EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr R Forhad	v	Excelerated Applications Limited

Heard at: Watford On: 23 and 24 September 2019

Before: Employment Judge George
Mrs S Wellings
Mrs A Brosnan

Appearances

For the Claimant: David Langwallner, Counsel
For the Respondent: Louise Carr, Solicitor

JUDGMENT

1. The claimant was not dismissed.

2. The claims of direct discrimination on grounds of race are dismissed.

3. The claim of race related harassment is dismissed.

4. The claim of unauthorised deduction from wages is dismissed.

REASONS

1. This claim arose out of a resignation by the claimant on 24 February 2018. He originally sent his notice of resignation by email and followed that with a hardcopy in which he gave notice that he was resigning from his role as a PHP Developer with the respondent with effect from 22 March 2018. Fortunately, he has been able to obtain a new job and that started on 26 March 2018.

2. After a period of conciliation which lasted between 28 March and 28 April, he presented a claim form on 19 June 2018. The respondent defended the claim by their response of 27 July 2018.

3. The case was case managed at a preliminary hearing conducted by Employment Judge Tuck on 25 January 2019. The record of that hearing is at page 30 of the respondent's bundle. The issues to be determined at the final hearing were set out in paragraph 8 of that record and it was confirmed by the parties that those remained the issues that we have to decide in this case. They are replicated below and it is the paragraph numbers from these reasons which we shall use when referring to particular factual and legal issues.

The Issues

4. The issues between the parties which fall to be determined by the Tribunal are as follows:

Time limits / limitation issues

(i) Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) and s140A &B of the Equality Act 2010 ("EQA") or should time be extended on a "just and equitable" basis as the treatment complained about is alleged to have occurred in November 2017, some seven months prior to the submission of the ET1.

Constructive unfair dismissal & wrongful dismissal

(ii) Was the claimant dismissed, i.e.
(a) did the respondent breach the so-called 'trust and confidence term', i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant?
(b) if so, did the claimant affirm the contract of employment before resigning?
(c) if not, did the claimant resign in response to the respondent's conduct (to put it another way, was it a reason for the claimant's resignation – it need not be the reason for the resignation)?

(iii) The conduct the claimant relies on as breaching the trust and confidence term is:

a. From November 2016 until 22 March 2018, the claimant was forced to do his own role of "mobile app" development and also the role of web development and Amazon Webb Services work.
b. From July 2017 to October 2017 the claimant was forced to work long hours of 14 – 15 hours per day on average.
c. Having to work during his period of holiday in October 2017.

d. In November 2017, Ciaran Mullaney telling the claimant that he "could not go" to a client event day on the Accenture project.
e. Failing to give the claimant a pay rise for 3.5 years.
f. Failing to pay the claimant and his wife's and child's visa application fees in respect of 2014 and 2016.

(iv) If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and, if so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

Remedy for unfair dismissal

(v) If the claimant was unfairly dismissed and the remedy is compensation:

a. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8.
b. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?
c. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

EQA, section 13: direct discrimination because of race.

(vi) The claimant alleges that Mr Varsani:
a. Said to him "we need a white face, to face customers", in November 2017, in the Respondent's office, when the claimant asked to be considered for promotion to Technical Director or Chief Technical Officer.
b. On 22 March 2018 (the claimant's last day) being required to leave early and to hand over his laptop and documents in a small meeting room which the claimant found oppressive,

whereas white employees who resigned left in a "happy" way, not having been taken to a small meeting room.

(vii) Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the following: hypothetical white comparators.

(viii) If so, was this because of the claimant's race / colour.

EQA, section 26: harassment related to race.

(ix) Did the respondent engage in conduct as follows:

a. Said to him "we need a white face, to face customers", in November 2017, in the Respondent's office, when the claimant asked to be considered for promotion to Technical Director or Chief Technical Officer.

(x) If so was that conduct unwanted?

(xi) If so, did it relate to the protected characteristic of race?

(xii) Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Unauthorised deductions

(xiii) Did the respondent make unauthorised deductions from the claimant's March 2018 wages in accordance with ERA section 13 by and if so how much was deducted?

a. The claimant complains that his final pay was in the sum of £166, whereas he expected to receive his usual salary of £2729. The Respondent states that a covering letter was sent to the claimant explaining the deductions.

Remedy

(xiv) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

5. There was some discussion at the outset of the hearing about whether all of the items set out on the claimant's schedule of loss would, if the claimant was successful, flow from claims that were identified in the issues and it was confirmed by the claimant's counsel that no application was being made to amend the claim, nor was it argued that the case management summary inaccurately reflected issues that appeared on the face of the claim form.

The Law

6. Section 95(1)(c) of the Employment Rights Act 1996 makes it clear that a dismissal includes the situation where an employee terminates the contract of employment (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This is commonly referred to as constructive dismissal and the leading authority is Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA. If the employer is guilty of conduct which goes to the root of the contract or which shows that he no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance of it. The employer's conduct must be the cause of the employee's resignation and thus the cause of the termination of the employment relationship. If there is more than one reason why the employee resigned, then the tribunal must consider whether the employer's behaviour played a part in the employee's resignation.

7. In the present case the claimant argues that he was unfairly dismissed because he resigned in response to a breach of the implied term of mutual trust and confidence; a term implied into every contract of employment. The question of whether there has been such a breach falls to be determined by the authoritative guidance given in the case of Malik v BCCI [1998] AC 20 HL. The term imposes an obligation that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

8. The question is always first whether, judged objectively, the failures of the employer were calculated or likely to destroy or seriously damage the relationship of trust and confidence, not merely whether they were unreasonable. Secondly, the tribunal must consider whether there was reasonable and proper cause for the conduct. In relation to that part of the test, it is unlikely that an employer will have reasonable and proper cause to behave unreasonably. However, whether the employment tribunal considers the employer's actions to have been reasonable or unreasonable

can only be a tool to be used to help to decide whether those actions amounted to conduct which was calculated or likely to destroy or seriously damage the relationship of trust and confidence and for which there was no reasonable and proper cause: Bournemouth University Higher Education Corp v Buckland [2010] I.C.R 908.

9. If the conduct is a significant breach going to the root of the contract of employment (applying the Western Excavating v Sharp test) and the employee accepted that breach by resigning, then he or she was constructively dismissed. The conduct may consist of a series of acts or incidents which cumulatively amount to a repudiatory breach of the implied term of mutual trust and confidence (see Lewis v Motorworld Garages Ltd [1986] ICR 157). If some of the alleged incidents are found not to have occurred, or not to have occurred in the way alleged, then a Tribunal must consider those events which it has found did occur and ask objectively whether they amounted to a repudiatory breach of contract.

10. Once he or she has notice of the breach the employee has to decide whether to accept the breach, resign and claim constructive dismissal or to affirm the contract. Any affirmation must be clear and unequivocal but can be express or implied. The law looks carefully at the facts before deciding if there has been affirmation of the contract. In Cockram v Air Products plc [2014] ICR 1065, EAT Langstaff P discussed the law about affirmation (see paragraphs 22 to 25) and held that, by itself, mere delay in resigning is unlikely to amount to affirmation: there may come a time when delay on the part of the employee will mean that he or she will be taken to have affirmed the contract and decided to carry on working under notwithstanding the breach. Langstaff P also gave the example of a situation where an employee has called for further performance of the contract and held that that might lead to affirmation being implied from that conduct if it is consistent only with the continued existence of the contract.

11. If an employee has affirmed the contract, he or she is still entitled to rely upon the totality of the employer's acts in a so-called "last straw" case where, following affirmation, there has been another incident provided that the later act forms part of the series (Kaur v Leeds Teaching Hospitals [2018] I.R.L.R. 833 CA).

12. Once the tribunal has decided that there was a dismissal, they must consider whether it was fair or unfair in accordance with s.98 ERA 1996: Savoia v Chiltern Herb Farms Ltd [1982] I.R.L.R. 166 CA.

Law relating to EQA claims

13. The Claimant complains of a number of breaches of the EQA. Section 136 of the 2010 Act reads (so far as material):

> "(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."

14. That section – and materially identical sections under the antecedent equality legislation - has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA. More recently, the CA of appeal had opportunity to consider the correct approach in Ayodele v Citilink Ltd [2018] ICR 748 CA paras. 62 & 63,

"as the authorities demonstrate, there may be cases in which there are at least the following three issues which arise in respect of any specific complaint of discrimination: (1) Did the alleged act occur at all? (2) If it did occur, did it amount to less favourable treatment of the claimant when compared with others? (3) If there was less favourable treatment, what was the reason for it? In particular, was that reason discriminatory?

63 Accordingly, there may be cases in which the tribunal never has to address question (3), because it is not satisfied that it has been proved on the evidence that the alleged act took place at all; or it may not be satisfied that there was less favourable treatment."

15. Unlawful direct race discrimination, for the purposes of the present claim, is where the employer treats an employee (A) less favourably than they treat, or would treat, another employee (B) who does not share A's race in comparable circumstances and does so because of B's race. It is contrary to ss.13 and 39(2)(c) and (d) of the EQA.

16. In UK law, if direct race discrimination is found to have taken place it is not capable of justification. The aim of the discriminator in taking the action complained of is irrelevant, the employment tribunal must consider whether we are satisfied that the claimant has shown facts from which we could decide, in the absence of any other satisfactory explanation, that the respondent has discriminated against him in the way alleged. If we are so satisfied, we must find that discrimination has occurred unless the employer shows that the reason for their action was not that of race.

17. We bear in mind that there is rarely evidence of overt or deliberate discrimination. We may need to look at the context to the events to see whether there are appropriate inferences that can be made. We also bear in mind that discrimination can be unconscious. Although the law anticipates a two-stage test, it is not necessary artificially to separate the evidence when considering those two stages. We should consider the whole of the evidence and decide whether or not the claimant has satisfied us to the required standard, not only that there is a difference in race and a difference in treatment, but that there is sufficient material from which we

might conclude, on the balance of probability, that the respondent has committed an unlawful act of discrimination.

18. It is unlawful for an employer to harass an employee (see section 40(1) of the EQA). The definition of harassment is contained in section 26 of the Act and, so far as relevant, provides as follows:

> "(1) A person (A) harasses another (B) if—
>
> (a)A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b)the conduct has the purpose or effect of—
>
> (i)violating B's dignity, or
>
> (ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> …
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a)the perception of B;
>
> (b)the other circumstances of the case;
>
> (c)whether it is reasonable for the conduct to have that effect."

19. What is and what is not harassment is extremely fact sensitive. So, in Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT at paragraph 22, Underhill P (as he then was) said,

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (…), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

20. The importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created for him or her was reinforced in Grant v HM Land Registry & EHRC [2011] IRLR 748 CA. Elias LJ said, at paragraph 47:

> "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

21. The tribunal may not consider a complaint under ss.39 or 40 EQA which was presented more than 3 months after the act complained of unless it considers that it is just and equitable to do so: s.123 EQA. Conduct extending over a period is to be treated as done at the end of the period. A failure to act is to be treated as occurring when the person in question decided upon the inaction and that date is assumed to occur, unless the contrary is proved, when the alleged discriminator does an act inconsistent with the action which it is argued should have been taken or when time has passed within which the act might reasonably have been done.

22. The tribunal may extend time for presentation of complaints if it considers it just and equitable to do so. The discretion to extend time is a broad one but it should be remembered that time limits are strict and are meant to be adhered to: Robertson v Bexley Community Care [2003] I.R.L.R. 434 CA. There is no restriction on the matters which may be taken into account by the tribunal in the exercise of that discretion. The tribunal should also consider the balance of hardship, in other words, what prejudice would be suffered by the parties respectively should the extension be granted or refused? The onus is on the claimant to satisfy the Tribunal that he or she should have the discretion exercised in his or her favour.

23. In British Coal Corporation v Keeble [1997] IRLR 336 the EAT advised that tribunals should consider in particular the following factors: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had cooperated with any requests for information; (d) the promptness with which the claimant had acted once he or she had known of the facts giving rise to the cause of action; and (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she had known of the possibility of taking action. However, the factors to be taken into account depend upon the facts of a particular case. Furthermore, one of the most significant factors to be taken into account when deciding whether to set aside the time limit is whether a fair trial of the issue is still possible (Director of Public Prosecutions v Marshall [1998] ICR 518). It is also important to consider the balance of prejudice caused to the respective parties.

The Hearing before us

24. The parties had each prepared separate bundles. The respondent's bundle is numbered from page 1 to 156 and page numbers from it are referred to in this judgment as RB page 1 to 156 as the case may be. Page numbers in the claimant's bundle are referred to as CB page 1 to 137 as the case may be.

25. The claimant's bundle appeared not to have been provided to the respondent's representatives in advance. After looking at the contents of the claimant's bundle while the tribunal were reading the witness statements, Ms Carr, the respondent's solicitor, removed some documents which she said were 'without prejudice' documents and was content for the

claimant to refer to such documents within that bundle as he chose when giving evidence. He had not, in his witness statement, cross referred to particular documents, but we have taken in evidence and taken account of such documents as he referred to during the course of his oral evidence and upon which Mr Varsani was cross-examined.

26. The claimant gave evidence with reference to a witness statement that had been prepared on his behalf. He did not call witnesses other than himself. The respondents gave evidence through Ramesh Varsani, who was formerly one of their directors until his resignation with effect from 22 June 2018.

27. On the morning of the second day of the hearing, after the claimant had given evidence and been cross-examined, Mr Langwallner applied for him to be recalled to adduce in evidence 3 documents out of a quantity of documentation, previously not disclosed, which the claimant had shown his counsel that morning. It was said to arise out of cross-examination and, specifically, in rebuttal of the case put to the claimant that the timesheets relied on by the respondent were accurate. Timesheets were first referred to in the ET3 (see RB pages 24 & 25) as grounds for the respondent's case that the claimant had not regularly been working more than his contractual 40 hours per week – one of the alleged breaches of the implied term of mutual trust and confidence. We gave Ms Carr time to inspect the documents which the claimant wished to adduce in evidence.

28. Ms Carr also applied to adduce in evidence a document which had been drawn up overnight to pull together, it was said, entries of a number of employees and workers who had at several different times entered their true hours in excess of 40 hours per week. This was said to be relevant to the claimant's evidence given the previous day that, on occasion, the reporting system did not permit him to accurately enter hours in excess of 40 hours per week.

29. The claimant's submissions were that, of the 3 documents which he wished to adduce in evidence, one was a copy or photograph of a cover of the timeslot machine said to demonstrate that it was not always accurate or sometimes malfunctioned, the second showed that there was a column on timesheets headed "changed by" with evidence that someone had changed the inputted entry (this was argued by the claimant to support his allegation that the timesheets had been tampered with) and the third was also said to evidence tampering with timesheets by showing different codes had been used. It emerged during Mr Langwallner's final submissions on this application that the claimant wished to rely upon a further 2 additional documents as relevant to the same issue. The documents were alleged to be relevant to the question of whether or not the timesheets had been tampered with and were not reliable. Any prejudice to the respondent would be alleviated by the right to crossexamine the claimant and for Mr Varsani to give evidence and be crossexamined about them. The claimant had

mentioned the documents to his solicitor who had not had sight of them and had exercised his judgment not to refer to them. He had known that he had them but had been unable to access them due a malfunction on his computer until the evening of the first day of the hearing. There was no real explanation for the absence from the claimant's witness statement of the allegation that the timesheets were tampered with save that drafting it had been very last minute. The claimant objected to the application by the respondent to adduce the new document.

30. The respondent argued that it was not until the claimant's oral evidence that it had been alleged that the timesheets had been tampered with. These were new issues which were not in the claim form or in the witness statement and the respondent should not be prejudiced by being unable to rely upon evidence put forward to counter this new case. As to the documents which the claimant wished to rely upon, the prejudice to the respondent were he to be allowed to adduce them in evidence was the fundamental point. Ms Carr's instructions were that the respondent would be able to show entry by entry that the time had not been tampered with because the system records every change that there has been to the data. The "changed" column shows authorisation by, for example, CM – rather than alteration of the data. Had the respondent known that this would be in issue, they could have called CM as the line manager about the changes which it is said were made to the entries. The prejudice was that, had they been aware that this was in issue the respondent could have arranged for evidence in rebuttal but that could not be done now. The claimant was mistaken about what the documents showed but it would take additional evidence to demonstrate that. There had been every opportunity for the claimant to raise this previously. He had had solicitors representing him since February 2019. Any failure by the respondent in relation to disclosure had not been raised at the PH that the claimant wished to have disclosure of further information about the timesheets and no application had been made since. It could have been raised on day 1 of the hearing in oral evidence.

31. We concluded that the claimant should not be permitted to adduce the additional documents in evidence. The relevance of the documents must be seen in the context of the claimant's evidence about his hours. This was that first, he worked in excess of his contracted 40 hours per week on the Premier League contract for more than the 8 weeks shown on the timesheet; second, that in general he worked very long hours on all projects; third he was asked by Mr Varsani to "productise the solution" which we took to mean create a product appealing to the respondent's clients which would solve problems which the clients had identified. Next he said that he could not log accurate hours into the system and finally he said that when he raised this he was told that he could take the time off at the end of the year. That was his oral evidence on day one which we took into account when reaching our conclusions on the substantive issues to be decided. He sought, at the start of day two, to apply for a number of documents to be adduced in evidence

which we were told tended to suggest that RB pages 99 to 116 could not be relied on as an accurate record of the hours worked during particular weeks.

32. We did not consider the claimant's explanation of the reasons why this application was being made so late in the day to be adequate. In particular, there was no satisfactory explanation as to why the allegation of tampering was not in the witness statement when it was clear from the time of the response that the respondent relied upon the detail in the timesheets to rebut the allegation that the claimant had been working excessive hours.

33. We were of the view that the respondent would be prejudiced by the documents being admitted in evidence unless they have the opportunity to call evidence to rebut the conclusion that the claimant invites us to draw from the documents. They say that they are able to do that and would have done so had they known the issue would arise. They could not have known it would arise and it is not simply a question of extra evidence by Mr Varsani – extra documents might be needed. The level of enquiry into the timesheets which would arise is disproportionate to their relevance in the case as a whole, given the rest of the available evidence which we must look at in the round. The likely disruption to the hearing (including potentially not completing it within the time available) was disproportionate to the importance of the documents. We were therefore of the view that the balance of prejudice was in favour of the respondent and rejected the claimant's application to adduce new documents.

34. So far as the respondent's new document was concerned, it had been created overnight and although it had not been possible to anticipate this particular factual challenge, the Tribunal would decide the case on the evidence which the parties had prepared in advance in accordance with the case management orders.

Findings of Fact

35. We make our findings of fact on the balance of probabilities, taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgement all of the evidence which we heard but only our principle findings of fact, those necessary to enable us to reach conclusions on the issues. Where it was necessary to resolve conflicting factual accounts we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

36. A brief chronology of the salient facts is that the claimant's employment started on 18 April 2012 (see the offer letter at RB page 40). The claimant was employed as a PHP developer. He was sponsored by the respondent under Tier 2 and therefore his right of residence in the U.K. at the time

depended upon him remaining in the job. We accept that he felt a degree of vulnerability as a result of that. There were two dates on which his visa had to be extended, February 2014 and November 2016; and the latter of those is particularly relevant to the complaints that he makes because he considered that the respondent should have helped him by paying for the application fees for his wife and child.

37. One of the claimant's co-workers - who was referred to in these proceedings only as 'Chris' - left the respondent's employment in October or November of 2016. Part of the claimant's complaint is that he was asked to take on the responsibilities that had formerly belonged to that colleague. He wrote to Tariq Malik (who has an HR function with the respondent) in about July 2017 (CB page 123) arguing that this meant that he should have an updated contract with a statement of responsibilities and role change.

38. He had also contacted TM in November 2016 about the visa fees and again in February 2017 saying "Could you please help me on getting back my visa application process fees" – CB page 128. He was advised to go to Mr Varsani and ask for his assistance with it, which he did on 6 March 2017, as we seem from RB page 59j, on 6 March; and the respondent refused the request for help with the visa fee.

39. Another individual that was relevant in the proceedings before us was Ciaran Mullaney (hereafter CM) who joined the business, or possibly returned to the business on 3 July 2017. It was the same year that a particular project for the Premier League came to fruition and in September and October of 2017, the claimant travelled to Bangalore to work on that project. The project itself had some high points and low points and following his return, the claimant wrote to Mr Varsani making various observations and complaints (RB page 56).

40. In that email, the claimant complained about previous statements that the company would award a bonus "[i]n March '17 Tariq said the company would give us a bonus at the end of the year" and refers to occasions when he had unsuccessfully asked for a promotion, pay rise and a bonus saying at RB page 58 "the company has not given me the opportunity to grow, by not giving any promotion or salary increments for the last 3+ years, no bonus as they promised, no payment towards my visa application fees as they ought to do, no formal letter for my yearly review and no appreciation for my contribution and hard work with the additional workload". He complained that there was a rebranding of the company or its services which would change his job responsibilities. This email led to a meeting between the claimant and Mr Varsani which took place on 10 November. RB page 59A is the claimant's e-mail requesting the meeting and setting out the agenda for it. RB pages 59C and D are the minutes of the meeting.

41. The 10 November meeting did not lead a satisfactory conclusion from the claimant's point of view and it is at that meeting that he says the comment

was made that he relies on as being the unlawful act which is either said to be direct race discrimination or race related harassment.

42. He raised a grievance on 22 January 2018 (RB page 60). The handling of the grievance does not itself form part as one of the complaints with which we are directly concerned but the subject matter of it cover the issues about which we need to make findings of fact in order to decide the complaint.

43. There was a grievance meeting to discuss the claimant's concerns on 23 January. RB page 66 and following are a set of minutes of that meeting which was typed on behalf of the respondent and sent to the claimant for his comments. They are therefore a composite document comprising in some places a record of what was said on 23 January and in some places the claimant's comments upon it. The outcome of the grievance was a report (RB page 71) by which the respondent dismissed the claimant's grievance. It was sent under cover of a letter at RB page 70 on 8 February. The claimant resigned later the same month (RB page 89).

44. The claimant's contract of employment starts at RB page 43. Clauses which were of particular relevance were,

"3 Job Title

Your job title is PHP Developer. You will be expected to perform all such acts and duties as may be required of you. …
A brief outline of your key responsibility and job description is attached as Appendix B.

…

5 Working Hours

Your minimum hours of work are 40 hours per week. …
During your assignments you shall be required to take the client's office hours and you may need to vary your hours to suit the client. You will be expected to work a minimum of 40 hours per week and within reason absorb any additional travel time.
…
You shall work such additional hours as may be necessary or appropriate to carry out your duties or as the needs of the business dictate. You shall not be entitled to receive any additional remuneration for work outside minimum hours.

6 Salary

a. Your salary of £35,000 per annum will normally be paid on the last working day of each month by direct credit transfer into your bank/building society account.

…

8 Awards

You may be eligible to receive a discretionary company bonus aware ("an award"). The amount of the award, the form of any award and any vesting of other conditions attached to this award will be entirely at the Company's discretion. …"

45. The job description, which we accept was applicable to the claimant's role, is at RB page 55. The key accountabilities were,

- Deliver high quality applications in accordance with of (sic) the Company's Applications & Solutions Development Guide.
- Prepare and maintain a project plan, project budget and work plan.
- Work effectively with all levels of management.
- Works effectively in a diversified team by guiding and supporting the team members.
- Proactively anticipate project "deviations" and be responsible for taking immediate corrective action.
- You may from time to time be required to undertake other tasks.

46. The first factual area of dispute about which we make findings of fact is the allegation by the claimant, that from November 2016 to 22 March 2018 (which was the end of his employment), he was forced to do his own role of "mobile app" development and also the role of web development and Amazon Webb Services work. We accept that this allegation can be taken together with the next, that between July and October 2017, he was forced to work long hours of between 14 and 15 hours per day on average.

47. The claimant's case is that the consequence of having to do his own role and that of two other people who had left and not been replaced, was that he had to work excessive hours. The Premier League job was a particular source of long hours; especially in September and October of 2017.

48. The respondent relies on timesheets that they refer to first in the grounds of response. One of the first things that we needed to consider was whether the timesheets (RB page 99 and following) are reliable. The claimant's evidence was that the data had been tampered with, that on occasions he was unable to enter the correct hours and that when he questioned it he was told that he would be able to take the extra hours at the end of the year.

49. We have taken into account all of the evidence of oral and documentary that we have heard on this point, but the reasons why we have decided that, on balance, they are broadly reliable is that they do show extra hours worked by the claimant on some weeks, particularly in the weeks that he was in Bangalore, and we reject the claimant's evidence that he was otherwise unable to enter hours worked in excess of 40 hours per week. It seems improbable that the system for booking hours would only have been able accurately to record time entered by the employee during those weeks. We are of the view that the explanation given in oral evidence by Mr Varsani for the 'changed by' column, referred to by the claimant, and different codes that were given was plausible. In essence his evidence, which we accept, was that the respondent uses a system designed by
SAP which is used by 70% of Fortune 500 companies and is configured to be auditable so that if there are any questions about its integrity the history of the data record can be investigated. If one were to try to put data against an object that does not exist it would give an error message but that would not mean that the system itself was at fault. We accepted his evidence that the timesheets were evidence that these were the hours which the claimant himself entered as having been worked by him.

50. The claimant argued that entries had been tampered with. However, it seems to us that he had the opportunity to enter his time accurately and did so in the autumn of 2017. The contract of employment states that the claimant is engaged to work 40 hours a week and if one looks at clause 5 of the contract, the company's standard daily office hours are between 9am and 6pm with an hour for lunch. He is expected to work a minimum of 40 hours per week and within reason absorb any additional travel time. We remind ourselves of the requirement to work additional hours, set out in clause 5 (see paragraph 47 above).

51. We consider that, as a whole, this means that a reasonable element of flexibility is expected of somebody in the claimant's position, as is standard for professionals paid a good salary. This isn't to say that an employer could use such a clause to require an employee to work unreasonably high hours. So, we have to consider the factual question as to whether the claimant was in fact required to work unreasonably high hours.

52. It is accepted by the respondent that the claimant took over some of the work done by 'Chris' and he accepted that he had the relevant skills to do so and that both were developers. The claimant did say in evidence that the role of an android developer and a cloud solution architect were specialised roles and different skillsets were needed. However, he did not say that he did not have those skills and it seems to us that they were broadly covered by the key accountabilities set out on RB page 55 of the respondent's bundle in the job description. We also note that the claimant did not complain at the time that he was being required to do jobs that were outside his skillset. Therefore, as tasks, they seem to us, to fall within the kind tasks that it was reasonable for management to request him to carry out.

53. We have seen the exchange at CB pages 109 to 111 where the claimant queried whether his role needed formally to change to reflect the development of the job content and he was reassured that it didn't. As we say, we are satisfied that the time sheets show what the claimant entered as the hours that he worked. They do not, overall, amount to him being asked regularly to work hours in excess of 40 hours per week. There is no evidence of an abuse of the flexibility in working hours which appears in the contract.

54. However, the claimant did give evidence that he was asked as he put it to "productise the solution" for particular difficulties that were encountered by the clients with the products that the respondent offered. We accept that this happened. Mr Varsani accepted that the professionals who worked for the respondent and in their industry, were enthusiasts who would work outside their contracted hours in order to look at solutions perhaps as a hobby. We find that the claimant did work very hard. He was a very enthusiastic worker for the company and we find he had a deep sense of personal pride in the work that he did. We think it is probable that Mr Varsani was pleased that the claimant was enthusiastic. But we reject the allegation that the claimant made that there were threats to his job, or to his sponsorship under Tier 2 if he did not do excessive amounts of work. As Mr Langwallner said in closing submissions, he essentially volunteered to additional tasks. We find he was not directed to do work in the evenings. It showed a level of commitment to the company and enthusiasm for his job. We also accept Mr Varsani's evidence that the respondent did not have enough work to justify recruiting a replacement for 'Chris' and that explanation makes sense to us.

55. So, although we consider that the claimant worked hard and did an element of additional development of products in his own time, we reject his implicit allegation that in general he was required to work an unreasonable number of extra hours on contractual duties outside the normal working hours. We put it that way because we are mindful that the allegation is an allegation of conduct that amounts to a breach of the implied term of mutual trust and confidence. The starting point is the contract, but an employer would not be able to rely upon this contract to request or require their employee to do a wholly unreasonable amount of extra work.

56. There was a particular period when the claimant was working on the Premier League project and, to judge by the timesheets, in weeks 34-41 he did work far in excess of 40 hours a week. We have noted that if you total the number of hours done in those weeks they come to something like 190 hours more than the weekly hours in the normal 40 hours per week and we did consider whether this itself was evidence that the claimant was required to do unreasonable amount of extra hours. The respondent points to the fact that two days' time off in lieu were given (in other words – 16 hours) however we

did consider what we should make of that, given the very large number of additional hours that were worked in those weeks.

57. We also took into account that the claimant was not entitled to paid overtime and that is clear on the fact of the written contract. Furthermore, there were other weeks in which he recorded himself as working fewer than 40 hours. The time off in lieu would therefore appear to be discretionary and the email sent by the claimant at the time (RB page 56) suggests that he was more upset about what he perceived to be the poor performance of others in relation to that work than he was about not getting more than two days' time off in lieu.

58. Therefore, we have reached the conclusion that that on its own, taken in the context of the allegation that is made and the employment as a whole, the claimant has not proved that the respondent behaved as alleged. We do not consider that this one period working on the Premier League contract means that he was required to work an unreasonable number of additional hours. We found that the factual allegations set out in paragraph 4(iii)(a) and (b) are not made out as alleged.

59. The claimant argued that he had to work during his holiday in October 2017. The respondent's account of this is that the claimant had not left passwords and he was only contacted insofar as it was necessary for them to find out what was needed for others who were not on holiday to do their work. Therefore, this is an issue which requires us to engage with the question of the reliability of the two witnesses' evidence.

60. The claimant struck us as recollecting events through the emotion that he now feels as a result of his experiences. On occasions he used heightened language, for example he said that he had been "promised" a bonus or a pay rise and yet when, in cross-examination, Ms Carr drilled down into exactly what was said to him, and what had been written to him he wasn't actually saying that it was a promise, he was saying he had been given "confidence" to believe that it might happen. He therefore seemed to us to hear conditional language from Mr Varsani - amongst others – that he may be eligible for a bonus but he presented that to us as being a promise. That use of language affects our view of his reliability as a witness generally, although we don't doubt his honesty.

61. The claimant clearly felt that his contribution to this company meant that he was worth more than he was paid. Employees sometimes do feel that they are worth more by way of remuneration than they receive, but a business is free to disagree - provided that what they pay is within the employee's rights under their contract and that the employer is not acting capriciously. The claimant seems to us not to understand this. He may or may not be worth more than he was paid by the respondent, but we are judging a claim of a breach of an implied contractual term.

62. The claimant described the company, which was a start up, as being 'my baby'. This shows an estimable commitment but a mistaken view of his position. All of this affects the way that we evaluate his evidence which it seems in our view contained elements of exaggeration about his contribution, the hours which he worked and the so-called "promises" which he says he was made which, in reality, were merely statements that a bonus or pay rise would be considered.

63. Coming back to the question of whether he was required to work during his holidays or whether it is more plausible that he was contacted in order to find out necessary information, we prefer the respondent's account and have concluded that the contact during his holiday was no more than was reasonable to find out necessary information.

64. It is accepted by the respondent that the claimant was told, probably in about November 2017, that he could not go to an Accenture project. The claimant accepted that he was not in a client facing role so although it might have been an opportunity for him, there was nothing wrong in the respondent deciding that he should not go.

65. The next matter that the claimant relies on is a complaint that he had not been given a pay rise in 3 ½ years.

66. At the time of his resignation, the claimant was, according to Mr Varsani's evidence, paid £44,000. He complains that his pay, although it had been reviewed, had not been increased in either 2016 or 2017. It was one of the elements of his grievance (dated 22 January 2018) and the outcome of the grievance included a commitment to review his pay again in April 2018. He had no contractual entitlement to a pay rise.

67. We accept Mr Varsani's evidence that the respondent had reviewed it. Their practice was to review salaries and compare them with the market rate, rather than to give an automatic pay increase - whether an inflationary rate or more than that - every year. They had reviewed the claimant's salary and concluded that it was fair when compared with the market rate. As a whole, we considered the claimant's evidence did not amount to him asserting that he was contractually entitled to a pay rise, just that he had been given the confidence to think that he might get one. The company was not profitable in this period and we accept that it could not afford a pay rise. Probably the claimant was encouraged to expect that one might come later if the company was in the position to pay one, but the contractual position is that a pay rise was clearly discretionary, and the claimant understood that to be the case.

68. We then go on to the allegation that the respondent had failed to pay the claimant, his wife and child's visa application fees for 2014 to 2016 and this is linked to the claimant's expectation that he might get a bonus that would cover it. It is clear when one looks at CB page 136 that in March 2017, he was waiting for a decision on his request for help with the fees and therefore

that he did not think it was an entitlement. It is clear from the RB page 59J that he got the decision and therefore his application was clearly rejected. There was no contractual entitlement either to a bonus or to payment of the visa fees. The claimant did not think that he had such a contractual entitlement to it or that he had been promised it. When he texted TM in March 2017, as we see from CB page 124, he started by saying he was "very much unhappy not getting my visa application processing fee". So, he clearly was not expecting it and was not expecting a further decision on this point.

69. It is worth pointing out that there is no jurisdiction in the Employment Tribunal to decide whether an employee is fairly paid. The respondent accepted that the claimant was hard working and a talented developer and we note the evidence in paragraph 9 of Mr Varsani's witness statement in this respect. So, this is not a judgment on the claimant's worth. We are making a judgment on his contractual entitlement.

70. We then turn to the question of whether on 10 November 2017, Mr Varsani made the comment, "we need a white face, to face customers". The agenda for that meeting is in the minutes at RB page 59C. The claimant had requested a meeting, amongst other things, to discuss his "promotion within the company". His e-mail at page 59G can best be described as highlighting a number of learning opportunities that clearly arose out of the Premier League project event activisation in Bangalore. In it he was very critical of Dan and CM. We do not need to adjudicate on whether or not those criticisms were justified but his experiences in Bangalore, as set out in that email, seem to us to have amplified the claimant's desire to have his status in the company recognised by promotion.

71. This seems to have been misunderstood by the respondent as a complaint that he wasn't given the commercial director role, but if the claimant explained his complaint in the way that he does in paragraph 13 of his witness statement, we can understand how the confusion arose. We accept that Mr Varsani thought that he needed to explain why the claimant had not been considered for the commercial director role to which CM was appointed. In that context, we find, that he explained that his view was that the claimant didn't have the skills or experience for the role. Separately, we accept the respondent's evidence that they had no need for a director level appointment doing the claimant's role.

72. We don't doubt that the claimant honestly believes that he heard the words "we need a white face"; the claimant's grievance letter at page 60 alleges that it was said to be a justification for CM's appointment. The respondent dealt with that grievance by telling the claimant that it was a very serious allegation (see RB page 68 within the minutes of the grievance meeting). They recorded that the claimant withdrew the allegation that he had not been appointed to the commercial director role, taking account of the lack of qualifications that he had for it. That seems to us effectively to have shut

down the allegation in the respondent's mind. But the claimant's annotations to the minutes show that he disagreed with this record of the grievance meeting itself. The complaint is omitted completely from the grievance outcome.

73. The claimant makes a very valid point that the first written record of the averral that Mr Varsani in fact said "right face", not "white face" is in the preliminary hearing. In the ET3, the respondent responded to the presumed allegation that he was not promoted because of race but was silent on the question of whether the comment was made. We have considered this very carefully. In his response to the grievance meeting minutes the claimant clearly expressed dissatisfaction with the record that he had withdrawn the allegation and it is, perhaps, surprising that the respondent did not deal with that point in the grievance outcome. It is also surprising that the allegation is not responded to in full in the ET3 when it was clear by that stage that it was being pursued. We considered carefully whether this reflects badly on Mr Varsani's evidence, such that we should reject it.

74. However, against that, there is the evidence that the General Manager (ExceleratedS2P) within the business more generally is NA, of Pakistani origin. He has a position in the company is a customer facing role. Despite the claimant's arguments, that does seem to us to be a relevant point. It is relevant because the fact that the respondent has appointed someone of Pakistani origin to a customer facing role is inconsistent with the statement that they need a "white face" to face customers. What is alleged against them is inconsistent with their actions. The word "right" is consistent with a discussion about CM's skills and experience being a better fit than the claimant's for the Commercial Director role – which is what the respondent mistakenly thought the claimant was complaining about. We are of the view that it was infelicitous even to say "right face" and was clearly bad practice to omit this issue from the grievance outcome. However, in our view, the claimant has not proven on the balance of probabilities that the comment was made as alleged and we conclude that he was mistaken about what he heard.

75. There was also the question of whether the circumstances of the exit interview were detrimental treatment and less favourable treatment. The only real difference of treatment that the claimant pointed to was that he did not have the opportunity to send a goodbye by e-mail. In fact, he could have done so. It was a very emotionally charged day. There seems to us to have been nothing remarkable about the exit interview and the arrangements for it and the claimant couldn't point to any particular thing that had been done differently for anybody else. His evidence did not support his case that he would be subject to less favourable treatment, let alone that be on the grounds of race.

76. So far as the unauthorised deduction from wages claim is concerned, it was confirmed by Mr Langwallner that the factual dispute that needed to be

decided was whether or not the claimant had carried over holiday from year to year. It was the claimant's case that as at the start of the calendar year 2018, he had 45 days' leave and had therefore not taken more than his holiday entitlement at the effective date of termination.

77. The respondent's case was that the claimant had not carried over annual leave entitlement from 2017 and, at the 22 March 2018 had accrued 5 days' holiday. The deductions made by the respondent from the final payment to the claimant were said to have been in respect of unpaid annual leave taken in January to March 2018 over and above the 5 days' accrued leave. The claimant did not challenge the calculation of the number of days' leave he was said to have taken in 2018.

78. There is nothing in writing from the respondent to support the claimant's allegation that he had been permitted to carry leave over from one year to the next. Clause 11(a) of the contract of employment is clear that it is exceptional for it to be done, and that anything that is carried over must be reflected in writing (RB page 46). Although there is evidence that in one previous year the claimant was credited with more than one year's entitlement to leave and that suggests that in a previous year holidays may have been carried over, there was nothing in writing to evidence an agreement to carry holiday over from 2017 to 2018. We find that the claimant was only entitled to the holiday that was accrued between 1 January and 22 March 2018. He was credited with five days' holiday from that period (see the calculation at RB page 94), which seems approximately right for that period.

Conclusions on the issues

79. We now set out our conclusions on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions.

80. In relation to the constructive unfair dismissal claim, we need first to consider whether the actions of the employer, individually or cumulatively, were calculated to or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee, not merely whether they were unreasonable. In that sense, the test for a breach of the implied term of mutual trust and confidence which is after all a high test. If we conclude that the actions of the employer did have that quality then we should go on to consider whether there was reasonable or proper caused for them.

81. The acts relied by the claimant as amounting to a breach of the implied term are set out in paragraph 4(iii) above. We were not satisfied that from November 2016 until 22 March 2018 the claimant was forced to do the work of more than one person. Any work which he picked up when a colleague

left was within his capability and within the scope of his job description. He was not forced to work excessively long hours on average between July 2017 and October 2017: he worked very long hours on a particular project which was only partly compensated for with time off in lieu of pay. He was only contacted on his holiday in October 2017 to the extent that it was necessary for the respondent to do so in order to obtain passcodes. He was told that he could not go to an event connected with the Accenture project, but that act was because his presence was not necessary and not because his contribution was not valued or because he was being sidelined. He was not given a pay rise but was given a pay review in the relevant period which was all that he was contractually entitled to. There is no evidence that the respondent was making pay awards capriciously. The respondent did not pay the visa application fees but neither did the claimant have a legitimate expectation that it would do so. His request for consideration of a bonus to cover that payment was answered promptly.

82. It will be apparent from this brief summary of our conclusions on the facts that, in our view, the acts relied on did not happen as alleged. Furthermore, we are satisfied that they do not meet the test for a breach of the implied term of mutual trust and confidence and certainly not for a repudiatory breach.

83. It was alleged in submissions by the respondent that the claimant had not left because of breaches in any event. Although the claimant had a new job lined up at the time of his resignation, we do not doubt his sincerity when explaining the reasons for leaving his employment in his resignation letter. In our view, the matters which caused him to resign did not happen in the way he perceived and were not breaches of contract which entitled him to resign and claim that he had been dismissed.

84. Therefore, the allegation that the claimant was dismissed fails.

85. Our conclusion is that Mr Varsani said to the claimant that the respondent needed the “right face” not a “white face” to face customers. That was in the context that Mr Varsani thought that the claimant required him to explain why he had not been given the commercial director’s role which had been given to CM who had the right experience. The claimant has not proved that the act complained of occurred. The phrase which was used was used was a poor choice of words but was used because CM had the skills and experience for the commercial director role which the claimant lacked. In relation to the alleged treatment on 22 March 2018, the claimant has not shown anything from which we could infer that his treatment differed in any particular respect from that given to any other employee who had resigned on their last day of employment. Nor has he shown anything from which we could infer that any difference in treatment was because of his race. The claims of direct discrimination and race related harassment are not made out.

86. It has been accepted that the claimant's case that there was an unauthorised deduction from his last payment of wages turns purely on the claim that the respondent had agreed to carry over annual leave from 2017 to 2018. Our conclusion is that this had not been agreed: the contract of employment is clear that carrying over holiday is exceptional and should be evidenced in writing. There is nothing in writing to confirm such a carry over. The respondent correctly calculated the amount of annual leave which had accrued between the start of the holiday year and the end of the claimant's employment. It is not argued by the claimant that they incorrectly calculated the number of days which he had taken. We are therefore of the view that the claimant has not shown that calculation of his final payment of wages and of what was owing to the claimant was wrong and dismiss the unauthorised deduction from wages claim.

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Employment Judge George

Date: …29 October 2019……..

Sent to the parties on: .....

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For the Tribunal Office