EMPLOYMENT TRIBUNALS

Claimant: **Mr S Islam**

Respondent: **London Borough of Hackney**

Heard at: **East London Hearing Centre**

On: **6, 7 & 8 March 2019**
26 April 2019 (in chambers)

Before: **Employment Judge Foxwell**

Members: **Mrs GA Everett**
Ms S Goldthorpe

Representation

Claimant: In person

Respondent: Mr R Kohanzad (Counsel)

JUDGMENT

1. **The Claimant's claims of discrimination because of religion or belief are dismissed on withdrawal.**

2. **The Claimant's claim of racial harassment arising from an incident on 14 December 2017 is well-founded but was presented outside the time limit contained in section 123 of the Equality Act 2010. The Tribunal does not find it to be just and equitable to extend time for the presentation of this claim and therefore the Tribunal does not have jurisdiction in respect of it and it is dismissed.**

3. **The Claimant's other claims of racial harassment and/or direct race discrimination are not well-founded and are dismissed.**

4. **The Claimant's claim of breach of contract as to notice is not well-founded and is dismissed.**

5. **The provisional remedy hearing listed on 19 June 2019 is cancelled.**

REASONS

Introduction

1. The claimant, Mr Syedul Islam, is Muslim and describes his ethnicity as non-white Bangladeshi Asian. He was employed by the respondent, the London Borough of Hackney, as a highways inspector between 24 July 2017 and 16 January 2018, when he resigned.

2. Having gone through early conciliation between 3 April 2018 and 17 May 2018, on 20 May 2018 the claimant presented complaints of race discrimination and discrimination on grounds of religious belief to the Tribunal. He also claimed that he had been constructively and wrongfully dismissed (dismissed in breach of contract).

3. The respondent filed a response on 25 June 2018 denying the claims.

The issues

4. The issues in the claim were considered at a preliminary hearing before Employment Judge Goodrich on the 1 August 2018. The claimant represented himself at that hearing (as he has done at this). After discussion, Judge Goodrich recorded the agreed issues as follows:

> ***Direct race discrimination and/or direct religion or belief discrimination; alternatively race discrimination and/or religion or belief harassment***
>
> *"The claimant makes the following allegations:*
>
> *1.1 During his first week of starting his role of highway inspector for the respondent he was accused by Leema Andrews and Rebecca Law of not doing his job and sitting around doing nothing, although he had been told by Brian Foxton and Steve Goodson that extensive training would be given to him since he had no experience within this field.*
>
> *1.2 Throughout the claimant's employment with the respondent he was accused of not doing his job and skiving off by Rebecca Law, Jessica Dempsey and Steve Kett, the claimant being informed of this by his manager Steve Goodson.*
>
> *1.3 Although the claimant was given instructions by Steve Goodson to go training with a fellow highway inspector called Steve Kett, Steve Kett told him that he would not train him as he was not prepared to wait for his lunch break.*
>
> *1.4 In December 2017, at a Christmas party event attended by most of the claimant team members, the team member Jessica Dempsey, in front of another colleague called Eddie Henry, referred to the claimant as "Paki".*

1.5 On 16 January 2018, the date the claimant resigned, Leema Andrews put the claimant on a loud speaker so the whole team would hear his conversation between him and Rebecca Law.

1.6 The claimant considers himself as having to resign because of the race and religious discrimination, bullying and harassment he experienced as set out above.

In respect of the claimant's direct discrimination complaints he compares his treatment with that of: Mark Adams, Highways and Licensing Officer; Andy Eaton, Highways Inspector; and Steve Kett, Highway Inspector. He says that none of them received "slander" nor were criticised or harassed in the ways he was. Alternatively, he relies on a hypothetical comparator."

5. Neither party suggested before us that there were further or other issues raised in the claim. Nevertheless, having regard to the recent decision of the EAT in **Saha v Capita plc [2018] EAT 80**, we considered the claim form to reassure ourselves of this. We were satisfied that the agreed list of issues reflected the specific factual allegations made by the claimant but it appeared to us that he was claiming that the respondent's conduct amounted to a repudiatory breach of contract which he had accepted by his resignation so that he was constructively dismissed. The claimant does not have sufficient qualifying service to claim unfair dismissal but we found that our breach of contract jurisdiction under the Extension of Jurisdiction Order 1994 had been invoked, although any remedy would be limited to notice pay.

6. The claimant adduced evidence at the case management stage that he is dyslexic and dyspraxic so we made adjustments for him in this hearing by taking breaks and moderating the pace of questions. The claimant had not raised claims of disability discrimination however and we have therefore not considered the evidence in this context (that is not intended to suggest that a claim of disability discrimination would have succeeded had it been bought). Similarly, during evidence the claimant and one of the respondent's witnesses (Steve Goodson) referred to instances when the claimant complained of "racism"; the Claimant has not presented claims of victimisation consequent upon this under section 27 of the Equality Act 2010 so we have not analysed the evidence in that context either (once again, the reader should not infer from this that any such claim would have succeeded had it been brought).

The hearing

7. The final hearing had been given a time estimate of three days by a Judge on initial consideration. Employment Judge Goodrich increased this to 4 days as an adjustment for the claimant's conditions. The final hearing was listed to start on Tuesday, 5 March 2018 and the parties duly attended that day only to find that the case was unallocated due to a lack of judicial resources. Employment Judge Ferguson was able to see the parties however simply to consider how the hearing could be dealt with over the remaining days of the allocation. She agreed a provisional trial timetable with them and directed that they attend at 12 noon on 6 March 2019 to allow this Tribunal (which was available for the remainder of the allocation) to read this witness statements and other documents. Unfortunately, because one of the Tribunal members had a meeting we were unable to start the hearing before 1.30 pm on 6 March 2018. The Tribunal was nevertheless able to receive the evidence and submissions relating to liability comfortably within the remaining

period of the allocation. It was necessary however for us to reserve our decision which we considered in chambers on 26 April 2019.

8. On the first hearing day we disclosed that Mrs Everett had sat on a previous case involving a highway inspector employed by the respondent in the team in which the claimant subsequently worked. We gave the parties the opportunity to consider whether they had any objection to her sitting on this case but neither had.

9. The Tribunal heard evidence from the claimant and he called no other witnesses. That is common in the Employment Tribunal and we draw no inferences from the number of witnesses a party calls.

10. The respondent called the following witnesses:

Brian Foxton: Mr Foxton is employed by the respondent as Group Engineer for Street Management. He has worked for the respondent since 2014 but has 30 years' experience in working for local authorities. He is Steve Goodson's line manager. He is white.

Steve Goodson: Mr Goodson is employed by the respondent as a Senior Engineer Inspector and has worked for it for about 15 years. He was the claimant's line manager. He is white.

(Maria) Leema Andrew: Mrs Andrew is employed by the respondent as a Senior Traffic Management Act Permitting Officer. She has worked for the respondent since 2007. She is British of Indian heritage.

Andrew Cunningham: Mr Cunningham is the respondent's Head of Street Scene and therefore the previous witnesses' ultimate line manager. He is a Chartered Civil Engineer. He has worked for the respondent since 2003. He is white.

Stewart Thorn: Mr Thorn is the respondent's Head of HR Business Partnering for the Chief Executive's Directorate. He is white. Although Mr Thorn attended to give evidence and was tendered for cross examination, the claimant did not have any questions for him and neither did the Tribunal.

11. In addition to the evidence of these witnesses the Tribunal considered the documents to which it was taken in an agreed bundle and references to page numbers in these reasons relate to that bundle. We received additional documents from the respondent during the hearing which were admitted and added to the bundle. It was clear, and the claimant confirmed, that these documents had been disclosed to him previously and he did not object to their inclusion. Accordingly, the bundle remained an agreed one.

12. Finally, we received closing submissions from the parties. Mr Kohanzad conceded in submissions that the respondent cannot rely on the defence in section 109(4) of the Equality Act 2010 ("the statutory defence") in respect of the acts of agency workers as it only applies to employees. This is relevant because an agency worker is said to be the perpetrator in one of the claimant's allegations. We accept that this concession was correctly made.

13. Mr Kohanzad also conceded that the respondent was not prejudiced by any delay in presenting a claim based on an incident on 14 December 2017. We shall return to the significance of this when considering the relevant time limits for discrimination claims.

14. At the close of the claimant's submissions and after the Tribunal pointed out that his evidence and submissions had been directed towards his complaints of race discrimination rather than discrimination on the grounds of religion or belief, and after the claimant had had a break to consider, he withdrew this aspect which we have therefore dismissed on withdrawal. Accordingly, the claimant's remaining claims are ones of race discrimination and breach of contract based on a breach of the implied term of mutual trust and confidence arising from the facts alleged as acts of race discrimination.

The legal framework

15. The claimant complains of direct discrimination and harassment because of race and of breach of contract.

Direct discrimination

16. Section 13 of the Equality Act 2010 provides as follows:

> *"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."*

17. Race is a protected characteristic under section 9 of the 2010 Act.

18. These provisions require a Tribunal to decide the following:

a. Has there been treatment?

b. Is that treatment less favourable than the treatment which was or would have been given to a real or hypothetical comparator?

c. Is the difference in treatment to the claimant's detriment?

d. Was that difference in treatment on a racial ground?

19. These elements require further explanation. A comparator must be the same in all material respects, apart from race, as the claimant. There must be some detriment to the claimant in the differential treatment and, while the threshold for this is low, minor or trivial matters may not cross it (see **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285**). *'Racial grounds'* are defined in section 9 of the 2010 Act: the claimant relies on his ethnicity in that he is a non-white man of Asian ethnicity and Bangladeshi origin.

20. A claim of direct discrimination concerns a comparison between the treatment given to the claimant and that which a comparator received or would have received. A comparator for this purpose must be the same in all material respects, apart from the protected characteristic, as the claimant (see section 23 of the Act). That said, the reason for the relevant treatment in some cases will be inherent in the conduct complained of, for example where a race specific comment is used: close examination of a comparator in

these cases will be unnecessary. Furthermore, where a hypothetical comparator is relied on the question for the Tribunal is often better expressed as *"what is the reason why the claimant has been treated in the manner complained of?"* (see **Amnesty International v Ahmed [2009] IRLR 884**).

21. The issue whether treatment amounts to 'less favourable treatment' is a question for the tribunal to decide. The fact that a complainant honestly considers that he is being less favourably treated does not of itself establish that there is less favourable treatment (see **Burrett v West Birmingham Health Authority [1994] IRLR 7**).

22. The determination of whether treatment is because of race requires a tribunal to consider the conscious or sub-conscious motivation of the alleged discriminator. This element will be established if the Tribunal finds that a racial ground formed a part of the reason for the treatment even though it may not have been the only or the most significant reason for the treatment (see **Nagarajan v London Regional Transport [1999] ICR 877**).

23. In cases where the less favourable treatment complained of is not inherently related to a protected characteristic the tribunal must look into the mental processes of the alleged discriminator in order to determine the reason for the conduct (see **Amnesty International v Ahmed [2009] IRLR 884**).

Harassment

24. Section 26(1) of the 2010 Act provides as follows:

> *"A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of—*
>
> *(i) violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."*

25. A claim of harassment requires evidence of unwanted conduct which has the *"purpose or effect"* of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her because of a protected characteristic. A claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention. This can require the tribunal to draw inferences as to what that true motive or intent actually was; the person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. Where the claim relies on the effect of the conduct in question, the perpetrator's motive or intention, which could be entirely innocent, is irrelevant. The test in this regard has, however, both subjective and objective elements: the assessment requires the tribunal to consider the effect of the conduct from the complainant's point of view (the subjective element) but it must also ask whether it was reasonable of the complainant to consider that the conduct had that requisite effect (the objective element). Overall, therefore, the test is an objective one (**Richmond Pharmacology v Dhaliwal [2009] ICR 724**). The fact that a claimant is peculiarly sensitive to the treatment accorded him does not necessarily mean that harassment will be shown to exist (**Driskel v Peninsula Business Services Ltd [2000] IRLR 151**).

Finally, the treatment must be because of a protected characteristic for the claim to succeed: simple offensive treatment is not enough.

The burden of proof in discrimination claims

26. Section 136 of the 2010 Act provides as follows:

> *"(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".*

27. This section requires a claimant to prove facts consistent with his claim: that is facts which, in the absence of an adequate explanation, could lead a tribunal to conclude that the respondent has committed an act of unlawful discrimination (see **Royal Mail Group v Efobi [2019] EWCA Civ 18**). 'Facts' for this purpose include not only primary facts but also the inferences which it is reasonable to draw from the primary facts. If the claimant does this then the burden of proof shifts to the respondent to prove that it did not commit the unlawful act in question (**Igen v Wong [2005] IRLR 258**). The respondent's explanation at this stage must be supported by cogent evidence showing that the claimant's treatment was in no sense whatsoever because of race, religion or a protected act. If a claimant fails to discharge the primary burden at stage one, then there is no requirement for a respondent to prove a non-discriminatory reason for any difference in treatment (**Ayodele v Citylink Limited [2018] ICR 748**).

28. We have borne this two-stage test in mind when deciding the claimant's claims. We have also borne the principles set out in the Annex to the judgment of Peter Gibson LJ in **Igen v Wong** firmly in mind. Save where the contrary appears from the context, however, we have not separated out our findings under the two stages in the reasons which appear below. In any event detailed consideration of the effect of the so-called shifting burden of proof is only really necessary in finely balanced cases.

The drawing of inferences in discrimination claims

29. An important task for a Tribunal is to decide whether and what inferences it should draw from the primary facts. We are aware that discrimination may be unconscious and people rarely admit even to themselves that such considerations have played a part in their acts. The task of the Tribunal is to look at the facts as a whole to see if they played a part (see **Anya v University of Oxford [2001] IRLR 377**). We have considered the guidance given by Elias J (as he then was) on this in the case of **Law Society v Bahl [2003] IRLR 640** (approved by the Court of Appeal at [2004] IRLR 799): we have reminded ourselves in particular that unreasonable behaviour is not of itself evidence of discrimination though a tribunal may infer discrimination from unexplained unreasonable behaviour (**Madarassy v Nomura International plc [2007] IRLR 246**).

Time limits for claims of discrimination

30. The primary time limit for complaints of discrimination is three months from the date of the act complained of (see section 123 of the 2010 Act). Where there are a series of acts constituting a continuing act, the three-month period runs from the date of the last act in the series. If a claim is presented out of time the tribunal may nevertheless extend time for bringing it if it considers that in all the circumstances it is just and equitable to do so. A failure to deal with a situation can constitute a continuing act (see **Littlewoods Organisation v Traynor [1993] IRLR 154**). We have reminded ourselves, however, that we must not conflate a series of isolated, separate acts with a continuing act even if those separate acts have common features. A continuing act is an ongoing situation or state of affairs so, in the leading case of **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96**, the ongoing state of affairs was that the Commissioner allegedly allowed a culture to continue in which discriminatory acts were tolerated: it was the culture which was the continuing act, not the individual actions of numerous police officers over many years.

31. Should we find that this claim or aspects of it have been presented out of time, we have considered two cases concerning the just and equitable extension of time. Firstly, **Robertson v Bexley Community Centre [2003] IRLR 434** in which the Court of Appeal emphasised that time limits are usually exercised strictly in employment cases and that there is no presumption for exercising the tribunal's discretion in a claimant's favour unless there are grounds for not doing so, rather the Court thought that this would be the exception rather than the rule. Secondly, **Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327** in which the Court of Appeal emphasised that none of the dicta in **Robertson** fettered the tribunal's judicial discretion when considering this point. In our judgement the important thing for us is to weigh all the circumstances and reach a just conclusion while bearing in mind that it is for a claimant to establish the tribunal's jurisdiction.

Constructive dismissal

32. It is well-established that an employee who claims to have been constructively dismissed must show that his employer acted in repudiatory breach of contract. Furthermore. he must show that he resigned in response to this breach and not for some other reason (although the breach need only be a reason and not the reason for resignation). It is open to an employer to prove that the employee affirmed the contract despite the breach, perhaps by delay or taking some other step to confirm the contract.

33. In this case the claimant relies on alleged breaches of the implied term of trust and confidence. A breach of the implied term of trust and confidence occurs where an employer conducts itself without reasonable cause in a manner calculated, or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (see **Mahmud v BCCI [1997] IRLR 462**). A breach of this implied term is likely to be repudiatory.

34. The claimant's claim that his employer acted in breach of contract is also based on the 'last straw doctrine'; this provides that a series of acts by the employer can amount cumulatively to a breach of the implied term of trust and confidence even though each act when looked at individually would not be serious enough to constitute a repudiatory breach of contract. Inherent in a last straw case is the fact that there was one final act which led to the dismissal ('the last straw') and the nature of this was considered in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** where the Court of

Appeal held that the last straw need not be unreasonable or blameworthy conduct, all it must do is contribute, however slightly, to the breach of the implied term of trust and confidence. If the act relied on as the final straw is entirely innocuous however then it is insufficient to activate earlier acts which may have been, or may have contributed to a repudiatory breach.

35. The question whether a repudiatory breach of contract has occurred must be judged objectively (**Buckland v Bournemouth University Higher Education Corporation [2010] ICR 908**); this requires the Tribunal to assess whether a breach of contract has occurred on the evidence before it. Neither the fact that an employee reasonably believes there to have been a breach nor that the employer believes it acted reasonably in the circumstances are determinative of this: the test is not one of 'reasonableness' but simply of whether a breach has occurred. Of course, where parties are acting reasonably it is less likely that there will have been a breach of contract when judged objectively but this is not necessarily so.

36. The Court of Appeal considered the characteristics of a repudiatory breach of contract in the case of **Tullett Prebon plc & ors v BGC Brokers LP & ors [2011] IRLR 420**. Maurice Kay LJ, who delivered the leading judgment held as follows at paragraphs 19 and 20:

> *"The question whether or not there has been a repudiatory breach of the duty of trust and confidence is "a question of fact for the tribunal of fact": Woods v WM Car Services (Peterborough) Limited, [1982] ICR 693, at page 698F, per Lord Denning MR, who added:*
>
> > *"The circumstances … are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not" (ibid).*
>
> *In other words, it is a highly context-specific question. It also falls to be analysed by reference to a legal matrix which, as I shall shortly demonstrate, is less rigid than the one for which Mr Hochhauser contends. At this stage, I simply refer to the words of Etherton LJ in the recent case of Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168 (at paragraph 61):*
>
> > *"… the legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."*

37. We have taken this guidance into account when determining the claimant's claim of constructive dismissal. We have reminded ourselves too that a breach of contract cannot be 'cured' by subsequent reasonable behaviour on the part of an employer: the right of an employee to resign in response to a repudiatory breach only ends when he has acted in a way which affirms the contract despite the breach (for example by delay).

38. The claimant's claim of constructive dismissal for notice pay turns, therefore, on the following basic questions:

a. When judged objectively, did the respondent act in repudiatory breach of contract?

b. Did the claimant resign because of this breach (the breach need only be a reason for his resignation)?

c. At the time of his resignation had the claimant lost the right to resign for this breach because of his earlier affirmation of the contract?

The scope of our findings

39. The tribunal heard a substantial amount of evidence over 3 days. Issues were tested and explored by the parties through their questions. We have not attempted to set out our conclusions on every question or controversy raised in the evidence but we have considered all of that evidence in reaching the conclusions set out below. The findings we have recorded are limited to those we consider necessary to deal with each of the issues raised by the parties. We have made our findings and on the balance of probabilities and unanimously. In doing so we have borne in mind that unlawful discrimination or harassment can be subtle and may not be consciously motivated. We have considered whether inferences can and should be drawn from the primary facts in deciding whether the respondent has engaged in unlawful conduct under the 2010 Act. We have assessed the evidence objectively in deciding whether the claimant has proved facts amounting to a repudiatory breach of contract which he accepted by resignation.

Findings of fact

40. The claimant was out of the workplace for about two years recovering from serious injuries sustained in a road accident. When he felt fit enough to return to work he applied for a job as a highway inspector with the respondent. This role involves inspecting street works done by utility companies and their contractors to ensure that health and safety is not compromised, to check whether relevant legislation had been complied with and to record results. It is not a field of work in which the claimant had any previous experience.

41. The claimant was interviewed by Mr Foxton and Mr Goodson who thought him intelligent, pleasant and to be someone with potential. They offered him the job despite his lack of experience and he began on 24 July 2017, reporting to Mr Goodson.

42. Highway inspectors are part of the respondent's Neighbourhoods and Housing Directorate and fall within the Street Scene Department headed by Mr Cunningham. Approximately 80 people work in the Street Scene Department.

43. Mr Foxton is the respondent's Network Manager and Group Engineer and has overall responsibility for the output of the Networks Team, which included the highway inspectors.

44. There are four work function areas within the Networks Team, these are: Permitting, headed by Mrs Andrew; Inspections, headed by Mr Goodson; Highways Licensing, supervised by Naglingam Rajeswaran; and the Temporary and Permanent Order Writing Team headed by Suresh Prajapati and Charlotte Connell.

45. The claimant was line-managed by Mr Goodson whose team comprised the claimant, Andy Eaton Steve Kett and Peter Brent-Smith. All the highway inspectors were white apart from the claimant.

46. Mrs Andrew's team compromised Jessica Dempsey, Rebecca Law, Maria Knopka and David Mannion. Mrs Andrew is of Asian heritage but her team were white. Jessica Dempsey and Rebecca Law were agency workers engaged to cover a maternity absence and a secondment. Both had experience in other London boroughs.

47. Mr Rajeswaran's team compromised Mark Adams and Costas Kefala. Mr Prajapati's and Ms Connell's team had one supervisee, Preet Durhailay, who was of Kenyan Asian origin. Ms Durhailay was on secondment to cover for maternity absence.

Comparators

48. The claimant has identified three named comparators for his complaints of direct race discrimination, these are Mark Adams, Andy Eaton and Steve Kett. The respondent accepts that Mr Kett is a relevant comparator as, like the Claimant, he became a highway inspector with no previous experience. Mr Foxton told us, however, that Mr Eaton joined as an experienced highway inspector and was able therefore to "hit the ground running". Mr Foxton also said that Mr Adams was doing a different job within the Networks Team and was an agency worker. We accept this evidence and for these reasons do not find that Mr Eaton and Mr Adams are proper comparators in this case.

Training

49. Mr Goodson told us that there is no structured or formal training process for highways inspectors, rather the custom and practice is for training to be done on the job. This training comprises reading relevant manuals and regulations and accompanying experienced inspectors at meetings and on inspections. We accept that evidence.

50. The claimant was given manuals and regulations to read when he joined the respondent. The claimant did not appear to his colleagues to be motivated to read these materials. For example, Mrs Andrew told us that when she saw the Claimant with apparently little to do she gave him a safety manual to read but saw him simply put it to one side. The claimant agreed that he ignored this manual. We have the benefit of expert evidence showing that the claimant has dyslexia and dyspraxia so we can see that the respondent's approach to training was likely to be unsuitable for him in this respect. The respondent did not know of the claimant's conditions at the time however as he did not tell them.

Being accused of sitting at a desk being paid to do nothing

51. It is common ground that in the first week of his employment the claimant was told by Mr Goodson that someone had made a comment that he was *"sitting at a desk being paid to do nothing"*. The claimant considered this as criticism of him but he was uncertain who had made the comment, although he knew it was either Rebecca Law or Mrs Andrew. He asked Mr Goodson for a meeting with both of them to discuss it. Mr Goodson agreed to hold a meeting to, as he put it, *"clear the air"*. Ms Law attended but not Mrs Andrew as she was on leave. Ms Law confirmed in the meeting that she had made this comment but explained that it was a criticism of the claimant's managers and not of the claimant himself as it had appeared as if he had been given nothing to do. There is some dispute in the evidence about whether Ms Law or the Claimant apologised in the meeting but we do not think anything turns on this.

52. There was no reference at the time to a racial component to this event and in cross-examination the claimant said that there was no evidence of a link between this comment and race, rather he characterised it as an unfair observation amounting to "character defamation".

The inspection with Steve Kett

53. One aspect of the claimant's training was to accompany experienced inspectors on inspections and Mr Goodson arranged for him to accompany Steve Kett on an inspection on 4 August 2017. This was the second week of the claimant's employment. At 11.46am that morning the claimant emailed Mr Goodson and Mr Kett to say that he would not go on the site visit because Mr Kett would not allow him a lunch break. He said he had been at work since 8.00am and was entitled to a lunch break (page 56a).

54. In a subsequent grievance investigation, the claimant said that Mr Goodson had paired him with Mr Kett as they had both started as highway inspectors without previous experience. The claimant said that Mr Kett had come into the office on 4 August 2017 at 11.30am and asked if he was ready to leave for an inspection. He said that he asked Mr Kett to wait so he could have an hour's break between 12 and 1.00 pm but that Mr Kett had simply shrugged and said he was keen to get going. The claimant stated that he thought that this demonstrated a poor attitude on Mr Kett's part. He told us in evidence that this occasion was the first time he had spoken to Mr Kett and that they did not speak to one another again for some months after that.

55. The claimant complained about this incident to Mr Goodson at the time and said that he never wanted work with Mr Kett again. It was put to the claimant in cross-examination that he was simply being inflexible but he maintained that the treatment of him (not waiting until he had taken a one-hour lunch break between 12 and 1 before going on an inspection) was because of race.

56. Mr Kett gave his account as part of the investigation into the claimant's grievance. He said that when he told the claimant to come out with him the claimant said *"naa I'm going at lunch at 12.00 and I'm taking one hour"*. Mr Kett said that he told the claimant that he could not wait and maybe he could take his lunch later (page 154). Mr Kett agreed that he left without the claimant and that the claimant did not attend the inspection which was part of his on the job training.

57. Mr Goodson told us that Mr Kett was someone who preferred to work alone and we accept that evidence. We were also shown a passage in the notes of Mr Kett's interview within the grievance process where he said that he did not speak to a colleague (not the Claimant) for six months because of a disagreement (page 156). We were told, and accept, that this colleague was white.

58. As can be seen, the parties do not disagree about the essential elements of this allegation, the only question is whether Mr Kett's refusal to wait was because of race.

The claimant's relationship with his colleagues

59. Mr Foxton's evidence was that the claimant's standard of work was acceptable but that he had concerns about his interaction with other members of the team. Mr Foxton said that the claimant could be polite and reasonable on one occasion but on the next

would isolate himself from the team by, for example, going to sit with other groups in the directorate. We accept this evidence.

60. Mr Foxton had a meeting with the claimant in September 2017 to provide feedback on his progress so far. The claimant alleges that Mr Foxton accused him of being a *"loner"* and referred to *"cultural issues"* in this meeting and, while these allegations have not been raised as separate justiciable ones, they are relied on as evidence showing a connection between the claimant's treatment and race.

61. It is common ground that Mr Foxton used the word *"loner"* in this meeting but he denies that this was a criticism, rather he said that he was trying to encourage the claimant not to isolate himself from the rest of the team. Mr Foxton was insistent in his evidence that there was no racial connotation to his comments, rather it related to the Claimant's behaviour. He also acknowledged using the phrase *"cultural differences"* but, he said, only when referring to the broad range of nationalities and ethnicities in the team.

62. The claimant was asked questions about this meeting when interviewed for his grievance (pages 202 – 203) and he said then that he had not thought that Mr Foxton's comments were racially motivated at the time but had come to this view subsequently because of other events. He said that it was true that he was a *"loner"* and added, "people say things about me that are not true".

63. We accept Mr Foxton's evidence that the context of these remarks was the claimant separating himself from his colleagues rather than any detrimental treatment because of or related to race.

64. It was put to the claimant in evidence that he liked to *"wind his colleagues up"* (provoke them for fun) which he denied. An example put to him was that he referred to Ms Law's status as an agency worker and contrasted this with his own permanent job in the *"clear the air meeting"* with her and Mr Goodson when he first started work. We find that this happened and that, more generally, the claimant liked to provoke his colleagues.

65. One incident relates to the booking of a pool car. This took place in late October 2017. The claimant was late in returning the car which caused problems for others who thought his actions deliberate. The claimant told us that the reason for the lateness was a problem with the booking system but Mr Goodson's evidence was that the claimant had told him at the time that his actions were deliberate.

66. Disagreement with colleagues about whether he had returned the pool car late deliberately led to the claimant leaving work without permission on Thursday, 26 October 2017. It was put to him that prior to leaving he threw a laptop on the desk and said he was going to resign. The claimant denied saying that he would resign and said that he had simply put the laptop on a desk.

67. The claimant was absent from work without permission on Friday, 27 October 2017 but returned to work on the following Monday, 30 October 2017. While absent he contacted the respondent's HR Department and spoke to Candice Gower-Smith, an HR Business Partner, to complain of *"bullying and racism"*. He did not follow this complaint up on his return to work so on 1 November 2017, Ms Gower-Smith emailed him saying as follows (page 68d):

> *"Last Friday you contacted me and explained that you was currently away from*

work unauthorised due to feeling upset about a situation at work, which you described as bullying and racism.

You explained to me how you had tried to improve the situation by talking to your line manager and group manager on a few occasions.

You confirm that whilst accepting that there was a general issue with the culture within the team, neither manager was prepared to deal with your concerns.

You said that because the circumstances was not been dealt with you found it hard to come to work.

Based on how you were feeling you wanted to lodge a formal grievance.

You wanted advice, and so I advised on the grievance procedure. I also advised that as you were currently off without approval you needed to liaise with your line manager at your earliest convenience, and that failing to do so, could result in management leading to deal with your absence via the A1 procedure.

I am emailing you as you said you would send me an email about your grievance/situation.

Please can you update me. If you have changed your mind, I will close this case."

68. The claimant replied the following day thanking Ms Gower-Smith for her email and saying as follows:

"Current update: I went back to the office the following week and explained how I felt to my line manager. This meeting was slightly different to the other ones as on this occasion he was taking minutes. He mentioned me going AWOL and that my attitude is extremely bad mainly focusing on my personality and characteristics.

Candice at the moment I am going to hold back on the formal grievance purely because I really need the job at this current time. I know the situation is never going to improve for me but if I lodge a formal grievance it is very likely that I will fail the probation period hence losing my job.

I will have to wait until I have completed the probation period and move forward from there.

Thank you again for being understanding and giving me valuable advice, I will be in touch shortly after I have completed my probation period."

69. Ms Gower-Smith acknowledged this email. Her proactive approach to the claimant's initial contact demonstrates to us that the respondent takes allegations of bullying and/or racism seriously.

70. The claimant contacted Ms Gower-Smith on two further occasions on 8 and 12 December 2017. On 8 December 2017 he emailed her asking about the correct grievance

procedure and whether he might obtain union support for *"help with his case"* (page 68B). Ms Gower-Smith sent him relevant information. On 12 December 2017 the Claimant emailed alleging that there was a clique which bullied people who did not fit in to their norm and that he was currently trying to gather as much tangible evidence as he could to help with his *"case"* (page 68A).

71. No disciplinary action was taken against the claimant for being absent without leave nor did he raise a grievance during the currency of his employment.

The Christmas party

72. The claimant told us that he made attempts to mix with his colleagues and that it was in this context that he attended a Christmas party at a restaurant on 14 December 2017. It is common ground that Jessica Dempsey referred to the claimant as "Paki" in a conversation with him at this event. Eddie Henry, who we were told is black and of Caribbean origin or heritage, was a witness to this. Evidence gathered subsequently shows that Ms Dempsey had been drinking alcohol at the party for some while when she spoke to the claimant and Mr Henry; she had no recollection of the conversation when interviewed. The claimant's account is that she said to Mr Henry and him, *"if I never trusted you I would not leave my purse with a black man and a Paki"* (page 207); Mr Henry's recollection recorded in his interview in the claimant's grievance was that Ms Dempsey said, *"I am white, you are black and you are a Paki"* when explaining fears she had had when younger. Mr Henry said that he was not upset by the comment but could see that the claimant was. Mr Henry put his own reaction down to his age and experience, which meant that he was not overly concerned by such comments.

73. Whatever the precise words used by Ms Dempsey, we are satisfied on the evidence that she referred to the claimant as a "Paki" and he was upset by this. "Paki" is a racially derogatory word.

74. The claimant did not mention this incident to his managers at the time. He first raised it with Mr Goodson on 14 January 2018 and then only in passing. He told Mr Goodson that he had laughed the word off at the time (page 137).

75. Ms Dempsey's contract with the respondent was subsequently terminated by it because of what she had said to the claimant at the Christmas party.

Resignation

76. The claimant resigned from his employment on the afternoon of 16 January 2018. The facts which immediately proceeded this are as follows.

77. On 15 January 2018 Ms Law sent a request by email to the claimant and Mr Goodson to undertake an urgent inspection that day at Victoria Park Road (page 79). She followed this up the next day with a request for confirmation that the work had been done. The claimant replied saying that he thought that Mr Goodson had carried out the inspection and had logged it. Ms Law replied saying that there was nothing on the system to show this (page 78). In fact, Mr Goodson carried out this inspection on 16 January 2018 (page 83).

78. On the morning of 16 January 2018 Mr Goodson asked the claimant to carry out

another inspection relating to a different set of works; Mr Goodson described this as a bigger job than the Victoria Park Road inspection. The claimant told Mr Goodson that he could not deal with this inspection despite it being on his inspection list as he did not have an Oyster card allowing him to travel. Mr Goodson did not believe this, rather he thought that this was the claimant being obstructive. We find that the claimant had the means to travel had he wished to as he did, in fact, do so.

79. Mr Goodson described his conversation with the claimant in an email to Mr Foxton and Mrs Andrew which he sent later that day (timed at 17.04). He said as follows:

> *"Earlier, I had asked Syedul to carry out this inspection as part of his daily tasks as it is on his inspection list for today. He told me he would probably not get around there as he hasn't got an oyster card.*
>
> *The conversation lasted approximately 27 minutes. Consisting of mainly why and how we are trying to stitch him up and get him out due to the colour of his skin. He has a real big thing about this and believes everyone gets treated better than him. I admit I lost it with him when he kept going on about what's going to happen to him on Thursday. I have told him that although he is carrying out his basic duties and sometimes picking up other activities out there, I am very concerned that his attitude towards other members of staff, and the accusations that it is everyone else picking on him because of his race and colour. To me (not an expert) this seems to be a sort of paranoia that he has got, and I am not sure I can deal with that within my team."*

80. The context of Mr Goodson's email was that the claimant was coming to the end of his probation and had been told that a probation review meeting would take place on Thursday, 18 January 2018. During their discussion on the morning of 16 January 2018, and having been pressed to answer, Mr Goodson had told the claimant that he was going to recommend that his probationary period be extended by a month. The claimant was disappointed by this.

81. Despite his initial prevarication the claimant did attend the site as he had been instructed to by Mr Goodson. While there he telephoned Ms Law. Ms Law's account of this conversation was part of the evidence in the subsequent grievance investigation (page 164). She said that she received a call from the claimant who appeared to think he was talking to her colleague Jess Dempsey. She said that the claimant simply handed the telephone to the contractor on site and that neither she nor the contractor knew what to say so she asked to be handed back to the claimant. She said that when she spoke to the claimant again she told him not to pass the phone over without saying to whom and then asked for the reason why an *"extension to work"* had been requested (we understand this to be a permit allowing a contractor to spend longer on a site than originally estimated). She said that the claimant then started shouting and accusing her of being patronising and trying to embarrass him. She said that she did not know how to handle this and that Mrs Andrew, who was nearby, then put the phone on loud speaker. Ms Law said that she told the claimant she was going to end the call and that he replied, *"go on I dare you I dare you to hang up on me".* She also alleged that he said, *"don't ever talk to me ever again I'm done with you"*. Ms Law said in interview that several other staff members overheard what was said, including Mr Kett, Ms Dempsey, Charlotte Connell and Preet Durhailey.

82. Mrs Andrew said in evidence that she put the claimant on speaker phone to hear what he was saying as she could see that Ms Law was crying. She said that she heard

the claimant shouting and that Ms Law said words to the effect of *"don't threaten me"*. Mrs Andrew said that she asked Ms Law to end the conversation at this point. She said that the Claimant then rang back to continue the conversation. This version is not the same as the account Ms Law gave in interview where she referred to one call only. Mrs Andrew also denied that other colleagues were present and could hear the exchange. This part of her evidence was inconsistent with Ms Law's account too and these differences caused us to consider Mrs Andrew's evidence particularly carefully.

83. The claimant's account is in his claim form. He said that he had received a call from Mr Goodson on the afternoon of 16 January 2018 asking why he had refused to carry out an inspection. He said that this accusation was untrue but then states that he carried out the inspection later that afternoon. He confirmed that he called Ms Law during this inspection because he was not sure what to do. He alleged that she became hostile, saying that he already knew what to do. He also alleged that she raised her voice. The claimant said that he felt embarrassed and told Ms Law that if she carried on with this behaviour he would raise a complaint.

84. We find that the telephone conversation between Ms Law and the claimant became heated and the probable reason for this was that they were at cross-purposes: Ms Law believed that the claimant was attending the inspection at Victoria Park Road about which they had exchanged emails. That inspection had in fact been done by Mr Goodson and the claimant was elsewhere. In this context it is easy to understand how each party to the conversation thought that the other was being obtuse.

85. We accept Mrs Andrew's evidence that Ms Law was visibly upset and note her comments in an email sent that afternoon that the claimant was *"very rude and unprofessional"* (page 82).

86. The claimant learned that his conversation had been put on speaker phone when he spoke to Mrs Andrew about it in a meeting later that afternoon. She described him as being angry in this meeting in her evidence to us. She told him that his conduct had been inappropriate and the claimant then accused her of favouring white people because she was married to a white man. Mrs Andrew replied that, while it did not matter to whom she was married, in fact her husband was also of Asian heritage. The claimant then accused Mrs Andrew, who is of Indian heritage, of not liking Bangladeshis.

87. On the afternoon of 16 January 2018 Mrs Andrew, Mr Goodson and Mr Foxton exchanged emails concerning the claimant's conduct as appears at pages 81 to 83. None of these were shared with the claimant at the time and cannot be a reason for his resignation.

88. At 12.05 that afternoon the claimant sent an email of resignation to every employee within the Street Scene Department. He said as follows:

> *"Hello, as of a long and thoughtful suffering six months within this team I have decided to resign.*
>
> *For those who I've cross paths with it has been an immense pleasure meeting you but unfortunately I leave with sadness.*
>
> *Essentially I resigned due to, racism, discrimination, harassment and bullying*

within my team. Sadly Brian Foxton or Steve Goodson never really supported me always brush the issues I raised under the carpet therefore I had no choice but to leave.

I wish everyone well and by God's grace I will find a better opportunity."

89. Because of the very public nature of this resignation, Mr Cunningham responded with his own general email (page 83A). He said that it was sad that the claimant had decided to resign and that his comments would be followed up through the proper channels, but he criticised the claimant for the manner in which he had chosen to resign and stated that he had provided no substance to support his allegations.

90. The respondent subsequently contacted the claimant to say that his resignation would be treated as a grievance. A grievance investigation was carried out in which none of the allegations of race discrimination were upheld. The claimant has not raised any complaint within these proceedings about the way in which his grievance was dealt with.

91. The evidence shows that the claimant did not develop a good working relationship with his immediate colleagues. For example, Mr Foxton says in his statement that it was *"common knowledge"* that the claimant did not get on with Ms Law. Similarly, Mr Goodson felt it necessary to hold a *"clear the air"* meeting within a week of the claimant starting work. In a meeting with the claimant in September 2017 Mr Foxton expressed concerns about him isolating himself from colleagues. We also heard evidence that the claimant preferred to deal with male members of the team and would sometimes put the telephone down if a female answered. Mrs Andrew said that Ms Law was in tears during her conversation with the claimant on 16 January 2018 and that the claimant's manner was rude. For his part, the claimant described colleagues as not co-operating with him in evidence to us and he said that he felt that he did not wish to sit with them.

92. We find on the balance of probabilities that the claimant did not feel part of the Networks Team and that his manner with other team members could be aloof and, on occasion, rude.

93. When it was put to the claimant by Mr Kohanzad that his difficult relationships with other staff members was not connected with race his answers were ambiguous; at times he said it was not and at others that it was.

94. We find that the Networks Team was diverse in terms of race, nationality and ethnicity; in particular it included others of Asian heritage. We do not know how many team members were of Bangladeshi heritage.

Conclusions

95. In this section of our reasons we set out our conclusions on each of the issues having regard to the legal principles and findings of fact set out above.

96. We begin with the burden of proof. As is common in disputed discrimination claims, there is no direct evidence linking the majority of the claimant's allegations with race (with the exception of the comment at the Christmas party). We have therefore, considered whether the claimant has proved facts from which an inference of race discrimination can be drawn so as to shift the burden of proof to the Respondent. We find

that the claimant's manner with colleagues, aloof and sometimes rude, may evidence a reaction to being treated differently and unfavourably because of race. The claimant certainly perceived it this way as his emails to Ms Gower-Smith show. Whether it is appropriate to draw inferences from this sufficient to shift the burden of proof must depend on all the facts relevant to each allegation but we have borne this factor in mind when considering those facts.

97. We turn then to the specific issues. We shall deal with the issues slightly out of order by dealing with issue 1.3 before 1.2.

Issue 1.1 "During his first week of starting his role of highway inspector for the respondent he was accused by Leema Andrews and Rebecca Law of not doing his job and sitting around doing nothing, although he had been told by Brian Foxton and Steve Goodson that extensive training would be given to him since he had no experience within this field."

98. We do not find that Mrs Andrew or Ms Law accused the claimant of not doing his job. We find that Ms Law referred to the claimant as *"sitting around doing nothing"* in a conversation to which he was not a party. We find that this was a criticism of the claimant's managers rather than the claimant himself. We do not find that there was a racial component to this comment.

99. We have reached these conclusions for the following reasons (taken as a whole):

a. Ms Law made her comment to others and not to the claimant and there is no evidence to suggest that she intended it to be repeated to him;

b. The claimant may not have appeared to be reading the training materials he had been given because of his dyslexia/dyspraxia but Ms Law could not have known this;

c. Although there is evidence that the claimant and Ms Law had a poor working relationship, this incident occurred within the first week of the claimant's employment and it is unlikely that this poor relationship had occurred at that stage.

d. The claimant did not regard the comment as racially motivated at the time and was ambivalent about his view now.

100. We do not find, therefore, that the making of this comment was treatment of the claimant because of race.

101. We had no evidence concerning the Claimant's actual comparator in this context. We infer, however, that Mr Kett passed his probation successfully and in doing so must have read manuals and regulations. There is nothing to suggest that Mr Kett had any difficulty in doing so. Accordingly, we find his named comparator to be irrelevant to this claim.

102. There is nothing in the evidence which leads us to conclude that a hypothetical white comparator would have been treated differently in the same circumstances.

103. We find that Mr Goodson's reporting of Ms Law's comment to the claimant was unwanted conduct which had the subjective effect of affecting his dignity in the workplace as he described it as *"character defamation"* but we do not find that this treatment was related to race. Although it was not put to Mr Goodson specifically, we think it more probable than not that he told the claimant of Ms Law's comment to encourage him to read the materials he had been given.

104. For these reasons this allegation fails as one of racial harassment or direct race discrimination.

Issue 1.3 Although the claimant was given instructions by Steve Goodson to go training with a fellow highway inspector called Steve Kett, Steve Kett told him that he would not train him as he was not prepared to wait for his lunch break.

105. We do not find that there was any racial component to this event. We accept Mr Goodson's evidence that Mr Kett preferred to work alone and infer that he would not have chosen to have a trainee but there is no evidence to show that he was unwilling to have the claimant accompany him on the inspection on 4 August 2017. It is clear that Mr Kett wanted to get on with the job and that it was the claimant who said that he would not go before lunch. In our judgement this evidence shows inflexibility on the claimant's and Mr Kett's parts. Their subsequent decision to have little or nothing to do with each other was mutual. In Mr Kett's case we do not infer from the primary facts that this was because of race for the following reasons:

a. The catalyst for this dispute was the claimant's refusal to attend an inspection as part of his training which, as we say below, was a surprising reaction from a newly appointed employee in training.

b. There is evidence that Mr Kett chose not to have dealings with another employee who was white.

106. We find it surprising that the claimant, a probationer in the second week of his employment, chose to make an issue of this dispute at the time. We also find it surprising that, having never previously spoken to or dealt with Mr Kett, he told his line manager that he never wanted to work with him again because of this. These features strike us as an extreme reaction on the claimant's part showing little or no insight into how his actions may have contributed to this disagreement so early in his employment.

Issue 1.2 Throughout the claimant's employment with the respondent he was accused of not doing his job and skiving off by Rebecca Law, Jessica Dempsey and Steve Kett, the claimant being informed of this by his manager Steve Goodson.

107. While we did not receive evidence about specific occasions when the claimant was accused of *"skiving off"* and the only evidence concerning *"not doing his job"* related to issue 1.1, it is clear that the claimant's managers were concerned about his relationship with colleagues from an early stage in his employment. Mr Goodson informed the claimant from time to time of complaints from colleagues and we have no reason to doubt that such complaints were made so we have considered this allegation in this broader context.

108. We are conscious that friction of this type can be a symptom of underlying racial harassment or direct discrimination and we are satisfied that the claimant has proved

sufficient primary facts upon an inferential finding of discrimination could be made so we have looked to the respondent for an explanation that this treatment was wholly unrelated to race.

109. We start by observing that it is unusual in the tribunal's experience for a manager to have to hold a *"clear the air"* meeting within a week of an employee starting a new job at that employee's request and it is notable that Mr Foxton, the claimant's line-manager's manager, felt it necessary to speak to the claimant about isolating himself within 6 weeks or so of him starting work.

110. It is clear to us that the claimant considered that he was being treated differently because of race from a relatively early stage in his employment; this is evidenced by his email correspondence with Ms Gower-Smith in late 2017 and Mr Goodson's email of 16 January 2018. The claimant's assumption about the ethnicity of Mrs Andrew's husband and her consequent affinity for white people and his assertion that Indians do not like Bangladeshis made in his discussion with her on 16 January 2018 suggest us that he is ready to assume a racial component to events with little or no evidence to support it.

111. We are satisfied by the totality of the respondent's evidence that complaints about the claimant were not racially motivated, rather in our judgement the claimant is a person quick to take offence irrespective of the circumstances or the existence of a cause. We find him to be someone sensitive to his perception of the acts of others but lacking in insight into the effects of his acts on others. Having regard to the evidence that the claimant liked to provoke, we find on the balance of probabilities that he was simply disliked by his colleagues because of his personality and attitude and that this had nothing to do with race. We note in this context that the Team and Department were diverse with workers of Asian heritage in positions of authority,

112. Accordingly, we find that this treatment of the claimant, complaints from colleagues, albeit unwanted, was neither related to race nor because of it. In those circumstances this allegation of racial harassment or direct race discrimination fails on the facts.

Issue 1.4 In December 2017, at a Christmas party event attended by most of the claimant team members, the team member Jessica Dempsey, in front of another colleague called Eddie Henry, referred to the claimant as "Paki".

113. Ms Dempsey undoubtedly referred to the claimant as "Paki" at the Christmas party on 14 December 2017 and he was upset by this. We find that this was unwanted conduct affecting his dignity in the workplace: while the comment was made on a social occasion at a restaurant, it was a work event. The treatment was self-evidently related to race. Accordingly, the components of a claim of racial harassment are established, subject to the issue of jurisdiction. An act of harassment cannot also be a detriment founding a claim of direct discrimination so we have not analysed this allegation in that context (see section 212 of the Equality Act 2010). We shall return to the issue of jurisdiction below.

Issue 1.5 On 16 January 2018, the date the claimant resigned, Leema Andrews put the claimant on a loud speaker so the whole team would hear his conversation between him and Rebecca Law.

114. The starting point is the claimant's conversation with Mr Goodson on the morning of 16 January 2018 about his forthcoming probation review. The claimant does not rely on

this as an allegation of race discrimination specifically but it is notable from Mr Goodson's contemporary record that the claimant complained about discrimination at the time and was pressing to know the outcome of his review. It was in this context that Mr Goodson delivered the unwelcome news that his probation was to be extended. Any new employee is bound to have found such news disappointing but the claimant's tendency is to conceptualise setbacks in terms of race and we find that he did so on this occasion.

115. There was also an issue about the work the claimant was supposed to do that day. The claimant had told Mr Goodson that he could not carry out an inspection because he did not have an Oyster card. We find that this was an example of the claimant being obstructive, possibly borne out of disappointment.

116. Later that day the claimant had a troubled conversation with Ms Law which was overheard by Mrs Andrew; we have found on the balance of probabilities that the claimant and Ms Law were at cross-purposes about which site he was at. We are in no doubt that the claimant was rude to Ms Law in their conversation and made her cry. The decision to put the call on loud-speaker was that of Mrs Andrew and not Ms Law. The claimant only learned of this because Mrs Andrew told him.

117. We have considered these events in the context of the burden of proof too. For the reasons given in respect of issue 1.4, we find that the claimant has proved primary facts from which race discrimination could be inferred. He had a poor working relationship with colleagues and had complained, at least to HR, about discrimination. The incident at the Christmas party was an isolated act by a single individual and does not help shift the burden of proof on this issue however.

118. We are satisfied that the claimant's treatment on 16 January 2018 was wholly unrelated to race. The respondent's employees were, in fact, reacting to acts instigated by the claimant; in Mr Goodson's case, responding to the claimant's questions about probation; in Ms Law's case answering his phone call. We find it improbable on the evidence that their reactions would have been different in the case of a hypothetical white comparator (we do not think that a valid comparison can be drawn with Mr Kett in respect of this claim). We accept the evidence of Mr Goodson and Mrs Andrew that the relevant treatment of the claimant was unrelated to race. This claim therefore fails on the facts.

Issue 1.6 The claimant considers himself as having to resign because of the race and religious discrimination, bullying and harassment he experienced as set out above.

119. This is an allegation of a discriminatory dismissal: our findings could only support a dismissal based on Ms Dempsey's use of the word "Paki" on 14 December 2017.

120. Towards the end of his oral evidence the claimant told us that this incident was the last straw which caused him to resign. We do not accept this for the following reasons.

a. The claimant was not consistent about this in his evidence; for example, he did not say that this incident was the last straw in his claim form and at one stage in cross-examination he said that events on 16 January 2018 were the last straw which was consistent with the closing paragraphs of his ET1.

b. The claimant took no steps to complain about Ms Dempsey's conduct at the

time despite having very recently complained about discrimination and investigated the grievance procedure in correspondence with Ms Gower-Smith.

c. In his claim for he said as follows:

> *"I was extremely hurt and upset since it was my first Christmas party. I decided not to dwell further and was going to mention this in the New Year to my line manager Steve Goodson."*

He did mention it in the New Year but not until 14 January 2018, some two weeks on.

121. Judged objectively, we do not find that the claimant resigned because of Ms Dempsey's comment on 14 December 2017. In fact, we find that he did not intend to resign until the events of 16 January 2018 when he realised that his probation was to be extended.

122. We also find that, while the respondent has vicarious liability for Ms Dempsey's act under the provisions of the Equality Act 2010, when judged objectively its own acts did not amount to a breach of the implied term of mutual trust and confidence. Ms Dempsey's language on 14 December 2017 was plainly inappropriate and hurtful but the claimant could not have reasonably, and did not construe it as something authorised by the respondent. The respondent had no opportunity to investigate or deal with it until it was reported by either Mr Henry or the claimant; there is no evidence that Mr Henry reported the matter and the claimant did not raise it (and then only in passing) until 14 January 2018. The respondent acted promptly and decisively in bringing Ms Dempsey's contract to an end when the matter was raised formally by the claimant as part of the grievance process. In those circumstances we do not find that the respondent conducted itself in a manner calculated or likely to undermine the trust and confidence essential to the employment relationship.

123. For those reasons therefore, the complaint of a constructive discriminatory dismissal fails. This finding also disposes of the claim for notice pay.

Jurisdiction

124. In light of our decisions the bulk of the claimant's claims fail on the facts but the allegation in issue 1.4 is made out subject to jurisdiction. We note in this respect that the claimant commenced early conciliation on 3 April 2018 which is more than three months after the event in question. Accordingly, this claim has not been brought within the primary time limit as the extension available under the provisions of the Employment Tribunals Act 1996 does not apply. We have considered, therefore, whether it is just and equitable to extend time for the bringing of this complaint.

125. This matter was not addressed directly in evidence save that Mr Kohanzad conceded that the respondent has suffered no prejudice as a result of the relatively short period of delay. The primary time limit for the claim in issue 1.4 would have expired on 13 March 2018. Early conciliation lasted between 3 April 2018 and 17 May 2018 and the claimant presented his claim promptly thereafter on 20 May 2018.

126. We find it more probable than not that the claimant based the timing of his initiation

of early conciliation upon the events of 16 January 2018: successful claims based on these events would have been in time and might have founded an argument that earlier events were an act continuing over a period. These are factors favouring the claimant when it comes to an extension of the time limit on just and equitable grounds.

127. On the other hand, the claimant is an experienced litigant having brought tribunal proceedings before in respect of an application for employment (we did not think he was forthcoming about this when he initially denied having claimed against a previous employer in answer to Mr Kohanzad's question although this was technically correct). Ms Dempsey's comment was racially explicit and the claimant's evidence is that he was upset by it. He was aware of the statutory time limit and had recently complained of discrimination to Ms Gower-Smith in correspondent where he referred to gathering evidence for his "case". These are good reasons for presenting a claim based on this incident within the primary time limit.

128. In these circumstances, and bearing in mind the guidance of the Court of Appeal in **Robertson v Bexley Community Centre (**above), we do not find it to be just and equitable to extend time for the bringing of this complaint. The claimant had sufficient knowledge to bring this claim in time but failed to do so. For these reasons therefore issue 1.4 fails for lack of jurisdiction.

129. Accordingly, the claimant's claims are dismissed and the provisional remedy hearing listed on 19 June 2019 is cancelled.

Employment Judge Foxwell

29 May 2019