited to that role. For these reasons the respondents considered that the respondent was suited to the role of HR Manager in the new structure.

21. The proposed salary for the new Operations Manager's role was £30,000 which is the same as the claimant's salary in her Business Process Manager role and also for the new HR Manager role. In the event, the Operations Manager salary was increased to £40,000 because the respondents were unable to find candidates of sufficient experience at a salary of £30,000. Although the salaries of the HR Manager and Business Process Manager were the same, the position of HR Manager was to be something of a demotion for the claimant in that she would be reporting to the Operations Manager rather than to the Directors directly. Her only direct reports would be in HR.

22. It was accepted by the respondents that the duties of the Operations Manager were similar to those of the Business Process Manager, the post held by the claimant. However, we accept the respondent's assertion that the jobs are not the same. Although many of the tasks are similar on paper, this was a more senior role and the claimant herself accepted that it involved greater responsibilities. The respondents wanted a client facing person to focus on and make strategic decisions on client acquisition without necessarily having to revert to the Directors on every occasion.

23. What the second and third respondent did not do before Mr Burch's

presentation, or in the period immediately following it, was to have any sort of meaningful conversation with the claimant about her place in the structure and her own preferences. They made assumptions that she would be happy to accept the HR post based upon their experience, but they did not discuss those assumptions with her.

24. The claimant's contractual six month probationary period was due to come to an end at the end of 2016. Although the respondents reviewed the claimant's salary (deciding not to increase it), they did not hold a review meeting. In contrast, the claimant did hold appraisal meetings for her direct reports as a result of which the respondents agreed to increase the salary of one employee. The only employee whose salary was increased at the beginning of 2017 was of black African ethnicity.

25. A meeting took place between the second and third respondents, the claimant and Mr Burch towards the end of January 2017, which resulted in email correspondence on 3 February in which the claimant thanked the respondents for agreeing in future years to hold her reviews in January, aligned with the other staff. She confirmed that she had asked them to agree a date for her next review and the third respondent then confirmed that it would take place on 24 April 2017. The claimant seemed content with this.

26. In January 2017, Mr Burch prepared a comprehensive action plan for the implementation of the new structure and in March he prepared a programme for that implementation. As part of the programme, the claimant was to prepare a presentation to the staff of the HR functional responsibilities which the claimant duly did. During this period, Mr Burch also provided the claimant with further details of the responsibilities of the other roles in the new structure, including that of Operations Manager. On 20 February 2017, Mr Burch sent an email to the claimant referring to those functional responsibilities stating, *"comments and suggestions welcome"* and, in relation to the HR Manager role, *"your input on this is important, please advise".* The claimant did not respond or comment.

27. By the beginning of May, the respondents were ready to commence the recruitment process for the Operations Manager. Email correspondence at the beginning of May between Mr Burch and the claimant shows that the claimant was personally involved in the advertisement for the new role. Analysis of candidates began in June.

28. Contrary to the third respondent's initial commitment to the claimant, her appraisal did not take place in the week commencing 8 April, primarily because the Directors wanted not only to be present themselves, but also to be accompanied by Mr Burch who was on holiday at the time. However, the third respondent did not then rearrange the meeting and by email dated 8 June 2017, the claimant chased him. Her email read simply, *"please advise when we will be able to have an appraisal review for myself".* The third respondent responded the following day suggesting 7 July, *"…if it's ok with you"* and this date was accepted by the claimant. We accept that there were difficulties with the availability of the three main protagonists. The second respondent was in India on more than one occasion over the relevant period and we have already noted that the third

respondent has a full-time job.

29. Mr Burch's initial assessment of the candidates for the Operations Manager role was by reference to a skills matrix which appears in the bundle at pages B103 and B107. This was by way of a series of tick boxes. It was apparent that had the claimant been measured against the same criteria, she would have had ticks against just about all of the boxes, but we accept the respondents' evidence that this was only the first stage of the recruitment process and the matrix was not intended to show the level of expertise or experience in those areas, merely whether there was any expertise or experience. We are supported in this by the fact that two of the other initial candidates also had ticks in virtually all of the boxes but were not deemed sufficiently experienced to fill the role. At the end of the recruitment process an offer was made to one candidate, ED, a white British female who accepted the role and commenced employment with the first respondent on 14 August 2017.

30. A meeting duly took place between the second and third respondents, Mr Burch and the claimant on 7 July 2017. The claimant expressed concern about the delay in holding her review meeting and the respondents acknowledged it and agreed that it was regrettable. There are notes of this meeting which were not intended to be verbatim. During the meeting the claimant denied that she had asked to concentrate on HR specifically and said that her concentration on HR was due to the way in which her role had evolved rather than a specific interest in that area. Although she had frustrations, she still wanted to work for the first respondent and said that she was *"ok"* with the HR Manager role as it was available to her and that it would *"do for the time being".* She explained why she had not applied for the Operations Manager role, referring to her desire to be undertaking further part time education and referring to a family matter such that she did not wish to take on any more responsibility.

31. In her evidence to the Tribunal, the claimant described this as a *"very emotional meeting"* and it is clear from the notes that she had frustrations and that she expressed those frustrations. The meeting was adjourned to 12 July to allow the Directors to consider the points she had made.

32. Between the two meetings, the claimant prepared her own notes which are at page B112. She did not show her notes to the respondents. In them, the claimant questioned whether she was being pushed out and asked what the motivation was for her to continue working for the first respondent.

33. The notes of the meeting on 12 July are at page B116. They confirm the Directors' decision not to increase her salary, about which the claimant was dissatisfied. She voiced a number of other areas of frustration with the Directors' management style and with the misconception that she wanted to concentrate solely on HR issues. These were reasons why she had not applied for the Operations Manager post. The Directors emphasised that there was no intention of wanting her to feel she was being pushed out of the company, or that she was not valued.

34. As stated above, these notes were not intended to be verbatim. The claimant does not suggest that what is recorded is wholly inaccurate but does say that the notes are incomplete and do not record everything discussed. She says that the most significant omission is that on 7 July 2017, she told the respondents that she felt discriminated on grounds of her race. Having heard the evidence of three of the four people who were present, we reject this. In the notes, the respondents have not tried to hide the fact the claimant has expressed frustrations with them, but more importantly, the claimant does not refer to race discrimination in the notes she made following the meeting. Furthermore, although she received the notes of the meeting on 7 July, she did not in the meeting of 12 July make any comment about what must have seemed to be a glaring omission. In summary we find that the notes prepared are an accurate record of the gist of what was discussed and that nothing of significance was omitted. The claimant did not tell the respondents that she felt discriminated on grounds of her race.

35. On 23 August 2017, the second respondent wrote to the claimant to confirm the change in role which would take place on 1 October. The letter reads (at page B160),

"…The post of Business Resources Manager will cease on 30 September 2017. The post of Human Resources Manager will be effective from 1 October 2017. Would you please respond to this letter indicating your acceptance of the post of Human Resources Manager with NOA Healthcare?"

36. The claimant was about to depart on leave and responded by email stating that there were still some issues which needed clarification, and once clarified she would tender her full response. She set out seven issues, including reference to constructive dismissal and being *"pushed out of NOA".* She describes as *"the big elephant in the room"*, that the role of HR Manager was insufficient to fill 37.5 hours a week. We note that although the first respondent had a very small number of direct employees, the post was intended to supply HR services to the bank of agency staff supplied by clients which numbered some three to four hundred. We note also that although the claimant refers to constructive dismissal, she does not refer to any suggestion that she felt discriminated against on grounds of race.

37. It does not appear that there was any meaningful discussion regarding these issues and on 25 September 2017, five working days before she was due to start her new job, the claimant wrote requesting reduced working hours. Her letter of 25 September (page B169), reads simply *"May I please request for reduced working hours, i.e. 10 hours per week with immediate effect. This is because I would like to undertake full time study for a Masters' programme."*

38. In or before May 2017, the claimant had applied for a full time post graduate course at the University of Surrey in HR Management. By 17 May 2017, she had been accepted on this course and by 13 June 2017, her post graduate student loan had been approved. The claimant did not mention any of this to the respondents at any time prior to 25 September.

39. A discussion then took place with the respondents. We accept the third respondent's evidence that to some extent they were thrown into a panic having had no prior warning and been given no detail as to how the proposal for 10 hours per week would work. The claimant then emailed again on 27 September confirming her lecture days were Monday, Tuesday and Friday and stating that study days were Wednesday and Thursday, but that she could still work more than 10 hours per week. She did not indicate how this could be achieved. She also confirmed that her course was to begin on 2 October 2017. She asked the second and third respondents to consider her request but made it clear that if not granted she would resign.

40. On the following day, the second respondent emailed the claimant to confirm that the first respondent could not grant the request in the best interests of the organisation. The claimant then submitted her letter of resignation to the Directors later that day. It is dated 29 September and can be found at page B195. It is worthwhile reciting that letter in full,

"Dear Wilson, Bibu and Anjana

Re: resignation from my employ

Firstly, I would like to thank you for the opportunities that have been afforded to me during my employment with NOA Healthcare. I truly believe the organisation is going places and it will take over the recruitment sector in the 'not too distant future'.

I would have loved to have stayed working here on a part time basis while pursuing my Masters studies but the business requirement is for a full time post. We have had lengthy discussions regarding the same. I therefore tender my resignation as of today as discussed.

I wish you all the best and hopefully once my course is finished I may be able to come and rejoin the team.

No words can express my appreciation to you all.

Kind regards…"

41. The claimant duly left with immediate effect and thereafter the respondents held a leaving party for the claimant and invited her to their Christmas party at the end of 2017. The claimant attended both.

42. The claimant commenced the early conciliation process on 8 December 2017, issuing her Tribunal claim on 17 January 2018.

43. Finally, we heard a considerable amount of evidence regarding the use by the respondents of the phrase *"the face of NOA".* In her witness statement and in her evidence to the Tribunal, the claimant stated that this phrase had been used on many occasions when discussing requests for outward and client facing roles, including that of Operations Manager. Her argument was that the phrase indicated a preference for someone who

was not black African and that she would effectively be sidelined into an HR Manager role where she would not be meeting with clients or suppliers. The second respondent admitted to using the phrase on one occasion only - in relation to the recruitment of a Business Development Manager some time before the Operations Manager was appointed. The third respondent denied vehemently ever having used the phrase.

44. The second respondent explained that he had used the phrase to signify someone who would effectively be an ambassador for the first respondent and to represent the company by their behaviour in dealing with prospective clients – effectively the public persona of the first respondent. Having heard the evidence, we accept the versions given by both the second and third respondents. Whilst we acknowledge that, the phrase *"the face of NOA"* could be used in a discriminatory manner, we find as a fact that the third respondent did not use it at all and that the second respondent used it on one occasion only and used it in the context and with the meaning set out above. We note that the claimant did not complain about the use of this phrase at any time during or immediately after her employment.

The Law

Limitation

45. Section 123(1) of the Equality Act 2010 provides that, subject to sections 140A and 140B, a complaint of discrimination may not be brought after the end of:

    (a) the period of three months starting with the date of the act to which the complaint relates; or
    (b) such other period as the Tribunal thinks just and equitable.

46. By Section 140B(3), in working out when that time limit expires, the period beginning with the day after day A as defined in Section 140B(2)(a), and ending with day B as defined in Section 140B(2)(b) is not to be counted.

47. Section 123(3) provides that "conduct extending over a period is to be treated as done at the end of that period" and "failure to do something is to be treated as occurring when the person in question decided on it". Under sub-section 123(4), in the absence of evidence to the contrary, a person is to be taken to decide on failure to do something when he does an act inconsistent with doing it, or on the expiry of the period in which he might reasonably have been expected to do it.

48. Although the 'just and equitable' test is a lower hurdle than the 'not reasonably practicable' test which operates in other types of claim and the Tribunal has a wide discretion in determining what, if any, period is just and equitable, the onus is still on the claimant to convince the Tribunal that it is just and equitable to extend time. The exercise of discretion in favour of the claimant should be the exception not the rule and there is no presumption in favour of extending time.

49. The Courts have set out a number of factors to which a Tribunal may have

regard. They include:

i. the prejudice that each one may suffer if the extension is refused;
ii. the length and reasons for the delay;
iii. the extent to which the cogency of evidence is affected by the delay;
iv. the extent to which the party sued had co-operated with the request for information;
v. the promptness with which the claimant acted when she knew of the possibility of taking action; and
vi. the steps taken by the claimant to obtain appropriate advice.

50. The Tribunal is not required to go through the list to make a finding in respect of each factor, however, it must not leave any significant factors out of its deliberations and on each occasion the Tribunal is required to establish the extent of and reasons for the delay.

Direct Discrimination

51. By Section 13 of the Equality Act 2010, "A person discriminates against another if because of a protected characteristic, he treats the person less favourably than he treats, or would treat, others." By Section 39(2)(c), an employer must not discriminate against an employee by dismissing that employee.

52. Treatment will be found to be because of a protected characteristic if that characteristic is the substantial or effective reason for the treatment. It is not necessarily for it to be the sole or intended reason. The fact that a claimant has been treated less favourably than an actual or hypothetical comparator is not sufficient to establish that direct discrimination has occurred unless there is 'something more' from which the Tribunal can conclude that the difference in treatment was because of the claimant's protected characteristic. However, the Court or Tribunal should not get too bogged down in determining the appropriate comparator and the question of whether there has been less favourable treatment. The focus must always be on the primary question – why did the respondent treat the claimant in this way?

Burden of Proof

53. It has been stated that, "those who discriminate on grounds of race or gender do not in general advertise their prejudice(s): indeed, they may not even be aware of them." The burden of proof provisions are set out in Sections 136(2) and (3) and state, "If there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person contravened the provision concerned, the Court must hold that the contravention occurred". However, that section does not apply if that person shows that he did not contravene the provision. This section does not expressly place a burden on the claimant, but the courts have confirmed that the initial burden of proof remains on the claimant.

Constructive Dismissal

54. There are three elements to constructive dismissal:

    54.1 There must be a breach of contract by the employer which is sufficiently serious to justify the employee resigning;

    54.2 The employee must have left in response to that breach; and

    54.3 The employee must not have affirmed the contract before leaving (for example by delaying too long before resigning).

55. Section 95(2) of the Employment Rights Act 1996, provides that for the purposes of that part of the act (which is Part 11 - relating to unfair dismissal), "an employee should be taken to be dismissed by his employer if –

    (a) the employer gives notice to the employee to terminate his contract of employment; and

    (b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is to expire;

    and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

Conclusions

Limitation

56. Of the three specific allegations of race discrimination, the dismissal is the only one which is in time, as it took place on 29 September 2017.

57. The other two allegations are out of time. The case has not been argued on this basis, but we feel it is worth noting that the dismissal could only be used as matter to establish a course of conduct extending over a period if the allegation in relation to the dismissal was well founded. For the reasons set out below, that is not the case here.

58. Looking therefore at the first two allegations of race discrimination and the extent and reasons for the delay, we consider that the alleged refusal to grant an appraisal, or at least the delay in granting that appraisal, must have been decided upon by early July 2017 at the very latest (just before the review meeting actually took place). The claimant would therefore have to have begun early conciliation proceedings in September 2017, before her dismissal. In the event, she did so in December 2017, some three months later.

59. We consider that the decision not to offer the claimant the role of Operations Manager must have been taken in January 2017 at the latest, when Mr Burch made his presentations to the staff. Accordingly, the claimant would have had had to commence early conciliation in April 2017, whereas she did so in December 2017, some eight months later.

60. As for the reasons for the delay, the claimant confirmed that she was aware of the time limit and also that she was aware that the time limit was close to elapsing or perhaps had elapsed. She gave two main reasons for the delay – firstly, the fact that she was in an emotional state following what had happened to her; and secondly, that she was at the time settling into her University course.

61. We are not convinced that either are plausible or satisfactory reasons for the delay. As Mr Isaacs has pointed out, the time limit in relation to the Operations Manager post at least had elapsed before she commenced her studies. We have also seen no evidence of her emotional distress and it seems somewhat inconsistent with her attendance at the two parties referred to and her ability to carry out other administrative aspects of her life without apparent impediment.

62. Turning to the prejudice that each party may suffer, we consider that there is prejudice on both sides. Were the application to be refused, the claimant would clearly be deprived of the ability to bring a claim of discrimination. On the other hand, if the application were granted, the individual respondents in particular would be faced to defend unpleasant allegations which were otherwise out of time.

63. As for the cogency of evidence, whilst we accept we were not pointed to any specific occasion when the lapse of time had affected the witnesses' memories, it is inevitable that delay can have an impact on that witness' ability to recall and we remind ourselves that it is a claim based primarily on oral evidence.

64. Finally, there is no suggestion that the claimant sought advice at this time.

65. The task of weighing these factors is not an easy one and to some extent they are finely balanced. However, although the claimant's reasons for the delay are not in themselves decisive, we repeat that we were not satisfied with her explanation and on balance, we do not consider it is just and equitable to extend time to allow the first two complaints of race discrimination to be heard.

66. Nevertheless, having heard the evidence, we will go on to give our conclusions in relation to all allegations of discrimination in any event.

67. The first allegation is the refusal of an appraisal meeting. We have found that an appraisal meeting did take place, albeit late. It took place on 7 and 12 July 2017. Whilst it was not a comprehensive review of performance, nor a goal setting exercise with accordance with best practice, we note that the first respondent is a very small company with limited resources and that the individual defendants are not well versed in HR practices and procedures (such that they relied on the claimant for HR advice). We have found as a fact there was some discussion of the claimant's strengths and weaknesses in those meetings, albeit in the context of a change of role.

68. The meeting was undoubtedly delayed for a combination of factors as set

out above. We find that the delay was due not only to the availability difficulties, but also because of reluctance on the part of the second and third respondents to have what might be difficult conversations with the claimant in which they would need to explain to her that she had not come up to their expectations in the area of client acquisitions. By accepting this explanation, we are not suggesting that it is good practice. On the contrary, matters may have turned out differently had the second and third respondents been prepared to have honest conversations with the claimant at an earlier stage than July 2017.

69. Nevertheless, we do not consider that the claimant has made a prima facie case of direct discrimination as a result of the delay in holding her appraisal. As a comparator, she cannot rely upon those whom she appraised, because the Directors were not involved in those appraisals. We have absolutely no reason to believe that the respondents would have treated any differently someone in the same situation as the claimant, with the same strengths and weaknesses, who is not of black African ethnic origin. Even if the burden of proof does pass to the respondents, we are entirely satisfied that their reasons for the delay were not discriminatory.

70. In any event, we have ample evidence that the claimant consented to the delay at least until April 2017 and that she did not chase the respondents until June 2017. Even then, she did not do so in a manner which signifies to the respondents or to us that she was unduly concerned about the delay at the time. Finally, we note that at no stage has the claimant complained that the delay (or refusal) was considered by her to be a matter of race discrimination, even though she told us in evidence that she came to that realisation in or about May 2017.

71. The claimant's second allegation relates to the failure to offer her the role of Operations Manager. She says that she should have been offered it because she was effectively doing the role already and that had she not been of black African ethnic origin, she would have been offered it.

72. Firstly, we have already concluded that this was a different role to that being undertaken by the claimant. In our judgment, the first respondent had no obligation to offer it to the claimant when the role was clearly a step up involving more responsibilities (as the claimant has admitted), but also in the context of the respondent's wish for the person in the role to focus on and have expertise and experience in client acquisition which they had no reason to believe the claimant had. At this point, we pause to say that this does not reflect any criticism on the claimant. It is obvious to us from the evidence given that the claimant had her hands full doing the duties assigned to her as Business Process Manager which she felt were the respondents' priorities whether or not she preferred doing those roles rather than focusing on client acquisition.

73. It is not in dispute that the claimant had the opportunity to apply for the role of Operations Manager and that she failed to do so. We have noted that in discussions with the respondents in July, she said that she did not wish to have the extra responsibility at that time given her plausible personal reasons.

74. The claimant's chosen comparator is ED (the successful candidate), but in our view, she cannot be a valid comparator because she applied for the role whereas the claimant did not. It may be that the claimant was not given a fair crack of the whip to demonstrate her client acquisition expertise whilst in employment as Business Process Manager, but she would have had the chance to do so through the appropriate process in competition with external candidates had she chosen to apply for the role.

75. If it be argued that there should be a hypothetical comparator, then again, we have absolutely no reason to believe that any such comparator would have been treated any differently to the claimant. In any event, we are entirely satisfied that the reasons why the respondents decided not to offer the Operations Manager role to the claimant have nothing to do with her race. They were entirely to do with her perceived lack of experience and expertise in client acquisition.

76. We have been critical of the second and third respondents for not communicating at all times with the claimant in an open and trustful manner. However, communication is two ways. If the claimant genuinely felt that she should have been offered that role, then she had ample opportunities to say so between December 2016 and July 2017. Even in July 2017, she was not suggesting that she should have been offered the role, but was in fact explaining why she had not applied.

77. The third allegation is the (constructive) dismissal. It will be apparent from the preceding paragraphs that we do not consider that the respondent was in fundamental breach of contract either by delaying / refusing the review, or by not offering to the claimant the position of Operations Manager. They had no contractual obligation to hold an appraisal and no contractual obligation to offer a higher and different role to an existing employee. Even cumulatively, these matters are a long way short of any breach of the duty of trust and confidence. We stress that the claimant was given every opportunity to apply for the role and that the respondents did hold a review after a delay which did not appear to be a significant issue for the claimant.

78. Even if there were a fundamental breach of contract, the claimant did not resign in response to that breach. The reason why she left was to undertake a post-graduate course at University, having been refused a request to work part-time. There is no suggestion that that refusal was in any way discriminatory. Furthermore, when asked what she would have done had her request for part-time employment been granted, she said that she would have converted her course to part-time and would have continued in the respondents' employment on that part-time basis. We do not accept that the alleged breach and breaches were a significant factor in her decision to resign even if they had been in any way discriminatory in nature.

79. Finally, it is our view that by delaying her resignation from (at the latest) May 2017 when the claimant said she realised that the breaches were discriminatory in nature, she has affirmed the contract of employment. There was therefore no constructive dismissal.

80. Section 95(2) of the ERA is the complicating factor referred to in the introduction above. In our view the letter from the respondents to the claimant of 23 August can be read as a letter giving notice of termination of employment on 30 September. It is essentially a letter terminating one contract of employment and offering engagement on the terms of another. If section 95(2) applies, this could then mean that the claimant is taken to have been dismissed by the first respondent by that letter rather than constructively. Mr Isaacs argues that the provision in s.95(2) does not apply in the discrimination case as there is no equivalent provision in the Equality Act 2010 and we agree with him. This is not an unfair dismissal claim under Part 11 of the Employment Rights Act 1996. However, if we are wrong about this, we have gone on to consider whether the dismissal by that letter could have been an act of discrimination contrary to Section 39 of the Equality Act 2010 and have concluded that it could not have been. The reason for that dismissal was the first respondent's desire to restructure leading to the redundancy of the claimant's post of Business Process Manager. For all of the reasons set out above, the claimant's race formed no part of the decision-making process of the respondents or any of them.

81. The complaints of discrimination are therefore not well founded.

82. Finally, we will add some general remarks about the claimant's case. Her entire claim that she was discriminated on the grounds of her race seems to hang up on two matters. Firstly, the appointment of a person of a different race to a role she did not apply for and secondly, the use of the phrase "face of NOA". We have already commented that ED was not an appropriate comparator and we have found that the "face of NOA" phrase was used only on one occasion in a non-discriminatory fashion. The claimant has given us no basis on which to conclude that the actions of the respondents were because of her race and she has not indicated any reason why the respondents, or any of them, should discriminate against someone of black African origin, particularly in circumstances when the only person who was granted a salary increase at the beginning of January 2017 shared that characteristic. We have also noted that at no stage prior to these proceedings did the claimant make any specific complaint of race discrimination. Having heard her give evidence and witnessed the way in which she has presented her case, the impression she has given to us is that if she had strong opinions at work, she would not shy away from expressing them. We have also heard evidence from the second and third respondents and whilst we believe that they would not have initiated any difficult conversation with an employee unless they absolutely had to, we have no reason to think that they would not have been receptive to approaches from the claimant if she had genuine concerns about her role and the change in that role.

83. In addition, we cannot ignore the terms of her resignation letter. Whilst we fully understand that some employees who are victims of discrimination may for very good reason not wish to set out their complaints in detail in a resignation letter, that is very different to the language used in the claimant's letter. Added to this, the claimant then voluntarily attended not only a leaving party for her but also a Christmas party with the very people whom she accuses now of race discrimination. It seems to us that the

sentiments expressed in her letter of resignation are wholly inconsistent with the case which she has brought to this Tribunal and the claimant has not been able to give us any explanation why she wrote in such effusive terms about the respondents in that letter. This must cast a significant doubt on her credibility generally and in her own belief in the specific complaints of race discrimination that she has brought.

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Employment Judge Finlay

Date: 20 May 2019

Reasons sent to the parties on

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For the Tribunal office