EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr G Singh	**v**	**1 Iceland Foods Limited** **2 Mr Marc Fensome**

Heard at Watford and by CVP **On:** 10-13 January 2022

Before: Employment Judge Manley
Ms C Baggs
Mr D Bean

Representation
Claimant: Mr P Pem, solicitor
Respondents: Mr R Hignett, counsel

JUDGMENT having been sent to the parties on 31 January 2022 and reasons having been requested one day out of time but otherwise in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction and issues

1. The claimant brought two claims, one in September 2020 for race and religious belief discrimination, and another after he resigned in October 2020, for constructive unfair dismissal and race and religious belief discrimination, victimisation and harassment.

2. At a preliminary hearing in March 2021, there was clarification of the Equality Act claims and a list of issues was agreed there. Each issue set out there, where necessary, is answered below in the conclusions.

3. In summary, there is a claim for constructive unfair dismissal with the alleged breach of contract being a breach of the implied term of mutual trust and confidence arising out of the same detriments as those alleged for the Equality Act claims which were numbered 1 to 13 in the particulars of claim. Some of those were identified as direct, some for harassment and/or victimisation. The claim for religious belief discrimination was later withdrawn and has been dismissed.

4. The hearing was listed for four days, the parties and witnesses attending by CVP with the tribunal being present in the tribunal room except for the day

we gave judgment. The tribunal had a bundle of over 400 pages and then a short supplementary bundle from the respondent and two supplementary bundles from the claimant. We had a witness statement from the claimant and there were six witnesses for the respondent as follows:

- Mr Fensome, second respondent and Regional Sales Manager
- Mr Phelan, Area Sales Manager
- Ms Turner, Head of HR Iceland and Food Warehouse
- Mr Millard, HR Case Manager
- Mr Ross, Senior HR Manager
- Ms Tolen, HR Case Manager

5. The tribunal wants to thank the witnesses for their considered and helpful answers to the questions put to them.

6. The tribunal also had sight of an opening note prepared by the respondent's representative, a chronology and a suggested timetable which we discussed and agreed.

The facts

7. We include here only facts which are relevant to the issues to be determined. As is often the case, the tribunal heard other pieces of information which are part of the history but we must concentrate of those which are relevant to the claims as agreed.

8. On 2 March 2015 the claimant commenced employment with the first respondent as a Trainee Store Manager at the Edgware Store. The first respondent is of course a large retail organisation, employing around 29,000 people. It has the usual policies for such a large organisation, but we only needed to look at the disciplinary policy for one aspect.

9. In 2017 the claimant raised a grievance against the second respondent, the regional manager, Mr Fensome, and his area manager, Ms Haywood. The outcome of that grievance was sent to him on 28 July and the grievance that he raised was summarised there and this is at page 142 of the bundle. The grievance was as follows:

> "1. *The visit feedback from frequency of visit by Mark Fensome over the Easter period was unacceptable. Mark's refusal to move you to another store until the Edgware store was fixed was wrong.*
>
> 2. *Rachel Haywood only considered transfers on Region 6 but were not closer to home.*
>
> 3. *There was a change in attitude from Rachel Haywood since the visit by Mark Fensome.*
>
> 4. *There was a lack of support for your operation by removing the supervisor from your store and there was a lack of communication regarding the building work in your store."*

10. As indicated that was contained within this outcome letter, the claimant had

been interviewed by Mr Roden, the Regional HR Manager who dealt with the grievance. In the outcome letter, which is a detailed one, Mr Roden dealt with each of those four grievances. In essence, he found that three of them were not upheld. Those involving Mr Fensome were rejected with reasons. One aspect which was upheld was that concerning Ms Haywood, the area manager, and what she had considered about transfers. Mr Fensome's evidence, which the tribunal accepts, is that he did not really remember this grievance when matters arose in 2020. It is not right to say that the grievance was upheld against Mr Fensome as the claimant alleges.

11. Later it was agreed that the claimant should be transferred, and he was transferred to the Hounslow West store which is closer to his home. There were about 40 employees in that store. The transfer was because there was a vacancy and Mr Fensome's evidence was that he highly recommended the claimant for that position.

12. For a period Mr Fensome was not the claimant's regional manager, but by late 2019 or early 2020, there had been a restructure so that Mr Fensome had again become the claimant's regional manager.

13. Mr Fensome has responsibility for 14 area managers who are the line managers of the store managers and almost 200 stores.

14. The line manager for the claimant by 2020 was Mr Phelan who was the area manager.

15. About 30 March 2020 Mr Fensome asked Mr Phelan to investigate an anonymous complaint which had been made to him. Mr Fensome said he had a longish telephone call from a female member of staff who raised a number of issues about the claimant's managing of the store. These were summarised in Mr Phelan's response which we see at page 147 of the bundle. There were 15 points summarised there. They range through a number of matters including such things as staff being paid for excessive hours; short-time working by the claimant; the claimant not wearing his uniform; being in the office rather than supporting the team; an allegation that he only recruited Punjabi staff; that he never worked late and had a second job.

16. There was then, on 7 April, a second anonymous complaint about the claimant contained within an email to the CEO's office (page 150). Similar allegations were made in that document.

17. On 8 April Mr Phelan reported back on his findings to Mr Fensome. In summary, he had visited the store four times, spoken to a number of staff and found most things were running fine. His summary appears at 152. He says:

> *"As discussed I will continue to monitor going forward the store has a good TSR in the claimant who I speak with regularly and as you know I speak with most colleagues when I am in the store anyway but there is obviously a reason why these concerns have been raised and I think I might know who it is so will ensure I speak with her. While not making it obvious I will continue to set the standards of professional behaviour of the Store Manager as I do with all of*

them on my area. I do not believe any formal action needs to be taken at this stage."

18. In any event, because there had been the second complaint, Mr Phelan was then asked to deal with that and he did so, again visiting the store another four times. His conclusion in this case was similar in that he found nothing to investigate further but that he would continue to monitor the situation. He concluded that the allegation had either been "*made maliciously or based on a misunderstanding".*

19. On 29 April, there was a further anonymous complaint again sent by email, which appears to be from the same person who had sent the previous one. This led to Mr Fensome deciding that he would visit the Hounslow West store on 29 April. Mr Fensome explained that he thought he should see for himself what was happening at the store. It was put to him in cross examination that he could or should have asked for another area manager to visit but the tribunal cannot see there can be any criticism of a regional manager visiting a store within his region where issues such as the ones summarised have been raised.

20. There is a central dispute about what was said when Mr Fensome visited the store. The claimant was on his day off but says he was passing the store and a security guard told him that Mr Fensome was there, so he went in. Mr Fensome asked the claimant how he knew that he was there as it was his day off and asked the claimant if someone had rung him to tell him that he was there. The claimant replied that no one had rung him. Mr Fensome then said something to the effect that the claimant was lying or not telling the truth. Mr Fensome does not believe he said that, but all the evidence suggests that he said something to that effect. The claimant's case is that Mr Fensome called the claimant a "*bloody liar*". As we will come to, others when spoken to at first, also said that this was said, namely that Mr Fensome said "*bloody liar*". Mr Fensome denied it when asked and denies it now. The tribunal find that Mr Fensome did not, on a balance of probabilities, say that the claimant was a "*bloody liar*". It is denied by him and very unlikely that he would use such language in an otherwise apparently reasonably friendly discussion. All those who at first stated that *"bloody liar*" had been said changed their statements during the investigation which followed and many of them, as we will come to, allege that they had been coerced into making that initial statement.

21. Another matter we will deal with relatively briefly because it does not appear in the list of issues, is that, at some point, there was an allegation that Mr Fensome said to a colleague (VK) something to the effect of *"Is the claimant good because he is working with his own people*". It is not alleged that was said in the presence of the claimant, but the claimant said that VK had later told him about that remark. The tribunal find that that remark was not made. Again, it was denied by Mr Fensome and it seems to the tribunal highly unlikely that he would make such a comment which could be interpreted in an offensive way. In any event, as we will come to, the allegation that Mr Fensome had made that comment was later retracted by VK in the grievance appeal process. That comment was not made.

22. On 30 April the claimant made an oral complaint of race discrimination to

the CEO against Mr Fensome. There is no record of what comments he alleged at that point, but Ms Turner then started an investigation on 30 April. She carried out the majority of the investigation by telephone as a result of the pandemic and she was working from home. She spoke to the claimant at length on 12 May, summarising what he said in nine pages of notes. In summary, the claimant said that Mr Fensome had said to him that he was a '*bloody liar'* and he also reported what he said VK had reported to him. He said that those comments amounted to humiliation.

23. Ms Turner then carried out a number of other telephone interviews with Mr Fensome and the others who the claimant has said were witnesses, particularly about the "*bloody liar*" allegation. Ms Turner spoke to WP, VK, Mr Phelan and BR, between 15 and 21 May. WP said that Mr Fensome had said the claimant was lying but not that he had said "*bloody liar*".

24. On 21 May BR, who appears to have been an important witness, made her first statement. In that she said that Mr Fensome had called the claimant a "*bloody liar*". Two days later, on 23 May, BR contacted Ms Turner by phone and said she was worried because some of the things she had said were not true and that she had been influenced by the claimant, and another colleague at the store, PS.

25. There was therefore a second interview with BR on 25 May and Ms Turner. In that interview this is recorded as having been said by BR:

> "*Manager called me in office and then he said tell me what happened the other day and he started writing and I tell exactly what happened the other day to him but he added the bloody liar phrases to make MF you know racist person. He wanted to make Mark to be a racist person so he added bloody liar and he told me to say he looked unprofessional. These two things there added extra my statement he came we were talking everything else was the same."*

26. As a result of this allegation, namely the allegation that pressure was put on BR to tell an untruth, it was decided to suspend the claimant. There was a suspension meeting held with Mr Phelan on 27 May. The notes which appear in the bundle show that reasons were given for the suspension orally, that is an allegation had been made that the claimant had told people to lie about the comment made by Mr Fensome. PS was also suspended.

27. A letter confirming the claimant's suspension was sent to him on 2 June. That letter does not contain the detail of why the claimant was suspended in relation to allegation made but said that it would allow an independent investigation to take place.

28. The computer system used by the first respondent is one called Nexus. It would appear that the claimant had full access to all parts of that system as a store manager. The claimant's evidence is that his access was changed to a more limited one when he was suspended but the evidence before the tribunal is that that did not happen. It would have needed an extra step to be taken other than Mr Phelan just recording that the claimant had been suspended. The written evidence from the IT department is that the claimant's access was not amended until early July.

29. Ms Turner then continued to carry out further interviews and she did that starting on 3 June. Between 3 and 11 June she spoke to a number of people, some of them more than once. This is set out in Ms Turner's statement at paragraph 9. She spoke to WP twice, to Mr Phelan, to BR twice, to PS, to the claimant, to VK and SSK.

30. The claimant has made some allegations about the telephone interview with Ms Turner. The tribunal cannot see anything contained in those telephone interviews with the claimant that suggest any impropriety. Ms Turner quite properly put the allegations made against the claimant to him; that is that he and PS had put pressure on witnesses to lie. She gave him an opportunity to answer. The tribunal cannot see what can be wrong with that.

31. The claimant became unwell shortly after this and underwent an Occupational Health assessment which indicated that he was not well enough to work, and he was then on sick leave.

32. On 16 June Ms Turner sent BR the notes of her second interview and asked her to confirm that it was true. This contained the allegation that pressure had been put on her to lie by the claimant and PS.

33. On 16 June Ms Turner also produced her investigation report. This recommended a disciplinary investigation into the allegations against the claimant. That disciplinary investigation would be:

> *"to establish whether there are any reasonable grounds to believe that Gurpal Singh may have influenced store colleagues to make false statements within an investigation and which may constitute gross misconduct and therefore if there is a disciplinary case to answer by Gurpal Singh or not".*

34. Ms Turner summarised her findings as follows:

> "*Having considered the findings of my investigation I would observe that I therefore believe that there is a disciplinary case to answer by Gurpal Singh in relation to the allegations he may have influenced colleague to make false statements during investigation. Due to the nature of this investigation and both the original grievance and the allegations arising from the grievance against GS it is recommended that the disciplinary manager reviews all statements across both investigations in order to conduct the hearing and make a decision as both the grievance and the allegations against GS are interdependent."*

35. There then was an email from BR to Ms Turner in response to Ms Turner having sent her the statement. This is an email dated 19 June in which BR says:

> *"I would like to say something. Last few days I was so much under pressure that I have been told to change my first statement by WP. He told me that he was instructed by Mr Fensome. The last three statements which I have given is not true I've been under too much pressure to do that by WP. WP called me the day I given my first statement that if we don't support Mr Fensome in this matter it will*

be in big trouble. He also mentioned Mr Fensome will be with us so we don't need to worry about anything."

36. By now, matters had been passed to Mr Millard, HR Case Manager, to commence the disciplinary investigation. This was partly because Mr Millard could, and in fact did, carry out face-to-face meetings with many of the witnesses. Between 23 June and 8 July he took a number of statements, all of them from people who had been spoken to earlier. Mr Millard spoke to the claimant twice, to BR, to WP and SSK.

37. In summary, BR changed her statement and reverted to her original statement about Mr Fensome having said "*bloody liar*" but then she changed it back again. It is clear to the tribunal that BR was very scared for her job and she expressed concern about that on a number of occasions. SSK also sought to change her statement saying that she had been threatened and pressurised by the claimant and PS.

38. There was also a relatively serious allegation made by SSK that the claimant and PS had attended her house which was also an allegation made by BR. The tribunal have seen a photograph of the claimant and PS in what is said to be SSK's garden. The claimant, when asked about this by Mr Millard during the disciplinary investigation, denied going to SSK's house. He was then shown the photograph, but he still denied that he had attended. At this tribunal hearing, the claimant admitted that he had attended SSK's house and said it because he was answering a distress call arising from domestic violence. He did not say that to Mr Millard, he explained, because he felt that there had been a trap. The tribunal is satisfied that the claimant did attend SSK's house which he must have been aware he should not have done whilst an investigation in which SSK was a witness was ongoing.

39. It also transpired, during Mr Millard's investigation, that the claimant appeared to have copies of various witness statements which, in the respondent's view, could well have been accessed via Nexus either using PS's account or the claimant's. This was denied by the claimant.

40. SSK then emailed Mr Millard on 6 July to raise concerns. On 7 July Mr Millard decided he should send a letter to the claimant reminding him of the terms of his suspension which told him, in no uncertain terms, that he should not contact witnesses.

41. Meanwhile, Ms Turner had been dealing with the claimant's original grievance against Mr Fensome and she sent an outcome to that on 8 July which the claimant says he got on 10 July. She advised the claimant that his grievance was unsuccessful. It is a detailed outcome letter. She said that she could not find that Mr Fensome had made the comments attributed to him and the grievance was not upheld. At a later point, the claimant appealed that grievance outcome.

42. Meanwhile, on 8 July, Mr Millard had a further fact-finding interview with the claimant and, on 15 July, he produced an investigation report. He found that the claimant had a case to answer and that there were four separate allegations. These read as follows:

"Influenced colleagues to make false statements.

Using inappropriate/threatening behaviour.

Breach of suspension terms/willfully refused to follow a reasonable instruction.

Misused company information/breach of data protection."

43. Under each of those headings Mr Millard set out a number of bullet points containing summaries of the evidence he had collected. So, for instance, under "*Influenced colleagues to make false statements*", there are a total of 19 bullet points setting out how the statements have changed and the allegations against the claimant. Under "*Using inappropriate/threatening behaviour*", there are 5 bullet points; under "*Breach of suspension terms*", there are 3 bullet points, and under "*Misused company information*", there are 8 bullet points. In summary, that is a detailed document which sets out why it is said the claimant has a case to answer.

44. The claimant had appealed the grievance outcome on 16 July, and it was assigned to Mr Ross on the same day.

45. On 21 July the claimant raised a further grievance alleging the disciplinary process was victimisation.

46. On 24 July he was written to, to be told that that this second grievance would be dealt with in conjunction with the disciplinary process. On the same day he received a letter inviting him to a disciplinary hearing on 7 August to answer the allegations contained in Mr Millard's investigation report. The claimant was sent a copy of that investigation report and he also had copies of his own statements made during the interviews that he had attended.

47. On 31 July the claimant asked for all the investigation transcripts or statements. On 3 August the first respondent wrote to the claimant informing him that the investigation report contained sufficient information for him to be able to answer the allegations, and that it would not be supplying copies of the further documentation. Having consulted the legal department, Ms Tolen, who wrote that letter, told the tribunal that it was felt the first respondent owed a duty of care to those who had raised allegations against the claimant and that it had to balance the claimant's right to sufficient information with those witnesses' concerns. The tribunal accepts that this matter was considered with care and the decision not to send copies of those documents was not an unreasonable one in the circumstances of the serious allegations raised against the claimant and the allegation that he had attended witnesses' homes. The claimant was told this again after he had repeated his request for the transcripts in a letter of 5 August.

48. The claimant asked for the disciplinary hearing date to be changed due to unavailability of a representative and it was rescheduled for 14 August.

49. In the meantime, on 11 August, there was an appeal meeting with Mr Ross with respect to the grievance. The claimant was signed off with depression

and anxiety so that the hearing on 14 August did not proceed. Mr Ross, who was dealing with the appeal against the grievance, interviewed a number of people. Importantly, he interviewed VK and it was at this point that VK retracted what she had earlier said about the allegation that Mr Fensome had made a comment about the claimant working with his own people. She alleged that the claimant and PS had told her to say that and she also said that she was scared of what "*they will do now*".

50. On 24 August Mr Ross provided the appeal outcome. That is a detailed document at page 205 to 210 of the bundle. It gives reasons for the rejection of the claimant's appeal in considerable detail and the tribunal accepts it is not an unreasonable decision on the basis of information provided to Mr Ross.

51. The claimant attended an Occupational Health telephone assessment on 14 September and there was then a further assessment of him. In summary, the claimant was unfit to attend work, but the Occupational Health report also made reference to the fact that he was unlikely to recover until the disciplinary matters were concluded.

52. The claimant presented his first claim form to the tribunal on 1 September. There was a further Occupational Health assessment on 24 September and on 2 October the claimant received a letter sent by Mr Brobin who had been appointed to deal with the disciplinary matter. The claimant accepts that he did not know Mr Brobin and had not been involved in any of the claimant's matters before this one. The claimant was informed that the first respondent intended to pursue the disciplinary matter and that the hearing was rescheduled for 16 October. The claimant was told that he had two weeks to make written submissions and details of the case against him.

53. On the same day the claimant decided to resign. The letter was sent by email *on 2 October. An extract of it reads as follows:*

> *"The reason for my resignation*
>
> *You should be aware that I am resigning in response to a repudiatory breach of contract by HR Department Iceland Foods Limited and I therefore consider myself constructively dismissed. You rejected my grievance appeal on 24 August 2020 which sets out the basis on which I believe you seriously breached my contract. As you have not upheld my grievance I now consider my position at Iceland Foods Limited is untenable and my working conditions intolerable leaving me with no option but to resign in response to your breach.*
>
> *A. fundamental breach of contract I strikingly believe not carrying out a fair grievance procedure in line with my contract and discriminating against me because of my race, religion and belief. "The reason for suspension is to allow an independent investigation to be carried out and to ensure no further allegations can be made against you". The decision to suspend me was unfair and unreasonable amounts to an act of victimisation contrary to the Equality Act 2010. The decision to pursue disciplinary proceedings and the manner in which the*

disciplinary investigation has been conducted amounts to victimisation contrary to the Equality Act 2010.

B. *Breach of trust and confidence/last straw doctrine. There is a clear intention that I will not be permitted to have a fair hearing and the only logical conclusion is that the outcome of the hearing has been pre-judged. The explanation provided for the failure to disclose the documentation namely "due to the potential risk of disclosure and /or duty of case to the witnesses" is unreasonable and irrational. In particular as the witnesses have been identified in the investigation report and a brief summary of their evidence has been provided. It is reasonable to assume that the decision which amounts to a contravention of the Acas Code of Practice was taken in bad faith as there has been a complete disregard for the principles of fairness and natural justice."*

54. The first respondent replied to that letter suggesting that the claimant take time to reflect but the claimant confirmed his resignation. He sent further letters about that which it is not necessary to go into. His employment therefore ceased on 2 October and his second ET1 was presented in November.

55. We have heard some evidence about what happened with respect to some of the witnesses after the claimant resigned. As we understand it BR was given a "*Pro-tem*" payment for a short period because there was no store manager. We were told that the first respondent's processes allow for that after a four-week gap, but this was actioned a little bit earlier, over three weeks, so that BR got it at the four-week period. It appears that BR also applied to be an apprentice store manager. This involves an independent panel and, having been recommended by her area manager, she is now working as an apprentice store manager. The claimant alleged this was linked, in some way, to supporting Mr Fensome but the tribunal does not accept that. The process seems to have been followed within the first respondent's own procedures.

56. WP was apparently promoted at some point to senior supervisor from supervisor but again the tribunal cannot see any connection between what he said during the investigation and that alleged promotion. SSK expressed interest in some progression with the first respondent but took the decision not to proceed with that. The tribunal is not satisfied that any of these actions have anything to do with what the witnesses said during he course of the investigation.

57. Those are the facts upon which we base our conclusions.

The law and submissions

58. We are first concerned with a constructive unfair dismissal case. The law is fairly settled with respect to that aspect. The right to make such a claim arises under s95 1) c) Employment Rights Act 1996. The tribunal has to consider whether there is evidence of a fundamental breach of contract by the respondent. In this case the allegation is that the implied term of mutual trust and confidence has been broken. If there is such a fundamental

breach, we have to consider whether the claimant resigned in response to that breach and did so without delay. Reference was made to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 but only in relation to the provision of information to an employee before a hearing.

59. As far as the Equality Act (EQA) claims are concerned, the claimant brings claims under sections 13, 26 and 27, for direct discrimination, harassment and victimisation. The relevant parts of those sections reads:-

13 Direct discrimination

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

26 Harassment

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

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

(i) violating B's dignity, or

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

(2) -

(3) -

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

(a)the perception of B;

(b) the other circumstances of the case;

c) whether it is reasonable for the conduct to have that effect.

27 Victimisation

1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4)This section applies only where the person subjected to a detriment is an individual.

60. Under section 136 EQA, the burden of proof rests on the claimant to prove facts from which we could conclude that there has been a breach of any of those sections and if and when he does so, the burden will shift to the respondent to explain any such matters. If the respondent fails to give a satisfactory explanation, the tribunal will find there has been discrimination.

61. We had written submissions from Mr Hignett on each of the 13 detriments and he then addressed us solely on the constructive dismissal aspect.

62. We had oral submissions from Mr Pem for the claimant. He did not take us through each detriment but submitted that there was poor treatment of the claimant amounting to a breach of the implied term of trust and confidence, pointing out where he said that there had been unfair treatment. Both in his cross examination and his submissions, Mr Pem suggested that there was unfair treatment because the respondent had failed to follow up suggestions made by BR when she was being interviewed that WP had put pressure on her to give the right answers because that would be of some assistance to Mr Fensome. Mr Pem's submissions were that all these matters were sufficient to amount to a breach of trust and confidence and steps were taken because the claimant is Asian.

Conclusions

63. It seems sensible to go through the 13 detriments, all of which are relied upon for constructive dismissal, and are also relied upon for different Equality Act sections. Just to ensure we have covered everything in the list of issues, we answer the questions in the list of issues where necessary. In some cases, our findings of fact make it clear what our answer is going to be, but we go through them to make that clear.

64. The claimant described his race as Asian. Any comparator therefore would seem to be a hypothetical non-Asian store manager who was facing allegations of pressuring junior members of staff to give untrue statements and associated alleged wrongdoing. The protected act for the victimisation claim is the grievance the claimant raised on 30 April (and, to a lesser extent, the one raised on 21 July).

65. **Detriment 1** (direct and harassment) is the allegation that Mr Fensome

called the claimant a bloody liar. As indicated the tribunal has found that that did not happen. The tribunal is satisfied that Mr Fensome said something to the effect of the claimant lying or not telling the truth. That is clear from most of the statements. That comment has no connection to the claimant's race, nor was that suggested by the claimant. The comment not having been made there can be no direct discrimination or harassment and it does not amount to a breach of contract.

66. **Detriment 2** (victimisation) is the decision to suspend the claimant. As a matter of fact, that did happen, but the claimant cannot show that it was less less favourable treatment because of him having raised a grievance. The suspension occurred after serious allegations were made by colleagues of the claimant. It is not a breach of contract to suspend someone in circumstances where allegations such as these have been made and there is no connection whatsoever to the claimant having raised the April grievance. Nor is it a breach of contract, provision for suspension being contained in the contract.

67. **Detriment 3** (direct and harassment) relates to Ms Turner putting allegations to the claimant in interviews. As our findings of fact make clear, Ms Turner did put those allegations to him. That is quite the proper thing to do. It has no connection to him having raised the April grievance. It is not a breach of contract nor is it any act of discrimination of any kind. It does not amount to harassment.

68. **Detriment 4** (constructive dismissal only) is the delay in the outcome of the grievance. The first question for the tribunal is whether in fact there was a delay. That is whether there was a delay in the matter raised on 30 April and decided on 8 July, a little over two months. There is no timeframe in the first respondent's procedure that the tribunal have been taken to, so the tribunal cannot say that it is a particular delay. Even if it does amount to delay, it is not a breach of contract because this was obviously a complicated matter which needed a considerable number of telephone interviews in the circumstances of a pandemic. There was no delay, and if there was a delay, it certainly does not amount to a breach of contract.

69. **Detriment 5** (victimisation) is the first respondent initiating a disciplinary investigation. Of course, the first respondent did start a disciplinary investigation. The first respondent only needs to show some reasonable cause to begin such an investigation and it has clearly managed to do that. These were serious allegations against the claimant. It is not a breach of contract to start a disciplinary investigation where such allegations are made, and neither can it be said that it is in any way connected to the claimant having put in a grievance.

70. **Detriment 6** (direct, harassment and victimisation) is Ms Turner rejecting the grievance. Of course, she did reject it. The tribunal has found that that was a reasonable decision in the light of her investigation. There is very little evidence from the claimant as to why he believed this might be a breach of contract or direct discrimination, harassment or victimisation. It is none of those and the claimant has singularly failed to show any connection between that and his race or that he made a protected act. It does not amount to a breach of contract.

71. **Detriment 7** (direct and harassment) ties into detriments 10 and 11 (direct, harassment and victimisation). This is the concern the claimant has raised about the first respondent's decision not to provide transcripts of interviews. This was decision made by the first respondent. The tribunal finds that the first respondent gave it careful consideration and provided reasons for not providing them. The tribunal finds, in the circumstances of this case, with clear evidence that witnesses were scared and had reported visits to their homes, that it was a reasonable decision in the circumstances. It did require balancing the claimant's need for information against those other concerns but the evidence shows that is what the first respondent did. The ACAS Code is only relevant for detriments 10 and 11, the disciplinary investigation. That code refers to normal circumstances where this sort of information would be provided. These were not normal circumstances. There is no breach of contract, no harassment, it has no relation to the claimant's race and it is not connected to his raising a grievance.

72. **Detriment 8** (victimisation) is inviting the claimant to a disciplinary hearing in July. There was such an invitation. The tribunal asks whether that can amount to a breach of contract. There are very few circumstances in which an invitation to a disciplinary hearing could be a breach of contract. In light of the investigation report and the evidence collected, it was a reasonable action to take. We also find that the claimant cannot show any connection between the invitation and him having raised a grievance. Again, the reason was the allegations made against him.

73. **Detriment 9** (victimisation) is the second grievance and disciplinary hearing being taken together. Again, this was a decision taken by the first respondent. The ACAS Code advises that it is something that can be done in appropriate circumstances. These were such appropriate circumstances. There was a clear connection between the claimant's grievance and what was happening at the disciplinary process. It is not a breach of contract nor is it connected to the claimant having raised a grievance.

74. Detriments 10 and 11 we have dealt with and that is to do with the provision of transcripts to the claimant.

75. **Detriment 12** (direct, harassment and victimisation) is Mr Ross not upholding the grievance appeal. Of course, this did occur; he did not uphold the grievance appeal. There is absolutely no evidence it had anything to do with the claimant's race and cannot therefore be direct discrimination or harassment related to race. Nor did it have any connection to the fact that he had raised a grievance. It does not amount to a breach of contract to fail to uphold a grievance appeal. It is merely one of the options open to an appeal manager in a suitable case.

76. **Detriment 13** (direct, harassment and victimisation) is the invitation to the disciplinary hearing in October. The first respondent gave the claimant reasons for inviting him to that meeting. It had reasonable grounds to hold such a meeting given that there had already been two adjournments and in the light of Occupational Health advice, that until the disciplinary matter was concluded the claimant would not be well enough. It was a reasonable step for the first respondent to try to take those matters forward. It allowed sufficient time for the claimant to make written submissions if he was not

able to attend and the tribunal notes that, at the date of the disciplinary hearing on 16 October, the claimant did not have a medical certificate. There is no breach of contract in that invitation. Nor can the claimant show any connection between that and his race; it is not harassment and it is not connected to him having raised a grievance.

77. The tribunal now address any outstanding issues in the list of issues. The first issue is the constructive unfair dismissal claim. The first question is - *Did the respondent breach the implied term of trust and confidence, that is, did it without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant*? Our answer for this must be - No. We have found no breach of contract. Proper investigations were carried out, they were careful and relatively thorough, they fell within the first respondent's own procedures and they adhered to fair industrial relation practices giving the claimant an opportunity to respond at all times.

78. There was a late suggestion by Mr Pem that there should have been an investigation into BR's suggestion that WP had applied some pressure in some way on behalf of Mr Fensome. This was not in the issues nor was it raised at any time by the claimant before he resigned. There does not seem to have been concern by the claimant and it is not something which we can take a view on. There was no breach in any such decision.

79. There is some merit in the issue about the transcripts not being sent to the claimant, but the tribunal agrees that the claimant did have sufficient information to attend a disciplinary hearing. The case against him was clear. The first respondent did not conduct itself in a manner likely to damage trust and confidence in the employment relationship and the claimant can therefore not show such a breach.

80. We do not really need to go beyond that, but the issues ask the tribunal to consider what was the reason for the claimant's resignation. Mr Hignett has suggested, on behalf of the respondents, that there is sufficient evidence that the claimant resigned because he did not want to attend a disciplinary hearing and risk being dismissed. The reasons the claimant gives for resigning appear in his letter which is quoted above and the tribunal accept that they were the reasons. At that point it did not include concerns about his health, nor did he ask for any sort of postponement. The tribunal accepts that the claimant believed that the decision was pre-judged, but he believed that wrongly and on no evidence whatsoever. Although that was one of the reasons for resigning, he had no basis for believing that an independent manager who was to hold the hearing had already decided the case against him. The reasons the claimant resigned were set out in his letter of resignation.

81. There is no need to answer any of the other issues under the constructive unfair dismissal heading so we move then onto the Equality Act matters.

82. The detriments relied on for the direct discrimination claim are 1,3,6,7,10,11,12 and 13 and the tribunal has already made clear that the claimant has not shown any less favorable treatment because of his race. He has not been able to show facts from which the tribunal could conclude that a hypothetical non-Asian store manager facing similar allegations

would not have faced the same process. Although the tribunal has found that Mr Fensome probably said something about the claimant lying, we do not accept it had any connection to the claimant's race.

83. The claimant's harassment allegations are at detriments 1,3,6,7,10,11,12 and 13. The tribunal has found that some matters alleged did not occur. For instance, the "*bloody liar*" comment was not made. A considerable number of matters raised did occur because they were part of the process during the investigation. The tribunal accepts that these matters might be unwanted. It is generally the case that employees do not want their grievances to be rejected, nor do they wish to be suspended or invited to a disciplinary hearing, but it has no relation whatsoever to the claimant being Asian. That is a requirement of the harassment section of the Equality Act that the conduct relates to race and none of the conduct was so related, nor is it reasonable for the claimant to believe it was.

84. For the victimisation claim, it is accepted that the claimant carried out a protected act on 30 April when he brought the grievance. He relies on detriments 2,5,6,8,9,12 and 13 as being detriments for this claim.

85. Again, as will be clear from what has been said earlier, the claimant has not been able to show that the detriments were because he had complained about race discrimination. In the respondent's investigation into that complaint, allegations were then made against the claimant but that is very different from him being able to show that the actions taken by the first respondent thereafter were because he made the complaint. The actions taken were because of things discovered during the course of the investigation.

86. That means that all the claimant's claims must fail and are dismissed.

COSTS

87. At the end of the oral judgment, the respondents made an application for costs. There was a short break before the application was made and there was a further break for the claimant's representative to take instructions.

88. In summary, the respondents made an application for costs because it was said the claimant's case was unreasonably brought and the conduct of the proceedings was unreasonable. There were four particular aspects to the respondents' application.

89. First, it is submitted that the race discrimination claim should not have been brought or continued as there was no evidence to support that claim and it has a negative impact on those against whom it is alleged, particularly in relation to Mr Fensome who remained as a respondent. Those Equality Act claims should have been either not brought or withdrawn when it was clear there was insufficient evidence to support such a claim.

90. Three other matters Mr Hignett made reference to:

91. The background evidence that the claimant had coerced junior members of staff to make false statements.

92. In the course of the hearing, the counter allegations were raised which the respondents had no warning of, in relation to promises or pay rises for witnesses, and

93. The claimant had told a lie with respect to his visit to SSK's house and given a poor explanation about that in the hearing.

94. The claimant objected to an order for costs and made submissions after the break. Again, in summary, it was said that there was no unreasonable behaviour; that the claimant had a genuine belief that there had been discrimination and his treatment was poor. It was submitted, on his behalf, that there should be no order for costs, particularly bearing in mind his means, which we will come to shortly, and because there had been no costs warning to the claimant who believed that the normal course in tribunal proceedings is that each party should bear their own costs.

95. The application is made under Rules 76 to 78 of the Employment Tribunal Rules. It is agreed that it is a matter for discretion for the tribunal once the threshold has been met. That threshold, in this case, is to show unreasonable conduct. The claimant's case is that the threshold is not met in this case and there should be no such order.

96. As far as the claimant's means are concerned, in summary, he is paying the housing costs of his ex-partner and two children including paying the mortgage for a home where he no longer lives. It appears that there may be equity of probably over £100,000 in that house where his ex-partner and the children live. He also pays some running costs for that home as well as come contribution towards groceries. He now lives with another partner and child. His current partner pays the housing costs there but he pays for a car and for an outstanding loan. In summary, the claimant's income is relatively limited at the moment although, as indicated, there could be some capital if at any time the property is sold.

97. The tribunal considered the application made. The first question is whether there was unreasonable conduct by the claimant in bringing or continuing or the conduct of the proceedings.

98. First, we considered the race discrimination claims. The tribunal agree that there was little or no evidence to support those claims, particularly in light of the fact that the comment the claimant alleged had been made by Mr Fensome, the tribunal has found were not made. We accept that the impact of being a respondent to a race discrimination claim, particularly in relation to Mr Fensome, is relatively severe. We also recognise though that Mr Fensome and the other witnesses who came here and had allegations of discrimination against them had been well supported by the first respondent.

99. Our view is that the race discrimination claims were brought and continued unreasonably. It should have become clear to the claimant and those representing him at a very early stage, that there was very limited evidence to support a race discrimination claim. In fact, there were not that many questions on that claim nor was it presented as a particularly important part of the claimant's claim.

100. As far as the other aspects raised by the respondents are concerned, the tribunal does not believe that they are sufficient to show unreasonable conduct. The tribunal's view is that they did not add significantly to the time the tribunal had to take, the witnesses were well able to deal with them fairly shortly and rebut them. The claimant had some information on what had happened to some of the witnesses after he left and there is nothing particularly wrong in it being put to the witnesses how that had come about and they were able to deal with it.

101. The claimant's untruth about being in SSK's garden is clearly one which he should not have made during an investigation, but the tribunal note that by the time of this hearing he did not maintain that denial but gave another explanation. The explanation is one which we did not necessarily accept but it does not make it a particularly serious matter.

102. Looking at those three matters the tribunal is not of the view that they form part of any unreasonable conduct, though we do say that the bringing and continuing of the race discrimination claims was unreasonable conduct.

103. The threshold for considering a costs award having been met, we therefore turn to the second part of our deliberations with respect of whether to make such an award. The respondents' case is that we should consider a contribution towards their costs which are a little over £25,000 and it is suggested we might want to consider around a half of that.

104. We have considered this with some care. Considering all the factors which we have before us at this time, we do accept that the claimant is of fairly limited means at the moment. We also have considered the fact that the respondents did not provide the claimant with a costs warning which might well have assisted him with considering whether to continue with this case. It is possible that the claimant might have not realised there was a risk of costs being awarded against him and we are also mindful of the fact that a costs order should not be punitive.

105. Having considered all those matters and the fairly limited extra time which we believe the race discrimination case took, given that almost all those matters would have arisen under a constructive unfair dismissal claim in any event, we have decided with some hesitation, not to make an order for costs.

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Employment Judge Manley

Date: 16 May 2022

Judgment sent to the parties on
7 June 2022

For the Tribunal office