EMPLOYMENT TRIBUNALS

Claimant: **Mr N Nyatsambo**

Respondent: **Atos IT Services UK Ltd**

Heard at: **Newcastle (by CVP)** **On: 19-22 July 2021**

Before: **(1) Employment Judge A.M.S. Green**
(2) Ms R Bell
(3) Mr R Dobson

Representation

Claimant: In person
Respondent: Mr M White, Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that the claimant's claims for direct race discrimination pursuant to the Equality Act 2010, section 13, and constructive discriminatory unfair dismissal under section 39, are dismissed. The claimant will pay the respondent £5,976 being a proportion of its restricted costs, assessed on the standard basis.

REASONS

Introduction

1. For ease of reading, we refer to the claimant as Mr Nyatsambo and the respondent as Atos.

The hearing

1. We conducted a remote CVP hearing to hear the claim and Atos' costs application. As Mr Nyatsambo was not legally represented and was presenting his own case, we carefully explained the procedure to him.

2. We worked from digital hearing bundles for the substantive claims and for the costs application. The following people adopted their witness statements and gave oral evidence:

    a. Mr Nyatsambo

    b. Ms P Johnson

    c. Ms C Watson

    d. Ms D Lomas

3. We took regular breaks. Mr White tendered a skeleton argument with supporting authorities and evidence which we have accepted for consideration. After hearing Mr White's closing oral submissions, we adjourned for one hour to enable Mr Nyatsambo to consider his closing oral submissions in response.

Basis of our decision

4. In reaching our decision, we have considered the oral and documentary evidence, Mr White's skeleton argument and the closing oral submissions from both parties. The fact that we have not referred to every document in the hearing bundles should not be taken to mean that we have not considered it.

The procedural history of the claim

5. Mr Nyatsambo claimed ordinary constructive unfair dismissal, discriminatory constructive unfair dismissal, and direct race discrimination. He presented his claim form to the Tribunal on 16 October 2019.

6. Atos filed its response to the claim on 18 November 2019, noting the lack of particulars in the claim and stated its intention to apply to strike out the claim on the grounds of time bar and prospects.

7. At a preliminary hearing on 17 December 2019, the Tribunal ordered Mr Nyatsambo to provide further and better particulars of his claim, including exactly what acts were said to have constituted race discrimination and when they occurred. The Tribunal concluded that there should be a further preliminary hearing to determine whether the claim should be struck out on time grounds.

8. Mr Nyatsambo did not comply with the Tribunal's order to provide further and better particulars which led the Tribunal to issue a strike out warning. Thereafter there were further delays and another preliminary hearing on 22 May 2020 at which Mr Nyatsambo was ordered to provide further and better particulars by 5 June 2020.

9. On 5 June 2020, Mr Nyatsambo provided further and better particulars of his claim in the form of a "personal statement" which he elected to adopt as his witness statement at the final hearing. The personal statement set out details of his objections to Atos' conduct in July and September 2018 and, for the first time, alleged unconscious racial bias.

10. Atos emailed Mr Nyatsambo three times between 18 and 20 July 2020 asking him to provide them with additional medical evidence that he had together with evidence relating to his search for, and taking up, alternative employment.

11. Mr Nyatsambo provided some limited documents in this regard on 3 July 2020.

12. There was further correspondence between the parties. A further preliminary hearing was held on 3 September 2020. The Tribunal considered Atos' application to strike out the claim on time bar grounds. At the hearing, the Tribunal did the following things:

    a. It struck out the claim for ordinary unfair dismissal as it was out of time.

    b. It extended time retrospectively to allow Mr Nyatsambo to bring his race discrimination claim.

    c. It made a deposit order of £400 on the basis that employment Judge Sweeney considered that Mr Nyatsambo's argument that he was treated less favourably because of race such that he was constructively dismissed, had little reasonable prospect of success. If Mr Nyatsambo decided to continue with his complaint of race discrimination as set out in the claim form and further information provided on 5 June 2020, he was required to pay a total of £400.

13. In granting the deposit order, employment Judge Sweeney recognised that:

    a. Mr Nyatsambo's case was based on ambitious allegations of unconscious bias, which allegations appeared to be based on inferences drawn from generalised assumptions.

    b. Mr Nyatsambo had not in his further and better particulars given details of any comparator in respect of the same, despite having been ordered specifically to do so.

    c. Even on Mr Nyatsambo own case, his managers were supportive of him and told him that he was doing well.

14. Mr Nyatsambo paid the deposit order and lodged a schedule of loss.

<u>The claims</u>

15. Mr Nyatsambo's remaining claims proceed under the Equality Act 2010 ("EQA"). He claims direct race discrimination under EQA, section 13 and constructive discriminatory unfair dismissal under EQA, section 39.

16. In summary, Mr Nyatsambo claims the following:

    a. Atos contracted with the Department of Work and Pensions ("DWP") to assess applicants' eligibility for statutory disability benefits such as the Personal Independence Payment ("PIP").

b. Atos employs nurses, including Mr Nyatsambo, known as Healthcare Professionals ("HP") to carry out the assessments which involves speaking with and meeting applicants either at an assessment centre or in their homes and to score their health against various descriptors.

c. The contract with DWP requires Atos to check on the consistency of scoring across HPs. To that end, Atos operates a Consistency Improvement Programme ("CIP") under which an automated computer system flags HPs whose scoring falls outside the average distribution range.

d. In the summer of 2018, Mr Nyatsambo was flagged by CIP as an outlier ("CIP Outlier"). This was because he was assessing significantly fewer people as eligible for PIP in comparison to the national average.

e. Consequently, Atos took action in July and September 2018 to bring Mr Nyatsambo's eligibility scores within the national distribution range. This included asking him to look again at training modules and to observe another HP performing an assessment as well as being observed himself by a Clinical Support Lead ("CSL"). At the same time they were telling the claimant he was doing nothing wrong.

f. Mr Nyatsambo viewed these requirements as performance management measures and took exception to them. He claims that the steps taken pursuant to his being classified as an CIP Outlier resulted from unconscious racial bias against him. He went on sick leave and eventually resigned.

The response

17. Atos' position regarding the claims, which are the subject of the deposit order, is that they are nonsensical. In summary, Atos responds as follows:

a. Mr Nyatsambo does not dispute that he was classified as a CIP Outlier.

b. CIP runs automated comparisons of the scores that HPs give to applicants for disability benefits.

c. The only space in which unconscious bias could possibly arise, therefore, would be in the actions that Atos took in response to Mr Nyatsambo being classified as a CIP Outlier.

d. Those actions were reasonable and justified. They did not amount to performance management or criticism of Mr Nyatsambo. They were clearly not racially biased.

e. Atos' reasonable actions did not amount to a repudiatory breach of contract even if, which is denied, they were motivated by unconscious racial bias.

f. In any event, Mr Nyatsambo waited until some two months after the outcome of a related grievance (which he did not appeal), claiming sick

pay throughout that time before giving notice of resignation. If his contract was breached, Mr Nyatsambo affirmed it.

g. If Atos was in repudiatory breach of Mr Nyatsambo's contract by discriminating unconsciously against him, which it denies, the discrimination was not a material factor in his overall decision to resign.

18. Atos also gave notice that it claims costs if it successfully defends the claims. It does so on the basis that Mr Nyatsambo was clearly warned of that risk when the Tribunal granted a deposit order for the reasons set out therein. He was on notice that his claims had little reasonable prospect of success.

<u>The issues</u>

19. The parties agreed a list of issues for the Tribunal to determine. These are set out in a document which, erroneously, still refers to those issues as being in draft. We checked with the parties that the list of issues set out therein was in fact agreed and they confirmed that to be the correct position.

20. The agreed list of issues is as follows. In relation to the claim for direct discrimination under EQA, section 13, did Atos do the following to Mr Nyatsambo:

a. In July 2018, require him to be observed more than once by a CSL after he was identified as a CIP Outlier? Mr Nyatsambo accepts that one observation was "the norm" in the circumstances.

b. In July 2018, require him to observe the work of a peer (Wayne) without giving a proper explanation of why this was necessary?

c. In July 2018, require him to study training modules that he had already completed?

d. In September 2018, inform him that he had been a CIP Outlier for 11 weeks and that this was a matter of concern?

e. In September 2018, subject him to more observations than his peers and/or scrutinise his work more intensively?

f. If so, did Atos treat Mr Nyatsambo more favourably than a comparator? Mr Nyatsambo relies on a hypothetical comparator.

g. If so, was the less favourable treatment because of Mr Nyatsambo's race?

21. In relation to the claim for discriminatory constructive dismissal under EQA, section 39, do the matters listed above amount (individually or cumulatively) to a breach of the implied term of trust and confidence?

22. If so, did Mr Nyatsambo resign in response to those breaches?

23. Atos accepts that if it is found that Mr Nyatsambo was constructively dismissed, and that he resigned in response to one or more of the breaches

of contract that also amount to an act direct discrimination, his dismissal will be discriminatory contrary to EQA, section 39 (2) (c) read with section 39 (7) (b).

24. The list of issues also address remedy. As we have dismissed Mr Nyatsambo's claims, there is no need to reproduce those issue here.

Findings of fact

25. Atos provides a range of IT, consultancy, and healthcare services. It has a contract with DWP to perform disability assessments of applicants for PIP. The eligibility of those applicants to PIP depends on the outcome of those assessments.

26. Atos employs a large number of people to carry out approximately 800,000 assessments annually. An assessment involves an HP meeting an applicant, asking them questions about their health, and assessing the application based on their answers. The assessor writes a report which involves scoring the applicant's needs against preset criteria provided by DWP. Assessments are either conducted at an assessment centre or in the applicant's home.

27. Mr Nyatsambo is a black African originally from Zimbabwe. He is a first-generation immigrant. He is a qualified nurse registered with the Nursing and Midwifery Council.

28. Mr Nyatsambo was employed by Atos to perform PIP assessments. His job title was "Healthcare Practitioner-Disability Analyst". He was an HP. He started working for Atos on 4 July 2016. He worked at Atos' Sunderland office. He was the only Black member of his team in the office. Ms Johnson was Mr Nyatsambo's line manager from June 2017 until March 2019. Ms Johnson is employed as a Service Delivery Manager in the PIP team in Sunderland. She currently is responsible for a new Virtual Academy.

29. In her witness statement, Ms Johnson refers to the fact that given the large number of assessments conducted annually, the importance of the assessment outcome to individual applicants and the significant public interest in the administration of disability benefits, it is of the utmost importance that PIP assessments are carried out consistently by all HPs who work for Atos. To this end, Atos has several stringent quality assurance policies and procedures as part of its contractual arrangements with DWP reflecting the importance of PIP assessments to both parties. As an example, she refers to the fact that Atos regularly audits HPs work for quality assurance. We have no reason to doubt what Ms Johnson says.

30. Part of the quality assurance process involves the use of the Clinical Dashboard Report ("CDR") which is a software tool that analyses trends in the performance metrics of individual HPs and compares them to national average scores. As part of its contract, Atos has agreed a CIP with DWP. The output from the CDR allows Atos to identify any areas where the subject HP is an outlier compared to the national average, in order to deliver the CIP. The CIP Outlier information acts as an early warning system. The CDR generates a Descriptor Analysis Report ("DAR") which is an analysis of how a given HP scored all assessments carried out by the same HP over a rolling 3-month period and compares it to national average scores to determine whether that

HP is a CIP Outlier. HPs are classed as an outlier if their Award Rate of claimant applications is either greater than 80%, or less than 40%, of the national Award Rate average. Atos controls and analyzes the data. It also sets the national averages. The information generated is provided to line managers within Atos' healthcare division so that they are able to discuss scoring trends with HPs that might become a matter of concern if not addressed. If an HP is identified as a CIP Outlier that fact, in itself, does not necessarily mean that the HP should be subject to performance management. Having heard Ms Johnson and Ms Watson's oral evidence, we were satisfied that being classified as a CIP Outlier was simply a starting point for a discussion with the relevant HP. We also accept that if an HP was identified as a CIP Outlier, they could ultimately be subject to formal performance management.

31. CSLs hold clinical assurance meetings every week to discuss the CDR and any CIP Outliers.

32. There is an expectation that CSLs will show HPs their DAR and talk through the areas in which they had been registered as an outlier. This is understood as business-as-usual support, not just where an HP has been identified as a CIP Outlier. Ms Watson, who was a CSL working in the Newcastle office at the time, but subsequently become Head of Academy in PIP thought that it was helpful to share the DARs with HPs, as it offered detailed information allowing the CSL to focus their discussions with the HP on the particular areas that were causing an issue. In her witness statement she says that she was not aware if that practice was consistently applied in all offices in the region and in the Sunderland office.

33. Atos operates a performance management policy which is called the "Performance Excellence Policy" (the "Policy"). A copy of the Policy has been provided [252]. The Policy is triggered if an employee is issued with a Performance Improvement Notice ("PIN") [253]. A PIN will record the following:

    a. SMART objectives (specific, measurable, achievable, realistic, and timely).

    b. Dates of review meetings during the performance improvement, a record of which will be kept.

    c. Any training or coaching that needs to be carried out.

34. Ms Johnson was responsible for managing Mr Nyatsambo's performance in accordance with the Policy. In late 2017, Mr Nyatsambo had a number of unsatisfactory audits which triggered the threshold for a Quality Support Action Plan ("QSAP") twice [128]. Ms Johnson drew up the QSAPs and supported Mr Nyatsambo with fortnightly meetings to help him achieve the goals that were set out in the QSAP. Mr Nyatsambo was subject to a PIN [139]. Ultimately, the QSAPs were closed, and no further action was taken under the Policy. Mr Nyatsambo was notified of that fact on 20 April 2018 [147].

35. It is common ground between the parties that in July 2018 there had been three complaints by applicants about Mr Nyatsambo on three consecutive

days. We accept from Ms Johnson's witness statement that it is not unusual for there to be complaints about HPs. This is because applicants for PIP often become emotional about their assessments particularly if they are assessed as being ineligible when they believe that they are entitled to the benefit. In these circumstances, an applicant sometimes perceives that the HP has acted unfairly, even where on investigation, it is found that the HP has applied the eligibility criteria correctly. However, all complaints have to be investigated to maintain public trust and transparency. Furthermore, Atos is obliged under its contract with DWP to investigate complaints that it has received. This applied to the complaints against Mr Nyatsambo.

36. Ms Johnson told Mr Nyatsambo about the three complaints at a face-to-face meeting with him on 16 July 2016.

37. Mr Nyatsambo went on sick leave for stress from 17 July 2016 for two weeks.

38. We have no doubt that Mr Nyatsambo was upset about the fact that there had been three complaints made against him. We formed the strong impression when hearing him give his evidence that he took his role as a nurse and HP seriously and he was understandably concerned about the complaints. This is also reflected in the contemporaneous note of the discussion [153] where it is stated that he was very distressed by the complaints and suggested that there were some racial undertones in respect of those complaints. The contemporaneous note does not provide any detail about what was meant by "racial undertones". However, in her oral evidence on re-examination, Ms Johnson said that Mr Nyatsambo believed that he was being targeted because of his colour. He gave further details that he believed he was being targeted as the only black man in the team and they wanted rid of him. She told him that that was not the case. Ms Johnson said that the comments stuck in her mind because she was very shocked about it. We note that he was advised that he would meet up with Ms Johnson on 17 July 2018 after allowing Mr Nyatsambo to read and fully absorb the complaints. He was also advised that there would be a provisional plan to support him.

39. In addition to the three complaints, Ms Johnson also informed Mr Nyatsambo that he had been identified as a CIP Outlier. He had been identified by the CDR as being below the national average for making awards to applicants. To fall within this category, the lower threshold was assessments below 40%. He was consistently scoring applicants "out of benefit". There is no dispute that Mr Nyatsambo accepted that he had been identified as a CIP Outlier. For example during his subsequent grievance hearing, in the minutes of that meeting, he is recorded as saying that he did not achieve the national average [181]. He is recorded as saying "although there is a national average which I did not achieve, I was told that I was doing a very good job". We note that Mr Nyatsambo did not challenge the accuracy of the minutes of that hearing.

40. Having heard Ms Johnson's evidence we find that whilst she spoke to Mr Nyatsambo about the complaints and his classification as a CIP Outlier the principal topic of conversation on 16 July 2018 was the complaints which had made him very stressed.

41. The complaints were investigated, and no further action was taken in respect of them. Mr Nyatsambo was informed of this on his return to work.

42. Ms Johnson did not understand why Mr Nyatsambo had been classified as a CIP Outlier because he had recently undergone significant observation as part of the QSAP process and she had no concerns about the way that he was carrying out his assessments or recording his findings. She wanted to get to the bottom of things as the purpose of CIP was for Atos to increase the consistency of PIP assessments across the country. She investigated matters whilst Mr Nyatsambo was on sick leave. We find Ms Johnson's evidence credible given the context of his recent QSAP history. Furthermore, in his own evidence, Mr Nyatsambo also accepted that he had been performing to the required standard. Clearly there was a reason why he had been classified as a CIP Outlier which needed to be ascertained. However, he believed that the subsequent steps that were taken by Atos in addressing his CIP Outlier status indicated that he was being placed into "measures" (i.e. formal performance management) which he thought were objectively unwarranted and, therefore, connected to his race. We disagree for the reasons set out below.

43. Ms Johnson discussed the fact that Mr Nyatsambo had been identified as a CIP Outlier with Ms Allison Evans. Ms Evans is the Sunderland CSL. The following things were agreed:

    a. Mr Nyatsambo would undergo additional observations by a CSL from outside the Sunderland office. Ms Johnson believed that this would help to get a fresh perspective on why Mr Nyatsambo was registering as a CIP Outlier. She said, in her witness statement, that "I was genuinely puzzled by this as I did not have any concerns about the quality of his work".

    b. Mr Nyatsambo should observe a very experienced peer, Wayne Rutherford, who did not work in either Sunderland or Newcastle. This was standard practice for HPs who might require support in certain areas and often helps them to gain fresh perspective.

    c. Mr Nyatsambo would be invited to re-read Aids and Assistance and Objectivity training modules as well as any other training related to the CIP pathway. Ms Johnson was already aware that Mr Nyatsambo had completed those modules but, in her experience, it was sometimes beneficial for HPs (and others) to return to basics. In doing so, Ms Johnson believed that there was no suggestion that Mr Nyatsambo had not mastered those aspects of his role. Rather, she thought that it might assist with resolving his CIP Outlier status if he was to refresh his memory of them.

44. Mr Nyatsambo returned to work at the end of July 2018. He remained a CIP Outlier. It was agreed not to send him to observe Mr Rutherford because Mr Nyatsambo told Ms Johnson that the thought of having to do this was making him feel stressed and that he felt very strongly about it. Consequently, Ms Johnson decided that instead of observing another HP, Mr Nyatsambo could just work with his own CSL, Ms Evans, to try to bring his scoring back into range.

45. Mr Nyatsambo continued to work through August 2018. He went on leave on 13 August 2018 for one week. Ms Evans observed Mr Nyatsambo twice. His first observation was 9 August 2018, and it was observed that he carried out the assessment with no clinical or behavioural concerns raised [153]. His second observation was on 29 August 2018 where it was noted that he was appropriate in his manner and his descriptor choices were fair and objective. No issues were highlighted [153].

46. The parties disagree on whether the proposed steps flowing from Mr Nyatsambo's classification as a CIP Outlier amounted to performance management under the Policy. Atos' position is that it did not. Mr Nyatsambo believes that it was effectively performance management. We prefer Atos' interpretation for the following reasons:

    a. Mr Nyatsambo was not subject to any ongoing formal action under the Policy as a result of his discussion with Ms Johnson in July 2018 and further action thereafter. He acknowledged under cross-examination that he had recently been signed off under the QSAPs.

    b. Mr Nyatsambo accepted under cross-examination that Ms Johnson did not understand why he had been classified as a CIP Outlier and she wanted to bring someone else in to provide a fresh perspective. In cross-examination it was put to Mr Nyatsambo that it made sense that if a manager had an issue with consistency and was not sure why, someone else should be brought in to provide a second opinion. In response to that, Mr Nyatsambo agreed that was a logical step to take. We believe that must have been the case at the time because he had recently been signed off under the Policy suggesting that there were no performance issues. The matter needed to be explored further.

    c. It was put to Mr Nyatsambo that the proposed steps were not performance management issues but to help him to bring his scores into line with the national average. He agreed but went on to say that he would still allocate the scores that he had given to the applicants. The Tribunal explored this with him further and it was clear from his evidence that he believed that his clinical judgement relating to an individual applicant should always prevail with the implication that if this amounted to his being classified as a CIP Outlier, so be it. He was essentially disagreeing with the concept using the CIP process to drive consistency in assessments across all HPs. He also believed that he was being asked to falsify scores in order to meet national average requirements. We have seen no evidence to support that proposition.

    d. At no stage thereafter was the Policy triggered. There was no PIN and no QSAP.

    e. At the time CSLs in the North East region participated in a weekly call to discuss data and trends emerging from the CDR tool and to agree actions relating to any CIP Outlier. In September 2018, Ms Watson was on one of these calls. She was asked to support Mr Nyatsambo as his own CSL, Ms Evans, was on holiday. At the time, Ms Watson said that there were three or four other individuals in the North East region that were identified as outliers. Ms Watson understood that Mr

Nyatsambo had been identified as a low awarder and fell outside the national average distribution range. The DAR was used to identify specific descriptor areas where he was scoring lower than the national average. Mr Nyatsambo scored high on awarding applicants "A" descriptors, meaning there was no restriction found and low on descriptors indicating that aids and appliances were required. Ms Watson contacted Mr Nyatsambo to arrange to visit him at the Sunderland office to discuss his award rate and the DAR with him. She showed him his DAR. Ms Watson reassured him that he was not a CIP Outlier because he was making mistakes and she was not criticising his performance. She told him about the contractual requirement for Atos to bring CIP Outliers' scores into line with the national average and gave details of where his scores were different and discussed the possibility that his experience in previous jobs was influencing the way in which he had approached his scoring. We accept Ms Watson's evidence that these conversations could be very useful to enable the HP to gain insight into their assessments and could lead to what Ms Watson described as "a lightbulb moment". We have no reason to doubt what Ms Watson said. She is an experienced CSL, and we found her to be a reliable and consistent witness when giving her evidence. We note that although Mr Nyatsambo took umbrage about Ms Watson's approach at the time, when he was cross examined it was put to him that she was doing her best to reassure him that he had done nothing wrong. In reply, he agreed but said he had found it confusing.

f. Ms Watson observed Mr Nyatsambo conduct an assessment on 24 September 2018. No issues were highlighted [153].

g. Ms Watson spoke to Mr Nyatsambo on the telephone on 25 September 2018 to discuss his assessment. During that conversation, Mr Nyatsambo became upset and defensive about his status as a CIP Outlier. He had been in outlier for 11 weeks. During that conversation he further alleged that he was being asked to falsify records. Ms Watson explained again to him that this was not the case. She was also concerned about how Mr Nyatsambo was taking the matter. By this we mean, he referred to the racism and bullying experienced by his children and his family. Ms Watson was very disturbed by this and assured him she would not work for a company like that. On cross examination, she stated that she took no further action and did not investigate. She stated she was not aware of any company policy.

h. Mr Nyatsambo's subsequent grievance outcome was that no formal measures had been put in place and the observations that had been recommended were the result of his CIP Outlier status. That was a reasonable conclusion to reach as it was based on evidence derived from a thorough investigation and the grievance hearing (see below).

47. On 26 September 2018, Mr Nyatsambo telephoned in to say that he was taking further sick leave because of work-related stress.

48. On 27 September 2018, Mr Nyatsambo emailed Ms Johnson, Ms Watson, Ms Evans and Ms Mynett [149-153]. He was confused and distressed that he was still being identified as a CIP Outlier. In summary, he said the following:

a. He continued to interpret this status as a serious criticism of his performance.

b. He claimed that he had been placed on “special measures”.

c. He said that he was being pressurised to changes reports to “fit the numbers”.

d. However, he also said that he really liked Ms Johnson, his CSL and his team.

49. Ms Johnson believed that Mr Nyatsambo was taking issue with Atos’ systems and policies in respect of the CIP and the policy of using and relying upon the outlier flag. She did not believe that anyone was being accused of racism.

50. Mr Nyatsambo was referred to occupational health and did not return to work at any point [162].

51. On 12 November 2018, whilst Mr Nyatsambo was still on sick leave, he lodged a grievance [164-174]. He was unhappy about the fact that he had been complained about by applicants and he had been required to undertake further training and observations because of being classified as a CIP Outlier. He said that the whole situation was making him paranoid, stressed, frustrated, and confused, amongst other things.

52. Ms Lomas, who is Atos’ Service Delivery Manager in Darlington, acknowledged Mr Nyatsambo’s grievance on the day that it was received, and she was appointed to investigate it. She carried out an investigation interviewing the key individuals. Her investigation notes have been produced [175-187]. She had a lengthy meeting with Mr Nyatsambo and his union representative during which Mr Nyatsambo was invited to set out his grievance which he did at length.

53. Ms Lomas heard Mr Nyatsambo’s grievance at the Sunderland office on 27 November 2018. He attended the hearing with his union representative from Unite. Ms Breen from HR also attended the meeting and took notes. These have been produced in the bundle [177-184]. Mr Nyatsambo has not challenged the accuracy of these notes and it is reasonable to presume that they are an accurate record of what was said at the hearing. The notes reveal that he raised several issues about the way his performance had been managed, going back to 2017 which was broader than the issues which he had raised in his written grievance. His union representative acknowledged that some of the issues he was raising had been resolved and were only being referred to for context. The core of his grievance was that he had been identified as a CIP Outlier on the one hand but on the other he had been told that he was doing a good job and that nobody could explain to him what he needed to do differently. Ms Lomas understood that Mr Nyatsambo found the situation confusing and stressful. The notes also indicate that both Mr Nyatsambo and his union representative referred to the CIP Outlier classification as if it was a form of performance management or implied criticism of Mr Nyatsambo’s work. Ms Lomas did not think that was the case but raised it with him on a few occasions during the hearing.

54. Towards the end of the hearing, Mr Nyatsambo emphasised that his complaint was about the process and that he got along with his colleagues. This was repeated by his union representative. The grievance was not about one person but about the process [182]. Mr Nyatsambo also acknowledged that his grievance has been taken seriously, and that he felt lighter mentally [183]. During cross examination, he was asked about the fact that no racial discrimination claims were made during the grievance hearing. He stated that by this time he was very unwell mentally and was relying on his union representative to represent him correctly.

55. After the hearing, Ms Lomas spoke to Ms Watson who explained to her how she had come to observe Mr Nyatsambo on 24 September 2018 and the nature of the conversation she had with him afterwards. She told Ms Lomas that she had shown Mr Nyatsambo his DAR and that it was usual practice to do this. She also told Ms Lomas that she had reassured Mr Nyatsambo that he was not asked to falsify records.

56. Ms Lomas also spoke to Ms Johnson on 28 November 2018 [187]. She told Ms Lomas that the suggestion that Mr Nyatsambo should be required to observe a colleague did not relate to the complaints against him which had been investigated and rejected. Furthermore, she also said that there were no performance measures being imposed on him. She simply believed that it would be beneficial for Mr Nyatsambo to observe an experienced colleague from outside his area because he had been identified as a CIP Outlier, that there were no identifiable issues with his performance and, therefore, no obvious way to address his CIP status. She also told Ms Lomas that she had reassured Mr Nyatsambo that he had not been placed under any pressure to falsify records.

57. On 11 December 2018, Ms Lomas wrote to Mr Nyatsambo with the outcome of his grievance [188-190]. In summary:

    a. She did not uphold the majority of his grievance but did find that the sharing of the CDR with Mr Nyatsambo could have been done more sensitively, with the purpose of the tool being explained [189].

    b. She made a recommendation that the business review the use of CDR in meetings of this kind, and that guidance on the matter be seen to be consistent across the regions [189-190].

    c. She made it very clear that Mr Nyatsambo's classification as a CIP Outlier did not amount to a criticism or a performance issue, and that the measures taken in response to that status were normal under the circumstances [188].

    d. She notified Mr Nyatsambo of his right of appeal.

58. Mr Nyatsambo did not exercise his right of appeal.

59. On 13 February 2019, Mr Nyatsambo resigned [193]. He gave no reason and did not purport to be resigning summarily in response to any act by Atos, including any alleged unlawful discrimination or breach of contract. He was unhappy about having to serve his full notice period [195] and his notice was

cut short by mutual agreement with the effect that his effective date of termination of employment was 6 March 2019 [207].

60. Mr Nyatsambo alleges that Atos' actions in July and September 2018 in responding to his CIP Outlier status were discriminatory and based on his race. We find as follows:

    a. We accept that during the conversation on 16 July 2018, he told Ms Johnson that he was concerned that the complaints made against him by the three applicants may have been racially motivated. However, that had nothing to do with his CIP Outlier status. They were separate matters. Furthermore, the complaints were investigated and not upheld.

    b. We also heard evidence that during a conversation Ms Johnson, Mr Nyatsambo alleged that senior management above her wanted the CIP Outlier status to be used as a pretext to remove the only black man in the Sunderland office. When she was cross examined about this, Ms Johnson accepted that this had been raised with her and that when it was, she was horrified. She said she told Mr Nyatsambo that this was not the case at all. Indeed, she told the Tribunal that she would not want to work for a company that treated a black person in the way suggested by Mr Nyatsambo. She also acknowledged to the Tribunal that she regarded it as a comment rather than an allegation. When she was asked by the Tribunal how she was able to assess the truth of the comment/allegation, she replied that no one had come from higher up in the organisation asking her to get rid of the black man as alleged. As far as she was concerned, Mr Nyatsambo's race was never in issue. However, she also accepted that she had not followed any company procedure relating to allegations of race discrimination after receiving the information from Mr Nyatsambo. She acknowledged to the Tribunal that she might have been at fault for not taking the matter further, but she defended herself by saying that the statement was patently untrue.

    c. In her evidence in chief, Ms Watson said that Mr Nyatsambo only raised the question of race once in a conversation with her and this was in general terms. There was conflicting evidence about what was actually said. The gist of Ms Watson's evidence was that when Mr Nyatsambo spoke to her on 26 September 2018, he had spoken about his challenges generally because of his race (i.e. having to work harder) and he also referred to the fact that his children had been bullied at school because of their race. When Mr Nyatsambo challenged Ms Watson on this in cross examination, he took umbrage. He seemed to misinterpret what Ms Watson had said to the effect that his children were underperforming at school. He did not seem to understand that what she had suggested was that they had been bullied because of their race. He suggested that he had simply spoken to her about the fact that he was depressed and frustrated and was at the end of his tether. Our general impression of Ms Watson was that she was a reliable and straightforward witness, and her account of the conversation is both plausible and credible. Race was discussed in general terms and not in respect of Mr Nyatsambo's performance at work.

d. During the course of the grievance, Mr Nyatsambo did not at any point suggest to Ms Lomas that his race was a factor in his treatment. He and his union representative made clear that his issue was with the process, which he believed had led him to being under constant scrutiny, rather than with any specific person [181-182]. Ms Lomas told the Tribunal that she only became aware of the race discrimination allegation when she received the hearing bundle (i.e. after Mr Nyatsambo had left Atos and instigated his claim in the Tribunal).

e. It has been suggested that he was treated less favourably than a hypothetical white comparator (i.e. a person who would also be classified as a CIP Outlier). We heard anecdotal evidence that other HPs in the Sunderland office were surprised about the extent to which Mr Nyatsambo was being scrutinised suggesting that he was being singled out because of his race. However, Mr Nyatsambo admitted under cross-examination that he did not know when he spoke to other team members in his office and whether any of them had been classified as CIP Outliers. He also accepted that even if they had, they would not necessarily share that information with him.

61. After leaving Atos, Mr Nyatsambo found alternative employment with the ambulance service which commenced towards the end of September 2019. It is a permanent position. His salary is £34,000 per year prorated as he works part-time. This equates to an annual salary of £18,400 per year. He co-owns his house with his wife. He has owned his house since 2004. The mortgage is £643 per month. Council tax is £83 per month. He pays for utilities at the rate of £150 per month and groceries at approximately £400 per month. He has a secured loan which costs him £200 per month. Other monthly outgoings include insurance (£125) and car tax (£20). He expects to enjoy a salary increase soon and he believes that his prospects with his new employer are good. He is a director of a company providing occupational health services. The company is currently not trading but he hopes it will start to do so in the near future and will be profitable. It is a vehicle for his wife's profession; she is an occupational health professional.

Applicable law

62. Race is a protected characteristic. Section 13 (1) of EQA defines direct discrimination as follows:

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. In this case, the Claimant alleges that he was paid less than his white comparators and he has been discriminated against because of his race and/or colour.

63. The EHRC Employment Code makes the point that the motive or intention behind the treatment complained of is irrelevant (see para 3.14). In other words, it will be no defence for an employer faced with a claim under section13(1) EQA to show that it had a 'good reason' for discriminating. In **James v Eastleigh Borough Council [1990] IRLR 288** the House of Lords held that the Council's policy of allowing those who had reached pensionable age free entry to its swimming pools discriminated against the male complainant on the ground of his sex. Lord Goff acknowledged that the

Council had the best of intentions in adopting the policy, which was to give financial assistance to retired people, whether male or female. However, the Council's benign motive was no answer to a claim of direct discrimination.

64. Similarly, in **Amnesty International v Ahmed [2009] IRLR 884** the employer's genuine concerns for employees' health and safety could not prevent the Race Relations Act 1976 from applying, since all the relevant elements of Section 1(1) were present. Once the tribunal had found that race was the ground for the less favourable treatment — in this case, refusing the claimant promotion to the post of Sudan researcher — that was the end of the matter and the employer's reasons or motives, however legitimate or laudable, were irrelevant.

65. Where crucial facts are in dispute, the law imposes a burden of proof to determine which side has the ultimate responsibility of proving his or her case to the court or tribunal. As a general rule in civil proceedings, the onus of proving the case is placed on the claimant — he or she must show that the court or tribunal has jurisdiction to hear the claim, that he or she is entitled to bring the claim, and that he or she is entitled to the remedy sought. The civil law standard of proof is on the balance of probabilities. This means that if the claimant satisfies a tribunal that his or her version of events in support of the claim is at least 51 per cent 'more likely than not', the claim will succeed, provided, of course, that the employer does not go on to establish a valid defence.

66. In discrimination claims under the EQA, claimants benefit from a slightly more favourable burden of proof rule in recognition of the fact that discrimination is frequently covert and therefore can present special problems of proof. Broadly speaking, section 136 EQA provides that, once there are facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof 'shifts' to the respondent to prove a non-discriminatory explanation.

67. Mr Justice Elias appeared to accept in both **Laing v Manchester City Council and anor 2006 ICR 1519, EAT**, and **Network Rail Infrastructure Ltd v Griffiths-Henry 2006 IRLR 865, EAT**, that in direct discrimination cases proof of less favourable treatment (discounting the employer's explanation for such treatment) can, of itself, establish a prima facie case of discrimination. However, much of the case law concerning the statutory burden of proof provisions suggests that something more than less favourable treatment compared with someone not possessing the claimant's protected characteristic is required. The clearest indication that this is so comes from the judgment of Lord Justice Mummery in **Madarassy v Nomura International plc 2007 ICR 867, CA**, where he stated:

    The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

68. The 'something more' can also comprise statistical evidence suggesting an unconscious bias. In **Home Office (UK Visas and Immigration) v Kuranchie EAT 0202/16** K claimed that the reason her performance review

had been downgraded — her line manager had recommended that she be placed in the band covering the top 20 per cent of performers, but a panel placed her in the band below — was her race. An employment tribunal rejected the claim, concluding that there was not enough evidence for K to establish a prima facie case of direct race discrimination. Allowing K's appeal against that decision and remitting the claim back to the tribunal for reconsideration, the EAT stressed that tribunals had to be alive to the possibility of unconscious discrimination as well as overt discrimination. The statistical evidence relied on by K — which indicated that staff who are part-time, are disabled or belong to a minority ethnic group were less likely to receive a performance bonus than other staff — could tend to show a discernible pattern of treatment of K's racial group from which a tribunal might infer unlawful discrimination. In those circumstances it was not open to the tribunal, taking proper account of the evidence before it, to reject the race complaint on the footing that there was no evidence before it which could amount to the 'something more' to which Mummery LJ alluded in **Madarassy**.

69. Sections 39(2)(c) and (4)(c) of EQA, provide that an employer (A) must not discriminate against or victimise an employee of A's (B) by dismissing B. It also includes constructive dismissal, which occurs where the employee, owing to the repudiatory conduct of the employer, is entitled to resign and regard him or herself as dismissed (section39(7)(b) EQA).

70. The relationship of employer and employee is regarded as one based on a mutual trust and confidence between the parties. **In Courtaulds Northern Textiles Ltd v Andrew 1979 IRLR 84, EAT**, the EAT held that it was a fundamental breach of contract for the employer, without reasonable and proper cause, to conduct itself in a manner 'calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties'. By 1981 the EAT found that the term was 'clearly established' and affirmed the formulation set out in the **Courtaulds** case — **Woods v WM Car Services (Peterborough) Ltd 1981 ICR 666, EAT**. Mr Justice Browne-Wilkinson put it this way:

> *To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.*

71. In **Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA**, the Court of Appeal applied general contractual principles when it held that an employee's right to resign, without notice, and claim constructive dismissal can only arise where there is a repudiation or breach of a fundamental term by the employer.

72. The effect of a repudiation or fundamental breach on the contract of employment has been the subject of considerable debate. In **Thomas Marshall (Exports) Ltd v Guinle and ors 1978 ICR 905, ChD**, Sir Robert Megarry VC was of the view that contracts of employment do not represent an exception to this rule. In that case the employer sought interlocutory injunctions to prevent the employee, who had wrongfully repudiated the contract halfway through its fixed term, from soliciting customers or using confidential information. Sir Robert believed that the courts 'must be astute to

prevent a wrongdoer from profiting too greatly from his wrong'. He reasoned that, although the remedy of specific performance is not available for a contract of employment — meaning that a court may not order an employee to work — this should not mean that the court is not able to restrain an employee from committing any breach, however flagrant, of his other obligations during the period of his contract.

73. This 'elective' approach to repudiatory breach was also adopted by Lord Justice Buckley in **Gunton v Richmond-upon-Thames London Borough Council 1980 ICR 755, CA**, where the question for the Court was whether the employer's repudiation of the contract had automatically brought it to an end. However, he recognised the special nature of employment contracts: a wrongfully dismissed employee has, in the absence of special circumstances, no option but to accept the employer's repudiation. He reasoned, therefore, that the court should easily infer acceptance on the part of the employee.

74. On the other hand, in **Sanders and ors v Ernest A Neale Ltd 1974 ICR 565, NIRC**, Sir John Donaldson held that the employer's wrongful repudiation automatically terminated the employment contract. He reasoned that because a wrongful dismissal prevented the employee from rendering services and meant that he or she was unable to sue for wages, the repudiated contract terminated automatically without the necessity for acceptance by the innocent party. That case was referred to in **Boyo v Lambeth London Borough Council 1994 ICR 727, CA**, where the Court of Appeal accepted that it was bound by the decision of the majority of the Court of Appeal in the **Gunton** case when assessing the measure of damages for an employee whose contract had been wrongfully repudiated. However, it is clear that it did so with reluctance and in obiter comments two members of the Court expressed the view that repudiation by the employer automatically terminates the employment relationship.

75. The tension between the elective and automatic approaches was resolved in favour of the former by the Supreme Court in **Geys v Société Générale, London Branch 2013 ICR 117, SC,** which is now the leading authority in this area. This point of principle was imbued with substantial practical importance because, under the contract of employment at issue, the amount of a termination payment differed, in the order of millions of euros, depending on whether the contract terminated before or after 31 December 2007. SG purported to dismiss G summarily on 29 November. He was ordinarily entitled to three months' notice, but SG later claimed to have acted under a contractual clause giving it 'the right to terminate [G's] employment at any time with immediate effect by making a payment to [him] in lieu of notice' (known as a PILON clause). SG had transferred an amount corresponding to three months' notice pay into G's bank account on 18 December, but it was not until 4 January that it sent him a letter stating explicitly what the payment represented. The High Court held that SG did not effectively invoke the PILON clause, and therefore terminate the contract, until January, when it informed G that the money paid to him was notice pay. However, on appeal, the Court of Appeal held that the making of the payment itself was effective to trigger the clause, without need for notification, and so the contract terminated on 18 December. G appealed to the Supreme Court.

76. The Supreme Court preferred the High Court's reasoning on the PILON clause and allowed the appeal on this point. However, the Supreme Court

also dealt with a crucial question that had been put to one side in the lower courts: did SG's breach of contract on 29 November, by purporting to end the contract other than in accordance with its terms, itself terminate the contract? Lord Wilson — giving a judgment on this question with which three other Justices agreed — held that it did not. The Court of Appeal in **Gunton** was right to apply the elective approach to contracts of employment, such that repudiation requires acceptance if it is to terminate the contract. The automatic theory enables the wrongdoer to benefit from his or her wrongdoing — for instance, by selecting a termination date to the detriment of the innocent party. In contrast, under the elective theory, the innocent party can judge whether it is in his or her interests to keep the contract alive.

77. In Lord Wilson's view, case law supporting the automatic approach relied on the more limited range of remedies available for repudiatory breach of an employment contract compared to other kinds of contract. The courts will not order specific performance of an employment contract, and wrongful dismissal gives rise to a claim for damages only (usually limited to wages during the notice period) rather than a claim for the wages that would have been paid for full performance. Lord Wilson considered that it would be a case of the tail wagging the dog if these limitations on remedy were treated as reasons for limiting the substantive right to sue for breach of contract in the first place. He also drew support for the elective approach from cases where courts had granted injunctions to enforce competition and confidentiality clauses against employees who had resigned in breach of contract, and cases where courts had ordered employers to give wrongfully dismissed employees the benefit of contractual disciplinary procedures. Such orders for performance of contractual obligations could only be explained on the basis that the contract subsisted beyond the repudiation. Accordingly, Lord Wilson approved the rule that, as with other types of contracts, a repudiation is only effective to terminate a contract of employment when it is accepted. This approach has the benefit of protecting the innocent party, so far as practicable, from the effects of breach by the other. However, the Supreme Court majority was critical of Lord Justice Buckley's observation in **Gunton** that acceptance of a repudiatory breach of an employment contract should be easily inferred. Lord Wilson noted that there is no point in conferring upon a party an election to which some other principle of law is applied so as to deprive it of real value. And Lord Hope commented that, while in practice an employee may have little choice but to accept a repudiatory breach, it should not be assumed that he or she has in law no alternative but to do so.

78. A situation where the discrimination consists in unconscious bias, which is by definition very hard to detect and prevent, because unconscious, may well not involve a breach of contract (by analogy to the decision in **Amnesty International**).

79. Rule 75 (1) (a) of the Tribunal Rules gives the Tribunal the power to make a costs order against one party to the proceedings (the "paying party") to pay the costs incurred by another other party (the "receiving party") on several different grounds. Rules 76(1)(b) sets out one of the grounds for making a costs order which is where a claim or response had no reasonable prospect of success.

80. If, following a preliminary hearing, the Tribunal decides that any specific allegation or argument in a claim or response has little reasonable prospect of

success, it may make an order requiring a party ('the paying party') to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument — rule 39(1) of the Tribunal Rules. If at any stage following the making of such an order the tribunal decides against the paying party in relation to that specific allegation or argument for substantially the same reasons as those it relied on when making the deposit order, that party is automatically treated as having acted unreasonably in pursuing that specific allegation or argument for the purposes of rule 76 of the Tribunal Rules (unless the contrary is shown) — rule 39(5)(a). This means that the tribunal will be required to consider whether to make a costs order against that party under rule 76(1) of the Tribunal Rules.

81. Rule 76(1)(b) of the Tribunal Rules follows a two-stage test. The Tribunal has a duty to consider making an order where this ground is made out but there a discretion whether actually to award costs. Whether or not the party has received legal advice or is acting completely alone may be an important consideration when deciding whether or not to make a costs order against him or her.

82. It is important to recognise that even if one (or more) of the grounds is made out, the Tribunal is not obliged to make a costs order. Rather, it has a discretion whether or not to do so. As the Court of Appeal reiterated in **Yerrakalva v Barnsley Metropolitan Borough Council 2012 ICR 420, CA**, costs in the employment tribunal are still the exception rather than the rule. It commented that the Tribunal's power to order costs is more sparingly exercised and is more circumscribed than that of the ordinary courts, where the general rule is that costs follow the event, and the unsuccessful litigant normally has to foot the legal bill for the litigation. In the employment tribunal, by contrast, costs orders are the exception rather than the rule. If the Tribunal decides to make a costs order, it must act within rules that expressly confine its power to specified circumstances, notably unreasonableness in bringing or conduct of the proceedings.

83. It is appropriate for a litigant in person to be judged less harshly in terms of his or her conduct than a litigant who is professionally represented. According to the EAT in **AQ Ltd v Holden 2012 IRLR 648, EAT**, an employment tribunal cannot, and should not, judge a litigant in person by the standards of a professional representative. Justice requires that tribunals do not apply professional standards to lay people, who may well be embroiled in legal proceedings for the only time in their life. Lay people are likely to lack the objectivity and knowledge of law and practice brought to bear by a professional legal adviser. The EAT stressed that tribunals must bear this in mind when assessing the threshold tests in the then equivalent to rule 76(1) of the Tribunal Rules. It went on to state that, even if the threshold tests for an order for costs are met, the tribunal still has discretion whether to make an order. That discretion should be exercised having regard to all the circumstances. In this respect, it was not irrelevant that a lay person may have brought proceedings with little or no access to specialist help and advice. This was not to say that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity. However, the EAT concluded that, in the instant case, the employment tribunal had been entitled

to consider the fact that H represented himself when refusing the employer its costs.

84. In considering whether to make an order for costs, and, if appropriate, the amount to be awarded, the Tribunal may have regard to the paying party's ability to pay. It is not obliged to do so; it is permitted to do so. The Tribunal is not required to limit costs to the amount that the paying party can afford to pay. However, we remind ourselves that in **Benjamin v Inverlacing Ribbon Ltd EAT 0363/05** it was held that where a Tribunal has been asked to consider a party's means, it should state in its reasons whether it has in fact done so and, if it has, how this has been done. Any assessment of a party's means must be based upon evidence before the Tribunal.

85. We are guided by **Arrowsmith v Nottingham Trent University 2012 ICR 159, CA** where the Court of Appeal held that the Tribunal is not required to limit costs to an amount that the paying party can afford to pay. Indeed, the Presidential Guidance on General Case Management for England & Wales states that a Tribunal may make a substantial order "even where a person has no means of payment". In **Arrowsmith** the Court of Appeal noted that the claimant's circumstances "may well improve and no doubt she hopes that they will". Although these comments were obiter, they suggest that the likelihood of a party's circumstances improving is a relevant factor when assessing the amount of costs in view of a party's means.

86. In **Vaughan v London Borough of Lewisham and Ors 2013 IRLR 713** the EAT upheld a Tribunal's decision to order the claimant to pay 1/3 of the respondent's costs even though her share was estimated to be around £60,000 and she could not at the time afford to pay it. The Tribunal referring to Rimer LJ's judgement in **Arrowsmith** accepted that the claimant was not presently in a position to make any substantial payment but took the view that there was a realistic prospect that she might be able to do so in due course when her health improved, and she was able to resume employment. The EAT considered that, in principle, there is no reason why the question of affordability has to be decided once and for all by reference to the party's means as at the moment the order is made. Indeed, that was the basis upon which the Court of Appeal proceeded in **Arrowsmith**, albeit that the relevant reasoning in that case was extremely briefly expressed. It had to be remembered that whatever order was made would have to be enforced through the County Court, which would itself consider the individual's means from time to time in deciding whether to require payment by instalments, and if so in what amount. **Vaughan** summarises the questions which the Tribunal must ask on the basis that it was right to have regard to the claimant's means as follows:

    a. Was there a reasonable prospect of the claimant being able, in due course, to return to well-paid employment and thus be in a position to make a payment of cost?

    b. If so, what limit ought, nevertheless, be placed on her ability to take account of means and proportionality.

87. The EAT commented that since affordability is not, as such, the sole criterion for the exercise of the discretion, a "nice estimate of what can be afforded is not essential".

88. In this case, we have been asked to determine costs on the "unassessed basis". This term is commonly used to refer to general costs which must not exceed an upper limit of £20,000 that can be awarded by the Tribunal without the need for the precise amount to be determined separately by means of a detailed assessment. The Tribunal must state the following:

    a. On what basis, and in accordance with what establish principles, it is awarding any sum of costs.

    b. On what basis it arrives at that sum.

    c. Why costs are being awarded against the party in question

Discussion and conclusion

89. In addressing each of the agreed issues, we find as follows.

    a. *In relation to his claim for direct race discrimination did Atos do the following to Mr Nyatsambo:*

        i. *In July 2018, require him to be observed more than once by a CSL after he was identified as a CIP Outlier? Mr Nyatsambo accepts that one observation was "the norm" in the circumstances.*

        Mr Nyatsambo was required to be observed in July 2018 more than once by a CSL.

        ii. *In July 2018, require him to observe the work of a peer (Wayne) without giving a proper explanation of why this was necessary?*

        Ms Johnson intended to require Mr Nyatsambo to observe the work of Mr Rutherford. This in fact did not happen because Mr Nyatsambo went on sick leave and when he returned, Ms Johnson was concerned about the impact on Mr Nyatsambo's mental health if he was required to observe Mr Rutherford. Although Mr Nyatsambo believes that it has never been properly explained to him why it was necessary to observe Mr Rutherford, we disagree. Ms Johnson had explained to him that he would need to undergo additional observations and also to observe Mr Rutherford. She told him this on 16 July 2018. The purpose of observing Mr Rutherford was not to impose performance measures but to support him. It was to put a support plan for him into place. During that conversation, Mr Nyatsambo had asked Ms Johnson whether he was being required to observe Mr Rutherford because of the three complaints that had been received about his behaviour. We are satisfied that Ms Johnson explained to Mr Nyatsambo that this was not the case. This was also supported by Ms Lomas' evidence when she investigated Mr Nyatsambo's grievance and interviewed Ms Johnson as part of her investigation.

iii. *In July 2018, require him to study training modules that he had already completed?*

Mr Nyatsambo was required to study training modules that he had already completed. This was confirmed by Ms Johnson in her witness statement and elaborated on in cross examination.

iv. *In September 2018, inform him that he had been a CIP Outlier for 11 weeks and that this was a matter of concern?*

Mr Nyatsambo was informed in September 2018 that he had been a CIP Outlier for 11 weeks. He was informed of this fact by Ms Watson when she visited the Sunderland office in September 2018 to discuss it with Mr Nyatsambo. It was a matter of concern because she did not know the reason why he was a CIP Outlier and wanted to discuss his DRA report with him in the hope that that would help them to gain insight and also hopefully to lead to a "light bulb moment".

v. *In September 2018, subject him to more observations than his peers and/or scrutinise his work more intensively?*

At that time, none of his peers in the Sunderland office had been categorised as CIP Outliers. However, there were three or four other employees in the North East region who were also of concern. Given that he was the only person classified as a CIP Outlier in his office, it follows that he would need to be scrutinised more closely than his colleagues because of that status. The purpose of that further observation and scrutiny was to enable Mr Nyatsambo to gain insight into why he was consistently underscoring applicants. This did not necessarily mean that he was underperforming and would be subject to formal performance management under the Policy.

vi. *If so, did Atos treat Mr Nyatsambo less favourably than a comparator? Mr Nyatsambo relies on a hypothetical comparator.*

Mr Nyatsambo has not identified an actual comparator. His hypothetical comparator would be a white HP who was also classified as a CIP Outlier. We saw no evidence that he was treated less favourably than the hypothetical comparator. It was standard practice.

vii. *If so, was the less favourable treatment because of Mr Nyatsambo's race?*

On the hypothesis that he was treated less favourably, this was not because of his race. His claim is centred upon the process and unconscious bias resulting therefrom. It is not directed against named individuals. He is critical of statistical data generated which classified him as a CIP Outlier. This is

quantitative evidence to be used by a CSL to evaluate the reason for the statistical classification as being outside the national award rate average. We have not seen any evidence of other individuals who were also classified as CIP Outliers and, more importantly, what their race or ethnicity was. Mr Nyatsambo has not provided any evidence to show that the data was analysed from a perspective of unconscious racial bias. The data related wholly to the number of assessments and how Mr Nyatsambo's own assessments related to the national award rate average. It was simply quantitative. The process of evaluating the reasons why his award rate was below the lowest point of the national average distribution range could only be determined by the steps proposed by Ms Johnson. Consequently, we are satisfied that Mr Nyatsambo has not provided evidence of to suggest that something more than less favourable treatment compared with someone not possessing his protected characteristic as required by **Madarassy**. For example, he could have provided a breakdown of the statistics to determine the racial profile of those individuals identified as CIP Outliers. If that evidence showed that he was the only black person in the group of individuals identified and his comparators were not subjected to requirement for further observations, to observe another CSL and to re-read modules then he would have established the existence of the "something" as prime facie evidence of less favourable treatment because of his race thereby shifting the burden of proof. He has not done that, and we cannot speculate whether that was indeed the case.

viii. *In relation to the claim for discriminatory constructive dismissal under EQA, section 39, do the matters listed above amount (individually or cumulatively) to a breach of the implied term of trust and confidence*?

The matters listed above do not amount individually or cumulatively to a breach of the implied term of trust and confidence. Mr Nyatsambo erroneously believed that he was being unjustifiably subjected to measures or made the subject of formal performance management under the Policy and that this amounted to racially discriminatory behaviour which eroded his trust and confidence in his employer. The evidence does not support such a conclusion and his belief is purely subjective and speculative. There is no basis to conclude that he was categorised as a CIP Outlier because of his race.

Atos acted with reasonable and proper cause in responding to the fact that Mr Nyatsambo had been classified as a CIP Outlier. In terms of its contract with the DWP. It was required to implement a consistency improvement programme and it was obliged to investigate the matter and to take steps to ensure that Mr Nyatsambo's future assessments fell within the national average distribution range. There is nothing to suggest that the steps taken by Atos were calculated or likely to destroy or seriously damage the relationship of confidence and trust

between the parties. Quite the contrary. The evidence clearly shows that Atos implemented its process in a supportive and proportionate way. Both Ms Johnson and Ms Watson were supportive and wanted to understand why Mr Nyatsambo has been classified as a CIP Outlier. They were genuinely puzzled. They were also concerned about his mental health and adjusted their support plan accordingly (e.g. by not requiring him to observe Mr Rutherford). They did not simply assume that Mr Nyatsambo was underperforming. The Policy was not engaged. No PIN was issued and no QSAP drawn up as had been done previously in 2017 and early 2018. Atos simply wanted to explore why Mr Nyatsambo's award rate was persistently below the lowest point of the CIP national average distribution range.

ix. *If so, did Mr Nyatsambo resign in response to those breaches?*

The question is otiose as there was no breach of contract. His resignation contains no reason. Even if Mr Nyatsambo ostensibly resigned because of a perceived breach, he was not justified to do so. There was no dismissal. The contract simply terminated on 6 March 2019 by agreement.

x. *Atos accepts that if it is found that Mr Nyatsambo was constructively dismissed, and that he resigned in response to one or more of the breaches of contract that also amount to an act direct discrimination, his dismissal will be discriminatory contrary to EQA, section 39 (2) (c) read with section 39 (7) (b).*

This issue does not arise as Mr Nyatsambo was not constructively dismissed.

90. We now turn to the question of costs. This is a case where a deposit order has been made. Such orders are rarely made in discrimination cases. There is a presumption of unreasonable conduct under rule 39 (5) (a) and rule 76 (1) that the Tribunal is required to consider when making a costs order. The law sets a high bar before a Tribunal will grant a deposit order. When Employment Judge Sweeney made the deposit order, Mr Nyatsambo was on notice that his claim had little reasonable prospect of success. Employment Judge Sweeney carefully explained this in his reasons supporting the deposit order. We remind ourselves that we are not bound by what Employment Judge Sweeney said but there is a strong presumption in favour of granting costs in circumstances where a deposit order has been made.

91. Mr Nyatsambo told the tribunal that he was not a lawyer, and we acknowledge that. He thanked everybody for their contributions. He told the Tribunal that he was a qualified nurse and had experienced mental health problems. He had suffered loss of earnings but was now in a better place and was working. He said that he had not been motivated by money in pursuing his claims. He said that what mattered to him was providing a good outcome for his patients and to tell his children proudly that he had done something good. He is a practicing Christian and had provided a letter of support from his pastor.

92. Mr Nyatsambo explained that he was a first-generation immigrant who wanted to stand up to racism. He pursued the claims to set an example regardless of whether the experience was painful or costly. He wanted his children to have a role model. He said that he wanted to fight injustice. He said that pursuing the claim had been very damaging to his person both physically and mentally and had nearly broken his marriage. He said that he had been separated from his wife for a period of time. He said that he was still dealing with his mental health. He said that even though he had limited resources and did not earn much money, that did not put him off from challenging a large company if it had wronged him. He said that this applied even if there was a risk of paying costs.

93. We have decided to exercise discretion to award costs for the following reasons:

    a. We are mindful of the fact that the circumstances upon which the deposit order was granted as explained to Mr Nyatsambo by Employment Judge Sweeney have not materially changed. Indeed, the further and better particulars provided by Mr Nyatsambo, and which were reviewed by Employment Judge Sweeney, have simply been recycled into Mr Nyatsambo's witness statement for the final hearing.

    b. Ultimately, we agree with Mr White's submission, that the claim should never have been raised in the first place and Mr Nyatsambo was repeatedly told of that fact both in the Grounds of Resistance and in the subsequent applications for a strike out order or a deposit order. Notwithstanding that, Mr Nyatsambo chose to pursue his claims which he presented late from the outset and had to seek permission from the Tribunal to have them accepted. At the time when the deposit order was made, he had a choice: he could have chosen not to pay £400 and to walk away or to pay and continue with the claim. He chose the latter. As a result of that, Atos have incurred unnecessary costs defending a claim that had little reasonable prospect of success.

    c. We also heard from Mr White that Atos was compelled to take three of its managers and its in-house lawyer out of work to attend the final hearing. Furthermore, a considerable amount of time and effort was expended by Atos in preparing the case. We also note the procedural history of this claim. They have been several preliminary hearings. One of these considered applications to strike out Mr Nyatsambo's claims and, in the alternative, the grant of a deposit order. This arose from the fact that Mr Nyatsambo had not complied with some of the Tribunal's orders.

    d. We are satisfied that the presumption of unreasonable behaviour has been met. In terms of exercising discretion, whilst we accept that Mr Nyatsambo is a litigant in person who should not be judged in the same light as a representative, nonetheless he is not free from the risk of the cost consequences that may flow from running a claim that has little reasonable prospect of succeeding. He knew the risks when the deposit order was granted. Nothing has changed substantially in the presentation of his claim or in the evidence relied upon in supporting his claim since the deposit order was granted.

94. Turning to quantification of costs, Mr White referred us to the schedule of costs that had been provided together with what he had set out in his skeleton argument. We note that Atos is limiting its costs application to external legal fees. The costs application does not cover the total costs incurred by in-house counsel in preparing for this hearing from the outset which could be recoverable and would be substantial. The schedule of costs provided in support of the application is restricted to £16,440 excluding VAT. Atos does not seek to recover VAT. The schedule of costs was predicated on a four-day hearing. Given that the Tribunal sat for three days, Mr White informed us that the figure should be reduced by a further £1500 (the daily refresher fee). This brings the restricted fee down to £14,940. Atos have proposed a 30% discount to that figure which would bring the total claimed to £10,458.

95. In terms of ability to pay, Mr White submitted that Mr Nyatsambo had owned his own property since 2004, and it was likely that the value of his home would have increased considerably since its purchase. It could provide collateral should Mr Nyatsambo require to borrow money to meet his cost liability. Mr White also submitted that Mr Nyatsambo was earning a reasonable salary. He appeared to have prospects in his new job. We were also referred to the fact that Mr Nyatsambo's wife is working and contributes to household expenses. The couple have started their own business which they hope soon to start trading profitably. He is working in a permanent role.

96. Mr Nyatsambo told us that he had used up all of his savings. He had suffered from Covid and a collapsed disc in his back and was waiting for an operation. In his words, he was not working "at full tilt". He earned enough money for his family. The family were not rich, but they were comfortably off. However, he could not pay even the cheapest lawyer. He told us that his wife had established the company and she had left her job when he suffered a mental breakdown. She works through an agency. The company was not yet running but the couple hope that it would be soon. The family have four children and Mr Nyatsambo and his wife work hard to look after them.

97. We believe that a costs order on the standard assessment basis should be made. Atos have restricted the amount of money that they are claiming and have applied a 30% discount. That is a reasonable thing to do. However, we do not think that 30% is appropriate given the fact that Mr Nyatsambo is a litigant in person and has modest means. We also believe that his mental state may have contributed to his unreasonable behaviour and may have affected his objectivity to some extent. However, we also note that he is in permanent employment, has prospects and expects to receive a pay rise soon. He has a putative business with his wife which they intend to start trading with a view to making a profit. We believe a 60% discount is appropriate which translates into an award of costs of £5976 based on a three-day hearing.

98. Finally, we wish to make the following observations which do not form part of the ratio of our decision and were not the subject of the agreed list of issues for us to determine. We acknowledge Mr Nyatsambo's feelings about his race. It is common knowledge that people from ethnic minorities frequently encounter difficulties in the workplace despite their qualifications and positive work ethic. We have no doubt that he takes his qualification/vocation seriously and wants the best for his patients/clients. Ms Johnson and Ms Watson were clearly shocked about what Mr Nyatsambo said to them about race. They

tried to reassure him that his concerns were groundless. However, given the sensitivities and serious nature of allegations of race discrimination, it is unfortunate that neither Ms Johnson nor Ms Watson did anything other than to provide reassurance. Atos is a large organisation with policies on equality and diversity. We would have thought that either or both of them would have taken matters further to investigate the allegations in accordance with those policies to avoid any misunderstanding that they might not be taking the allegation seriously. In this regard, it is also important to repeat and to emphasise that Mr Nyatsambo did not criticise them in that respect when cross examining them; he was courteous to them. Indeed, Mr Nyatsambo did not make allegations of race discrimination against any named individuals at Atos. His complaint was about the process (being classified as a CIP Outlier). His complaint was unfounded.

Employment Judge Green

Date 2 August 2021