EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss Fani Nyikadzinashe	AND	Mecca Bingo Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Plymouth **ON** 2 and 3 December 2019

EMPLOYMENT JUDGE N J Roper **MEMBERS** Mrs P J Skillin
Mr T M Smaldon

Representation

For the Claimant: Mrs Hodgkin of Counsel
For the Respondent: Mr Baker of Counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:
1. The Claimant's claim for unfair constructive dismissal is dismissed; and
2. The Claimant's claim of race discrimination is dismissed.

REASONS

1. In this case the claimant Miss Fani Nyikadzinashe claims that she has been unfairly constructively dismissed, and that she has suffered discrimination on the grounds of her race. The respondent contends that the claimant resigned, that there was no dismissal, that in any event that its actions were fair and reasonable, and denies that there was any discrimination.
2. We have heard from the claimant, and we have heard from Mr Nigel Green and Mrs Sarah O'Neill on behalf of the respondent. We also accepted a statement of evidence from Mr Mark Brenton on behalf of the respondent which was not challenged by the claimant.
3. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The respondent company is Mecca Bingo Ltd which runs the national chain of bingo clubs, and which is a subsidiary of the Rank Group. The respondent has eight bingo clubs across

the South West of England and Wales, which includes a club in Fore Street, Plymouth ("the Club"). Each club has a General Manager who reports to the Area Manager. In this case have heard from Mr Nigel Green who is the General Manager of Club. We have also heard from Mrs Sarah O'Neill, who is his Area Manager for the South West and Wales. As noted above we also accepted an unchallenged statement from Mr Mark Brenton who is an Area Manager from London.

5. The claimant Miss Fani Nyikadzinashe describes herself as being Black British of Zimbabwean ethnic origin. She was employed by the respondent as a Team Member from 4 August 2003 until her resignation which took immediate effect on 15 June 2018. The claimant was also training to be a nurse, and the claimant had made it clear to the respondent that she intended to terminate her employment voluntarily on 28 July 2018 in order to pursue her nursing career.
6. The respondent is a large employer with a number of policies and procedures in place. There is an Equal Opportunities Policy which promotes equal treatment for all employees and potential employees. There is also an Harassment and Bullying Policy which addresses the issue of "respect at work" and inappropriate banter in the workplace. This policy provides that: "Harassment and bullying is not necessary directed at the affected employee. For example, a female employee may feel harassed by lewd comments related to females generally and/or offensive pictures, even though these are not directed at and/or related to her personally."
7. Section 5 of that Harassment and Bullying Policy has a section on "Harassment & Bullying by Third Parties" which provides: "The Company recognises that occasionally employees may feel they have been bullied or harassed by third parties such as customers or contractors undertaking work on the premises. The procedure set out at section 6 of this Policy specifically relates to alleged bullying or harassment by a colleague and will not be an appropriate way of dealing with allegations of harassment by a third party. Any situation of this nature should, however, be reported to the employee's Line Manager as soon as possible who will take advice and action to resolve the situation. An investigation into the alleged bullying and/or harassment will usually take place. Appropriate action by the Company *may* well include barring a customer from the Club and/or the Company making a formal complaint to a contracting Company. If the employee concerned does not feel that the situation has been dealt with adequately by the Company, he/she should make a formal complaint via the Companies Grievance Procedure …"
8. The respondent also has a Grievance Procedure which sets out the way in which it deals with formal grievances. In addition, the respondent historically required all employees to complete "respect at work" training relating to discrimination and inappropriate banter. This course has recently been replaced by an online diversity course, which is a presentation followed by a test related to the contents. This course and the test are mandatory for all employees.
9. The claimant had been a Team Member at the Club since 2003. There were approximately 12 employees at the Club, and the General Manager Mr Nigel Green had been in place for a number of years. He had therefore known the claimant for some years and had a good working relationship with her.
10. The claimant worked part-time for 16 hours per week. She usually worked all day on Saturdays (from 11 am to 11 pm) and on Monday evenings. The claimant was also undertaking a nursing degree. In April 2018 the claimant asked Mr Green if she could take her usual Monday evening shift as holiday for a couple of months in order to accommodate a nursing placement which was commencing on 23 April 2018. Mr Green agreed. The claimant also told him that once she had finished she would be resigning her employment to pursue her career in nursing, and her last working day would be 28 July 2018. In a later conversation Mr Green agreed with the claimant that she need only work the afternoon on her last day on 28 July 2018. The claimant informed him that she would be starting a full-time job as a nurse when she finished with the respondent.
11. The events relating to the claimant's complaint about a customer commenced on Tuesday, 22 May 2018. She sent a text to Mr Green asking to speak to him. Mr Green offered to call her if she wished, but she did not respond. The following day Wednesday, 23 May 2018

the claimant attended at the Club in person and asked to speak to Mr Green. She reported that while she was working at the Club on the previous Saturday, 19 May 2018, the date of the royal wedding between Prince Harry and Megan Markle, she had heard one customer saying to another customer: "I can't believe he's marrying a black woman". The claimant reported that she had commented "wow" to the customer, who had then apologised to her. The claimant said to the customer words the effect "I can't believe you said that". Mr Green discussed the matter with the claimant and said that he was sorry she had experienced this upsetting incident and that he would speak to the customer. On the following day 24 May 2018 Mr Green sent a text to the claimant to confirm that he would speak to the customer and decide what to do following that discussion.

12. On 24 and 25 May 2018 the claimant sent further text messages to Mr Green to the effect that she was apprehensive about attending work on her next scheduled shift on Saturday, 26 May 2018 because she might meet the customer. Mr Green suggested that the claimant might work on Front of House where an encounter would be less likely. He subsequently asked the claimant what she wished to do. The claimant replied that she was unsure but that she did not like feeling so apprehensive about coming to work. Mr Green agreed that the claimant need attend work on the Saturday for the evening shift only, and working on Front of House from 5 pm to 11 pm, instead of her normal start time at 11 am. This was because Mr Green knew that the customer in question usually attended on a Saturday, but would normally have left the Club by 5 pm. The claimant worked this reduced, changed shift without any difficulty. Mr Green also contacted the respondent's HR advisers for advice. The advice was effectively that he should speak to the customer which is what he had intended to do in any event.
13. Mr Green knew the customer because she was a regular customer at the Club. In addition, he knew the customer's husband because they had sat next to each other whilst supporting the local football team. Mr Green had on one occasion visited their house to visit the customer's husband who was ill. He had done so on the day before the events giving rise to the complaint in question. Mr Green therefore knew the customer and her husband, and describes them as acquaintances, rather than friends.
14. On 26 May 2018 Mr Green spoke to the customer when she visited the Club. She did not deny making the comment in question. She explained that she was horrified that she had upset the claimant and that she wished to buy her a gift to apologise for any upset. Mr Green did not think that would be a good idea and advised the customer not to do so. He made it clear to the customer that she had offended the claimant and that she should take more care about the words she used when visiting the Club. Mr Green was satisfied that the customer was genuinely sorry for what had happened. In the light of this reaction, and the fact that she was a long-standing customer with no similar previous issues, Mr Green was confident that she would behave appropriately in the Club in the future and that there would not be a repeat of any similar incident.
15. On Tuesday, 29 May 2018 Mr Green sent a text to the claimant to confirm that he had spoken to the customer who was very apologetic and had wanted to buy her a gift, although he had advised her not to. He confirmed that he had told the customer that she must be more careful about her language in the future. Mr Green asked the claimant how she wished to manage her work over the forthcoming weekend.
16. The claimant replied by email dated 31 May 2018 to this effect: "Firstly, I am sorry for the late response - I have been on three nights back to back and this is my first afternoon free. I received your text and I'm in no position, neither do I feel the desire to want to face the customer in question. A personal attack was made and I feel aggrieved at the prospect of having to be expected to be in her presence. There was more said that Saturday, but I did not mention it in the beginning because I did not feel the need to say too much. So I realise that this is not what you anticipated but I cannot be there on Saturday afternoon if the customer in question is there. My emotional well-being is extremely important to me and the fact that I have been worried about my job on Saturday since Monday only diminishes my enthusiasm. Apologies but my feelings are very clear and I cannot change them."
17. Mr Green reported the matter to the respondent's HR advisers. He had also previously informed his Area Manager Sarah O'Neill of the matter by telephone. Mr Green again

agreed that the claimant should work a shortened shift on Saturday, 2 June 2018 and attend only from 5 pm and to work at Front of House with the intention of avoiding the customer who normally came in on a Saturday morning and early afternoon. The claimant agreed to this, and Mr Green decided to pay the remainder of the shift to the claimant as compassionate leave, although the claimant did not know this at that time. As it happened, when the claimant came to work just before 5 PM on Saturday, 2 June 2018, she saw the customer from a distance and came in by a different door in order to avoid her.

18. The claimant then visited the Club on Sunday, 3 June 2018 to speak with Mr Green. She gave further details of the discussion on 19 May 2018. The claimant said that one customer had said to the other "I can't believe he's marrying an American" and the other customer had replied, in a lowered voice, "I can't believe that he's marrying a bloody black woman" or possibly "a pissy black woman". After the claimant had objected the customer had apologised, but had gone on to talk about an earlier incident in which she herself had complained about someone using the word "gollywog". The purpose had apparently been to reassure the claimant that she had not meant to cause offence, which had had the opposite effect because the claimant was offended by these comments as well.
19. Mr Green does not recall that the words "bloody" or "pissy" were said to have been used when the claimant first complained about the customer's language, but accepts that he cannot be sure about that.
20. Mr Green was about to go on leave for a week and spoke to Mrs O'Neill who was his line manager. She agreed to pursue the matter, and on 4 June 2019 Mr Green sent the claimant a text to confirm that she would be doing so. The claimant responded on 4 June 2018 with a text saying: "Thank you very much Nigel - enjoy your time off!"
21. Mrs O'Neill considered the matter and concluded that a warning letter to the customer was the right response. She fully understood why the claimant felt offended by what had happened and had considered whether excluding the customer was the appropriate sanction. She bore in mind that the comments in question were made from one customer to another, and were not directed at the claimant. In addition, the customer had apologised to the claimant and had expressed remorse when challenged about her behaviour by Mr Green. Mrs O'Neill therefore decided to write to the customer giving her a formal warning about the use of language in the Club which might be regarded as being discriminatory or offensive. She made it clear that if there were any similar incidents in the future then she would be excluded from the Club. Mrs O'Neill prepared this letter on 11 June 2018 but apparently the respondent decided to seek legal advice on the content and it was not sent to the customer until 19 June 2019.
22. Meanwhile Mrs O'Neill had communicated her decision to Mr Green who sent a text to the claimant on 8 June 2018 saying: "it would appear the area manager has or will be sending a formal warning to [the customer] but no barring so not sure how you want to play tomorrow."
23. Mrs O'Neill also prepared a letter to the claimant confirming the respondent's position. She intended to reassure the claimant that the respondent took the matter very seriously and that in addition to Mr Green speaking to the customer she (Mrs O'Neill) had also written to the customer to warn her that if any similar language was repeated then she would be excluded from the Club. As it happens, this letter was not sent to the claimant because her written resignation intervened, and that letter was sent after the claimant's resignation had subsequently been acknowledged.
24. Meanwhile, on 9 June 2018 the claimant had telephoned Mr Green to say that she was ill and would not be attending work because of anxiety. She also sent an email to Mr Green on 9 June 2018 which stated: " … I feel incapable of being able to effectively fulfil my work obligations and duties knowing that in doing so, I will have to serve the customer in question at some point during the day. Expecting to be able to offer sincere and earnest company focused customer service to an individual who I now know from her conduct regards me as a less than worthy human being based on the colour of my skin, is a source of exceptional distress and totally crippling of my self-esteem and self-worth. So in response to your text "how are you going to play tomorrow"? This is my livelihood, and has been for the last 14 years and I will not be in work on Saturday. Frankly speaking I am exceptionally

disappointed and may go as far as to say disgusted by the company's stance on this matter. This situation is surely an infringement of the Human Rights Act of 1998 and Equality Act 2010. It is clear that employees are expendable if it means loss in profit." Mr Green was aware that Mrs O'Neill was dealing with the matter, and replied immediately to the effect that he was sorry that she felt that way and would forward her email to the HR department.

25. On Friday, 15 June 2018 the claimant's sister attended the Club with a letter of resignation from the claimant. She resigned her employment without notice. Her letter included the following comments: "I feel that I've been given no choice but to resign in light of my recent experiences resulting from the racially inspired incident that occurred on 19 May on Club premises. I made it clear in my grievance correspondence that I was finding it difficult to come into work due to anxiety but I was still required to resume service as normal, as if the incident had not occurred. In essence you made it unbearable for me to continue my employment with Mecca bingo due to lack of support, empathy and compassion, regarding my mental state due to this racially inspired incident. There was a fundamental breach of contract, by failing to provide a safe and secure working environment even after I'd made my concerns very clear about my anxiety about working the same conditions and environment. Numerous attempts to resolve the situation were not taken with the urgency that was required and almost 4 weeks post incident I have had no contact from Human Resources. This has now left me no choice but to resign from the company citing Constructive Dismissal for this decision. I regret that this 14 year relationship should end on these terms and also apologise for the inconvenience caused."
26. The claimant's resignation then resulted in a discussion with the HR Department on 21 June 2018. The HR Department agreed to send the claimant the formal Grievance Procedure, and also sent her the letter to her which had earlier been prepared by Mrs O'Neill.
27. The claimant was clearly dissatisfied that the customer in question had not been suspended, and complains about differential treatment and specifically the manner in which the respondent dealt with a situation involving Tracy Bailey. In February 2018 a male customer was loud and aggressive towards Tracy Bailey, who was the Duty Manager on shift at the Club, and swore at her. The respondent decided to suspend his membership of the Club temporarily to afford an opportunity to discuss the matter more calmly. On the next occasion he attended the Club the customer was still difficult and the suspension remained. After he had calmed down the customer agreed to meet with Mr Green. They discussed the matter and the matter was resolved, and the customer's membership of the Club was reinstated. The customer's suspension was in place from 6 February to 19 February 2018.
28. The claimant subsequently raised a formal grievance, which the respondent received at the end of June 2018. Under this policy the respondent was not obliged to process this grievance because the claimant had resigned her employment. Nonetheless the respondent agreed to do so. Mr Green forwarded the formal grievance to Mrs O'Neill. She took legal advice to check that there was no compelling reason why she should not hear the grievance, given that she had already been involved in her warning letter to the customer in question. The advice which she received was that she could proceed to hear it provided she did so in an impartial manner, which Mrs O'Neill set out to do.
29. The claimant's formal grievance was to the effect that the claimant had not received adequate support in response to her complaints about the customer's conduct.
30. The grievance hearing took place on 9 July 2018 and the claimant was accompanied by a former colleague. The claimant made it clear that she felt that the customer should have been excluded from the Club and that the steps taken against her were not sufficient. She referred to what she saw as a close personal relationship between Mr Green and the customer and that Mr Green had visited the customer's house the day before the incident, which is why Mr Green had been reluctant or unable to deal with the matter sufficiently seriously. The claimant complained that she had resigned her employment because Mrs O'Neill as the Area Manager had confirmed that the customer would not be excluded and that only a warning letter would be sent. The claimant was asked what outcome she was seeking, and replied that she wanted an apology and acknowledgement of wrongdoing,

not be out of pocket financially, and for there to be additional training about discrimination at the Club.

31. Mrs O'Neill questioned Mr Green about his relationship with the customer in question, and also checked that all employees at the Club had completed the online diversity course and test (which they had).
32. Mrs O'Neill did not agree that the claimant's complaint had not been dealt with seriously enough and that she had not received adequate support. Mr Green had spoken personally to the customer to ensure that she should moderate her language whilst in the Club and the customer had apologised. Mr Green had accommodated the claimant's concerns by rearranging her shifts. Following the second conversation in which the claimant gave more detail about the incident the customer had been sent a formal warning letter, and the fact that this had happened was also communicated to the claimant. In the context of what had occurred, in particular that the customer had made the offensive comments in question to another customer and not directly to the claimant, and then apologised to the claimant, Mrs O'Neill concluded that the action taken was reasonable and that the claimant had been properly supported.
33. With regard to Mr Green's alleged lack of objectivity and his relationship with the customer, Mrs O'Neill had discussed the matter with Mr Green and concluded that there was no close relationship between the customer and Mr Green and that his acquaintance with her had not had any adverse impact on the decisions which he had made.
34. In conclusion Mrs O'Neill was of the view that the respondent acted reasonably and supportively, although matters might perhaps have progressed more quickly, given that there had been a delay in sending the letters which Mrs O'Neill had prepared.
35. Mrs O'Neill concluded the grievance with two key outcomes: first, she apologised for the fact that the claimant's complaint had not been resolved more speedily, and secondly, she agreed to arrange for the claimant to be paid from the date that she had resigned on 15 June 2018 to the date when she had always intended to leave the Club to pursue her nursing career on 28 July 2018. Mrs O'Neill hoped that that gesture of goodwill would resolve the matter. Mrs O'Neill's conclusions were confirmed in a letter dated 1 August 2018.
36. The claimant remained dissatisfied and exercised her right of appeal. The appeal was heard by Mr Mark Brenton, who is the Area Manager for London and the South East. The grievance appeal hearing took place on 13 September 2018 and the claimant was accompanied by a former colleague. The claimant's appeal was based on three grounds: first, the claimant felt that she had not been supported following her original complaint and was not given a safe place to work; secondly, she complained that Mr Green had not been impartial in the way he dealt with the matter; and thirdly that Mrs O'Neill had not been objective because she had been involved in dealing with the original complaint before she dealt the grievance decision.
37. Mr Brenton concluded that the comment made by the customer to another customer was not acceptable and that the customer should have been reprimanded about it, which is exactly what had happened, firstly by Mr Green verbally and then by Mrs O'Neill in writing. Given that the comment was not made directly to the claimant, but was made by one customer to another, and that the claimant had known the customer for many years and they had not previously had any issues, Mr Brenton concluded that the respondent's response to the situation was appropriate. In addition, given that the claimant had been offered work on other departments where she was less likely to need to interact with the customer, and had also been given time off when she expressed concern, Mr Brenton felt that the support offered was appropriate and reasonable.
38. Mr Brenton could find no evidence that Mr Green had "downplayed" the incident or reacted with insufficient seriousness on the basis that he had a close relationship with the customer in question. Mr Green had spoken to the customer and accommodated the claimant's requests concerning shifts, before passing the matter onto his Area Manager. Mr Brenton rejected the suggestion that Mr Green had acted in a biased or inappropriate manner. In addition, Mr Brenton rejected the suggestion that Mrs O'Neill had not been impartial in hearing the grievance because she had previously been involved as Mr Green's Area

Manager. He concluded that there was no reason to suggest that Mrs O'Neill would consider it to be inappropriate to overturn any decision made by Mr Green if she felt it appropriate to do so as Mr Green's line manager. Mrs O'Neill also checked with the respondent's legal department before doing so, and had agreed to act in an impartial manner.

39. Mr Brenton also investigated the claimant's concerns that her complaint and then her grievance were not dealt with in a timely manner. He had discussed with the claimant Mrs O'Neill's decision to arrange to pay the claimant up to her original proposed departure date of 28 July 2018 as a gesture of goodwill to recognise that matters might have been concluded in a more timely fashion. The claimant queried whether the correct amounts had been paid. Mr Brenton checked with the respondent's Payroll Manager that this was the case.
40. Overall Mr Brenton concluded that the respondent had dealt with the situation reasonably and responsibly and did not consider it appropriate to pay the claimant any further financial compensation as requested. He also determined to dismiss her appeal against the grievance decision, and confirmed his decision by letter dated 24 September 2018.
41. The claimant then commenced the Early Conciliation process with ACAS and issued these proceedings on 19 October 2018.
42. Having established the above facts, we now apply the law.
43. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if she terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct.
44. If the claimant's resignation can be construed to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
45. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination. The protected characteristic relied upon is race, as set out in sections 4 and 9 of the EqA.
46. As for the claim for direct discrimination, under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
47. We have considered the cases of: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL; Igen Ltd and Ors v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Hewage v Grampian Health Board [2012] IRLR 870 SC; Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Courtaulds Northern Spinning Ltd v Sibson [1987] ICR 329; Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131; Claridge v Daler Rowney [2008] IRLR 672; Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA; Lewis v Motorworld Garages Ltd [1985] IRLR 465; Nottingham County Council v Meikle [2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; and Wright v North Ayrshire Council [2014] IRLR 4 EAT; Leeds Dental Team v Rose [2014] IRLR 8 EAT; Hilton v Shiner Ltd - Builders Merchants [2001] IRLR 727 EAT; Moores v Bude-Stratton Council EAT/313/99 and Yorke and Yorke v Moonlight UKEATS/0025/06/MT.

48. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").
49. In a case management order dated 8 July 2009 it was confirmed that the claimant brings two claims, namely direct discrimination on the grounds of her race, and unfair constructive dismissal. We deal with each of these in turn.
50. Direct Race Discrimination: The claimant had originally complained that she was subjected to less favourable treatment by the respondent on the grounds of her race, namely that her complaint was dealt with less seriously by the respondent than that of the different complaint raised by Tracy Bailey who is white. In particular she asserts that when Tracy Bailey raised her complaint against the customer, that customer was suspended from 6 February 2018 to 18 February 2018, whereas when the claimant raised her complaint, that customer was not suspended.
51. During the course of this hearing the claimant conceded under cross examination that none of the respondent's managers who were involved in this matter (namely Mr Green, Mrs O'Neill and Mr Brenton) had subjected her to any less favourable treatment on the grounds of her race. Put another way, she conceded that none of the treatment she received was meted out because she was Black, in circumstances where the same treatment was not or would not have been applied to someone of a different racial group, for instance a White person.
52. With regard to a claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of her race than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the claimant. Although the claimant was not formally withdrawn, there was no evidential basis put forward for suggesting any less favourable treatment was suffered because of the claimant's race.
53. In this case, we find that no facts have been established upon which the tribunal could conclude (in the absence of an adequate explanation from the respondent), that an act of discrimination has occurred. In these circumstances the claimant's claim of direct discrimination fails, and is hereby dismissed.
54. Unfair Constructive Dismissal: The claimant relies upon a fundamental breach of the implied term that an employer will not act in a way which is calculated or likely to destroy or seriously damage the trust and confidence between employer and employee. The allegations which are said to amount to such a breach relate to the handling of the claimant's grievance complaint. More specifically, the claimant complains first that the relevant manager did not act appropriately in response to her grievance because he had a personal relationship with the customer in question, and secondly that her grievance appeal was tainted because the Area Manager Sarah O'Neill had previously been a decision-maker in the process and was not independent of the earlier decision.
55. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

56. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors Maurice Kay LJ endorsed the following legal test at paragraph 20: "… whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."
57. In Courtaulds Northern Spinning Ltd v Sibson it was held that reasonable behaviour on the part of the employer can point evidentially to an absence of significant breach of a fundamental term of the contract. However, if there is such a breach, it is clear from Meikle, Abbey Cars and Wright, that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. In need not be the predominant, principal, major or main cause for the resignation.
58. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment 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: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence". 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".
59. This has been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied; (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) It is open to the employer to show that such dismissal was for a potentially fair reason; (iv) If he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair."
60. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney [2008] IRLR 672); and that if an employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (Lewis v Motorworld Garages Ltd [1985] IRLR 465). In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA).
61. The judgment of Dyson LJ in Omilaju has recently been endorsed by Underhill LJ in Kaur v Leeds Teaching Hospital NHS Trust. Having reviewed the case law on the "last straw" doctrine, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation by the employee.

62. In addition, it is clear from Leeds Dental Team v Rose that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed, and does not turn on the subjective view of the employee. In addition, it is also clear from Hilton v Shiner Ltd - Builders Merchants that even where there is conduct which objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties, if there is reasonable and proper cause for the same then there is no fundamental breach of contract.
63. More specifically for this case, we have been referred to Yorke v Moonlight in which the EAT (Scotland) per Lady Smith noted at paragraph 19: "If, for instance, an employer were to fail without reasonable and proper cause, to take reasonable steps to control the behaviour of a third party who repeatedly causes upset and distress in the workplace, we can see that such failure might be seen as being in breach of the implied term of trust and confidence." We were also referred to Moore v Bude-Stratton Town Council in which the EAT held per Lindsay J at paragraph 19: " … whilst, as one would expect, even a single incident of verbal abuse, though not coming from the employer himself or itself, can ground a successful claim for constructive dismissal on the basis of its having been destructive of the mutual obligations of trust and confidence between employer and employee, each incident needs to be examined in the light of its surrounding circumstances. They will include whether the verbal abuse was, so to speak, "authorised" in the sense of coming from some senior person in the employer's organisation and thus seeming to have the authority of the employer behind it and whether a timely retraction or apology was offered by the employer. It will be for the employment tribunal, using its good sense and practical experience of the working environment, to judge, on the facts of each particular case, whether the verbal abuse in question could fairly be regarded as coming from (or as if from) the employer and whether, if an apology or retraction was promptly offered, the employee was being hypersensitive, too thin-skinned or inflexible, in persisting in a view that trust and confidence had been seriously or even irremediably wounded. Where verbal abuse has been persisted in and where the employer, knowing of it or having good reason to suspect it, has taken no steps to curb it, a tribunal is, of course, more likely (and, in the minority view, properly more likely) to treat the verbal abuse as "authorised" in the sense explained above …"
64. Bearing in mind all of the above, our findings with regard to the constructive unfair dismissal claim are as follows.
65. The nature of the claimant's constructive unfair dismissal claim was identified at the case management hearing on 8 July 2019. As noted above, it relies on a breach of the implied term that an employer will not act without reasonable or proper cause in a way which is calculated or likely to seriously damage or destroy the trust and confidence between employer and employee. The allegations which the claimant identified and which was said to amount to such a breach relate to the handing of her grievance complaint, and more specifically that Mr Green did not act appropriately in response to her grievance because he had a personal relationship with the customer in question; and that the grievance appeal was tainted because Mrs O'Neill had previously been a decision-maker in the process and was not therefore independent of the earlier decision. In addition, in the context of the direct discrimination claim, the claimant complained that the customer in question was not suspended, when suspension had been meted out to a different customer who had been abusive to a different manager namely Tracy Bailey.
66. We find that the second allegation (as against Mrs O'Neill), and the alleged lack of independence committed when she heard the claimant's formal grievance, cannot be circumstances which are causative of the claimant's alleged constructive dismissal, simply because it occurred after the claimant had already tendered her resignation.
67. With regard to the failure of the respondent to suspend the customer in question, we are unanimous that in itself a failure to suspend this customer was not an act which can be said to be one which without reasonable proper cause was calculated or likely to destroy or seriously damage trust and confidence between the parties. It is not for the claimant to insist on what customers the respondent should suspend, and the respondent had a reasonable explanation for not suspending the customer in question. This included the fact

that she had been a long serving customer, there been no historical difficulties, the customer apologised immediately, and the respondent had reasonably concluded on the evidence before it that a recurrence of her behaviour was most unlikely. The subjective view of the claimant may well have been that she was not supported because the customer was not suspended, but viewed objectively we are unanimous that that decision in itself was not a fundamental breach of contract as alleged.

68. Although not specifically set out in the case management summary, the claimant has clearly complained about a lack of support following the events in question. Her email of 31 May 2018 confirmed that she did not wish to face the customer in question and that she felt aggrieved at having to be expected to be in her presence, and referred to her emotional well-being. She confirmed this in her email of 9 June 2018 and stated why she was unable to continue to work in the presence of the customer. In her letter of resignation on 15 June 2018 she expressed the reason for her decision to resign as being the lack of support, empathy and compassion regarding her mental state following the racially inspired incident. She alleged that the failure to provide a safe and secure working environment was a fundamental breach of contract.
69. We have discussed this criticism of the respondent's conduct at length. In particular, we have examined the alleged failure of the respondent to reply (either supportively or at all) to the claimant's email of 9 June 2018 as amounting to a fundamental breach of the implied term of trust and confidence. The claimant was clearly distressed at the prospect of having to return to work when the customer might be present, and objected to the decision communicated on the day before (8 June 2018) to the effect that the customer was to receive a warning but would not be barred. There were a number of ways in which the respondent could have dealt with the matter in a supportive way. These range from suspending the customer's membership permanently, or temporarily for six weeks until the claimant's employment was due to end, or temporarily for six weeks on the days when the claimant was due to work (Mondays and Saturdays). The respondent could also have confirmed to the claimant that they understood why she was distressed, and could have paid her to stay at home for the remaining short number of shifts before her employment was due to end. It is not for the tribunal or the claimant to dictate to the respondent which of these should have been adopted, but the point is that there were options open to the respondent to support the claimant more constructively in reply to the circumstances which pertained at that time, namely that the claimant had walked out of work having seen the customer on 2 June 2018, and had expressed further concerns in detail by letter dated 9 June 2018, which confirmed that she felt unable to work in the presence of the customer. The respondent did not reply promptly to the claimant's communication to the effect that she felt exceptionally distressed, and what she perceived to be an infringement of her legal rights. We have considered at length whether this has amounted to a fundamental breach of the implied term of trust and confidence.
70. However, we conclude that there was no fundamental breach of the following reasons. In the first place we agree that the incident in question was a serious incident and it is unsurprising that the claimant found it so offensive. The respondent investigated the matter promptly and challenged the customer in question. The customer apologised and received a warning to the effect that she would be suspended if that conduct were to continue. Between the event in question and Saturday, 2 June 2019, Mr Green and the claimant had had a constructive dialogue and Mr Green had made enquiries of the claimant and put in place a course of action with which the claimant had agreed. This included shortening her shift on Saturday 2 June 2018 and moving her shift to Front of House. The clear understanding between them was that this was to avoid contact between the claimant and the customer. The claimant did see (but did not have to speak to) the customer in question on that shift, but neither Mr Green nor the claimant had expected that to happen which is why it was agreed that the claimant could start at 5 pm. In other words, as at Saturday, 2 June 2018, the respondent had acted responsibly and supportively in seeking to find a resolution, and had done so with the claimant's consent as at that stage.
71. This was superseded by the claimant's email on 3 June 2018, when she informed Mr Green for the first time that the incident in question with the customer involved more offensive

language and was more serious. Mr Green acknowledged that complaint and referred it to his Area Manager because he was due to go on holiday. Despite being away was still able to communicate with the claimant on 8 June 2018, to the effect that the customer would receive a formal warning but would not be barred. On hearing this decision not to suspend the customer, the claimant wrote her email of 9 June 2018 complaining of lack of support, and her distress at the thought of working with the customer. Mr Green did not ignore that letter. He acknowledged it immediately and confirmed that he was sorry that the claimant felt as she did, and agreed to forward that email to the Human Resources Department and said he would be in contact as soon as he could. The claimant agreed in evidence that Mr Green acted appropriately in this respect. As at this stage therefore, we conclude that the respondent had acted responsibly and supportively from the time the claimant first reported her initial complaint.

72. Unfortunately, there was then a delay in the respondent's HR department dealing with that referral. The claimant did not hear in reply between Mr Green's acknowledgement of her letter of 9 June 2018, and her written resignation on 15 June 2018. It is true that by that time she had not received a substantive response to her email of 9 June 2018. Equally, it is true that there were other options open to the claimant. Most notably, the Harassment Policy makes it clear that in cases of third-party harassment appropriate action might include barring a customer (and by implication would not necessarily do so), and that: "If the employee concerned does not feel that the situation has been dealt with adequately by the Company, he/she should make a formal complaint via the Company's Grievance Procedure". The claimant did not raise a formal grievance at that stage, in circumstances where we know that a formal grievance hearing would have been processed, because that is how the respondent chose to deal with the matter even after she had resigned. Even stopping short of a formal grievance, the claimant knew that Mr Green had tried to deal the matter constructively hitherto, and she could have telephoned, texted or emailed him to ask what was happening. At that stage she was on certified sick leave and was not due to work or meet the customer. It was open to her to ask Mr Green, or otherwise chase the respondent, to confirm what was happening in reply to her letter of 9 June 2018. She did not do so chose to resign her employment instead.
73. In these circumstances, and viewing the respondent's actions objectively, we do not accept that there has been any action or any course of conduct by the respondent which can be said to be in fundamental breach of the implied term that an employer will not act without reasonable proper cause in such a way to destroy or seriously damage the trust and confidence between them. In general terms, we find that the respondent was responsible and supportive throughout. The respondent challenged the customer in question, obtained an immediate apology, and genuinely tried to resolve matters with the express agreement of the claimant. The claimant resigned her employment shortly after hearing that the customer would not be barred. She may well have felt subjectively that she was not being fully supported, but the test to be applied as to the respondent's conduct is an objective one. We reject the allegation that the respondent was in fundamental breach of contract.
74. The claimant's resignation cannot be construed to be a dismissal, and in the absence of a dismissal, the claimant's unfair dismissal claim must stand dismissed.
75. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 41; a concise identification of the relevant law is at paragraphs 43 to 63; how that law has been applied to those findings in order to decide the issues is at paragraphs 64 to 74.

_____
Employment Judge N J Roper
Dated: 3 December 2019