EMPLOYMENT TRIBUNALS

Claimant: **Miss S Ugboaja**

Respondent: **Hounslow Council**

Heard at: **London South Employment Tribunal**

On: **8 – 11 November 2022**

Before: Employment Judge Dyal, Ms H Bharadia, Ms N Beeston

Representation:
Claimant: in person
Respondent: Mr Harding, Counsel

RESERVED JUDGMENT

1. The claims fail and are dismissed.

REASONS

Introduction

1. The matter came before the tribunal for its final hearing.

The issues

2. The issues were identified at Preliminary Hearing 4 Februrary 2022 as follows:

S.13 Equality Act 2010 ("EQA 10")

Did the respondent do the following: –

- Did Mr Amer Butt say in the concierge's office in the summer/autumn of 2019 that he preferred black males as they were more subservient and that was why he preffered to hire them rather than black females who were trouble?
- Did Mr Amer Butt say in the CCTV room in the presence of " Kenneth" that it was not worth a black woman having a uniform as they did not fit the mould?
- Did the respondent fail to respond to the claimant's grievance of 05 February 2020 adequately or at all?
- Dismissed the claimant on 01April 2020

If so, was it because of her race?

The claimant relies upon a hypothetical comparator.

S26 EQA 10 Harassment related to race

Did the respondent engage in conduct as follows

- Did Mr Amer Butt say in the concierge's office in the summer/autumn of 2019 that he preferred black males as they were more subservient and that was why he preffered to hire them rather than black females who were trouble
- Did Mr Amer Butt say in the CCTV room in the presence of " Kenneth" that it was not worth a black woman having a uniform as they did not fit the mould.

If so, was that unwanted conduct?

Did it relate to race?

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

If not, did it have that effect? The tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Breach of contract

What was the claimant's notice period?

Was the claimant paid for that notice period?

If not, was the claimant guilty of gross misconduct?

Protected disclosure

- On or about date approaching Christmas 2019 did the claimant report to Mr Amer Butt and Mr Chris Shoebridge, head of housing via email that the building was a fire hazard due to the presence of vegetation close to the building and attached to the building which had recently caught fire. (Disclosure one)
- On or about the date between December 2019 and New Year 2020 did the claimant report to Mr Amer Butt and Mr Chris Shoebridge, head of housing that due to the ingress of water into the electrics the building was dangerous. (Disclosure two)

- Was the above a disclosure of information
- Did the claimant believe the disclosure(s) was made in the public interest
- Was that belief reasonable
- Did either the first or second disclosure tend to show that the health or safety of an individual had been, was being or is likely to be endangered.
- Was the reason or principal reason for the dismissal of the claimant either disclosure one and/or disclosure two.

3. At the outset of the hearing the parties agreed that these remained the issues, save that the Claimant applied (successfully) to amend and add a further putative protected disclosure to the list: the Claimant's emails to Councillors that appeared at C345-50 of the bundle (disclosure 3).

4. In closing submissions the Claimant withdrew the latter two race discrimination complaints (the complaint about her grievance and the complaint about dismissal).

The hearing

5. *Documents before the tribunal*:
   5.1. Agreed bundle running to 791 pages;
   5.2. Respondent's grievance policy.

6. *Witnesses the tribunal heard from*:
   6.1. For the Claimant:

6.1.1. The Claimant
6.1.2. Mr Ali-Kila, Former Concierge Officer
6.2. For the Respondent:
6.2.1. Mr Amer Butt, Formerly Concierge Team Leader
6.2.2. Mr Elliot Brooks, Director of Resident Services
6.2.3. Mr Chris Shoubridge, Formerly Head of Housing Management
6.2.4. Mr John Gleeson, Principal Human Resource Advisor / Team People Business Partner (written evidence only)
6.2.5. Mr Kenneth Mowoe, formerly Concierge Officer (written evidence only)

The hearing

Specific disclosure

7. At the outset of the hearing the Claimant applied for specific disclosure in respect of:

7.1. Mr Butt's entire personnel file. She said in her reply to Mr Harding's submissions (in which he objected to disclosing the file among other things because it contained irrelevant information such as pay information) that pay information could be omitted;
7.2. The Respondent's grievance policy;
7.3. Documents that evidence how her grievance of February 2020 was dealt with, particularly an email she says Ms Hayter sent her to the effect that she had not raised a grievance and to delete Ms Hayter's contact details.

8. The test upon an application for specific disclosure so far as relevant is (*Santander UK Ltd v Bharaj* UKEAT/0075/20):

8.1. Whether the documents sought are relevant in the sense of supporting and/or adversely affecting a party's case;
8.2. Whether disclosure is necessary for a fair disposal of the issues between the parties.

9. We resolved the application as follows:

9.1. The grievance policy should be disclosed (the Respondent consented to this);
9.2. The had to disclose any documents that had not yet been disclosed that evidenced how the claimant's grievance of February 2020 was dealt with, in particular, if it existed, any document from Ms Hayter in which she told the claimant that her grievance did not exist and to delete her contact details or anything similar.
9.3. The application for Mr Butt's whole personnel file/whole personnel file less pay data was refused. The request was much too wide and would inevitably include a great deal of irrelevant material. However, any documents evidencing any complaints against Mr Butt by other employees, where the complaint was of race discrimination / race harassment / victimisation for

making public interest disclosures or raising health and safety concerns must be disclosed. This is the sort of material which may shed light on the reason why Mr Butt acted as he did in the case. It is the sort of material that might be capable of shifting the burden of proof and/or from which it might be just and equitable to draw inferences.

10. The grievance policy was swiftly disclosed on Day 1. On Day 2, Mr Harding said that he had reviewed Mr Butt's personnel file and that it did not include reference to any complaints against him. Mr Harding indicated that a further search was being conducted in relation to the Claimant's February 2020 grievance including by contacting Ms Hayter but as far as the Respondent was concerned there was nothing further to disclose. Nothing further was disclosed.

Application to amend

11. In March 2022, the Claimant emailed the tribunal twice asking to amend her claim. The first email applied to add a claim of s.103A ERA, unfair dismissal. This was hard to follow since days previously there had been a preliminary hearing in which it had been identified that there was already such a claim and the record of that hearing had already been sent to the parties. The second email sought to add a complaint (of an unspecified kind) that the grievance process had been flawed. That was also hard to follow since a complaint about that was already on the list of issues. The Respondent was asked to comment on the application at the time but, for reasons that are unclear, did not do so. The applications were outstanding at the outset of the hearing so the tribunal raised and addressed them.

12. There was a lengthy discussion with the Claimant in which we sought to understand what it was that she was seeking to add by amendment. Her position was ultimately that she wanted to rely on additional protected disclosures in support of her claim that she was dismissed contrary to s.103A ERA. The disclosures she sought to rely upon were the emails she sent to councillors that appear at C345-350 of the bundle. The Respondent consented to this application. We were content to allow the application not least because it was by consent, because an email to councillors was referred to in the ET1 together with an assertion that it was shown to Mr Butt and because the application had been made well in advance of the hearing albeit left undetermined.

Managing the hearing

13. The hearing itself was challenging and it was unavoidably necessary to interrupt the Claimant quite regularly in order to give her guidance, to bring things back to the issues and to let others speak when it was their turn to do so:

    13.1. When the Claimant was being cross-examined:

        13.1.1. she tended to give very long answers which did not, or only barely, engaged with the question. Instead of directly engaging with the question she frequently preferred to repeat complaints about Mr Butt,

concerns about the quality of the Respondent's social housing stock and the main theses of her case. She was therefore periodically interrupted by Judge Dyal and asked to focus on the question;

13.1.2. she sometimes interrupted the question before it had even been formed and began speaking at length. She was therefore asked to pause, wait for the question and then answer it.

13.2. When the Claimant was cross-examining:

13.2.1. instead of asking questions she frequently made dense speechs at the witness that included multiple factually controversial propositions. It was necessary to interrupt these and remind the Claimant to pose a question. Where she was struggling to do so, Judge Dyal transposed the gist of the Claimant's speech into a series of short questions for the witness to answer;

13.2.2. the Claimant very frequently interrupted witnesses. Often this would be a word or two into the witness's answer where he was attempting to respond to what had been a long question;

13.2.3. there was frequently a distinct lack of focus on the issues in the claim but instead a focus on off-topic issues. For instance, because the Respondent had objected to disclosing Mr Butt's personnel file and referred as, an example, to pay information within it as irrelevant the Claimant took this mean that Mr Butt had probably been defrauding the Respondent by claiming pay for hours he had not worked. There was no proper basis for that allegation which in any event was not a matter that was before the tribunal. The tribunal gave the Claimant a great deal of leeway in what it allowed her to ask about but there are limits. It was generally necessary to interrupt the Claimant periodically to remind her of the issues in the case by reference to the list of issues and invite her to focus upon them.

14. All of the above are common features of employment tribunal proceedings particular where litigants represent themselves. However, it is very much a question of degree and this case was well outside the normal range.

15. We are not suggesting, however, that the Claimant was intentionally disruptive or anything of that nature. She was passionate about her case, inexperienced in running an employment tribunal claim and this was simply her way of presenting it.

16. In addition to the above efforts to assist the Claimant and to level the playing field, the tribunal also allowed the Claimant to go very significantly over her time-estimates for cross examination. Indeed, it allowed the Claimant to go over even her revised time estimates. We also allowed the Claimant to speak entirely uninterrupted in closing submissions. Only when she had completed her speech (about 30 minutes) did Judge Dyal asked her some questions about the race discrimination complaint.

Witnesses who were not called

17. Two of the Respondent's witnesses were not called. There was no explanation for this. In the circumstances, we did not feel we could attach any weight to their evidence where it related to controversial issues.

Findings of fact

18. The tribunal made the following findings of fact on the balance of probabilities.

19. The Respondent is a local authority. The Concierge Service was a part of the Housing Department. It had several offices which were located within some of the Respondent's larger housing estates. The Concierge Service was a point of contact between tenants and the council at which housing issues could be raised. In the usual way the Respondent also had a maintenance department that was responsible for carrying out planned and reactive works to its estate.

20. The Claimant was employed as a Concierge Officer. Her contract of employment provided:

> **Probation**
>
> The appointment is subject to the satisfactory completion of a 6 months' probationary period.
>
> **Period of Notice**
>
> During your probationary period, the amount of notice required to terminate this contract is one week on either side. Once you have successfully completed your probationary period, the amount of notice required to terminate this contract is **one month** on either side.
>
> If the statutory entitlement to notice exceeds your contractual entitlement, the statutory period will apply.

21. The Claimant's employment commenced on 12 August 2019. It commenced with a two week induction. She was initially based at Cornish House, Brentford Towers.

22. Mr Amer Butt, Concierge Team Leader, was the Claimant's line manager. Mr Butt had around 23 years service with the Respondent at this time. Several members of his family also worked for the Respondent. This included his brother, two of his sisters and his son. His evidence, which we accept, is that he was not involved in the recruitment process for his family members, with the exception of his son. When his son was recruited, one of the interview panellists was unable to attend at short notice so he was asked to take his place. In each case the family connection was declared.

23. The Respondent's practice was for line managers to carry out monthly review meetings with probationers. The Claimant had a first probation meeting on 11 September 2020. It was unremarkable.

24. The Claimant had a second probation meeting on 15 October 2019. Mr Butt raised a number of significant performance issues. A point of chronology is important here: at this stage the Claimant had not made any of the disclosures she relies upon as Public Interest Disclosures and more generally had not made any complaints about Mr Butt.

25. The performance issues that were raised included the following which were to become a theme of the remainder of the Claimant's probation:

    25.1. Timekeeping;
    25.2. Failing to complete any CRM reports (case management system);
    25.3. Health and safety concerns: leaving the door open at the end of her night-shifts on three occasions.

26. We are entirely satisfied that each of these concerns was well founded in fact and that it was appropriate to raise them with the Claimant:

    26.1. The Claimant had been late to work on several occasions. She did not dispute this at the time. At trial in relation to her own timekeeping the gist of her oral evidence was that there was often a lot of traffic and this made her late. She did not appear to see this as a significant issues. We, however, can see why this was a concern to her employer, especially while she was on probation when employees tend to try to show their best side. On Day 3 of the hearing, while cross-examining Mr Shoubridge, the Claimant suggested a new explanation for lateness which was that at least sometimes it arose out of a need to obtain a key and handover with staff in a different building. Mr Shoubridge did not accept that explanation and it is therefore not in evidence. We in any event reject it. If this had been a significant explanation for her lateness it would have been offered contemporaneously and/or in the Claimant's answers to cross-examination.
    26.2. CRM data is easily gathered. We do not think Mr Butt would have said there were no reports if there were any since it would be so easy to disprove what he said.
    26.3. We are satisfied that the Claimant did fail to lock the office door on three consecutive occasions. At trial the Claimant's position on this was that it illustrated that Mr Butt had been obsessed with checking up on her because in order to find the door open it would have been necessary to send someone to check the office after midnight. That was because, she said, she finished at midnight and she was the only person who worked at that office - so the next person on shift the following day would be her. However, that is not right. At this stage of the chronology the Claimant was working at Cornish House where there was both a day shift and a night shift. The day shift staff discovered that she had left the door unlocked.

27. The action points arising from the meeting were entirely reasonable:

    27.1. Arrive at work on time;
    27.2. Raise CRMs reports;
    27.3. Lock the office door when you leave.

28. The Claimant's behaviour was very challenging at this meeting. She left part way through stating that she wanted senior management present. It was therefore not possible for Mr Butt to show her the notes of the meeting and ask her to comment on them there and then. However, he did email the notes to the Claimant and she did not respond. Her evidence to us was that she did not know that she could comment on them. However, we do not accept that. It was obvious she could do so and, we find, that she was asked to so (this is recorded in the notes of the second and third probation review meetings).

29. On 18 October 2019, the Claimant asked Mr Butt for a transfer to Wicksteed Office. He granted this request and she moved to that office from 21 October 2019. At this office the Claimant was a lone worker who worked nightshifts. There were CCTV cameras in place at the office which were there so that the workplace could be monitored. This was, among other things, a health and safety measure. There were three CCTV cameras and they were all in open sight. The footage the cameras captured was visible both to the employee at the office (such as the Claimant) and remotely. There was also a check-in system known as Linkline. The employee was required to check-in at the beginning and end of the shift as well as hourly during the shift. There was more than one way of doing this, but the main way was using a piece of wearable technology that was known as the pendant. It was quick and easy to use.

30. A third probation review meeting was scheduled for 12 November 2019. This was postponed at the Claimant's request.

31. On 13 November 2019, the Claimant raised a grievance complaining of victimisation and harassment by Mr Butt. This was a wide ranging complaint that spanned health and safety issues as well as allegations that were characterised as "harassment, bullying, victimisation and discrimination in the workplace". It included a complaint about uniform but *not* the complaint that is in the list of issues or anything like it. The complaint was that the Claimant had needed to chase Mr Butt for a uniform and when it was provided the packets had been ripped and the shirts worn because it had previously belonged to another member of staff.

32. On this matter of uniform we prefer Mr Butt's evidence which is that he provided the Claimant with uniform at an early stage and that the uniform was not second hand. Among the uniform were four blouses. The packet for one of the blouses was open because another employee had tried it for size over the top of her clothes and it had been too big. Otherwise the uniform was unopened. The notes of the first probation review meeting record "Uniform provided". The Claimant's contemporaneous comments on those notes take no issue with that.

33. On 14 November 2019, the Claimant emailed Councillor Guy Lambert. The email was lengthy and included a combination of concerns about the quality/safety of the housing stock, the problems with which the Claimant in part attributed to Mr Butt. It also included complaints about the way Mr Butt treated her, which she put down to her raising concerns about quality and safety issues. The complaint about uniform noted above was repeated. Mr Lambert responded that he was pressed and would think about how to deal with the email. He said he would only

discuss it confidentially with a councillor colleague whom he trusted to keep it confidential. In the event, by some means which are unclear, this email as well as other similar ones, were passed to Mr Butt.

34. On 15 November 2019 the third probation meeting went ahead and Mr Shoubridge, Head of Management Services, attended the meeting with Mr Butt. At the meeting:

    34.1. The Claimant was told not to copy peers into her emails unnecessarily and inappropriately. This related to an email to a colleague, Sandy Colquhoun, which is not in the bundle and which we have not seen, though which we asked to see on day 3 of the hearing. In the event it was not provided. Mr Harding said, and we accept, that he had asked his client for it but that the wheels turned slowly and it was not obtained in time prior to the evidence closing.
    34.2. It was noted that the Claimant continued to fail to raise CRMs appropriately: she had raised 17 activity logs but no incident reports.
    34.3. The Claimant was challenged on not logging her arrival and departure with Linkline and at times failing to make the hourly check-in.
    34.4. The Claimant had been late to work on three occasions since the last review meeting. On two of those occasions she was about 40 minutes late. On the third she was about two hours late. On the latter two occasions she had given last minute notification that she would be late. On the first occasion she had not given any notification.
    34.5. The Claimant had closed the office about 20 – 25 minutes early on five occasions.

35. Save for the email to Ms Colquhoun, the factual bases of the criticisms of the Claimant are corroborated by the documents before us and we accept they are well founded. However, we cannot tell whether or not there was anything properly to criticize in the missing email.

36. The Claimant gave no contemporaneous explanation nor mitigation for these criticisms of her performance. We have already set out above her evidence to the tribunal in relation to arriving to work late. Her evidence in relation to:

    36.1. CRMs the Claimant suggested that this was a training issue and she required more training. If there was a training issue we would have expected to her to say so contemporaneously, so we reject that explanation.
    36.2. In relation to Linkline, the Claimant essentially put the shortcomings down to technology problems and/or said it was not possible that she had not checked in as much as is alleged because Linkline would have called her. We can accept there may have been the occasional technology problem but we do not accept it is the principal explanation: the principal explanation is that the Claimant simply omitted to call Linkline. It may well be that she was busy and distracted by her work but nonetheless this was an important safety measure that should have been prioritised. Whether Linkline called her or not, we find that there were indeed many occasions on which she did

not contact it when she was supposed to, both in this review period and others. That is corroborated by the Linkline reports in the bundle.

36.3. In relation to closing the office early the best the Claimant could say was that other people did this too. We can accept that it is probably true that on occasion other people closed the office early and did so for a range of reasons (some good some bad). That did not entitle the Clamant to do so. She was a probationer and it was not too much to ask for her to work her hours.

37. On 15 November 2019, after the third probation meeting, the Claimant wrote a further email in relation to her complaint. The gist of it was that she was being set up to fail her probation and that Mr Butt had an inappropriate power and influence over the Concierge Service. Further, that he deviously manipulated people out of their jobs so that he could fill their posts with people he "personally chose (usually Indian) casual staff". She said that other staff members were late most days, did not wear uniform but got away with it because they were Mr Butt's family or under his control. She complained that Mr Butt was monitoring her, including on CCTV.

38. An interim performance review meeting was held on 27 November 2019. This meeting was again conducted by Mr Butt and Mr Shoubridge. The Claimant's performance was criticised in relation to a number of matters:

38.1. The Claimant was copying people inappropriately to her emails. We have had sight of the emails and agree that in places people are inappropriately copied. For example the Claimant copied the Liberata help account into emails in which she makes complaints about her line manager and also copies in a peer (Mr Ali-Kila). We agree that was inappropriate and worthy of correction.

38.2. The Claimant was still not using Linkline properly. We accept that factually this was the case: the Linkline reports support this.

38.3. The Claimant had been late to work on several occasions. We accept that factually this was the case. She was asked if there were any issues preventing her getting to work on time and she said there were none.

38.4. The Claimant had continued closing the office early on occasion. She had also taken taking extended lunch breaks. We agree that factually this was the case.

38.5. The Claimant had completed some CRM reports but had not actioned them correctly. We accept this factually was the case.

39. This was another difficult meeting at which the Claimant did not fully engage. At the meeting the Claimant asked for an OH appointment. We accept that the Claimant was finding the performance management extremely difficult and perceived it as harassment though, objectively, it was not.

40. On 5 December 2019, at around 10pm, there was a fire outside at Fraser House, which is part of Brentford Towers, a high-rise estate. Some bushes had been set alight. The Claimant was on-shift and called Linkline and the London Fire Brigade who extinguished the fire. Nobody was hurt. This was a small fire but given its location it was a concerning event nonetheless.

41. The Claimant complains that she was left alone to deal with this incident and suggests that Mr Butt should have assisted her to deal with it. However, Mr Butt's working hours were 9am – 5pm, so he was not on shift. He was a low-level manager and there was no reason for him to be involved with the immediate response to this fire that night.

42. No doubt this was a difficult incident for the Claimant to deal with, but it is not really right to say she dealt with it alone. The London Fire Brigade fought and extinguished the fire. There was no expectation that she do so. All the Claimant really needed to do was call the fire brigade, Linkline and complete a simple incident report form. We accept that she also spoke with residents that night who had, understandably, come out of their flats on seeing the fire. The Clamant was disappointed that no other Concierge Officers came to assist and we sympathise with that.

43. The Claimant, however, went so far as to repeatedly criticise Mr Butt for going to Pakistan after the fire. This was a remarkable criticism. All Mr Butt did was take a period of planned annual leave commencing on 7 December 2019. There was no reason for him to cancel that leave. Again, in the context of the local authority hierarchy, he was a low-level manager. There was no need for him – or anyone - to cancel leave because there had been a small fire that had been handled by the fire brigade. There was a maintenance team to deal with any repairs that may have been required.

44. The Claimant's case as recorded in the list of issues is that *"On or about date approaching Christmas 2019 did the claimant report to Mr Amer Butt and Mr Chris Shoebridge, head of housing via email that the building was a fire hazard due to the presence of vegetation close to the building and attached to the building which had recently caught fire."*

45. In her witness statement she states:

> *On or about date approaching Christmas 2019 I reported to Mr Amer Butt and Mr Chris Shoebridge head of housing, that the building was a fire hazard due to the presence of vegetation close to the building and attached to the building which had recently caught fire. The connectivity in the area is often down but I tried to contact the other concierge officers. When I did call nobody picked up so eventually when the internet came back up I sent an email. I contacted Amer Butt to come to the office to help shortly to help with issues in the office after but he refused to do so.*
>
> *On or about the date between December 2019 and New Year 2020 I reported to Mr Amer Butt and Mr Chris Shoebridge plus Counsellor Guy Martin, Counsellor Steve Curran of Hounslow , concerns with the recent fire risks and that due to the ingress of water into the electrics the building was dangerous.*

46. There is no email before us on or about Christmas 2019 in which the Claimant reports the fire or any issues about it to Mr Butt or Mr Shoubridge. However, it is likely that she discussed the fire with them at some point in December 2019 and

likely that she referred to vegetation close to the building being on fire, since that is what happened. She also sent some emails about this in January 2020 (see below).

47. The second disclosure the Claimant relied upon, per the list of issues, is *"on or about the date between December 2019 and New Year 2020 did the claimant report to Mr Amer Butt and Mr Chris Shoebridge, head of housing that due to the ingress of water into the electrics the building was dangerous."*

48. The Claimant's evidence about reporting a danger arising from ingress of water into the electrics of the building was vague. We have quoted above what she said in her statement. There are various documents in the bundle in which reports/complaints about leaks on the premises including her office are made. However, the only documents that refer to a risk arising from the electrics that we can find in the bundle post-date her employment (questions posed by the HSE and in an email from the Claimant to the employment tribunal). The correspondence with Councillors does not refer to the electrics though there is, in the email of 14 November 2019, a reference to having to mop up a leak. Mr Butt was absent from the office from 7 December 2019 to 2 January 2020 so in that period there could not have been any oral report to him.

49. The evidence is far from clear, but doing our best we can accept that the Claimant reported leaks on several occasions during her employment and did so in a way that was critical of the Respondent for allowing them to continue. However, we do not accept that she reported the specific matter that is alleged in her disclosure (leak creating a danger with electrics) in the window of time she alleges. She reported that matter after her employment ended to the HSE and in correspondence to the tribunal.

50. By letter of 10 December 2019, the Claimant was invited to a grievance meeting by Ms Skelton, HR Manager. The Claimant had some correspondence with Ms Skelton in which we discern some reluctance on her part to attend a grievance hearing. In any event, the correspondence culminated with an email from the Claimant on 16 December 2019 stating:

> *I have gone through the HR Policy and made the appropriate steps as documented to raise my complaint. I have notified higher management that for now the complaint has been raised to them and no further action will be required unless deemed appropriate. With the long delay in communication before you scheduled this meeting I had already had this conversation. Thank you for your time and no further action is necessary for the meantime.*

51. Ms Skelton took this to mean that the grievance was withdrawn and it was treated as such.

52. An OH appointment was arranged for the Claimant to take place on 17 December 2019. She did not keep the appointment.

53. The fourth and fifth probation review meetings were combined into a single meeting because of Mr Butt's annual leave.

54. The Claimant had asked in advance for a female to be present at the meeting. She referred to this at one stage of her oral evidence to the tribunal. However on 14 January 2020, she emailed Mr Butt stating that she had said she did not want a female officer present. The meeting was therefore conducted by Mr Butt and Mr Shoubridge. It took place on 16 January 2020. The Claimant's performance was criticised in a number of respects:

    54.1. Text messages: it was said that the Claimant had sent Mr Butt text messages that were inappropriate including in their tone. In our view these text messages were not inappropriate and Mr Butt was being oversensitive in this regard. One of the messages is critical of Mr Butt and the Claimant says that she felt unsupported by him. This must be what he thought inappropriate but we do not agree that it was. The Claimant was entitled to express that feeling.
    54.2. Email: it was said that the Claimant had sent Mr butt an email that was inappropriate in tone and contents. In our view Mr Butt was again being oversensitive in this regard. The email was not rude, although it did include a reference to the Claimant feeling singled out by him. Again, that was how she felt and she was entitled to say so.
    54.3. CRMs: there continued to be problems with the way in which the Claimant was completing CRM reports, including by not attaching e-forms. We accept that this was well founded in fact it is corroborated by the documents.
    54.4. Timekeeping: there had been six occasions when the Claimant was late, 14 occasions when she had left early and 6 occasions when she had take an extended lunch break. We accept these points were well founded in fact, they are corroborated by the documents.
    54.5. Linkline: there were multiple failure to make contact when it was required. We accept this well founded in fact, it is corroborated by the documents.

55. The Claimant gave very limited responses to the performance isues raised at this meeting which was again, a difficult meeting. The meeting concluded with an indication that Mr Butt and Mr Shoubridge may go down the unsatisfactory performance route.

56. On 17 January 2020 the Claimant emailed Councillor Lambert making wide ranging complaints about Mr Butt and some complaints about Mr Shoubridge, including that he had managed to rise to a senior role on account of having a background in psychology that allowed him to manipulate people. She also said this in relation to the fire:

> All of this has gone way too far. There was a fire at Fraser House. Even though there were other concierges on the location at Brentford Towers nobody can to help me. The fire was climbing up near the blocks by the bushes and people from the top floors could see it and where worried. I dealt with everything myself. I called the fire brigade, spoke to tenants outside, reassured them, stood with people in the cold, logged the report everything. Amer my team manager said nothing. No good job or anything. There was no procedure to follow I just made my own. Everything is back to front here the procedures are old and dated. I can shape a better service.

57. On 20 January 2020, the Claimant forwarded the emails she had sent to Councillor Lambert to Councillor Curran.

58. On 23 January 2020 the Claimant emailed Mr Butt, Mr Shoubridge and others stating among other things:

> I would also like to make you aware that there was a fire at Wicksteed House before Christmas and I dealt with the whole incident myself, speaking to tenants, firecrew etc. Nobody from any of the blocks came to help. Amer went to Pakistan and I had no response from him. This is all on camera. I'm suffering from shock from all of this with this added prolonged stress. I'm taking this further.

59. An 'unsatisfactory performance' meeting was arranged for 27 January 2020. The Claimant requested a postponement. The meeting was rescheduled to 4 February 2020. The Claimant sought a further postponement to 11 February 2020 for her trade union representative to attend. Ms Brebner, HR, asked the Claimant who the representative was. The Claimant never gave this information but said that the meeting could proceed in her absence.

60. The meeting proceeded in the Claimant's absence. It was conducted by Mr Butt and Mr Shoubridge. The Claimant was criticised in relation to a number of matters:

    60.1. In appropriate email correspondence: this criticism included, among others, the emails referred to above to the Councillors.
    60.2. Timekeeping: there were a further two instances of lateness. We accept that this allegation was founded in fact.
    60.3. Covering the office CCTV camera and ignoring instructions that she cease to do so: the Claimant had been covering up one of the CCTV cameras in her office because the CCTV footage was being used to monitor her. This camera covered her workstation. She had been repeatedly instructed not to do so but continued to nonetheless. We accept that this allegation was founded in fact. There is email correspondence corroborating it. Some further comment is required. Mr Ali-Kila, who for reasons of availability was interposed during the Claimant's evidence, gave evidence that another employee had been in the habit of covering the camera (Adam). When the Claimant's evidence resumed, the gist of it was that she had taken her lead on this from Adam. This had never previously featured as an explanation for covering the camera. Mr Butt was then asked whether he accepted that Adam had covered the camera and the gist of his evidence was that as far as he knew Adam had not done that. He was aware of Adam asking for the camera to be adjusted but that had nothing to do with him covering it. We accept Mr Butt's evidence on this point. Even if Adam did cover the camera

he was not aware of it and contemporaneously the Claimant made no suggestion that the reason she was covering the camera was for any reason other than her privacy.

60.4. There were further occasions on which the Claimant had failed to contact Linkline. We accept that, this is well edvidenced.

60.5. CRM reports had been completed incorrectly in that 12 of them had no eforms attached. We also accept that.

60.6. False overtime claims: this heading was used and it related to a discrepancy about the stated start time for a shift. The issue was not progressed and was not one of the matters that the Claimant was impugned for in the conclusions to the meeting.

61. On 5 February 2020, Mr Butt issued a letter to the Claimant setting out a recommendation of dismissal. The letter gave the Claimant the opportunity to meet with Mr Brooks or provide a written submission in response to the recommendation.

62. Later on 5 February 2020, the Claimant submitted a grievance. The details of the grievance were very brief and said only this: *"Corruption and nepotism. Harassment and Bullying and [coercion] for me to fail my probation. Lack of knowledgeable procedures. Unsafe working practices and putting tenants lives at risk."*

63. On 12 February 2020, the Claimant had a grievance investigation meeting with Ms Hayter. The Claimant's account of this meeting is that Ms Hayter asked her to write a list of all of the people who were providing her with information for her grievance and helping with it. She refused. Ms Hayter then said words to the effect that the Claimant did not have grievance and that she should delete Ms Hayter's contact details. We find this account of the meeting implausible and reject it. It is wholly inconsistent with the email exchange between the Claimant and Ms Hayter that followed (see below) in which Ms Hayter is plainly content to correspond with the Claimant about her grievance and if anything tries to persuade her to continue with it. As regards the Claimant providing information at the meeting, we think it is much more likely, and find, that she was asked to provide details of her grievance and the people it related to. After all she had given only the briefest details of it in the written grievance itself. At one stage of her oral evidence, the Claimant told the tribunal that at this meeting Ms Hayter had expressed disgust at Mr Butt's conduct when the Claimant had outlined a pay issue. That corroborates our view of what happened at this meeting and is inconsistent with the Claimant's account that Ms Hayter shut down the grievance at this meeting.

64. On 12 February 2020, the Claimant emailed Mr Brooks (cc'ing Mr Shoubridge) and asked to be moved to a different manager, complaining that Mr Butt was harassing her. Mr Brooks responded stating that he was copying in John Gleeson as he was aware that the Claimant had a grievance being progressed in line with the Council's policy. This reply maintained Mr Shoubridge in cc. The Claimant then asked Mr Gleeson who had told him about her grievance.

65. On 13 February 2020 the Claimant emailed Ms Hayter forwarding the above chain and said: "*Ultimately I feel the grievance investigation has been massively comprised so can no longer go ahead."* She did not say why, but her evidence to the tribunal was because Mr Shoubridge had been made aware of the grievance.

66. Ms Hayter responded to the effect that the grievance process had not been compromised and that she remained independent. The content of this message also makes clear that at the grievance meeting the Claimant had given Ms Hayter a detailed account of her complaints. It also asks the Claimant for the names of colleagues who could corroborate her views because Ms Hayter was *"eager to get some collaborative evidence of your comments in order for me to make a fair and honest assessment of this case."* She concluded: *"If you still decide not to pursue this complaint please confirm to me direct and I will ensure all paperwork and conversations are marked closed."*

67. The Claimant responded again stating "*The grievance has been compromised and cannot go ahead and this can be seen? [sic] This breaches codes of practice on disciplinary and grievance procedures 2019 clearly state this and if you were to go ahead it would show that the grievance was clearly biased."*

68. Ms Hayter responded *"whilst I do not agree with your comments I respect your decision and your absolute right to halt this grievance."* The grievance was therefore treated as at an end.

69. The Claimant commenced a period of sickness absence on 17 February 2020.

70. On 2 March 2020, the Claimant had an email exchange with Mr Gleeson in which she queried what had become of her grievance. She said that she had told Ms Hayter that a new investigation was required. Mr Gleeson responded that the grievance had been closed in accordance with the above exchange of emails.

71. The Claimant was offered a probation review meeting with Mr Brooks who had been passed the probation report and recommendation of dismissal and tasked with making a decision.

72. The Claimant initially indicated that she did wish to meet with Mr Brooks to discuss the recommendation of dismissal. A meeting was arranged for 10 March 2020, but the Claimant did not attend. The meeting was rearranged for 13 March 2020, but again she did not attend. The Claimant was given a further opportunity to provide a written submission but she did not do so.

73. The Claimant was dismissed by letter dated 23 March 2020 upon one weeks notice which was given as 29 March 2020. The reasons for dismissal were given as:

    73.1. Poor timekeeping;
    73.2. Consistent failure to raise CRM reports;
    73.3. Consistent failure to comply with Linkline reporting;

73.4. Email communications using inappropriate language and persistent inclusion of recipients who did not need to be included;
73.5. Continuing to cover the CCTV camera in the concierge office.

74. The Claimant received her termination payslip in advance of receiving the above letter. This occurred because the letter was initially addressed to the Claimant's work email address which she was not checking. This mistake was rectified. The date of termination was amended to 1 April 2020 and the Claimant was paid a week's notice to expire on that date.

Racist comments

75. On balance we find that Mr Butt did not make the racist comments alleged, namely:

75.1. that he preferred black males as they were more subservient and that was why he preferred to hire them rather than black females who were trouble;
75.2. it was not worth a black woman having a uniform as they did not fit the mould.

76. We appreciate that there are many reasons why victims may not report complaints contemporaneously that they later then report. It is necessary therefore to be cautious about inferring anything from a lack of contemporaneous complaint. In this case, however, there is good reason to draw an inference. The Claimant was, as Mr Harding submitted, a 'vociferous' complainer. She made many contemporaneous complaints and they were wide ranging, used the word discrimination, referred to uniform, were deeply critical of Mr Butt and generally sought to impugn Mr Butt as much as possible. And yet there was no reference to the matters now in issue. The Claimant had no plausible explanation of this. She suggested that they were not the sort of things you would put in a complaint and that she did not know if they would be taken seriously. However, in our view, it is plain that these were just the sort of thing that were apt to put in a complaint and that the strong likelihood is that the Claimant *in particular* would have done so had those things been said.

77. More generally we also found Mr Butt's evidence more credible on these matters than the Claimant's. Both had their evidence tested before us.

Did Mr Butt monitor the Claimant obsessively?

78. A central thesis of the Claimant's case is that Mr Butt monitored her obsessively and that this shows that he had an ulterior motive: this was not an ordinary concern about the performance of a probationer but someone going to extraordinary lengths to get rid of an employee they considered a trouble maker.

79. We do not accept that Mr Butt monitored the Claimant in an obsessive way. The reality is that employees routinely, and rightly, ask for evidence and examples where they are accused of poor performance. It is therefore right and rational for

a manger to obtain such evidence and to put it to the employee, as happened here.

80. The Claimant mischaracterises the amount of effort that was required to put this material together. Mr Butt's evidence was that he went to Tremor House on a handful of occasions during his working time to download CCTV footage (from which he deduced information about the Claimant's start/finish/break times etc) and says this took about an hour each time. The Claimant said repeatedly that he went there daily. The basis of this assertion seemed to be that so much footage had been gathered including on consecutive days. Equally the Claimant sometimes suggested that because some of the footage was of her working weekend shifts Mr Butt had obtained the footage outside his working hours at the weekend. We accept Mr Butt's evidence about the frequency and timing of visits to Tremor House. They were occasional and during working time. Each time he visited he was able to download footage in respect of multiple days. It was not necessary to go daily nor over the weekend.

81. The Claimant also thought some sort of obsessive investigation was required to obtain information about her Linkline contacts. However, we prefer Mr Butt's evidence that he was simply emailed Linkline reports, in relation to all concierge officers, as a matter of course on a monthly basis.

82. The Claimant was also of the view that CCTV should not have been used to monitor her. She did not give any evidence about this, but when cross-examining, time and time again, she purported that Mr Butt's son had been involved in some disciplinary issues which had been dropped because his trade union had objected to the use of CCTV footage. She contended that it was therefore inappropriate for Mr Butt to use CCTV footage. Mr Butt and Mr Shoubridge gave evidence about this issue in relation to Mr Butt's son and neither agreed that it turned on any finding it had been inappropriate to use CCTV footage. Ultimately, the Claimant asserting something (no matter how many times) while cross-examining is not evidence if the witness (as here) does not accept it. There is therefore no evidence of the account of events that the Claimant asserts in respect of Mr Butt's son. In any event we are satisfied that, in this workplace, CCTV footage was routinely used/viewed where it could shed light on performance/conduct issues. This is something that Mr Ali-Kila's evidence corroborated. His evidence was that there was a wide spread of employees felt that CCTV was being used against them in an intrusive way.

83. All of the above said, while we come to the view that, objectively, Mr Butt was not monitoring the Claimant obsessively nor harassing her, we do accept that this is the way the Claimant subjectively perceived it. We accept she has deeply held views that Mr Butt did obsessively monitor and harass her.

84. The Claimant's evidence was that even if it were right that she was sometimes late and sometimes left early, this was in keeping with the organisational culture. Her evidence was that Mr Butt allowed others, especially those he favoured, to come and go as they pleased without repercussions. We can accept that some other employees were late from time to time, however, on balance we do think the Claimant's account at its height is implausible. Mr Ali-Kila's evidence was that

the majority of the concierge staff considered that Mr Butt was monitoring them too closely. We accept that evidence and it tends to undermine the Claimant's account that everyone else could simply do as they pleased.

Law

Direct race discrimination

85. Section 13 Equality Act 2010 is headed "Direct discrimination". So far as relevant it provides:

> *"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."*

86. Race is protected characteristic. Section 23 (1) provides*:*

> *"On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case."*

87. The phrase 'because of' has been the subject of a significant amount of case-law. In ***Page v NHS,*** Underhill LJ said this:

> *29. There is a good deal of case-law about the effect of the term "because" (and the terminology of the pre-2010 legislation, which referred to "grounds" or "reason" but which connotes the same test). What it refers to is "the reason why" the putative discriminator or victimiser acted in the way complained of, in the sense (in a case of the present kind) of the "mental processes" that caused them to act. The line of cases begins with the speech of Lord Nicholls in Nagarajan v London Regional Transport [2000] 1 AC 501 and includes the reasoning of the majority in the Supreme Court in R (E) v Governing Body of the JFS ("the Jewish Free School case") [2009] UKSC 15, [2010] 2 AC 728. The cases make it clear that although the relevant mental processes are sometimes referred to as what "motivates" the putative discriminator they do not include their "motive", which it has been clear since James v Eastleigh Borough Council [1990] UKHL 6, [1990] 2 AC 751, is an irrelevant consideration: I say a little more about those terms at paras. 69-70 of my judgment in the magistracy appeal, and I need not repeat it here.*

88. In ***Page v Lord Chancellor*** [2021] ICR 912, Underhill LJ said this:

> *69. … is indeed well established that, as he puts it, "a benign motive for detrimental treatment is no defence to a claim for direct discrimination or victimisation": the locus classicus is the decision of the House of Lords in James v Eastleigh Borough Council [1990] ICR 554; [1990] 2 AC 751 . But the case law also makes clear that in this context "motivation" may be used in a different sense from "motive" and connotes the relevant "mental processes of the alleged discriminator" (Nagarajan v London Regional Transport [1999] ICR 877 , 884F). I need only refer to two cases:*

(1) The first is, again, Martin v Devonshires Solicitors [2011] ICR 352 . There was in that case a distinct issue relating to the nature of the causation inquiry involved in a victimisation claim. At para 35 I said:
"It was well established long before the decision in the JFS case that it is necessary to make a distinction between two kinds of 'mental process' (to use Lord Nicholls' phrase in Nagarajan v London Regional Transport [1999] ICR 877 , 884F)—one of which may be relevant in considering the 'grounds' of, or reason for, an allegedly discriminatory act, and the other of which is not." I then quoted paras 61–64 from the judgment of Baroness Hale of Richmond JSC in the Jewish Free School case and continued, at para 36: "The distinction is real, but it has proved difficult to find an unambiguous way of expressing it … At one point in Nagarajan v London Regional Transport [1999] ICR 877 , 885E–F, Lord Nicholls described the mental processes which were, in the relevant sense, the reason why the putative discriminator acted in the way complained of as his 'motivation'. We adopted that term in Amnesty International v Ahmed [2009] ICR 1450 , explicitly contrasting it with 'motive': see para 35. Lord Clarke uses it in the same sense in his judgment in the JFS case [2010] 2 AC 728, paras 137–138 and 145 . But we note that Lord Kerr uses 'motivation' as synonymous with 'motive'—see para 113—and Lord Mance uses it in what may be a different sense again at the end of para 78. It is evident that the contrasting use of 'motive' and 'motivation' may not reliably convey the distinctions involved—though we must confess that we still find it useful and will continue to employ it in this judgment …"
(2) The second case is Reynolds v CLFIS (UK) Ltd [2015] ICR 1010 . At para 11 of my judgment I said:
"As regards direct discrimination, it is now well established that a person may be less favourably treated 'on the grounds of' a protected characteristic either if the act complained of is inherently discriminatory (e g the imposition of an age limit) or if the characteristic in question influenced the 'mental processes' of the putative discriminator, whether consciously or unconsciously, to any significant extent: … The classic exposition of the second kind of direct discrimination is in the speech of Lord Nicholls of Birkenhead in Nagarajan v London Regional Transport [1999] ICR 877 , which was endorsed by the majority in the Supreme Court in R (E) v Governing Body of JFS [2010] 2 AC 728 . Terminology can be tricky in this area. At p 885E Lord Nicholls uses the terminology of the discriminator being 'motivated' by the protected characteristic, and with some hesitation (because of the risk of confusion between 'motivation' and 'motive'), I will for want of a satisfactory alternative sometimes do the same."

70. As I acknowledge in both those cases, it is not ideal that two such similar words are used in such different senses, but the passages quoted are sufficient to show that the distinction is well known to employment lawyers, and I am quite sure that when Choudhury J (President) used the term "motivation" he did not mean "motive".

89. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337 at [11-12], Lord Nicholls:

'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.

The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'

90. The circumstances in which it is unlawful to discriminate against an employee are, so far as relevant, set out in s.39 Equality Act 2010. In that regard something will constitute a 'detriment' where a reasonable person would or might take the view that the act or omission in question gave rise to some disadvantage (see ***Shamoon v Chief Constable of the RUC*** [2003] IRLR 285, §31-35 per Lord Hope). There is an objective element to this test. For a matter to be a detriment it must be something which a person might reasonably regard as detrimental.

91. In assessing the 'reason why' it is the decision maker's mental processes that are in issue. That is so even if the decision maker has unknowingly received and been influenced by tainted information ***(CLFIS (UK) Ltd v Reynolds*** [2015] ICR 1010).

92. Section 26 EQA 2010 provides:

(1) A *person (A) harasses another (B) if –*
(a) A engages in unwanted conduct related to a relevant 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 [for short we will refer to this as a "proscribed environment"].
…
(4) In deciding whether conduct has the purpose or 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."

93. In ***Weeks v Newham College of Further Education*** UKEAT/0630/11/ZT, Langstaff J said this at [21]:

> *"An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff-room concerned. We cannot say that the frequency of use of such words is irrelevant."*

94. In ***Richmond Pharmacology v Dhaliwal*** [2009] IRLR 336 (at ¶15), Underhill J (as he was) said:

> 15…*A Respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That…creates an objective standard….Whether it was reasonable for a Claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt."*
>
> *22…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…"*

95. A finding that it is not objectively reasonable to regard the conduct as harassing is fatal to a complaint of harassment. That point may not be crystal clear on the face of s.26 Equality Act 2010 but see the *obita dicta* of Underhill LJ in ***Pemberton v Inwood*** [2018] IRLR 557 at [88] and the ratio of ***Ahmed v The Cardinal Hume Academies***, unreported EAT Appeal No. UKEAT/0196/18/RN in which Choudhury J held that ***Pemberton*** indeed correctly stated the law [39].

96. In considering whether a remark that is said to amount to harassment is conduct related to the protected characteristic, the Tribunal has to ask itself whether, objectively, the remark relates to the protected characteristic. The knowledge or perception by the person said to have made the remark of the alleged victim's protected characteristics is relevant to the question of whether the conduct relates to the protected characteristic but is not in any way conclusive. The

Tribunal should look at the evidence in the round (per HHJ Richardson in ***Hartley v Foreign and Commonwealth Office Services*** UKEAT/0033/15/LA at [24-2].)

97. In considering whether the conduct is related to the protected characteristic, the Tribunal must focus on the conduct of the individuals concerned and ask whether their conduct is related to the protected characteristic (***Unite the Union v Nailard*** [2018] IRLR 730 at [80]).

98. In ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam*** [2020] IRLR 495 HHJ Auerbach gave further guidance:

> *[21] Thirdly, although in many cases, the characteristic relied upon will be possessed by the complainant, this is not a necessary ingredient. The conduct must merely be found (properly) to relate to the characteristic itself. The most obvious example would be a case in which explicit language is used, which is intrinsically and overtly related to the characteristic relied upon. Fourthly, whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative.*
>
> *[24] However, as the passages in Nailard that we have cited make clear, the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Ms Millns confirmed in the course of oral argument that that proposition of law was not in dispute.*
>
> *[25] Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be.*

The burden of proof and inferences

99. The burden of proof provisions are contained in s.136(1)-(3) EqA:

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

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

100. In ***Igen Ltd & Others v Wong*** [2005] IRLR 258 the Court of Appeal gave the enduring guidance on the burden of proof. Although that was a case brought under the Sex Discrimination Act 1975, it has equal application to all strands of discrimination under the EqA:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.
(2) If the claimant does not prove such facts he or she will fail.
(3) 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. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.
(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.
(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

101. In ***Madarassy v Nomura Bank*** 2007 ICR 867, a case brought under the then Sex Discrimination Act 1975, Mummery LJ said:

> *"The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

102. The operation of the burden of proof was helpfully summarised by Underhill LJ in ***Base Childrenswear Ltd v Otshudi*** [2019] EWCA Civ 1648 at [18]:

> *'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:*
>
> *(1) At the first stage the Claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):*
>
> *"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.*
> *57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"*
>
> *(2) If the Claimant proves a prima facie case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues: "He may prove this by an adequate non-discriminatory*

> *explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim." He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'*

103. In ***Deman v Commission for Equality and Human Rights*** [2010] EWCA Civ 1279, Sedley LJ observed at [19]: *'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'*

104. The Court of Appeal in ***Anya v University of Oxford*** [2001] ICR 847 at [2, 9 and 11] held that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

105. It is not permissible to infer discrimination simply from unreasonable treatment. However, it can be permissible to infer discrimination from the failure to explain unreasonable treatment (***Bahl v The Law Society*** [2004] IRLR 799).

Public interest disclosures

106. A protected disclosure is a qualifying disclosure made by a worker in accordance with any of sections 43C to 43H. A qualifying disclosure is defined by section 43B, as follows:

> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
> *[…]*
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
> *[…]*
> *(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.*

107. In ***Williams v Michelle Brown AM***, UKEAT/0044/19/OO at [9], HHJ Auerbach identified five issues, which a Tribunal is required to decide in relation to whether something amounts to a qualifying disclosure:

> *'It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a*

disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.'

108. S.103A ERA provides:

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

109. There is an important distinction between detriment cases, where it is sufficient that the disclosure is a material factor in the treatment, and dismissal cases, where it must be the sole or principal reason (***Fecitt v NHS Manchester*** [2012] ICR 372 CA).

110. The approach to the burden of proof in section 103A claims was summarised by Mummery LJ in ***Kuzel v Roche Products*** [2008] ICR 799 as follows:

'[…]

[52] Thirdly, the unfair dismissal provisions, including the protected disclosure provisions, pre-suppose that, in order to establish unfair dismissal, it is necessary for the ET to identify only one reason or one principal reason for the dismissal.

[53] Fourthly, the reason or principal reason for a dismissal is a question of fact for the ET. As such it is a matter of either direct evidence or of inference from primary facts established by evidence.

[…]

[57] I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.

[58] Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.

[59] The ET must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not

> correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, it is not necessarily so.
> [60] As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the Tribunal to find that, on a consideration of all the evidence, in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.'

111. However, as Mummery LJ said

> *[55]* ". . . the burden of proof issue must be kept in proper perspective. As was observed in *Maund* . . . when laying down the general approach to the burden of proof in the case of rival reasons for unfair dismissal, only a small number of cases will in practice turn on the burden of proof."

112. This case does not turn on the burden of proof. As set out below, we have been able to make a positive finding of fact about the reasons for the dismissal.

113. The 'reason' for dismissal is the factor operating on the decision-maker's mind which causes him/her to take the dismissal decision (**Croydon Health Services NHS Trust v Beatt** [2017] ICR 1420). The net could be cast wider if the facts known to, or beliefs held by, the decision-maker had been manipulated by another person involved in the disciplinary process with an inadmissible motivation, at least where they held some responsibility for the investigation (***Royal Mail Ltd v Jhuti*** [2020] All ER 257)

Discussion and conclusions

Race discrimination and harassment

114. The complaints of race discrimination and harassment related to race fail on their facts. Mr Butt did not say the racist things he is alleged to have said.

115. The complaints of race discrimination in respect of the grievance and the dismissal were withdrawn in closing statements. They were not in any event pursued in evidence. Had they not been withdrawn we would have rejected them.

115.1. There was not a failure to deal with the Claimant's grievance of 5 February 2020. It was dealt with in an ordinary and unsurprising way until the Claimant withdrew it. In any event this was nothing at all to do with race.
115.2. The Claimant was dismissed but this was nothing to do with race. The reasons for dismissal are considered below.

Breach of contract

116. This complaint was not pursued albeit that it was not withdrawn either so we deal with it.

117. The Claimant was entitled to one week's notice unless and until she successfully passed her probation in which case she would be entitled to one month's notice. The Claimant did not pass her probation. She was dismissed upon one week's notice and paid for that notice period. There was no breach of contract.

Automatic unfair dismissal

Did the Claimant make disclosures and if so were they Protected Disclosures?

118. In relation to disclosure 1, the Claimant did not make the disclosure alleged. We acknowledge, however that she made one or more disclosures along similar lines in early December 2019 and/or January 2020.

119. In relation to disclosure 2, we do not accept that the Claimant made a disclosure about leaks creating an electrical risk during the course of her employment. We acknowledge however that she made various complaints about leaks.

120. In relation to disclosure 3, the Claimant did make this disclosure (or more accurately these disclosures): her email correspondence with the Councillors.

121. It is not necessary to decide whether or not the disclosures amounted protected disclosures since even if they did, for the reasons we set out below, the dismissal was not unfair by s.103A ERA.

Reasons for dismissal

122. In considering the reasons for the Claimant's dismissal we think it is important that the mental processes of each of Mr Butt, Mr Shoubridge and Mr Brooks are assessed. That is because the former two managers' recommendation of dismissal was heavily influential upon Mr Brooks' decision to dismiss and Mr Butt is said, by the Claimant, to have been motivated by her disclosures.

123. Even if disclosure 1 and/or disclosure 2 were made, we do not think they were material to either Mr Butt's or Shoubridge's thinking. They were not among the matters that caused them to recommend the Claimant's dismissal. The fire and the leaks were just day to day issues of a sort that arose from time to time in local authority housing.

124. We likewise do not think that disclosure 1 or disclosure 2 even if made had any bearing on Mr Brooks' decision to dismiss. Simply, they were not among the reasons in his mind for dismissing the Claimant.

125. Disclosure 3 is different, and it is plain that both Mr Butt and Mr Shoubridge took a dim view of the Claimant's email communications with the Councillors. The email chain with the councillors was expressly referred to in the probation report

and appended as one of the emails of concern.

126. Disclosure 3 was also one of the matters that Mr Brooks took into account. One of the reasons for dismissal was sending inappropriate emails and this email chain was among the emails that were impugned as inappropriate.

127. However, in order for the dismissal to be contrary to s.103A ERA, it must be the case that the protected disclosure(s) was(were) the sole or principal reason for dismissal. That is certainly not the case here.

128. Mr Brooks gave five reasons for concluding that the Claimant's performance was sufficiently poor that she should fail probation and be dismissed in his letter of dismissal:

128.1. Poor timekeeping;
128.2. Consistent failure to raise CRM reports;
128.3. Consistent failure to comply with Linkline reporting;
128.4. Email communications using inappropriate language and persistent inclusion of recipients who did not need to be included;
128.5. Continuing to cover the CCTV camera in the concierge office.

129. We are satisfied that those were indeed his reasons. The emails issue was one of five issues and the email chain with the Councillors was but one of many impugned emails.

130. The tribunal asked Mr Brooks about his reasons for dismissing the Claimant and how heavily the emails to Councillors had weighed. His response was that the main issues for him had been the Claimant's timekeeping and the *Claimant's* failures in relation to health and safety. By the latter he explained that he meant her failures to contact Linkline and covering the CCTV camera in the office.

131. We accept Mr Brooks' evidence. We found it credible of itself and when tested against logic, common sense and the evidence. The Claimant's repeated failures of timekeeping over the course of her probation period were remarkable. What was remarkable was that they persisted despite them being pointed out month after month. Likewise the failure to contact Linkline was a serious issue for a lone worker, working a nightshift. Again these were repeated and persistent. Further, covering up the CCTV camera was serious for two reasons. Firstly, it was serious because the CCTV cameras were there in significant part as a safety measure for staff. Secondly, because the Claimant had repeatedly disobeyed direct instruction to stop covering the camera.

132. Overall then, in our view, the third disclosure was a *very* minor part of the reason (nowhere near being the principal reason) for dismissal in Mr Brooks' mind.

133. For completeness we note that we accept that Mr Brooks' concern about the emails with Councillors was not that the Claimant was making complaints per se, but rather his view that contacting councillors should be a matter of last resort if complaints through the management failed.

134. We do acknowledge that it is clear that Mr Butt did not appreciate the Claimant complaining about him. He picked her up (as described in our findings of fact) on email and text message correspondence where she did this. However, we are nonetheless entirely satisfied that the Claimant's complaints, written and oral, including but not limited to disclosures 1 – 3, were not individually or cumulatively the principal reason why he and Mr Shoubridge recommended dismissal. There were genuine performance concerns that had nothing to do with the Claimant's complaints/disclosures. They related to substantively important matters (timekeeping, record keeping (CRM), health and safety (Linkline and covering the camera)) and these were much the more weighty reasons in their minds.

135. In conclusion, even if the Claimant made protected disclosures, they were neither the sole nor the principal reason for dismissal, and the claim of s.103A unfair dismissal must fail.

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Employment Judge Dyal
Date: 13 November 2022

Sent to the parties on
Date: 25 November 2022