Case number: 1401752/2019 (V – CVP)

EMPLOYMENT TRIBUNALS

Claimant: **Mr Jabar Jafar**

Respondent: **Department for Work & Pensions**

Heard at: **Bristol** **On:** **14-17 December 2020**
18 December 2020 in chambers

Before: **Employment Judge Oliver**
Ms S Maidment
Ms Y Ramsaran

Representation
Claimant: In person
Respondent: Ms S Hornblower, counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that the claims for race discrimination, harassment and unfair dismissal fail and are dismissed.

_____
Employment Judge Oliver
Date 19 December 2020

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON
22nd December 2020
By Mr J McCormick

FOR THE TRIBUNAL OFFICE

REASONS

1 The claimant had brought claims for direct race discrimination, harassment on grounds of race and constructive unfair dismissal.

2 This was a hybrid hearing and was conducted in this way in order to ensure a safe socially-distanced hearing during the COVID-19 pandemic. It was originally intended that all parties should appear by video link. It was then decided that the claimant and Tribunal panel should attend the hearing in person, to ensure the claimant could participate without any problems caused by remote hearing technology. All of the respondent's witnesses and the respondent's counsel appeared by video link. Judgment was reserved to be given in writing.

Issues

3 There was a case management preliminary hearing on 10 December 2019, and a list of issues was agreed. There was a further case management preliminary hearing on 7 February 2020, at which the claimant was permitted to amend the list of issues in relation to his claim for constructive dismissal.

4 The final list of issues was confirmed with the parties at the start of the hearing, as follows.

5. **Section 26: Harassment on grounds of race or nationality.**

    5.1 Did the respondent engage in unwanted conduct as follows:

        5.1.1 Acting as described at issues 7.2, 7.3 and 7.7 below.
        5.1.2 Was the conduct related to the claimant's protected characteristic?
        5.1.3 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?
        5.1.4 If not, did the conduct have the effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

6. **Section 13: Direct discrimination on grounds of race or nationality**

    6.1 Did the respondent subject the claimant to the following treatment falling within section 39 Equality Act, namely:

        a. The respondent's actions at issues 7.2, 7.3 and 7.7 below.
        b. Any of the treatment not found to have been harassment.
        c. Did the respondent treat the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies upon hypothetical comparators.
        d. If so, can the claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment

was because of the protected characteristic?

e. If so, what is the respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

7. **Constructive unfair dismissal**

7.1 The claimant claims that the respondent acted in fundamental breach of contract in respect of the implied term of mutual trust and confidence. The breaches were as follows.

7.2 On 23 November 2017, Mr Richard Phillimore, who was acting as the claimant's team manager:

7.2.1 called the claimant to a one-to-one meeting without any notice as to the purpose or content of the meeting;
7.2.2 informed the claimant that he had instructed another manager to listen to the claimant's telephone calls to undertake a quality check;
7.2.3 advised the claimant that his work was 'no good at all,' and that 'his days were numbered' because 'customers did not understand what he was saying' as his English language and accent was not understandable;
7.2.4 required the claimant to stand in the room and recite the declaration required for Employment Seekers Allowance from memory, so as to test his ability to recall and communicate in English;
7.2.5 informed the claimant that he would be put on a low mark and that Mr Phillimore would review his work again to determine whether he could carry on in his existing role; and
7.2.6 was dismissive, critical and uninterested in the claimant's responses, and was deliberately intimidating.

7.3 In or about November 2017 and again after the claimant raised a grievance in December 2017 about the same conduct, Mr Peter Blogg, an employee of the respondent who worked opposite the claimant, said to the claimant's colleagues in his presence:

7.3.1 'do you understand what he said? I couldn't understand a word';
7.3.2 the claimant 'doesn't speak English';
7.3.3 'where does he come from?'; and
7.3.4 'because he is Iraqi, he can't be trusted.'

7.4 In or about November 2017, the respondent unreasonably investigated and/or determined the claimant's grievance on the grounds that it concluded that nothing improper had occurred in November 2017; and, in particular:

7.4.1 the claimant did not receive any feedback nor was any action taken in respect of the complaint against Mr Phillimore and Mr Blogg;
7.4.2 the claimant did not receive any notes of the meeting relating to his grievance;

7.4.3 Mark Watson prevented the claimant from exercising his right of appeal against the outcome to his grievance, because he failed to respond to the claimant's request for an extension of the deadline for appealing, given the letter notifying him of the right was incorrectly dated;

7.4.4 The claimant was promised that he would be issued with a letter of official apology by Nikki Lewis in respect of the conduct of Mr Phillimore and Mr Blog, but was not provided with one.

7.5 After raising a grievance, the claimant requested that he should be transferred / re-allocated to another office to relieve the stress and anxiety which he suffered on attending Lodge House, but that request was denied.

7.6 Following his return to work from seven months' sickness absence in August Jen Scull failed to:

7.6.1 allow the claimant to return to work on a phased return as proposed by his doctor, and told him that his options were to return full-time either for training or to his substantive post;

7.6.2 refer the claimant for an occupational health assessment.

7.7 On 21st January 2019, Vanessa Court, a team leader at the service delivery department at 100 Temple Street, beckoned the claimant to come to speak to her by gesturing with her finger, rather than by addressing him orally by name and asking him to come to speak to her;

7.8 In the period between the 2 April 2019 and 25th April 2019 the respondent failed to conclude the grievance process relating to Vanessa Court and to provide the claimant with an outcome. (This breach was said to have been the 'last straw' in a series of breaches, as the concept is recognised in law).

7.9 Did the claimant resign because of the breaches?

7.10 Did the claimant delay before resigning and affirm the contract?

7.11 If there was a constructive dismissal, was it otherwise fair within the meaning of s. 98(4) of the Act?

8 **Time/limitation issues**

8.1 The claim form was presented on 9 May 2019. As a result, any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction to hear it. It is not disputed that the constructive unfair dismissal claim has been presented within time.

8.2 Can the Claimant prove that there was conduct extending over a period? If so, is such conduct accordingly in time?

8.3 If not, was any complaint presented within a period which the Tribunal considers just and equitable?

Evidence

9 We had an agreed bundle of documents, which we have read and taken into account to the extent the documents were referred to by the parties in evidence or submissions.

10 There were written witness statements which we took read.

11 We heard evidence from the claimant. We also heard evidence from the following witnesses for the respondent, which was given by video link:

11.1 Richard Phillimore (the claimant's team manager at the time of some of the events);
11.2 Mark Watson (Operational Lead - grievance manager for the claimant's first formal grievance).
11.3 Nikki Lewis (Service Centre Leader - discussed wellbeing issues with the claimant).
11.4 Jennifer Willis (the claimant's line manager at the time of some of the events - dealt with the claimant's return to work).
11.5 Vanessa Court (Team Leader - subject of the claimant's second formal grievance).
11.6 Nicky Sutton (Job Centre Manager - investigating officer for the claimant's second formal grievance).

12 We had oral submissions from both parties, and written submissions from the respondent.

13 We did not hear any oral evidence on the first day of the hearing, as the claimant only had copies of the bundle and witness statements on his mobile phone. We adjourned until the following day to allow the claimant to make copies. The respondent then agreed to provide a paper copy of the bundle and statements for the claimant to use at the hearing. We heard evidence and submissions on 15, 16 and 17 December, and met to consider our decision on 18 December.

14 The claimant also raised the issue of documents missing from the bundle. The respondent's representative confirmed that these documents could not be located and the respondent had complied with its obligations of disclosure. The Judge explained to the claimant that we could not order disclosure of documents that could not be located, but he could raise the issue of missing documents with the witnesses or in submissions.

15 There was also some confusion about the claimant's witness statement. He wished to rely on a statement which was different from that exchanged between the parties. We clarified that this was the statement he had used for a previous Preliminary Hearing. The claimant then agreed that the statement in the bundle should be used for the full hearing.

Facts

16 We have considered all of the evidence and submissions, and find the facts necessary to decide the issues in the case. Both the claimant and respondent provided additional witness evidence that was not directly relevant to the issues, and we have not made findings on this evidence unless this was necessary.

Background

17 The claimant was employed by the respondent from 1 February 2016 as an administrative officer. He resigned on 25 April 2019. The Early Conciliation notification was 25 February 2019, the Early Conciliation certificate was dated 13 March 2019, and the ET1 was sent on 9 May 2019.

18 The claimant worked on Employment Support Allowance (ESA), and his manager from April 2016 was Mr Richard Phillimore. The claimant was placed on a performance action plan in 2016 after concerns were raised about the information he provided to members of the public during some of his calls. He successfully completed this plan and he received a positive performance review in 2016/17. Mr Phillimore then moved and the claimant had a different manager.

Incident on 23 November 2017

19 The claimant alleges acts of race discrimination and harassment by Mr Phillimore, which he also relies on as breaches of contract for his constructive unfair dismissal claim. These relate to an incident on 23 November 2017.

20 The claimant's team leader at this time was Ms Tracy Wotherspoon. Mr Philimore was acting as team leader in her absence on holiday. On 23 November, Mr Phillimore called the claimant to a 1:1 meeting. This was to discuss a call check. Mr Phillimore's evidence is that this was done by a colleague Jayne Richards, who did call checks as part of her role. All staff had call checks. Ms Richards would select calls at random to listen to, as part of quality control. Ms Richards did call checks on the claimant's calls that day and alerted Mr Phillimore that one call was not up to standard. He listened to the call and agreed, and asked the claimant to a meeting to give feedback about the problem with the call.

21 The claimant says that Mr Phillimore told him at meeting he had asked Ms Richards do call checks on him. Mr Phillimore denies this. He explained this was part of Ms Richards' role, and he did not have input into this as it was not within his remit. On the balance of probabilities, we prefer Mr Phillimore's version of events. His evidence was clear and as a temporary manager he did not have the authority to ask for call checks to be done on the claimant.

22 The claimant says he had a conversation with Ms Wotherspoon before she went away on holiday, and she told him there would be no checks or 1:1 meetings while she was away. She put a note on the system. Mr Phillimore's evidence is that he was not aware of this. We accept that the claimant had this conversation with Ms Wotherspoon, but we also accept that Mr Phillimore was not aware of this.

23 The claimant says he was told his work was no good at all, and not up to scratch. He also says he was told his days are numbered, he would be put on a low mark, and Mr Phillimore would review his work again to determine if could carry on in his role. He says that Mr Phillimore was dismissive and critical, and deliberately intimidating. The claimant says he became tearful, and Mr Phillimore did then tell hm there was nothing to worry about. He had to leave work that afternoon as he was so upset.

24 Mr Phillimore's evidence is that he did say the claimant's work was not up to scratch, but he denies making the other comments. He says this was a normal informal meeting, during which the claimant seemed a little angry and defensive. He did not notice the claimant becoming upset, but agrees he told the claimant there was nothing to worry about.

25 We accept that the claimant found this meeting difficult and he was upset afterwards. He had explained he had previous issues with Mr Phillimore which had made him feel anxious, and that they did not get on well. However, having considered all of the evidence, we find that Mr Phillimore did not behave in way which fell outside normal line management discussions when giving negative feedback.

26 We have considered this in the context of Mr Phillimore having previously put the claimant on a performance action plan, which he completed successfully and then had a positive performance review. We note that both parties agree that Mr Phillimore told the claimant at the end of the meeting there was nothing to worry about. We find that Mr Phillimore did not say to the claimant during this meeting that his days are numbered or he would be put on low mark. He did not say during this meeting that he would review the claimant's work again to determine if could carry on in his role – particularly taking into account that he was only covering for the usual team manager at the time. We also do not find that he was deliberately intimidating towards the claimant.

27 The claimant's original case was that Mr Phillimore told him to recite a declaration from memory. He clarified in evidence that this actually happened in 2016. The claimant and Mr Phillimore agreed in their evidence that it was actually the claimant who said he could recite the declaration from memory, Mr Phillimore then said "go on then", and the claimant tried to do so.

28 The claimant's original case is also that Mr Phillimore made remarks about his English language skills and accent. The Judge specifically asked him to clarify his evidence, and whether he was saying that Mr Phillimore made such remarks or any racist remarks. The claimant said he did "not use direct words like Mr Blogg did". Instead, the claimant says Mr Phillimore agreed when the claimant asked if there was a problem with his English before he recited the declaration. This was during the incident in 2016. He says Mr Phillimore confirmed this, saying "yes, go on". The claimant did not say there were any racist remarks made during the incident on 23 November. Mr Phillimore denies making any such remarks at any time.

Claimant's first grievance

29 The claimant submitted a grievance form on 6 December 2017, in which he

listed three incidents involving Mr Phillimore. This included an incident on 23 November. The typed details say that Mr Phillimore's comments and intention seem to be "*an act of bully and discrimination due to race or any other grounds related to my culture or background*". The form and typed details do not say anything about specific comments relating to race or ability speak English.

30 The claimant spoke to Amy Dolman, Operations Manager, about both Mr Phillimore and comments he says were made by a colleague Peter Blogg. The claimant says he also put in a written grievance about Mr Blogg. The respondent denies receiving this, and has not been able to find a record of it. There is an email from Ms Dolman to the claimant on 8 December 2017, which refers to having received a form for one individual, and asks if he still wants her to speak to the other individual he has concerns with. There is no evidence in the bundle to suggest that there was a separate written grievance about Mr Blogg. We did not hear any evidence from Ms Dolman or Mr Blogg, and there are no notes of any discussion between them. Although the evidence is unclear, it appears that Ms Dolman had a conversation with Mr Blogg. We do not know the content or outcome of that conversation.

31 Ms Dolman had an informal meeting with Mr Phillimore on 11 December. She then met with the claimant who said he did not want mediation with Mr Phillimore or details to be given to his line manager. He agreed to discuss the issue with the site manager Linda Clarke. They met on 12 December. The claimant said he did not want formal action, but he asked Ms Clarke to speak to Mr Phillimore to explain how his actions made him feel.

32 Ms Clarke did speak to Mr Phillimore. She then wrote a letter to the claimant saying she was writing to confirm he did not want to take up a complaint formally, and wanted her to investigate informally. Then letter said she had concluded her informal investigation and "*found no case to be answered*". She did not report back to the claimant on what Mr Phillimore had said. The claimant asked for an update on 16 January. Ms Clarke replied that as far as she was concerned the issues had been concluded, and she had spoken to Mr Phillimore but was not going to detail the nature of the conversation.

33 The claimant was off sick with work related stress from 23 January 2018. On 21 March 2018 he contacted Ms Clarke and said he wanted to make a formal grievance. They spoke on 4 April. Ms Clark sent a letter confirming that there was an offer to mediate, or otherwise the grievance would be investigated by an independent manager.

34 Ms Clarke asked Mr Mark Watson to act as the grievance manager. He sent a letter to the claimant on 1 May 2018 inviting him to a meeting, which took place on 9 May 2018. The claimant attended with his union representative. We have seen notes of the meeting. There was a notetaker, and we accept that these are an accurate record of the meeting. The claimant gave a summary of the comments he said were made to him, including Mr Phillimore saying "*its not good English*", Mr Blogg commenting "*speak English I can't understand you*", He also stated that Mr Blogg continued to make comments after Amy Dolman spoke to him.

35 Mr Watson says the claimant was clearly unwell during this meeting, and

there was an adjournment so he could talk to his union representative. He said he gave the claimant the opportunity to give more detail about what was said to him, but the claimant was unable to do so. His evidence was that the claimant was very upset. He said the claimant was not able to articulate his concerns further, tell him when things were said, or give details about the range of other comments.

36 Mr Watson did not talk to Mr Phillimore, Mr Blogg or Ms Dolman. He had seen Ms Dolman's notes of the informal process involving Mr Phillimore, but had no further information about the issue with Mr Blogg. He did not consider adjourning the meeting or asking for information another way. His explanation for this was that the claimant not able explain what was said and when it happened, and he felt he had given the claimant every opportunity to present to him. His evidence in answer to questions from the Judge was that, in hindsight, the comments about speaking English did ring alarm bells – but he attempted to get information about the range of comments and when they were said from the claimant, and the context was important.

37 Mr Watson sent an outcome letter on 11 May 2018. This did not uphold the grievance. The letter says he did not get the sense that the two individuals "*acted in a way or used inappropriate language that could with any certainty be attributed as bullying, discrimination or harassment*", and "*the complaint as you have described does not constitute a case of bullying, harassment or racism*". The letter enclosed the notes of the meeting. It did not enclose the notes of the original discussions with Mr Phillimore during the informal process.

38 The outcome letter gave a right to appeal by 1 June. Mr Watson said the letter was written on Friday 11 May, but due to the post may not have been sent until the Monday. Due to a bank holiday the following week he gave some additional time for the appeal.

39 The claimant says he only received the letter few days before the appeal deadline. He contacted his union representative, who advised him to telephone Mr Watson to say he would appeal and ask for further time. The claimant says he left Mr Watson a telephone message. Mr Watson says he never received this, and he would have passed it on to the appeal manager if he had received it. On balance, we find that the claimant attempted to leave a telephone message about the appeal, but we accept that Mr Watson did not receive this. The claimant also says he thought his union was sending a written appeal. No written appeal was received by the respondent.

Claimant's return to work

40 The claimant was well enough to return to work in August 2018 when his fit note expired. His old job with ESA had disappeared, so he was to move to dealing with universal credit (UC). The claimant had wanted to move from working at Lodge House, where the alleged incidents took place. He had been told by Ms Clarke that other locations were not available. During attendance meetings he had discussed moving location, and we note that moving floors or departments was suggested as an adjustment during a meeting with Steve Puckey on 10 July 2018.

41 The claimant initially returned to work at Flowers Hill on 20 August 2018. It was agreed he would take some annual leave, and return on 10 September 2018. He was to return in the same role of administrative officer, but he needed some retraining as he was moving to UC. His new line manager was Jen Willis (formerly Scull). On 10 September he attended Lodge House for UC training, but there had been a mistake as he had not been told the training had been postponed. He met with Mr Watson and his union representative that day, and it was agreed he would work 10-2 that week. Ms Willis met the claimant the next day when she was back in the office, and they discussed a return to work plan. They agreed 9.30-2.30 for the following week. They met again on 14 September, and agreed a plan to increase hours between weeks two and five until he would be working 9.30 to 5.24. Ms Willis' note of this meeting confirms this is a plan and is changeable if needed.

42 The claimant says he was required to return full time for training or his substantive post, rather than a phased return as advised by his doctor. Ms Willis says the claimant himself asked to return full time as he was no longer entitled to sick pay, and they then agreed the shorter hours set out above. Having considered the written evidence, this supports Ms Willis' version of events and we find that the claimant was not required to return full time.

43 The respondent had obtained an occupational health report on the claimant in April 2018, which noted a previous report in March had advised an early return to work was appropriate. The previous report had also said the claimant was fit to return to work. The claimant had not been happy with this earlier report. There was no immediate referral for a further report when the claimant returned to work in September. The claimant was off sick from 8 October 2018, and he gave a verbal resignation. He later withdrew this resignation and returned to work on 6 November 2018. He signed an occupational health referral form on 5 December 2018. We also heard evidence from Ms Willis and Ms Lewis that the occupational health provider they used had a bad backlog at this time, and they wanted a face-to-face appointment for the claimant which would take longer to arrange. The claimant had an occupational health appointment by telephone on 30 January 2019, and in person on 5 February 2019.

44 On 5 December 2018 the claimant sent an email to the Director of Working Age Benefits about his situation and asked for the matter to be looked into. It was arranged that the claimant would meet with Nikki Lewis, Universal Credit service centre leader. They met on 28 December 2018 for around an hour and a half. We have not seen any notes of this meeting, as it was an informal conversation. It was agreed that the claimant would try a job centre role, and he was to move to Temple Street job centre for work shadowing. Ms Lewis met him outside on his first day, and introduced him to his new manager Rob Evans.

45 The claimant says that, during this meeting, Ms Lewis said she would send him a letter of apology about the discrimination by Mr Phillimore and Mr Blogg, and mentioned financial redress. He says she was sympathetic, and said she was sorry for what had happened to him. He says he remembers this because he didn't know there was a process for a formal apology, and did not know the term financial redress. Ms Lewis gave detailed evidence as to why this was not correct. She agrees that she offered to provide an apology, but this was to be a letter to the claimant thanking him for his time at UC, and apologising for the mix-

up in relation to the UC training. She said that the claimant had tried to raise issues about his earlier grievance, but she had made it clear she was unable to deal with this. She also had no authority to offer financial compensation. We have seen subsequent correspondence with the claimant which refers to Ms Lewis providing an apology, but this does not state what the apology was about.

46 Having considered all the evidence, we find that Ms Lewis did offer an apology, but this was related to the claimant's UC training and not his allegations of discrimination or time at Lodge House. We accept her clear evidence that she was not able to deal with earlier events. Ms Lewis was generally sympathetic towards the claimant, and it appears he misunderstood what the apology would be about.

Incident at Temple Street

47 The claimant says there was an incident at Temple Street, when a colleague Vanessa Court was disrespectful to him. The date is not clear but it appears to be 18 January 2018, based on a report from Mr Evans on 21 January.

48 The claimant says that Ms Court used a beckoning gesture towards him using one finger, which he found disrespectful. He demonstrated this at the Tribunal. He said this happened the first time he met her. Mr Evans had spoken to her about the claimant shadowing work, and then told him go downstairs to meet her. He says she used the gesture to call him over as he was coming down the stairs. Ms Court denies this. She says it was not possible, as she did not know who the claimant was. They worked in a busy council office attended by the public as well as staff, so it would not be obvious who he was and she would not beckon someone she did not know. She also says that Mr Evans introduced them. She denies ever having gestured to the claimant in this way.

49 The claimant seems to clearly remember this incident. However, we accept Ms Court's explanation that this could not have happened when they first met as described by him. It may be that Ms Court did beckon to the claimant at another time, but does not recall this.

50 The claimant was upset after this incident. He talked to Ms Lewis again on 22 January 2019. They discussed other work options, including joining the national insurance team after an occupational health assessment. The claimant was then off sick from that date.

Claimant's second grievance and resignation

51 The claimant submitted a new written grievance on 10 April 2019. This complains about Ms Court pointing at him and calling him over with her middle finger. He said he found this offensive, unacceptable and culturally rude. Nicola Sutton, job centre manager, was appointed investigate. She obtained some advice from HR on 11 April. She wrote to invite the claimant to a meeting on 15 April, with the meeting to take place on 25 April.

52 Ms Sutton called the claimant on 23 April as she had not heard anything from him. We have seen her notes of this call. The claimant said he did not have enough notice for his key worker and union representative to accompany him.

He said he was considering resigning, as his GP and key worker has said it might be best for his mental health. He also said he was considering dropping his complaint. Ms Sutton told the claimant this was his decision to make. She offered to postpone the meeting, to give him time to make a decision on how he wanted to proceed. She asked him to let her know by the end of the week, and the claimant said he would contact her in the next couple of days.

53 Ms Sutton sent a letter to the claimant on 26 April to say she was going on leave, and would put the complaint on hold as she had not heard from the claimant. She confirmed her understanding that the claimant was considering how he wanted to proceed with his complaint, and whether to withdraw it or resign, and he wanted to discuss this with his GP/key worker first.

54 The claimant resigned on 25 April 2019. The reasons given in his letter are that he was "*bullied, harassed and discriminated against because of race in November-December 2017 and January 2019, and the grievances I raised regarding these issues were not appropriately dealt with*". He also said that mutual trust and confidence had been irreparably broken, and this was a fundamental breach of contract.

55 Ms Sutton discovered that the claimant had resigned on her return from leave. She asked for advice on whether she could get a signed document confirming the claimant did not want pursue his grievance. There were no plans to meet the claimant again, so she decided not ask for written confirmation in order to avoid causing distress. She assumed that he did not want to continue with the grievance because he had told her that he might resign instead during their call on 23 April 2019.

Applicable law

56 Discrimination in employment is regulated by the Equality Act 2010 ("EA"). Race is a protected characteristic under section 9, and this includes nationality.

57 Under section 123 of the EA, complaints of direct discrimination or harassment, "may not be brought after the end of— (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable." Under section 123(3), conduct extending over a period is to be treated as done at the end of the period.

58 In ***Hendricks v Metropolitan Police Commissioner*** [2002] EWCA Civ 1686, the Court of Appeal stated that the test to determine whether a complaint was part of an act extending over a period was whether there was an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably. This is distinct from a succession of unconnected or isolated specific acts, where time would run from the date of each specific act.

59 ***British Coal Corporation v Keeble*** [1997] IRLR 336 (EAT) confirms that the Tribunal's discretion is as wide as that in section 33(3) of the Limitation Act 1980 when considering whether it is just and equitable to extend time for presentation of a complaint of discrimination. The Tribunal should have regard to the particular circumstances of the case. Relevant factors are: the length of and

reasons for the delay; the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the respondent cooperated with any requests for information; the duration of any disability of the claimant; the promptness with which the claimant acted after becoming aware of the possibility of bringing a claim; and the steps taken by the claimant to obtain expert advice.

60 It is for the claimant to show that it is just and equitable to extend time, and the exercise of discretion should be the exception rather than the rule (***Bexley Community Centre (t/a Leisure Link) v Robertson*** [2003] EWCA Civ 576).

61 Under section 13 EA, 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. This is direct discrimination.

62 Harassment is defined in section 26(1) EA:

> *(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.*

63 We have considered the burden of proof provisions at 136 EA and reminded ourselves of the relevant case law:

> *136 Burden of proof*
> *(1) This section applies to any proceedings relating to a contravention of this Act.*
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

64 The key cases providing guidance on the burden of proof provisions are ***Barton v Investec Henderson Crosthwaite Securities Ltd*** [2003] IRLR 332, (EAT), ***Igen Ltd and others v Wong and other cases*** [2005] IRLR 258 (CA), and ***Hewage v Grampian Health Board*** [2012] IRLR 870 (SC). The main question is whether the facts show a prima facie case of discrimination and, if so, whether the respondent's explanation is sufficient to show there has not been discrimination. We are not to apply this in a mechanistic way, and there is rarely direct evidence of discrimination. However, under the burden of proof provision so we do require some facts to indicate that there may have been discrimination before we scrutinise the respondent's explanations. A simple complaint of unfair treatment does not, on its own, provide sufficient facts for the burden to move to the respondent or for the Tribunal to find that this treatment was unlawful discrimination.

65 The definition of a dismissal includes circumstances where an employee is entitled to terminate their employment contract without notice by reason of the employer's conduct (Section 95(1)(c) of the Employment Rights Act 1996). This requires a significant breach going to the root of the contract, or something that shows the employer no longer intends to be bound by one or more essential terms of the contract (***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221, CA).

66 This fundamental breach can be a breach of the mutual duty of trust and confidence, which is an implied term of all employment contracts. The test is whether the employer acted without reasonable or proper cause in a way that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties (***Mahmud and Malik v BCCI*** [1997] ICR 606, HL). This can include a "last straw", which must contribute to the breach in some way but need not necessarily be a fundamental breach in itself.

67 In addition, the employee must resign in response to the breach. The resignation needs to be at least in part due to the breach, so that it is an effective cause of the resignation, although the breach does not need to be the only reason for resignation.

68 An employee cannot delay too long or they may be found to have waived the breach or affirmed the contract. An individual can explain a delay in resigning, but continued performance of the contract would generally indicate an affirmation. This is applied less strictly in employment cases compared to other cases, but an employee can still affirm the contract by delay in resigning (***Buckland v Bournemouth University Higher Education Corporation*** [2011] EWCA Civ 131, CA). The fact an employee is on sick leave is relevant to determining whether they have affirmed the contract, and what matters is whether, in all the circumstances, the employee's conduct has shown an intention to continue in employment rather than resign (***Chindove v William Morrisons Supermarket plc*** UKEAT/0201/13).

Conclusions

Time/limitation issues

69 We start with the time/limitation issues, which relate to the allegations of race discrimination and harassment against Mr Phillimore and Mr Blogg. The claimant says these took place in November/December 2017. He also says that the incident with Ms Court on 18 January 2019 was race discrimination and harassment, and this is within time. He seeks to link this with the other incidents.

70 ***Can the Claimant prove that there was conduct extending over a period? If so, is such conduct accordingly in time?*** We find that the claimant has not proved there was conduct extending over a period. The claimant says that the incidents are connected, and the various managers all knew about the background of his complaints. However, we do not accept this. The incidents in 2017 involved two different managers who worked in a completely different location from Ms Court. There is no evidence that the managers knew or communicated with each other. Ms Court said that she had not heard of Mr Phillimore or Mr Blogg until the Tribunal process, and she was not aware of the

background of the claimant's previous grievance as it was not appropriate for her to be given this information. There is a gap in time of more than a year. The incidents are also different – use of allegedly racist language about English language skills, as compared to a gesture. We therefore find these were unconnected acts rather than a continuing state of affairs.

71 ***If not, was any complaint presented within a period which the Tribunal considers just and equitable?*** It is for the claimant to show that the claim was presented within a just and equitable period. He provided no evidence on this in his witness statement. As he was representing himself, the Tribunal asked him some questions about this point. We have considered all the circumstances of the case and the factors from the Limitation Act.

72 The length of the delay is considerable – from November/December 2017 to 9 May 2019. Although the claimant says there should be more documents about his complaint relating to Mr Blogg, it appears that further documents do not exist, and so there is no issue about failure by the respondent to disclose relevant information. The claimant has been very unwell at times. However, he was well enough to return to work for periods of time between August 2018 and January 2019. He was also well enough to submit grievances, and he was receiving advice and assistance from the union. Importantly, one of the managers accused of race discrimination and harassment, Mr Blogg, left the respondent in 2018 and it has not been possible for the respondent to contact him. This makes it difficult for the respondent to defend this part of the claim, as they are unable to provide any direct evidence.

73 Taking all of these matters into account, we find that the claims of race discrimination and harassment relating to Mr Phillimore and Mr Blogg were not presented within a period which we consider just and equitable. This means the claims were presented out of time and the Tribunal does not have jurisdiction to determine them.

Harassment and direct discrimination on grounds of race or nationality

74 This means that only the allegations of harassment and direct discrimination against Vanessa Court are within time.

75 Starting with the harassment claim, the first issue is - ***did the respondent engage in unwanted conduct?*** We have found that the incident as described by the claimant did not occur – Ms Court did not use a beckoning gesture to call the claimant over when she first met him. We therefore find that the respondent did not engage in unwanted conduct as alleged by the claimant.

76 Although Ms Court denied ever having used a beckoning gesture to the claimant, his clear recollection of this event suggests that she may have done so at another time, but she does not recall this. We have therefore gone on to consider - ***was the conduct related to the claimant's protected characteristic?*** We find that it was not. Even if Ms Court did use a beckoning gesture towards the claimant at another time, there is nothing to suggest this was connected with his race or nationality. It is for the claimant to show some facts to indicate that there may have been discrimination. The claimant described and demonstrated the gesture to the Tribunal. We do not consider that this was

offensive or inappropriate, and there was nothing to connect this to the claimant's race or nationality.

77 The direct discrimination claim fails for the same reasons. The respondent ***did not subject the claimant to the treatment*** as described by the claimant. Even if this treatment occurred at another time, the claimant has not ***proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic.***

78 The claims of harassment and direct discrimination against Ms Court therefore fail and are dismissed.

Constructive unfair dismissal

79 We have considered the issues in turn, starting with those relating to Mr Richard Phillimore on 23 November 2017. For each issue we have considered whether the alleged acts occurred and, if so, whether they constituted a breach of contract. We have applied the test of whether the respondent has, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties.

80 The first allegation is that Mr Phillimore ***called the claimant to a one-to-one meeting without any notice as to the purpose or content of the meeting***. We find that this did happen. The claimant was called to a meeting to discuss the result of a call check without any prior notice. However, we do not find that this was a breach of contract or otherwise unfair. This was an example of day-to-day management by an acting team leader, and it was appropriate to have a private informal conversation about the matter without giving the claimant notice in advance.

81 The second allegation is that Mr Phillimore ***informed the claimant that he had instructed another manager to listen to the claimant's telephone calls to undertake a quality check.*** We have found that this did not happen.

82 The third allegation is that Mr Phillimore ***advised the claimant that his work was 'no good at all,' and that 'his days were numbered' because 'customers did not understand what he was saying' as his English language and accent was not understandable.*** We have found that Mr Phillimore did say that the claimant's work was "not up to scratch". However, we do not find that this was a breach of contract, or an inappropriate comment. The conversation was about the quality of the claimant's work, following a call check by another manager which had raised some concerns. We have found that Mr Phillimore did not tell the claimant during this meeting that his days were numbered. The issues about understanding the claimant's language and accent were not pursued at the hearing, as the claimant said Mr Phillimore had not made direct comments to him.

83 The fourth allegation is that Mr Phillimore ***required the claimant to stand in the room and recite the declaration required for Employment Seekers Allowance from memory, so as to test his ability to recall and communicate in English***. It was clarified at the hearing that this actually happened in 2016.

The claimant volunteered to recite the declaration, and Mr Phillimore said "go on then". We do not find that this occurred as described in the list of issues, and was not a breach of contract.

84 The fifth allegation is that Mr Phillimore ***informed the claimant that he would be put on a low mark and that Mr Phillimore would review his work again to determine whether he could carry on in his existing role***. We have found that this did not happen as described during this meeting, and we note that as temporary acting team leader Mr Phillimore was not in a position to mark the claimant or review his work on an ongoing basis.

85 The sixth allegation is that Mr Phillimore ***was dismissive, critical and uninterested in the claimant's responses, and was deliberately intimidating.*** We have found that the claimant found this meeting difficult, and he was upset afterwards. However, having considered all the evidence, we have found that Mr Phillimore did not act inappropriately towards the claimant and was not deliberately intimidating.

86 Next are the allegations relating to Mr Blogg. ***In or about November 2017 and again after the claimant raised a grievance in December 2017 about the same conduct, Mr Peter Blogg, an employee of the respondent who worked opposite the claimant, said to the claimant's colleagues in his presence: 'do you understand what he said? I couldn't understand a word'; the claimant 'doesn't speak English'; 'where does he come from?'; and 'because he is Iraqi, he can't be trusted.'*** We have decided this allegation on the basis of the evidence available to us, on the balance of probabilities.

87 The claimant's evidence was that Mr Blogg made these types of comments both before and after he submitted his first grievance. We had no direct evidence from Mr Blogg, as he left the respondent's employment in 2018 and the respondent has not been able to contact him. We had no evidence of the discussions that Ms Dolman had with him at the time of the events. We also had no evidence about his response to these allegations during the formal grievance investigation, as Mr Watson did not speak to Mr Blogg as part of his investigation. Ms Phillimore gave evidence that he did not witness this behaviour, and he thought that Mr Blogg and the claimant got on well. However, this does not show that the claimant's version of events is incorrect. On the balance of probabilities, and considering the limited evidence available to us, we therefore find that Mr Blogg did make these comments in front of the claimant.

88 Next are the allegations about the formal grievance investigation. The overall allegation is: ***In or about November 2017, the respondent unreasonably investigated and/or determined the claimant's grievance on the grounds that it concluded that nothing improper had occurred in November 2017.*** Having considered this carefully, we find that there was an unreasonable investigation and determination of the claimant's grievance.

89 In relation to the informal grievance investigation, the claimant was given a conclusion of "no case to answer" in relation to the issues with Mr Phillimore. It is unclear how this was an appropriate conclusion when the claimant had asked Ms Clarke to speak to Mr Phillimore to let him know how he had made him feel. We have no details at all of what was discussed with Mr Blogg and no feedback was

provided to the claimant on this issue.

90 In relation to the formal investigation by Mr Watson, there was no investigation of the issues about race discrimination that the claimant raised in the grievance meeting. We accept that the claimant found it difficult to explain his concerns, and did not provide clear detail about when and where things happened. However, as recorded in the notes, he did explain comments that had been made to him about his ability to speak English. These are clearly allegations that could be race discrimination. Mr Watson did not investigate these allegations at all with the individuals named, or with Ms Dolman who had dealt with the original issue about Mr Blogg. Instead, he concluded that the complaint as described did not constitute a case of bullying, harassment or racism. Mr Watson was aware that the claimant was unwell at the meeting, but did not provide him with a different opportunity to explain his concerns further, such as by adjourning the meeting or allowing him to provide further information in writing. Taking all of these matters into account, we find that this was an insufficient investigation of serious allegations raised by the claimant. We also find that the conclusion was unreasonable, as it was based on an insufficient investigation.

91 The claimant also made specific complaints about the grievance process. Firstly, ***the claimant did not receive any feedback nor was any action taken in respect of the complaint against Mr Phillimore and Mr Blogg.*** This overlaps with our findings above. The claimant did not receive any clear feedback after the informal process. It appears he had no feedback about the issues raised with Mr Blogg. He was simply told there was no case to answer in relation to Mr Phillimore, rather than being given any explanation of Mr Phillimore's response to his discussion with Ms Clarke. No action was taken after the formal grievance process, but as explained above this was based on an insufficient investigation.

92 Secondly, ***the claimant did not receive any notes of the meeting relating to his grievance.*** The claimant did receive the notes of the formal grievance meeting with the outcome letter. He did not receive notes of the original meeting between Mr Phillimore and Ms Clarke, but we do not find he was entitled to receive these notes as this was an informal process.

93 Thirdly, ***Mark Watson prevented the claimant from exercising his right of appeal against the outcome to his grievance, because he failed to respond to the claimant's request for an extension of the deadline for appealing, given the letter notifying him of the right was incorrectly dated***. We have found that the letter was not incorrectly dated, and that Mr Watson did not receive the claimant's message requesting an extension. We therefore find that Mr Watson did not prevent the claimant from exercising his right of appeal.

94 Fourthly, ***the claimant was promised that he would be issued with a letter of official apology by Nikki Lewis in respect of the conduct of Mr Phillimore and Mr Blogg, but was not provided with one***. We have found that this was a misunderstanding on the claimant's part, and Ms Lewis did not promise the claimant that he would be issued with a letter of official apology in relation to conduct of Mr Phillimore and Mr Blogg.

95 The next allegation is, ***after raising a grievance, the claimant requested***

that he should be transferred / re-allocated to another office to relieve the stress and anxiety which he suffered on attending Lodge House, but that request was denied. The claimant had initially been told by Ms Clarke that other locations were not available. However, the respondent did accommodate a change of location when the claimant returned from sickness absence. As found in the facts, there was a mistake with the UC training when the claimant first returned to work, when he attended Lodge House without knowing the training had been postponed. This was resolved that day, and he was never required to work at Lodge House on his return from sickness absence. We therefore find that this request was not denied.

96 The next allegation is, ***following his return to work from seven months' sickness absence in August Jen Scull failed to: allow the claimant to return to work on a phased return as proposed by his doctor, and told him that his options were to return full-time either for training or to his substantive post; or refer the claimant for an occupational health assessment.***

97 In relation to the phased return, we have found that the claimant was permitted a phased return to work. We have also accepted Ms Willis' evidence that the claimant initially wanted to work full-time due to having run out of sick pay. We have also found that she did not tell him that his options were to return full-time for training or to his substantive post.

98 In relation to occupational health assessments, the respondent had a report from April 2018 when the claimant returned to work, and they did refer him for a face-to-face report later. It appears that there was no immediate referral to occupational health when the claimant first returned to work, and the Tribunal notes that it would be good practice to obtain an up-to-date medical report when an employee returns from a lengthy sickness absence. However, the claimant's fit note had expired meaning he was well enough to return. We have also accepted the respondent's explanation that some of the delay was due to the occupational health provider's backlog. We do not find that the delay was a breach of contract or otherwise unfair.

99 The next allegation is, ***on 21st January 2019, Vanessa Court, a team leader at the service delivery department at 100 Temple Street, beckoned the claimant to come to speak to her by gesturing with her finger, rather than by addressing him orally by name and asking him to come to speak to her.*** As set out above in relation to race discrimination and harassment, we find that this did not happen as described by the claimant when he first met Ms Court, and even if did happen at another time it would not be a breach of contract.

100 The final allegation is, ***in the period between the 2 April 2019 and 25th April 2019 the respondent failed to conclude the grievance process relating to Vanessa Court and to provide the claimant with an outcome.*** As set out in the facts, the respondent did progress the grievance process during this time. The process was not concluded because it was put on hold while the claimant decided how he wanted to proceed. The claimant then resigned, and Ms Sutton reasonably took the view that this meant he did not want to continue with the grievance.

101 The next issue is, ***did the claimant resign because of the breaches?*** We

have found there are two potential breaches of contract – the conduct by Mr Blogg, and the inadequate investigation into the claimant's grievances about Mr Phillimore and Mr Blogg. Taken together, these are sufficient to amount to a breach of trust and confidence. His letter of resignation refers to having been bullied, harassed and discriminated against because of race in November-December 2017, and complains that the grievances he raised were not appropriately dealt with. These issues are therefore part of the reason that the claimant resigned, and are an effective cause of the resignation.

102 The next issue is, ***did the claimant delay before resigning and affirm the contract?*** We find that the claimant did delay before resigning and affirm the contract. The breaches occurred in November/December 2017, and May 2018 (when the formal grievance outcome was provided). The claimant did not resign until April 2019. We have taken account of the fact he was very unwell and off sick for some of this period. However, the claimant did return to work in September 2018. Although he went off sick again in October, he did attend work in September and some of October, and from 6 November until he went off sick again on 22 January. He also had union advice during this time. The "last straw" relied on by the claimant is the incident with Ms Court in January 2019. However, we have found that this did not happen as described by the claimant. We have also found that, even if it did occur at another time, it was not an act of discrimination or otherwise inappropriate behaviour that would be a last straw for the purposes of a constructive dismissal claim. We have found no conduct by the respondent since the claimant returned to work that would amount to a breach of contract.

103 A constructive dismissal claim requires an employee to resign because the employer has committed a fundamental breach of contract. This means the employee must resign relatively quickly after the breach. Remaining employed for a considerable period of time indicates that the employee has affirmed the breach and regarded the contract as continuing, particularly where the employee attends work during this time. In all the circumstances, we find that the claimant's conduct did show an intention to continue in employment rather than resign. He did affirm the contract by remaining employed until April 2019.

104 We have taken into account the claimant's closing submissions. He explained he felt there had been a lack of duty of care by the respondent, and also institutional racism. He says this has made him unwell. He also believes that all of his treatment was linked. However, our role is to decide the issues as listed at the start of this decision, based on the facts and the relevant law. We have given relatively lengthy written reasons to assist both parties to understand why we have made this decision.

105 For the reasons given above the claims all fail and are dismissed.