



EMPLOYMENT TRIBUNALS

Claimant: Mrs B Knight

Respondent: Havant & South Downs College

Heard at: Southampton (by CVP) On: 22, 23, 24, 25, 26, 29, 30 November and 1, 2 December 2021

Before: Employment Judge Dawson, Dr Thornback, Mr Spry-Shute

Appearances

For the claimant: Mr Davies, solicitor

For the respondent: Mr Griffiths, Counsel

JUDGMENT

1. The claimant's claim that she was discriminated against on the grounds of race in 2017 is dismissed on the ground that it was not presented within 3 months of the act complained of or such other period as the tribunal thinks just and equitable.
2. The claimant was unfairly dismissed by the respondent.
3. All other claims of the claimant are dismissed.
4. Directions for the determination of remedy are given in a separate case management order.

REASONS

1. By a claim form presented on 9 February 2020, the claimant presented a claim

of discrimination on the grounds of race and constructive unfair dismissal (although she did not tick the unfair dismissal box).

2. By way of very brief overview (and without prejudice to the findings of fact we set out below) the claimant was a teacher working, initially, for Alton College (Alton) and, following a merger in 2019, for Havant and South Downs College, the respondent. The claimant describes herself as “Black British” and taught English. Until September 2017 the claimant was employed on a variable hours contract but wished, she says, to have a fixed hours (albeit fractional) contract. She says that in September 2017, when the opportunity to apply for such a post arose within the English department, the respondent deliberately failed to tell her about the job opportunity. She says that she complained about that and asserted that it amounted to discrimination on the grounds of race, which was a protected act. She says that as a consequence of the protected act and/or because of her race she was subjected to a series of detriments from June 2018 onwards. She went off sick on 17 December 2019 and did not return to work before her resignation upon 2 months’ notice on 2 February 2021.
3. In addition to the allegations of direct discrimination, harassment and victimisation the claimant asserts that she resigned as a result of a series of repudiatory breaches of contract by the respondent (some 27 in total) and was, therefore, unfairly dismissed.

The issues

4. An agreed list of issues appears in the bundle at page 152. Notwithstanding the agreed list, we were presented with another list of issues by the claimant on the 1st morning of the hearing. That list of issues was, largely the same, some dates were clarified and one alleged protected act was withdrawn. Whilst understandably frustrated at the late service of the list of issues, the respondent did not object to the tribunal relying upon that list for the purposes of the hearing and this judgment.

Housekeeping and the Conduct of the Hearing

5. At an earlier case management hearing the tribunal had limited the number of words in the parties’ witness statements. The claimant’s statement as served had significantly exceeded that limit but, prior to the final hearing, she and her solicitors had worked to reduce the number of words in the statement by deleting words from the statement which had been served. It still exceeded the word count by some 500 odd words and at the outset of the hearing the claimant applied to extend the word count by that amount. The respondent did not object to that application and tribunal granted it.
6. During the course of the hearing the claimant also applied to add a small number of documents to the trial bundle which, again, the respondent did not object to and which was permitted.
7. A broad timetable had been set for the hearing by Employment Judge Bax on 22 September 2021. We asked the parties to give more specific estimates for

cross examination of the particular witnesses and they did so. The respondent's counsel was able to complete cross examination of the claimant and her witness within the time he estimated. The claimant's solicitor was reminded when he was reaching the limits of the estimates provided and asked for a short extension in respect of some witnesses but did not need to seek a substantial extension. The tribunal is grateful for the cooperation of the parties in this respect.

8. During the course of the hearing references were made to emails which the respondent said had been sent in respect of training but which had not been disclosed. The respondent was reminded of the order which had already been made in respect of disclosure and of the ongoing obligation of disclosure. Notwithstanding that no further documents were received.
9. During the course of cross-examination of Ms Kingsley, Mr Davies sought to put to her (and refer the tribunal to) a previous judgment of a differently constituted employment tribunal. The judgment was not in the bundle and the respondent objected to it being adduced. We asked Mr Davies what the relevance of the judgment was and he said that it went to a point which, chronologically, lay between 2 paragraphs of the witnesses statement but which she had not addressed. He indicated that he thought Ms Kingsley might not give an accurate account of that point. It seemed the tribunal that the application to adduce the judgment was premature in the sense that Mr Davies had not laid any evidential basis for showing its relevance and permitting its admission. We invited Mr Davies to do that and make his application at the appropriate point. He did not return to the application.
10. Having regard to the issues, it seemed to the tribunal that it was somewhat surprising that the respondent was not calling Ms Richardson. At the outset of the respondent's case we drew to the parties' attention the case of Wisniewski v Central Manchester Health Authority [1998] PIQR 324, in which the Court of Appeal stated "Mr Grime accepted that there is a line of authority which shows that if a party does not call a witness who is not known to be unavailable and/or who has no good reason for not attending, and if the other side has adduced some evidence on a relevant matter, then in the absence of that witness a judge is entitled to draw an inference adverse to that party and to find that matter proved"
11. We made clear that it was a matter for the respondent as to whether it wished to provide any explanation for not calling the witness. At the end of the 5th day of the hearing (being Friday, 26 November 2021) and before calling its final witness (who was to be called on the following Monday) the respondent's counsel stated that he intended to ask the final witness (Ms Berry) to explain why Ms Richardson was not being called. In essence the reason was because she was travelling. We indicated that there was insufficient time on the Friday to determine an application to allow the final witness to give evidence of that nature which was not in her witness statement and the application will be

decided on the following Monday. Nevertheless, the fact the counsel alerted the tribunal to the application meant that the claimant's solicitor had the weekend to prepare for it.

12. We granted permission for that evidence to be given and gave oral reasons which appear as an appendix to this set of reasons.
13. We were told by Ms Berry that the respondent had contacted Ms Richardson in July 2021 while she was still employed by it but serving her notice period, having been made redundant. It asked whether she would be willing to give evidence in these proceedings but she indicated that she was likely to be travelling at the time of them. Somewhat surprisingly Ms Richardson was not told what the allegations were against her and, we understand, even at the date of these proceedings does not know the serious allegations that are made about her. Ms Berry indicated that it might well be that Ms Richardson was unaware that the tribunal is likely to make any findings in the course of this hearing that might affect her.
14. We accept that evidence although find that to be a surprising position given the specific nature of the allegations- that she has racially discriminated against somebody and misled an internal investigation. It is a matter of concern that the respondent did not tell Ms Richardson, while she was still employed by it, that those allegations had been made against her. It may very well be that had Ms Richardson been aware of the allegations she would have wanted to give evidence in these proceedings.
15. We make the findings of fact on the evidence we have heard and it is, of course, a matter for the respondent which witnesses it chooses to call. We are conscious that our decision may have been different if Ms Richardson had given evidence, on the other hand it may not have been, we simply do not know and cannot speculate.
16. We heard from the claimant and her husband and for the respondent we heard from
 - a. Ms Scott, at the relevant time the Learning Manager for Teaching, Learning and Quality. She had worked for Havant and South Downs College for 24 years.
 - b. Ms Kingsley, Assistant Principal Academic Curriculum for the respondent who had 1st started at Alton College and had a background of working in the English department.
 - c. Ms Sibley who had worked with the respondent since 30 September 2019 as a People Services Business Partner. People Services performed a human resources type function.
 - d. Ms Dhesi, Vice Principal – Students, Learning & Quality.

- e. Mr Barlow, Deputy Principal (Curriculum).
- f. Ms Berry, Vice Principal Organisational Development & People who had overall responsibility for People Services.

17. We received a bundle running to 786 pages plus the additional documents referred to above. In these reasons, where we refer to page numbers, we are referring to the hearing bundle unless otherwise stated.

The Law
Discrimination

18. The following are relevant sections from the Equality Act 2010.

13 Direct discrimination

- 1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

26 Harassment

- 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—
 - a. violating B's dignity, or
 - b. creating an intimidating, hostile, degrading, humiliating or offensive environment for B

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

- 5) The relevant protected characteristics are—

...
race;

....

27 Victimisation

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
 - (a) B does a protected act, or

- (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act—
 - (a) bringing proceedings under this Act;
 - (b) giving evidence or information in connection with proceedings under this Act;
 - (c) doing any other thing for the purposes of or in connection with this Act;
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.

109 Liability of employers and principals

- (1) ...
- (2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

19. Section 136 Equality Act 2010 deals with the reversal of the burden of proof and states

(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.

20. In considering questions of causation, in Nagarajan [1999] IRLR 572, the House of Lords held that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case was, 'why the complainant received less favourable treatment ... Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'

21. In Madarassy v Nomura International plc [2007] IRLR 246, the Court of Appeal held, at paragraphs 56-57,

"The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. 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.

57 'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal

could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by s.5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

22. The claimant referred us to Bahl v The Law Society [2004] IRLR 799. In that case the Court of Appeal held

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It has been suggested, not least by Mr de Mello in the present case, that Sedley LJ was there placing an important gloss on Zafar to the effect that it is open to a tribunal to infer discrimination from unreasonable treatment, at least if the alleged discriminator does not show by evidence that equally unreasonable treatment would have been applied to a white person or a man.

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In our judgment, the answer to this submission is that contained in the judgment of Elias J in the present case. It is correct, as Sedley LJ said, that racial or sex discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it. However, the final words in the passage which we have quoted from Anya are not to be construed in the manner that Mr de Mello submits. That would be inconsistent with Zafar. It is not the case that an alleged discriminator can only avoid an adverse inference by proving that he behaves equally unreasonably to everybody. As Elias J observed (paragraph 97):

'Were it so, the employer could never do so where the situation he was dealing with was a novel one, as in this case.'

Accordingly, proof of equally unreasonable treatment of all is merely one way of avoiding an inference of unlawful discrimination. It is not the only way. He added (ibid):

'The inference may also be rebutted – and indeed this will, we suspect, be far more common – by the employer leading evidence of a genuine reason

which is not discriminatory and which was the ground of his conduct. Employers will often have unjustified albeit genuine reasons for acting as they have. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful discrimination to be made. Even if they are not accepted, the tribunal's own findings of fact may identify an obvious reason for the treatment in issue, other than a discriminatory reason.'

We entirely agree with that impressive analysis. As we shall see, it resonates in this appeal

23. In *Hewage v Grampian Health Board* [2012] UKSC 37, the Supreme Court held "Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352 (para 39) it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

24. In *Laing v Manchester City Council* [2006] IRLR 748 Elias P observed as follows:

"71. We would add this. There still seems to be much confusion created by the decision in *Igen v Wong*. What must be borne in mind by a tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race.

72. The courts have long recognised, at least since the decision of Lord Justice Neill in the *King* case to which we have referred, that this would be unjust and that there will be circumstances where it is reasonable to infer discrimination unless there is some appropriate explanation. *Igen v Wong* confirms that, and also in accordance with the Burden of Proof directive, emphasises that where there is no adequate explanation in those circumstances, then a Tribunal must infer discrimination, whereas under the approach adumbrated by Lord Justice Neill, it was in its discretion whether it would do so or not. That is the significant difference which has been achieved as a result of the burden of proof directive, as Peter Gibson LJ recognised in *Igen*.

73. No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865

(at para 17), it may be legitimate to infer that a black person may have been discriminated on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable? There is no single right answer and tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages.'

25. In Birmingham City Council and another v Millwood UKEAT/0564/11/DM the EAT considered the question of whether an inadequate explanation for treatment would cause the burden of proof to shift. Langstaff J said

"[25]...We approach this question by remembering that the purpose of the provisions is to identify a proper claim of discrimination, recognising that it is highly unlikely in the real world that there will be any clear evidence that that has occurred. The inference will have to be drawn if a claim for discrimination is to succeed at all. Though a difference in race and a difference in treatment to the disadvantage of the complainant is insufficient and something more is required, Mr Beever was prepared to accept that where as part of the history that the tribunal was examining an employer had at the time of the alleged discriminatory treatment given an explanation for it which a tribunal was later to conclude was a lie, that might, coupled with the difference in race and treatment, justify a reversal of the burden of proof. We agree.

[26] What is more problematic is the situation where there is an explanation that is not necessarily found expressly to be a lie but which is rejected as opposed to being one that is simply not regarded as sufficiently adequate. Realistically, it seems to us that, in any case in which an employer justifies treatment that has a differential effect as between a person of one race and a person or persons of another by putting forward a number of inconsistent explanations which are disbelieved (as opposed to not being fully accepted), there is sufficient to justify a shift of the burden of proof. Exactly that evidential position would have arisen in the days in which *King v Great Britain-China Centre* [1991] IRLR 513, [1992] ICR 516 was the leading authority in relation to the approach a tribunal should take to claims of discrimination. Although a tribunal must by statute ignore whether there is any adequate explanation in stage one of its logical analysis of the facts, that does not mean, in our view, to say that it can and should ignore an explanation that is frankly inadequate and in particular one that is disbelieved.

26. In the victimisation case of Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830, Lord Nicholls considered that the test (in the context of victimisation) must be what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously was their reason?
27. In deciding whether the claimant was treated unfavourably we have had regard to the decision in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11 that, in respect of the definition of detriment,

“As May LJ put it in *De Souza v Automobile Association* [1986] ICR 514, 522 g, the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.

But once this requirement is satisfied, the only other limitation that can be read into the word is that indicated by Brightman LJ. As he put it in *Ministry of Defence v Jeremiah* [1980] ICR 13, 30, one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to “detriment”: *Barclays Bank plc v Kapur (No 2)* [1995] IRLR 87. But, contrary to the view that was expressed in *Lord Chancellor v Coker* [2001] ICR 507 on which the Court of Appeal relied, it is not necessary to demonstrate some physical or economic consequence. (Paragraph 34 to 35).

28. We have referred above to *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324. On a similar line we have been referred by the claimant the case of *Nayyar and others v Denton Wilde Sapte and another* [2009] EWHC 3218 (QB) and by the respondent to *Habinteg Housing Association Ltd v Holleron* UKEAT/0274/14

29. In respect of the presentation of claims under Equality Act 2010, section 123 provides

- (1) [Subject to [sections 140A and 140B],] proceedings on a complaint within section 120 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

30. In *Abertawe Bro Morgannwg University Local Health Board v Morgan* UKEAT/0305/13 (18 February 2014, unreported), the EAT stated “Though there is no principle of law which dictates how sparingly or generously the power to enlarge time is to be exercised (see *Chief Constable of Lincolnshire Police v Caston* [2009] EWCA Civ 1298 at para 25, [2010] IRLR 327, per Sedley LJ) a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to do so, and the exercise of discretion is therefore the exception rather than the rule (per Auld LJ in *Robertson v Bexley Community Centre* [2003] EWCA Civ 576, [2003] IRLR 434 (CA)). A litigant can hardly hope to satisfy this burden unless he provides an answer to two questions, as part of the entirety of the circumstances which the tribunal must consider. The first question in deciding whether to extend time is why it is that the primary time

limit has not been met; and insofar as it is distinct the second is reason why after the expiry of the primary time limit the claim was not brought sooner than it was." (para 52).

31. In Olufunso Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, Underhill LJ stated "It will be seen, therefore, that Keeble did no more than suggest that a comparison with the requirements of section 33 might help "illuminate" the task of the tribunal by setting out a checklist of potentially relevant factors. It certainly did not say that that list should be used as a framework for any decision. However, that is how it has too often been read, and "the Keeble factors" and "the Keeble principles" still regularly feature as the starting-point for tribunals' approach to decisions under section 123 (1) (b). I do not regard this as healthy. Of course the two discretions are, in Holland J's phrase, "not dissimilar", so it is unsurprising that most of the factors mentioned in section 33 may be relevant also, though to varying degrees, in the context of a discrimination claim; and I do not doubt that many tribunals over the years have found Keeble helpful. But rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language (as occurred in the present case – see para. 31 above). The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.

Constructive Dismissal

32. A termination of the contract by the employee will constitute a dismissal within the ERA 1996 if he or she is entitled to so terminate it because of the employer's conduct. The Court of Appeal made clear in Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27, it is not enough for the employee to leave merely because the employer has acted unreasonably; its conduct must amount to a breach of the contract of employment.

33. Harvey on Industrial Relations helpfully summarises the law as follows¹:

In order for the employee to be able to claim constructive dismissal, four conditions must be met:

- (1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.
- (2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the

¹ Division D1, para 401

contract by the employer will not be capable of constituting a repudiation in law.

(3) He must leave in response to the breach and not for some other, unconnected reason.

(4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.

34. In this case the claimant, in respect of the breach of contract, relies upon a breach of the implied term of trust and confidence.

35. In Malik v Bank of Credit and Commerce International SA [1997] IRLR 462, the term (was held to be as follows: "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

36. In Buckland v Bournemouth University Higher Education Corporation it was reiterated that at the stage when the tribunal is considering whether there has been a repudiatory breach of contract it is not to apply the range of reasonable responses test.

37. In Omilaju v Waltham [2005] ICR 481 Dyson LJ said:

14 The following basic propositions of law can be derived from the authorities.

1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221.

2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606, 610 e– 611a (Lord Nicholls of Birkenhead), 620 h– 622c (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, per Browne-Wilkinson J in *Woods v W M Car Services (Peterborough) Ltd* [1981] ICR 666, 672 a. The very essence of the breach of the implied term is that it is calculated or likely to *destroy or seriously damage* the relationship.

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Mahmud*, at

p 610 h, the conduct relied on as constituting the breach must

“impinge on the relationship in the sense that, looked at *objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer” (emphasis added).

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put in *Harvey on Industrial Relations and Employment Law*, para DI [480]:

“Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the ‘last straw’ which causes the employee to terminate a deteriorating relationship.”

...

19 The question specifically raised by this appeal is: what is the necessary quality of a final straw if it is to be successfully relied on by the employee as a repudiation of the contract? When Glidewell LJ said that it need not itself be a breach of contract, he must have had in mind, amongst others, the kind of case mentioned in the Woods case at p 671 f– g where Browne-Wilkinson J referred to the employer who, stopping short of a breach of contract, “squeezes out” an employee by making the employee’s life so uncomfortable that he resigns. A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase “an act in a series” in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

20 I see no need to characterise the final straw as “unreasonable” or “blameworthy” conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw

may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21 If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

22 Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective (see the fourth proposition in para 14 above).

38. In Kaur v Leeds Teaching Hospitals [2019] ICR 1, Underhill LJ gave the following guidance at paragraph 55:

In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju [2005] ICR 481) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate

consideration of a possible previous affirmation, for the reason given at the end of para 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?

39. In deciding whether the employee resigned in response or partly in response to the breach the question is whether the repudiated breach played a substantial part in the reasons for resigning (Wright v North Ayresshire Council [2014] ICR 77, United First Partners Research v Carreras [2018] EWCA Civ 323).

Constructive Dismissal and Discrimination

40. In Lauren De Lacey v Wechslen UKEAT/0038/20/VP it was held:

[68]...in Williams v Governing Body of Alderman Davies Church in Wales Primary School [2020] IRLR 589, at paragraph 89, HHJ Auerbach said that a constructive dismissal should be held to be discriminatory “if it is found that discriminatory conduct materially influenced the conduct that amounted to a repudiatory breach.” At paragraph 90, HHJ Auerbach said that the question was whether “the discrimination thus far found sufficiently influenced the overall repudiatory breach, such that the constructive dismissal should be found to be discriminatory.” (my emphasis)

[69]. I respectfully agree with the test as it is set out in paragraph 90 of the Williams judgment. Where there is a range of matters that, taken together, amount to a constructive dismissal, some of which matters consist of discrimination and some of which do not, the question is whether the discriminatory matters sufficiently influenced the overall repudiatory breach so as to render the constructive dismissal discriminatory. In other words, it is a matter of degree whether discriminatory contributing factors render the constructive dismissal discriminatory. Like so many legal tests which are a matter of fact and degree, this test may well be easier to set out than to apply. There will be cases in which the discriminatory events or incidents are so central to the overall repudiatory conduct as to make it obvious that the dismissal is discriminatory. On the other hand, there will no doubt be cases in which the discriminatory events or incidents, though contributing to the sequence of events that culminates in constructive dismissal, are so minor or peripheral as to make it obvious that the overall dismissal is not discriminatory. However, there will be other cases, not falling at either end of the spectrum, in which it is more difficult for an ET to decide whether, overall, the dismissal was discriminatory. It is a matter for the judgment of the ET on the facts of each case, and I do not think that it would be helpful, or even possible, for the EAT to give general prescriptive guidance for ETs on this issue.”

41. In Driscoll v & P Global EA-2020-000876-LA it was held that a constructive

dismissal is, in principle, capable of constituting an act of harassment, within the meaning of section 26 of the Equality Act 2010.

Findings of Fact

42. The claimant started working for Alton College in 2013. As we have indicated she was employed on a variable hours contract. She commenced working in the English department in 2014 where she was timetabled to teach GCSE English. By 2017 she was also teaching Functional Skills.
43. The claimant had a diploma in secondary education and a BA and an MA in English.
44. The claimant's students generally obtained good exam results and did so in particular in 2018 and 2019. At page 558 is an email from a student to the claimant stating "thank you so much for all the additional support and guidance which you have given me throughout the college period, I cannot believe I passed I honestly thought I'd failed again... But thank you for the 1:1 time we had, it has clearly paid off..."
45. Similar praise is found in an email from Ms Richardson to the claimant on 13 June 2018 where she states, in the context of a complaint to which we will return, "... I know you are a good teacher and we get lovely feedback from your Functional Skills and GCSE classes – we had students asking to move into your classes which is always a good sign." (Page 195)
46. The claimant was also an examiner for the Pearson Ed Excel Examination Board in GCSE English Language.
47. The claimant's line manager was Ms Richardson from whom we have not heard. She carried out an appraisal on 11 November 2016 in respect of the claimant in which she wrote "You are a dedicated teacher Betty and genuinely care about the students welfare & progress. You deal with some of the most challenging students in college, but always manage to maintain a positive attitude which is much appreciated. You are always willing to help out and have offered to cover English Literature lessons & help with the creative writing group. This is definitely an area I'll take action on. Thank you for all your hard work and enthusiasm!" (Page 463).
48. Subsequently, on 18 August 2017, Ms Richardson wrote to the claimant stating "Hi Betty, we discussed in your appraisal that you were interested in teaching some A-level..." (Page 467). We find, therefore, that from November 2016 the respondent and Ms Richardson in particular were aware the claimant wanted to teach A-level. In that email she went onto offer her A level Lit/Lang teaching on a Thursday morning and a Tuesday afternoon.
49. We formed the view that the claimant was a careful and conscientious teacher who took pride in her work.

50. In 2014, the respondent advertised for a 0.5 teaching post which the claimant applied for. In fact the respondent did not appoint to that post because the job advertisement had been a mistake. However the claimant had applied for the job - as is apparent from her email of 8 September 2017 to Ms Kingsley and Ms Richardson where she states "Nicola, I'm sure you remember that I did apply for a 0.5 teaching post when Jenny Alexander left the interview never took place..." (Page 191). Ms Kingsley's reply accepts that the post was not filled but does not suggest that she was unaware that the claimant had applied for it.
51. In May 2017 the respondent advertised for an English teacher. The advertisement appeared in the TES. It stated "We are looking for Teacher of English Literature and/or Language with the ability to teach A-level, along with GCSE and functional skills." (Page 653). In her evidence Ms Kingsley said that the advert was, in fact, wrong and the respondent was only looking for an English language teacher.
52. It is apparent from page 653 that the TES advertisement referred potential applicants to the Alton College website for further details. Thus we accept that the job was advertised on the respondent's own website.
53. The evidence of all witnesses was that Alton's practice at that time (and the respondent's now) is that when jobs were advertised externally they were also included on an email which is circulated to all staff internally. Doing so allowed staff at the college to apply for the role if they wished to. Sometimes jobs were only advertised internally, but it was not the practice to only advertise jobs externally.
54. The claimant's case is that this job was not advertised internally. The respondent's case is that it was. When the parties talk about advertising internally, both refer to the circulation of the email to internal staff.
55. The respondent is unable to demonstrate that the role was advertised internally and a screen print at page 484 of the bundle shows a number of emails from Harinder Matharu of the respondent which were sent to staff between 3 October 2016 and 14 December 2017 in respect of staff vacancies. The 2017 English teacher role is not among the emails which were sent. The claimant says that shows that this job was not advertised internally. Moreover she gave evidence that she has searched carefully through her emails and is confident no such email was sent. The respondent says that it may have been sent by a different employee and would have been circulated as a matter of course.
56. Somewhat surprisingly, it became apparent during the evidence that the respondent has not attempted to search its records to find any internal email referring to the role. Ms Kingsley told the tribunal that she probably became aware that the claimant felt aggrieved, because the role had not been advertised internally, in 2017. When asked whether she would have checked whether the email had been sent she said "why would I check? It was common practice every time." When it was then put to her that, if someone was saying

that the failure to circulate the email was an act of racism, surely there was a duty to investigate properly, her response was “[the claimant] never made a formal statement...”

57. Ms Dhesi investigated a grievance from the claimant made in February 2020 which included a complaint about the 2017 role. She was asked whether she asked for the internal advertisement to be produced but confirmed that she did not.
58. We found that the claimant's evidence in this respect was clear and she had, we accept, carried out a thorough investigation of her own emails to check whether she was right that the job had not been internally advertised. We find that had it been advertised she would have noticed the job since it was one she would have wanted and she would have applied for it. The respondent's answer on this point is no more than a bare assertion that the email would have been sent because it always sends such emails. We reject that evidence and prefer the claimant's evidence. We find that the internal email was not sent.
59. The claimant's case is that the email was not sent because Ms Richardson did not want her to apply for the job. The claimant and her husband, in compelling evidence, explained that they have sought to think of other explanations as to why she would not have been told about the job or why Ms Richardson would not have wanted the claimant to apply for it. They are unable to think of any explanation and therefore forced to conclude that it must be because of the claimant's race.
60. There were 10 English teachers in the Department and, on the evidence we have heard, only the claimant was in a position where she would want to apply for this role. She was the only teacher on a variable hours contract. She was the only Black teacher in that department in the Alton College.
61. Ms Richardson would have been aware that the role was available and being advertised and, in circumstances where she knew the claimant wanted more A-level teaching and had applied for a similar role in the past, it is odd that she did not have a conversation with the claimant telling her about the job.
62. It was also suggested during the course of Ms Kingsley's evidence that it would have been inappropriate for any teacher to be told individually that the job was being advertised since that might amount to coaching. We do find that position to be credible if it is the respondent's normal process to circulate details of the jobs internally in any event. While we accept that it might be said that internal candidates should not be coached, there is a significant difference between telling somebody that a job is being advertised and coaching them.
63. We must decide whether the claimant has proved facts from which we could decide that she was treated less favourably because of her race. We have reminded ourselves that it is not sufficient for a claimant to assert that there is a difference in race and a difference in treatment. We have also reminded

ourselves that in this case, on the face of matters, the claimant was not treated differently to any other teacher in the sense that this internal email was not sent to anyone.

64. However, the latter point is only superficially accurate. All other roles, as far as we are aware, were advertised internally. The claimant was the only person who have been interested in applying for this role, as far as we know, and it was in those circumstances that the email was not circulated. The respondent has not suggested that the failure to circulate the email was simply an oversight on the part of its administration (which we might have accepted), instead it has forcefully asserted that the email was sent.

65. We find that the claimant has proved the following facts:

- a. she was a good English teacher,
- b. she was capable of teaching A-level (page 462),
- c. her managers knew that she wanted to apply for a permanent role,
- d. she was the only person in the college who would have wanted to apply for the role
- e. had she been told of the role she would have applied and been appointed to it,
- f. it would have been natural for the claimant's line manager to have mentioned the role to her in the circumstances,
- g. the respondent gave a misleading explanation as to whether she would have been given the role or not,
- h. for an unexplained reason, the college departed from its normal process of circulating by email the details of the job
- i. the claimant was the only person affected by the respondent's decision not to circulate the email internally.

66. When we ask ourselves why Ms Richardson would not tell the claimant about the role, we can see no reason whatsoever.

67. It seems to us that in the absence of an explanation as to why the respondent did not tell the claimant about the job, the facts which the claimant has proved are facts from which we could conclude that she was not told of the role because she was Black. She was better suited to the job than either of the candidates who were appointed and yet was kept from applying for it.

68. Thus we look to the respondent for an explanation. The respondent has not given any explanation at all as to why the email was not circulated or Ms

Richardson did not even tell the claimant about the role.

69. We are willing to accept that there may be a good explanation as to why the email was not circulated but the onus is on the respondent to provide that explanation and it has not done so.
70. Thus in respect of issues 2.1.1 and 5.1.2 we find that in May 2017 there was a failure to advertise two permanent English teaching posts and we also find that the claimant has proved facts from which we could decide, in the absence of an explanation, that was because of race.
71. It follows that in respect of issues 2.1.2 and 5.1.3, the claimant was overlooked, at the time when the recruitment took place.
72. The claimant was upset about the two external candidates being appointed instead of her. In early September her husband (who also taught at the school) spoke to Jon Myers, the Vice Principal about the situation. The claimant's husband and Mr Myers met on 15 September 2017 and a subsequent meeting was arranged for the 18 September 2017 which the claimant also attended.
73. There were no minutes of that meeting but the claimant's witness statement sets out what she says happened. She says that she told Mr Myers "I had been working successfully for the Respondent from 2013 and had still not been offered a permanent role, or to be given any career development. I said that while there were no such roles available, I understood the position but recently two new English teachers had been recruited, who were far less experienced than I was. Caroline (white) had only just qualified. I had a Master's degree, was a GSCE examiner, and had almost 10 years' qualified teaching experience. It made no sense. I said that in the absence of any other logical explanation I felt it was due to racial discrimination" (paragraph 25). The respondent has not sought to contradict that account and we accept it. This was a protected act.
74. Mr Knight's evidence, which we considered to be moderate and reasoned and which we also accept was that in the meeting it was made clear that he and his wife believed that racial discrimination was at the root of the negative treatment which the claimant had been subjected to.
75. It is apparent that Mr Myers acted on the conversation and, on 20 September 2017, Ms Richardson wrote to Ms Knight stating that Mr Myers had requested that the claimant be given some A-level teaching. (Page 477). In addition the claimant was offered 0.3 full-time equivalent permanent contract (page 180).
76. It is asserted by the claimant that, in June 2018, Ms Richardson provided details of fabricated complaints about the claimant from students/parents to the claimant (issues 5.1.4/ 3.1.1/ 4.2.1).
77. The claimant's case is that Ms Richardson gave her a torn off piece of paper

with a number of complaints on from different students. The piece of paper is not in the bundle but an email is present from the claimant to Ms Richardson dated 13th June 2018 stating “I’ve read the students’ complaints about my teaching of Beloved. If I’m being honest I’m upset and demoralised by their comments...”. She goes on to defend herself from the allegations (page 196).

78. Ms Richardson replied “Dear Betty please don’t be upset about the comments – we all get them from time to time –... I know you are a good teacher and we get lovely feedback from your Functional Skills and GCSE classes – we have students asking to move into your classes which is always a good sign. The reason for letting you see the A-level comments to help you in your development in this area...” (Page 195).
79. The claimant accepts that one complaint had been made by the parent of a student but says that the piece of paper contained details of additional complaints and those complaints were entirely made up. She asserts that Ms Richardson’s action was done to retaliate for the claimant claiming that she had been discriminated against in respect of the job interview.
80. There is no copy of the piece of paper for us to satisfy ourselves as to what was said. Moreover the claimant, at paragraph 44 of her witness statement, does not go into any detail as to what was written.
81. The admitted complaint made from the parent of a student is at page 193. We note that it makes complaints that the claimant’s lessons were too “fluffy” and needed more structure. It complains that the claimant’s teaching style is of “go and discuss” which is only useful to a certain extent. It says that the book was not taught chapter by chapter and time limits on tasks are not set by the teacher.
82. In the claimant’s reply to the piece of paper which Ms Richardson gave to her, she answers the allegations made. The claimant states “Comments like: 'we were told to go and discuss', 'unstructured', and 'fluffy lessons', seem to imply a lack of planning for lessons etc. I spent hours and hours planning for these lessons and even though I didn’t teach the text linearly.... Lastly - the comment about not timing group discussions, is completely untrue” (page 195).
83. Thus the claimant did not respond to any complaints which are not within the complaint at page 193.
84. In those circumstances we are not satisfied that the piece of paper which the claimant was given in 2018 contained any complaints which had been fabricated. The claimant is recollecting events from some time ago, when much has happened to affect her recollection. Whilst we do not doubt the sincerity of her evidence, we are not satisfied that there were any fabricated complaints on the piece of paper.
85. In October 2018 the claimant had an appraisal with Ms Richardson. The claimant says, and we accept, that she filled in her comments prior to the

meeting and there was then a discussion with Ms Richardson. The claimant complains that Ms Richardson did not send her comments following the appraisal and that the claimant only received them on the 1 December 2020 after requesting them by email from Dani Evely (issue 5.1.5).

86. At page 642 is an email from the claimant to Dani Evely dated 27 November 2020 in which she states “could you please ask Ms Richardson to send you a copy of my last appraisal on 17/10/2018... never received a copy with her comments following the meeting as it has been the procedure in the past.”
87. We find that the claimant made no request for the comments after the meeting in October 2018 and she does not appear to have been troubled by it before the end of 2020. Even if the respondent did normally send such comments straight after an appraisal, there is no evidence on which we could find there was anything sinister in the failure to do so on this occasion. Sometimes things simply get overlooked. We find that there was no detriment to the claimant in this respect and any failure certainly did not amount to a breach of the implied term of trust and confidence.
88. In June 2018 Ms Richardson sent an email to the claimant talking about her timetable. The claimant replied stating that she was happy to just teach GCSE now as she had made plans to focus on other things in the future. (p197). The following year, on 27 June 2019, Ms Richardson wrote to one of the claimant’s colleagues, Daniela Blajan asking if she was interested in teaching GCSE English and functional skills in the next academic year. Ms Blajan was interested (page 207 – 208).
89. Thus some of the existing classes of the claimant were transferred from her to Ms Blajan. However, in September 2019 the claimant was asked to teach a GCSE class on a Tuesday morning and, under the timetable for that year, her hours were increased. Thus on 19 September 2019 the respondent wrote to the claimant stating “I am pleased to offer you a temporary 0.43 contract for the academic year 2019-20. This will start on 01 September 2019 and will end on 31 August 2020 when you will revert to your permanent fraction of 0.03” (page 587).
90. Whilst we accept that the removal of the functional teaching skills and the giving of them to Ms Blajan was without consultation, we find that the respondent was acting reasonably in dealing with its timetable. It seems to us that colleges are entitled to move the teaching timetables of teachers and do not always need to consult, even if they have done so in the past. There is no evidence upon which we could conclude that the respondent’s behaviour was either because of race or because the claimant had made her complaint of discrimination in 2017. There is no evidence that the claimant was treated differently to anybody else. We do not think that the respondent’s actions were likely to seriously damage the relationship of trust and confidence. These are the findings we make in relation to issues 2.1.8, 4.2.2 and 5.1.6.

91. In November 2019, the claimant was sent a certificate by the Joint Council for Qualifications. It carries a large number “3” and states “2019 award for services to examining- Mrs Betty Knight- In recognition of your work for over 3 consecutive years as an examiner.”
92. The claimant sent that certificate on to Harinder Matharu, a member of the respondent’s People Services stating “Hi Harinder A copy of the examiner award certificate for my file. Thank you”. She appears to have either forwarded that email to Ms Richardson and Ms Morgan or sent a blank email attaching the certificate (page 602).
93. The claimant complains that the examiner’s award was ignored (issues 2.1.3, 3.1.2 and 5.1.7) . The claimant’s email did not ask for any particular account to be taken of the award but says in her witness statement that the emails were not acknowledged which was hurtful and upsetting. She says that a white teacher with similar examining experience and particularly with an examiner award would be looking at becoming a head of Department if they weren’t already.
94. The claimant adduces no evidence in support of her assertion that a white teacher would have been treated in the way that she says and her case was not advanced in that way in cross examination.
95. There is a degree of oversensitivity by the claimant in this respect and we do not think that the respondent behaved inappropriately in not acknowledging her certificate. Whilst it may have been good management practice to send a congratulatory email, in failing to do so we do not find that the respondent was behaving in any way unreasonably. We do not accept that the respondent’s purpose in not acknowledging the email was to violate the claimant’s dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It would also not be reasonable for the conduct to have that effect and we do not find that it did so, even taking account of the claimant’s perception and the circumstances of the case.
96. Moreover, there is no evidence upon which we could conclude that the failure to acknowledge the certificate was because of the claimant’s race or related to her race. It would not seriously damage the relationship of trust and confidence.
97. Following the merger in 2019 the respondent changed the way in which teachers were informally assessed.
98. Before the merger, Alton had a process called “Learning Walk Feedback”. The teacher would be observed and a feedback sheet completed and feedback would be given. The feedback sheet required the assessor to give an overall outcome, being one of 3 options;
 - a. requires DoL/ CM intervention

- b. requires CM support
- c. no action required.

99. The claimant was assessed in that manner in February 2019 and the feedback is at page 200. Some feedback was given and the claimant was assessed as requiring CM support.

100. The feedback was largely positive, it recorded that the claimant was adept at using open questions and scaffolding to draw out and support student responses, that she provided clear instructions both verbally and on the board/PowerPoint, that she reminded the students about study skills and gave lots of good one-to-one discussion/support. On the negative side, it picked up on a low level of energy in the room, generally low level poor behaviour and student engagement flagging at points.

101. Guidance on the new process is set out at page 487. The guidance contains the following statements

- a. Drop-in observations are ungraded and will last a minimum of 30 minutes and usually no longer than 45 minutes,
- b. Should the observer need to return to the session in order to support a full and accurate judgement of the quality of teaching and learning, the teacher will be informed of their intended point of return and purpose of so doing ,
- c. To ensure consistency across College and enable appropriate observer training some joint observations will also be conducted
- d. Feedback should be given at a meeting which should take place within 1 or 2 working days of the observation. In exceptional circumstances where a meeting is not possible alternative arrangements can be made.
- e. Observers will ensure that they provide clear, supportive and evidence-based feedback, including reasons for the chosen route.

102. Following the observation (called a drop-in session) a teacher would be placed on 1 of 3 pathways. The 1st called “sharing of good practice” is for teachers where the teaching went well and the learners benefited significantly as a result. The 2nd called “continuous development” applies where there has been sound teaching and learning has been demonstrated and an action plan will be agreed with the teacher. The 3rd route, called “teacher is supported to improve” is where the assessor believes there are significant areas for development and the learners may have suffered a detriment to their learning as a result.

103. When a teacher is assessed to need the 3rd pathway they are required to engage in an “Individual Improvement Plan” which would last a maximum of

6 weeks and is supported by another teacher. Re-observation must then be carried out and if significant areas continue to require development the matter is managed under the capability procedure.

104. Managers within the respondent were trained on the process (which was new for Alton staff but not others). The intention was that the training would be then cascaded down to teachers. Ms Scott the Learning Manager for Teaching, Learning and Quality provided 3 examples of the different pathways so that teachers would know what to do to meet the requirements of the scheme.

105. The respondent asserted that the claimant would have been given training but could not show any evidence to that effect. It stated that even if the claimant had not attended the training, the PowerPoint and materials were circulated to the teachers. Ms Kingsley was asked whether there might be an email in existence and stated that there most probably would be. Despite reminders by the tribunal, the respondent had not been able to find any such email by the end of the hearing.

106. The claimant said that she had not been trained or given any guidance on the new policy and we accept that evidence.

107. We accept that in 2019 Ms Scott asked Ms Richardson for the names of teachers who could be assessed under the drop-in scheme. The intention was that Ms Scott would do the assessment with Ms Richardson, partly, so that she could observe the way in which Ms Richardson would carry out the sessions.

108. The intention was that all teachers would be observed 2 or 3 times a year.

109. We have not been given any evidence as to how many teachers Ms Richardson put forward but the claimant was selected for a lesson observation which took place on 3 December 2019. It is apparent from the investigation that was carried out into the claimant's subsequent grievance that there were at least 4 joint observations of staff at around that time (page 289).

110. We find that there was nothing wrong with the respondent selecting the claimant for a joint assessment and carrying it out. There is no evidence on which we could conclude that Ms Richardson selected the claimant because of her race or because she had made a complaint of discrimination in 2017. Not only was there a significant passage of time between the complaint and the drop in session but it was standard practice for teachers to be assessed during the year. As we have indicated other teachers were similarly assessed. Thus we make no criticism of the respondent in this respect. We do not find that the claimant was singled out for a joint observation or that her selection was because she had previously complained of discrimination (issue 4.2.3).

111. The assessment took place on 3 December 2019. It was carried out by

Ms Richardson and Ms Scott. We accept that Ms Richardson and Ms Scott did not know each other particularly and Ms Scott was not aware of the complaint which the claimant had made about Ms Richardson. Ms Richardson did try explain to Ms Scott prior to the observation that there had been some history between the two of them but we find that Ms Scott was not particularly interested in that, preferring to focus on the observations she would make in the session. We find that was appropriate.

112. There is no dispute that the observation lasted for less than 30 minutes, the claimant puts it at no more than 25 minutes. We accept the claimant's evidence in that respect. Somewhat inaccurately, Ms Scott states in her witness statement that the observations were supposed to last for "20 – 30 minutes as a snapshot of what was happening in the class." When it was put to her that is not what the document at page 487 says, she replied that they were only "guidelines". Whilst it is true that they are described as guidelines, Ms Scott gives no basis for her assertion that observations are supposed to last for 20 to 30 minutes and we find that if guidelines exist, they should usually only be departed from for good reason.
113. We find that the reason the observation stopped after 25 minutes was because there was a break. Although the Guidelines allow for observing tutors to speak to the students, Ms Scott and Ms Richardson did not do so. Ms Scott and Ms Richardson made no attempt to convene a 2nd drop-in session.
114. The feedback sheet (Informal Drop – in Record) appears at page 233. It was completed by Ms Scott. It is an overwhelmingly negative document. There is very little in the "Strengths" column and the way in which the column "Areas for Development" is written would be highly demoralising for a teacher.
115. An Individual Improvement Plan was created for the claimant with a start date of 3 December 2019.
116. The claimant was invited to a meeting later on 3 December 2019 when feedback was given. Before the meeting took place, Ms Kingsley had explained to Ms Scott that, in the college's view, the claimant had often found supportive feedback to be quite negative and she should approach the feedback with a positive approach to achieve the best outcome. There are no notes of the meeting which took place. The claimant and Ms Scott give differing accounts of what happened in the meeting. The claimant says that she was berated, humiliated and racially stereotyped, Ms Scott states that she explained how support was given to teaching staff and that it was a positive pathway with good outcomes for both staff and students alike.
117. We formed the view that Ms Scott was an honest witness but one who was somewhat blunt. We formed that view both from her answers in cross examination but also from the way in which she completed the feedback sheet at p233. We do not accept the claimant's characterisation of the meeting, but we find, on the balance of probabilities, that the type of feedback which would

have been given in the meeting would have been consistent with the kind of feedback which was given on the feedback sheet.

118. We were told that 10% of the respondent's teachers are on an Individual Improvement Plan at any one time.
119. Thus by the end of 3 December 2019, the claimant, who considered herself a conscientious and good teacher (with good reason) had, on the basis of a 25 minute observation, been given overwhelmingly negative feedback which was bound to have damaged her confidence and self-esteem. She had been placed on an improvement plan which required her to work with another teacher and was a step on the road to being placed on a capability programme. She found herself being regarded as in the bottom 10% of teachers which the respondent employs.
120. We accept that it is important that teaching standards are maintained and that any employer has the right to assess their staff and, if there are grounds for doing so, require them to go on some sort of performance improvement programme.
121. On the respondent's own case, it took no account of the claimant's previous good record relying simply on the one observation of 3 December 2019. The respondent then required claimant to go on an Individual Improvement Plan, having given overwhelmingly negative feedback. However it did so when it had not complied with its own guidelines because it did not assess the claimant for a minimum of 30 minutes.
122. It seems to us that, at the very least, if the respondent was going to be so critical of the claimant without having any regard for her teaching record, it should have either observed the claimant for longer or had a 2nd drop-in session "in order to support a full and accurate judgement of the quality of the teaching and learning" (in the words of the guidelines).
123. On balance we find that the respondent's actions in this respect, without reasonable and proper cause, were likely to seriously damage the relationship of trust and confidence between employer and employee. The respondent's actions were without reasonable and proper cause because it had not fully complied with its own guidelines.
124. Given the undoubted right of any employer to manage its staff, we have found that the actions of the respondent only just fell into the category of being a breach of the implied term of trust and confidence. Nevertheless, that is our finding in the circumstances which existed.
125. Thus, in respect of issue 5.1.8 we find that the claimant was provided with humiliating feedback and there was an attempt (which succeeded) to place the claimant on an individual improvement plan. We find that the way the respondent acted did amount to a breach of the implied term of trust and

confidence.

126. However, we find that Ms Scott acted in the way that she did because she believed that the actions were appropriate based on what she had observed. We accept her evidence that as at 3 December 2019 she was not aware of the earlier allegation of discrimination made to Mr Myers and, even if she was, we are satisfied that she would not have scored the claimant down because of that. There is no evidence that she acted on the basis of the claimant's race. Those are our findings in respect of issues 3.1.3 and 4.2.4
127. Moreover, in respect of issues 5.1.9 and 5.1.10, we do not agree with the claimant's assertion that the respondent decided to start the individual improvement plan without any grounds for doing so. Whilst we are critical of the process by which the respondent assessed the claimant and gave feedback we have not found that Ms Scott fabricated her views and, therefore, there were grounds for starting the improvement plan.
128. On 4th December 2019 the claimant emailed to Ms Scott a letter with a series of 6 comments on the feedback. In essence she sought to defend herself from the allegations. She stated that she felt the whole experience had been very negative and degrading and the suggestion that she needed to enhance her subject knowledge was disheartening (Page 401).
129. In the feedback form, Ms Scott had recorded that she had seen no promotion of equality and diversity. Within the document which the claimant sent in reply she stated "As regards Equality and Diversity, I am a Black teacher who is teaching English to a majority of White students. Is that not a challenge to the racial stereotype and a positive role model to the one Black student in the class? Yet, it appears my presence and efforts (it's exhausting to have to keep fighting for equality!) are being seen by you as making a completely 'insufficient impact on learning'!! An area for development?"
130. On 5 December 2019 Ms Scott wrote to Ms Richardson stating "unfortunately, she is now throwing the E & D Black comment at me too. I have spoken with People Services and they have advised that you now take this up with them. There are issues here with capability and compliance." (page 242).
131. When asked to explain that comment in evidence, Ms Scott stated that the reference to "at me too" was a reference to the other points which the claimant was disagreeing with in the document at page 401. The difficulty we have with that explanation is that it is not the natural way of reading that email. The email starts with an explanation that the claimant had sent the PowerPoint and there were no object aims and objectives showing. It then refers to the claimant's letter and says that she has confused the mark scheme and the objectives but does not refer to anything else in the letter. If the explanation of Ms Scott is correct, we have been given no explanation as to why the email of 5 December 2019 picks up the E & D comment rather than, say, the comment "it is always difficult to engage students when they are retaking a subject they

have underachieved at previously". If the explanation given by Ms Scott is correct we ask ourselves why the email of 5 December 2019 doesn't say "unfortunately she is now throwing the "it is difficult to engage students" comment at me too" or pick up on any of the other comments in the letter of 4th December.

132. The most natural reading of the email is that Ms Scott has, by now, become aware of the fact that the claimant has accused Ms Richardson of race discrimination in the past. Not only is that the most natural reading but is also borne out by the particular phrases used. Ms Scott refers to the claimant "throwing" the E&D Black comment at her. The word "throw" would not normally be used to refer to an employee raising concerns about feedback; it is more naturally to be read as a reference to an employee making unfounded allegations against the writer.

133. In any event, the claimant was not accusing Ms Scott of racism in the letter at page 401. She was simply explaining that she believed her very presence was a fulfilment of the requirement of diversity. That might be right or wrong, but it is not reasonably described as "throwing the E & D Black comment".

134. In our judgement the statement in the email "unfortunately, she is now throwing the E & D Black comment at me too" was unwarranted and inappropriate.

135. Within the email, Ms Scott did not seek to answer the claimant's points but recorded that she had spoken with People Services who have had that Ms Richardson should take the matter up with the claimant because there are issues with capability and compliance. (Page 242).

136. Ms Richardson followed that up on 13 December 2019 when she asked the claimant to meet with her and Ms Scott in the 1st week back in January to discuss how to proceed following the observation of the lesson (p250).

137. The claimant then wrote to Ms Richardson on 16 December 2019 asking her to explain what it is that she and Ms Scott wanted to speak to her about. She asked 3 questions including why she had been graded insufficient for Equality and Diversity. (Page 250).

138. Ms Richardson replied on 17 December 2019 stating

Hi Betty, please don't worry. The meeting in January is just to revisit the route forward from your informal drop in. All teachers who are deemed to be on the development route are offered support to help them. I understand from your original meeting with Claire that you were not keen on the idea and wanted to give you another chance to think about it. Other teachers in college are going through this process and are finding it helpful.

In terms of your questions:

1 There were two observers because this is standard practice to ensure consistency and has happened with other teachers across college.

2 Equality and diversity was not seen being promoted by use of teaching materials. E&D also covers students being treated fairly based on their individual needs but in this session all students were being treated the same.

3 Only half of the students had lanyards on. The reason for a 2/6 was that you did challenge the use of phones at one point in the session. Safety is about the environment that is created in the classroom. Did learners all feel comfortable and safe to answer questions, give ideas etc This was lacking in this session. The atmosphere in the classroom was quite uncomfortable with lots of silences and students not wanting to move to sit with other students.

I hope this helps in clarifying the situation

(p250)

139. Meanwhile, the claimant had written to Ms Kingsley on 13 December 2019 in an email which set out a brief account of the matter and stated that she felt singled out and suicidal and unwelcome at Alton College. She also stated that she had been in contact with an employment law firm for advice (page 247).
140. Ms Kingsley replied to state that she knew the informal drop-in system to be robust and standardised and also pointed out that a majority of lessons had been judged as “progressing” or “developmental” so far since the scheme was rolled out. She told the claimant she was welcome to come and talk and also involved Ms Sibley a business partner for People services. (Page 246)
141. Ms Kingsley did not reply to any of the concerns raised by the claimant in her letter of 4th December.
142. In respect of issue 3.1.4, we do not find that the claimant’s complaints of 4 December 2019 were ignored. We find the Ms Scott passed them on to Ms Richardson in accordance with advice from People Services and Ms Richardson then sought to arrange a meeting to discuss those concerns in January. She also reassured the claimant in her email of 17 December 2019.
143. Issue 3.1.4 (and 5.1.11) actually contains 2 separate issues. The first is whether the complaints were ignored (which we have dealt with) the 2nd is the act of accusing the claimant of throwing the E & D Black comment.
144. It is helpful to address, at this stage, issues 3.2 to 3.5 in turn. It has not been suggested that the claimant became aware of that accusation before disclosure in these proceedings took place.

145. We find, in respect of issue 3.2 that the conduct was unwanted. We also accept, in relation to issue 3.3 that the unwanted conduct clearly related to the claimant's race.
146. In relation to issue 3.4 and 3.5 we do not find the accusation was intended to have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. We find, rather, that Ms Scott was expressing inappropriate frustration at the claimant's comments about equality and diversity.
147. The more difficult question is whether the accusation had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Had the claimant been aware of the comment then undoubtedly it would have done so. However, the claimant has not brought a claim in respect of how she felt once she became aware of the accusation when disclosure took place in these proceedings.
148. We do not find that the comment made by Ms Scott, as a matter of fact, created an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It seems to us that Ms Richardson carried on dealing with the claimant in an appropriate manner and sought to arrange a meeting to deal with the claimant's complaints.
149. We must make a finding as to whether or not in circumstances where the claimant was unaware of the comment and it did not, as a matter of fact, change the environment which the claimant was in, we can or should find that the making of the comment had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Whilst we reiterate our view that the comment was inappropriate and had no place in the correspondence, we are unable to find that was the case.
150. In respect of issue 5.1.11, we find that in acting in that way, Ms Scott, without reasonable and proper cause, behaved in a way which was likely to seriously undermine the relationship of trust and confidence, at least once the claimant became aware of the comment. There was no reasonable or proper cause for that behaviour.
151. Issues 2.1.4 and 5.1.12 refer to a complaint by the claimant on 5 December 2019. The claimant's witness statement does not deal with any such complaint nor does the claimant's chronology. To the extent that this is intended to be a different factual allegation to those dealt with above we do not find it is factually proven.
152. As we have indicated, on 13 December 2019 Ms Richardson invited the claimant to attend a meeting in January to discuss the way forward. The claimant asserts that this was a meeting with the intention to bully her into agreeing an individual improvement plan and threaten her with disciplinary

action for non-compliance.

153. The claimant says that the evidence that the meeting was intended to be bullying towards her is found in the email correspondence between the 5 December 2019 and 18 January 2020.
154. The background is that the claimant had emailed Ms Kingsley on more than one occasion on a Friday evening and also emailed Ms Richardson suggesting that she felt suicidal and unsupported. On 17 December 2019 Ms Kingsley wrote to Ms Sibley of people services stating "I copied you into my reply to Betty's email - the second she has sent on Friday evenings (about 7pm both times) directly expressing or implicitly suggesting suicidal thoughts/intentions. Please can People Services become involved - I shouldn't have to spend my weekends worrying whether Betty has done something to herself and do not want to receive this type of emotional blackmail on Friday nights. I know you can't stop her sending me these emails, but I do think People Services should contact her. Copying in Steph since she has also received a similarly threatening email from Betty and her husband Graham who teaches here too." (p244)
155. On 19 December 2019, Ms Richardson had emailed Ms Sibley stating "Hi Nathan, thank you for the offer to talk things through. As of tomorrow I will switch my email onto auto reply so I won't receive any emails should Betty send them. Did you/people services email Betty to offer her support? My main concern is that she will interpret any non-communication from the college as evidence of being discriminated against and not being supported." (Page 254)
156. We do not share the claimant's analysis of those emails. We think that it would be upsetting to the claimant's colleagues to receive emails on a Friday night from the claimant saying that she was considering suicide. Moreover it would be frustrating to them to receive those emails on a Friday night when they had made clear to the claimant that she could discuss things with them during the week if she wanted to do so. It is not unreasonable for colleagues to seek advice from human resources officers in those circumstances and even if the emails reflect frustration with the claimant's actions rather than concern for the claimant, we do not find that be surprising in the circumstances.
157. Those emails do not lead to the conclusion that the intention was to bully the claimant on 13th January 2020.
158. The meeting on 13th January 2020 had to take place to move matters forward. Ms Richardson was in a line management role and was required to resolve the situation which had arisen. The email that was sent to the claimant (which appears at page 250) is unobjectionable. This was not conduct which was likely to affect the relationship of trust and confidence (issue 5.1.13).
159. The sending of the email, we are satisfied, did not have the purpose of violating the claimant's dignity or create an intimidating, hostile, degrading,

humiliating or offensive environment for the claimant nor, reasonably, did it have that effect. There is no evidence that it was sent for reasons related to race (issue 3.1.5). We do not find that sending the request was a detriment to the claimant, no reasonable employee would have considered themselves disadvantaged as a result of the invitation, nor is there any evidence that the invitation was sent because the claimant had made a previous allegation of discrimination against Ms Richardson (issue 4.2.5.)

160. In January 2020 the exam results came out for a group of students who the claimant had been teaching (including those in the lesson on 3rd December). They were good results as can be seen on the analysis at page 597. The claimant asserts in her witness statement that the results are further proof that the respondent had no legitimate grounds for attempting to “put me on capability” (paragraph 114). That is something of a simplification. Whilst it seems to us that the claimant was a good teacher, we have also found that the feedback Ms Scott gave to the claimant was based on what she saw in the 25 minute assessment, even though the method of the assessment and the feedback given was inadequate.
161. We do not find that there was any obligation on the respondent to respond in a particular way to the results which the claimant had in January and we do not find that the respondent overlooked those results. The respondent would have been fully aware of the claimant’s results; the claimant’s complaint, really, is that the respondent did not, in response to the results, tell the claimant that there would be no further action on the drop-in session.
162. We do not find that allegations 3.1.6 and 5.1.14 are proved from a factual point of view but even if they were, the respondent’s actions were not a breach of the implied term of trust and confidence and nor were they related to the claimant’s race.
163. The claimant went off sick on 17 December 2019. The statement of fitness for work dated 24 December 2019 shows that the reason for not being fit for work was “stress at work” (page 425).
164. After being signed off work, the claimant sent a very small number of emails to her students. On 16 January she emailed a number stating “well done guys – you’ve all passed!! If you weren’t able to collect your results from the hub today, they’ll be posted to your home address.” (Page 264). Around the same time she replied to an email from a student asking her whether passing the exam meant that she no longer needed to attend English lessons (Page 266).
165. Also on 16 January 2020, the claimant contacted a colleague talking about the exam results but also stating “ ironic in that these students are from the Tuesday group I was told 'students were confused' and that 'the classroom environment and layout was not motivational and did not support the learners to have a good experience.'?? (see attached) Still feeling really angry!! (here's

my private email address - ...) Betty,” (page 263).

166. It appears that the recipient of that email was unhappy about it and passed it on to Ms Richardson who, in turn, passed it on to Mr Sibley (page 262).
167. On 20 January 2020, Mr Sibley wrote to the claimant stating “Just wanted to check in to see how you are? It has been brought to my attention that you have contacted both staff and students over the last week, also sending your private email address to another member of staff. May I remind you that you are currently signed off sick from the college, it's inappropriate to contact both students or members of the team until you return to work. Could I ask that any correspondence comes through me as your point of contact.” (Page 265)
168. We find there was nothing wrong with the respondent's actions. If someone is signed off as due to ill-health, particularly with stress at work, it is reasonable for an employer to take the view that they should not be engaging in work matters, for their own health. Checking emails can increase stress. Conscientious employees will often attempt to do work while they are signed off and there is nothing wrong with employers reinforcing that they are to refrain from work for their own good. However, even if that was not Mr Sibley's motivation, continuing to contact staff and students while signed off can cause confusion. Students do not know who to contact if they are receiving emails from staff who are signed off as well as staff who are covering for the ill member of staff. Finally, in this case, we take the view that the email sent by the claimant to her colleague was inappropriate in any event.
169. In respect of issue 3.1.7 we are satisfied that the reason for sending the email was not related to race and in relation to issue 5.1.15 we do not think respondent's behaviour was inappropriate.
170. On 6 February 2020 the claimant raised a grievance with the respondent, primarily about the assessment on 3 December 2020 however the grievance also referred to a separate letter sent by the claimant's solicitor. We have not seen that letter but the contents of it appeared to have fed into the subsequent investigation into the claimant's grievance by Ms Dehsi.
171. Issues 3.1.8 and 5.1.16 state that Ms Richardson provided false information about the claimant's performance history during the internal investigation with Ms Dehsi and, further, that she defamed the claimant's character with comments about her mental state, behaviour and professionalism including racially stereotyping her and making unfounded complaints regarding social media posts.
172. In the investigation meeting held with Ms Richardson on 10th February 2020, Ms Richardson asserted that there had been a number of complaints. In particular (at page 272) stated she stated that the claimant's teaching on the A-level course was seen to be inadequate and parental complaints were

received. Ms Kingsley gave similar evidence stating “there are several complaints from both students and parents.”

173. That evidence gives the impression that there were a number of parental complaints, and certainly more than one. It is apparent that this evidence was important since it formed part of the decision set out in the grievance outcome letter dated 13 March 2020 (pages 334 to 335).

174. Following disclosure in these proceedings, the claimant says that evidence was untrue. An order was made for disclosure of the complaints received about the claimant and the only evidence which has been disclosed is in relation to a student who we refer to as JA. She was a member of the claimant’s A-level English class in which they were studying a book called “Beloved”. On 16 March 2018 the student’s mother wrote to Libby Morgan, the claimant’s learning manager, “ it was a pleasure to meet you last night and thank you for your time yesterday evening discussing [JA]’s English with us. as requested, and putting in writing my concerns regarding [JA]’ lessons with Betty and the teaching so far of the book “Beloved” (page 193; this is the complaint we have referred to above).

175. There is no other evidence of any other complaints made by any other students or any other parents.

176. Within these proceedings, there was no attempt to adduce evidence to substantiate the assertion that more than one complaint had been made. Ms Kingsley’s witness statement was entirely silent on the point and she gave evidence that she had been told of the complaints by Ms Richardson in any event.

177. Given that it was an express issue in this case that the complaints relayed by Ms Richardson were in fact fabricated, it is something of a surprise that the respondent not only has adduced no documentary evidence of any complaints from the time but it has not even adduced any oral evidence. It has, however, maintained its position that there was more than one complaint.

178. The claimant has not been able to produce evidence that only one complaint was made, she is in the position of being required to prove a negative in that respect.

179. We must decide whether, on the balance of probabilities, there was more than one complaint so that when Ms Richardson referred to “parental complaints” she was being accurate. We think that if there had been more than one complaint, the respondent would have been at pains to show us what those complaints were in these proceedings. That the respondent is simply unable to provide any evidence of any complaints, apart from in relation to JA, causes us to conclude that it is more likely than not that was the only complaint.

180. In the circumstances we find that Ms Richardson’s evidence to the

internal investigation was false insofar as it referred to more than one complaint

181. However, the whole thrust of Ms Richardson's evidence at this point was, also, we think somewhat misleading. The notes of the meeting record, at page 272, this extract

This teaching on the A Level course from BK was then seen to be inadequate and parental complaints were received. SR explained she did an observation off the back of complaints (around February 2018). She then gave feedback to BK and BK felt very criticised. SR and BK then had conversations to decide whether BK wanted to carry on with A Level teaching. SR confirmed she had emails of these discussions. BK felt she couldn't do teaching.

182. It is instructive to consider Ms Richardson's email to the claimant of 13 June 2018 in which she wrote

I know you are a good teacher and we get lovely feedback from your Functional Skills and GCSE classes- we had students asking to move into your classes which is always a good sign. The reason for letting you see the A level comments is to help in your development in this new area & as you say it is only some of the students - some of the students/ parents did enjoy your lessons. I am very happy for you to teach the A level again in September if you would like to (page 195)

183. We find that in giving evidence to the internal investigation Ms Richardson was more critical about the events of 2018 than the contemporaneous documentation warranted.

184. We do not agree, however, that she defamed the claimant's character in the way that issues 3.1.8 and 5.1.16 go on to suggest. Ms Richardson gave an assessment of the claimant. Managers are required to do that in some grievance interviews and must be able to speak frankly. It does not follow that because Ms Richardson wrongly referred to "complaints" rather than "complaint" and somewhat overstated the problems which the claimant had in 2018 that the rest of her evidence was wrong.

185. In respect of the allegation that Ms Richardson made unfounded claims regarding social media posts, in her witness statement at paragraph 118, the claimant makes clear that she is referring to the statement made by Ms Richardson that the claimant "has a habit of posting stuff on social media about how she is in a dark place."

186. In the evidence which we have seen the claimant does refer to herself as being in "a dark place". She said that to the doctor (page 666) and she said it to one or more colleagues on 17 December 2019 (page 250). We are not satisfied that what Ms Richardson said was untrue.

187. The claimant also states, in her witness statement, that insofar as

Stephanie described her as “defensive, irrational and prone to emotional flareups” she was using a racial stereotype and that no white teacher would be described in those ways. She also states that she regards those comments as a further swipe at her for complaining about racism in 2017.

188. In fact, the record of the interview does not show Ms Richardson using the words in the way the claimant has summarised them. The interview does not record Ms Richardson using the word defensive or, indeed, irrational. It states that in the past the claimant has acted irrationally but that is somewhat different to characterising somebody as “irrational”. It does not refer to the word “emotional”.
189. On the question of whether the claimant was resistant to feedback we note that the claimant was resistant to the feedback she was given on 3 December 2019, she was not willing to accept that any of it might be right and she was also a little defensive in her response to the complaints provided in June 2018 (page 195). Whilst the claimant may well be right that there was no basis for the complaints in June 2018 or the feedback in December 2019, her response does provide a basis for Ms Richardson saying to the investigation meeting that the claimant had been resistant to feedback in the past.
190. In respect of issue 3.1.8, we must consider whether the claimant has proved facts from which we could decide that falsely stating that there had been more than one complaint from parents and going too far in stating the problems which existed in 2018, was for a reason related to race.
191. We have considered whether the combination of the fact that Ms Richardson wrongly stated that there had been more than one complaint and overstated the difficulties in 2018, combined with the lack of any evidence from Ms Richardson (or the respondent) as to how that came about does cause the burden of proof to shift. In this respect, as in others, the claimant relies upon the principles in *Bahl*.
192. We have taken into account the generally supportive emails from Ms Richardson to the claimant and the whole of her account given to the investigating officer at the time, in reaching our conclusions. Given that there was a complaint about the claimant in 2018 and it is quite likely that over time Ms Richardson’s recollection would change in the way that all witnesses recollections change, we are not satisfied that the claimant has discharged the burden of proof upon her in this respect. The way in which Ms Richardson explained matters to the respondent is as consistent with recollections changing over time as it is with discrimination. Therefore we find that the claimant has not proved facts from which we could decide, in the absence of any other explanation, find that the respondent, through Ms Richardson, acted because of reasons related to race.
193. Having said that, we do find that insofar as Ms Richardson gave inaccurate information to an investigation into the claimant’s grievance about

the number of complaints which had been made and also overstated the problems with the claimant's teaching, she did behave in a way which was likely to seriously damage the relationship of trust and confidence. Her evidence to the investigation gave the impression that this was an employee who was in difficulties. That impression was certainly false insofar as it referred to parental complaints rather than a single parental complaint but it is also not consistent with the contemporaneous documentation which we have seen. It is incumbent upon a manager giving evidence in that type of internal investigation to ensure that the evidence which they are giving is accurate. Ms Richardson should have gone back and checked the records and realised that there was only evidence of one complaint from a parent and should have given a more positive account of the claimant's teaching, at least in 2018. There was no reasonable or proper cause for Ms Richardson's failures in this respect.

194. During the course of the investigation into the claimant's grievance, Ms Dhesi spoke with Ms Richardson, Ms Scott and Ms Kingsley. She prepared a detailed report. The claimant complains that she did not interview Mr Myers, Libby Morgan or colleagues in the English department as well as students in respect of the lesson which was observed (issues 2.1.5 and 5.1.17).

195. There is no obvious reason why Ms Dhesi would have spoken to Mr Myers given that her report at page 290 accepted that the claimant had made a complaint of discrimination to him. Moreover, given that the grievance primarily related to the conduct of the joint observation of the claimant on 3 December 2019, little would have been gained from speaking to the claimant's other colleagues. Whilst it might be the case that the respondent could have done more in terms of interviewing people, that is often the case in a grievance investigation. In our judgement the respondent behaved reasonably in the level of investigations carried out into the claimant's grievance. We do not find that failing to interview those people was conduct likely to damage the relationship of trust and confidence nor was it a detriment to the claimant. There is no evidence that a white person would have been treated any differently to the claimant and we do not think that they would have been.

196. Issues 2.1.6 and 5.1.18 both assert that on 9 March 2020 (being the date of the grievance meeting) the respondent disregarded specific evidence in investigating the claimant's grievance, including the work of students from the observed lesson. It seems to us this is largely repetition of the previous issue and is unfounded. Indeed we have concluded that notwithstanding that the claimant did not attend at the grievance meeting on 9 March 2020, Mr Barlow went through out a careful and conscientious decision making process. Again whilst it might be said that Mr Barlow could have gone further, it cannot be said that what he did was in any way unreasonable. It was certainly not a breach of the implied term of trust and confidence. There is no evidence that a non-Black employee would have been treated favourably to the claimant.

197. Issue 5.1.19 complains that the respondent failed to investigate the

allegation of poor performance of the claimant following the comments made by Ms Richardson in the investigatory meeting. This allegation is wrong. It is quite clear that Mr Barlow did investigate the allegation as can be seen from the bottom of page 334 and the top of 335. The claimant may not have agreed with his conclusion, and his conclusion may possibly have been wrong, but he investigated it and, in our view, did so in good faith.

198. Mr Barlow did not uphold the claimant's grievance. Having received a lengthy investigation report running to 12 pages and having considered the interviews and documents, he sent a letter to the claimant on 13 March 2020 stating that he did not uphold her grievance. (Page 333). We must decide whether that decision was either a breach of the implied term of trust and confidence (that is to say it was behaviour which was likely to destroy or seriously damage the relationship of trust and confidence) or was an act of direct discrimination because of race (issues 2.1.7 and 5.1.20).

199. We can deal with the race discrimination claim briefly. There is nothing to suggest that Mr Barlow would have reached any different decision in relation to a white employee. The claimant sought to advance during the hearing a large-scale conspiracy whereby it was put to all of the witnesses that they behaved as they did because of race. In that respect the presentation of the claimant's claim did her case little credit. The claimant could simply point to no evidence to suggest that Mr Barlow (or indeed Ms Dehsi) behaved as they did because of the claimant's race.

200. The more difficult question is whether the failure to uphold the grievance was an action which was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. The reason that the question is difficult is that we have found that the way in which feedback was given from the drop-in session on 3rd December did amount to a breach of the implied term of trust and confidence. Does it follow that if Mr Barlow reached a different conclusion to us, his failure to uphold the grievance was itself an action likely to seriously damage the trust and confidence between the claimant and the respondent?

201. We do not think that Mr Barlow did act in a way likely to seriously damage the trust and confidence. We find that he acted fairly at all times and was at pains to ensure that the grievance was determined fairly. The simple fact that he did not reach the same conclusions that we have done does not mean that the failure to uphold the grievance was a breach of the implied term of trust and confidence.

202. Issue 5.1.21 refers to a failure by the respondent to make any workplace pension contributions. We heard no evidence on this point and it was not referred to in the course of the hearing or closing submissions. In those circumstances we do not find that this issue is factually made out.

203. We have set out above that the comments of Ms Richardson on the

claimant's appraisal in 2018 were not sent to the claimant until 1 December 2020. At issue 5.1.22 we are required to consider whether it was a breach of contract that those comments, when received, indicated that the claimant's performance was good and there were no grounds to hold a joint observation of the claimant or place her on an IIP. Insofar as the way that the allegation is written is that there was a breach of contract on the 1 December 2020, when the comments were received, it seems to us that allegation is ill founded. It cannot be a breach of contract simply to send to the claimant comments which she had requested. Insofar as what is really meant by this allegation is that it is another reason why a joint observation should never have taken place, again we do not find that there was any breach of contract. The reason for joint observations was not to target poor performing employees. All employees were to have 2 or 3 observations per year. Finally (to the extent it is alleged) it would not be a breach of the implied term of trust and confidence to place the claimant on an improvement plan simply because she had received positive comments in an appraisal in October 2018. The fact that an employee, in 2018, receives positive comments does not prevent an employer placing them on an improvement policy over a year later, if the circumstances warrant it.

204. After the claimant had gone off sick she was entitled, under the respondent's policies, to a period of full pay and a period half pay depending on how long she had been employed. On 12th of December 2020 the claimant's salary was reduced to nil when that entitlement expired. However, the claimant says that, in fact, she should always have been paid at full pay because of clause 1.9 of the Managing Sickness Absence Policy, Appendix D (page 230).

205. Clause 1.9 provides

A period of absence due to injury sustained by the employee in the actual discharge of his/her duties, and which is not attributable to any fault of his/her own, will not be recorded for the purposes of this scheme.

206. The claimant's argument is that she suffered a recognised psychiatric condition being mixed anxiety and depressive disorder (page 427) which amounted to an injury which was sustained in the discharge of her duties because it was sustained at work. Therefore she contends that she was entitled to be paid full pay.

207. The respondent investigated this claim and took the view, having taken legal advice, that the claimant's illness would not amount to an injury. The analysis is at paragraphs 4.5 and 4.6 on page 362.

208. The respondent (in the 2nd grievance decided by Mr Barlow on 7 April 2021) decided that the reason for the claimant's absence was not a workplace injury and therefore paragraph 1.9 did not apply (page 398).

209. The way the claim is advanced in the list of issues is not that there was

an express contractual entitlement to be paid at a higher rate of pay which was breached, but that in failing to pay the claimant the sums to which she was entitled, the respondent breached the implied term of trust and confidence.

210. When the respondent has taken legal advice in good faith and acted upon that advice, it seems to us that it would be difficult to argue that following the legal advice would be a breach of the implied term of trust and confidence. However, even if we were wrong in that respect, for the reasons set out below we are not satisfied that the claimant should have been paid in accordance with clause 1.9.

211. For the claimant rely upon clause 1.9 she must show that the injury was sustained in the actual discharge of her duties. The highest which the claimant can put her evidence is at page 438 where there is a letter from her GP stating "I am writing to confirm the ongoing medical conditions for which we are currently treating Mrs Knight. She has a diagnosis of mixed anxiety and depressive disorder that dates back to 11th February 2020. We have no record of any mental health diagnosis prior to this. She is consulting with us regularly for this problem".

212. The letter from the claimant's GP does not state that the mixed anxiety and depressive disorder was sustained in discharge of the claimant's duties. Indeed the claimant was not at work by 11 February 2020. The letter from the GP does not state that the disorder was caused by what had happened to the claimant at work or that it was sustained in the course of her duties. Thus even if we were required to make a decision on the question of whether or not the respondent was right in this respect, we would find that it was. This deals with issue 5.1.23.

213. Once the claimant had gone off sick the respondent decided that it was not appropriate for Ms Richardson to keep in contact with the claimant. Given the level of distrust between the claimant and Ms Richardson, as well as the emails which the claimant had been writing referring to suicidal thoughts because of the way she had been treated by the respondent, we find that decision was a reasonable one. It was decided that Mr Sibley a business partner in People Services, would be designated as a contact person to keep in touch with the claimant. That was permissible under section 18 of the Managing Sickness Absence Policy (page 222).

214. Under section 18 of the policy (dealing with managing long-term absence), there were various obligations upon on the respondent when a member of staff was on long-term absence. They included:

- a. Contacting the employee regularly to find out how they are.
- b. Keeping the employee in touch with developments in the workplace and discuss arrangements to support their return to work.

- c. After 4 weeks of absence the manager should contact People Services to discuss carrying out an absence review and where appropriate refer the employee to occupational health. The occupational health advisor will provide the college with, amongst other things, any steps the college should consider to support the employee and facilitate their return to work.
 - d. Where an employee was not expected return to normal duties within the foreseeable future opportunities for redeployment to suitable alternative employment or a contractual change in hours may be explored in consultation with the employee.
215. On 17 December 2019, Mr Sibley wrote to the claimant offering to meet her and referring to the respondent's Employee Assistance Program or MIND (page 259). He followed that email up on 18 December 2019 stating that in case the claimant would prefer not to meet he was enclosing the details for the Employee Assistance Program and MIND.
216. On 7 January 2020, Mr Sibley wrote to the claimant stating that he was sorry to hear that she had been signed off until the end of the month and stating that if she had any questions or would like a discussion she could contact him (page 260). The claimant replied to that email stating that she had been too upset about how she was treated to have contacted him before and that she did not feel it would help to speak to him or anyone associated with the college at the moment. She referred to her solicitors. (Page 260).
217. On 20 January 2020 Mr Sibley wrote to the claimant about not contacting staff or students while she was off (page 265).
218. On 10 February 2020 Mr Sibley contacted the claimant about her grievance and invited her to a meeting to discuss it. The claimant declined stating that she did not have the mental or physical strength for a face-to-face meeting but also stating that she had engaged a solicitor to negotiate a constructive dismissal with the college (page 274).
219. It appears that thereafter there was very little contact with the claimant. The contact appeared to be little more than the claimant sending in sick notes and the respondent acknowledging receipt of them and dealing with matters of pay. There appears to have been no further attempt to find out how the claimant's health was and no attempt to restore the working relationship. There was no follow-up after the grievance outcome was sent.
220. In many respects it is easy to have sympathy for the respondent faced with an employee who was not responding to early enquiries as to their health and, at the same time, threatening legal proceedings. It is not helpful for an employee to behave in that way. However, the way the respondent acted was not in accordance with its own policy. There was no attempt to find out how the claimant was or keep her in touch with developments in the workplace. There

was no attempt to discuss with the claimant redeployment or contractual changes, there was no attempt to contact an occupational health advisor in order to consider reorganisation of work. In essence the claimant was simply left alone.

221. In the course of his oral evidence Mr Sibley told us that, in fact, he had stopped being the point of contact for the claimant in April 2020 and the business partner who was the point of contact changed to Dani Evely. Not only was that evidence not given in Mr Sibley's witness statement, but we have heard no evidence from Ms Evely as to any contact she tried to make. The emails from Ms Evely in the bundle only relate to pay and the 2nd grievance. A timeline provided by the claimant at page 382 does record that on 5 November 2020 she received an email from Ms Evely introducing herself as the new contact from people services (page 382). That means that there was a period from April 2020 to November 2020 when the claimant's point of contact had changed from Mr Sibley but the new person had not introduced herself.

222. We find that to leave the claimant in such an isolated position for such a long period, when her line manager was not having contact with her and nor was anyone from People Services, was behaviour which was likely to seriously damage the relationship of trust and confidence (issues 5.1.24 and 5.1.25.). There was no reasonable or proper cause for that behaviour.

223. However, we do not think there was anything wrong with the respondent allowing Ms Richardson to continue line managing the claimant, despite the claimant raising complaints about her. An employee is not entitled to a change of line manager simply because they complain about the manager they have got. Our view may have been otherwise if Ms Richardson was the point of contact with the claimant while she was off ill. However, the respondent had taken steps to ensure that somebody different would contact the claimant (although they did not in fact do so) and in those circumstances we do not think there was anything wrong with failing to remove Ms Richardson as the line manager (issue 5.1.26).

224. On 1 February 2021 the respondent sent an email to all staff in respect of Race Equality Week. It was intended to invite staff to reflect upon their own knowledge and understanding of race equality and to consider what actions could be taken to challenge race inequality. It was a positive and appropriate email to send (page 346). The email stated "As an education provider, we play an integral role in challenging stereotypes and fighting against any form of racism or discrimination". The claimant says that that was untrue of the respondent and the respondent was merely ticking a box without any real desire to challenge stereotyping or fight discrimination. The claimant says it was the last straw.

225. We do not accept that characterisation by the claimant. Having heard Ms Berry we take the view that the email was sent genuinely and with sincere

intent. The fact that the respondent may have failed in some respects in the past does not mean that it cannot sincerely seek to promote race equality. We find that sending this email was an entirely innocuous act on the part of the respondent (issue 5.1.27).

226. The claimant resigned and her resignation letter was treated as a 2nd grievance. We find that at the time when the claimant resigned she was motivated by the way she had been treated in respect of the drop-in assessment and the feedback had been dealt with, the way in which the grievance investigation was carried out including evidence from Ms Richardson and the lack of contact whilst off sick.

227. The respondent carried out an investigation into the allegations contained in the resignation letter, that the respondent had failed to adequately employ all the steps outlined in the Managing Sickness Absence Policy, that the respondent had discriminated against the claimant by not applying the policy to her in the same way as any other employee, that there was a breach of clause 1.9 of the policy and that those matters had led to the claimant's resignation. Mr Turner, director of IT services, carried out a thorough investigation, his report ran to 11 pages. The claimant was invited to a meeting which she did not attend but was asked questions which she answered. (Page 371).

228. Mr Barlow, again, heard the grievance. His report on this occasion was more brief but he concluded that the claimant had been treated in the same way as other employees. He stated that of the 106 instances of long-term sick leave associated with stress/anxiety/depression, 80 had not been offered an occupational health consultation and 26 were offered that option. He explained why he did not consider the claimant was entitled to sick pay under paragraph 1.9 of the appendix to the Managing Sickness Absence Policy.

229. At issue 4.2.6 it is alleged that failing to uphold the 2nd grievance was an act of victimisation. There is nothing to suggest that Mr Barlow failed to uphold the 2nd grievance because of any complaint by the claimant about race discrimination and there is no evidence from which we could conclude facts that that might be the case. Having heard from Mr Barlow we are satisfied that that was not the case.

Conclusions

230. Having regard to the application of the burden of proof provisions, we conclude that there are facts from which we could decide, in the absence of any other explanation, that the claimant was discriminated against on the grounds of race in relation to the English teacher job in May 2017. We have set out our reasons above. The respondent has not provided any explanation for failing to tell the claimant about the job vacancy or why the claimant was overlooked in the recruitment process. Therefore we find that the claimant was discriminated against on the grounds of race in respect of issues 2.1.1 and 2.1.2.

231. However we have not found any evidence that an employee who was not Black would have been treated more favourably than the claimant in respect of issues 2.1.3 to 2.1.8.
232. Issue 2.1.9 requires us to consider whether the claimant's constructive dismissal was discriminatory. In the case of *Lauren De Lacey v Wechslen* UKEAT/0038/20/VP it was held that the test which we must apply is whether the discrimination sufficiently influenced the overall repudiatory breach such that the constructive dismissal should be found to be discriminatory.
233. We do not think that the discrimination in respect of the claimant in 2017 did materially contribute to or influence the constructive dismissal. We do not think that events of 2017 influenced the claimant at all in her decision to resign in 2021. Her concerns in 2017 had been dealt with, at the time, to her satisfaction which is why she had carried on working with the respondent in the careful and conscientious way that she did. It was not a reason for the resignation and, therefore, we do not find that the claimant's dismissal was discriminatory on the grounds of race.
234. In respect of the claims of harassment, in respect of all of the allegations in the list of issues apart from 3.1.4 and 3.1.9, we have found that that they were not made out or the claimant has not proved facts from which we could decide, in the absence of any other explanation that the reason for the claimant's treatment was related to race.
235. In relation to issue 3.1.4, we have found that although Ms Scott engaged in unwanted conduct which was related to the claimant's race, it did not have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her.
236. In respect of issue 3.1.9, since we have found that there were no acts of harassment which would amount to a repudiatory breach of contract, any constructive dismissal cannot be an act of harassment.
237. In respect of the claims of victimisation, we accept that there was a protected act insofar as the claimant met with John Myers in September 2017 and stated that she had been the victim of race discrimination.
238. In respect of the allegations at 4.2.1 to 4.2.6, we have not found that all of the allegations were factually proved. However, even those that were proved, we are satisfied, they were not because the claimant had made a complaint of discrimination.
239. In respect of the claim of constructive unfair dismissal we have found that the respondent, without reasonable and proper cause, behaved in a way which was likely to destroy or seriously damage the relationship of trust and confidence between the claimant and it insofar as:

- a. it discriminated against the claimant when it did not circulate details of the role in 2017,
- b. the way it conducted, and gave feedback in respect of, the drop-in session on 3 December 2019 and, in particular, placed the claimant on an individual improvement plan without conducting a proper drop-in observation which complied with its own guidelines,
- c. Ms Scott accused the claimant of throwing the E & D Black comment,
- d. Ms Richardson gave misleading information to the internal investigation in 2020 about the number of complaints which had been made about the claimant and the quality of her work in 2018,
- e. it failed to keep in touch with the claimant whilst she was off sick in accordance with the managing absence policy.

240. We have found that the claimant resigned because of those matters summarised in the above apart from

- a. the issues in respect of the English teacher role in 2017 (for the reasons we have already given)
- b. the accusation by Ms Scott that she had been throwing the E & D Black comment, because she was unaware of that comment at the time of her resignation.

241. In making that finding we acknowledge that the claimant would not have known, at the time of her resignation, that Ms Richardson's evidence about multiple complaints was inaccurate (since that was only discovered in disclosure in these proceedings) but she would have known that Ms Richardson had not given a fair portrayal of her teaching in 2018.

242. We find that all of the matters that the claimant knew about (apart from those in 2017) played a substantial role in her decision to resign.

243. We must then decide whether the claimant affirmed the contract. In this respect we have found that the matter which the claimant says was the last straw was entirely innocuous. However applying the guidance in *Kaur* we must ask ourselves what was most recent act which the employee says triggered her resignation. It was the lack of contact, which continued up to the point of her resignation. The claimant had not affirmed the contract since that act and we find that it was, by itself, a repudiatory breach of contract. The claimant resigned in response to that lack of contact and therefore the claim of constructive dismissal succeeds.

244. The respondent has not sought to advance any potentially fair reason for the dismissal and therefore we find that the dismissal was unfair.

Time

245. In respect of the claim of race discrimination that we have found proved, we must decide whether it was presented in time or not.
246. In reaching our conclusion on this point we have considered whether we should take into account the comment of Ms Scott in her email of 5 December 2019 in considering whether there was conduct extending over a period.
247. However, ultimately the act of 2017 is the only act of discrimination which we have found proved in this case and therefore it is difficult to see how it would form part of conduct extending over a period. In any event, we also think it was an act of a very different character to the email from Ms Scott in 2019 and was not part of conduct extending over a period with Ms Scott's act.
248. In those circumstances the claim in respect of the matters in 2017 is very significantly out of time.
249. Thus, we must consider whether the claim was presented within such period as we think just and equitable.
250. The claimant had plenty of time to present a claim in relation to the 2017 matters and did not do so. She did not do so because she was satisfied with the way things had been resolved. There is no good reason for her delay and the delay is very long. The claimant clearly had access to legal advice over the period and we do not think that the claim in that respect was presented within such period as is just and equitable.

Overall Conclusions

251. The claimant's claim of direct discrimination in 2017 is dismissed on the grounds that the tribunal lacks jurisdiction to deal with it having regard to the date of the presentation of the claim.
252. The claimant was constructively dismissed by the respondent because it was in repudiatory breach of contract in:
- a. the way it conducted, and gave feedback in respect of, the drop-in session on 3 December 2019 and, in particular, placed the claimant on an individual improvement plan without conducting a proper drop-in observation which complied with the Guidelines,
 - b. Ms Richardson gave misleading information to the internal investigation in 2020 about the number of complaints which had been made about the claimant and the quality of her work in 2018,
 - c. it failed to keep in touch with the claimant whilst she was off sick in accordance with the managing absence policy,

and the claimant resigned because of those breaches.

253. The claimant's other claims are dismissed.

APPENDIX

Oral Reasons Given For Allowing The Respondent To Ask Supplemental Questions Of Ms Berry

1. The respondent applies to ask additional questions in in chief of Ms Berry.
2. The application arises in these circumstances.
3. The claimant makes a number of allegations and in particular a number of allegations against Ms Richardson who was her line manager when working for the respondent.
4. At the outset of the respondent's case the Tribunal raised with the respondent that it noted that Ms Richardson was not being called to give evidence and noted the principles set out in Wisniewski v Central Manchester Health Authority about circumstances in which a Tribunal is entitled to draw an adverse inference when a witness is not called. We left that matter with the respondent.
5. The respondent then called a number of witnesses and at the end of the fifth day of the hearing, before calling its final witness, applied to ask that witness additional questions to explain the absence of Ms Richardson on the basis that she was travelling.
6. The application was developed on the morning of the sixth day of the hearing (being the following Monday). We are told that Ms Berry can only give a limited account of why the respondent cannot call Ms Richardson but that it is important for the Tribunal to know the circumstances of why she is not giving evidence. Mr Griffiths said that the prejudice to Mr Davies by this evidence being called at the last minute and without significant notice being given of it would be outweighed by the probity of the evidence that Ms Berry might give.
7. Mr Davies for the claimant resists the application and points out that the application would have been expected to be made on the first day of the hearing, but it took the Employment Judge on behalf of the tribunal to raise the matter and even then it was left until the end of the hearing. He describes the application as being an ambush amounting to unreasonable conduct which appears to be planned.
8. We certainly think it would have been very much better if the application to adduce this extra evidence had not been left until the end of the hearing and we do not accept that there is any good reason for leaving it to the end. We must apply the overriding objective which requires the Tribunal to deal with cases fairly and justly and, ultimately, we think that this evidence is important because if we are to be asked to draw adverse inferences from the fact that Ms Richardson is not being called, the reason why she is not being called is of relevance.

9. Whilst we have a lot of sympathy for Mr Davies who is faced with this evidence at the last minute, he has not suggested that he would have done anything different in terms of carrying any further investigations if the application had been made earlier and it is difficult to see that he could have made any such investigations. He might well have drawn our attention to the lack of supporting evidence which the respondent calls in respect of any explanation, but it is still open to him to do that now. In those circumstances, with some reluctance, we accept that the probative value of the evidence does outweigh the prejudice to the claimant, and we will allow those supplemental questions.

Employment Judge Dawson
Date: 7 December 2021

Judgment & reasons sent to parties: 23 December 2021

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

CVP

The hearing was conducted by the parties attending by Cloud Video Platform. It was held in public in accordance with the Employment Tribunal Rules. It was conducted in that manner because a face to face hearing was not appropriate in light of the restrictions required by the coronavirus pandemic and it was in accordance with the overriding objective to do so.