RM

EMPLOYMENT TRIBUNALS

Claimant: **Ms R Leher**

Respondents: **(1) Aspers (Stratford City) Limited**
(2) Mrs K Joyce (neé Greenyer)
(3) Mr T Greenwood
(4) Miss D Peneva

Heard at: **East London Hearing Centre (in public, by video)**

On: **10 – 13 August 2021**
30 August, 1 and 6 September 2021 (in chambers)

Before: **Employment Judge Moor**
Members: **Ms P Alford**
Mrs M Legg

Representation
Claimant: Mr P Starcevic, counsel
Respondents: Mr E McFarlane, consultant

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. **The complaint of unfair dismissal is well-founded.**

2. **The dismissal was an act of unlawful victimisation.**

3. **The failure to respond to the request for games table refresher training was direct race and age discrimination.**

4. **It is just and equitable to extend time for the complaint of direct discrimination in relation to games table refresher training.**

5. **Save, in respect of one issue failing by majority decision, the remaining claims of direct race or age discrimination fail.**

6. **The Second Respondent on behalf of the First Respondent, unlawfully victimised the Claimant by:**

a. Failing to investigate her allegation that she had been victimised or harassed after her return to work from 5 November 2018;

b. In his approach at the grievance appeal hearing of 28 November 2018 by deliberately discouraging the Claimant from arguing that what had happened to her was discrimination; and by threatening the Claimant in relation to further discrimination complaints.

7. The First Respondent unlawfully victimised the Claimant by requiring her to undertake 6 weeks' training in the proposed alternative role in the gaming team.

8. The First Respondent, the Third and the Fourth Respondent unlawfully victimised the Claimant by excluding her from discussions about after-work drinks.

9. Except for the claims of unlawful victimisation that have succeeded by majority (see below), the remaining claims of victimisation fail.

10. The claims of unlawful harassment fail (in one respect by majority).

11. The holiday pay claim fails.

It is the judgment of the Tribunal by majority that:

12. The dismissal was not an act of direct race or age discrimination.

13. The First Respondent and Third Respondent unlawfully victimised the Claimant by giving her 4 short changeover shifts in December 2018.

14. The First Respondent unlawfully victimised the Claimant by failing to provide her with handover information on 19 and 20 December 2018.

15. The claims of direct race and age discrimination fail in relation to the failure of Mr Greenwood to investigate and his approach at the grievance appeal hearing.

16. The claims of harassment relating to race and age fail in relation to the failure of Mr Greenwood to investigate and his approach at the grievance appeal hearing

It is the minority judgment of Ms Alford that:

17. The dismissal was an act of direct race and age discrimination.

18. The claims of direct race and age discrimination succeed in relation to the failure of Mr Greenwood to investigate and his approach at the grievance hearing of 28 November 2018.

19. The claims of harassment relating to race and age succeed in relation to Mr Greenwood's conduct towards the Claimant during the grievance hearing of 28 November 2018.

It is the minority judgment of Mrs Legg that:

20. The Claimant was not unlawfully victimised by:

a. the Third Respondent giving her 4 short changeover shifts in December 2018;

b. the failure to provide handover information to her on 19 and 20 December 2018.

REASONS

1. The Claimant resigned from her employment with the First Respondent ('R1') in circumstances she claims were direct race and/or age discrimination, victimisation, harassment relating to race and/or age and constructive unfair dismissal. She also makes a claim for outstanding holiday pay.

2. The hearing was originally listed for what became the first week of the national lockdown in March 2020. It was unfortunately postponed for a further 18 months. We thank the parties for undertaking a remote hearing by video. During the hearing different participants encountered the occasional connection difficulty, but we ensured an effective hearing took place by pausing and, if necessary, recapping any evidence missed.

Issues

3. The claim form was presented on 14 February 2019. At that point the Claimant was still employed. The claim alleged direct age and race discrimination, victimisation and harassment relating to race and age. The Claimant resigned on 11 April 2019, and on 17 June 2019 she submitted an amended claim making additional discrimination and victimisation claims and an unfair constructive dismissal claim including that the dismissal was discrimination (paragraph 100). EJ Burgher allowed the claim to be amended at the Preliminary Hearing on 24 May 2019. The Claimant provided further particulars by order. Both the amended claim form and the amended response form on behalf of all Respondents well set out the issues in the case. EJ Burgher drew up a list of issues appended to his Case Management Order. Mr Starcevic helpfully provided a List of Factual Allegations identifying the claim to which each related. We were also assisted with a chronology, cast list and glossary. The age group relied on is the mid-forties and over.

4. We agreed to deal with liability only at this stage.

5. The holiday pay claim was not particularised. By the end of the hearing, it was established that it related to non-payment in respect of 4 days of booked holiday in the holiday year 2018 ultimately taken as sickness. The Claimant contended that European law allowed these to be carried over. R1 contended that the days claimed were after the 4 weeks' holiday under Regulation 13 of the Working Time Regulations 1998 (derived from the relevant European Directive) and therefore could not be carried over. It

was agreed that holiday accrued but untaken in the holiday year 2019 had been paid.

Findings of Fact

6. We heard the evidence of the Claimant, the third Respondent, Mr T Greenwood, group HR director, the second Respondent, Mrs K Joyce (neé Greenyer), the fourth Respondent, cash desk supervisor, Miss D Peneva, Miss L Lewis, HR manager, and Miss C Djurisic, gaming customer service manager, seconded to manage the cash desk. We read the documents referred to us in the evidence. In reaching findings of fact we applied the balance of probabilities test by asking ourselves what was more likely to have occurred. We make the following findings of fact.

7. R1 runs a 'super casino' at Stratford Westfield Centre. It is open 24 hours a day, 364 days a year. It employs around 560 staff. R1 belongs to the Aspers Group of companies.

8. The Claimant is of mixed black African heritage. At the time she started with R1, she was nearly 41 years of age. She had about 22 years' experience of working in the gaming industry, including on cash desks and on gaming tables as a dealer at high-end London casinos. She also had managed a betting shop.

9. The Claimant began work on 21 November 2011 for R1 as a cashier on the cash desk. She was initially paid £23,500. This was more than any other cashier because of her greater experience. Thus, from the start of her employment, she was the most experienced cashier on the cash desk. In that sense she was a senior cashier, though this was not a job title.

10. By the time she resigned on 11 April 2019, she was the longest serving cashier. She had seen numerous cash desk colleagues promoted. None of them were black or of mixed black heritage. All of them were younger than her, but two had been promoted in the 40-50 age bracket.

11. During her employment, if a shift changed and there was no supervisor present, and if she was working, the Claimant was given the task of handover to the next shift. She would inform the next shift what the next supervisor needed to know. This was not a formal arrangement. We find it more likely than not that the Claimant was given this task because she was the most experienced cashier on shift when she worked.

12. From time to time the Claimant covered for the supervisor role. She also trained new and junior cashiers.

13. Like many on the cash desk the Claimant volunteered for overtime.

14. The Claimant actively sought out training opportunities.

Salary Increase 2012

15. In early 2012, management decided to award gaming and cash desk staff a £1000 salary increase to recognise their contribution to the successful opening of the casino.

16. The Claimant was sent a letter in which she was purportedly awarded this increase, but her salary in fact remained the same at £23,500. As far as she is aware, she was the only person this happened to. At the time, there were other black cashiers and others with mixed black heritage and other cashiers of her age group, and she does not think this happened to them.

17. Mr Greenwood gave differing explanations for this salary increase. At paragraph 7 of his statement, he suggested that this increase was to make up some salaries to their market equivalent but not the Claimant's because she was on the top of the salary band. Whereas in his oral evidence he recalled that the £1000 increase was general and paid to the workforce after a successful opening. He accepted the Claimant was involved in the successful opening and could not explain why she was not awarded the increase. After the Claimant immediately complained and persisted over several months, she was ultimately granted the £1000 salary increase in July 2012. We find this was an increase applied across the board and no reliable explanation has been given for why the Claimant did not receive the increase initially.

STEP and PPP Bonuses from 2016

18. In July 2016, R1 introduced a bonus scheme. It had two parts both dependent on appraisal scores, known as Performance Enhancement System ('PES') scores (406).

19. First, the STEP programme identified high achievers. If an employee received 3 PES scores of 4 in their last three 6-monthly appraisals, then they would receive a salary increase of £1000.

20. Second, for a Personal Performance Payment (PPP) bonus, the employee's two previous PES scores had to be at least a 3 and a 4.

21. Mrs Joyce told the Claimant that she was excluded from the STEP incentive because her salary exceeded 'the bracket allocated' (425). She says she was told by a manager to tell the Claimant this, though she does not remember by whom. Mrs Joyce accepted in evidence the Claimant's salary was not in fact above the salary band.

22. On balance, despite the Respondents' inconsistent explanations, we find the Claimant was not eligible for either the STEP payment or the PPP bonus. This is because she did not receive high enough PES Scores. The Claimant disputed this during her grievance saying she had received 3s and 4s. Miss Lewis checked an excel spreadsheet of historic PES scores and provided the Claimant's PES scores to Mr Bailey who dealt with the grievance (512). The Claimant has not challenged this summary. We find it likely that she did not gain a PES score of 4 in the years during which she had lateness problems. On balance, therefore, we find the table of her PES scores to be correct. In 2012: 3; 2013: 2; 2013: 3; 2014: 3; 2015: 3; 2016: 2; 2017: 3.

Lateness

23. The Claimant accepts that, in the gaming industry, attending work on time is regarded as important. The cash desk (known as the cage) is a restricted

area. This means that the cashier finishing a shift cannot leave until the cashier due to replace them arrives. One cashier's lateness therefore directly impacts upon other colleagues.

24. The employee handbooks from July 2013 and January 2017 state at paragraph 2.9: 'Employees are individually responsible for ensuring that they arrive at work early enough to enable them to begin their work at the appointed start time…It is accepted that circumstances outside employees' control can cause lateness, for example if a traffic accident has caused long delays on the roads. However, a high volume of traffic causing delays that is a normal or regular occurrence, or which can reasonably be anticipated, will not be regarded as a valid reason for an employee's lateness.' (235) It advised persistent lateness may result in disciplinary action.

25. R1 had a clocking-in system, known as TMS. The nearest clock-in machine for the cashiers was about 30 seconds to a minute away from the booths where they sat to work.

26. We find that R1 followed this practice in relation to lateness:

    26.1. a manager would give an employee a negative file note ('NFN') for arriving at work late 3 times in 12 months, unless that person was on a final written warning when a NFN might be given for one further incident of lateness;

    26.2. if an employee was 1 minute late for work, they would be docked 15 minutes' pay;

    26.3. from September 2018, as set out in the cash desk newsletter, cashiers were asked to arrive in the cash desk 2-3 minutes before the start of their shift. (R1 might wish to consider the inequity of not paying for this early arrival whereas a 1 minute late arrival resulted in docked pay of 15 minutes.)

27. In her statement and her oral evidence, the Claimant accepted that she was persistently late at times and did not have a good record on timekeeping. Her main problem was that she had to drive to work from Kent and heavy traffic and accidents sometimes led her to be late. She could not afford to take the train.

28. Mrs Joyce described her problem with the Claimant's timekeeping as her arriving 'just in time' which led others to follow her example.

29. We set out below what disciplinary action was taken in relation to the Claimant's lateness:

    29.1. None in 2012;

    29.2. in June 2013 a formal warning for 6 lates in 6 months (349);

    29.3. on 16 November 2013 a NFN for 4 or 5 lates (393);

    29.4. no NFNs or warnings in 2014, 2015;

29.5. on 10 June 2016 (i.e. 3 years after first warning, following an NFN) a formal warning for lateness (654);

29.6. on 15 December 2016 a NFN for 3 lates (one for 1 minute);

29.7. on 2 May 2017 a first formal warning for lateness (4);

29.8. on 13 December 2017 a final warning for lateness (one for 1 minute);

29.9. on 21 April 2018 a NFN for 1 incident of lateness of 30 minutes (recorded incorrectly by Mrs Joyce as 45 minutes);

29.10. on 20 June 2018 being investigated for lateness but not disciplined for it: one was an asthma attack and one was 1 minute early.

29.11. In total: 3 formal warnings for lateness and 1 final written warning. The Claimant accepted those warnings and promised to do better.

Other Staff Disciplinaries

30. The Claimant was not alone in having a record of warnings. We do not have full information for the other cashiers working during the Claimant's employment but from the limited material before us we do know that:

30.1. In a management handover document, Mr A Buckleton (who was promoted to supervisor in early 2018) was described as follows: *'struggles with consistent level of customer service, several final warnings in regards to professional behaviour in the past*.' He also had anger management problems that led to conflict management training.

30.2. Miss Peneva (who was promoted to supervisor in May 2018) had a final warning for conduct issued on 21 March 2017 that expired on 20 March 2018.

30.3. Mr B Smith, who was offered promotion to supervisor in early 2018, was said to struggle '*with organisational skills'*.

Training Opportunities

31. The Claimant was keen to progress. She made 'bright spark' suggestions. During her employment she received 7 positive file notes commending her for good work: 3 in 2017 and 3 in 2018.

32. In October 2015, she was one of two employees selected to work on a VIP cruise, because of her customer service skills and rapport with customers. The marketing department, rather than her own, selected her for this.

33. As part of her ambition, she sought training opportunities and requested these in her appraisals. Miss Lewis agreed that managers would normally select for training those with the potential for promotion.

First Aid Training 2015, 2016.

34. The Claimant put her name forward to do first aid training when it became available in 2015 and 2016. Four white cashiers were selected. From Mrs Joyce's explanation in the covert recording of November 2018, selection for first aid courses appears to have been informal. We accept the Respondents' evidence that employees were selected for courses quite near to the time of the course to avoid drop-outs and some selection depended upon who was available on that day.

Table Games Refresher Training

35. On 19 May 2017 the Claimant emailed Russell Richardson of the gaming team to ask for a refresher training course or a session on the gaming tables so that she could work in the pit when available. In that email she told him of two days when she was off: the clear implication being those days were days she was available for training. She did not receive any reply. We therefore reject the contention at paragraph 24 of the Response form that the Claimant sought paid training.

36. At some point before his resignation in early 2018, Mr B Smith equally requested refresher training on gaming as he had prior experience like the Claimant. This was agreed to by Russell Richardson and the relevant managers. Mr B Smith did this training in his own time and obtained overtime shifts on the gaming tables when available. Mr B Smith is white and was not in his forties or mid-forties but younger when this opportunity was afforded to him.

37. When this difference in treatment came up in the final grievance, Mr Greenwood stated that a table assessment could be offered to the Claimant on the same basis as it had been to Mr Smith.

Conflict Management Training 2018

38. Normally only security, supervisors and managers received conflict management training. But towards the end of 2018 some spare places came up. Mr A Buckleton and Mr B Smith were selected.

    38.1. Mr A Buckleton had anger management problems and this was the reason he was selected.

    38.2. No reason has been given why Mr B Smith was selected.

    38.3. No reason has been given for not providing it to the Claimant.

Documents

39. About 6 months before May 2018, in the run up to the new data regulations (GDPR), R1 began to weed out documents from personnel files relating to 'historic personal data'. This process was ongoing.

    39.1. Mr Greenwood confirmed R1 kept documents relating to currently employed staff job applications and promotions.

39.2. Some recruitment documents found their way onto the Claimant's personnel file including the two interview notes in the bundle.

39.3. At paragraph 27 of his witness statement, Mr Greenwood stated that when he looked at the grievance, 'I read the available previous documents and could understand why other people had been promoted or appointed ahead of her, based on their track records and CVs and age did not come into it, and she didn't give me any reason to think that age or race did come into it.' … None of this evidence, if it existed, was before us. Mr Greenwood could not say why the documents he said he had read had not been provided in disclosure.

39.4. Miss Lewis' evidence was that recruitment documents went into a separate 'recruitment file'. She did not look for the documents of those successful candidates currently employed. No one in HR or R1 has looked at the successful applicants' files for the purpose of this claim. Miss Lewis could not explain why not. There is therefore no evidence before us to support the assertions in the Response form as to the merits of the successful candidates (e.g. page 165).

39.5. We have not seen any documentary evidence of criteria for posts except on the advertisement in 2013, see later.

39.6. As to disciplinary records, Mr Greenwood's evidence was that he looked at the records of other cash desk supervisors (paragraph 19). He asserted in his evidence that their records were not so bad. We have not seen this information and note that in relation to Mr A Buckleton and Miss Peneva it is arguably not correct (see above).

39.7. Mr Greenwood accepted that R1 had the PES scores for all internal candidates for the jobs the Claimant applied for. He accepted PES scores would have been a factor in the appointment decision (along with the interview performance). When asked why R1 had not produced comparative PES scores for the Claimant and the successful candidates to help support his contention that race and age were not factors, he stated, '*We have chosen not to*'.

Cash Desk Coach/Supervisor Positions

40. Jobs on the cash desk were difficult for R1 to fill because they are regulated and require the job-holder to be licensed. There is also a fair degree of industry-specific knowledge involved. It was therefore usually internal recruits who succeeded in obtaining the cash desk coach/supervisor role.

41. In 2013 a cash desk coach role was created (later called cash desk supervisor). The Claimant applied for this role in 2013, July 2014 and in November 2014. In each case she was not successful.

Cash Desk Coach 2013

42. In 2013 there were three cash desk supervisor vacancies. In July 2013 the Claimant applied and was interviewed for this role, but not appointed.

43. Using the information provided by the Claimant, we find that two of the successful candidates for supervisor were white and between 40-50 years of age, the other younger.

44. The criteria set out in the advertisement were: customer service experience and focus, and 12 months' cash desk room experience, and a PES Score of 3 or 4.

45. At this point, the Claimant had just received a warning for lateness. This was not referred to when she was told she was not successful. We find, however, it likely that it was considered in assessing her application because timekeeping was important in the industry.

46. There were also two *count* desk coach vacancies. The count desk is situated behind the cash desk. The Claimant was interviewed but not appointed. We do not know who was successful. At one stage however, Ms T Trezelle-Workes was promoted to count room coach. She is described (at 766) as 'black Caribbean'.

47. The Claimant was not interviewed for the cash desk manager vacancy, which went to a white employee aged between 30-40.

Cash Desk Coach July 2014

48. The Claimant applied again for the cash desk coach role in July 2014. She was interviewed on 8 July 2014 but not appointed. Two candidates were selected to be coaches: both white and between 25-35 years of age (361-366).

49. The Claimant had no NFNs or warnings in 2014. Her PES Score for the previous year, 2013, was a 2**,** meaning '*quality of acceptable customer service is inconsistent*…' (390). Her PES Score at the end of 2014 was a 3. We do not know what her mid-year score was. The interviewers will therefore have known that her last annual PES score was a 2. This was below the advertisement requirements for the job in the previous year. The interviewers will not yet have known her 2013 PES annual score.

50. The interview notes dated 8 July 2014 record 'good interview calm demeanour good answers and examples given. Working practice does not demonstrate readiness for cage role.'

51. Each month each colleague nominates another colleague for a 'rising star' award. Managers moderate the nominations and select the '*rising star of the month'*. In early August 2014 the Claimant was awarded the rising star award from nominations in July 2014. Through the rising star award, colleagues pick out those amongst them whom they regard as going places i.e. having potential for promotion.

Cash Desk Coach November 2014

52. Four months later the Claimant had another try for promotion to cash desk coach. Again, she was interviewed on 25 November 2014. The interview notes were retained on her personnel file. The interviewers stated she was able to draw on experience to give examples and identified the ability to do more than she did in the cashier role. But both agreed that she needed to put those answers into practice in her daily work and that she had not been able to identify how the coach role would support the manager. She was not appointed.

53. The successful candidate was white European and between 30-40 years of age.

54. In November 2014 the Claimant had no recorded lateness problems in the form of NFNs or warnings.

Other Positions

55. The Claimant tried for Guest Relations Supervisor in 2015, but her application was not acknowledged. By the time she sent a reminder email, it was the day the interviews took place. In this role the Claimant would have supervised staff greeting customers at the entrance. It was also lower paid. The successful candidate had been a cash desk supervisor and was white and between 40-50 years of age.

56. The Claimant applied for Compliance Risk Officer/Collator in February 2016 but was unsuccessful after interview.

57. The Claimant applied for but did not get an interview for Learning and Development Officer in August 2016. The Claimant acknowledged she did not have any qualifications for this role (410).

58. The Claimant applied for Group Collator in September 2016 and was advised she was unsuccessful. The Claimant acknowledged she had no experience in surveillance but relied on her lengthy experience in the industry and her ability to learn.

59. The Claimant applied for a trainee surveillance officer post on 12 December 2016 (415). The interview notes show she gave a good interview but did not get the role because the quality of applications was '*high with other candidates having skills in IT, report writing and communication above her own'* (417).

60. For those other positions, where we have not set it out expressly, we do not know the age group or race of the successful candidate.

December 2017 Cash Desk Supervisor Advertisement

61. A position of cash desk supervisor was advertised internally in late 2018. Only one vacancy was advertised.

62. The Claimant thought that Ms A Speiwak would be deciding the appointment. She did not think she stood a chance because this manager did not like her. She therefore did not apply.

63. Ms Speiwak resigned. Mr Malik acted-up and made the appointment decisions.

64. Mr B Smith was chosen for the role but on 1 February 2018 he resigned. On the same day Mr A Buckleton, the next best candidate, was offered the post instead.

Promotion of Miss Peneva May 2018

65. The staff handbook (both in 2013 and 2017) stated that vacancies would be advertised unless there was a '*succession management programme'*.

66. Mr Malik and Ms Stephens decided in about April 2018 that a further cash desk supervisor was required. They asked Miss Lewis, of HR, if they could appoint from the December 2017 recruitment round. Miss Lewis agreed.

67. During the grievance, R1 at first suggested there were 2 vacancies for the original advertisement, which was not the case. Miss Lewis' timeline, at page 463, showed this and that the additional supervisor role was only created 2 months later.

68. What we do not accept is that at the time (or indeed now) Miss Lewis genuinely considered that Miss Peneva could be regarded as on a succession management programme. There is no evidence of this. Miss Peneva was third in the list of five candidates and therefore not an obvious candidate for promotion. And, at the time of the interviews, she had final written warning for conduct. She was not in such a programme. We consider this is an excuse Miss Lewis came up with when the Claimant brought a grievance about the breach of policy in the failure to advertise this vacancy. Ultimately, in her oral evidence, Miss Lewis accepted Miss Peneva was not in a succession management programme.

69. Mr Greenwood said in his evidence that a final written warning would preclude someone from appointment. He later said it would be highly unusual to appoint someone with a final written warning depending on the quality of the candidate. Miss Peneva's warning would have expired in mid-March 2018, she was therefore on a final warning when interviewed and assessed.

70. Miss Peneva was promoted to cash desk supervisor without the appointment being advertised. She is white and was in her forties when she was appointed. The Claimant was very aggrieved about missing out on this opportunity. Despite her decision in December 2017, we accept that she would have applied for this further vacancy, now that she knew Ms Speiwak was not making the decisions. Of course, all potential applicants for this second vacancy were denied the opportunity to apply.

Promotions Generally

71. On the cash desk, no black or black mixed heritage cashier has been promoted. By the time of resignation there were around 20 cashiers and 3 supervisors across different shifts over the 24 hours.

72. Two employees in the 40-50 age group were promoted to cash desk

coach. The Claimant thought they were in her age group. This is consistent with her record in the evidence. Miss Peneva was also promoted to supervisor when she was in her forties.

73. Overall, we have heard of only 2 black or black mixed heritage employees gaining promotion to supervisory positions out of a staff of 560. Ms T Trezelle-Workes was promoted to count desk supervisor and Mr Bailey to the very senior managerial position of General Manager Gaming.

74. We have seen R1's diversity figures for September 2018 that 6% of staff are 'black British' with a further 7% being in the category 'ethnicity other' which may include people of mixed Black African heritage. There were, in 2018, therefore around 39 black British employees, perhaps more depending on the 'ethnicity other' category.

First Grievance

75. On 22 May 2018 the Claimant raised a grievance with Miss Lewis about a breach of R1's Equality and Diversity policy giving no details (491).

76. Mr Bailey was appointed to decide the grievance. It was established the grievance was about the appointment of Miss Peneva without advertisement and the lack of bonus. Mr Bailey met with the Claimant on 22 June 2018 and investigated. He spoke to, Mr Malik the acting cash desk manager.

Investigated for Lateness

77. On 21 April 2018, Mrs Joyce issued a NFN to the Claimant for being 45 minutes late. She now accepts the facts were that the Claimant had been 30 minutes late. (Mrs Joyce could have started dismissal proceedings because the Claimant was on a final written warning for lateness but did not do so.)

78. On 20 June 2018, the Claimant had a meeting with Mrs Joyce about recent alleged lateness since receiving a final warning. The Claimant accepted she was 30 minutes late on 10 April 2018. She told Mrs Joyce the reason was caring responsibilities for her grandchild. The second allegation of lateness was for arriving at her desk 1 minute late. The Claimant contended she had clocked in 1 minute early. The final incident concerned 16 June 2018. It was established this was an absence for an asthma attack that had been sanctioned by a manager. On 26 June 2018, Mrs Joyce informed the Claimant she would take no further action on these issues.

79. On balance we do not consider that Mrs Joyce investigated these matters because the Claimant had raised a complaint: at least two of them were substantial lateness that required investigation and Mrs Joyce took no further action, even though the Claimant was on final written warning.

Letter of Concern about Sickness

80. On 3 July 2018, Mrs Joyce sent the Claimant a letter of concern in relation to her sickness.

81. We accept that Mrs Joyce says this was a standard step and not because the Claimant had raised her grievance. Mrs Joyce accepted in the grievance that it should have been removed from the file because one of the absences was sanctioned by a manager and should have been recorded as a voluntary early leave (591).

First Grievance Outcome

82. Mr Bailey's outcome letter (511) of 4 July 2018 informed the Claimant that:

    82.1. HR had been consulted and it was reasonable to use candidates from the earlier exercise because it was within a few months.

    82.2. He summarised the Claimant's salary rises and PES scores and established she had not therefore qualified for the STEP or PPP bonus.

83. The Claimant appealed that decision. She objected to Ms Stephens dealing with it and it was passed to Mr Whitmore, Head of Live Table Gaming. The Claimant objected to him because he was junior to Mr Bailey and therefore was not, she argued, in a position to overturn the decision of his superior. This objection was not accepted.

84. On 7 August 2018 Mr Whitmore sent his outcome letter (553). He acknowledged that the Claimant had acted-up as supervisor ad hoc, as had other colleagues. He did not uphold her appeal, coming to the same conclusions as Mr Bailey.

Miss Djurisic approach 9 August 2018

85. Miss Djurisic was seconded to manage the cash desk. She heard from Mrs Joyce that the Claimant was arriving just in time or late. She knew that the Claimant was on a final written warning. She wanted to make it clear to the Claimant that she should not be late.

86. Miss Djurisic spoke to the Claimant in the corridor—a place where people would come and go from the cash desk.

87. Miss Djurisic did not threaten the Claimant with dismissal. She said she did not want to lose the Claimant through lateness.

88. The Claimant said to Miss Djurisic that she was arriving on time. Miss Djurisic responded that she was arriving '*just in time'*. We find this is likely what Mrs Joyce had told her, as it was Mrs Joyce's problem with the Claimant. We note arriving just in time is not arriving late. Miss Djurisic told the Claimant she should arrive 2-5 mins early for her shift. In this regard, on balance, Miss Djurisic may well have said to the Claimant, in an effort to make her point, that she was 'taking the piss'.

89. In this effort to make her point, Miss Djurisic came across as more than direct but aggressive and the Claimant felt intimidated by her comments.

90. We find, however, on balance that Miss Djurisic did not say you are a

'grown-ass' woman. We do so because this is not recorded in the Claimant's near-contemporary note of the conversation: a note in which she attempted to record what had been said. This was such an unusual comment that we consider the Claimant would have recorded it at this time, especially if she had been offended by it as she contends. We find Miss Djurisic probably said words the gist of which were: you are a grown woman, come in on time. This was again to make the point to the Claimant that she was sufficiently experienced to know that coming in on time was important.

91. We find on balance that, at this stage, Miss Djurisic did not know that the Claimant had complained about discrimination. We accept her evidence and she had not been interviewed.

ACAS EC Certificate

92. On 14 August 2018 the Claimant first contacted ACAS Early Conciliation. She was provided with a certificate on 14 September 2018 when it ended.

93. By this point the Claimant had TU representatives at her grievance meetings. She had also used online resources. She said she understood the ACAS EC period was either to reach a settlement or bring a claim. She had access to Trade Union advice but not legal advice. She had spoken to Citizens Advice at a brief advisory session. But she could not afford a lawyer.

Incidents at work

94. On 17 August 2018 Mr A Buckleton, now a supervisor, counted the Claimant down as she was reaching her desk. She had a reputation for arriving at work just on time. We find it likely this was why he was counting her into her desk. While it was likely meant as a joke, we accept the Claimant was upset by it.

95. The Claimant observed other cashiers arriving between 1 minute before and 1 minute after their shift started and not being spoken to.

96. The Claimant felt at this time that she was being watched and micromanaged. She contends that supervisors were standing behind her watching what she was doing. She recalls Miss Peneva pulling her up on how she had packaged some £20 notes but when the Claimant asked if she should do it differently Miss Peneva said not to do so and walked away. (The Claimant referred to this incident in a what's app discussion with a colleague on 20 August 2018). The Respondents' witnesses pointed out that the cash desk was a small space and that a supervisor would often stand behind the cashiers at the booths. We consider the Claimant may have become sensitive to management at this point because she knew she had made a complaint but that these incidents were not because she had raised a complaint. They were more likely, in our judgment, the approach of a relatively new supervisor, Miss Peneva.

29 August 2018 – 5 November 2018 Off sick

97. On 29 August 2018 the Claimant was signed off work by her GP with

stress. This period of sickness lasted until 5 November 2018.

98. On 18 September 2019 in the cash desk newsletter all cashiers were requested to attend 2-5 minutes before the start of their shift.

Second Grievance

99. On 5 October 2018, the Claimant then wrote to Mr Greenwood seeking to appeal Mr Whitmore's decision on the grievance appeal. On 11 October 2018 Mr Greenwood refused to hear an appeal against the appeal because that was not part of the procedure.

100. However, Mr Greenwood noted that the Claimant had raised new matters in her letter to him and he required these to be investigated by Mr R Smith, Group Operating Director (561). This has been referred to as the second grievance. The Claimant provided further details for it on 11 October 2018.

101. In this second grievance the Claimant alleged that:

101.1. she had been victimised, harassed, and bullied since raising her grievance by Mr Malik, Miss Djurisic and Mrs Joyce: she gave detailed examples;

101.2. she was facing ongoing discrimination in promotion;

101.3. R1 was looking to get rid of her;

101.4. she disagreed with the reasons for Miss Peneva's promotion.

102. The Claimant accepts that Mr Smith listened to her in his investigation and adopted a careful approach. He met with her on 22 October 2018 in a meeting lasting from 3pm to 6.30pm. He interviewed Miss Djurisic on 24 October 2018 about the matters she raised including the allegation that she had used the 'grown ass woman' phrase. He interviewed Mrs Joyce on 29 October 2018. Mrs Joyce said she knew a grievance had been made and the cash desk was small and that the cashiers talked but she did not know what the grievance was about. Mr Smith asked her whether she had harassed the Claimant or treated her differently or bullied her or victimised her (592). Mr Smith interviewed Mr Malik on 31 October 2018. He asked, 'were you aware that Rita felt you had discriminated against her'. He also asked whether Mr Malik had bullied her. Mr Malik said no and that he was disappointed to hear those allegations. (595) Mr Smith stated in the outcome letter that he also spoke to Mr R Richardson the CSM L&D Gaming who explained how Mr B Smith had been trained and that he had not been approached by any other cashiers 'for a similar situation'.

103. There is no real dispute that the cash desk was small, and discussions happened and that by this stage (end October 2018), in general terms, Mrs Joyce, Miss Djurisic and employees on the cash desk knew that the Claimant had made a discrimination complaint.

Second ACAS Certificate 26 October 2018

104. Meanwhile, on 26 October 2018 the Claimant had contacted ACAS Early

Conciliation again. A certificate was provided on 16 November 2018, the day after Mr Smith's outcome letter see below.

Return to Work 5 November 2018

105. On 5 November 2018, the Claimant returned to work and had a return to work interview with Miss Djurisic. The Claimant told her that the GP had recommended a phased return, but Miss Djurisic established there was no paperwork to support this and she asked the Claimant to obtain the necessary paperwork from her GP. Once it was forthcoming a phased return was allowed.

106. We find Miss Djurisic has a direct approach to management and this is the approach she adopted here. She was happy that the Claimant was back because the team was short-staffed. She was also relatively distant from the cash desk team.

107. We make the following findings about the Claimant's return to work:

    107.1. On day 1 she likely was ignored by her by her two colleagues and Mrs Joyce merely responded to her greeting. But Mr Buckleton did not ignore her.

    107.2. Mrs Joyce did not greet her with any more than an 'alright' on day one because of the grievance harassment bullying allegations made.

    107.3. Overall the atmosphere was initially uncomfortable for all. The Claimant was also quieter than usual.

    107.4. However this frosty atmosphere soon melted, and cash desk workers reverted to relatively friendly communication. We rely on the Claimant's covert recording of 27 November 2018 as evidence of this.

    107.5. On balance therefore we do not agree either that the Claimant was shunned for days nor that she was not speaking to her colleagues.

    107.6. Miss Djurisic was a distanced manager, as was her usual approach.

Second Grievance Outcome Smith

108. Mr Smith sent the Claimant his detailed outcome letter on 15 November 2018. He rejected the Claimant's grievance giving reasons for each issue.

109. The Claimant appealed the outcome of the second grievance by letter of 20 November 2018.

Mr Greenwood Appeal Meeting 28 November 2018

110. Mr Greenwood was employed by Aspers Group company, but he had authority to hold grievances for R1. He read the documents from Mr

Smith's investigation and his outcome letter.

111. On 28 November 2018 Mr Greenwood held a meeting with the Claimant and her TU representative. Miss Lewis also attended.

112. Mr Greenwood informed the Claimant that he did not consider her discrimination claim was substantiated.

113. Mr Greenwood had noted there were two new complaints in the Claimant's appeal letter, points 12 and 13, about matters that had occurred since the return to work on 5 November. Mr Greenwood did not investigate these apart from asking the Claimant about them. Point 12 alleged continued harassment, bullying, and unprofessional behaviour on her return to work. When asked about it at the meeting she referred to being ignored by Mrs Joyce and two colleagues on the first day. And Mrs Joyce only saying 'yeah alright' in response to her greeting. She told Mr Greenwood that this was very different behaviour than before her grievance where one of her colleagues would hug her and have a pet name for her. He expressed the view it was unsurprising if colleagues were not as friendly towards someone who had made a complaint of discrimination about them. She also told him that Miss Djurisic had demanded written proof of her GP advice on a phased return. He said that this was normal practice.

114. He pointed out what he called '*the elephant in the room'* that the Claimant was on a final written warning for lateness. He considered that this precluded her promotion. The Claimant said she had never been informed about this in previous job application feedback.

115. On games table training, the Claimant told Mr Greenwood, in response to Mr Smith's investigation, that she had asked Mr B Smith how he had got the training. She spoke to Mr Whitmore and, on his direction, asked Mr Richardson by email for the same training, but she did not receive a response. Mr Greenwood indicated he would take that away and have a look at it. He did not do so, despite noting to Miss Lewis, in a break, that it was 'a bit interesting' (807).

116. Mr Greenwood accused the Claimant of bringing a tribunal claim. There followed an 'oh yes you did; oh no I didn't' exchange between them, until Miss Lewis corrected Mr Greenwood.

117. We find that the Claimant did not agree not to use the 'discrimination' word during this meeting. In fact, Mr Greenwood pushed her into not using that word and pressured the TU representative not to do so. When, later in the meeting, the Claimant referred to what had happened as discrimination, Mr Greenwood intervened warning her that she was '*using the d word'* again. He made it clear that he did not wish to hear any further argument that she had been discriminated against.

118. At the end of the meeting, Mr Greenwood told the Claimant that if she made any further discrimination complaints that were not supported with evidence then the company might take a different approach. The recording transcript records him as saying: '*please don't take this as a threat or as a warning, just a bit of advice, you've made a number of serious allegations … most if not all of these things I don't believe are substantiated. If you*

make those kinds of allegations in the future, they need to be backed up and supported with evidence because, it's not a threat, but if there's a belief that an employee has made up allegations against other employees whether they're colleagues or senior people which, … can cause stress and upset for other people. The company might take a different view and treat what you've put in writing in a different way.' Having considered his oral evidence and the context, we unanimously find, 'different way', it was clear that Mr Greenwood was referring to disciplinary action. Although he repeated that his words were not a threat, we find it was plain they were in fact a threat to the Claimant. His aim was to make it clear to the Claimant that she might be disciplined for a discrimination complaint the next time if R1 took the same view that it was not substantiated. This was also his aim during the meeting when he discouraged the use of the 'd[iscrimination] word'.

119. Overall, having listened to the recording of the meeting, we find that Mr Greenwood was not aggressive but was condescending towards the Claimant.

120. The Claimant made a covert recording of the meeting with Mr Greenwood. During private breaks:

120.1. Mr Greenwood said to Miss Lewis 'One of the benefits of getting older I keep getting left out I've been doing … I've been doing this. It's like Danny La Rue … I've been doing pantomime for 500 years!' He used a whimpering voice in this exchange. Unanimously we do not accept Mr Greenwood's explanation that he was referring to himself in this exchange. The statement 'I keep getting left out' does not make sense if he was referring to himself. He was the HR director and there was no context for him being left out. This was more obviously a reference to the Claimant's complaint that she had been doing the job for years but kept getting left out of training and promotions. Although this comment was not directed at the Claimant, it clearly showed that Mr Greenwood's attitude was to mock her complaint of age-related discrimination.

120.2. Miss Lewis stated privately to Mr Greenwood she thought the complaints malicious and that the Claimant wanted money. Mr Greenwood did not agree with this.

120.3. We agree with the Claimant that Miss Lewis in the meeting was more than a scribe but gave her opinion to Mr Greenwood as can be seen in these private exchanges.

121. Mr Greenwood did not uphold the appeal and confirmed the outcome of the second grievance in a letter of 14 December 2018. It does not appear from his letter that he investigated whether the Claimant had contacted Mr Richardson, but he informed her that '*for fairness*' she could be offered games table training like Mr Smith (670). He stated, '*I think it would be sensible for a dealer assessment to be undertaken to evaluate your current performance level and a training plan created accordingly'*. He agreed in his oral evidence that this was known as a 'table assessment': a test of

dealer skills at the gaming table.

Further Issues at Work

Chebetlova Reprimand

122. Mrs Joyce did sheepishly reprimand Ms Chebetlova for being a minute late. She had changed her approach to reprimanding staff in public because of the Claimant's complaint. She was awkward in doing so because Ms Chebetlova was not normally late.

123. The Claimant's phased return ended on about 5 December 2018.

Short Changeover Shifts

124. Mrs Joyce gave the Claimant 4 short changeover shifts in the December 2018 rota. This was more than other colleagues. The Claimant would not have expected more than 2 in this month. A short changeover shift means that the next shift is 11 to 12 hours after the end of the first. This gives little time to travel home, rest and return to work. They are disliked by cashiers.

    124.1. The majority of the Tribunal (Ms Alford and EJ Moor) have reached the conclusion that this was a subtle way of punishing the Claimant for having complained. They take into account that the allocation of 4 shifts was twice what was normally expected and that these shifts were disliked. They weigh in the balance that Mrs Joyce was plainly upset by the discrimination complaint when asked about it at interview and likely took offence. Although Mrs Joyce gave the Claimant a holiday on her birthday in December, in their view this was because holidays were normally given to workers on their birthday. One of the reasons given to us for this rota was that the Claimant was on a phased return, which was not the case after 5 December. In their judgment, a partly incorrect explanation makes it less reliable and gives rise to the inference that the complaint was the reason for this treatment.

    124.2. Mrs Legg considers that this shift allocation was not a deliberate punishment. She weighs more heavily that Mrs Joyce gave the Claimant two days off on her birthday in mid- December when holidays were not normally given in December and considers therefore that the 4 shifts came about because of the difficulty of organising the rota. She also weighs heavily that the covert recording of late November shows that Mrs Joyce was accommodating to the Claimant about training and considers on balance that she was not therefore likely to have punished the Claimant in her allocation of shifts.

Handover

125. On 19 and 20 December 2018, the Claimant was not given handover information when a supervisor was not present. It was passed to more junior employees.

125.1. The majority of the Tribunal (Ms Alford and EJ Moor) consider, on balance, that this was because of the Claimant's discrimination complaint. It was a personal complaint against Mrs Joyce at least and colleagues likely knew about by then and understood that Mrs Joyce was upset by it. They consider the weightiest factor here is the prior practice that the Claimant was given the handover information if she was in work. This was because she was the longest-serving and most experienced. It was therefore unusual and undermining of her not to be given this information. This was a change in practice that, to them, was marked and odd. The inference arose therefore that colleagues were subtly leaving her out because she had made a discrimination complaint against one of their own.

125.2. Mrs Legg weighs most heavily the covert recording of late November in which staff appeared to be getting on amicably. She considers that not being provided with the handover information on only two days is insufficient a change from which to draw any inference.

Drinks

126. On 19 and 20 December 2018, all the other colleagues working in the cash desk, two cashiers, Miss Peneva and Mrs Joyce, discussed going out for a drink at Las Iguanas. The Claimant was the only one in the room not included. This was not a formally organised works drink, but we all consider it was a drink among work colleagues to which the Claimant would normally have been invited. We all agree it was at the very least insensitive to discuss the arrangements in front of her when she was not invited. We all conclude that this exclusion was because the Claimant had complained of discrimination. While working relationships were relatively amicable, the team did not wish to socialise with someone who had complained of discrimination against Mrs Joyce personally. This was a way to make their displeasure over the complaint felt.

Difficult customer

127. On 21 December 2018 the Claimant dealt with a difficult customer at the cash desk. She was used to having to do so. He may well have been abusive by raising his voice and arguing.

128. We accept the evidence of Miss Peneva and Mrs Joyce that they observed this but did not interfere because to do so could have exacerbated the situation and undermined the Claimant in front of the customer. This was their usual practice. Miss Peneva told us, and we accept, that the Claimant was really good at calming down difficult customers, and she did so on this occasion. Miss Peneva kept an eye on the situation to make sure she could see any sign, like eye contact, from the Claimant that she needed help. The Claimant did not give such a sign. It was not until after another customer that the exchange took its toll and the Claimant became upset. She left the cash desk in tears. Mrs Joyce, upon hearing this, went to her, and asked if there was anything she needed. The Claimant asked to go home early and Mrs Joyce agreed.

129. We are unanimous that on balance Mrs Joyce and Miss Peneva offered the right level of support here. While in the past Mrs Joyce might have been friendlier towards the Claimant when she went to see her, she nevertheless acted appropriately by going to see her, by asking her what help she wanted and by allowing her to go home.

Shredding

130. Miss Peneva directed that the Claimant should do some shredding on 21 December 2021. We considered whether this was another subtle way of punishing the Claimant by giving her a menial task. But, on balance, we all agree that this instruction to shred was not because the Claimant had made a complaint. We take into account the following matters: shredding had to be done within a certain time; there was a fair amount to do; everyone did shredding including managers; and this was just one occasion on which the Claimant was asked to shred. The Claimant objected to being asked to do shredding in her witness statement, but changed this in her oral evidence to objecting to the time when she was asked. The Claimant was not clear in her evidence that they were busy at the time: she said 'ideally' we were busy, which was not a memory of being busy. It was not clearly, therefore, an inappropriate time to be instructed to do so.

Sickness Absence and Return to Work Discussions

131. From 29 December 2018 the Claimant was off sick from work with stress.

132. On 14 February 2019 the Claimant presented a Tribunal claim for age and race discrimination and victimisation and harassment.

133. On 18 March 2019 she attended an occupational health meeting. On 25 March 2019 she attended a welfare meeting off site with Miss Lewis. By this time R1 was aware of the claim. In the light of the tribunal claim and prior grievance, they discussed the arrangements for the return to work. The Claimant suggested other members of staff be trained on bullying and harassment This was rejected because Miss Lewis considered the grievance closed and no member of staff had been found guilty of such behaviour. She referred to the polices that existed at work in equal opportunities and conduct and the training of managers in mental health.

134. On 2 April 2019, a second welfare meeting was held at short notice because of the expiry of the Claimant's fit note. The Claimant was accompanied. Miss Lewis confirmed a 12-week phased return. She proposed a return on 11 April and that the Claimant was paid 'emergency leave' for the period not covered by a fit note. Two options were discussed: either a return to the original role or a new role on the gaming tables. This latter role would have meant the Claimant did not have to work with those she had complained about.

135. For a return to work at the cash desk, Miss Lewis proposed that the cash desk team would be reminded of the importance of working together professionally. The Claimant would be provided with a buddy who could be a manager in another department. Miss Lewis referred to the lateness issue and the prior warning. She did so to explain that managers would

still have to manage lateness.

136. For alternative work at the gaming tables, Miss Lewis proposed that the Claimant would do 6 weeks of training. This was an insult to the Claimant who had a great deal of experience on gaming tables, albeit some 7 years before. She accepts that she would have had to learn the particular approach of R1, but we accept her evidence that this would not have taken anything like 6 weeks. She contends that normal training would start with a table assessment (as Mr Greenwood had proposed in the grievance outcome); or the kind of training Mr B Smith received which took no more than a few hours; or, at the most, the 2 weeks of training that R1 admits would be provided to an experienced croupier starting work with R1.

137. The Claimant wrote to Miss Lewis 5 April 2019. She explained how she felt about the proposed 6 weeks' training. She told Miss Lewis she considered it to be insulting. She also made the point clearly that it would be treating her differently from both Mr B Smith and a new starter with her experience

138. In Miss Lewis' reply of 9 April 2019 she refused to adjust the length of the training period. She relied on there being a phased return (but did not explain how the standard 2 weeks for a new starter became 6 weeks even with a phased return) and she tried to distinguish Mr B Smith's situation.

139. Why, then, did Miss Lewis state that the alternative role would start with 6 weeks of training? In her evidence to us she said if it turned out it was not necessary it could have been reduced. But this is not what she told the Claimant in her reply. Miss Lewis ignored the two plainly comparable situations. As a matter of fact, Mr B Smith could not be distinguished from the Claimant: he too was a current cashier with experience. In the past, the Claimant's request had also been for unpaid training. As a matter of fact, the new starter with experience, was probably less of a comparator, having no experience with R1 at all. But even if their 2 weeks of training had been applied, a phased return would not have turned it into 6 weeks. We do not accept Miss Lewis's evidence that she was trying to ensure the training was a success. If this had been the case we consider, on hearing the Claimant's objections, she would have altered her initial proposal along the lines of her oral evidence to us: starting with Mr Greenwood's proposal of a table assessment and seeing how the Claimant went. She told Mr Greenwood she thought the complaint malicious. We have concluded, on balance, that Miss Lewis used the training as an obstacle to the Claimant's return because she thought the Claimant had made a malicious complaint.

Resignation

140. On 11 April 2019 the Claimant resigned by letter.

141. We find her reasons for doing so from her letter were:

    141.1. she felt the 6 week training course for the table games option was demeaning, belittling, and insulting and was an act of discrimination in itself compared to the treatment of Mr B Smith who had only a few hours of training. It was the equivalent to a new trainee. A new starter only received 2 weeks' induction. A

table assessment test would have been appropriate to determine ability, before imposing 6 weeks' training;

141.2. she did not consider it was Miss Lewis' intention to look into the recent issues, by which we find she meant point 12 of her last grievance and her contention that she had been victimised on the cash desk because Miss Lewis had reiterated that the matter was closed;

141.3. she considered there was 'discriminatory treatment' from 'cash desk colleagues' which had continued and gave her no confidence in returning. This was the treatment she complained about since her grievance that we have set out above;

141.4. no assurance had been given about training the individuals implicated and her request that there be bullying and harassment training within the company had not been acknowledged.

142. In addition, while not referred to expressly in her resignation letter, we unanimously find that the alleged discrimination in promotions was also in the Claimant's mind when she resigned. We rely on her oral evidence in cross-examination where she referred to the start of her considering that her employment was becoming 'intolerable' was when she 'realised' she was being discriminated against in promotions and submitted her grievance.

143. We also find that the Claimant very likely had in mind Mr Greenwood's approach to her grievance given that it was so striking: his threat not to bring further complaints of discrimination and his suppression of the 'discrimination' word during the meeting. In her claim form of 14 February she refers to his indirect threat of counter-action if she went to a tribunal and that she found his approach bullying, intimidating, and harassing (paragraph 63). And, at paragraph 93 of her Amended Claim form, she contended that she resigned in response to the conduct set out. We therefore find Mr Greenwood's conduct at the meeting was also one of the matters that caused her to lose confidence.

Holiday

144. All agree the holiday year was the calendar year. The Claimant was paid for her accrued but untaken holiday for 2019. She claims 4 days in respect of 2018 when she had booked holiday but was sick. She agreed in her evidence that she had taken 4 weeks' paid holiday in 2018 in addition to these four days.

Submissions

145. Both representatives gave us succinct and helpful oral submissions. We summarise their main points below.

146. Mr McFarlane, for all Respondents, started at the end and argued that there was no constructive discriminatory dismissal here. His main argument was that nothing had happened after the last incident at work on

21 December 2018 which amounted to a breach of contract or last straw. He argued that by continuing to receive pay until early April, that was too much of a delay and was affirmation. The welfare meetings were to achieve a successful return to work while being consistent with the grievance outcomes. The Claimant's objection to the training offered was inconsistent with her claim in the past that she had not received sufficient training. This was not a last straw.

147. Mr McFarlane acknowledged that Mr Greenwood's handling of the grievance could be criticised but what he had said in the covert recordings was not directed at the Claimant. His aim was to find a successful way forward. The Claimants TU representative appeared to agree this was not a discrimination case.

148. On the direct discrimination case, the logic of the Claimant's case on promotion had to be that there was a policy or practice of discrimination and she had not shown that here. The appointment of Miss Peneva was in relation to a job round for which the Claimant had not applied. This decision could not be said to have been to ensure the Claimant failed. He relied on the Claimant's poor timekeeping as the more obvious explanation for why in the past she had not been successful. He made detailed submissions on why the particular complaints were not race or age related.

149. In relation to victimisation he asked us to weigh heavily the covert recording in November which showed staff relationships were amicable despite the investigation of the grievance. The Claimant was sensitive to matters that arose at work because she had raised a grievance.

150. He argued that much of the claim was out of time and could not be revived by a new ACAS EC certificate. There was no explanation for any delay and during much of the period the Claimant had access to TU advice. The weeding of the personnel files by R1 meant that they were prejudiced in not having available all documents. He acknowledged that the dismissal claim was in time.

151. Mr Starcevic for the Claimant gathered the direct discrimination claim into 4 strands: bonus/incentives; promotions; training; and treatment in lateness and absence.

152. He argued there was a pattern here of failure to succeed although the Claimant was clearly very experienced and long-serving and paid higher to recognise that. She was rejected for promotion even when voted a 'rising star'. Her lateness had not been referred to as a problem in feedback and anyway others with chequered careers had been promoted. It was remarkable there were no black supervisors in the cash desk. The only similar promotion was that of Ms Trezelle-Workes, which did not fit with the demographics produced. When there was a promotion to someone in authority this was consistently a white, younger person. He reminded us that evidence of race or age discrimination is usually not obvious and it was a question of what inference could be drawn from the facts. He argued the facts here allowed us to draw such an inference of a arguable case which led to the burden of proof being reversed. R1, he contended, could not then show that in this case the decisions made were

in no way tainted with race or age. Very often no explanation had been given. R1 had not even provided us with the CVs of the successful candidates.

153. On the time point Mr Starcevic relied on the direct discrimination complaint here being about a 'state of affairs' and as such a continuing act. There did not have to be an express policy. It was right for the Claimant to pursue her complaints internally before bringing a claim. From then on R1 could have preserved documents and there were clearly some in existence it had simply chosen not to produce.

154. On victimisation he argued that Mr Greenwood's approach clearly was to threaten the Claimant. We could rely on his tone, his rubbishing of the Claimant's genuine complaints. As in St Helens (see below), so here Mr Greenwood had crossed the line from an appropriate expression of his view that the grievance did not succeed to inappropriate pressure and threats. The manner in which the grievance was handled could still amount to a detriment even if the outcome was correct, he referred to Deer (see below).

155. He argued there was a discernible change in attitude towards the Claimant after her grievances which was because of the grievance. This was a closed environment: the team was likely to know.

156. On harassment he repeated, effectively, his submissions and drew our attention in particular to the complaint against Miss Djurisic and Mr Greenwood's mocking of age.

157. On unfair dismissal he went through the statutory test and argued there were two last straws here: the 6 weeks' training and the decision not to coach staff on bullying even when the continuing claim had not been investigated. Nor was there any affirmation here: the Claimant with the Respondent was still discussing her options. It was not an affirmation to see what the Respondent could propose post-grievance.

Law

Unfair Constructive Dismissal

158. Section 95(1)(c) of the Employment Rights Act 1996 ('the ERA') provides that there is a dismissal where the employee terminates the contract in circumstances such that she is entitled to terminate it without notice by reason of the employer's conduct. This is known as a 'constructive dismissal'.

159. An employee is entitled to terminate without notice (treat herself as constructively dismissed) when the employer has committed a repudiatory breach of contract, Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, namely: *'a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract'.*

160. The Claimant relies on the implied term existing in all employment contracts '*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' Malik v BCCC SA [1998] AC 20, 34H-35D.

161. A breach of this implied term is inevitably a repudiation of the contract. The test whether there is a breach is objective and not dependent on the employee's subjective view.

162. The Claimant also relies on the principle that a course of conduct can amount to a breach of the implied term: individual actions may not in themselves be sufficient but taken together may have the cumulative effect of such a breach. The last incident relied on does not need to be serious (a breach in and of itself), Lewis v Motorworld [1986] ICR 157, but it must contribute, however slightly, to the breach of the implied term, Omilaju v Waltham Forest LBC [2005] ICR 481. This is an objective test: even if the employee finds it hurtful, if the last act is innocuous it is insufficient.

163. If there is a repudiatory breach the employee must show that she resigned at least partly, in response to the breach, Nottinghamshire County Council v Meikle [2004] IRLR 703 CA.

164. After any repudiatory breach the employee has a choice, either to affirm the contract and continue to work, or to accept the breach, resign and treat herself as dismissed. Delay in resigning after the breach is not, of itself, affirmation but, in an employment context, it may be evidence of an implied affirmation. This is because, by working and receiving a salary, the employee can be said to be doing acts consistent with further performance of the contract and therefore affirmation of it, WE Cox Toner Ltd v Crook 1981 ICR 823 EAT. However, if the innocent party further performs the contract to a limited extent, but at the same time makes it clear that she is reserving her rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice her right subsequently to accept the repudiation, Farnworth Finance Facilities Ltd v Attryde [1970] 1 W.L.R. 1053.

165. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, the Court of Appeal restated the law on affirmation in a 'last straw' type case (after it had become unclear). The Claimant can refer back to earlier cumulative events if there is a 'last straw' and no affirmation after it. At paragraph 55 Underhill LJ set out a useful sequence of questions: 1. what was the most recent act or omission which the employee says triggered his resignation. 2. Has he affirmed the contract since then? 3. If not, was the last act a repudiatory breach on its own. 4. If not, was it nevertheless part of a course of conduct, which viewed cumulatively amounted to a breach of the implied term. The Tribunal does not need to consider possible previous affirmation if it has identified a later last straw. 5. Did the employee resign in response or partly in response to that breach?

Direct Discrimination

166. Under section 13 of the Equality Act 2010 ('EqA'), the Claimant must establish, on the balance of probabilities, less favourable treatment because of race or age.

167. Under section 39, in employment (and so far as is relevant here) less favourable treatment must amount to either a dismissal or a detriment or in the way in which opportunities for promotion and training are accessed.

168. To find a 'detriment' a 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'*, Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11 (paragraph 34). An unjustified sense of grievance cannot amount to 'detriment'. But nor is it necessary to demonstrate some physical or economic consequence.

169. Deer v University of Oxford [2015] IRLR 481 EWCA confirmed that the manner in which a grievance was handled could amount to a detriment even if the outcome of the grievance was justified.

170. The less favourable treatment should be judged against a comparator whose circumstances are not materially different, section 23 EqA.

171. The reverse burden of proof was enacted to assist Claimants. Section 136(2) of the EqA provides: '*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.*' Section 136(2) does not apply if A shows that A did not contravene the provision. The guidance of the higher courts is that the Tribunal should follow a staged approach to determining the issue.

172. The first stage is for the Claimant to show an arguable case for discrimination. The second stage is for the Respondent to show a non-race- or age-related reason.

173. If the Tribunal is satisfied that the Respondent has shown the reason for any unfavourable treatment, it can go straight to the second stage, the 'reason why' question, in reaching its decision.

174. If there is more of a question-mark over the reason for treatment, it is best to follow the two-stage test as set out in the guidance in Igen v Wong [2005] IRLR 258 CA.

    174.1. The first stage is that the claimant proves on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the Claimant, which is unlawful. These are referred to below as 'such facts'. (We pause to note 'such facts' could include evidence of a difference in status, a difference in treatment, and evidence as to whether a like for like comparison is drawn.) If the Claimant does not prove such facts, she will fail.

    174.2. It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. In some cases the discrimination will not be an intention or 'motivation' but merely based on assumption or because an employer unwittingly applies a different standard

to non-white employees. The outcome at this stage will usually depend therefore what inferences it is proper to draw from the primary facts.

174.3. At this stage the question is whether the primary facts 'could' lead to the conclusion of discrimination.

174.4. At this stage the Tribunal assumes there is no adequate explanation.

174.5. Is any provision of a Code of Practice relevant?

175. Once the Claimant has proved 'such facts', it is then for the employer to prove that it did not commit the act. It is then necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of race or age. A cogent explanation is normally required.

176. The bare facts of a difference in treatment and a difference in status only indicate a possibility of discrimination, they are not 'without more' sufficient material from which a Tribunal can conclude that there has been discrimination, Madarassy v Nomura International plc [2007] IRLR 246 CA paragraph 54-57. Likewise, that the employer's behaviour calls for an explanation is insufficient to get to the second stage: there still must be reason to believe that the explanation could be that the behaviour was '*attributable (at least to a significant extent)*' to the prohibited ground, B v A [2010] IRLR 400, per Underhill P at paragraph 22. Therefore '*something more'* than a difference of treatment and a difference of race is required. (This is logical given that in some cases, a difference in treatment may merely be because of a small sample size.)

177. In Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279 at paragraph 19 Sedley LJ observed this 'something more' did not have to be a great deal, for example a comparator treated more favourably in the absence of explanation.

Victimisation

178. Parliament has decided that those who make complaints of discrimination should not be treated badly for doing so. The policy behind the victimisation provisions is to ensure that workers are not deterred from bringing complaints even if those complaints are not correct but as long as they are made in good faith.

179. Section 39(4) of the EqA provides that: (4) An employer (A) must not victimise an employee of A's (B) - … (d) by subjecting B to any other detriment.

180. Section 27 of the EqA defines victimisation as follows:

'*(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.'

181. A protected act includes: *'making an allegation (whether or not express) that A or another person has contravened this Act'* section 27(2)(d). Thus, the definition of a 'protected act' is broad. It is any allegation, even if not made explicitly, that a person has contravened the Equality Act. The act prohibits discrimination because of race and age, among other protected characteristics.

182. An allegation is not a protected act 'i*f it is made in bad faith'*, section 27(3)

183. Sometimes it is poorly understood that the prohibition against victimisation applies even if the discrimination allegation is incorrect or subsequently found not to be substantiated, as long as it was made in good faith. Here, importantly, R1 has not contended that the Claimant made her complaints in bad faith.

184. What about the link between the protected act and the detriment: how do we interpret the word '*because*' in section 27? The law requires more than a 'but for' link: it is not enough to say that, if the Claimant had not made the complaints, then the bad treatment would not have happened.

185. The Tribunal must consider what was in the mind of the decision maker, consciously or subconsciously. Chief Constable of West Yorkshire v Khan [2001] ICR 1065 HL suggests must find the 'core reason' or the 'real reason' for the act or omission. The Equality and Human Rights Commission Code at paragraph 9.10 also makes it clear that the protected act need not be the only reason for the decision.

186. It is also important to remember that a discrimination allegation is not necessarily an allegation of intentional race (or other) bias. Discrimination can occur entirely unconsciously (unwittingly) by the operation of unconscious biases, for example racial stereotyping. Employers should by now be aware of this. Most people are unwilling to acknowledge, even to themselves, that race (or another protected characteristic) could be an unwitting factor in their conduct or decision-making. We all like to think of ourselves as fair.

187. Mr Starcevic referred us to St Helens MBC v Derbyshire [2007] UKHL 16, in which two letters sent to equal pay claimants by solicitors during litigation were deemed to have crossed the line between the proper defence of the action and detrimental treatment. The Tribunal decided the letters effectively contained a threat and were intimidating.

Harassment

188. Section 26 EqA provides so far as is relevant to this case:

'(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to [race/age], and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. …

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

© whether it is reasonable for the conduct to have that effect.'

189. We must ask the questions posed by the statute in turn.

190. To establish that the unwanted conduct is 'related to' the protected characteristic the Claimant does not have to show that the unwanted conduct was directed to her 'because' she was black or of a certain age, but that there was a connection between the conduct and those matters, see paragraph 7.9 of the Code, and Hartley v Foreign and Commonwealth Office Services 2016 (paragraph 23-24). In that case the EAT held that whether the conduct is 'related' to the protected characteristic is a broad test, requiring an evaluation by the Tribunal of the evidence in the round. The alleged perpetrator's and victim's perceptions of whether it is related are not conclusive. The precise words and the context are important. It is also open to us to draw inferences if necessary.

191. The question of whether an act is 'sufficiently serious' (to quote from the Code at paragraph 7.8) to support a harassment claim is essentially a question of fact and degree.

192. In Weeks v Newham College of Further Education EAT 0630/11 Langstaff P considered that '*environment'* means a state of affairs, which may be created by one incident where the effects are of longer duration (paragraph 21). But at paragraph 17 he observed:

> '*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.'*
>
> The context of words used is very important.

193. Whether the conduct violates a person's dignity is also a question of fact and degree. We note the observations of Underhill P (as he then was) referred to us by Mr Caiden in Richmond Pharmacology v Dhaliwal [2009] ICR 724 (EAT) at paragraph 22 (in a harassment related to race claim):

> *… 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 (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…*

Time Limits

194. A claim of unfair dismissal or of discrimination must generally be brought within 3 months of the act or omission complained of ('the primary time limit'), as extended by the ACAS Early Conciliation ('EC') provisions.

195. The EC provisions alter the primary time limit in this way: within three months of the dismissal or act/omission complained of then the prospective claimant must start ACAS EC by contacting ACAS. At the end of this process ACAS would provide them with a certificate with an end date. Depending on the dates the prospective Claimant had up to one further month within which to bring a claim.

196. In De Lacey v Wechseln Ltd UKEAT/0038/20/VP, the question of time limits and constructive dismissal and discrimination was considered. There the claim of constructive dismissal was brought in time. If then the Tribunal finds that earlier acts of unlawful discrimination had a material influence on the resignation, then the claim for dismissal discrimination would be in time even if the acts of unlawful discrimination alone were outside the primary time limit.

Extension of Time Limits in Discrimination Claims

197. First, we must consider whether there was '*conduct extending over a period'* section 123(3) EqA. Some unlawful conduct must be within the primary time limit for this to apply. An act or decision with continuing consequences is not an act extending over a period. A state of affairs/regime/policy may well extend over a period.

198. If the claim is outside the primary time limit, we consider whether to extend our discretion to extend time if it is '*just and equitable'* to do so, section 123(1)(b) EqA. In exercising this jurisdiction, we weigh the relevant factors including the reasons for the delay, the availability of legal advice, the balance of prejudice caused by the delay, the merits of the claim.

Holiday

199. The representatives agreed that holiday that could not be taken because of sickness could be carried over into the next holiday year if it was that referrable to the 4 weeks' holiday derived from the European working time directive: Regulation 13 of the Working Time Regulations 1998, rather than the Regulation 13A additional leave of 1.6 weeks.

Application of Facts and Law to Issues

200. We agreed at the outset that the Amended Claim and Response form encapsulate the issues in addition to Schedule A of the Case Management Order from the preliminary hearing of 24 May 2019. Mr Starcevic helpfully provided a 'List of Allegations' showing the allegation, which claim it related to and the relevant paragraph number of the claim. We have used this list to work through each of the factual issues before us.

Holiday Pay

201. We find that the holiday pay claim fails. This is because as a matter of fact, the Claimant had taken 4 weeks' leave in the holiday year 2018 before the additional days leave on which she was sick. The representatives agreed in those circumstances that the leave lost could not be carried over.

Direct Race Discrimination

202. We identify the complaints of direct discrimination by referring to the Claim Form paragraph numbers as identified in Mr Starcevic's List of Allegations.

Failure to Promote: Paragraph 101 (a)-(d)(h)(j)(k) and paragraph 23

Race

203. The Claimant refers to each job application and 'avers' that she was treated unfavourably on grounds of race or age when she failed. Mr Starcevic, in closing, put his case on the basis that, standing back, we could detect in this a state of affairs. The Claimant had failed on so many occasions to succeed. He argued that we could infer from demographics and her long experience and fitness for promotion that this was because of race.

204. We first look at the applications the Claimant made to become cash desk coach/supervisor. This is because this was the most obvious promotion for her to seek, given her experience and position. There were 3 opportunities for 6 vacancies (3 in 2013, 2 in July 2014 and 1 in November 2014).

205. First, we ask whether the Claimant has established a difference in race. Within the cash cask roles, we consider that she has done so. Only white individuals were promoted.

206. We do not consider that, over 5 years, the promotion of only two black or mixed black heritage candidates to supervisory or managerial positions is enough to suggest there was no difference in race here: the cash desk coach/supervisor is a different position and different managers assessed promotion to it. (In any event, the promotion of two individuals in a work force of 560 over 5 years sounds few; we have no figures on how many promotion exercises there were and the proportions of black and white candidates in order to put those figures in context. The Respondent ought to have supplied such figures had it wished to use those two promotions to defeat this claim.)

207. We then go on to look for 'something more', as Madarassy requires. Is there any evidence in this case that could enable us to draw the inference that the Claimant was not promoted because of race? We bear in mind it

is rare to find express evidence of this (something Mr Greenwood appears to have misunderstood). We must look at all the circumstances. It has been a very difficult decision for us to reach. In order to 'show our working' we list below those factors that could amount to a 'something more'. We have then weighed them against factors which point in the other direction.

208. The possible 'somethings more' we considered were:

208.1. R1's failure to provide documents (or evidence) to support the case in their Response form that the successful candidates were better. R1 made a deliberate decision not to provide comparative PES score data. Miss Lewis could not explain why the currently employed successful candidates' recruitment documents were not supplied when they appear to have been available to the drafter of the response form.

208.2. The Claimant was the most experienced cashier at the start. This is why she was paid more. She acted-up as supervisor on occasions, trained juniors, and was the person to receive the handover information in the absence of a supervisor if she was on shift. All these factors suggested she was likely fitted for promotion to supervisor.

208.3. The interview notes in July 2014, that she was not ready for the role, were inconsistent with her nomination as a rising star in July 2014 and selection for it in August 2014. We take into account, however, that the first opinion was expressed by a manager and the second by peers.

208.4. She had no lateness problems in 2014, the year that 2 of the 3 promotion exercises were held.

209. We have also considered the factors that do not point to an inference of race:

209.1. the Claimant's PES scores do not suggest she was an obvious candidate for promotion. For the 2013 exercise she had a 3 (her 2012 score) and for the 2014 exercises she had a 2 (her 2013 score). We consider a candidate's PES score was likely a criterion: we refer to the advertisement from the first selection process. She was not a high-flyer according to her PES scores.

209.2. In relation to the 2013, the Claimant's lateness problems and warning in that year suggest she was not obviously fitted for promotion at that time. We agree that supervisors would have to model good conduct, and prompt timekeeping was important.

209.3. The comments in her November 2014 interview notes evidence specific and plausible reasons for why she failed: that the Claimant needed to put her answers into practice in her daily work and that she could not explain how a supervisor would support the manager.

209.4. The Claimant's failure to secure other jobs does not provide

supporting evidence because: we have insufficient evidence of a difference in race or age for the Compliance Risk Officer/Collator; Learning and Development Officer; and Group Collator roles (none of which appear obviously to be supervisor.) The Claimant acknowledged some lack of qualifications for the Learning and Development Officer role. It appears to us her application had not been received for the Guest Relations Supervisor role. And, for the Trainee Surveillance Officer role, there is specific evidence from the interview notes that others had more relevant skills.

209.5. The lack of witness evidence from R1 is potentially explicable because these promotion exercises were 5 and 6 years before the ET1 was presented. Although we have not heard any specific evidence about whether the decision makers were no longer employed.

210. We have considered these factors with a great deal of care. We have concluded (with some difficulty, but unanimously) that none of the possible candidates for a 'something more' could lead us to conclude (or infer) that the failure to promote the Claimant to cash desk supervisor was because of race.

210.1. While there are factors that suggest the Claimant was fitted for promotion—her experience, her acting up, the handovers—there are equally factors that point away from this—for the 2013 exercise her lateness and for the 2014 exercises her poor PES score.

210.2. While some available documentary evidence has not been provided with no explanation, the documents that we do have suggest that for the November 2014 exercise, the interviewers gave specific and relevant reasons for why the Claimant failed.

210.3. The other job applications do not support any inference of race or of a policy or practice.

Age

211. We have more easily reached the conclusion that the promotion decisions were not because of age. We refer to the same reasoning as in the direct race discrimination case, but we are reinforced in this view because two of the successful candidates promoted to cash desk supervisor were in the age group 40-50. We consider that this is so close to the mid-forties age group that the Claimant relies upon as to prevent us from drawing any inference that the reason for not promoting her was age-related.

Other job applications

212. It follows from our assessment (above) of the jobs other than cash desk coach/supervisor for which the Claimant applied that we do not consider there is enough evidence either to show a difference in race or age; or to show a 'something more' that could lead us to infer the failure of the Claimant was because of race or age.

Additional Cash Desk Supervisor Post in May 2018: paragraph 101(o)

213. That leaves the question whether the promotion of Miss Peneva to cash desk supervisor in May 2018 was because of race or age.

214. Here we have been unable to find a difference in race or age. The decision complained about is the decision not to give the Claimant an opportunity to apply. But every potential candidate, apart from Miss Peneva was disadvantaged by this. There is no suggestion that only black or mixed black heritage candidates would have applied or older candidates would have applied. We know there were approximately 20 cashiers and internal promotion was usual. We find therefore that some of those who were disadvantaged by this decision were white and younger.

215. We accept, however, that the decision to appoint without advertisement was contrary to the First Respondent's policy because Miss Peneva was not in a succession management programme. This was not a case of a candidate dropping out: it was a new vacancy. The convenience of using the prior procedure may have been uppermost in the managers' minds but this was not a good enough reason for breaching the procedure and denying others an opportunity to apply for this new vacancy.

Training

216. We have considered the three allegations that there was direct race and/or age discrimination in relation to training.

First Aid: paragraph 101(e) and (g)

217. In relation to first aid training there was a difference in race and age: white, younger employees were offered first aid training and not the Claimant. We considered whether the Claimant's request for training could amount to 'something more': it could be argued that it was odd that she was not provided with this training when she had specifically requested it. But in the light of the practice, explained by Mrs Joyce in the covert recording in November 2018, we do not consider this enough to shift the burden of proof. People were offered first aid training randomly and much depended on who was available at the time. We have therefore concluded that race and age were not the reasons for not being offered this training.

Conflict Management: paragraph 101(m)

218. In relation to conflict management training, there was a difference in race and age between the Claimant and Mr Buckleton and Mr Smith who were offered it. In relation to Mr Buckleton's selection there was an obvious reason why he had been selected: he had anger management problems. We accept that reason. It was not to do with race or age. We do not know the reason for Mr Smith's selection but again take the view that selection for this training likely depended on who was available and when. It was a one-off and there was only one space available. We do not consider the Claimant has identified enough of a 'something more' to shift the burden of proof in relation to this training.

Table Games Refresher: paragraph 101(l)

219. In relation to refresher table games training, we take a different view. In this case Mr B Smith was a true comparator: he was in the same circumstances as the Claimant being someone with prior experience who asked for refresher table games training in his own time. The Claimant has identified a clear difference in race and age. We have rejected the First Respondent's attempt to distinguish the two cases: the Claimant's email to Mr Richardson identified two days off she had coming up. She did not expect that the training was paid. She made the same request Mr Smith had made, but unlike him was not provided with the training. This was not a limited training place: unlike the conflict training or the first aid training.

220. We consider that the 'something more' here is that R1 gave what was evidently a wrong explanation for why Mr B Smith obtained the training. This was an explanation it put forward expressly in its Response (paragraph 24). It stated, in terms, that the difference between them was that Mr Smith did not ask for the training to be paid. But R1 did not pursue this difference in evidence. The Claimant's evidence and email were clear. While we do not consider R1's explanation in the first stage (considering whether the burden of proof has shifted), we can take into account that the Respondent provided us with an uncredible explanation at this first stage as a 'something more'. There is a stark difference in treatment between two real comparators here and an uncredible explanation put forward that was not withdrawn, even after the Claimant's email was disclosed. It is not as if the Respondent likely mistook its explanation. It had every opportunity to investigate this allegation in the second grievance (Mr Smith) and its appeal (Mr Greenwood). The Claimant had told R1 about her email to Mr Richardson. We consider that the true comparator and this uncredible explanation could lead us to conclude that the reason the Claimant was not provided with refresher training on the gaming tables was her race and/or her age.

221. The burden of proof therefore shifts to R1 to show that race and/or age had nothing whatsoever to do with the failure to provide her with training. R1 has failed to do so. We have heard no explanation for the difference in treatment at all. R1 has not told us that Mr Richardson was not available to give evidence. R1 could have explained that this was merely an oversight. It did not do so. The explanation it has given – that Mr Smith offered to do the training in his own time, does not distinguish him from the Claimant and is therefore no explanation at all.

222. We therefore find that the Claimant was directly discriminated against because of her age and her race in not being provided with refresher games table training.

Money

223. The third category Mr Starcevic relied upon related to the direct discrimination claims in relation to money.

Salary Increase: paragraph 6

224. In relation to the £1000 increase in salary, we do not consider that the Claimant has made out any difference in age and race from the treatment

of others. She states she was singled out. This means, because there were others of her age and other black or mixed black heritage cashiers, that there was not a difference of age or race here. For this reason, her claim fails.

Bonus Scheme: paragraph 20, 101(i)

225. In relation to the STEP and PPP elements of the bonus scheme, the Claimant has not established any unfavourable treatment in the form of a detriment because she has not established that she was eligible for such payments. We have accepted that the list of PES scores provided to her during her grievance was likely correct. According to this list she was not eligible for either the STEP or the PPP increases.

Other allegations of direct discrimination

226. We then consider the other allegations of direct discrimination.

227. The Claimant does not pursue any claim in respect of the NFN for lateness on 12 October 2015.

NFN April 2018: paragraph 101(n)

228. In relation to the NFN of 21 April 2018, we have concluded that the exaggeration in lateness from 45 minutes to 30 minutes probably did not amount to a detriment because the Claimant would in any event have received a NFN for 30 minutes lateness. Both periods of time are significant. We accept that Mrs Joyce could have taken more serious action, given that the Claimant was on a final written warning but chose not to do so. We also accept that a NFN could be given for one incident of lateness where a final written warning exists. There is nothing to show here that the Claimant was treated differently to anyone else in the same situation and therefore we reject that this NFN or the mistake as to the length of time was because of race or age.

Disciplinary Investigation: paragraph 101(r)

229. Similarly, we do not consider the fact of the investigation for lateness was because of race or age. We agree that one of the incidents investigated was harsh: being late by 1 minute when the Claimant had clocked in 1 minute before her start time and her desk was within a minute of the clocking-in machine. But this did appear to accord with the Respondent's practice at the cash desk of expecting staff to be at their desk at their start time. Furthermore, there were 2 further incidents of lateness that warranted investigation. Given that the Claimant had a final written warning at the time, it is not surprising to us that these were investigated. No further action was taken. We consider all three incidents would have been investigated for any other member of staff on a final written warning for lateness, given how important arriving promptly for work was to R1.

230. Similarly, we consider the sickness letter was a standard step that would have been taken for a similar level of absence by any employee. Mrs Joyce did not know that one of the absences had been sanctioned by another manager. This was therefore not because of race or age.

Lateness accusation: paragraph 101(q)

231. For the same reason we do not find that the NFN, in respect of being late for work by a minute, warrants any inference that it was because of race and/or age. We have gone straight to the 'reason why' question here. The Respondent's approach was to be strict on start times. The newsletter on 18 September 2018 set out the even greater expectation that staff arrive at their desk a few minutes before their start time. This was not to do with race or age but the Respondent's approach to prompt arrival. While the Claimant saw others not spoken to about such minute-late arrivals, there is no evidence that they had received final written warnings and were not therefore obviously in the same circumstances as she was. While we criticise the inequity in the Respondent's approach to arriving at work on time: docking 15 minutes pay for one minute of lateness but expecting staff to arrive, unpaid by several minutes early; this was an approach applied to all.

Grievance paragraph 101(p)

232. We do not find that the outcome of the grievance of 22 May 2018 and its appeal were direct race or age discrimination. There is no comparator evidence that a white or younger person bringing a complaint of discrimination would have been treated any differently. Nor is there any evidence from which we could draw such an inference. The Respondent sought to defend its decisions, which is unsurprising. Mr Bailey investigated the two allegations before him. He decided the short period of time after the December recruitment round was the reason for the decision not to readvertise. There was evidence for that conclusion. There was evidence for Mr Bailey's conclusions on the question of salary increase and bonus and we have agreed with this outcome.

Miss Djurisic's Approach 9 August: paragraphs 101(s)(t)

233. In relation to the approach by Miss Djurisic on 9 August 2018, we have found she was indeed aggressive. We have considered whether there was a reason for this. We have concluded she was trying to assert herself as a manager and get across a clear message to the Claimant about needing to improve her lateness and that she did so poorly but that she would have adopted this approach had the Claimant been white or younger. She had a direct management style. She did not threaten the Claimant with dismissal, in fact the opposite, she told her she did not want to lose her for lateness. We do not find that she used the 'ghetto' language that the Claimant recalls and therefore find no express evidence of race discrimination in her approach. She may well have said 'grown woman' but that does not indicate to us that she was aggressive to the Claimant because of her age but rather her trying to point out the Claimant had been at work long enough to know the rules on lateness. Overall, her aggression, we conclude, came about because of an effort to make her point. She made it badly. That is all. We consider she is likely to have adopted the same approach with someone on a final written warning who was white or younger than the Claimant.

Timing Arrival: paragraph 101(u)

234. We do not consider that Mr Buckleton's demonstrable timing of the Claimant's arrival at work was to do with her race or age. We go straight to the 'reason why' question here. We conclude his conduct was plainly to do with her reputation for arriving just on time.

Micromanaging: paragraph 1010(v)

235. We have concluded on the facts that the Claimant was not watched or micromanaged in August 2018. Her claim of discrimination in this respect fails on the facts.

Mr Greenwood failing to investigate grievance appeal; mocking age: paragraph 101(w)(x)

236. The next two complaints we take together: whether it was race or age discrimination for Mr Greenwood to fail to investigate the new parts of the Claimant's grievance appeal the majority and whether it was direct discrimination to mock the Claimant for her age during a break in that meeting.

237. We agree that Mr Greenwood failed to investigate adequately point 12 of the Claimant's grievance appeal that she had been harassed or bullied on her return to work. He asked her questions but did not ask her colleagues. He ought to have been more concerned whether the Claimant was being treated badly for having raised a complaint. He took too easily the side of the employees being complained against.

238. The majority of the Tribunal (Mrs Legg and EJ Moor) conclude that he would have adopted the same approach if the Claimant had been white or younger and brought a discrimination complaint. This is because in their view his interest was in defending the Respondent's position, bearing in mind the ACAS certificate and the likelihood of a Tribunal claim. This is why, in their view, he discouraged the use of the 'd' word and made the threat about further complaints at the end of the meeting (see below). The mocking of her privately was, in their view, in relation to her age complaint rather than her age alone. In their judgment this revealed his attitude to discrimination complaints rather than age itself.

239. The minority of the Tribunal (Ms Alford) considers that Mr Greenwood's approach was so surprising for a Director of Human Resources that she draws the inference that he would not have conducted himself in such a way if the discrimination complaint had been by a white person or a younger person. She concludes he would have shown such individuals more respect and would have taken it more seriously. He knew that point 12 was a new claim and he would have investigated it. All it would have required was talking to Mrs Joyce and the other colleagues who allegedly ignored her. She considers his mockery of the Claimant related to her age as well as her complaint. Overall she concluded his failure to investigate and his approach were therefore direct age and race discrimination.

Short changeover shifts: paragraph 101(y)

240. On the Claimant's case this was a change in approach from previous years. She states no one else was given so many short changeover shifts

when there were other cashiers of her age and who were black/mixed black heritage. There is therefore no difference in race or age established on the evidence.

Not receiving handover information: paragraph 101(z)

241. Again, this was a change in approach from her earlier employment. We do not conclude therefore that this failure to provide handover information in December 2018 can have been because of age or race. In the past the Claimant was provided with this information showing her age or race was not relevant to this practice.

Excluding from drinks: paragraph 101(aa)

242. Again, because we have found that the exclusion from the drinks discussion was a change in approach from previous years, we do not conclude the exclusion was because of race or age. If so, this would have applied in previous years.

Difficult customer: paragraph 101(bb)

243. On the facts we have concluded that the Claimant was provided with appropriate support and was not therefore treated unfavourably or to her detriment.

Shredding: paragraph 101(cc)

244. On the facts we have concluded that this was a task all were required to do from time to time and there was no less favourable, detrimental treatment here.

6 Weeks' Training for Gaming: paragraph 101(dd)

245. Plainly there was a difference of age and race here: the Claimant was treated differently from a younger, white comparator Mr B Smith, when Miss Lewis maintained the need for 6 weeks of training on table games.

246. It is very surprising to us that Miss Lewis maintained the 6 weeks training even after the Claimant had complained about it and identified for Miss Lewis the training normally given to new starters with experience. It is also very surprising that Miss Lewis did not adopt Mr Greenwood's proposal (a table assessment and subsequent evaluation), especially that she was involved in giving her opinion to Mr Greenwood.

247. These surprising features amount to 'something more' and require the Respondent to provide a non-race- and age-related reason for Miss Lewis's approach to a return to work on the gaming tables. Here we all agree that there is such an explanation. We conclude the reason for Miss Lewis's decision to maintain the need for 6 weeks training was because she regarded the Claimant as a malicious complainant and therefore a troublemaker. Miss Lewis was not seeking to ensure an effective return. The longer training period was an obstacle put in the Claimant's path to a likely successful return to work. In this respect she treated the Claimant differently to a new starter or Mr B Smith, but we have concluded that the

reason was not race or age but her view that the Claimant's grievance was malicious. (We reject that this was a reasonable view to reach but we deal with this aspect below.)

Time Limits

248. We have found that the failure to offer refresher training on the games table was direct race and age discrimination. We now consider whether this claim was brought in time.

249. The Claimant knew about Mr Smith's training opportunity when she made her request to Mr Richardson on 19 May 2017. Doing the best that we can it would have been reasonable to expect a reply within a fortnight, so we find the earliest the Claimant could have suspected that she was treated differently to Mr Smith was about 2 July 2017.

250. The claim about games training was not an extended act it was a single failure. ACAS EC should therefore have started by no later than 1 October 2017. This would have afforded a further month's extension of the time limit to 1 November 2017. This claim is therefore some 14.5 months out of the primary time.

251. We must therefore consider whether it is just and equitable to extend time. We consider the explanation for the delay; the balance of prejudice; the merits and any other relevant factor.

252. The claim was brought on 14 February 2019. The first ACAS certificate is dated 14 September 2018. The Claimant received some brief advice from Citizens Advice in around October 2018. She did not have access to legal advice then. She had the support of her trade union.

253. On 22 May 2018 the Claimant had raised a general equal opportunities grievance. This was extended on 5 October 2018 to specifically include the complaint about games table training. This was considered by Mr Smith in his outcome letter of 15 November 2018 and by Mr Greenwood in the appeal, which ended on 14 December 2018.

254. During January and February 2019, the Claimant was off work with stress.

255. We recognise that it is difficult to bring a discrimination complaint while in employment. We recognise too that suspicions that one might have been discriminated against grow in time. In this case the Claimant described matters becoming intolerable when she saw Miss Peneva appointed without advertisement. She raised a complaint about this and, only once that complaint had been dealt with, did she complain about the history of her treatment, including this lost training opportunity. From May 2018 therefore the delay is explained by the conduct of the internal grievance. This had ended on 14 December 2018 but from then until the presentation of her claim the Claimant was off work with stress. We consider therefore from May 2018 the internal grievance and sickness provide a reasonable explanation for the delay in bringing the claim.

256. However, from October 2017 to May 2018 the Claimant has not given any reason for the delay. She also understood in around October 2018 that,

soon after the EC certificate expired, she needed to make a claim. But at that stage she had the internal grievance to run its course and was then ill.

257. When considering the balance of prejudice, there is no information or evidence from the First Respondent that it has been prejudiced by the delay in bringing this part of the claim. They have not informed us that Mr Richardson was not available to give evidence. Plainly he was available to Mr Smith during the internal grievance. This is not a case where the First Respondent has therefore been prejudiced in terms of the evidence available to it by the delay. The complaint was clear from the internal grievance; the Claimant referred to her email during that grievance and it was disclosed to the First Respondent.

258. The merits are a weighty factor in the balance of prejudice in favour of the Claimant.

259. How then do we weigh all those factors? The balance of prejudice lies very much in the Claimant's favour. Her lack of explanation for bringing the claim from October 2017 to May 2018 lies on the other side. Doing the best that we can to achieve fairness, we consider the merits to be the weightiest factor and therefore we unanimously exercise our discretion to extend time on the basis that it is just and equitable to do so.

260. In summary therefore the direct race and age discrimination claim succeeds in relation to the failure to give refresher table games training. The remaining direct discrimination claims fail (the claim relating to Mr Greenwood by a majority).

Victimisation

261. Both the first and second grievances amounted to protected acts. They both included an allegation that the Respondent had broken its equality policy and contravened equal opportunities. The second alleged race or age discrimination. Both were impliedly allegations of a breach of the Equality Act.

262. Our task is therefore to consider whether the things complained of subjected the Claimant to a detriment because she had alleged a contravention of the Equality Act. We again refer to the List of Allegations for the relevant paragraph of the claim form.

Accused of clocking on at 1559 hours: paragraph 103(b)

263. On 17 June 2018 Mrs Joyce accused the Claimant of arriving at her desk a minute late. We have found as a fact this was not because of the grievance. It was not therefore victimisation. The Claimant defended herself by stating that she had clocked on a minute early. We deprecate the First Respondent's inequitable approach to timekeeping: not paying but requiring staff to be at their desk before their start time; but docking 15 minutes pay for 1 minute of lateness. It does not really surprise us that, with this inequitable approach to pay, staff tried to arrive just in time.

Lateness investigation: paragraph 103(c)

264. We have found as a fact that the June disciplinary investigation into lateness was not because of the grievance. The victimisation claim therefore fails.

Sickness Letter: paragraph 103(d)

265. We have concluded that the sickness letter was not sent because of the grievance. The victimisation claim therefore fails.

Grievance Outcome: paragraph 103(e)

266. Mr Bailey plainly knew about the protected act. He identified a non-race or age-related reason for the decision not to advertise the vacancy, namely the nearness in time of the last recruitment exercise, which was open to him on his investigation. We have therefore concluded that his decision not to uphold the grievance was not because the grievance was a protected act, but for the reason he identified. We do consider he ought to have identified that the failure to advertise the new vacancy was a breach of recruitment policy. And we take the view that going to the third selected person on a short list was probably not appropriate. But these are matters of opinion and not matters that give rise to any inference that Mr Bailey's reason was not the real reason for his decision.

Refusal of Request for Senior manager to hear appeal: paragraph 103(f)

267. We do not consider that this allegation has been proved on the evidence we have heard. There was a good reason why Ms Stevens did not hear the grievance or appeal, because she had been involved in the original decision. The choice of a junior manager looks likely to have been for this reason rather than the fact of the protected act.

Miss Djurisic Conduct: paragraphs 103(g, h, l, j)

268. On the facts we found Miss Djurisic's conduct on 9 August was not victimisation because she did not know the Claimant had done a protected act.

Counting Down: paragraph 103(k)

269. We set out above our conclusion that the reason for counting the Claimant down in work was her reputation for arriving just in time. It was probably inappropriate management behaviour and did upset the Claimant, but it was not done because she had done a protected act.

Micromanagement: paragraph 103(l)

270. We have concluded that the approach to the Claimant at the end of August was not because she had made a complaint. The claim for victimisation fails for this reason.

Not Upholding Grievance: paragraph 103(m)

271. For the same reasons we gave in relation to the grievance outcome, we do not conclude that the failure to uphold the grievance appeal was

because it was a discrimination grievance. This was not victimisation.

Return to Work Meeting Miss Djurisic: paragraph (103)(n)

272. We have found that Miss Djurisic was direct but not hostile in the return to work meeting. It was appropriate for her to seek GP advice about the phased return. We therefore do not find that her approach subjected the Claimant to a detriment and the claim fails.

5 November Return to Work: Claimant ignored: paragraph 103(o)

273. We have considered this part of the claim carefully in our findings of fact. We do not accept the Claimant's case (as it ended up) which was that she was shunned by colleagues for days, except Mr Buckleton. We have accepted that Mrs Joyce merely said 'alright' to her greeting on the first day and other colleagues did not greet her. Relationships were frosty on this day because the team, by then, probably knew of the complaint she had brought, including against Mrs Joyce. But we have concluded that the atmosphere melted so that, by 27 November 2018, there were relatively amicable discussions at work. We consider this first day, on its own, did not subject the Claimant to a detriment. A reasonable employee, looking at the matter in the round, would not have decided that they were disadvantaged in their future work on the evidence of the first day alone. We acknowledge that it is human nature to be upset by an allegation of discrimination and that relationships might initially be awkward and less friendly than they once were. Given that normal discussions reverted fairly soon, the Claimant could not rely on this first day as subjecting her to a detriment.

Short Changeover Shifts: paragraph 103(p)

274. We conclude that by being given twice as many short changeover shifts as others, this was a detriment. These shifts were difficult and unpleasant because of the limited time to get home, sleep, and rest, before having to travel back into work. They were disliked by staff. A reasonable employee would have regarded being given twice as many as usual as a disadvantage.

275. For reasons given in the findings of fact, the majority (Ms Alford and EJ Moor) concluded that these shifts were given to the Claimant because she had made a complaint and Mrs Joyce therefore punished her with a tougher rota. By majority therefore the Tribunal finds she was unlawfully victimised.

276. For reasons given in the findings of fact, the minority (Mrs Legg) did not reach this conclusion.

Chebetlova reprimand: paragraph 103(r)

277. We all agree that the reprimand of Ms Chebetlova did not subject the claimant to a detriment because the reprimand was not directed at her.

278. But we agree that this reprimand was evidence of a change in approach by Mrs Joyce to reprimand others arriving late, even by a minute, in public

to show that she was applying the same rule to all. This was because of the Claimant's complaint.

Handover: 19 and 20 November: paragraph 103(t)(v)

279. By a majority (Ms Alford and EJ Moor), as explained in our findings of fact, we consider that the decision not to give handover information to the Claimant was because the team knew she had made a discrimination complaint. We also consider that this was a detriment because, although an unpaid task, it acknowledged who was the senior person on the shift. It was a sign of status, and the Claimant can reasonably have felt at a disadvantage by not being chosen to undertake this task. By majority therefore the Tribunal finds she was unlawfully victimised.

280. The minority (Mrs Legg) does not agree that the failure to provide the handover information was because of the protected acts and therefore does not conclude that this was victimisation.

Drinks: paragraph 103(u)

281. We unanimously agree that being excluded from discussions at work about a social occasion amongst colleagues when one would normally be included would subject an employee to a detriment at work. A reasonable employee would consider that such exclusion was to their disadvantage because they had lost the opportunity to bond with colleagues on that social occasion. The occasion was sufficiently linked to work by the fact that it was amongst work colleagues and was discussed about at work and would provide the opportunity for team bonding.

282. We unanimously agree that this was because the Claimant had complained about victimisation against Mrs Joyce, and she and the team knew it.

Difficult customer: paragraph 103(w)

283. It follows from our findings of fact that managers dealt appropriately with the difficult customer. We therefore find the Claimant was not subject to a detriment and was not victimised.

Conduct of Mr Greenwood in Grievance Hearing; and his outcome letter: Paragraph 103(p)(s)

284. Mr Greenwood failed to investigate with staff whether they had ignored the Claimant on her return to work. He prejudged this and took their side, understanding how it might be distressing to be complained against. He had no similar understanding of how difficult a discrimination complaint might be to make while still employed. Nor did he seem to understand that victimisation might occur even if the discrimination complaint is unsubstantiated.

285. He also failed to investigate the games table refresher training as he had promised. There is no reference in his letter to the explanation for the different treatment: though he offered refresher training in the future. This gave some remedy but missed the question whether a member of staff

had treated the Claimant differently in the past because of a protected characteristic. This was what the Claimant had complained about and he avoided dealing with.

286. He suppressed the use of the 'discrimination' word at the hearing. He threatened the Claimant with disciplinary action if she made further discrimination complaints with insufficient evidence. He showed no understanding at all that it is not usual to find express evidence; that much discrimination is unwitting; and that a pattern might cause a person to be suspicious and wish to seek answers. Mr Greenwood took a simplistic view: his aim was not to have further discrimination complaints. He was furthermore condescending. He used his senior position to put pressure on the Claimant.

287. We unanimously agree that this approach: the failure to investigate; the suppression of the discrimination part of her complaint; and the threat as to future disciplinary action all subject the Claimant to a detriment. An employee could reasonably take the view that they had been disadvantaged: their full complaint was not being investigated; the discrimination part of it discouraged by a senior manager; and any future ability to complain about discrimination was being inhibited by a threat of disciplinary action by a senior manager.

288. We are unanimous that the reason for this detriment was because the Claimant had done a protected act. It is clear from his discouragement of the 'd' work and threat as to future complaints that Mr Greenwood did not want to be dealing with discrimination complaints and got this message across to the Claimant. The fact that he so readily empathised with those complained against and failed to investigate supports us in this conclusion.

289. Mr Greenwood did not consider the discrimination complaint to have been brought in bad faith. Nor was it brought in bad faith: R1 has not made this argument, which would not have succeeded before us. The Claimant had detected what she reasonably believed were patterns in her employment that led her to suspect, again reasonably, that her race and/or age were holding her back.

290. Mr Greenwood's failure to investigate and conduct at the grievance meeting were therefore unlawful victimisation.

6 weeks training in return to work proposal: paragraph 103(x)

291. We refer to our discussion of Miss Lewis's maintaining the 6 weeks' table games training.

292. First, we consider that this subjected the Claimant to a detriment. She was discussing return to work proposals. She was concerned about going to work with a team some of whom she had complained against. She had been off for a few weeks with stress. She had prior experience in dealing (table games) and such a sideways move fitted the company's need for her to return and her need to feel comfortable at work. Furthermore, in the outcome of her grievance, she had been offered merely a table assessment for table games work (with further evaluation thereafter) by Mr Greenwood to resolve her complaint about an earlier request being

ignored. Miss Lewis's proposal of 6 weeks' training and then her maintaining of it after reasonable objections, put an obstacle in the way of an effective return. The period was more than the direct comparator Mr B Smith had been given. It was more than a new starter with experience, even with the phased return. A reasonable employee in such circumstances would have regarded such a lengthy training period as putting her at a disadvantage: it disregarded her prior service and was demeaning. A reasonable employee would have seen it as such, as well as different and less favourable treatment.

293. Second, we are unanimously of the view that Miss Lewis maintained this period, despite the objections, because the Claimant had done a protected act in complaining about discrimination. Miss Lewis, wrongly, thought that this was a malicious complaint. It was not. We consider this influenced her approach: especially in not reducing the period to the table assessment that Mr Greenwood had proposed or to the limited time that Mr Smith, a direct comparator, had undertaken. This was because Miss Lewis saw the Claimant as a troublemaker. She placed this training as an obstacle to an effective return, not to smooth its way. We therefore conclude the 6 weeks' training requirement was unlawful victimisation.

Refusing to provide staff training in return to work proposal: paragraph 103(y)

294. We do not consider refusing to train staff implicated in the bullying allegation was victimisation. This is because we accept that Miss Lewis considered, where no internal grievance had been found against those staff, this to be unnecessary. This was her reason for doing so. We find she is likely to have reached this view whether or not the Claimant had done a protected act. Further, Miss Lewis had gone some way to allay the Claimant's concerns by offering to restate that all staff should behave appropriately and professionally.

Referring to disciplinary issues in return to work proposal: paragraph 103(z)

295. Miss Lewis referred to the warning. It had expired. But we do not consider that this subjected the Claimant to a detriment. It was a matter of fact that she had a record of being late to work. Miss Lewis raised this to remind the Claimant that managers would still need to manage her in the future and that included dealing with lateness. This was merely a statement of the ordinary processes.

296. In summary the claims for victimisation succeed:

    296.1. unanimously in relation to; Mr Greenwood's failure to investigate and his approach to the grievance hearing; being excluded from the drinks discussion by Mrs Joyce and Miss Peneva; and Miss Lewis's requirement of 6 weeks' training in the alternative work proposal.

    296.2. by a majority in relation to Mrs Joyce giving short changeover shifts in December; and not being given handover information twice in December.

Harassment

297. While Mr Starcevic did not press the harassment claim except in two respects, preferring to emphasise the victimisation claim, he did seek our adjudication on this claim as an alternative. We have referred to his list of allegations to identify those maintained as harassment allegations relating to race or age.

298. ***Miss Djurisic on 9 August 2018.*** We have found Miss Djurisic's forthright manner and approach was aggressive and upset the Claimant. But we are clear that it did not relate to race or age. The ghetto language was not used. The threat of dismissal was not made. Although words to the effect of 'grown up' may have been used, this was no more than to emphasise that the Claimant was aware she needed to be on time. It was not therefore unlawful harassment.

299. ***Sickness letter***. We do not consider that this letter related to race or age. It was a standard letter that related to the absences Mrs Joyce was aware of. It was not unlawful harassment.

300. ***Not upholding the grievance and grievance appeal.*** We cannot see how this could amount to harassment. It may have been unwanted conduct because the Claimant disagreed with it. But in our judgment, it did not have the purpose or effect of creating the proscribed environment or violating dignity. The Claimant has not pointed to any particular feature of either decision which did so. Both managers gave reasons for his decision. They were not gratuitous in their assessment of the complaint. Nothing they said violated dignity. Nor did their decisions relate to race or age.

301. ***Refusing request for someone more senior to hear grievance appeal***. We reject this claim. The Claimant might have disagreed with the decision but, in our judgment, it did not create the proscribed environment or violate her dignity. Nor was it in any way related to her race or age.

302. **Being told to arrive 2 minutes early**. We are clear that this did not relate to the Claimant's race or age. It was a practice instituted for all staff very soon afterwards. While there was unfairness in the Respondent's approach to time (not paying staff for arriving the required few minutes early but docking them 15 minutes pay for being a minute late), this applied to all and therefore did not relate to race or age.

303. **Demonstrably counting down arrival.** While we all agree it was unprofessional of Mr Buckleton to do this and that it upset the Claimant, it did not relate to race or age but her reputation for coming in just in time.

304. ***Micromanagement***. We refer to the facts we have found. We do not consider she was watched or micromanaged. The claim of harassment therefore fails.

305. **Not upholding the grievance appeal.** For the same reasons as the grievance decision itself, we do not find that this was harassment.

306. ***Miss Djurisic's approach in Return to Work meeting.*** This allegation fails on the facts we have found. Miss Djurisic was direct but not

harassing. She followed procedure in relation to the medical evidence required for the phased return.

307. ***Being ignored on return to work***. Logically in our view this conduct cannot relate to race or age in the sense that before the complaint all had been amicable. For this reason, it is not unlawful harassment.

308. **Conduct of Mr Greenwood in Grievance Meeting**

308.1. We all agree that Mr Greenwood's approach was unwanted conduct: he pressured, condescended, and threatened the Claimant.

308.2. We all agree that, although only one incident, this had the effect of creating the proscribed environment because of the following factors: Mr Greenwood's seniority and therefore the significance of his words; his domination of the meeting; the significance of his threat. We consider the environment he created was hostile to the Claimant and intimidating.

308.3. The majority of Tribunal (Mrs Legg and EJ Moor) consider that, however much they criticise his conduct, it did not relate to race or age but rather the protected act. They also consider that his conduct displayed a lack of competence in the sense that he showed a lack of understanding of unwitting discrimination and how an employee might infer it in the absence of 'express' evidence. What he mocked was the age discrimination complaint.

308.4. The minority of the Tribunal (Ms Alford) weighs the attitude revealed by Mr Greenwood's private mocking of age more heavily. She considers that as a senior HR director, he will have heard complaints before and that his dislike of the complaint cannot therefore fully explain his conduct. In her view, his behaviour was more surprising than could be explained only by his dislike of the complaint (though she agrees he disliked it). He mocked the Claimant's age in those private remarks. She considers his condescending and intimidating manner related therefore to age. She also takes the view that so surprising was his approach, that she also infers a white complainant would have been shown more respect. She considers he would have been less inclined to pressure and condescend to a white complainant and this harassment therefore also related to race.

309. **The complaints from paragraph 103 (q, r, t– w)** put in the alternative as harassment. We unanimously agree that these complaints do not relate to race or age. The Claimant states they are changes in the working practices and relationships. In our judgment as a matter of logic it would be difficult to suggest they relate to age and/or race if the Claimant had not been treated like that by the same colleagues in the past. In this case there is no particular evidence that relates to race or age in any of those complaints and we therefore reject them as harassment allegations.

310. **6 weeks' training requirement.** We all agree that this related to Miss

Lewis's attitude to the complaint, revealed in the covert recording. We do not find that this requirement related to race or age.

311. In summary therefore the harassment claim fails:

311.1. in relation to Mr Greenwood's conduct by a majority;

311.2. in every other respect unanimously.

Constructive Unfair Dismissal

312. While the list of issues requires us to look at each matter complained of, it seems to us that, legally, we should consider only those matters that materially influenced, at least in part, the Claimant's decision to resign. We should ask in respect of those matters whether, taken as a whole or separately, they amounted to a fundamental breach of the implied term (i.e. whether, without reasonable and proper cause, the Respondent seriously damaged or destroyed the relationship of trust and confidence.)

313. We have concluded that the following conduct of the First Respondent, taken together, amounted to a breach of the implied term.

314. First, the last straw, Miss Lewis's requirement that to move to alternative work, the Claimant underwent 6 weeks of table games training. We considered the sequence of events here carefully because we wanted to test Miss Lewis's suggestion that her aim was to ensure success and her argument that hers was a generous approach to training to ensure success. The trouble with this is that the Claimant sent her a well-reasoned objection to the length of training. First, that Mr B Smith, a cashier with, like her, prior experience, was given only hours of training before being allowed to work at the tables. Second, that even a new starter with experience (not exactly like her but the closest next comparison) would only have received 2 weeks. Yet, despite these reasons, Miss Lewis maintained the 6 weeks. The phased return does not justify the length. If she had really been wishing the return to work, we cannot see why she simply did not suggest Mr Greenwood's approach in his outcome letter: a table assessment and then evaluation or simply accept a reduction. We conclude that the length of the training was put there as an obstacle to progression and not to ensure the move would be successful. We understand why, therefore, the Claimant saw this suggestion as demeaning. Miss Lewis had no reasonable and proper cause to suggest this length of training: the comparators we have heard about it received less and Mr Greenwood had proposed less. We conclude this suggestion did have the effect of damaging the Claimant's trust and confidence in the way forward to staying with the company.

315. Second, the conduct of the grievance appeal. We conclude Mr Greenwood failed to investigate the Claimant's suggestion that she was being currently victimised adequately. A reasonable employer would have asked at least the supervisors on the cash desk how relationships had been. He prejudged this matter. While he asked the Claimant about this part of her complaint, this was in the context of a meeting where he had made it clear to her that he did not think her discrimination complaint had any grounds and he did not want her to use the discrimination word. We consider this

failure to investigate and discouragement against using the 'd' word added to a breach of the implied term by undermining the Claimant's confidence in the grievance process.

316. Third, Mr Greenwood threatened her with disciplinary action if she brought further unsubstantiated complaints, which the company might then consider had been made-up. While he chose his words carefully, they created a chilling effect. It is difficult to identify express evidence of race or age discrimination. That alone should not reasonably stop a complaint which relies on patterns or unexplained different treatment. We consider the Claimant hearing this will have lost confidence in the First Respondent's approach to discrimination complaints. Mr Greenwood had no reasonable or proper cause for making the remarks: the complaints were not malicious, R1 has not suggested to us that she brought them in bad faith.

317. Fourth, we have found that the decision not to advertise the vacancy to which Miss Peneva was appointed was a breach of the First Respondent's policy. The internal grievance outcome was that it was not discrimination because managers wanted to use the recent recruitment exercise. While we have agreed that it was not discrimination, we do not agree that this reason justified the failure to advertise the vacancy. The First Respondent's policy was clear. The only reason not to advertise was if there was a succession management programme. There was none here. The Claimant (along with other colleagues) was denied the opportunity of applying for a promotion contrary to policy. This breach of policy added to the breach of the implied term.

318. Finally, the Tribunal by a majority concluded that in two respects the Claimant was victimised in December (the short changeover shifts and twice on handover). We all agree that colleagues victimised her by excluding her from a discussion about drinks.

319. We have concluded that these matters amounted to a breach of the implied term because they seriously damaged the relationship of trust and confidence. There was no reasonable and proper cause for any of them. They amounted therefore to a fundamental breach of contract.

320. For the avoidance of doubt, we have also concluded, , that we would have reached the same conclusion even without the incidents of victimisation in December. The first four matters we have covered taken together were sufficiently serious to seriously damage the relationship of trust and confidence.

321. We have concluded that the following matters that the Claimant relied upon in her resignation did not contribute to the breach of contract:

    321.1. the promotion decisions: none were obviously a breach of contract;

    321.2. what is described as 'continued victimisation': while the majority of the Tribunal has identified some aspects of how she was managed in December as victimisation, we do not consider that they could be described as continuing. We acknowledge the

Claimant's real fear, however, that further decisions could have been taken by managers to punish her for her complaint and hence why the discussion for a return to work in an alternative role was so important to her;

321.3. the refusal to give bullying training: we all agree, in the circumstances, it would have been reasonable to have provided such training. But we do not go so far as to say it was a breach of contract not to do so. The Claimant's complaint had not been upheld internally.

322. We conclude the Claimant was constructively dismissed because she resigned at least in material part in response to a fundamental breach of contract.

Affirmation

323. The 'last straw' here was Miss Lewis' retention of the 6 weeks training requirement for alternative work in her return to work proposals.

324. Even though the Claimant told Miss Lewis why this was inappropriate to her experience, and different treatment to a new starter with her experience and different treatment to Mr Smith, Miss Lewis refused to remove or reduce it in her proposal for a return. We have found that this was because Miss Lewis saw the Claimant as having brought a malicious discrimination complaint and being a trouble-maker. The retention of the proposal was unlawful victimisation and a breach of the implied term as to trust and confidence: by Miss Lewis's proposal the First Respondent was treating the Claimant differently to others in the same situation. A reasonable employee could have reached this view. The Claimant would reasonably be concerned about appearing to be a laughingstock if she agreed to such a long period of training in comparison with her peers.

325. There is no question of the Claimant affirming the contract after this last straw. Miss Lewis's refusal to reduce the 6 weeks training for the alternative role was only 2 days before the resignation. The Claimant needed some time to think through her decision and that short time could not be regarded as affirmation even though she was being paid.

326. R1 does not make the argument that there was a potentially fair reason for dismissal. Nor do we consider that there was a potentially fair reason for the dismissal. We conclude therefore that the Claimant was unfairly dismissed.

Was the dismissal also unlawful victimisation?

327. We unanimously conclude that the dismissal was unlawful victimisation because part of the reason for it was the conduct of Miss Lewis and Mr Greenwood that we have found to be unlawful victimisation.

Was the dismissal also direct race and/or age discrimination?

328. It follows from the majority judgment (Mrs Legg and EJ Moor) that the dismissal was not direct discrimination because they have not found that

any of the acts or omissions that led the Claimant to resign were direct discrimination.

329. It follows from the minority judgment (Ms Alford) that the dismissal was an act of direct race and age discrimination because the Claimant resigned partly in relation to the conduct of Mr Greenwood which she considers also amounted to direct race and age discrimination.

330. There is no time limit issue in relation to the dismissal claim.

331. We agreed with the representatives that the issues of Polkey and Contribution be left to the remedy hearing. While they invited us to consider the ACAS uplift, because it was not identified as an issue in the liability part hearing at the outset, we have also decided to leave that issue to the remedy hearing, though our findings here will be relevant to it.

Employment Judge Moor

23 September 2021