EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

"This has been a remote hearing as requested by the claimant. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and because the claimant, being in quarantine due to a recent visit to a red-list country, was unable to attend a face-to-face hearing."

Claimant: Miss L Sibanda

Respondent: Clinisupplies Ltd

Heard at: Watford Employment Tribunal (by CVP)
On: 24 to 27 August 2021 and 31 August and 1 September 2021

Before: Employment Judge George
Members: Mrs A Brosnan, Mr A Scott

Representation
Claimant: Mr J Hitchens, counsel
Respondent: Mr P Chadwick, consultant

RESERVED JUDGMENT

1. The respondent shall pay to the claimant £250 unauthorised deduction from wages in respect of an unpaid long service award.

2. The claimant was not dismissed by the respondent.

3. The claimant's contract of employment came to an end on 17 July 2018 when her claim form in Case No: 3330972/2018 was received by the respondent.

4. The claimant is entitled to be paid in respect of such paid annual and additional leave which she had accrued between 1 April 2018 and 17 July 2018.

5. The claims of unfair dismissal, wrongful dismissal, direct race discrimination, race related harassment and victimisation are not well founded and are dismissed.

REASONS

1. Following a period of conciliation which took place between 15 May 2018 and 4 June 2018, the claimant presented her first claim (Case number 3330972/2018) on 28 June 2018. Details of the claim are in a rider at DB page 20 but there are also reformulated grounds of complaint (DB page 28) which were put together for the purposes of particularising and clarifying her claim later and which were not originally attached to the ET1 in claim 1. That claim was defended by a response that was received on 14 August 2018. A second period of conciliation took place between 7 September 2018 and 7 October 2018. The claimant presented her second claim (Case number 333 4600/2018) on 5 November 2018 and that was defended by a response received on 19 December 2018. The first claim was presented against three respondents, the corporate employer – which is the present respondent - Paul Cook, and Amanda Cass. The claims against the individual respondents were dismissed on withdrawal by a judgement sent to the parties on 16 June 2019. The claims arise out of the claimant's employment by the respondent as an HR Manager which started on 2 July 2013. She started alternative employment on 8 October 2018.

2. The claimant gave evidence by adopting a written witness statement upon which she was cross examined. The respondent relied on the written and oral evidence of five witnesses: Mr Cook the CEO, Ms Cass - the HR Director, Ms Rebecca MacFarlane – then director, urology and wound care with the respondent who heard the claimant's grievance, Ms Ruth Hall - then Commercial Excellence Director, and Ms Ella Cannon who was HR Assistant with the respondent between 13 September 2017 and 14 March 2019. We also took into account those documents in the bundle to which we were taken. Documents in the joint document bundle are referred to as DB DB page 1 to 470 or as the case may be and documents in the claimant's bundle of documents are referred to as CB page 1 to 28 as the case may be. We also had the benefit of written submissions provided by Mr Hitchens for the claimant directed to the question of dismissal and oral submissions from both representatives.

3. There was a preliminary hearing on 15 October 2019 before Employment Judge Hyams when he excluded from evidence "the content of the discussions at the meeting between the claimant and the respondent 14 May 2018 and correspondence following on from that meeting in which the respondent sought to compromise the claimant's claims on the basis that she left her employment in return for a sum of money" (see page 1 of his reserved judgment).

4. Judge Hyams also conducted a telephone hearing on 24 April 2020 after the substantive hearing of the claims, which had been scheduled to start on 27 January 2020, was postponed on the application of the parties because the case was not yet ready for trial. He listed the final hearing for five days starting on 24 August 2021. There was also a discussion with him about how the issues in the case should be defined. He outlined for the benefit of the parties (at paragraph 9 to 20) the law relating to the termination of the contract of employment and directed the parties, amongst other things, to

agree redactions to the claim and responses necessitated by the successful application to exclude without prejudice material from evidence and to send a proposed final list of issues marked for his attention.

5. Neither of those tasks appears to have been done. At the start of the hearing the parties confirmed that the agreed list of issues at CB page 11 was the agreed template for decision-making with one proviso. That was that the claimant no longer pursued the allegation that she had been subjected to harassment or direct race discrimination by having been excluded from external Culture Meetings between November 2017 and 7 August 2018 (List of Issues 1.a)(2)). It was also confirmed by Mr Hitchens in closing submissions that the unauthorised deduction from wages claim in respect of an alleged bonus pay shortfall of £141 was no longer pursued. The respondent confirmed that they were now happy to proceed on the basis that the allegation that the claimant had not been paid a car allowance and that that was harassment related to race and/or direct race discrimination was a claim within the scope of the existing pleadings.

6. After those preliminary matters the tribunal took time to read. In the course of that it became apparent that the list of issues presented to us as an agreed list did not clearly identify those issues which needed to be decided in order to reach a conclusion on the question of whether or not the claimant had been dismissed either by resigning in circumstances that amount to a constructive dismissal or by the respondent's email of 7 August 2018.

7. The tribunal therefore circulated for comment a proposed recast of sections 4 and 5 of the agreed list of issues. After taking time to consider them, and before the tribunal started to hear evidence, the parties agreed that those amendments should be substituted for Issues 4 and 5 in the agreed issues. The final version of the Agreed List of Issues, agreed on day two of the hearing, is set out in this reserved judgement. The original numbering has been retained for ease of reference.

8. It also seemed to us that the case of Mr Clutch Autos v Blakemore (UKEAT/0509/13) was of potential relevance in relation to the claim that the claimant had been dismissed. The original Agreed List of Issues framed the question about the effective date of termination as whether it was the 31 May 2018 (a date included in the claim form) or the 7 August 2018. The latter was the date of an email from the respondent to the claimant saying that they would treat her as having resigned with effect from 31 May 2018. However, it was common ground that there was no communication on 31 May 2018. If the respondent did not terminate employment with effect from that date (and there was no admissible evidence that they had) and the claimant did not communicate acceptance of any repudiatory breach by resigning on that date, then there seemed to be no factual basis advanced by either party which could bring the employment to an end on that date. As was the case in Mr Clutch Autos, it seemed to us that we potentially needed to consider the effect on the employment relationship of the claimant presenting Case No: 3330972/2018, given that she could not rely upon communications made during the without prejudice negotiations. This was canvassed in evidence and submissions.

9. A six-page additional bundle containing emails between the claimant and PC was admitted by common consent prior to any oral evidence being called. One of the allegations was that the claimant had been invited to a without prejudice meeting and that this was unlawful under ss.13, 26, and 27 of the Equality Act 2010. Both parties referred in their statements to an email of 8 May 2018 inviting the claimant to a without prejudice meeting but that email was not in either bundle. We raised with the parties whether it was possible for the Tribunal to decide whether being invited to a without prejudice meeting was a detriment to the claimant without seeing the terms of the invitation. We also pointed out that the defence to the allegation that placing the claimant on garden leave was discrimination was that the entire reason was that there were settlement negotiations ongoing. The parties then agreed that an exchange of emailed communications prior to the meeting should be admitted in evidence and that that correspondence would not offend against the exclusion of evidence by Judge Hyams which covered correspondence after the meeting. Neither party suggested to us that these emails were covered by without prejudice privilege although they were making arrangements for a without prejudice meeting to take place. In the alternative, they agreed that any privilege in those emails was waived by common consent.

10. There was a contested application by the respondent's representative before the claimant started to give evidence about whether it was relevant to the issues for him to be able to cross-examine the claimant about her recent trip to Zimbabwe solely as to credit. The application was refused for reasons which were given orally at the time.

11. The respondent also applied for leave to amend the response to allege that, in the event that the claimant is found to have been unfairly dismissed, they would have fairly dismissed her in any event on grounds of some other substantial reason or capability in the sense of long term sickness absence. We had invited the parties to indicate whether they wished us, in the first instance, to decide issues relating to Polkey and contributory conduct. They indicated that they did, and the respondent sought leave to amend the nature of the Polkey argument they wished to raise. They argued that it was clear that the claimant had been on long term sickness absence. This application was refused for reasons which were given orally at the time.

12. Oral reasons having been given for these decisions at the time, they are not now provided in writing. The parties may request written reasons for these decisions but must do so in writing within 14 days of the date on which this reserved judgment is sent to them.

The Issues

Issue I. Harassment on grounds of race s. 26 Equality Act 20 10

a) Did the Respondent engage in unwanted conduct? The Claimant relies on allegations set out below:

(1) Not including a profile picture of the Claimant upon the Respondent's webpage after she became HR Manager in November 2017 to 7 August

2018;

(2) *no longer pursued*;

(3) From November 2017 to 7 August 2018, not paying the Claimant a car allowance;

(4) The Respondent ignoring the Claimant's suggestions and business plan when addressing the significant increase in workload in HR;

(5) The Respondent, Paul Cook, making reference during meetings and in official documentation, to 'keeping the chimp at bay', in particular asking the Claimant, without context, how she kept the 'chimp at bay' in a meeting with her around March 2018;

(6) The derogatory, condescending and dismissive way Amanda Cass spoke to the Claimant on 2 May 2018

(7) The Respondent (Ella Cannon) raising a grievance against the Claimant dated 4 May 2018;

(8) The Respondent, Paul Cook, inviting the Claimant on 8 May 2018 to a 'without prejudice' meeting to allegedly discuss her grievance;

(9) The Respondent, Paul Cook, placing the Claimant on garden leave on 8 or 9 May 20 18 without good reason;

(10) The Respondent, Paul Cook, on 8 or 9 May 2018 restricting the Claimant's access to her colleagues, JT systems and the building where she worked;

(11) The Respondent, Paul Cook, putting the Claimant on statutory sick pay;

(12) The Respondent interpreting the Claimant's Employment Tribunal claim dated 28 June 2018 as a resignation;

(13) The Claimant's dismissal/termination of employment on 7 August 2018 the Respondent claims that the Claimant claims she was constructively unfairly dismissed with effect from 31 May 2018 or was she unfairly dismissed by the respondent on 7 August 2018 as alleged by the Claimant?

b) Was the conduct related to the Claimant's race?

c) Did the conduct have the purpose of violating the Claimant's dignity of creating an intimidating, hostile degrading or humiliating or offensive environment for the Claimant?

d) If not, did the conduct have the effect of violating the Claimant's dignity of

creating an intimidating, hostile degrading or humiliating or offensive environment for the Claimant?

e) In considering whether the conduct had that effect, the Tribunal will take into account Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

f) Are any of the Claimant's claims time barred?

Issue 2. Direct discrimination on grounds race s.13 Equality Act 2010

a) Has the Respondent subjected the Claimant to the treatment at allegations set out above in I (a)?

b) If so, has the Respondent treated the Claimant less favourably than it treated or would treat a comparator? The Claimant relies on the following comparators; Amanda Cass, Ella Cannon, Pat Haskell, Ruth Hall, Rebecca MacFarlane, Andrea Smart, Martin Beynon, Joseph Connolly should they not prove suitable, the Claimant relies on a hypothetical comparator;

c) If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race?

d) If so, what is the Respondent's explanation? Does it prove a non-discriminatoryreason for any proven treatment?

e) Are any of the Claimant's claims time bound?

Issue 3. Victimisation as at s.27 Equality Act 20 10

a) The Claimant relies on the following protected acts; (I) Grievance dated 4 May 2018 alleging race discrimination, and (2) Case number 3330972/2018 dated 28 June 2018 alleging race discrimination. The Respondent accepts that these were protected acts.

b) Was the Claimant subjected to detrimental treatment by the Respondent because she had carried out protected acts? The Claimant relies upon the allegations set out at paragraph I (a) 8- 13 above.

Issue 4. Unfair Dismissal S.95(I)(c) Employment Rights Act 1996
Issue 5. Wrongful Dismissal/Breach of Contract

a) Did the claimant clearly and unequivocally resign from her employment with the respondent?

b) If so, when did she communicate that resignation and when did the respondent receive that communication?

c) If she did resign, what were the reasons for her resignation and did they include any or all of the matters relied upon in para.1(a) 1 to 13 in the Agreed List of Issues?

d) If she did resign in response to any such matters, did they, individually or cumulatively, amount to a fundamental breach of the implied term of mutual trust and confidence? That will involve consideration of whether such acts as the claimant may prove occurred breached the test set out in Malik v BCCI [1998] AC 20 HL?

e) Prior to any such resignation, had the claimant affirmed the contract of employment?

f) Taking into account the conclusions on the above, was the claimant dismissed by the respondent within the meaning of s.95(1)(c) ERA?

g) If not, then was the claimant dismissed by the respondent within the meaning of s.95(1)(a) ERA by their email of 7 August 2018?

h) If the claimant was dismissed, then what was the reason for dismissal?

i) Was it a potentially fair reason within s.98(2) of the ERA?

j) Was the dismissal fair or unfair within all the circumstances as provided for within s.98(4) of the ERA?

k) If the claimant was dismissed, then was that dismissal without notice?

l) If so, was the respondent entitled by reason of the claimant's repudiatory breach of contract to dismiss her without notice?

Issue 6. Unlawful Deductions/Breach of Contract

(a) Did the Respondent make unauthorized deductions from the Claimant's pay contrary to s. 13 Employment Rights Act 1996?

(b) In particular, was the Claimant owed wages for (I) the period of her employment from end July 2018 up until 7 August 2018; (2) a length of service award of £250; (3) *not pursued]*; (4) holiday pay and (5) car allowance?

(c) If the Claimant was due any or all of the amounts set out at clause 6 (b) above, were they paid to the Claimant by the Respondent?

Issue 7 **Remedy**

a) Should the Claimant be successful in any of the claims set out above, what is the appropriate remedy?

b) If successful, should any remedy be subject to reductions for contributory conduct and Polkey?

Findings of Fact

13. We make our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgement all of the evidence which we heard but only our principle findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

14. A summary of the background to the claim is that the claimant started employment with the respondent on 2 July 2013 as an HR Assistant. At the time the claimant joined, the business which smaller than it was by mid-2018 and the HR Manager (then the most senior designated HR professional) was PH. She left in 2016; the exact date is unclear but it was possibly late Spring or early Summer. The claimant had been promoted and was HR Officer. Her CIPD training is to Level 3 and Level 5.

15. The respondent specialises in the manufacture and marketing of products for primary and secondary healthcare. By 2016/2017 the claimant reported to the then CEO, HB. PC joined the organisation in April 2017 as Executive Vice President of Commercial Operations and became CEO in April 2018, whereupon the claimant reported to him. The organisation was growing and, in September 2017, EC was recruited as a new HR Assistant.

16. There is a disagreement between the parties about when the claimant's promotion to HR Manager took effect. PC's evidence was that he agreed to change the claimant's job title to HR Manager but that it would happen when the new structure was in place (PC para.20). This is particularly relevant to the merits of Issue 1.a - her complaint that, unlike PH, she did not have a profile picture on the respondent's webpage (see DB page 289). The allegation is that there was a difference in treatment in that PH, as HR Manager prior to 2016 had her picture on the website but the claimant's picture was not put on the website when PH left.

17. The respondent states that the reason for this was that the claimant was not then as senior as PH had been and not part of the senior leadership team. Therefore, they say, it was appropriate for her not to be included on that webpage. In addition they argue that, at the relevant time, the claimant was not HR Manager which was a reflection of her seniority in the organisation. At the time of the webpage at DB page 289, HB was still the CEO and the others photographed are described collectively as Chairpersons and Senior Leadership. Some individuals listed do not have pictures but all have senior job titles: directors, heads of department, vice-president.

18. The claimant's statement evidence (her para.1) was that she became HR Manager from November 2017 and she confirmed that on oath. However, under cross-examination, she conceded that she had not been designated HR Manager until the changes to the HR structure took effect. Those

changes included the appointment of an HR Director – namely AC - on 1 May 2018. The claimant accepted that date under cross-examination.

19. Prior to the changes to the structure, the claimant had the title of HR Officer. We accept that she was the most senior HR professional in the organisation, but she nevertheless operated at an HR Officer level, consistent with her qualifications and experience. We accept that she was not designated HR Manager until about April 2018. This is also consistent with the signatures on emails from the claimant such as that dated 24 November 2017 (DB page 182 – HR Officer) and that dated 19 January 2018 (DB page 198 – HR Officer).

20. This finding is also consistent with PC's email dated 1 December 2017 (DB page 183). This confirms his agreement that the claimant's salary increased to £37,000 from 1 December 2017 and that the respondent would support her level 7 CPID training. The email continues,

    "you and I will align on the HR structure in January as we discussed yesterday with a view to bringing in a senior HR Business Partner or Director to support the growing business. At this stage we will look to make an adjustment to your title of HR Manager."

21. This makes clear that the title of HR Manager was to happen when the HR Business Partner or Director was recruited. Further support for this is provided by the email exchange at pages 198 to 199 in which the claimant asked for confirmation of the date on which her job title would change and PC replies that he would communicate that change with the announcements of the new structure of the HR department.

22. It is clear to us that the claimant was not a member of the Commercial Leadership Team and she accepted that. She sought to suggest that there was a different leadership structure which meant that she should have been included in the webpage on DB page 289 but we reject that assertion. When PH left, the claimant may have picked up work which PH had been doing on a day to day basis but she was working at a more junior level within the HR department. They were not in a comparable situation and her job title was HR Officer. The claimant's statement evidence that she was appointed HR Manager in November 2017 and should have been included in the webpage immediately is inexplicably inconsistent with the email exchanges between her and PC.

23. The email exchange at DB page 183 also supports PC's evidence that he consulted with the claimant on the structure of the HR department. By that email, he sent her the job specification for the job to which she would be reporting which can only be consistent with the degree of consultation which he describes. See PC para.12 to 21 when he describes two meetings on 17 and 30 November 2017 about her proposal for the structure of the HR department.

24. We find that this consultation had been meaningful at least since that time. The email at DB page 178 records the claimant's gratitude for a meeting which was in part about her own ambition to become CIPD Level 7 qualified

but also, as she accepted in cross-examination a wider discussion about how the HR department would evolve.

25. It is not clear to us whether the proposal put forward by the claimant (DB page 179) was proffered by the her unsolicited and PC replied to it appropriately or whether he asked her for it in which case he was consulting and seeking her opinion. Either way, it is totally and inexplicably at variance with her statement evidence (para.15) that drafting the new job description for the HR Business Partner was done without consultation or communication with her. This is the second matter where the claimant's statement evidence was inexplicably at odds with the natural reading of the documents in the case and this causes us to be less likely in general to take the claimant's word on evidence which is not supported by the documentary evidence.

26. The claimant shared with PC a comparison which she had done between the job description at DB page 185 (HR Manager) and the draft job description at DB page 189 (described as HR Business Partner or Director depending on experience). She alleged to him (and in her statement to this hearing) that the new job mirrored the tasks she was already carrying out. The job description at page185 must have been in the new role for her because it is for the role HR Manager (the proposal for which had only been made to her some 6 weeks previously) and there is no date on the job description to show that it was signed off.

27. Our sense is that, by awarding the claimant a pay rise and a change of title from HR Officer to HR Manager, PC was trying to support the claimant through changes which would potentially be of concern to any employee when a new appointment is made at a senior level within their department. She had been managing the department for some time but the business was projected to expand considerably at this time because HB, the founder, had sold his interest to a private equity company who intended global expansion. We accept that someone operating in HR at a more senior level than the claimant was needed and the claimant didn't disagree with that. However, such a change could potentially be of concern to an employee.

28. The job descriptions of these two roles are bound to cover the core areas of Human Relations work but when we compare the two it seems to us that the HR Manager's role is stated to be more operational and the HR Business Partner or Director is described as more strategic. This means that the roles do not, in fact, overlap and the new role did not overlap considerably with the function which the claimant had previously been carrying out.

29. The claimant also alleges that she should have had a car allowance. In cross-examination her case was clarified in that she was not arguing that she was entitled to the same car allowance as members of the commercial leadership team. However, she compared herself to JH, the Digital Marketing Professional whom she said was not part of the leadership team but was based at Head Office, like the claimant, and was – she alleges – offered a car allowance (see claimant's statement para.12). The claimant

denied the respondent's evidence that she was not in the same position as JH who is not black.

30. We reject the claimant's assertions on this and accept that JH's role required her to travel more extensively for work than did the claimants. The specific instances given by the claimant when she travelled for work were few. We accept that it was the nature of JH's role which was the reason why she had a car allowance. The claimant said that she had been unaware that she could have claimed business expenses for the more limited occasions when she travelled to different sites. She only used the car for work a few times and in evidence appeared to accept that she had never during her employment complained that this was a difference in treatment which was on grounds of race. Our finding is that the reason she did not have a car allowance when JH did was wholly to do with the nature of the work that she was doing.

31. The respondent operates a long service bonus after 5 years' service. It was common ground that the only condition for receiving this award was that an employee should be in employment on the 5th anniversary of the start of their employment. The respondent has produced no evidence that there is any other condition, such as that the employee should not be under notice of termination of employment.

32. Another area of factual dispute concerned the claimant's allegations that during meetings and in official documentation PC referred to "keeping the chimp at bay". The only documentation which has been admitted in evidence and which includes any such reference is at DB page 277 and following. It is common ground that DB page 277 was an agenda for the Culture Energisers' Briefing for the National Sales Conference. The briefing took place on 10 April 2018. According to PC, the National Sales Conference was to take place between 16 and 19 April 2018 although the slides at DB page 280 refer to the whole company session being on 18 April 2018. The exact planned date does not seem to be material to our decision on the issues.

33. The briefing notes for the 10 April 2018 start on DB page 279. The claimant attended this briefing session but was absent from the National Sales Conference. The agenda for 10 April includes at para 4 (DB page 278) that attendees should prepare their own examples for example "Your experiences of chimp moments, how you reacted and what the impact was".

34. We accept that the culture builders were an external group of consultants brought into the respondent to improve organisational performance at a time of change and growth in the organisation. One of the tools which they used and which they was teaching to the organisation was the Chimp Paradox, which we understand from the documentation in the bundle and from general knowledge to be a widely known theory of mind management. It seems from the Culture Energisers pack that they would encourage attendees to be aware of the impact of their emotions on their actions and on others which would affect their performance and that of the company.

35. The claimant's allegation is that PC, without context, used the phrase "keeping the chimp at bay" including in a one to one meeting in March 2018 when he asked how she kept the chimp at bay. Her evidence was that she was offended by it. However, in oral evidence when asked whether she knew that it was phrase used in a well-known and established mind management tool she said "I appreciate that". Her claim appears to be based upon her evidence that the phrase was never mentioned in the Culture Energisers' workshop she attended but was used by PC, without any context, in official documentation like the bonus review and in a one to one meeting (claimant para.14).

36. She had attended the workshop as a member of the Culture Energisers' group who were spearheading the cultural change that the culture builders organisation were working on with the organisation. We think that it is quite possible that PC did ask the claimant how she kept the chimp at bay given the agenda for the 10 April (DB page 278) but are certain that any use of that phrase by him was because that phrase was used by the Culture Builders in the way we have explained and in the context of the Chimp Paradox theory. We reject the claimant's evidence that she was unaware of this theory at the time and we reject her evidence that it was not discussed in the workshop she attended. It is improbable that she was unaware given her role as a Culture Energiser. In part, we bear in mind our previously expressed reservations about the credibility of the claimant's evidence. The documentation for 10 April 2018 refers to a session earlier in the year and is part of training which builds on this theory. It is improbable, given the wording of the documentation for the 10 April 2018, that the theory was not explained.

37. Of course, being aware that the phrase was used in the context of this theory of mind does not preclude the claimant being offended by the use of it. However, she accepted that she never told anyone that she was offended, which is surprising if she had been offended by it given that she was the HR Manager and the organisation was planning a whole company role out of training based upon this theory. If she had been offended as she now says, one would have expected her to say something to avoid anyone else being offended by it, regardless of the ethnicity of the workforce.

38. PC accepted that if a black person has the word chimp used of them without understanding the context they might well be offended by that. We are very aware that this is language which is misused by some and that there are well publicised, deplorable incidents of racist language which includes the word chimp being used of a black person. Therefore, there is need for the context of training of this sort to be absolutely clear because there is the potential for unwitting offence to be caused. However, we reject the claimant's evidence that she did not know of the context, as a matter of fact. We also reject the claimant's allegation that the phrase was used "in official documentation like bonus review" (her para.14) or without any context.

39. AC was recruited to the senior HR role and appointed HR Director. The claimant complained in her statement that this had been done without any interview process and that she was not considered for the role. This is not

part of her claim but, given that she had only recently been promoted into the role of HR Manager as part of the reorganisation of the department which created the senior, strategic role it seems unremarkable to us that she was not considered for it. In fact, AC did go through an interview process which she described to us and we accept that evidence.

40. She visited the respondent's Head Office and met with the claimant and EC for the first time on 11 April 2018 which was prior to her anticipated start. AC then wrote to the claimant the following day (DB page 296) in friendly terms. Both AC and the claimant agree that the meeting the previous day had been entirely positive. During the meeting between AC and EC, the latter had explained to AC that she was very unhappy with the claimant's management of her and was shocked that she had not passed her probation (para.12 of AC). AC informed EC that the claimant had been very positive about the junior employee. AC described the extent of EC's unhappiness in oral evidence in the following way,

    "she had been crying, shaking. She told me that her relationship with the claimant was really poor and I'd asked her if she was looking for another job and she said yes, she had the CV ready. So I asked if she could hang on until I joined. And she said she would try. That's why I was saying to her 'Hang on. Please don't resign yet.'"

41. EC had had probation reviews at 3 months (DB page 247) and 6 months (DB page 240). She had been a recruiter and was moving into HR. The gist of claimant's reservations about EC were that she performed really well in recruitment related tasks but there was room for improvement in HR related tasks. The claimant had conducted a performance review on 16 March 2018 at which she had extended EC's probation but did not provide the review documentation until 6 April 2018. EC disagreed with that documentation in that she did not consider that it was a fair reflection of the meeting. Her evidence was that she had been told that she only needed to make minor adjustments (EC para.18 and 24). She refused to sign off the review form.

42. Text messages between the two of them are at DB pages 421 to 429 which the claimant relies upon as showing a cordial and professional working relationship. So far as they go, they show EC and the claimant as cooperative and supportive toward each other but they cover a limited series of dates. An email from LP to the claimant about EC (DB page 230) raises concerns about timekeeping when assisting at an interview in February and in March. This is some counterbalance to EC suggestions that the claimant had no reasonable grounds for criticising her.

43. In our view, it took a comparatively long time for the claimant to provide the review documentation (DB page 240). It is sufficiently long that describing it as having been provided late is apt. Furthermore, a gap of approximately 3 weeks between the meeting and the documentation leaves the claimant open to the allegation that the contents were not an accurate representation of what was discussed.

44. The pattern of marking on DB page 243 has Satisfactory, Good or Excellent in all bar one category. That category is that of "Competency Level for the role". We agree that to mark that category as 'improvement required' does not show consistent marking; it is not possible to understand from the form how that, which appears to judge overall competency, could fairly be marked lower than any other category which each appear to feed into the overall competency. Additional internal inconsistency is found where the category 'work relationships - interpersonal communication' is marked as 'satisfactory' but the narrative refers to communication as something requiring improvement. The feedback does not provide clear guidance for EC about what she should do to improve at the next review.

45. Taking all this into account our view on this is that it is a poorly executed performance review. On the other hand, the evidence we have seen supports an inference that there were at least some genuine causes for a level of concern about EC's performance. Whether this was sufficient for her not to be marked as competent for the role is not something which we need to decide. What we do accept is that the form included things which were not discussed at the meeting and the reasons for EC's failure successfully to complete probation were not evidenced on the form. EC declined to sign this off (DB page 314) accusing the claimant of changing the contents of the form in the 3 weeks following the meeting.

46. When meeting EC on 11 April 2018 (before receipt of the review form), AC sought to reassure her that she, the HR Director, would be starting in 3 weeks. She repeated that in an email (DB page 297). She seemed to us to be seeking to try to forestall instability in the department before she arrived.

47. It is clear from the exchange of emails at DB page 314 to 315 and the meeting on 25 April 2018 that the relationship between the claimant and EC was deteriorating at this period.

48. On her first day, 1 May 2018, AC had a full day induction which included a short (probably 45 minutes) presentation by the claimant on behalf of HR but nothing of note happened on that day. Then, on 2 May 2018, AC had a meeting with the claimant which was scheduled to take place between 9.00 am and 3 pm the purpose of which was a general overview of the priorities of the HR Department. We will go into more detail below but, the meeting did not in the end last for 6 hours but at lunch time (AC para.40) they took a break. During the break RH told AC that EC was very upset about a meeting which she was due to have with the claimant that afternoon. AC was due to meet with PC at the same time, 3.00 pm.

49. After talking with EC, AC offered to ask the claimant to postpone the meeting between her and EC until AC was free to attend. AC then spoke to the claimant to explain the situation. She asked if she could postpone the meeting until the 3 of them could meet together and also said that she wanted to get the claimant's view of the matter. This was prior to 3 pm before AC went to speak to PC. Then after that meeting AC spoke to the claimant again at about 18.05. So we accept that the claimant had 3 separate interactions with AC on 2 May: the first between about 9 and noon,

the next sometime around lunch when AC asked C to postpone her imminent meeting with EC and, finally, at 18.05.

50. The claimant does not separate out these difference interactions in her statement. Her account of the second is at para.22 in which she says that AC cancelled a planned meeting with the claimant to meet with EC and then instructed her (the claimant) to cancel her regular one to one meetings with EC. She complains that AC believed everything EC had told her without hearing the claimant's perspective. Where that account from para.22 differs with our findings in para.49 above, we reject it. In particular, AC did not cancel a meeting with the claimant after lunch to speak to EC; we accept that AC was reacting to events in speaking with EC.

51. There is some common ground about the content of the first of the three meetings - that in the morning on 2 May. The claimant accepted that AC raised with her the imminent meeting about Investors in People; GDPR (coming into force 25 May 2018); and pensions. These all seem to us to be appropriate priorities that HR Director needed to know about immediately on starting. It was also common ground that the respondent had failed a previous assessment by Investors in People.

52. Prior to starting, AC had asked the claimant to prepare a 12-month HR calendar setting out key events during the year. This had not been done by 2 May 2018; the claimant did not understand that it had been expected to be complete by that date and AC asked her why she had not done it. It came across from the claimant's oral evidence that she felt under pressure by these questions and others like them. She alleged that AC had been condescending and intimidating. However, she accepted in cross-examination, for example in relation to specific questions about HR policy and contracts she had been involved in, that there was "Nothing inappropriate about the question but [in] the way it was posed and how it came across."

53. On the other hand, there is a clear conflict between the two accounts in some details. For example, the claimant said that AC said "you don't even understand how pensions are". AC, by contrast, said she had volunteered the limits of her own knowledge.

54. Our conclusion is that, viewed objectively, there was nothing in what AC said or did which caused the claimant to feel as she describes beyond the fact of asking perfectly appropriate questions about the priorities of the HR department. To the extent that the case is pursued that AC was derogatory, condescending and dismissive towards the claimant we reject it.

55. There are a number of reasons why we prefer AC account of meeting 2 May 2018 to that of the claimant. In general, we had concerns about the claimant's credibility and reliability as a witness. Her evidence about some matters was contrary to clear documentary evidence (see paragraphs 19 to 22 above). The claimant's oral evidence contradicted her witness statement evidence in some respects (see her concessions about whether she was in the senior leadership team and whether she was consulted about changes to the HR department). We have rejected her evidence that

she was unaware of the theory of mind in which she had been instructed in her role as Culture Energiser. In our view, that damages her credibility generally. She was also somewhat evasive and uncooperative in some of her answers in cross-examination.

56. Furthermore, during the third meeting between the claimant and AC on 2 May 2018, which took about half an hour at 18.05, the claimant made no reference to having been upset by AC during the morning session. The respective accounts of the later session is at AC paragraphs 44 to 49 and the claimant's para.22 – in which she elides the conversation immediately after lunch and that at 18.05 but provides very little detail of what was said.

57. AC's account of the meeting at 18.05 included that the claimant said that she hadn't done anything wrong towards EC and felt victimised as the situation had not been kept within HR (AC para.47 which the claimant accepted was accurate). AC wrote a file note following the third meeting (DB page 327) and her account of the meeting is backed up by that file note. The claimant's oral recollection of the third meeting was vague in places: she did not remember AC agreeing with her that AC needed to hear the claimant's perspective and say that all AC had said was that EC was upset. We reject that; the file note supports AC's evidence on this. AC suggested that they discuss the claimant's side of the story in more detail the following day.

58. The claimant was unable to attend work on 3 May due an unexpected family bereavement. She notified AC of that in the early hours of the morning (DB page 328) and PC at about the same time (DB page 329). PC (DB page 330) and AC (DB page 331) responded sympathetically and appropriately. AC suggested flowers (DB page 338 at 09.25). PC agreed (DB page 339 4 May 2018 at 10.00 am).

59. The claimant was still on bereavement leave when EC brought a formal grievance about her (DB page 340). She left it on AC's desk on Friday 4 May at about lunchtime. AC picked it up on Friday afternoon. The gravamen of the grievance (taken at face value) alleges oppressive management; that EC is unable to succeed with the company because the claimant allegedly failed to provide sufficient training and then relied upon minor administrative errors in order to fail her probation; that the claimant belittled her in front of colleagues; that the claimant returned the probationary review form late and included things which were not discussed at the meeting. In essence, EC alleged that the claimant failed her probation without proper justification.

60. She also alleged that the claimant had twice booked her own holiday to prevent EC from taking her choice of holiday dates. The company permitted employees to take an extra day's leave on or near their birthday and EC's fell on the Easter weekend so she intended to take a day's leave to increase the length of that weekend. As a comment we find it hard to see how the claimant would have known that EC intended to take her birthday in lieu on either Thursday 29 March or Tuesday of the following week in advance of booking her own holiday. However, EC second allegation about annual leave (for 2 to 4 January 2019) was that she had checked before

booking that the claimant had not already booked leave. EC had to make her leave requests through the claimant. If substantiated, this allegation was, we consider, serious because it would demonstrate that the claimant was acting manipulatively to disadvantage her subordinate. AC told PC about the formal grievance by EC against the claimant very soon after she received it.

61. Also on 4 May 2018, AC enquired by email about the claimant's likely length of bereavement leave (DB page 346). We accept that she did not know about the claimant's grievance against her at this point because this is apparent from the time of the two emails. The grievance was sent by the claimant to PC on 4 May 2018 by email sent at 17.36 (DB page 347).

62. In summary, the claimant's complaint was all about AC's conduct of meeting on morning of 2 May 2018 – which she describes as disrespectful and undermining her in several respects - and AC's handling of the EC situation. She posits two possible reasons (1) her own decision to extend EC's probation and (2) racial prejudice.

"… is it because of the color of my skin and that I am being spoken to in a demeaning manner as if my presence is disgusting and I am not worth of having a respectful., acknowledging and appreciative conversation?"

63. It is rightly accepted by the respondent that, in writing this grievance the claimant was asserting her rights under the EQA and that the grievance is, therefore, a protected act. Whether their subsequent actions were done on grounds that the claimant had made a protected act is one of the key issues for the Tribunal to decide. PC's immediate action was to acknowledge the grievance (DB page 350), commiserate with the claimant about her bereavement and encourage her to take the time she needed as compassionate leave. We accept his oral evidence that he took the weekend to work out what to do about what he regarded as a very serious situation for the organisation (which he described as "a small organisation of our size") given that there were two grievances in the HR team.

64. PC and AC said that the wording of this grievance caused them to think that the claimant no longer wished to work for the respondent and, in the case of AC, that the claimant didn't wish to work with AC but didn't point to any particular phrases that caused them to think that. PC referred to the reference to the claimant taking things up with her union in the following terms on DB page 349,

"As such, I have taken this up with my union and they are copied in this email. They will also be getting involved in any formal or informal meeting or processes for addressing this matter as I mentioned earlier."

65. PC detailed explanation of this in oral evidence, which we accept was honestly given, was as follows,

    a. He thought that, given the claimant's experience in HR and his own experience, this was "leading to route [where she was] wanting to go to settlement. Would have thought that copying the Trade Union

TU kind of tells me that the claimant wouldn't want to work for AC in the future".

b. "I think I'd received the grievance prior from EC about the claimant. I'd received the grievance from the claimant about AC. [It was] evident to me given what [was] in the grievance and the fact that [she'd] copied in her TU and experience in HR - been through these processes before - that she was looking for settlement or way out of the organisation."

c. When asked to explain why he invited the claimant to a without prejudice meeting and not invited EC to such a meeting, PC said "Given the content and nature of the claimant's letter and the fact that TU copied and her deep involvement [in previous WP meetings as someone with] CPID level 5 - normal that looking for a settlement. [It was] nothing to do with race or religion. Entirely the content of her letter and what she seemed to be looking for and what good for the organization. What I felt was right for the organization."

66. PC also explained the rationale behind the new structure of the HR department as being that he needed an HR team leader to help him look at strategic change and different cultures for the business. The conversations he had had with the claimant caused him to think that she did not have experience of that and that she would value a senior person joining who did. AC was brought in as the senior professional on the path. He felt that the claimant did not want to work with AC and also felt that the organization at that time needed that strategic leadership and robust processes for which he had recruited AC. He accepted that those matters were not explicitly set out in his statement but we accept that they were matters which he genuinely had in his mind when deciding to invite the claimant to a without prejudice meeting to explore whether a mutual acceptable settlement could be reached. We accept his evidence that he was quite certain, based upon previous experience he had had with the claimant in conducting without prejudice or protected conversations with individuals who had left the respondent's employment, that she would understand the potential benefits of such a conversation in the situation.

67. PC gave AC the grievance against on 8 May 2018 before inviting the claimant to a without prejudice meeting. We are of the view that PC and AC each reached the conclusion that the allegations were false. AC rejected the allegations both that she had behaved in an intimidating way and that she had been influenced by race. They reached that conclusion without any investigation.

68. The invitation was sent on 8 May 2018 at 18.17 (see the additional bundle)

"Before responding formally to your email or initiating any of the company's internal procedures, I would like to meet with you on a without prejudice basis to discuss your email and how best to progress matters. I would also like to confirm that at this meeting you can bring with you your union representative as support."

69. The claimant replied within about 40 minutes on 8 May 2018 at 19.00 and said that she was happy to meet on a without prejudice basis to discuss her email and how best to progress the matters. She subsequently found that the union representative was unavailable and the date of the meeting was rearranged. We are satisfied that there is no indication from this initial email that the claimant is unwilling to meet – quite the contrary.

70. The claimant's oral evidence about her expectations on receiving the invitation was not consistent. She appeared to say that she attended the without prejudice meeting without expecting it to be a meeting at which a consensual termination of employment would be discussed. She was asked whether she agreed that there was no obligation for her to attend the meeting and said that she could not say yes or no but then continued "I've been asked to come to a meeting to resolve a matter then and I felt obliged to attend the meeting as I had raised the grievance".

71. In answer to the question whether there were often without prejudice meetings where there were serious concerns and disputes she answered "not to my knowledge". She claimed that she had no experience of without prejudice meetings but subsequently said that the difference between her situation was that previous potential leavers were on restrictive covenants.

"In my mind I didn't pay a lot of attention to the term without prejudice. I didn't see it. It really didn't register with me that a meeting at which to attempt to terminate my employment."

"My rep came with me because in my head I believe that this was a grievance meeting to resolve the grievance. I raised an employment matter and I signed up for them to represent me in employment matter. I thought that this was the beginning of the procedure to resolve this grievance."

72. Her evidence that she thought she was going to a grievance meeting is disingenuous. It is contrary to her quick acceptance of the invitation to a "Without Prejudice" meeting. In our view, no experienced HR person would think that a grievance meeting needed to be conducted under cover of without prejudice. She wrote that term herself in her email accepting the invitation on 8 May 2018. So we reject her evidence that she didn't see the term without prejudice. It is an example of a number of instances where we found the claimant's oral evidence about what she thought at the time to be unreliable. We have carefully considered the terms of the email exchange and there is no sense that she was under pressure or confused. She was supported by her union.

73. Our conclusion is that the claimant understood when she received the invitation to the without prejudice meeting and accepted it that it was not an invitation to a grievance meeting but was to a meeting at which the participants would try to find a way to resolve their dispute, which might involve her leaving her employment voluntarily if mutual acceptable terms could be reached and that, if such terms could not be reached, then the grievance would be investigated. We reject her evidence to the contrary

and reject any suggestion that the claimant considered herself to have been disadvantaged by receiving the invitation. She was an experienced HR professional who had supported PC at two such meetings in relation to other former employees of the respondent.

74. Once the claimant accepted the invitation, PC wrote on 9 May 2018 at 08.40 asking for an outline of what HR work was pressing. The claimant replied by email at 12.27 (CB page 22). In it she said that she was going to look into them soon after her extended compassionate leave and referred to potentially coming come back into work after the without prejudice meeting scheduled for 14 May 2018. She concluded "I am happy to work from home until the meeting or to come in for any urgent tasks that needs me to be in the office and I will bring the keys."

75. PC replied later that day (timed at 16.50) to thank her for confirming attendance on 14 May 2018 and to say (CB page 21)

"Pending the outcome of the discussion on Monday, you are not expected to undertake any work and therefore I am now placing you on garden leave. You will receive your full pay during the period of garden leave, however access to our systems, including IT and the offices will be restricted."

76. The contrast in wording of CB page 21 and the initial acknowledgement of the grievance at DB page 350 cause us to find that the reason why PC placed the claimant on what he referred to as "garden leave" was her agreeing to the without prejudice and not the grievance itself. So, although we find that the grievance was in his mind and part of his reason for inviting the claimant to a without prejudice meeting, it was not any part of the reason for him placing her on garden leave - it was part of the background. It had no causative link with placing her on garden leave. We also accept his evidence that access to IT and possession of company keys was removed during periods of without prejudice negotiations.

77. AC's evidence about her own reaction when she found out about the grievance was in her statement at para.58. "shocked and sickened by the complaint and […] really offended by the allegation of race discrimination". She said in para.60 that her experience was that it was standard practice that people would not carry out normal duties when they agreed to attend without prejudice discussions. In her oral evidence, she refuted the suggestion that she wanted the claimant to leave the business because the claimant was the most important person to AC in the business at that time because of her institutional knowledge about the HR department and its function. That evidence was entirely spontaneous and we accept it.

78. In our experience, garden leave is often used when notice of termination of employment has been given but not exclusively. The claimant, through Mr Hitchins, drew attention to DB page 135 of the respondent's policy which, under the heading "Garden Leave" says that following notice given by either party, the company may require you to take 'garden leave'.

However her oral evidence on this, as with her evidence on previous without prejudice conversations generally, was unsatisfactory and vague and we accept that previous practice of PC was that individuals who had agreed to attend without prejudice discussions would be placed on garden leave although we accept that that is not the use of the term in the handbook. Given our finding about PC's previous practice and that that was known to the claimant, we do not think that in this case it is right to draw any inference from the use of the term.

79. As a matter of fact, both PC and AC seemed to think that the claimant wanted to leave the business. AC's oral evidence on this was that.

"I said to PC 'It reads as if she wants to leave. She doesn't want to work with me' and one of the ways to find out was to invite her to a without prejudice discussion but he should speak to KLC."

80. AC also conceded that she had thought that the claimant had misrepresented what happened at the 2 May meeting in order to start the without prejudice discussions.

81. It was a valid criticism of AC that she proffered her opinion about what the claimant wanted and what a possible option for the respondent was and then recommended that PC seek legal advice. The opinion that she proffered was that PC should consider inviting the claimant to a without prejudice meeting. AC, as the person about whom the grievance was made, clearly had an interest in how it was conducted and, difficult though it might have been, it would have been better had she not offered counsel about a course of action beyond taking external advice. She had also formed the view that the claimant was looking to leave. Part of what was in her mind when she proffered the opinion that the claimant was looking to leave, was that the claimant had raised a grievance alleging race discrimination which she, AC, believed to be false.

82. As a consequence of that, we think that it can fairly be said that the respondent had in mind, when inviting the claimant to the without prejudice meeting, that an outcome might include claimant leaving the business. This is implicit in PC's explanation that he had put some effort into recruiting AC as someone who brought to the organisation the senior HR expertise which the claimant did not have that and his perception that the claimant did not want to work with AC and was looking for an exit. These things meant that it was the claimant who was being invited to consider her future rather than anyone else but the reason why a without prejudice meeting was considered at all was that AC and PC read into the claimant's grievance that she was looking for an exit.

83. Having said that, we are quite clear that, contrary to the way she now presents the situation, the claimant did not consider herself to have been disadvantaged by the mere invitation. Furthermore, she had the opportunity to reject the invitation.

84. The claimant's statement evidence (her para.35) was that she first found out that EC had lodged a grievance against her on 18 May 2018.

However, to judge by PC's email to her on DB page 357, that cannot be true because on 17 May 2018 he provided bullet point details of it. It seems that she found out who had brought the grievance against her on 17 May but knew that there was a grievance against her before that date. She responded saying that she would like to have the opportunity to speak for herself in relation to EC's grievance (DB page 359).

85. The claimant had been signed off sick from work on 10 May 2018 for two months. The relevant sick note giving the reason for absence as work related stress covers the same period (DB page 356) and was received on 13 May. An email at DB page 364 notified the claimant that the grievance investigation will start and that the company sick pay will expire on 13 June 2018 (4 weeks from the date the note was provided) although that is not consistent with the length of the sick note. It is common ground that the without prejudice period of communications ended on 4 June 2018 - the date on which the early conciliation period ended.

86. Company sick pay was paid to the claimant. The written policy is at DB page 100 section C. This provides that employees are entitled to SSP from the fourth consecutive day of sickness absence and that any additional sick pay is at the discretion of the directors. The claimant appears to have been paid one month full pay. The claimant stated in her para.49 that, in this respect, she was treated less favourably than white colleagues who were off sick on full company sick pay. The individual she mentions by name are AS whom she alleged to receive full pay when off sick for almost 6 months after "barely a year" of service. PC's evidence which we accept was that AS was paid up to 5 working days sick pay as part of the policy then in place. She alleges another salesperson received full pay throughout a 6 months absence and PC agreed and said that that individual was being treated for aggressive cancer so, discretionary sick pay had been paid. There was reference to another individual who was paid a single day's full pay when sick. We were also taken to an email exchange between PC and the claimant at pages 213 to 214 in which PC says "If we have people off who genuinely off sick and they are not frequent flyers we should always pay." He also states that the respondent should not automatically deduct pay.

87. We conclude that those others are in no way comparable to the claimant, two because of the short period of absence and then applicable policy and the second because their personal circumstances meant they met the definition of disability in s.6 of the EQA. However, it does appear that the discretion to award company sick pay was generously exercised. The claimant was paid discretionary company sick pay for 4 weeks (DB page 385).

88. On 6 June 2018 the claimant wrote to inform PC that she was being distressed to receive emails despite being signed off work due to work related stress (DB page 365). She says that being asked to attend meetings while unwell was affecting her mental health and hampering her recovery. She also says that she is not happy with her personal details being shared. This, we gather, was a reference to not sharing her

personal email address with RMacF who had been asked to investigate the grievance. Her access to the IT systems had not been restored so she was mailing from her personal email address.

89. Although the claimant had sent the respondent her MED3 certificate (DB page 356), she did not send them the letter from her GP headed "To Whom it may Concern" dated 23 May 2018 (DB page 360) or the mental health assessment dated 18 June 2018 (DB page 369). The respondent had no knowledge of that and specifically no knowledge that "it was felt that attending any further workplace meetings would be detrimental to her mental health and recovery." (DB page 360)

90. In response, PC wrote saying that he was sorry to hear that the claimant was still not feeling well (DB page 367). PC stressed that there was no dispute that she was unwell, but suggested that it might be beneficial to progress matters promptly so asked whether the claimant would like to meet or whether she would prefer to engage via email. He offered his services to facilitate communications with RMacF since the claimant was unwilling to allow her personal email to be shared with RMacF. The claimant did not reply to this mail. Her next communication with the respondent was her ET1, presented on 28 June 2019 but served by the Tribunal on 17 July 2018.

91. The respondent relies upon the claim form as a communication that the claimant regarded her employment as having ended on 31 May 2018. It is the only communication which could possibly be relied upon as resignation. This is where the parties' regrettable failure to redact the claim form to reflect the decision by Judge Hyams that evidence of the discussions at the meeting on 14 May 2018 and correspondence following on from that meeting should be excluded causes some difficulty. We had had to exclude from our consideration those matters which rely upon that evidence. There was no resignation on 31 May 2018 and that date appears to be a reference to the contents of without prejudice discussions.

92. There are places in the ET1 and attached rider (DB page 20) where the claimant make statements relevant to her employment status and her claim of unfair dismissal.

    a. Box 5.1 (DB page 10) where she answers the question "Is your employment continuing?" with the answer "No". She is then prompted to give a date and answers "31 May 2018". She said in her statement para.33 that she was required to do that. She denied in cross examination that she was, by that, saying that her employment had ended and said that she had to put that date because the form prompted her to. However, our view is that that can only have been the case because she stated that her employment had ended. Her explanation as to why she answered "No" was that "I believed that my employment had ended on the 31.5 because of the termination date that I was given."

    b. By Box 8.1 the claimant claimed unfair dismissal.

c. In Box 9 she states "I did not choose to leave Clinisupplies but it's become clear that I am not wanted by the organisation judging by how they have treated me." This statement is not inconsistent with the claimant having left (in the past) but both suggests that the choice to leave has been made in the past – "I did not choose to leave" and that she *is* not wanted (i.e. in the present). Her explanation for that was that "I wasn't there physically even though my contract was very much live because I had not resigned from the organisation. Unwillingly I was forced out."

d. There is a rider to the ET1 at DB page 20 headed "THE FACTS OF MY CLAIM". She details the matters she complains of and then at para.6 says "My conclusion is that there is and has been a motive to use me and then dismiss me just the way other employees have been dismissed. I am of the view that this is unfair constructive dismissal." She states that she intends to file an employment tribunal claim on grounds including "Constructive dismissal" (DB page 21).

e. On DB page 26 under a heading "Unfair Constructive dismissal" the claimant stated that PC "is intent on dismissing me". She says that this has "caused me to lose trust and confidence in" the respondent and that the working relationship has been damaged. She repeats that PC is intent on terminating her employment and "hence I argue this to be unfair constructive dismissal and discrimination." "Being put on garden leave which is suspension and not having access to emails, work and my working colleagues." Three lines from the end "finally forcing me to leave and intimidate me with an unfounded grievance from an HR Assistant of whom her work performance concerns were well documented." She appeared to say in cross-examination that, in effect, when she wrote the form she was still employed but she was in the process of being constructively dismissed.

63. It was put to the claimant in cross-examination that she voluntarily resigned which she denied – again saying that she was given a termination date of her employment of 31 May 2018. There is no admissible evidence to support that and we have preferred the evidence of PC that the claimant understood the purpose and effect of without prejudice communications. It is clear that the claimant did not accept in cross-examination that she resigned. However the ET1 and attached rider read as though she thinks the job is over "It will likely take me several months to get my health back and to get back to myself hence to get a job in my profession and role will depend on my recovery." She could not have been talking like that had she thought the job continued.

64. She was receiving advice at this point from her trade union and drafted the first claim form with input from her representative and her family. We also take into account the claimant's explanation in para.54 to 56 of her statement where she states that she thought the behaviour was sufficiently serious for her to resign but that she did not resign before 7 August 2018 (consistent with the argument in her second claim). She points out that

she continued to submit her sick certificates and to receive sick pay which she would not have done had she resigned. She submitted one further MED3 on 16 July 2018 (pages 406 and 407) which was dated 10 July 2018 and extended the period of sickness absence until 13 August 2018. The reason given for the absence is depression and anxiety.

65. The claimant was suffering from work related stress at this time as is clear from the medical evidence. However, she was also a qualified HR professional. The question "Is your employment continuing" is a very simple question and the suggested answers are "yes" or "no". She answers "No" which prompted the question about when the employment ended. The respondent later sought clarification about her intentions but it would be very unwise for them not to have taken steps to ask the claimant to clarify her intentions and the fact that they did so is not determinative of how the claimant's words should be understood by the reasonable employer. Furthermore, their interpretation of her words would not be conclusive. The question for us is whether she clearly and unequivocally resigned. Where there is ambiguity we should consider how they would have been understood by a reasonable listener and be construed in the light of the facts known to the employer when he receives the letter.

66. We found the claimant's evidence about what she meant by her words to be equivocal and it does not adequately explain the way that she completed box 9. We think is clear in context that "leave" on DB page 26 means leave employment not leave the building, contrary to the claimant's explanation. The claimant stuck to the line that she had not resigned but that is, in our view, untenable in the face of the way she completed the ET1. The comment in the rider (DB page 26) explaining the unfair constructive dismissal claim including by reference to "finally forcing me to leave and intimidate me with an unfounded grievance" is a clear reference to the EC grievance which she found out about after the without prejudice meeting so she did not think herself to have been dismissed by communication of the date 31 May 2018 (paragraph 35 of C statement).

67. Taken as a whole, we think that the ET1 it written from the perspective of someone who believes their employment is over. Although she does not in the ET1 or anywhere else state expressly "I resign from my employment with Clinisupplies" the rider clearly, to our mind, express the position that the respondents have conducted themselves in a way which entitled her to resign and that her employment is over but can consider herself to be dismissed. It seems to us that by this ET1 the claimant is communicating that she considers that her trust and confidence in her employer has been lost because of their actions and she has been forced out of employment. We consider that this is how the ET1 and rider would have been understood by the reasonable employer. By communicating this position to them we consider this to amount to a resignation.

68. We accept that, among the reasons for the resignation are those matters which she seeks to rely upon in these proceedings which are mentioned in the particulars attached to Case No: 3330972/2018. Those are Issue 1.a)(1), and (3) to (11).

69. The respondent did not receive the ET1 until 17 July 2018. The claimant had submitted her ET1 on 28 June 2018 and therefore she can only have had in mind matters known to her at that date.

70. On 22 June 2018 PC forwarded to the claimant questions from RMacF about her grievance against AC (DB page 376). The claimant did not respond. It was pointed out to her that this was sent 6 days before she submitted the first claim form. However, the claimant said that she had not seen it until later and that, as she had already been advised not to get involved in the emails which were causing her harm, she didn't think that she should be subject to these questions in the state she was in.

71. We do not accept this explanation for her failure to respond to the grievance. The first claim form is very detailed and goes into precisely the same matters which the grievance was investigating. So although we accept that the claimant was suffering some effects of mental ill health it does not appear to have prevented her from dealing with the issues in some detail in her claim form. We appreciate that she had some help but, nonetheless, consider that this to be an unsatisfactory answer.

72. PC wrote again on the 29 June 2018 (DB page 385) confirming that the investigation would continue even if she didn't participate. He also clarified that the company sick pay commenced on 10 May 2018 and expired on 7 June so that the claimant she would be paid SSP thereafter. The claimant accepted in oral evidence that she saw this email. She was asked about why she did not choose then to add any more information to the grievance and part of her answer was

"I had raised a grievance and said my piece and at this time PC already made up his mind that I not required in the business a lot going on in the business and I was expected to respond in so many things. I was no longer part of the respondent, according to what had transpired prior to these emails. I may have read it and ran it through I felt that my grievance was not going to be heard fairly based upon how it was dealt with from the outset."

73. The sick note submitted on 10 May 2018 covered two months (DB page 356). Another one is at DB page 406 which covered 10 July 2018 to 13 August 2018 was sent to the respondent on 16 July 2018 (DB page 407) and was processed. It was received the by the respondent the day before the claim form was sent to them by the Tribunal when they still didn't know the terms of it.

74. However, on 16 July 2018 the claimant knew that she had brought Employment Tribunal proceedings. She was receiving income from 28 June 2018 onwards and it is fair to say that in continuing to receive this and in submitting the sick note the claimant acted inconsistently to the position she had clearly expressed in the ET1 form and attached particulars that her employment was already at an end. It is hard to draw any conclusion from this other than that the claimant was not always acting consistently. This does not cause us to change our view that the ET1 clearly evinces a state of affairs where the employment has ended,

an intention to communicate that state of affairs, to accept it and to allege that it was unlawful.

75. RMacF investigated the grievance made by the claimant and dismissed it by an outcome letter dated 6 July 2018 (DB page 402). She then went on to investigate EC's grievance against the claimant. PC forwarded to the claimant questions from RMacF in relation to that on 6 July 2018 (DB page 400). It emerged in RMacF's oral evidence that she had not been told that the claimant had no access to the respondent's IT systems. The claimant would have struggled without that access to provide the information requested about her conduct of EC probation reviews. Nevertheless, the claimant did not request access or respond in any way PC email of 6 July 2018 with RMacF requests. He concluded by saying that they hoped that she would participate in the investigation but that if they did not get a response from her by 5 pm on 13 July 2018, RMacF would continue with the investigation based on the information she had.

76. The sick note that before PC at this point states work-related stress (DB page 356). The sick note that he received on 16 July says depression and anxiety (DB page 406). The respondent therefore still did not have medical evidence that the claimant was unfit to attend meetings.

77. The outcome of EC's grievance was sent to her by RMacF on 24 July 2018 (DB page 410). It was clear from RMacF oral evidence that she did not know at that time that the claimant had put in a Tribunal claim. Her outcome recommendations included that EC should not report to the claimant in the future. The outcome was not sent to the claimant; there is nothing particular remarkable in that. In our experience an employee's grievance outcome is not routinely sent to the subject of their grievance although, where that subject is still in employment it is possible, depending upon circumstances, that the grievance outcomes will need management action to be taken.

78. RMacF upheld the grievance and she describes in her statement her concern about the behaviour she found to have occurred. However, she accepted in oral evidence that there were a number of matters of which she was unaware which had the potential to affect her conclusions. They were,

    a. The criticisms of EC by LP;

    b. The text messages between EC and the claimant which would provide another view of the relationship to that provided by EC; She described them as "intriguing".

    c. That the claimant had no access to her emails or the IT systems which might have explained the claimant's failure to respond to an initial request for information;

    d. That the claimant was on sick leave. RMacF believed the claimant still to be on compassionate leave.

79. Inevitably, in the circumstances, it was a one sided investigation as she acknowledged. We find that RMacF formed the view that the claimant was deliberately not cooperating. This not a criticism of her because she based her decision on the information available to her. She talked about the claimant refusing to engage. The claimant's position was that she was unfit to engage. Despite the GP letter at DB page 360 dated 23 May 2018, we doubt that the claimant was unfit to engage in any capacity, given that she presented her claim form. She was being asked to engage by answering questions in writing and there is no medical evidence that she was unfit to do that. This judgment does seem to have influenced RMacF judgment about the claimant and whether she had done what she was accused of.

80. When the respondent received the claim form, they wrote on 20 July 2018 (DB page 416 - 417) to acknowledge receipt and to say that

"One important matter that we need to clarify, is that you have said on your tribunal claim that you let Clinisupplies employment on 31 May 2018.

We have not received any resignation letter from you stating that you have resigned and as you know we have been continuing to pay you, either by salary or sick pay whilst the grievance matters are being concluded.

It is therefore very important that you advise me by return whether you still consider that you are employed by Clinicsupplies whether you consider that you resigned from our employment on 31 May 2018"

81. PC asked the Claimant to respond by the following week. She did not and on 30 July 2018 (DB page 415) he sent a follow-up email in which he repeats that the claimant "stated on your employment tribunal claim that you left the company on 31 May 2018" and said that if he does not hear from her by 3 August 2018 he would take it as confirmation that she left the company on 31 May 2018. Having received no response, on 7 August 2018 he wrote and told the claimant that the respondent was processing her resignation with the leave date of 31 May 2018. She received no SSP for any period after 31 July 2018.

82. For completeness we should say that the second claim form (DB page 32) relies upon an effective date of termination of 7 August 2018 arguing that the claimant did not resign, despite a repudiatory breach of contract, but that the employment continued after 31 May 2018, until she was dismissed by email dated 7 August 2018 from the respondent saying that they would treat her as having resigned on 31 May 2018.

Law applicable to the issues in dispute

81. The claimant also complains of a number of breaches of the Equality Act 2010 (hereafter the EQA). Section 136 of the 2010 Act reads (so far as material):

> "(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

82. This section applies to all claims brought before the Employment Tribunal under the EQA. By s.39(2) EQA an employer must not discriminate against an employee by dismissing them or subjecting them to any other detriment.

83. Section 13 (1) of the EQA reads:

"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."

The Claimant complains that she has suffered direct discrimination on grounds of the protected characteristic of race.

84. In the alternative, the claimant complains of race related harassment. It is unlawful for an employer to harass an employee (see section 40(1) of the EQA). The definition of harassment is contained in section 26 of the Act and, so far as relevant, provides as follows:

"(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
(2) …
(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."

85. In addition, the claimant alleges that some of the acts complained of amount to unlawful victimisation, contrary to s.27 EQA, which provides that,

"(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.

(3) …"

86. What is and what is not harassment is extremely fact sensitive. So, in Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT at paragraph 22, Underhill P said:

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (…), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

87. The importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created for him was reinforced in Grant v HM Land Registry & EHRC [2011] IRLR 748 CA. Elias LJ said, at paragraph 47:

> "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

88. Furthermore, in Weeks v Newham College of Further Education [2012] EqLR 788 EAT, Langstaff P said:

> "17....Thus, although we would entirely accept that a single act or a single passage of actions may be so significant that its effect is to create the proscribed environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding.
>
> ...
>
> 21. However, it must be remembered that the word is 'environment'. An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staffroom concerned."

89. In Pemberton v Inwood [2018] EWCA Civ 564; [2018] ICR 1291, Underhill LJ set out guidance on the relevant approach to a claim under section 26 of the EQA as follows [at para 88]:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to

> have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

90. The EAT provided guidance on ways in which actions might be "related to" the protected characteristic relied on in Bakkali v Greater Manchester Buses (South) Ltd [2018] ICR 1481 EAT paragraph 31

> "Conduct can be "related to" a relevant characteristic even if it is not "because of" that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, "related to" such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader inquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. As [counsel] submitted, "the mental processes" of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the claimant. It was said that without such evidence the tribunal should have found the complaint of harassment established. However such evidence from the alleged perpetrator is not essential to the determination of the issue. A tribunal will determine the complaint on the material before it including evidence of the context in which the conduct complained of took place.**"**

91. The application of the burden of proof in direct discrimination claims has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA. In that case, the Court was considering the previously applicable provisions of s.63A of the Sex Discrimination Act 1975 but the guidance is still applicable to the equivalent provision of the EQA.

92. When deciding whether or not the claimant has been the victim of direct race discrimination, the employment tribunal must consider whether they have satisfied us, on the balance of probabilities, of facts from which we could decide, in the absence of any other explanation, that the incidents occurred as alleged, that they amounted to less favourable treatment than an actual or hypothetical comparator did or would have received and that the reason for the treatment was race. If we are so satisfied, we must find that discrimination has occurred unless the respondent proves that the reason for their action was not that of race.

93. We bear in mind that there is rarely evidence of overt or deliberate discrimination. We may need to look at the context to the events to see whether there are appropriate inferences that can be made from the primary facts. We also bear in mind that discrimination can be unconscious but that for us to be able to infer that the alleged discriminator's actions were subconsciously motivated by race we must have a sound evidential basis for that inference.

94. The provisions of s.136 have been considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC – and more recently in Efobi v Royal Mail Group Ltd [2021] ICR 1263 UKSC. Where the employment tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely

to have a bearing upon the outcome. However, it is recognized that the task of identifying whether the reason for the treatment requires the Tribunal to look into the mind of the alleged perpetrator. This contrasts with the intention of the perpetrator, they may not have intended to discriminated but still may have been materially influenced by considerations of, in the present case, race. The burden of proof provisions may be of assistance, if there are considerations of subconscious discrimination but the Tribunal needs to take care that findings of subconscious discrimination are evidence based.

95. Furthermore, although the law anticipates a two stage test, it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). We should consider the whole of the evidence when making our findings of fact and if the reason for the treatment is unclear following those findings then we will need to apply the provisions of s.136 in order to reach a conclusion on that issue.

96. Although the structure of the EQA invites us to consider whether there was less favourable treatment of the claimant compared with another employee in materially identical circumstances, and also whether that treatment was because of the protected characteristic concerned, those two issues are often factually and evidentially linked (Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL). This is particularly the case where the claimant relies upon a hypothetical comparator. If we find that the reason for the treatment complained of was not that of race, but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to.

97. In terms of the victimisation claim, in the present case it is accepted that the claimant made the protected acts relied upon: a grievance dated 4 May 2018 and Case No: 3330972/2018 and we do not need to set out the law on what amounts to a protected act. The then applicable prohibition on victimisation in the Race Relations Act 1976 was considered by the House of Lords in The Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, HL. The wording of the applicable definition has changed somewhat between the RRA and the Equality Act. However Khan is still of relevance in considering what is meant by the requirement that the act complained of be done “because of” a prohibited act. Lord Nicholls said this, at paragraph 29 of the report,

> “The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact”

98. Again, a person’s subjective reasons for doing an act must be judged from all the surrounding circumstances including direct oral evidence and from such inferences as it is proper to draw from supporting evidence and documentary evidence. For the purposes of a victimisation claim, the doing of a protected act does not have to be the sole or even the principal cause, as long as it was a significant part of the respondent’s reason for

doing the act complained of, in the sense of more than trivial. However, dismissal (or any other detrimental act) in response to a complaint of discrimination does not constitute victimisation for the purposes of s.27 EQA if the reason for it was not the complaint as such but some feature of it which can properly be treated as separable: Martin v Devonshires solicitors [2011] ICR 352, EAT; Page v Lord Chancellor [2021] ICR 912, CA.

99. In order to find that an act complained of was to the detriment of an employee, both for the purposes of a s.13 direct discrimination claim and a s.27 victimisation claim, the 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: De Souza v Automobile Association [1986] IRLR 103, CA. This was explained in Shamoon to mean that the test should be applied from the point of view of the victim: if their opinion that the treatment was to their detriment was a reasonable one to hold, that ought to suffice, but an unjustified sense of grievance was insufficient for the claimant to have suffered a detriment.

100. The EHRC Code of Practice on Employment (2011) advises in para 9.8 that a detriment is "anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage."

101. In the present case there is a dispute about whether the employment relationship was ended by resignation or by dismissal. The respondent argues that the claimant resigned by means of her claim form in Case No: 3330972/2018 where she stated that her employment had ended on 31 May 2018. The claimant disputes this and argues that she was dismissed by email dated 7 August 2018 advising her that they would process her as a leaver. It was common ground that there was no communication relied upon by either side which had the potential to communicate a resignation or dismissal prior to the first claim form.

102. It is common ground that a resignation shall be of no effect until it is actually communicated by the employee to the employer: Edwards v Surrey Police (1999/UKEAT/698). Simply presenting a claim for unfair dismissal will not be sufficient to communicate a resignation: Rai v Somerfield Stores Ltd [2004] ICR 656 EAT. The claimant in Rai had presented his claim for unfair dismissal prematurely a few days before the date on which it was subsequently found his employment came to an end. The claimant was absent from work and his primary case was that he had been dismissed by his employer when they wrote to him urging him to return by a particular date or he would be considered to have resigned. The EAT held that such a conditional termination was a letter giving information that if he did not turn up for work then his employment would be terminated on that day – 9 April, rather than termination on notice given on the date the letter was received. That conclusion led to the conclusion that the unfair dismissal claim was premature and that the Tribunal had no jurisdiction. The claimant ran the alternative argument that his originating application (as it then was) was communication of resignation when it was presented on 6 April and that was rejected as set out in para.47 to 52 which we quote in part and which is relied on by Mr Hitchens.

> "47. The second mode of communication relied upon by [the claimant] was the presentation of the Originating Application to the Employment Tribunal on 6 May[1]. The difficulty about this submission, …, is that delivery of an Originating Application to the Employment Tribunal could not have been communication of anything to [the respondent]. Of course the Originating Application would necessarily be sent to [the respondent] at some time after its presentation; and, indeed, it was. But if the constructive dismissal is not complete until there has been communication, as is accepted and is common ground, it was not complete by virtue of the Originating Application until after it had been presented when the Originating Application was sent by the Tribunal to [the respondent]. Thus, the Originating Application on that basis was again premature because it would have been presented at a date before the constructive dismissal was completed by communication to [the respondent].
>
> …
>
> 51. We do not regard [F C Shepherd & Co Ltd v Jerrom [1985] IRLR 275 EAT] as a decision which leads us to the conclusion that presentation of an Originating Application to a Tribunal is necessarily communication to the employers on the date on which it is presented. It will inevitably reach the employers and will then become a communication to the employers; but for present purposes, whether it was communication to them on the date of presentation as opposed to later is the vital issue."

103. In Rai, the Tribunal found that the claimant had taken no steps to communicate to the employers his acceptance of any repudiatory conduct on their part. We do not read para.47 of Rai as saying that resignation can never be communicated by a claim form, indeed the final sentence relied upon by Mr Hitchens reads that the originating application was premature "because it would have been presented at a date before the constructive dismissal was completed by communication to [the respondent]." Our reading of para.47 is confirmed by para.51. Ultimately, we consider that a claim form is capable of being a communication but what it communicates will depend upon its terms. The problem for Mr Rai was that in order for the Tribunal to have jurisdiction he needed his employment to have terminated before he presented a claim for unfair dismissal and, unlike this claimant, he had not presented a second claim.

104. In deciding whether or not a communication amounts to a resignation, where there is ambiguity, it is likely to be construed against the person seeking to rely on it, all the surrounding circumstances must be considered and the Employment Tribunal should ask itself how a reasonable employer (or employee in the case of dismissal) would have understood them in the circumstances.

105. Section 95(1)(c) of the Employment Rights Act 1996 (hereafter the ERA) makes it clear that a dismissal includes the situation where an employee terminates the contract of employment (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This is commonly referred to as

[1] This appears to be an error as para.6 of the judgment states that the originating application was presented on 6 April.

constructive dismissal and the leading authority is Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA. If the employer is guilty of conduct which goes to the root of the contract or which shows that he no longer intended to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance of it. The employer's conduct must be the cause of the employee's resignation and thus the cause of the termination of the employment relationship. If there is more than one reason why the employee resigned then the tribunal must consider whether the employer's behaviour played a part in the employee's resignation.

106. Where an employee considers that their employer is in repudiatory breach of contract, they must resign in order to accept that repudiation otherwise the contract has not come to an end: Pickford v Howard Tool Co [1951] 1 KB 417. Furthermore, any acceptance of a repudiation must be clear and unequivocal: Norwest Holst Group Administration Ltd v Harrison [1985] ICR 668, CA.

107. The claimant argues that she was unfairly dismissed because she resigned because of a breach of the implied term of mutual trust and confidence; a term implied into every contract of employment. The question of whether there has been such a breach falls to be determined by the authoritative guidance given in the case of Malik v BCCI [1998] AC 20 HL. The term imposes an obligation 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. One question for the tribunal is whether, viewed objectively, the facts found by us amount to conduct on the part of the respondent which is in breach of the implied term as explained in Malik v BCCI. Whether the employment tribunal considers the employer's actions to have been reasonable or unreasonable can only be a tool to be used to help to decide whether those actions amounted to conduct which was calculated or likely to destroy or seriously damage the relationship of trust and confidence and for which there was no reasonable and proper cause.

108. If that conduct is a significant breach going to the root of the contract of employment (applying the Western Excavating v Sharp test) and the employee accepted that breach by resigning then he was constructively dismissed. The conduct may consist of a series of acts or incidents which cumulatively amount to a repudiatory breach of the implied term of mutual trust and confidence (see Lewis v Motorworld Garages Ltd [1986] ICR 157).

109. Once he has notice of the breach the employee has to decide whether to accept the breach, resign and claim constructive dismissal or to affirm the contract. Any affirmation must be clear and unequivocal but can be express or implied. Mere delay in resigning is unlikely to amount to affirmation by itself delay can be taken as evidence that the employee has affirmed the contract and decided to carry on working under notwithstanding the breach. An example would be a situation where an employee has called for further performance of the contract and that might lead to affirmation being implied from that conduct if it is consistent only

with the continued existence of the contract. Whether it is or not is a matter of fact and degree.

110. Once the Tribunal has decided that there was a dismissal, whether initiated by the employer or a constructive dismissal, they must consider whether it was fair or unfair in accordance with s.98 ERA 1996.

> **"Section 98 Employment Rights Act 1996**
>
> 1. In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
>
> a. the reason (or, if more than one, the principal reason) for the dismissal, and
>
> b. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> 2. A reason falls within this subsection if it-
>
> a. Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> b. Relates to the conduct of the employee,
>
> c. Is that the employee was redundant, or
>
> d. ...
>
> 3. …
>
> 4. Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)-
>
> a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> b. shall be determined in accordance with equity and the substantial merits of the case."

Conclusions on the Issues

111. We now set out our conclusions on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions.

112. We start with the specific factual matters relied upon by the claimant as discrimination, harassment, victimisation and as being breaches of implied term of mutual trust and confidence.

113. It is true that the claimant's photograph and profile was not included on the respondent's web page but this was entirely due to the fact that she was not in the role of HR Manager until April 2018 and, in any event, was not a member of the commercial leadership team or of such a seniority that she could be regarded as a member of the leadership team more broadly. She seeks to compare herself with PH, but the latter was HR Manager when she was on the webpage.

114. The fact that she was not on the webpage was not, therefore, related to race. In the circumstances of her relative lack of seniority and the fact that she was not HR Manager, it was not reasonable for her to regard the absence as having the harassing effect. As a claim of race related harassment, this allegation is dismissed.

115. Furthermore, the claimant has not shown facts from which it could in the absence of any other explanation be inferred that she was subject to less favourable treatment on grounds of race in relation to this matter than a comparable white employee, namely one who had not yet been appointed to be HR Manager and was not a member of the commercial leadership team. Alternatively, the respondent have shown a non-discriminatory reason for her photograph not being on the webpage. The direct race discrimination claim based upon this is dismissed.

116. The allegation that she was excluded from external culture meetings has been withdrawn.

117. The claimant was not entitled to a car allowance because neither was she a member of the commercial leadership team - who had that as part of their remuneration package - nor was her role of a kind which required her to do so much business travel that she merited a car allowance. The alleged comparator she has drawn our attention to was not in material identical circumstances to hers because she had a role which required a considerable amount of business travel. The claimant could have claimed business mileage expenses but did not.

118. The fact that she did not have a car allowance was not, therefore, related to race and, in the circumstances of her relative lack of seniority it was not reasonable for her to regard the lack of a car allowance as having the harassing effect. Furthermore, given that she apparently did not complain about the lack of car allowance contemporaneously or even claim the business mileage she would have been entitled to, we are of the view that this did not, in fact, cause her upset during her employment. The non-payment of a car allowance had neither the purpose nor the effect of creating the proscribed environment. As a claim of race related harassment it is dismissed.

119. The claimant has not shown facts from which it could in the absence of any other explanation be inferred that she was subject to less favourable treatment on grounds of race in relation to this matter than a suitable comparator who would have been someone not in the leadership team who

did not have a role which required them to do so much business travel that it merited a car allowance. Alternatively, the respondent have shown a non-discriminatory reason for her not benefitted from a car allowance.

120. The respondent, through PC, did not ignore the claimants suggestions and proposals for the HR department. As we set out in paras.23 to 27 above, there were two meetings between the claimant and PC at which her proposal for the structure of the HR department, he shared the draft job description for the role to which she would be reporting. He had valid and logical reasons for introducing the senior role and the level of discussion and consultation is evidenced by contemporaneous emails. PC may not have agreed with the claimant's allegation that the new role mirrored tasks she was already carrying out, but we reject the allegation that he ignored her contribution. This allegation is not made out on the facts.

121. As to the allegation that PC made frequent reference to "keeping the chimp at bay", in the event, this was pursued in relation to one specific alleged incident dating from about March 2018. We think that PC may well have asked the claimant how she kept the "chimp at bay" in a meeting in around March 2018 and have seen documentation from the culture builders which refers to this concept which would have been sent to the claimant alongside her fellow culture energisers in particular in preparation for a briefing session on 10 April 2018.

122. We have rejected the claimant's evidence that she did not at the time understand the context. She may have been upset by the use of this phrase because of its connotations with racist language and the respondent may wish to reflect on this. We accept, and it is common ground, that the "Chimp Paradox" is a psychological theory widely used as a tool to encourage people to understand their strengths and weaknesses in various field of life. However, the potential to give offence is clear and this should be born in mind by employers using it as cultural development tool.

123. Nonetheless, in the present case, we are quite satisfied that its use in documentation and by PC was with reference to this psychological theory and was not related to race and that that was known by and must have been understood by the claimant. She did not tell anyone that she was offended by use of the phrase. In those circumstances, even if she was upset, it is not reasonable to regard the use of the phrase has having the harassing effect and it was not related to race.

124. The training was given to everyone regardless of race; we note the breakdown in PC's statement of the ethnic diversity of the respondent. Everyone attending on 10 April 2018 was invited to consider occasions when they had had to confront their inner chimp. It may have been at this meeting rather than one in March that the claimant was asked what she was doing to keep her chimp at bay or it might have been during an earlier planning session. However everyone present received the same message so it is not less favourable treatment. Furthermore, it was not on grounds of race.

125. As to the allegation that AC spoke to the claimant in a derogatory, condescending and dismissive way, we have found that this is not an accurate description of AC conduct on 2 May 2018. There was no detrimental treatment of the claimant in this meeting. The questions which she asked were appropriate given the information she needed to find out and the claimant's view that she was being put on the spot was more to do with her lack of preparedness than to do with the questions asked by AC. The calendar of HR events was very straightforward and had not been provided. There were pressing matters upon which AC was entitled to expect the claimant to have the details: the meeting with the IIP assessor in two days and GDPR being two such matters. We can readily understand that AC required to be satisfied that the HR department was ready for the IIP assessor visit and was aware what changes GDPR would mean for their processes.

126. In the event, it was not put to EC that she had brought her grievance of 4 May 2018 because the claimant is black. We do not need to decide whether her complaints were themselves well-founded. We accept that, through no fault of her own, RMacF was not aware of all of the relevant information when she made her decision about the merits of it. However, the evidence of AC and RH supports the view that EC was genuinely upset about the claimant's behaviour and genuinely aggrieved that she had not passed her probationary review. We have found that the probation review form did include matters which were not discussed at the meeting and was unsatisfactory because the reasons why EC failed her probation were not evidenced (see para.45 above). Our conclusion is that the reason she brought her grievance was because she believed herself to have grounds to do so and felt she had been unfairly treated. There is no basis for concluding that she would have reacted differently had been treated the same way by a white manager. In all the above circumstances, it is not reasonable to regard the grievance as having the harassing effect. As the basis for a complaint of race discrimination or race related harassment this allegation is not well founded.

127. PC did invite the claimant to a 'without prejudice' meeting but it was not to discuss the claimant's grievance in the sense of being a grievance hearing. It was "to discuss your email and how best to progress matters" (additional bundle email of 8 May 2018 at 18.17). We have found that the claimant would have understood what was meant by the term 'without prejudice' and that she cannot have expected that it was to discuss the allegations themselves (see, in particular, para.73 above). This invitation was alleged to be harassment, discrimination and/or victimisation.

128. The claimant has not shown facts from which we might infer that in extending this invitation PC treated her less favourably than he would have treated another employee who was not black but who had put in a similar or comparable grievance about a recently appointed superior and had been the subject of another grievance from the only other person in the department. EC was in a different position in this respect. We accepted his evidence that AC had particular experience which was valuable to the respondent given their ambitions for expansion. The grievance seems to us to have played a part in his decision to invite the claimant to the meeting

but there is no evidence from which we can infer that her race was a factor in any way.

129. He does not react to the claimant's grievance or to EC grievance by inviting either of AC or EC to a 'without prejudice' meeting. Prior to these incidents there is every indication PC was happy with the claimant in her role: pay rises she was being given a title that reflected a greater seniority. She'd been with the respondent nearly 5 years.

130. To succeed in a claim for discrimination or victimisation an employee has to show that the treatment fell within s.39(2) or (4) EQA 2010. In the context of this particular allegation, they have to show that they have been subjected to a detriment (ss.39(2)(d) and 39(4)(d) EQA 2010). We do not think that when an employer invites an employee to a without prejudice meeting that inevitably means that they have been subjected to a detriment. We need to ask ourselves whether, from the point of view of the employee, their opinion that the treatment was to their detriment was a reasonable one to hold; whether, by reason of the act complained of, a reasonable worker would or might take the view that they had been disadvantaged in the circumstances in which they thereafter had to work. As a general proposition, an employee is being invited to a meeting which both agree cannot be referred to in any subsequent dispute which provides an opportunity for the parties to find a mutually acceptable solution to a particular difficulty in the employment. This invitation is argued on behalf of the claimant to have been a detriment on the basis that it is said that PC and AC accepted that the intended course which the meeting might start was that the claimant would leave the business and that it was a detriment to the claimant to know that those individuals to whom she reported did not want her in the business.

131. However we do not think that that was the view of PC or AC. Their view, rather, was that the email from the claimant indicated that she did not want to remain in the business – not that they did not want her in the business. AC in particular, stressed that the claimant's knowledge of the business made her the most important person in it to her in her new role and we accept her evidence on that. The most that can be said is that they accepted that it was not in the business's interests to have an unwilling employee working within it. PC may have recognised that an outcome might include the claimant leaving the business but we do not think that he desired that outcome.

132. PC had a number of things in mind (para.64 to 66 above). They included the extent of the claimant's experience in HR and his experience of her support to him in dealing with previous settlement agreements which gave him the sense that this was about her wanting to go down the without prejudice negotiations route. He couldn't point to any particular wording used which gave that impression but thought that the fact that she had copied her emails to the Trade Union and that the claimant had been through the processes before in relation to others, made him think that she was looking for a settlement or a way out. He took into account that there were two grievance concerning the small HR department and she had brought one and was the subject of the other. He considered what he

thought was good for the organisation or right for the organisation and at that juncture he as CEO needed a senior professional such as AC.

133. AC's evidence was that she had been in organisations before when people had made false allegations in order to try to get a settlement. She considered the allegations not only to be false but to be outrageous. Although we can well imagine that it must have been a shock to her to be the subject of this grievance on 8 May 2018 - one working week into her new role - about something which happened on the morning of the second day she was employed, this underlines that she should not have been involved in giving any advice to PC at all. She should not have given her opinion on the allegations. It was bound and did influence him to form the view that the allegations were false.

134. AC gave PC her advice on what to do by saying, first, that it looked as though the claimant did not want to work with her so he could invite her to a without prejudice meeting to see whether that was true and, secondly, to contact his legal advisers.

135. In the light of all of those matters being in the mind of PC when he decided to invite the claimant to the without prejudice meeting, including a perception that the allegations were false, it seems to us that the fact that she had brought a grievance alleging race discrimination was more than a trivial part of the reasons for the invitation.

136. However, we have concluded that the claimant did not suffer a detriment when she was invited to the without prejudice meeting. We say that, even if she thereby knew that those she reported to (PC and AC), her employer, thought that a possible solution to the disagreement was for her to leave employment on mutually agreeable terms. We are quite satisfied that she consented to go to the without prejudice meeting with the understanding that the purpose of it was to see whether parting company by agreement was a solution and, if it could not be, that her grievance would be investigated. That was the way in which the invitation was received by the claimant. We do not think that when she received that invitation she thought that she would be disadvantaged in her employment in the future should settlement terms not be agreed. We reject the argument that she considered herself to be disadvantaged by that invitation as being contrary to her actions, given her understanding of the purpose of such meetings.

137. If one looks at the email response from the claimant to the invitation on 8 May it was rapid, she readily agreed to attend the meeting and appeared to have no reservations. According to her original particulars of claim (DB page 21 para.5) she had a briefing with her Trade Union before the without prejudice meeting. This reinforces our view that she went to it willingly and with her eyes open. To be invited to this meeting in those circumstances was not, in our view, a detriment to her.

138. Therefore we dismiss the claims of direct discrimination and victimisation based upon the invitation to the without prejudice meeting.

139. Placing the claimant on garden leave was clearly done following her agreement to attend the without prejudice meeting and therefore we are satisfied, based upon the chronology, was done because she was entering

into settlement negotiations which might lead to her consensual exit from the business. Involuntary leave with pay would be a more accurate description and there is the risk that garden leave has overtones of the kind of leave one is on following notice of termination being given but that wasn't the way it was used here. Similarly the restriction of access to her colleagues, IT systems and the building where she worked was done because she was entering into settlement negotiations.

140. Our conclusion is that by the 28 June 2018 the claimant considered herself to have been constructively dismissal and to have been forced out of the business. That is why she communicated her acceptance of that through her ET1 (see paras.62 to 67 above).

141. Being put on garden leave, having access to colleagues restricted and restriction of IT access were detrimental to the claimant. However we are satisfied that none were less favourable treatment on grounds of race. None of these actions was related to race and the race related harassment claims based upon that fail. Furthermore, the sole reason for these actions was that the claimant had agreed to enter into without prejudice negotiations.

142. It is argued on behalf of the claimant that because the invitation to without prejudice negotiation was done in part because of her race discrimination grievance, she was subjected to victimisation by being placed on garden leave and having her IT access, and so on, restricted. However the grievance is the context within which those steps were taken not the reason for them. That argument is essentially that "but for" the grievance none of this would have happened which is not the applicable test. The claims of direct race discrimination, race related harassment and victimisation based upon the restriction of access to colleagues, IT systems and the building are not well founded.

143. The claimant was put on statutory sick pay after one months' discretionary company sick pay. This was in accordance with the contract when an employee was absent on sick leave. We do not consider the isolated instance when discretion was exercised more generally to be comparable to the claimant's situation: see para.86 & 87 above. The only person to receive long term company sick pay was receiving treatment for cancer and was therefore covered by the definition of disability under s.6 of the EQA. There is nothing from which we can infer that the claimant's grievance played any part in the decision to move her onto SSP. As such, the claim that this action was direct race discrimination, race related harassment or victimisation is not well founded.

144. We have concluded that the claimant's first Tribunal claim presented on 28 June 2018 did amount to a resignation. The respondent was therefore both accurate and reasonable to interpret it as such. There is no evidence from which it can be inferred that they would not have reached that conclusion had a like claim form been presented in like circumstances by an employee who was not black or that their judgment was in any way related to race. The claim that it was direct race discrimination, race related harassment or victimisation for them to interpret the claim this way is not well founded.

145. The employment terminated on 17 July 2018 when the claimant's position that the employment had ended was clearly and unequivocally communicated to the respondents. Therefore the allegation that she was dismissed on 7 August 2018 is not made out.

146. The victimisation claims based upon the grievance have been considered above. The claimant also argues that she was victimised by the respondent treating her claim form as a resignation because the claim form complained of discrimination or by being dismissed because she brought a discrimination claim in the Employment Tribunal. However, we consider it objectively to be the case that the first claim form communicated the claimant's resignation and/or termination of employment and that is how the reasonable employer would have interpreted it. This was based upon the wording and not because the claim alleged race discrimination.

147. The respondent wrote to the claimant asking her whether she still considered herself to be employed by them (paras.80 and 81 above) and she did not reply. The communications culminated in the decision to treat her as having ended her employment with effect from 31 May 2018 and were written because of a desire to have closure, and to cease paying sick pay to someone who was no longer an employee. In those circumstances, we do not consider the communication to have been unlawful as alleged.

148. Turning to the unfair dismissal and wrongful dismissal claims.

149. We have concluded that the claimant's communication of her desire to end the employment by the ET1 presented on 28 June 2018 amounts to a resignation without notice. The only date referred to is the 31 May 2018. It is not possible for either party independent or by agreement to vary retrospectively the date of termination of employment. However this should be viewed as a termination without notice because by indicating that the employment has already ended she is certainly not resigning on notice. Therefore the employment ended on 17 July 2018 when the communication was received by the respondent that the employment was regarded as terminated without notice.

150. The reasons for the claimant's resignation were those matters upon which she relies as allegedly unlawful acts in these proceedings and which are listed in Issue 1.a)(1), and (3) to (11) (see para.68 above). All of those are allegations which we have found not to be discrimination, harassment or victimisation for detailed reasons which are set out above. We also conclude that they do not, individually or cumulatively amount to a breach of contract. In reaching that conclusion, we recognise that actions might amount to a breach of the implied term of mutual trust and confidence separate to the claims under the EQA. However, where we have accepted that the incidents happened as alleged, they were done with reasonable and proper cause. The respondent was not in repudiatory breach of contract.

151. The question of affirmation does not arise. The claimant was not dismissed. We do not need to go on to consider the other issues set out in Issues 4 and 5 above.

152. We turn to the claim of unauthorised deduction from wages.

a. The claimant was not employed between end July 2018 and 7 August 2018 so is not owed any wages for that period.

b. The claimant was still employed by the respondent on 2 July 2018; the 5th anniversary of the start of her employment. It was common ground that the only condition for receiving the length of service award of £250 was that the employee should be in employment on the 5th anniversary of their start date. The respondent has produced no evidence that there any other condition and therefore we find that she was entitled to this figure. The respondent has subjected the claimant to an unauthorised deduction from wages of £250.

c. The bonus pay shortfall which was part of the original claim was not pursued.

d. The claimant may well be entitled to holiday pay under reg.14 of the Working Time Regulations 1998 in respect of leave accrued during the annual leave year which started on 1 April 2018 and was not taken as at 17 July 2018. The parties did not have the information available about the number of days she had taken. We hope that now that we have determined the date of termination of employment they will be to calculated any sums due. In that hope, we do not consider it proportionate to list a remedy hearing at present, but direct that the parties write to the Tribunal with their suggested figures for any unpaid holiday pay and, if there is any further disagreement, to state whether or not this can be determined by the Tribunal in chambers without a further oral hearing at which the parties are present.

I confirm that this is our Reserved Judgment with reasons in Case No: 3330972/2018 and Case No: 3334600/2018 and that I have approved the Judgment for promulgation.

_____

Employment Judge George

Date: 23 January 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

24 January 2022

FOR EMPLOYMENT TRIBUNALS