THE EMPLOYMENT TRIBUNALS

BETWEEN

Mr Charles Dowyde ***Claimant***

AND

National Car Parks Ltd ***Respondent***

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central **ON**: 18, 19, 20 and 21 December 2018 and (in chambers) 5 February, 24 and 25 October 2019

EMPLOYMENT JUDGE: Mr Paul Stewart **MEMBERS:** Mr David Kendall and Ms Helena Szumowska

Appearances:

For Claimant: Mr S Martins, Legal Executive

For Respondent: Ms J Hale, Solicitor

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant was unfairly dismissed; and
2. The Claimant was victimised contrary to section 27 of the Equality Act 2010.

REASONS

1. The Claimant resigned from his employment by letter dated 6 December 2017. By his application to the Employment Tribunal, he raised the following claims:

- Unfavourable treatment on protected grounds of disability pursuant to s. 15(1) of the Equality Act 2010;
- Indirect discrimination pursuant to s.19 Equality Act 2010
- Failure to implement reasonable adjustments to accommodate his disabilities

pursuant to ss. 21 and 39 of the Equality Act 2010;

- Applying a discriminatory provision, criterion and practice pursuant to s, 20 Equality Act 2010.
- Unlawful victimisation pursuant to ss. 27 and 39 of the Equality Act 2010;
- Constructive dismissal pursuant to s. 95 of the Employment Rights Act 1996.

2. At an Open Preliminary Hearing held on 28 September 2018 by Employment Judge Mason, it was decided that the Claimant did not have a disability within the meaning of section 6 and Schedule 1 of the Equality Act 2010 and all of his complaints of unlawful disability discrimination contrary to the Equality Act 2010 were dismissed with the judgment stating that his claims for constructive unfair and wrongful dismissal should proceed and be heard at this Hearing. Employment Judge Mason reconsidered this judgment on 23 October 2018 and reinstated the claim for victimisation contrary to section 27 of the Equality Act 2010 as the Claimant was not required to show that he was disabled for the purposes of that claim.

3. So, this Hearing has been concerned with the claims of constructive unfair and wrongful dismissal and of victimisation.

4. We heard evidence from the Claimant and from three witnesses called on behalf of the Respondent, Mr Tristian Arnold, Mr Andreas Krythreotis and Mr Duncan Bowens.

Facts

5. The Respondent is a well-known provider and operator of car parks. The Claimant started working for the Respondent as a Cluster Leader on 5 October 2015. That title appears to be synonymous with Cluster Manager which was the title under which the Claimant's service with the Respondent was discussed at this Hearing.

6. A Cluster Manager has responsibility for the management of a group of car parks referred to as a Cluster. Within the London area, there were 5 Clusters each managed by a Cluster Manager reporting to Mr Tristian Arnold, the Head of Operations for London. Mr Arnold in turn reported to Mr Rob England, the Respondent's Director of Off-street Operations.

7. Although it does not form an essential ingredient of any claim that was or is being pursued by the Claimant, it is the case that the Claimant is black. The other Cluster Managers and the witnesses called by the Respondent are white. Reporting to the Cluster Manager were a number of Customer Service Assistants usually headed by a Team Leader who acted, in effect, as a deputy Cluster Manager. Of the Team Leaders we heard about, one existing Team Leader was black and the Claimant appointed another who was black.

8. As was indicated in the judgment of Employment Judge Mason on the Preliminary Hearing at paragraph 8, the Claimant has suffered from various health conditions. For the purposes of that PH, he relied only on asthma and migraine. In the event, his claim to be disabled within the meaning of the Equality Act 2010 was dismissed but, when he raised a grievance on 25 July 2017 (to which we will refer later in these Reasons), he cited asthma, bronchitis and migraine as being conditions from which he suffered and which the Respondent knew about. His grievance was that

the Respondent, by making him subject to a Performance Improvement Plan, was treating him less favourably because of something arising in consequence of his "disability", in which context his "disability" appeared to be interchangeable with the conditions from which he suffered.

9. The Claimant, in his ET1 and in his witness statement, described his initial appointment as "Cluster Leader" but the letter dated 9 October 2015 offered him appointment as Cluster Manager at a salary of £30,000 per annum. He was required to report to Mr Tristian Arnold and be based at premises at Saffron Court in London EC1. The offer letter specified his first three months of his employment to be a probationary period. During that probationary period, he was tested and passed a programme entitled "Together We Shine", (*TGWS*) a pre-requisite of being adjudged to have satisfactorily completed his probation period.

10. In December 2015, on completion of his probationary period the Claimant was given one of the London clusters to manage, Cluster 5. In his statement, he describes this as him being "set up to fail by Tristian Arnold in December 2016 when he gave me the hardest group to manage in London".

11. If that was the case – and we saw no evidence that it was – Mr Arnold's plan failed because, as was acknowledged by the Respondent, the Claimant was a success in managing Cluster 5, so much so that, when the Claimant was asked to help out in Brighton over the summer of 2016, serious consideration was given to moving the Claimant permanently to Brighton in June 2016. This was a move which was recognised to be a development move for the Claimant. However, Mr Arnold blocked that move by telling the Claimant that he had development plans for the Claimant in London: he needed a strong manager to take over the management of Cluster 2, his most important cluster, and he wanted the Claimant as his best manager to manage it.

12. The complement of staff in Cluster 2 had previously included a Team Leader, a role acknowledged to be in effect a deputy Cluster Manager. However, Mr Jason Radcliffe who had been Team Leader in Cluster 2 had been moved to be Team Leader in Cluster 1 where the Cluster Manager was less experienced than the Claimant. It should be noted that the Claimant's move to Cluster 2 took place in mid-2016 and he had not yet completed his first year of employment with the Respondent.

13. When he started in Cluster 5, the Claimant had no team leader but, in the course of his management of that cluster, he appointed a female Team Leader. The movement of Mr Radcliffe away from Cluster 2 ahead of the Claimant's assumption of responsibility for Cluster 2 was a disappointment to the Claimant. In due course on 10 February 2017, he appointed a Team Leader for Cluster 2, Mr Ade Osimuwa.

14. However, the Claimant by that stage considered he was having to struggle in Cluster 2 doing the job, as he saw it, of both Cluster Manager and Team Leader. His antipathy for Mr Arnold, evident in his view that Mr Arnold set him up to fail in December 2015 by moving him to Cluster 5, developed still further. He started to record conversations covertly and has produced, in a bundle, transcripts of 11 conversations he recorded but, curiously, only two of these conversations involved Mr Arnold.

15. For his part, Mr Arnold began to think that the Claimant was underperforming. His method of managing his Cluster Managers was to conduct One-to-One [*121*] meetings weekly with each manager. This would entail meeting the manager at one of the car parks within the cluster, walking from top to bottom of the car park making notes as to what had been done and then having an interview with the manager in which notes would be made on Mr Arnold's laptop making use of a template which contained a list of actions that had been specified in previous 121s as needing to be done by the manager. Target dates – in terms of the weeks of the year – were set for each action.

16. We were shown one example of the notes made at one 121 meeting conducted by Mr Arnold with the Claimant on 22 December 2016 in week 43 while the Claimant was at Cluster 2. We were not able to glean a great deal of information as to how well the Claimant was performing historically from this one example for we were not shown notes of any other 121 meetings conducted with the Claimant. Nor were we able to assess how well the Claimant was performing from this one example for we were not shown any comparable notes made in respect of any other managers.

17. The Claimant during his period as Cluster Manager of Cluster 2 considered that Mr Arnold was bullying him. One of the conversations he recorded that was supposed to provide us with evidence of such bullying comprised a very short transcript of a phone call between the Claimant and Mr Arnold in which the Claimant phoned with the message that he would "be there in a minute: I'm just at Aldersgate" and Mr Arnold informs him that "the meeting starts at 09:30 okay if you are late again okay then I will have to take action I'm not having people late for our meetings do you understand?" The Claimant told Mr Arnold that he had heard him and Mr Arnold said: "So I suggest you hurry up". When the Claimant accepted he should, the conversation ended

18. The Claimant, when giving evidence, accepted that the transcript did not convey bullying but he said that Mr Arnold had been shouting.

19. Mr Arnold's evidence was that he regarded the Claimant, formerly his best manager, to be underperforming when managing Cluster 2. However, he did not produce any documentary evidence demonstrating such underperformance either in the form of notes of 121 meetings or in the form of performance reviews that were conducted, we were told, on a quarterly basis,

20. In or about March 2017, Mr Arnold put forward to his line manager Mr England a business plan that would entail raising the salary to be paid to London Cluster Managers to £35,000. We were told this higher salary was designed to assist the recruitment of higher calibre candidates. Mr England approved the plan as worthy of the attention of the Board of Directors and he therefore passed the business plan to his line manager, Mr Bowens, the managing director of the Respondent company. The Board approved the plan although Mr Arnold was unable to remember quite when approval came through.

21. Mr Arnold, while wanting to increase the salary of London Cluster Managers generally for recruitment (and, by extension, retention) purposes, did not feel he could recommend that the Claimant's salary should be increased. In April 2017, the Claimant attended, along with other Cluster Managers, a conference in Cardiff at which he learned that he was to be moved back to Cluster 5. Other London Cluster

Managers were told when the Claimant was not present that they were to be awarded pay rises with at least two of them having the increase to £35,000 made in two steps because they had not yet successfully completed their probation period. The four other Cluster Managers had all shorter periods of service than had the Claimant who, of course, had passed his probation.

22. News of the increase in salary that other Cluster Managers had received started to trickle through to the Claimant. It clearly did nothing to make him happier with the management afforded him by Mr Arnold.

23. On 1 May 2017, the Claimant moved back to Cluster 5. However, Mr Arnold did not perceive any improvement in the Claimant's performance. As the Claimant was later to complain to Mr Bowens, he suddenly went from receiving an acceptable score of 3 out of 5 in his quarterly performance reviews to receiving a 2. That meant that the perception of the Claimant's performance changed from being one where he was regarded as fulfilling his role to one of underperformance. Furthermore, the receipt of a 2 triggered the Claimant being served with a Performance Improvement Plan [*PIP*] in June, approximately four weeks before the first meeting scheduled in the PIP on 21 July 2017. Mr Arnold told us that his concerns about the Claimant's performance had been expressed in 121 meetings and help offered through that medium. He had made his mind up to put the Claimant on a PIP when he had walked through the Claimant's car parks and had given him the opportunity to complete tasks.

24. Mr Arnold told us:

> In advance of that planned meeting, I expected the Claimant to have read the PIP and be able to discuss it but the meeting did not take place because the Claimant had not read the plan. We rescheduled the first meeting but that did not go ahead – came a point where the Claimant came in and the subject moved away from PIP and became attacks on my character. I believe it was arranged for 4 weeks after 21 July and we told the Claimant that he was expected to read the PIP.

25. On 25 July 2017, the Claimant submitted a grievance. Curiously, at that stage, his grievance related to his perception that the Respondent …

> … in applying the PIP on my person… … is treating me unfavourably because of something arising in consequence of my disability. For the avoidance of doubt, it was not a proportionate means of achieving a legitimate aim to put me on a PIP. The PIP applied a discriminatory effect on protected grounds of disability pursuant to s 15(1)(a)(b) EqA 2010.

26. On 26 July 2017, Mr Andrew Moody of HR wrote to the Claimant acknowledging the receipt of the grievance and indicating that, in line with the Grievance policy of the Respondent at that time, he would be inviting the Claimant to a meeting "in order that we can fully explore your grievance".

27. On 11 August 2017, Mr Moody wrote again saying:

> I am writing to confirm that due to the nature of your grievance to ensure impartiality I am trying to arrange a Head of Function from the North, as you can appreciate it is currently holiday season this is taking a little longer than I

anticipated.

28. On 15 August 2017, the Claimant augmented his grievance with a long letter setting out a more detailed recitation of his concerns. He asserted that the Respondent had …

> … omitted to recognise its 'statutory duties' germane to my 'health and safety' at work.

29. He asked that the Respondent observe the ACAS guidelines with regard to the grievance procedure as a whole and not victimise him for having raised a grievance.

30. Under the heading "Health and Safety – Work-Related Stress", the Claimant wrote:

> 6. My doctor has made a 'professional medical diagnosis' of work-related stress, panic attacks, anxiety, depression, migraines, asthma, sleepless nights, and heart palpitations 'as a direct consequence' of the pressures borne within my working environment, and management's unreasonable expectations of my person. Each of the aforementioned medical conditions are recognised disabilities within the definition of s6(1) EqA 2010. For the avoidance of doubt, I have had asthma since a child."
>
> 7. As such, I feel 'tired all the time' which is having a 'substantial effect' upon my 'abilities and capabilities' to undertake my 'day-to-day activities'. It would be a conducive to discuss this with an occupational health practitioner to determine what 'reasonable adjustments could be implemented to assist me.

31. After asking that a 'stress specific risk assessment be undertaken in accordance with the Health and Safety Executives 'Management Standards' and referring the Respondent to the increased duties on an employer to care for the physical, financial and even psychological welfare of its employees as highlighted in Spring v Guardian Assurance plc (1994) 2 All ER 129, the Claimant set out a Chronology which started with February 2017 when the other managers in London were given a pay increase which was to come in two parts:

> 10. … One part on completion of the manager training modules, and the other for general increase.
>
> 11. All the other managers in central London received the increases.
>
> 12. I completed the manager's module, and I was informed by the other managers that on completion of the same manager training modules that they would receive an increase of £3000 on their annual salary, plus a £2,000 award taking them up to £35,000 per year salary.
>
> 13. My salary has not been changed, and I have not received any reason for this.
>
> 14. Thus, I require to know why all the other managers have received their pay increases, and I have not?
>
> 15. How do you say this isn't a discriminatory practice?
>
> 16. How do you say that I have not been treated less favourably in

comparison to the other managers whom have received their pay increases?

17. Added to this, the shouting and aggression that I have endured at the hands of Tristian Arnold, has exacerbated my anxiety related disorder, and anxiety. The harassment is related to my disabilities. The working environment is hostile, intimidating, and oppressive.

18. In January 2017 my line manager Tristian Arnold overstepped his bounds being very unprofessional in shouting at me regarding the condition of some of the car parks in a verbal threat of what [*sic*] my job being at risk.

19. This attack left me feeling in a constant state of anxiety, which has exacerbated my asthma. It also triggers my anxiety attacks. This has caused sleepless nights and heart palpitations.

20. As this is [*sic*] happened now more than once, I tried to settle this by reporting these actions to my senior manager. These concerns were raised as 'verbal grievances'. They were also raised as an assertion of a statutory right pursuant to section 44(1)(c) ERA 1996 –

> … he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety.

32. The Claimant had had the benefit of some legal input into the writing of this letter for he then spent the next two paragraphs referring to certain case law as support for propositions concerning the duty on an employer to provide reasonable support to ensure that the employee can carry out his work without harassment or disruption by fellow employees before he continued:

23. I was then informed that Tristian Arnold was giving my position to another manager and moving me out. I believe this was an act of unlawful victimization for having raised verbal grievances and for having asserted statutory right under section 44 (1)(c) ERA 1996 as outlined in paragraph 20 above.

24. I spoke to Tristian about this and his reply was shocking. He said that he knew where I heard that remark from!! He didn't deny it, which led me to believe that it was true.

25. In the next 2 months he gathered enough evidence to convince his reporting manager to allow him to make the move, the conditions of which were very poor. In a subsequent meeting with his line manager he still never denied it I have had to rely on my inhaler to keep my asthma and more importantly my wheezing under control while trying to deal with the increasing frequency of headaches and migraines as my manager makes nasty remarks about my competence instead of giving me feedback on how I can improve my performance. This applies an ongoing discriminatory effect on protected grounds of disability pursuant to section 15(1)(a) and (b) EqA 2010.

26. He has also invited my team to write grievances against me to sabotage my reputation. This is an act of on lawful victimization pursuant to section 27(1)(a)(2)(c)(d)EqA 2010, and moreover, detrimental treatment pursuant to section 44(1) Employment Rights Act 1996 for having asserted a statutory right.

> 27. This has made my life living hell, has made me feel sick on more than one occasion and has left me feeling very fearful for my job. Attending meetings where I have been constantly singled out for being at fault while been criticized for not completing tasks and doing this in front of the other managers in a further attempt to undermine and discredit me. It is my position that my employer is acting in a calculated manner to seriously undermine (if not destroy) the implied term of mutual trust and confidence given its respective omissions to act to prevent acts of unlawful harassment from being inflicted upon my person.
>
> 28. Emotionally Tristian Arnold has been more willing than me to damage my relationships by knowing how to make me feel guilty 'shouting at me regarding conditions and car parks which were worse before I took over' by manipulating me into doing things that were not my best interest and knowing how to upset me which has upset the delicate balance I strive to maintain keeping my asthma under control.
>
> Socially by making others think less of me by negative outbursts of my conduct that are unfounded.
>
> 29. Economically by controlling money pay rises that I was entitled to that was given to others for the same criteria that I had also completed. The only differences that I can see is that they are white and I am black. Tristian Arnold has repeatedly and deliberately tried to hurt me because I complained of my poor treatment over a protracted period of time.
>
> 30. I believe the workload is too much for one person to undertake, given the demands of the job, which are unreasonable… … As my employer I believe that Tristian Arnold my line manager should've spent more time developing my health and safety skills along the same lines as he developed others and this would've shown that he was interested in my success as a manager. He never spent a single day with me except to criticize in every way he could keeping his criticisms verbal to prevent disclosure.

33. The Claimant's letter continued through to a list of Conclusions that, and here we summarise, asserted his employer to be vicariously liable for acts of harassment related to the Claimant's disability, to have failed to make reasonable adjustments to accommodate the Claimant's disability, one such adjustment being the provision of bullying and harassment training.

34. Mr Andy Kythreotis, the Head of Commercial Insight and Revenue Management, accompanied by Mr Andrew Moody, HR Business Partner, conducted a hearing into the Claimant's grievance on 21 August 2017 which lasted for 3 hours and 20 minutes (with a couple of breaks totalling some 14 minutes when the Claimant had become upset) and concluded with Mr Kythreotis saying that he would now investigate.

35. Before continuing the account of what Mr Kythreotis did, the following day the Claimant received a letter from Mr Kevin O'Connor, the Respondent's Head of Operations, informing him that he was required to attend a disciplinary hearing on 31 August 2017 convened in relation to allegations of the Claimant's behaviour to fellow employees and of his having discussed his line manager (Mr Arnold) with his employees. This letter was replicated 8 days later with one alteration, that relating to the consequence should the case be proven. The letter of 22 August indicated

that the consequence could be a formal warning being issued to the Claimant while the letter of 30 August indicated additionally that, if the case were deemed to be one of gross misconduct, the consequence could be the termination of the Claimant's employment.

36. The letter of 22 August 2017 provided the Claimant with a copy of the Company's Disciplinary and Grievance Policy together with a copy of the notes of an investigation meeting held on 31 July 2017 and a witness statement of Mr Ade Osimuwa. The investigation meeting of 31 July 2017 was effectively an interview of the Claimant by a Business Manager, Ms Carly Edwards, and Mr Andrew Moody, HR Business Partner in connection with issues arising from a grievance of Mr Jonathan Walker. Mr Walker was one of the Customer Service Assistant staff who worked for the Claimant. In an email dated 5 June 2017 and sent to Mr Tristan Arnold, Mr Walker had outlined his dissatisfaction with the way he had been treated by the Claimant during his probation period. Mr Walker considered himself to have been subjected to a constant barrage of the Claimant's "emotional baggage and general distain for his boss" Mr Arnold with little to no training being given to him. The way the Claimant treated him was to lead to him feeling unappreciated and inadequate.

37. Mr Walker's email was treated as a grievance and, because it raised issues about the conduct of the Claimant, an investigation was launched into the Claimant's conduct. The statement of Mr Osimuwa was dated 3 August 2017 and rehearsed failings that Mr Osimuwa had discerned in the Claimant's treatment of him and other members of staff.

38. The outcome of this disciplinary hearing when it was eventually determined – on 1 November 2017, not 31 August – was notified to the Claimant by letter dated 5 December 2017 from Mr O'Connor. His conclusion was that there was no case to answer. However, he offered advice to the Claimant in two paragraphs:

> I do however need to remind you about the discussion you conducted with a customer service assistant regarding disdain for your line manager Tristian Arnold and how this is not appropriate at your level to be doing so nor is it appropriate to implicate an individual in displaying racial discrimination against you without sufficient evidence to back your allegation up.
>
> As part of your investigation you mentioned about being asked to falsify health and safety records, I must remind you that this could be seen as gross conduct and if found guilty of could lead to disciplinary action that could lead to termination of employment.

39. To revert to Mr Kythreotis, after the grievance hearing on 21 August 2017, he formed the plan of speaking to both Mr Arnold and Mr England. He conducted an interview with Mr Arnold and put the Claimant's allegations to him which Mr Arnold denied. After speaking to Mr Arnold, Mr Kythreotis decided an interview with Mr England was not necessary. In a passing conversation with Mr England, he obtained confirmation that the Claimant had had a meeting with Mr England and had expressed concerns about his relationship with Mr Arnold. However, he did not use this confirmation of the Claimant having had concerns with Mr Arnold as being a reason to have a formal and recorded interview with Mr England.

40. Mr Kythreotis was to state his conclusions in a grievance outcome letter dated 19 September 2017. In the letter, he wrote:

> You made an allegation within your grievance that Tristian was asking colleagues to raise grievances against you in order to "sabotage" your reputation. You went as far as to say you feared colleagues were being asked to "fabricate" grievances. When I questioned you further on the subject you were unable to offer any corroborating evidence and agreed with me that it was reasonable for your manager to be seeking the views of others to fairly assess your performance levels. As part of my investigation with Tristian on this matter he denies ever encouraging or asking colleagues to make any such claims against you.

41. In his oral evidence, Mr Kythreotis admitted that, not only had he not interviewed any of the staff managed by the Claimant, he did not know the identity of the members of staff and had not sought to establish their identity. He admitted he had not sought independent evidence that might corroborate the Claimant's allegations or, indeed, Mr Arnold's denial of the same.

42. Mr Kythreotis dealt with the Claimant's grievance about pay in this way:

> On the subject of pay that you raised, it is your assertion that you were treated differently to your colleagues in recent pay reviews. You also concluded that the fact that you were "black" and the other cluster managers were "white" suggested that there was a racial motive behind the withholding of any pay increase. Having confirmed the details of pay awards to our cluster managers in London with our payroll department I can confirm that in April and May 2017 (not February as you claim in your grievance letter), your fellow cluster managers did receive pay rises. I addressed this with Tristian in detail as part of my investigation and his claim was that he never promised to you that your salary will increase to any specified figure. He pointed out that should you have been awarded a pay rise at the same time as your colleagues it would have been less to reflect the fact that the other cluster managers have additional responsibilities, such as managing the local maintenance team and the night team leaders. No such additional responsibilities were ever assigned to you.
>
> Tristian went on to explain that at the time of awarding pay increases it had become clear to him and Rob England that there were performance related issues that needed to be addressed before any change in pay could be agreed. At this time, site visits were arranged for Tristian and Rob to explain what the issues were. Tristian concludes that the decision to withhold the pay increase was taken in conjunction with Rob England in light of the circumstances. However, there is an understanding from Tristian that all of this could and should have been better communicated to you.
>
> It can be standard practice for an organisation to withhold pay increases and bonuses in light of prevailing performance related issues. In this case it may have been reasonable to do so but I strongly believe that NCP fell short of our responsibilities to make sure you fully understood why this was the case and what you would need to do to secure a pay increase in the future.

43. Towards the end of his letter, Mr Kythreotis set out his conclusions marked with

bullet points, two of which were as follows:

1. I do not believe that harassment has taken place towards you by NCP management, but accept that the relationship has been under strain due to poor communication.

2. I am satisfied that NCP are acting appropriately in withholding pay awards on the grounds of performance, but accept that in your case more should and could have been done to explain the reasons. I see no evidence to back up your claim that pay has been withheld from you on the grounds of racial discrimination.

44. The difficulty that we have with this conclusion of Mr Kythreotis is that Mr Arnold's evidence was that he recommended an increase in the pay of London Cluster Managers from £30,000 to £35,000 …

> 9. … because of the work that the London Cluster Managers were doing and the commercial contribution to the business and in order to attract good candidates … … I put forward recommendations to the executive team to increase the salary of Cluster Managers in London in general, in order to ensure that we get good calibre people and we can be competitive. I would not have the final say. I recommended that the Cluster Managers should get a salary of £35,000 and a car. This was accepted. I do recall discussing Charles' salary. At the time when other salaries were being increased I had concerns about Charles' performance, which I was trying to address with him. I would not have recommended a salary increase at that time. But I do not have the final say. This would be up to Duncan Bowens and Rob England. With the benefit of hindsight, I should have explained this to Charles. I realise now that Charles has learnt from colleagues that they had had pay rises. But I thought I had been clear that I felt he was not fulfilling his role.

45. So, the recommendation for this pay increase related to all London Cluster Managers for commercial reasons. It was not intended to be an increase that was dependent on performance. Part of the remuneration of these managers was a bonus which could vary in size in accordance with the grade at which the manager was assessed to be at in his performance review. We were told the grades ranged from 1 to 5 with 1 being "Not performing", 2 being "Under-performing" and 3 being "Satisfactory". We assume grade 4 was the equivalent of "Good" and 5 "Excellent".

46. A manager assessed at Grades 1 or 2 on his performance review would not be entitled to a bonus. The Claimant was assessed at Grade 3 and had been so assessed in the four previous quarters. Thus, at the end of 2016, he received a bonus appropriate to having been assessed at Grade 3 during the previous year. However, come April and May 2017, he was being denied the general increase on the grounds of performance.

47. We had difficulty in understanding Mr Kythreotis' logic in concluding that the Respondent acted appropriately in denying to the Claimant the general increase afforded all other London Cluster Managers. If performance was intended to be taken into account and justified the exclusion of the Claimant from the general increase, a competent investigator of the Claimant's resultant grievance would have investigated the assessment of the performance of all of the London Cluster

Managers and determined whether performance issues denied any of the others from the increase. As it was, we were shown evidence to indicate that certain of the other London Cluster Managers had not passed their probation when they received part of the pay increase of £5,000 with the remainder of the increase being automatically paid when they had successfully completed their probationary period and the Together We Shine [*TGWS*] programme. The Claimant had long since successfully completed probation and he completed the updated TGWS programme in April 2017 having completed an earlier version of that programme. It is difficult to see quite how a more experienced manager, one graded as "satisfactory" at the last performance review undertaken, could have been adjudged less deserving of the pay increase than a tyro manager.

48. Other parts of the Claimant's grievance were rejected by Mr Kythreotis and the Claimant appealed. Notice of his appeal was received on 30 September and the form of his notice appears to have been in the form of annotations to the grievance outcome letter of 19 September 2017. Mr Duncan Bowens, the Managing Director of the Respondent, heard the appeal on 17 October 2017.

49. At the appeal, the Claimant was accompanied by a Team Leader, Mr Kirion Sanchez while Ms Paula Holt, HR Business Partner, was also present. In the letter Mr Bowens sent on 20 October 2017 informing the Claimant that his appeal was unsuccessful, he wrote with regard to the subject of pay …

> … it is your assertion that you are treated differently to your colleagues in recent pay reviews. You concluded that the fact you were "black" and the other cluster managers were "white" suggested that there was a racial motive behind the withholding of any pay increase. You said you had been told by all your peers that they had received these increments throughout the last financial year and for reasons ranging from performance, length of service and completing TGWS.
>
> As I explained during the meeting, I have the final signoff of all pay increments and so can therefore confirm the following. Those that received pay increments did so in April and not throughout the year in an ad hoc fashion awarded by Tristian Arnold as your claim. All pay increases have to be submitted to the Executive team of which I am part of and are approved in that forum.
>
> I addressed with Tristian what was discussed between him and yourself in relation to your pay and he has confirmed that no pay rise or specific amount was ever promised to you. I confirmed Tristian and Andy's explanation about pay increments being associated with performance and that due to there being issues with your performance during the time of who are the other four employees within the business been pay increments, no pay reward was granted. This was also a similar situation with four other employees within the business. I also explained that it is common practice within this business when performance reaches the expected level a pay rise may be considered. I acknowledged and agreed with you that this was not communicated to you and I have raised this with both Rob England and Tristan that going forward all pay reviews are to be discussed with individuals.
>
> Despite the lack of communication by management, I uphold the original decision that the only reason you were not awarded a pay increment was due to the concerns regarding your performance and that you were about to be placed

on a Performance Improvement Plan (PIP).

50. The fact that Mr Bowens was part of the Executive team that had approved the pay rises to be awarded (and thus, by implication, had approved the exclusion of the Claimant from the pay rises) means that he was hearing an appeal from the rejection of a grievance that, in part, related to the decision that the Executive team had taken. Thus, it seems to us that Mr Bowens was articulating a very good reason why he was an inappropriate person to be hearing an appeal from the rejection of a grievance which effectively was complaining of a decision that Mr Bowens was party to. Paragraph 15 of the Respondent's Discipline & Grievance Policy specifies that the appeal should normally be heard by a more senior manager not involved with the case.

51. But leaving that aside, it is difficult to see how Mr Bowens could have sensibly rejected the appeal with regard to pay on the grounds that he did. He cited the fact that pay increases were withheld from four other employees in the business on the grounds of performance. However, the complaint of the Claimant related to him being excluded from a specific pay increase that was recommended by Mr Arnold to be awarded to London Cluster Managers in general for commercial reasons. There were five London Cluster Managers and four of them received the increase that Mr Arnold had recommended (although two of them received the increase in stages as and when they completed probation successfully and TGWS programme). He may have spoken to Mr Arnold and ascertained that Mr Arnold had never promised the Claimant a pay rise or a specific amount. However, he must have known that Mr Arnold had not promised anyone a pay rise and that his recommendation was that the salary of all London Cluster Managers should be increased. The amount of the increase was an integral part of Mr Arnold's recommendation and his proposed pay increase was completely divorced from performance and was wholly related to the commercial interest of the business in recruiting and retaining high calibre staff.

52. Mr Bowens in his evidence said that he had spoken to Mr Arnold and Mr England after the grievance appeal hearing but he made no notes of the information he obtained from either of them.

53. Mr Bowens did not take issue with the failure of Mr Kythreotis to seek independent corroboration of either the allegations made by the Claimant or the denials of the same by Mr Arnold. He rejected the appeal.

54. Not mentioned in the appeal outcome letter was the fact that Mr Bowens wanted to, and did, organise a mediation meeting between Mr Arnold, Mr England [who was the Senior Head of Operations (South) and Mr Arnold's manager], the Claimant and Mr Moody which was held on 21 November 2017. The idea, as Mr Bowens said in evidence, was to have an open and honest discussion between the Claimant and Mr Arnold. However, that was not how the Claimant saw it when the mediation was held. In evidence, he indicated his view that the mediation had been set up:

> … so as to say that they had done nothing wrong – their attempts to mediate and draw a line in the sand caused me to treat that as the straw that broke the camel's back.

55. The final bullet point of the grievance appeal outcome letter was Mr Bowens saying:

1. I see no reasonable cause for the current performance improvement plan to be removed so this will remain in force for the durance [*sic*] of the performance management process.

56. Technically the PIP had expired on 13 October 2017, that is, a week before Mr Bowens' letter. The Claimant was called to a meeting convened to progress the PIP which appeared to have been regarded by the Respondent as revived by reason of Mr Bowens' final bullet point. Initially, the meeting was scheduled for 24 November 2017 which the Claimant failed to attend but he did attend the rescheduled meeting on 27 November 2017. The Claimant came to the meeting unprepared, having read but not prepared the PIP documentation as originally issued and apparently reissued to him on 27 October 2017. The Claimant recorded the meeting and it is clear that Mr Moody and Mr Arnold were both frustrated by the Claimant's lack of engagement.

57. Mr Moody sent a letter to the Claimant at his mother's address, an address at which he was no longer living, on 6 December 2017. This letter effectively scolded the Claimant. He was told that his allegation of racial discrimination had been addressed formally as part of the grievance procedure, that he was on a PIP due to his performance, that his whole demeanour and tone was accusatory to both Mr Arnold and to Mr Moody, that he had to address the areas of his performance that required improvement otherwise disciplinary action would be taken against him on the grounds of capability and finally noted that the Claimant had been off sick since 4th December 2017 with a sore throat / cold and flu.

58. The Claimant denied receiving that letter before, on 6 December 2017, he wrote a letter of resignation. He asserted that he had:

> … compiled a series of final straw breaches ranging from less favourable treatment because of my race black Afro-Caribbean which resulted in me being treated differently to my non-black colleges [*sic*] for 2 years.

59. The Claimant then set out nineteen numbered paragraphs under the heading "Disability Discrimination". We find it curious that the Claimant placed quite so much emphasis on his perception that he was being discriminated against because of disability because three of the paragraphs referenced a perception on the part of the Claimant that he was being discriminated against on racial grounds. In particular, he complained that a move out of London that he had been offered had been blocked by Mr Arnold who subsequently offered the move to a white manager. He further complained that:

> My fellow white managers were awarded a salary increase in April 2017 and May 2017 for completing their management development modules I was not awarded the increase even though I completed the same modules at the same time (race discrimination pay).

60. The third allegation of discrimination on racial grounds was a complaint that the grievance appeal outcome from Mr Bowens:

> … comprised of a tissue of lies … … designed to protect the racial regime in the business not least his friend Triston Arnold because of my race (last straw)

61. The Claimant concluded his letter with this paragraph:

> Ergo, all the circumstances described above shows an objective assessment of all the contract breakers breach of the implied term of trust and confidence arising from the terms of my employment chiefly relating to Race / disability discrimination and harassment which was clearly displayed when the Employer (NCP) denied me the contractual benefit of a transparent fair and full investigation by supplying me with copies of their investigation notes together with copies of the witnesses statements obtained during this period.

62. And, on 28 March 2018, the Claimant presented his ET1 to the Tribunal which, with ACAS having been engaged with Early Conciliation, was within time.

The Law

63. Both parties have provided us with written submissions each of which recite many cases none of which we dissent from and some of which provide us with helpful guidance through the issues we have to decide upon.

Dismissal

64. We start with dismissal. We acknowledge that the definition of dismissal at section 95(1)(c) of the Employment Rights Act 1996 provides that a dismissal occurs where:

> … the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

65. We accept that the test is contractual, as per ***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221. And we are indebted to Ms Hale for providing us with the recent Court of Appeal pronouncement on "last straw" acceptances of a series of breaches by the employer in ***Kaur v Leeds Teaching Hospitals NHS Trust*** [2018] IRLR 833 where the headnote records:

> An employee who is the victim of a continuing cumulative breach is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation; provided the later act forms part of the series. This does not involve any tension with the principle that the affirmation of a contract following a breach is irrevocable. Cases of cumulative breach of the implied term of trust and confidence fall within the well-recognised qualification to that principle that the victim of a repudiatory breach who has affirmed the contract can nevertheless terminate if the breach continues thereafter. It is true that the correct analysis in such a case is not that the victim can go back on the affirmation and rely on the earlier repudiation as such: rather, the right to terminate depends on the employer's post-affirmation conduct. However, there is nothing wrong in speaking of the right to terminate being revived, by the further act, in the straightforward sense that the employee had the right, then lost it but now has it again.
>
> In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions: (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation? (2) Has he or she affirmed the contract since that act? (3) If not, was that act (or omission) by itself a repudiatory breach of contract? (4) If not, was it nevertheless a part of a

course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation) (5) Did the employee resign in response (or partly in response) to that breach? None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy.

66. Following the questions suggested by the Court of Appeal, we conclude that:

1. The most recent act (or omission) according to the Claimant's evidence was the attempt at a mediation meeting on 21 November 2017 of those representing the Respondent to:

   > … draw a line in the sand caused me to treat that as the straw that broke the camel's back.

   The Claimant may have been speaking in metaphors but we understood him to be treating the mediation as a further attempt by the Respondent to ignore both the legitimate grievance he had raised and its complete failure to investigate properly that grievance. His grievance may have been somewhat scattergun but it contained a central allegation that he had been discriminated against on the grounds of race.

   The Claimant did not bring a claim of racial discrimination and it is not our place to make findings on a claim not brought by a litigant. However, our clear view was that, had the Claimant been complaining to a tribunal of racial discrimination and relying upon the facts he set out in his grievance, the burden of proof would have shifted and it would have fallen to the Respondent to explain away the central contradiction of how the Claimant's performance came to deny him the benefit of an across-the-board increase for London Cluster Managers that was based on the need to increase the basic pay, and therefore the attractiveness, of that particular job. The investigation undertaken by Mr Kythreotis was defective as was the handling of the Claimant's appeal by Mr Bowens. Both senior managers ignored that central contradiction and a blind eye was turned to the fact that some of the Cluster Managers being awarded the increase had not demonstrated performance, either by passing their probation or completing the TGWS course.

2. We did not regard the period of time between the Claimant attending the mediation on 21 November and the sending of his resignation letter on 6 December as indicative of the Claimant affirming the contract. He attended a PIP meeting on 27 November which was a further manifestation, in his eyes, of the unfair manner in which he was being treated. We consider he was entitled to take a reasonable period of time to reflect on the series of events that had started with him being denied the increase that all other London Cluster Managers received and to pluck up the courage to take the irrevocable step of treating the contract as discharged by virtue of the Respondent's breach or breaches of contract.

3. We do not regard the approach adopted by the Respondent in the mediation

as being, of itself, a repudiatory breach of contract.

4. We do, however, regard the approach adopted in the mediation to be a part of a course of conduct comprising several acts and omissions which, when viewed cumulatively, amount to a (repudiatory) breach of the implied term of trust and confidence.

5. And, finally, we are satisfied that the Claimant resigned in response to that repudiatory breach.

67. Thus, we consider the Claimant to have been dismissed. That being the case, it falls to the Respondent to demonstrate the reason for dismissal which they have not done. We thus find the dismissal to have been unfair.

Victimisation

68. The Claimant's case is that he did a protected act. He raised a grievance asserting discrimination on the grounds of disability and of race. He says, and we find with justification, that the allegation of race discrimination was not properly investigated and he was, in effect, told he had to accept the contrary assertion that it had been properly investigated and his grievance dismissed. Being expected to submit to and respect the findings of an inadequate investigation of his grievance and the dismissal of his appeal against such findings, is, in our view, to suffer a detriment. We think that the inadequacy of the way in which Mr Kythreotis conducted the investigation of his grievance was not mere incompetence but was a manifestation of a knee-jerk reaction to deny the possibility that the allegation of unlawful discrimination could be well founded.

69. Thus, we consider the Claimant was victimised.

Conclusion

70. We find the Claimant to have been constructively, and unfairly, dismissed. Further, we find him to have been victimised in the way his grievance, a protected act, was handled. We did not hear evidence on remedy. It clearly falls to the parties to attempt to reach agreement on remedy and thereby minimise further expenditure. However, in the event that no agreement is reached within 21 days of the date of this judgment, permission is given to the Claimant to apply to the Tribunal for the matter to be set down for a further day's hearing on remedy. And, in the event that agreement on remedy is reached, we direct that the parties inform the Tribunal within 7 days of such agreement of the fact of agreement and such order as the parties wish the Tribunal to make.

EMPLOYMENT JUDGE
On: 14 November 2019

DECISION SENT TO THE PARTIES ON

19/11/2019
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FOR SECRETARY OF THE TRIBUNALS