Case Number 2202915/2019

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms KD Woodruffe	**v**	**Marks and Spencer plc**

Heard at: Central London Employment Tribunal

On: 2 - 6, 9 & 10 November 2020

Before: Employment Judge Brown

Members: Mrs H Craik
Mr I McLaughlin

Appearances

For the Claimant: Mr M Goldborough, Solicitor
(for first 4 days of hearing; the Claimant appeared in person thereafter)

For the Respondents: Miss K Hosking, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. **The Respondent did not subject the Claimant to direct race discrimination or race harassment.**

2. **The Claimant was not a disabled person at the relevant times.**

3. **The Respondent did not constructively dismiss the Claimant.**

REASONS

Preliminary

4. The Claimant brings complaints of direct race discrimination, race harassment, direct disability discrimination, disability harassment, failure to make reasonable adjustments and discriminatory constructive dismissal.

5. The Claimant relies on being a black woman of Afro-Caribbean ethnic and national origin.

6. The Claimant contends that she was a disabled person at the relevant times by reason of her depression and anxiety.

7. At a preliminary hearing on 10 January 2020, Employment Judge Adkin decided that it would be just and equitable to extend time for the complaints.

8. The List of Issues had been agreed as follows:

Disability

1. Was C a disabled person within the meaning of s.6 of the Equality Act 2010 (EA 2010) at the material time (May-September 2018)?

C says she is disabled by reason of her depression and anxiety.

2. Did R know, or should it have known, that she was disabled?

3. If so, at what times?

Direct race discrimination

4. C relies on a hypothetical comparator.

5.Did R treat C less favourably than the relevant comparator?

The allegations are in paragraphs 5 and 6 of the Grounds of Complaint ('GC'(13)), and paragraphs 4, 7, 12, 15, 16 and 17 of the "further particulars" document ('FP'(42e)) and are set out below. NOTE: The list of issues at 45f-hdoes not include paragraphs 12 or 15 of FP, but it is clear from para 6 of his case management summary that EJ Isaacson had allowed C's application to amend in respect of these paragraphs.

In GC para 5 (14): a) that C's fellow section manager at Ilford, Margaret Troy (referred to by C as "Maggi"),referred to C as "ghetto" because of her accent [also at FP para 7, 42g];

In GC para 6 (14) :b) that a Commercial Manager at the Fenchurch Store, Suzanne Field, was heard to be discussing C's "attitude problem" and stated that C "kissed her teeth on the shop floor";

c) that James Mugford stated he did not like C because of her "long and funky hair".

In FP para 4 (42f): d) that before she started work "Mr John" (the then-Store Manager at Stratford) required C to show her acceptance letter to prove she was offered a job, and that this was because of the way she looked and her race.

In FP para7 (42g): e) that Margaret Troy mocked her accent and stated "This ain't Jamaica".

In FP para 12 (42h) :f) that James Mugford tried to intimidate C from speaking for her rights or raising (alleged) mismanagement at the branch.

In FP para 15 (42i) g) that on her first day at the Fenchurch store she was verbally attacked by Suzanne Field, who was aggressive towards her and told her she was underperforming;

In FP para 16 (42i-j): h) that Suzanne Field mentally harassed her by "questioning me about the daily tasks to the point where she started to make me feel like I had not done them";

In FP para 17 (42j): i) that Suzanne Field told the other managers not to work with her;

j) that Suzanne Field did not respect her staff decisions and discussed them with the sales assistants.

6. If so, was that treatment because of C's race?

Harassment relating to race

7. Did R engage in unwanted conduct related to C's race that had the purpose or effect of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

8. C relies on the treatment set out at 5 (a)-(k) above.

9.Was it reasonable, in all the circumstances, for C to regard the alleged conduct as having that effect?

Direct disability discrimination

10. C relies on a hypothetical comparator.

11.Did R treat C less favourably than the relevant comparator?

C relies on the following allegations of less favourable treatment [see "Disability Discrimination Claim" dated 31 January 2020]:

a) “Due to C’s Depression & Anxiety, Suzanne Field specifically asked C not to work if she could not, and did not follow the recommendations of phased return to work by the GP”

b) As alleged in paragraph 25 of “further particulars”(42l). The allegation is that the investigation started by Suzanne Field should have been suspended until C was fully recovered.

12.If so, was that treatment because of C’s disability?

Failure to make reasonable adjustments

13.C says [see “Disability Discrimination Claim” dated 31 January 2020]:

a) “Suzanne Field failed to comply with her duty to make RAs as C was told she could only have a phased return to work by her GP. This meant that she could not work a full 8 hour day and was to be gradually increased over the weeks. Suzanne Field failed to acknowledge the sick note recommendation and stated to C that she should not work [if] she could not do it properly.”

b) As alleged in paragraph 25 of “further particulars” (42l). The allegation is that the investigation started by Suzanne Field should have been suspended until C was fully recovered.

14.Did R apply a provision, criterion or practice to C by doing any of the following:

14a) requiring employees to work 8 hour shifts as normal hours (not allowing C to return from sick leave on a graduated basis from 10 August 2018, as set out by the GP in a fit note)

14b) continuing investigations in respect of employees when they return to work (continuing the investigation of C when she had not yet fully recovered following her sickness absence)

15. Do the above constitute valid PCPs for the purposes of ss.20/21 of the Equality Act 2010?

16. If so, did any such PCP put C at a substantial disadvantage in comparison with persons who are not disabled?

17.If so, did R fail to take such steps as it was reasonable to have to take to avoid the disadvantage?

Harassment relating to disability

18. Did R engage in unwanted conduct related to C’s disability that had the purpose or effect of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for C by:

a) persisting with the investigation of C when she had not yet fully recovered following her sickness absence [see para 25 of “further particulars”]

19. Was it reasonable, in all the circumstances, for C to regard the alleged conduct as having that effect?

Discriminatory constructive dismissal

20. Did C resign as a result of race and/or disability discrimination?

4. The Claimant confirmed that she was not bringing claims of discrimination arising from disability or victimisation.

5. Tribunal heard evidence from the Claimant. The Tribunal also heard evidence from Gisele Lolonga, a former Commercial Manager at the Respondent's Ilford store and the Claimant's line manager there. Ms Lolonga gave evidence by videolink.

6. The Tribunal also heard evidence from Margaret Troy, a former Section Manager at the Respondent's Stratford store; James Mugford, former Store Manager at the Respondent's Ilford store; Suzanne Field, former Commercial Manager at the Respondent's Fenchurch Street store and the Claimant's line manager there; Gary Ridgeon, Chelmsford Store Manager and grievance investigator; Jacinta Sholay, Section Manager, Foods, at the Fenchurch Street store; and Clare Lawrence, former Section Manager at the Fenchurch Street store. Margaret Troy gave her evidence by videolink.

7. There was a volume Bundle of documents. The Claimant produced her training guide, workbook and a rota during the hearing. The Respondent did not object to these documents being admitted.

8. The Claimant's solicitor, Mr Goldborough, did not represent the Claimant after 5 November 2020, the fourth day of the hearing. On Friday 6 November 2020 the Claimant confirmed to the Tribunal that she would represent herself. The parties agreed that the case should be adjourned until Tuesday 10 November 2020 to allow the Claimant to prepare her cross examination of the Respondent's remaining witnesses and her closing submissions.

9. The Tribunal made various case management decisions during the hearing, for which it gave oral reasons at the time. Both parties made submissions. The Tribunal reserved its judgment.

Findings of Fact

10. The Claimant started work for the Respondent as a Section Manager in August 2017, at its Stratford store.

11. The Claimant had worked in the retail sector for many years previously and had considerable management experience before her employment by Marks & Spencer.

12. The Claimant told the Tribunal that, on the first day of her employment at Stratford, the manager there, Mr John, had asked to see the Claimant's letter of appointment before accepting that she was an employee. The Claimant told the Tribunal that she believed that this was because of her race. She said that,

at the time, she had blue hair and very long blue nails and she believed that Mr John thought that she could not be working for Marks and Spencer; he would not tell her anything about the job until she showed him her letter of appointment. The Claimant complained to Amber Harris, a recruitment manager, about Mr John's treatment of her on that day.

13. The Claimant was asked, in evidence, whether the fact that she had blue hair and blue nails was because of race. The Claimant replied, "No, that's just a look."

14. In her written submissions, the Claimant drew the Tribunal's attention to the US California Senate Bill No 188 "The Crown Act" which states that policies banning natural hairstyles "including afros, braids, twists and locks" have a disparate impact on black people. She contended that hair can be a proxy for race.

15. While the Tribunal accepted that hair can be a proxy for race, this was the first time that the Claimant had put her case in this way. She had told the Tribunal in evidence that she believed that John objected to the way she looked specifically because she had hair typically associated with black people. She had not even said that she had braids (as opposed to dyed blue hair).

16. It was not put to any of the Respondent's witnesses that the Claimant had braids, or hair which was typically associated with black people.

17. After the Claimant's arrival at the Stratford store, Mr John undertook the Claimant's induction and there were no further issues between them.

18. It was not in dispute that the Respondent's Stratford store was a very large store, with hundreds of employees. The Claimant undertook Section Manager training at Stratford and was "signed off" as a Section Manager there.

19. The Claimant produced her "Workbook" and Training Guide for Section Managers to the Tribunal. According to the Guide, training consists of 70% learning on the job through work experience from a Buddy ", 20% feedback and review of progress with the line manager and 10% attending a workshop and e-learning with a learning and development specialist, page 8 of the Guide.

20. The Guide also states that the Section Manager's training lasts 16 weeks, 10 of which are non-operational, page 12 of the Guide.

21. The Claimant told the Tribunal that she was assigned an "operational" role immediately.

22. The Claimant's workbook recorded that the Claimant had completed the vast majority of the technical skills required for a Section Manager. It also recorded that, on 14 November 2017, the Claimant had been signed off as having demonstrated the required behavioural and technical skills to be a successful Section Manager. The manager who signed her off as having completed her training was called Carol.

23. The Respondent's electronic training course record showed that the Claimant undertook the following courses on the following dates: induction course on 13 September 2017, People and Policies on 31 January 2018, Duty Manage with Confidence on 6 March 2018.

24. The Claimant worked in the Respondent's Stratford store from August 2017 until November 2017.

25. Margaret Troy also worked as a Section Manager in the Stratford store at that time. Ms Troy had worked for the Respondent for many years and had gained promotion to the Section Manager role. She was therefore very familiar with the Respondent's processes.

26. The Claimant told the Tribunal that Ms Troy called her 'Ghetto' and 'Jamaican' on numerous occasions. The Claimant said that she believed that this was because she is black and that, therefore, these comments felt racially discriminatory. She said that she did not complain at the time as she did not want to exacerbate matters and just wanted to be able to do her job.

27. In evidence at the Tribunal, the Claimant said that Ms Troy would sometimes say these things on the shop floor and sometimes in the stock room, when everyone was laughing and joking around.

28. The Claimant was asked if she could remember any particular time when this had occurred.

29. The Claimant said that, on one occasion, a customer had brought children's clothes back to the store, but the Claimant had declined to accept them because they smelt of food and therefore were not in the condition in which they had been sold – and the Claimant had told the customer that they were free to make a complaint. The Claimant said that Ms Troy had commented, somewhat admiringly, on the Claimant's stance, "You are so ghetto".

30. On another occasion, the Claimant said that she had shouted loudly across the shopfloor to a colleague who had come out of the lift, and whom the Claimant had not seen in some time, "Wagwan babes". The Claimant said that Ms Troy had shushed the Claimant and said, "This ain't Jamaica." The Claimant explained that "Wagwan" is a term of greeting from the Caribbean, particularly from Jamaica. She said that Ms Troy was joking when she said these words.

31. The Claimant said that Ms Troy worked with lots of black people, that half the team at the Stratford store were black.

32. Ms Troy told the Tribunal that she could see that the Claimant, who was new to the role, was struggling with her role and Ms Troy told the Claimant that Ms Troy would support her in any way she needed. The Claimant did not challenge Ms Troy's evidence on this.

33. It appeared from both the Claimant's and Ms Troy's evidence that the Claimant and Ms Troy had a good working relationship in general.

34. Ms Troy denied calling the Claimant “ghetto”, or mocking her accent, or saying “This ain’t Jamaica”. She said that the allegations had never been raised with her and that she had never spoken this way to anybody in her life and that she found the allegations deeply hurtful and untrue. Ms Troy said that she did not know what “Wagwan” means.

35. The Tribunal found Ms Troy to be credible. She gave her evidence in a straightforward way and appeared to have a good recollection of the Claimant and her interactions. The Tribunal believed Ms Troy when she said that she did not know what “Wagwan” meant.

36. While the Claimant’s account had the ring of truth, the Tribunal did not find her account more credible than Ms Troy’s. The Tribunal did not find that the Claimant had discharged the burden of proof to show that Ms Troy used these words. What the Claimant described was joking and laughing amongst a racially diverse workforce both on the shopfloor and in the stockroom. It may be that the Claimant has misattributed the comments to Ms Troy.

37. The Claimant transferred to the Respondent’s Ilford branch in November 2017, following her successful sign off as a Section Manager by the Stratford branch.

38. She told the Tribunal that she felt racially discriminated against and harassed by James Mugford, the Store Manager there. In her witness statement she said that Mr Mugford criticised her ‘West Indies Caribbean accent’. She also said a colleague had told her that Mr Mugford did not like her ‘long and funky hair’; the colleague had reported that Mr Mugford had said, “Wait until you see our new Section Manager with her hair” and had made a disapproving face. Ms Lolonga corroborated the statement that Mr Mugford had said, “Wait until you see our new Section Manager with her blue hair and long nails...” and made a disapproving face.

39. In evidence at the Tribunal, the Claimant was asked to describe how Mr Mugford had criticised her accent. She said that a group of staff were in a huddle with Mr Mugford and the Claimant made a couple of comments and everyone had laughed. Mr Mugford said, “I hope you are joking”; later her had told her, “There is a way to conduct yourself on the shop floor.”

40. It was put to the Claimant during her evidence that this exchange was not about the Claimant’s accent. The Claimant did not disagree.

41. In the Claimant’s grievance hearing later, with Gary Ridgeon on 14 May 2018, the Claimant was asked if she could give examples of Mr Mugford’s racism towards her, pp 283 – 284. The Claimant said that she was treated like she was trouble and had attitude when she arrived in Fenchurch Street, she implied that this must have come from Mr Mugford.

42. Mr Mugford denied having ever criticised the Claimant’s accent or her hair.

43. It was not put to the Mr Mugford in cross examination that the Claimant’s hairstyle was a typical of a black woman’s hair, or that he had objected to the Claimant wearing braids.

44. The Tribunal considered that the Claimant's evidence about Mr Mugford's comments about her accent were very vague. The example she gave about her accent was nothing to do with her accent. The Claimant said elsewhere in her evidence that her blue hair was nothing to do with her race.

45. On the balance of probabilities, the Tribunal did not find that Mr Mugford criticised the Claimant's accent.

46. The Tribunal accepted the Claimant and Ms Lolonga's evidence that Mr Mugford said, "Wait until you see our new section manager with her blue hair and long nails..." and made a disapproving face.

47. The Claimant told the Tribunal that she believed that she had been targeted and harassed by Mr Mugford because she is black and that her line manager, Gisele Lolonga, had said that she believed this too.

48. Ms. Lolonga told the Tribunal that she had brought a grievance against Mr Mugford herself. She confirmed that she believed that Mr Mugford had treated the Claimant differently because she was black.

49. The Claimant also told the Tribunal that James Mugford was dismissive of her contributions to team meetings and that he tried to intimidate the Claimant from speaking about company policies and mismanagement.

50. It was not in dispute that the Claimant had disagreed with Mr Mugford about how to conduct Return To Work meetings, p298. Mr Mugford had told her that she needed to have a sanction in mind when conducting these, but the Claimant had believed that a sanction would not be appropriate when a person had been genuinely sick.

51. Mr Mugford told the Tribunal that the Respondent's policy on absence was clear, that sanctions for absence were concerned with unacceptable level of attendance, not misconduct. There is a trigger period for absence which triggers a sanction. Mr Mugford said that the Ilford store had a high level of absence in store, which was causing operational difficulties. He said that there had been a general discussion with managers about how to manage absence and that the policy had not been imposed on the Claimant, but was being applied consistently across the store. Mr Mugford was trying to set a benchmark for all managers, based on policy.

52. The Claimant and Mr Mugford also disagreed about whether managers were required to swipe "in" and "out" when they attended work. The Claimant contended it was a health and safety issue. Mr Mugford said that managers were not paid by the hour and were not required to swipe in and out; he trusted managers to be honest about the hours they worked.

53. The Claimant gave evidence that she had told Mr Mugford that she wished to raise a grievance against the top team of managers about policies not being followed and that Mr Mugford had told her she did not want to take M&S on. The Claimant told the Tribunal that she had then been moved to the Respondent's Fenchurch Street branch.

54. Gisele Lolonga told the Tribunal that she had been present in a meeting with the Claimant and Mr Mugford when the Claimant had said that she was not happy because she had not finished training and was being moved again to a different store. The Claimant had also said that she wanted to complain about disrespect from managers. Ms Lolonga told the Tribunal that Mr Mugford remarked that a grievance would fall on Ms Lolonga and the Claimant's previous manager in Stratford, Carol.

55. Mr Mugford was cross examined about whether he considered the Claimant had "attitude" – it was put to him that this had racist connotations when used of a black person.

56. Mr Mugford told the Tribunal that he believed that the Claimant did have a negative attitude to feedback. He said that he believed that it was good to give honest feedback, to support staff to improve. However, he found those conversations with the Claimant challenging as she did not take the feedback as constructive. Mr Mugford said that he perceived that the Claimant had a negative attitude to her role, training and the business, partly because of a gap between her expectations of the Respondent as a business and the Respondent's expectation of her.

57. The Claimant said that she believed Mr Mugford moved her to the Fenchurch branch to fail. The Claimant said that she could not have underperformed when she had not been trained adequately.

58. Mr Mugford told the Tribunal that he wanted to the Claimant to move from his store because he believed that she was underperforming. He believed that she should not have been signed off as a Section Manager, but he also considered that she had been given additional training by her manager at Ilford, Gisele Lolonga, and that she therefore ought to have been capable of performing as a Section Manager.

59. The Respondent accepted at the Tribunal, however, that the Claimant had not undergone all the training for the Section Manager position, as demonstrated by gaps in her workbook. Ms Lolonga agreed that the Claimant's performance issues were due to lack of training. Giselle Lolonga was interviewed by Gary Ridgeon during the grievance process on 23 May 2018. Mr. Ridgeon asked Ms. Lolonga about what the Claimant had been told about her move to Fenchurch Street: 'During the meeting, was it made clear to Katherine that she was under performing?' to which Ms. Lolonga replied, 'no it was not a question of underperforming, it was an apology for not training her properly...'.

60. Nevertheless, Mr Mugford telephoned Angela Barker, store manager at the Fenchurch Street store. Angela Barker later told Mr Ridgeon's grievance investigation what Mr Mugford had said to her, page 304. Mr Mugford had told her that the Claimant had been signed off as a Section Manager at Stratford and sent to him, but that he believed that the Claimant should never have been signed off and that he was not going to keep her in Ilford branch.

61. Ms Barker told Mr Ridgeon that she had then spoken to her own Human Resources Business Partner and had agreed to take the Claimant and "manage

her up or out of the business". However, Ms Barker also said that she had spoken to Stratford who said that the Claimant was fine, but just needed technical skills, page 305.

62. Ms Barker also told Mr Ridgeon that, on the first day the Claimant came to Fenchurch Street, Ms Barker had been "very honest" with her and had told the Claimant that she had been sent to Fenchurch Street because Ilford had felt she was not where she needed to be. Ms Barker had told the Claimant that someone would go through the Section Manager pack with her. Ms Barker told Mr Ridgeon that when someone had then taken the Claimant through the Section manager pack, the Claimant had said that no one had told her before that she was underperforming, p305.

63. Ms Lolonga sent emails to the Fenchurch Street branch about the Claimant's development needs on 5 February 2018 and 10 February 2018. On 5 February 2018 she set out areas which she had told the Claimant she would need to focus on for her development. In the 10 February email, Ms Lolonga said that she had spoken to the Claimant on 29 January regarding her transfer to Fenchurch Street and had told her that she had not been given the training required and the best way to address this was to go to Fenchurch street to be given the right support and training and the Claimant should view this is a fresh start. Ms Lolonga said, "We discussed the areas [the Claimant] will need to up her performance which were all very technical..".

64. The Claimant told the Tribunal that, on her first day at the Fenchurch Street store, she was verbally attacked by the store manager and Suzanne Field, the Commercial manager. She said that both were aggressive and said that she was "underperforming" and told the Claimant to "shape up or get out". The Claimant also said that she had met Ms Field during the second meeting that day and Ms Field had been so aggressive that the Claimant had started to cry.

65. In the Claimant's grievance meeting with Mr Ridgeon on 14 May 2018, the Claimant told him, "Angela [Barker] told me I was underperforming. ..I respect her for telling me." Page 282. The Claimant also said that Ms Field didn't want to hear about the past and "felt aggressive", p270.

66. Nevertheless, when Mr Ridgeon asked her how things were "now", the Claimant replied, "it's amazing at Fenchurch Street. I'm doing well. 1st week I was on edge. I was so scared they didn't see what I was about… If Angela and Suzanne hadn't been straightforward I wouldn't be in this job.", pages 276 – 277.

67. Both Jacinta Sholay and Clare Lawrence, Section Managers at Fenchurch Street told the Tribunal that Angela Barker and Ms Field were very direct in their communication style, but fair.

68. In Ms Field's evidence to the Tribunal, she described her meeting with the Claimant on the first day. She agreed that the Claimant had become tearful and said the Claimant was saying she hadn't got the training and got very frustrated. Ms Field told the Tribunal that she had reassured the Claimant that Ms Field had 30 years experience and would be able to train the Claimant. She told the

Tribunal that Ms Barker and she had invited the Claimant about her past managerial experience and there was nothing aggressive or attacking in that.

69. The Tribunal questioned Ms Field at some length about this meeting. Ms Field said that she had gone through the areas which Ms Lolonga had identified the Claimant would need to work on and Ms Field gave the Claimant the opportunity to discuss her experience and what she had learnt. Ms Field was adamant that she had not told the Claimant she was underperforming.

70. The Tribunal concluded, on all the evidence, that Mr Mugford had told Ms Barker, in terms, that the Claimant had been underperforming. Ms Lolonga had said, in emails to the Fenchurch Street store, that there were areas where the Claimant needed development, that the Claimant had not been given all the training she required, but that she had also told the Claimant that she would need to improve her performance in certain technical areas.

71. Ms Barker had an initial meeting with the Claimant on her first day at Fenchurch Street and told her that she had not been performing adequately as a Section Manager.

72. Ms Field and Ms Barker met with the Claimant later that day and went through with her the areas in which she needed further training and in which her performance would accordingly need to improve.

73. The Claimant was very upset to by this and believed that her performance was being criticised for the first time.

74. Having questioned Ms Field at some length about this meeting, the Tribunal was satisfied that Ms Barker and Ms Field were not aggressive towards the Claimant in their approach to her. The Tribunal decided the Claimant simply felt that she was “under attack” because she felt that her performance was being examined and criticised for the first time. During her grievance, she acknowledged that Ms Barker and Ms Field had, in fact, been straightforward with her.

75. In April 2018 the Claimant brought a grievance against the Ilford store manager, James Mugford, alleging that he had made to feel she didn’t fit in because of her race and appearance, and that he had tried to have her performance-managed out of the business. Her grievance was investigated by Gary Ridgeon, the Chelmsford store manager.

76. Mr Ridgeon did not uphold the Claimant’s complaints about James Mugford. However, he did find that the reasons for her transfer to Fenchurch Street (and, in particular, her underperformance) had not been properly explained to her by her line manager, and that this had made her feel she had not been treated fairly.

77. The Claimant told the Tribunal that Ms Field had been heard to be discussing the Claimant’s “attitude problem” and had stated that the Claimant “kissed her teeth on the shop floor”.

78. The Claimant was cross examined about Ms Field saying that she had an attitude problem; it was put to her that she had given no details about when this had occurred. It was also put to the Claimant that she was confusing Ms Field's comment about another employee, Michelle. The Claimant replied that there was more than one conversation. She said "It was loads of little things she did. I was unable to speak."

79. Ms Field denied ever having said that the Claimant had an "attitude".

80. The allegation was so vague that the Tribunal was unable to make any findings about whether, when, and in what circumstances Ms Field might have discussed the Claimant having an attitude problem.

81. The Claimant said that Ms Field had accused her of kissing her teeth. She agreed that "kissing teeth" would not be appropriate on the shop floor.

82. Ms Field told the Tribunal that another member of staff called Catherine, who is also black, complained to Ms Field that the Claimant had kissed her teeth. Ms Field told the Tribunal that she could not ignore the complaint and asked the Claimant about it. She said that the Claimant had denied having done so. Ms Field said that that was the end of the matter.

83. The Tribunal accepted Ms Field's evidence on this, she remembered the incident and explained the context.

84. The Claimant complained that Ms Field would pick up the Claimant and micromanage her - she compared her treatment with that of other Section Managers.

85. Ms Field agreed that she would walk round the Claimant's section with her and ask her to explain things, because she needed to know what were the best sellers and how to sell more of other items. Ms Field said that she showed the Claimant how to use all the tools and reports to help her analyse sales, and did so on a number of occasions, which she expected to have to do because employees did not necessarily pick it up first time. Ms Field explained that the other Section Managers were already proficient.

86. Jacinta Sholay, Section Manager at Fenchurch Street, told the Tribunal that every day Ms Field would give Section Managers directions for what they needed to get done that day.

87. The Claimant complained Ms Field had not allowed staff to help the Claimant when she needed it. Denise Roddick, the section co-ordinator for menswear told the Claimant that other managers were told not to work with the Claimant by Suzanne Fields. The Claimant said that this had happened in relation to a change in the layout of the store, in about March 2018, which the Claimant had never done by herself before. The Claimant said that Ms Roddick had told her that Ms Field had commented that she wanted to see if the Claimant failed.

88. Ms Field told the Tribunal that she had never told a manager not to work with the Claimant. She said that she had allocated relevant people to work with the

Claimant, including Denise, who was very competent, and Kerrie, section coordinator, who Ms Field considered very strong.

89. Jacinta Sholay, another Section manager at Fenchurch Street, told the Tribunal that Ms Field never told her not to work with the Claimant. She told the Tribunal that she had helped the Claimant after a move which the Claimant had undertaken had not gone well. She also said that the Claimant worked very closely with Henry, another Section Manager, who gave the Claimant a lot of support.

90. Ms Field said that Henry, the menswear Section Manager, had raised with Ms Field that the Claimant had copied his critical path and overlayed womenswear onto menswear. Ms Field would ask all her managers to prepare critical paths and wanted them all to undertake this work individually, so that they could discuss how to do it correctly. She wanted to see the Claimant's own work in this regard.

91. Jacinta Sholay gave evidence about these critical paths. She said, "Suzanne was very big on critical paths – they showed how you are going to do things – if she asked for it and if you didn't do it, she would ask why you hadn't done it." Ms Sholay said that she had not seen Ms Field being more critical of the Claimant. Ms Field was "very big on feedback and on what can you do better".

92. The Claimant also said that Ms Field did not respect her decisions and management, as Ms Field discussed, with the operational sales assistants, the Claimant's staff allocations. She said that this was highly inappropriate as they were subordinate to the Claimant.

93. The Claimant explained that "A & A ladies" had complained to Ms Field about the Claimant's decision to move staff from the men's suits section into another area, to rationalise the different hours which people were working. The Claimant said that Ms Field had tacitly supported the A&A ladies' complaint and had questioned the Claimant's decision in the stockroom with these ladies present, so that the Claimant felt undermined in front of them. The Claimant explained to the Tribunal that the Respondent was moving to "labour scheduling", where all staff would be expected to be deployed in every area of the store, so what the Claimant had done was in accordance with the Respondent's new practices.

94. Ms Field told the Tribunal that men's suiting made a lot of money for the Fenchurch Street store and that the relevant staff were very experienced in that area. She said that she would have expected the Claimant to look elsewhere first, before moving these members of staff. Ms Field said that it was a matter of making money. She said that she could overrule her section manager's decisions, but would only do so having had a discussion about it.

95. Ms Sholay agreed, in evidence, that the staff who normally worked on men's suits were particularly experienced in that area, including in taking measurements. She said that they would, however, have been deployed to tills and other areas at busy times.

96. In June 2018 the Claimant's manager, Suzanne Field, prepared an Informal Performance Improvement Notice (IPIN) for the Claimant, page 148. As the name suggested, this was an "informal" performance management process, setting out expectations for improvement in performance.

97. It was not in dispute that the Claimant breached the confidence of a Section Managers' meeting and told a more junior employee, who had been discussed in that meeting, what had been said about them. Jacinta Sholay, who is a black woman and Section Manager, had identified one of her reports as a very high performer, but said that the employee needed to work on hiding her emotions and frustrations. There had been a general discussion about this.

98. The Claimant had reported some of the discussion to the employee, who then approached Jacinta Sholeh and said they were very upset about the negative comments which had been made about them.

99. A misconduct investigation was commenced into the Claimant's actions and the Claimant was interviewed about the matter on 28 June 2018. The Claimant was asked whether she had told the employee that Suzanne Field had said that the employee had attitude. The Claimant agreed that she had told the employee this. She then clarified that it was Ms Sholay who had raised the issue, page 156.

100. The Claimant was absent because of sickness from 3 July 2018 to 7 August 2018. Her sick notes for that period stated that she was depressed, pp 226 - 228.

101. The Claimant had had had an episode of depression in 2014 associated with a traumatic event in her personal life, which had not recurred before she started work at the Respondent. In her Disability Impact Statement, the Claimant told the Tribunal that she disclosed her medical conditions of Bell's Palsy and Asthma to the Respondent when she started work, but not the depressive episode because it was not a recurring condition at that time, p178.

102. The Claimant told the Tribunal that she was diagnosed with depression on 21 May 2018, and that she informed Suzanne Field about this.

103. However, her GP records show that the diagnosis in May 2018 was stress at work, p189.

104. The Respondent accepted that the Claimant told her store manager, Angela Barker, that she had visited her GP because her face had "frozen" and the GP had given her medication and diagnosed stress at work, p306.

105. On the evidence, the ET concluded that the Claimant was diagnosed as suffering from "stress at work" on 21 May 2018 and told the Respondent this.

106. She was diagnosed with depression from 3 July 2018 and the Respondent was notified of this by the GP sick notes at the time, pp 226 - 228.

107. The Claimant attended an absence review with Ms Field on 18 July 2018, p162.

108. In that meeting, the Claimant attributed her depression to experiences at the Ilford store. She said that she was starting treatment by therapy on 6 August 2018, p163. She also said that she was taking medication for the nerve damage to her face, page 164.

109. At the end of the meeting, Ms Field said, "Can I just remind you that when you return to the store that you are still under investigation pending a hearing for misconduct and that your [IPIN] will resume once you are back to work." The Claimant replied, "I understand, my performance had dipped so can understand why I'm on the [IPIN] and the investigation is right because I should not have done that." p165.

110. In evidence at the Tribunal, the Claimant had not asked for the investigation or the IPIN to be delayed.

111. The Claimant's Fit Note dated 6 August 2020 recommended a phased return from 8 August, working four hours per day for two weeks, then six hours per day for a further two weeks, then a review, p 228.

112. A return to work meeting was conducted on 10 August 2018. The notes of the meeting recorded that the Claimant would work one week on reduced hours, and then have two weeks' pre-arranged annual leave, and would thereafter return to work on short hours on 28 August 2018, when the hours would be reviewed, p167.

113. The Claimant told the Tribunal that, in her return to work meeting in the first week of her return in August, Ms Field had tried to pressurise her into increasing her hours and had refused to accept her Fit Note. The Claimant said that she had therefore gone back to her GP to obtain another Fit Note and the GP had told the Claimant that it was a legal document, which Ms Field would have to accept. The Claimant said that she had gone back to Ms Field with the Fit Note and Ms Field had snatched it out of her hand. She said she had 2 meetings with Ms Field in the first week of her return.

114. The Claimant was asked about the chronology. She was very unclear about this. Initially, she said that there were 2 Fit Notes written in early August. When she was taken to the Fit Notes, one authorising a return to work on 8 August and one written more than two weeks later, on 24 August, she said that she could not remember.

115. The Claimant then said her 2 meetings in early August were, first with Angela Barker and, second, with Ms Field.

116. The Claimant's GP notes only showed visits to the GP on 6 August 2018 and on 24 August 2018. This did not support her account of returning to the GP during the first week of work when Ms Field had allegedly wanted to increase the Claimant's hours of work.

117. The Claimant agreed that she was allowed to work 4 hours a week on the first week of her return and reduced hours when she was due to return after

holiday on 28 August 2020. On all the days she worked in August 2018, she was permitted to work reduced hours as recommended by her GP.

118. The Claimant's second Fit Note was dated 24 August 2018. This stated that the Claimant had depression and recommended that the Claimant should work four hours per week between the hours 9am-5pm until the end of September, p229.

119. The Fit Note did not suggest that the IPIN performance management process, or the disciplinary investigation, should be delayed until the Claimant returned to work full time.

120. Ms Field was cross examined about whether she should, nevertheless, have postpone the Claimant's disciplinary investigation process and IPIN performance management process until the Claimant was back to work full time.

121. Ms Field said that the Claimant had previously been signed off work for "stress at work" and the Respondent's People Specialists advised that it would be best for the Respondent to complete the investigation, to clear the stress. Ms Field said that she was not conducting the investigation herself, but that she understood that, as soon as the misconduct matter was concluded, the Claimant's stress would be alleviated.

122. The Claimant told the Tribunal that, during her holiday in August 2018 she had discussed matters with her family and decide to resign. She said that the reason she had done this was because the Respondent was going to push ahead with the IPIN performance management process and the disciplinary investigation, despite the Claimant being ill.

123. The Claimant resigned on 28 August 2018 and her employment ended on 2 September 2018.

124. The Claimant presented her claim to the Tribunal on 2 August 2019.

Relevant Law

Disability

125. By *s6 Equality Act 2010*, a person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities.

126. The burden of proof is on the Claimant to show that he or she satisfies this definition.

127. *Sch 1 para 12 EqA 2010* provides that, in determining whether a person has a disability, an adjudicating body (which includes an Employment Tribunal) must take into account such Guidance as it thinks is relevant. The relevant Guidance to be taken into account in this case is Guidance on Matters to be taken into Account in Determining Questions Relating to the Definition of Disability (2011).

128. The effect of an impairment is long term if, inter alia, it has lasted for at least 12 months, or at the relevant time, is likely to last for at least 12 months.

129. Where an impairment ceases to have an effect but that effect is likely to recur, it is to be treated as continuing, *Sch 1 para 2, EqA 2010.* "Likely" again means, "could well happen".

130. In assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time of the alleged discrimination. Both the likelihood of recurrence and the likelihood of an impairment lasting at least 12 months are to be judged on the basis of what was known at the time of the alleged discrimination. Anything occurring after that time is not relevant in assessing likelihood, Guidance para C4 and *Richmond Adult Community College v McDougall* [2008] ICR 431, CA.

131. In *J v DLA Piper UK* [2010] IRLR 936 Underhill P considered the difference between a reaction to adverse circumstances at work (which does not amount to a disability) and a 'mental illness' or 'mental condition' which is sufficient to amount to a disability. He commented that the difficulty in distinguishing between the two can be exacerbated by the "looseness with which some medical professionals and most lay people, use such terms as 'depression' ('clinical' or otherwise), 'anxiety' and 'stress'". Underhill P said, "Fortunately, however, we would not expect those difficulties often to create a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at paragraphs 40(2) above, a Tribunal starts by considering the adverse effect issue and finds that the Claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for twelve months or more, it would in most cases be likely to conclude that he or she was indeed suffering 'clinical depression' rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long lived", at para [42] of the judgment.

Discrimination

132. By *s39(2)(c)&(d) Equality Act 2010*, an employer must not discriminate against an employee by dismissing him or subjecting him to a detriment.

133. By *s39(7) EqA 2010,* "dismissing" an employee includes constructively dismissing the employee.

Direct Discrimination.

134. Direct discrimination is defined in *s13(1) EqA 2010:*

"(1) 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."

135. Race and disability are protected characteristics, *s4 EqA 2010.*

136. In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," *s23 Eq A 2010.*

Causation

137. The test for causation in the discrimination legislation is a narrow one. The ET must establish whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?." Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified, para [77].

138. If the Tribunal is satisfied that the protected characteristic is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence, *per* Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. "Significant" means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

Detriment

139. In order for a disadvantage to qualify as a "detriment", it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment". However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, *Shamoon v Chief Constable of RUC [2003] UKHL 11.*

Harassment

140. *s26 Eq A* provides

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

…..

(4) In deciding whether conduct has the effect referred to in subsection (1)(*b*), each of the following must be taken into account— (*a*) the perception of B; (*b*) the other circumstances of the case; (*c*) whether it is reasonable for the conduct to have that effect."

141. Under the EqA, the conduct must be for a reason which relates to a relevant protected characteristic, rather than because of race or disability. The test for whether conduct is related to a protected characteristic is broader than the "because of" test for direct discrimination; however, there must still be a

relevant association with the protected characteristic and that is an objective question, *UNITE v Nailard* [2018] IRLR 730 (CA).

142. In *Richmond Pharmacology Ltd v Dhaliwal* [2009] IRLR 336, the EAT said that, in determining whether any "unwanted conduct" had the proscribed effect, a Tribunal applies both a subjective and an objective test. The Tribunal must first consider if the employee has actually felt, or perceived, his dignity to have been violated or an adverse environment to have been created. If this has been established, the Tribunal should go on to consider if it was reasonable for the employee to have perceived this. In approaching this issue, it is important to have regard to all the relevant circumstances, including the context of the conduct. A relevant question may be whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence: the same remark may have a different weight if evidently innocently intended, than if evidently intended to hurt (paragraph [15]).

143. The EAT also commented that "Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. Whilst it is very important that employers and tribunals are sensitive to the hurt that can be caused by offensive comments or conduct (which are related to protected characteristics), ".. it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase paragraph [22]."

144. In *Land Registry v Grant* [2011] IRLR 748 at [47] Elias LJ said that words of the statutory definition of harassment , ".. are an important control to prevent trivial acts causing minor upsets being caught by the definition of harassment." In GMBU v Henderson [2015] 451 at [99], Simler J said, "..although isolated acts may be regarded as harassment, they must reach a degree of seriousness before doing so."

Burden of Proof

145. The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010.*

146. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgment.

147. In *Madarassy v Nomura International plc.* Court of Appeal, 2007 EWCA Civ 33, [2007] ICR 867, Mummery LJ approved the approach of Elias J in *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865, and confirmed that the burden of proof does <u>not</u> simply shift where M proves a difference in sex and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient, para 56 – 58 Mummery LJ.

148. The explanation for any less favourable treatment does not have to be a reasonable one; the mere fact that an employee is treated unreasonably is not enough to justify an inference of unlawful discrimination, *London Borough of Islington v Ladele* [2009] IRLR 154, EAT.

Duty to Make Adjustments

149. By *s39(5) EqA 2010* a duty to make adjustments applies to an employer. By *s21 EqA* a person who fails to comply with a duty on him to make adjustments in respect of a disabled person discriminates against the disabled person.

150. *s20(3) EqA 2010* provides that there is a requirement on an employer, where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter, in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

151. *Para 20, Sch 8 EqA 2010* provides that an employer is not under a duty to make adjustments if the employer does not know and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the substantial disadvantage.

Substantial Disadvantage

152. 'Provision Criterion or Practice' should be construed widely: it may include one-off decisions/actions as long as there is some indication that the same decision or action would be repeated if similar circumstances arose, *Ishola v Transport for London* [2020] ICR 1204 (CA).

153. It is necessary for a Tribunal to identify the nature and extent of any alleged disadvantage suffered and to determine whether that disadvantage is because of disability. In order to do so, the Tribunal should consider whether the employee was substantially disadvantaged in comparison with a non-disabled comparator. If a non-disabled person would be affected by the PCP in the same way as a disabled person then there is no comparative substantial disadvantage, *Newcastle Upon Tyne Hospitals NHS Trust v Bagley* (2012) UKEAT/0417/11/RN, para 72. However, it is important to identify the PCP correctly before carrying out that comparison, *Griffiths v Secretary of State for Work and Pensions* [2016] IRLR 216 (CA).

Reasonableness of Adjustments

154. The test of 'reasonableness', imports an objective standard, *Smith v Churchills Stairlifts plc [2005] EWCA 1220*, *[2006] ICR 524, Collins v Royal National Theatre Board Ltd* 2004 EWCA Civ 144, 2004 IRLR 395, per Sedley LJ para 20.

155. To be a reasonable adjustment, a proposed step must actually remove or reduce the disadvantage: carrying out assessments, trial periods, and discussing, considering or offering adjustments, are not adjustments in

themselves and there is no duty on an employer to engage in them, *Tarbuck v Sainsbury Supermarkets Ltd* [2006] IRLR 664.

156. Whether a particular step would be effective in avoiding the substantial disadvantage is relevant to the question whether it would be reasonable to have to take it. If its effectiveness is uncertain, that is one of the factors to be weighed in assessing reasonableness.

157. The *Code of Practice on Employment* 2011 provides examples of factors which might be taken into account in determining whether a particular step is reasonable for an employer to have to take include;

a. whether taking any particular steps would be effective in preventing the substantial disadvantage;

b. the practicability of the step;

c. The financial and other costs of the step and the extent of any disruption caused;

d. The extent of the employer's financial and other resources;

e. The availability to the employer of financial and other assistance;

f. The type and size of the employer.

Burden of Proof – Reasonable Adjustments

158. To shift the burden of proof to the Respondent, the Claimant must therefore show evidence from which it could be concluded that there was an arrangement causing a substantial disadvantage and that there was some apparently reasonable adjustment which could have been made. If the Claimant does this, the burden shifts.

Discriminatory Constructive Dismissal

159. By *s95(1)(c) Employment Rights Act 1996,* "an employee is dismissed by his employer if...—(c) 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."

160. In order to be entitled to terminate his contract and claim constructive dismissal, the employee must show the following:

a. The employer has committed a repudiatory breach of contract. Every breach of the implied term of trust and confidence is a repudiatory breach, *Morrow v Safeway Stores* [2002] IRLR 9;

b. The employee has left because of the breach, *Walker v Josiah Wedgewood & Sons Ltd* [1978] ICR 744;

c. The employee has not waived the breach- in other words; the employee must not delay his resignation too long, or indicate acceptance of the changed nature of the employment.

161. The evidential burden is on the Claimant. Guidance in the *Western Excavating (ECC Limited) v Sharp* [1978] ICR 221 case requires the Claimant to demonstrate that, first the Respondent has committed a repudiatory breach of his contract, second that he had left because of that breach and third, that he has not waived that breach.

162. In order to establish constructive dismissal based on a repudiatory breach of the implied term of trust and confidence, the employee must show that the employer has, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them, *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606, *Baldwin v Brighton and Hove City Council* [2007] ICR 680, and *Bournemouth University Higher Education Corporation v Buckland* [2009] IRLR 606.

Decision

163. The Tribunal has taken into account all the relevant facts and the law before coming to its decision. For clarity, however, it has addressed each issue separately.

Direct Race Discrimination and Race Harassment

Allegation 1: Before the Claimant started work "Mr John" (the then-Store Manager at Stratford) required C to show her acceptance letter to prove she was offered a job, and that this was because of the way she looked and her race

164. The Tribunal accepted the Claimant's evidence that Mr John had required the Claimant to show her acceptance letter to prove she had been offered a job.

165. However, the Tribunal decided that the Claimant had not provided evidence that she had been treated less favourably in this regard than a comparator who was white, or not of Afro-Caribbean ethnic/national origin.

166. In the Tribunal's workplace experience, it would not be unusual to expect a new employee to bring their letter of appointment with them on the first day, to identify them as an employee.

167. There was no evidence that he treated other new employees differently.

168. Furthermore, the Claimant herself told the Tribunal that she believed that Mr John had required her to show her acceptance letter because of her blue hair and nails. She said that these were not related to her race but were "just a look". The Tribunal was satisfied that Mr John's request to see her letter of appointment was nothing to do with race. Her claims of direct race discrimination and harassment in this regard therefore fail.

Allegations 2 and 3: C's fellow section manager at Ilford, Margaret Troy, referred to C as "ghetto" because of her accent; Margaret Troy mocked her accent and stated "This ain't Jamaica".

169. The Tribunal found that the Claimant had not discharged the burden of proof to show that Ms Troy used these words. It found Ms Troy's denial that she had done so to be credible. These allegations of race discrimination and harassment fail.

Allegations 4 and 5: James Mugford stated he did not like C because of her "long and funky hair"; James Mugford tried to intimidate C from speaking for her rights or raising (alleged) mismanagement at the branch.

170. The Claimant also alleged that Mr Mugford did not like her because of her accent. The Tribunal considered that the Claimant's evidence about Mr Mugford's comments about her accent was very vague. The example she gave about her accent was nothing to do with her accent. The Tribunal did not find that Mr Mugford criticised the Claimant's accent.

171. Tribunal found that Mr Mugford had said, of the Claimant, "Wait until you see our new Section Manager with her blue hair and nails."

172. The Tribunal, however, did not find that Mr Mugford treated the Claimant less favourably than a white, or non Afro-Caribbean, comparator. On the Claimant's own evidence, her blue hair and nails were not related to her race. It was never put to Mr Mugford that the Claimant's blue hair was related to race. He was not cross examined to the effect that he objected to braids. The Claimant did not mention, until the last day of the Hearing, that her blue hair was in braids or extensions, rather than dyed blue. The Tribunal decided, on the evidence, that Mr Mugford would have said the same about a white comparator who had blue hair and nails. Mr Mugford's words were not related to race and this allegation of direct race discrimination or harassment fails.

173. On the evidence, the Tribunal found that the Claimant and Mr Mugford had genuine disagreements about the appropriate processes to be adopted at the Ilford branch, for example about conducting Return to Work meetings and whether managers should swipe in and out. The Tribunal concluded that Mr Mugford gave reasonable and credible justifications for the procedures he adopted. It decided that there was no evidence that Mr Mugford would have applied different policies if the Section Manager who disagreed with the policies was white or non-Afro-Caribbean. Mr Mugford applied procedures consistently and his treatment of the Claimant was not related to race in any way.

174. The Tribunal concluded that Mr Mugford may well have said to the Claimant, that if she brought a complaint, it would be against her managers at Ilford and Stratford, that is, Gisele Lolonga and Carol. The Tribunal accepted Ms Lolonga's evidence that the Claimant said she might complain because she was unhappy about being moved to another store again, without completing her training. It was logical that the complaint would have been against her managers, who were responsible for training her.

175. In those circumstances, there was no evidence that Mr Mugford would have dealt with a white person's putative grievance differently. Mr Mugford was simply pointing out the realities of the grievance which the Claimant was contemplating.

176. The Tribunal was satisfied that Mr Mugford's comments in this regard had nothing to do with race – these claims of direct race discrimination and harassment therefore fail.

177. The Tribunal accepted that Mr Mugford believed that the Claimant was underperforming. There was a difference of opinion between Mr Mugford and Ms Lolonga about this. The Claimant did not allege that Mr Mugford discriminated against her in this regard – it was not one of the issues in the claim.

178. In summary, the Claimant had an unhappy time at the Ilford store, and disagreed with Mr Mugford about the application of policies. She was unhappy about being transferred again from that store. On all the evidence, however, the Tribunal found that Mr Mugford did not treat her differently to the way he would have treated a white comparator in the same circumstances.

Allegation 6: On the Claimant's first day at the Fenchurch store she was verbally attacked by Suzanne Field, who was aggressive towards her and told her she was underperforming

179. The Tribunal found, as a matter of fact, that the Claimant felt under attack in the meetings on her first day at Fenchurch Street, because performance issues were raised with her.

180. The Tribunal was satisfied, however, that the reason the Claimant's performance was raised with her in these meetings was because Mr Mugford had told Angela Barker that the Claimant was underperforming.

181. Other Section Managers told the Tribunal that Angela Barker and Suzanne Field were very direct in their communication style, and honest.

182. The Tribunal was satisfied that Mses Barker and Field were not aggressive towards the Claimant, but were direct with her, as they were with other employees. It concluded that there was no evidence that they treated the Claimant less favourably than a white comparator who had arrived at the Fenchurch Street in circumstances where there previous Store Manager had told her new Store Manager that she was underperforming. The Tribunal was satisfied that their actions were not related to the Claimant's race.

Allegation 7: Suzanne Field mentally harassed the Claimant by questioning her about the daily tasks to the point where she started to make her feel like she had not done them

183. The Tribunal preferred Ms Field and Ms Sholay's evidence regarding Ms Field's management style. It found that Ms Field asked all the Section Managers, on a daily basis, about their sections and gave them directions about

what they needed to achieve that day. The Tribunal found that Ms Field was a very conscientious manager, who would require Section Managers to plan their work and would provide regular feedback to them. She would repeatedly show Section Managers how to perform tasks like critical paths until they got them right. This was her normal management style.

184. The Tribunal did not find that Ms Field treated the Claimant differently to other Section Managers. She did closely manage and guide her whole Section Manager team. The way she managed the Claimant was not related to race but was consistent with the way she dealt with other Section Managers. This allegation of race discrimination and harassment failed.

Allegation 8: Suzanne Field told other managers not to work with the Claimant

185. The Tribunal preferred Ms Field, Ms Sholay's evidence to the Claimant's on this allegation. It found that Ms Field did not tell other managers not to work with the Claimant. In fact, Ms Field allocated some experienced members of staff to support the Claimant, including Denise and Kerrie. Ms Sholay helped the Claimant. Another Section Manager, Henry, worked very closely with the Claimant and supported her. On one occasion, Ms Field commented to Henry that she would have preferred the Claimant to devise her own critical path, rather than simply copy Henry's. This did not amount to an instruction not to work with or to help the Claimant. This allegation fails on the facts.

Allegation 9: Ms Field did not respect the Claimant's staff decisions and discussed them with the sales assistants

186. The Tribunal found that, on one occasion, Ms Field had questioned the Claimant's decision to move experienced staff from the men's suit department. It was not in dispute that some sales assistants – the A&A ladies, had raised the decision with Ms Field.

187. The Tribunal preferred Ms Sholay and Ms Field's evidence in respect of this - the staff in the men's suit department were very experienced in this area, including in fitting the suits. The Tribunal accepted Ms Field's evidence that the men's suit department at the Fenchurch Street branch was extremely profitable and therefore Ms Field would have expected the Claimant to move other members of staff, rather than the ones assigned to this crucial area. Ms Field's questioning of the Claimant on this one occasion was not related to race in any way, but was because Ms Field rightly wanted to protect the profitability of the men's suit section. Insofar as Ms Field discussed the matter with the A&A ladies, the A&A ladies had initiated the discussion – this was not to do with race.

Allegation 10 Suzanne Field was heard to be discussing C's "attitude problem" and stated that C "kissed her teeth on the shop floor

188. The allegation that Ms Field had said that the Claimant had an attitude problem was so vague that the Tribunal was unable to make any findings about whether, when, and in what circumstances Ms Field might have discussed the Claimant having an attitude problem.

189. The Tribunal accepted Ms Field's evidence that another member of staff called Catherine, who is also black, complained to Ms Field that the Claimant had kissed her teeth. Given that the Claimant agreed that "kissing teeth" was not appropriate on the shop floor, the Tribunal accepted Ms Field's assertion that she could not ignore the complaint and therefore asked the Claimant about it. When the Claimant had denied having done so, that was the end of the matter.

190. The Tribunal found that there was no evidence that Ms Field would have treated a white employee in these circumstances any differently. Ms Field took a light touch approach to the complaint and accepted the Claimant's denial. The Tribunal was satisfied that Ms Field's action in this regard were nothing to do with race.

Disability

191. The Claimant accepted that she was not disabled before she joined the Respondent. She had had a limited episode of depression in 2014 which was not considered likely to recur thereafter.

192. She was diagnosed with depression in June 2018, about 10 weeks before her employment ended.

193. There was no medical evidence that the depression which was diagnosed in June 2018 was likely to last for 12 months thereafter – in the sense that "it could well happen". Even by early September 2018, there was nothing to indicate then, apart from the Claimant's assertion in evidence, that the depression was likely to last for 12 months, or to recur in the future.

194. It is now known that the Claimant's depression did last for 12 months after June 2018, but this was not known at the relevant time and cannot be taken into account.

195. The Tribunal decided that the Claimant was not a disabled person at the relevant times.

Direct Disability Discrimination

196. If the Tribunal is wrong in its decision regarding whether the Claimant was a disabled person, the Tribunal went on to consider the merits of the Claimant's disability discrimination claims.

Allegation: Due to the Claimant 's Depression & Anxiety, Suzanne Field specifically asked the Claimant not to work if she could not, and did not follow the recommendations of phased return to work by the GP – direct discrimination

197. The Tribunal found that this allegation failed on its facts. It did not accept the Claimant's evidence that Ms Field rejected the Claimant's Fit Note on her return to work. In fact, as the Claimant agreed, she was permitted to return to work and to work the reduced hours recommended by her GP, both

immediately on her initial return to work to early August 2018, and on 28 August after her holiday. There was no less favourable treatment of the Claimant.

Allegation: Suzanne Field refused to suspend the investigation until the Claimant was fully recovered.

198. On the evidence, neither the Claimant, nor her GP suggested that the disciplinary investigation or the IPIn should be suspended. Further, the Respondent's human resource advisers advised the Respondent that, in order to relieve the Claimant's stress, the disciplinary investigation should be concluded.

199. The Tribunal concluded that there was no evidence that a non-disabled comparator in the same circumstances would have been treated differently. The Tribunal did not find that the Respondent had deliberately continued with the investigation because the Claimant was disabled – there was nothing to support such a finding.

Harassment relating to disability

Allegation: persisting with the investigation of C when she had not yet fully recovered following her sickness absence

200. The Tribunal accepted that, despite the Claimant not objecting to the investigation continuing, this was unwanted by the Claimant. As made clear in the Tribunal's findings on direct discrimination, the Tribunal did not find that the Respondent had deliberately continued with the investigation because the Claimant was disabled. However, the Tribunal accepted that continuing with the investigation was related to the Claimant's disability, as the Respondent had been advised that concluding the investigation would relieve the Claimant's stress.

201. On the evidence the Tribunal did not find that continuing with the investigation had the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The Tribunal found that the reason the investigation was pursued was advice that this would be the best course for relieving the Claimant's stress and the Claimant did not object.

202. Furthermore, taking into account the circumstances of the case, including the Claimant's perception and whether it was reasonable for the conduct to have the effect, the Tribunal decided that the conduct did not have the prohibited effect. The Tribunal did not find that the Claimant felt, or perceived, her dignity to have been violated or an adverse environment to have been created. The Claimant did not react negatively to the news that the investigation would continue; she accepted that this was appropriate. Further, it would not have been reasonable for her to have perceived this. On the facts, there was nothing to indicate that Ms Field intended to cause offence when she told the Claimant that the investigation would continue. The news may not have been welcome, but that does not reach the threshold of conduct which amounts to harassment.

Failure to Make Reasonable Adjustments

Allegation: PCP: requiring employees to work 8 hour shifts as normal hours (not allowing C to return from sick leave on a graduated basis from 10 August 2018, as set out by the GP in a fit note)

203. This allegation failed on its facts, the Claimant was not required to work normal hours on her return to work in August 2018.

Allegation: PCP: continuing investigations in respect of employees when they return to work (continuing the investigation of C when she had not yet fully recovered following her sickness absence)

204. The Tribunal accepted that the Respondent did apply this provision, criterion or practice to the Claimant. However, the Tribunal did not find that the Claimant was put at a substantial disadvantage compared to non disabled people by this PCP.

205. There was no medical evidence that postponing the investigation, rather than having a decision and moving on from it, would but a person who was disabled with depression and anxiety at a substantial disadvantage, compared to a non-disabled person.

206. The Tribunal also concluded that the Respondent could not reasonably have been expected to know that proceeding with the investigation would put the Claimant at a substantial disadvantage compared to non disabled people. The Claimant's GP did not advise that the investigation should be delayed, the Claimant did not ask that it be delayed and the Respondent's own advice was to finish the investigation and thereby alleviate the Claimant's stress.

Constructive dismissal

207. The Tribunal has decided that the Respondent did not subject the Claimant to the discrimination or harassment that she has alleged. On all the facts, the Tribunal found that the Respondent had reasonable and proper cause for actin as it did. The Respondent therefore did not breach the term of trust and confidence as the Claimant has alleged. The Claimant was not entitled to resign and claim constructive dismissal.

_____

Employment Judge **Brown**

Date: 17 November 2020

SENT to the PARTIES ON

17/11/2020

.....

FOR THE TRIBUNAL OFFICE