EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Saeeda Akbar	**v**	**Beaumont and Fletcher Ltd**

Heard at: London Central
On: 12 – 18 January 2023

Before: EJ G Hodgson
Ms J Holgate
Mr S Pearlman

Representation

For the Claimant: Ms D Gilbert, counsel
For the Respondent: Mr J Vatcher, counsel

JUDGMENT

1. The claims of direct discrimination and harassment are dismissed on withdrawal.

2. The claim of victimisation fails and is dismissed.

3. The claim of unfair dismissal succeeds.

ORDERS

1. There will be a remedy hearing on 25 and 26May 2023 by CVP. The second day is reserved for the tribunal's decision.

2. The respondent should prepare a pdf bundle for use of the tribunal. It should be sent to the claimant and the tribunal 5 working days before the hearing.

3. If any further evidence is needed the parties should apply as soon as is practicable to rely on further evidence. Any proposed witness statement must be attached to any application.

4. The claimant must file and serve an updated schedule of loss not later than 21 days before the hearing.

REASONS

Introduction

1.1 By a claim form dated 26 April 2021, the claimant brought allegations of direct race discrimination, harassment, victimisation, constructive unfair dismissal, and wrongful dismissal.

1.2 The claim was heard over three days starting 12 January, with two days in chambers.

The Issues

2.1 We agreed that there were claims of direct discrimination and harassment. The protected characteristic is race. The claimant identifies as a British national of Pakistani origin.

2.2 In addition, there are claims of constructive unfair dismissal, wrongful dismissal, and victimisation.

2.3 The claims of direct discrimination and harassment were withdrawn during the hearing and they were dismissed on withdrawal.

2.4 It was common ground that in the claim form no specific allegations of detriment are identified. It is alleged that the factual circumstances said to be allegations of detrimental treatment now in the claimant's issues are now the claimant's issues.

2.5 The respondent has taken no issue with the inclusion in the issues those allegations said to be detrimental treatment and we will consider those alleged detriments in our conclusions.

Evidence

3.1 We heard from the claimant and, on her behalf, Ms Juliette Gutierrez-Bailey

3.2 For the respondent we heard from Ms Jana Durisova and Ms Victoria Lee.

3.3 We received a bundle of documents.

3.4 Both parties provided written submissions.

Concessions/Applications

4.1 On day one, we noted that the list of issues was inadequate. It had been discussed before EJ Atkin; it had been modified by EJ Khan. We asked the parties to provide a consolidated list. The respondent accepted there were protected acts for the purpose of victimisation, and we ordered the respondent set out the facts conceded for the purpose of the concession.

4.2 We sought clarification as to whether the claim form identified specific allegations of harassment and victimisation.

4.3 We confirmed the hearing would deal with liability only.

4.4 We agreed a timetable.

4.5 We received an initial consolidated list of issues. We sought clarification for where the specific allegations of harassment and victimisation are set out in the claim form and directed that the proposed list of issues be annotated.

4.6 On day two, the claimant withdrew all claims of harassment and direct discrimination. However, the claim of victimisation proceeded.

4.7 We clarified that there was a claim of wrongful dismissal. It follows there were three claims: constructive unfair dismissal, various allegations of victimisation, and wrongful dismissal.

4.8 We asked the parties to confirm whether contributory fault should be dealt with as part of the liability hearing, particularly given that there could be findings of fact for the purpose of wrongful dismissal. We confirmed the party should file written submissions to be supplemented by oral argument.

4.9 On day three. In oral submissions, the claimant stated we should decide contributory fault, but the respondent objected.

4.10 The tribunal confirmed it would not deal with any Polkey issue until any remedy hearing.

4.11 The respondent failed to comply with the order to clarify the basis on which it was accepted there were two protected acts.

The Facts

5.1 The respondent company specialises in providing luxury handmade furniture, furnishings and textiles. It is a small company with

approximately ten employees. Ms Jana Durisova is the sole director and majority shareholder. The company has an office and showroom in Chelsea. It operates nationally and internationally.

5.2 The respondent employed the claimant, on 26 November 2016, as an office administrator. Her role was focused on sales, and most of her tasks revolved around the logistics of sales and managing orders. Her duties included overseeing the packing of goods and their export.

5.3 We have accepted respondent's evidence that Ms Durisova increasingly found the claimant difficult to manage and was frustrated by aspects of the claimant's performance. Her perception was the claimant needed reminders to undertake work, including updating the respondent's "Sage" system, which dealt with stock, and routine tasks such as raising credit notes.

5.4 Approximately three years before her dismissal, there was difficulty between the claimant and junior member of staff, Ms Green. Ms Green became upset. The claimant was sent home. Her conduct was considered. No formal action was taken. The claimant apologised. Ms Durisova kept a record on the claimant's file, but there was no formal disciplinary. There are no other specific examples of the claimant's behaviour towards other staff relied on by the respondent, albeit Ms Durisova's evidence is that the claimant was difficult to manage and could communicate annoyance and otherwise be difficult. Ms Durisova felt she needed to "tiptoe" around the claimant to avoid unpleasantness.

5.5 The claimant did not perceive any specific issues with her performance. She does not accept that Ms Durisova's perception was reasonable or caused by any of the claimant's conduct.

5.6 Despite Ms Durisova's perception, she sought to help the claimant to progress. She gave her opportunities in copywriting, technical drawing, and research into new clientelle. The claimant went on a course about computer drawing skills. The claimant assisted in proofreading. However, it is common ground that the claimant's role remained essentially the same throughout her employment.

5.7 The claimant formed a negative view of Ms Durisova, describing her as insulting and patronising, and ultimately she raised two grievances which alleged race discrimination. It is unclear from the claimant's evidence as to how, when, or why she formed such a seriously negative view.

5.8 The events with which we are directly concerned started around the end of March 2021 when the relationship between the claimant and Ms Durisova became strained, which ultimately ended in the claimant leaving.

5.9 The claimant gave little evidence about the events in late March and early April 2021. In her oral evidence she indicated she had little memory.

5.10 The claimant's statement says "It all started around April 2021, when I had just come into work in the morning and she came downstairs. JD used to sit on the ground floor, and my desk was in the basement and began snapping at me for something that had not been actioned." This would indicate that there had not been a serious breakdown in the relationship previously, albeit we find the claimant's evidence on this has been inconsistent.

5.11 We find that around the end of March 2021, the claimant and Ms Durisova had a one-to-one meeting. We find that the claimant was discontent. She indicated she wanted more responsibility. This led to a conversation. Ms Durisova asked the claimant to consider exactly what she intended and to give proposals. The claimant perceived Ms Durisova's response to be negative. It is unclear what the claimant was seeking. This led to a degree of tension and Ms Durisova perceived the claimant's conduct as increasingly negative.

5.12 On 8 April 2021, in a further meeting, Ms Durisova raised with the claimant the need to ensure the Sage system was properly updated. Ms Durisova perceived the claimant's reaction as negative and as one of anger, insolence, and hostility. The claimant had little recollection of this meeting. We are satisfied that both found it negative. The claimant told Ms Durisova she did not like Ms Durisova's tone of voice. Ms Durisova acknowledged the comment, and said she would remain conscious of it, but that it was no excuse for the claimant to be angry.

5.13 The claimant's claim form alleges that, at this meeting, she told Ms Durisova that she felt Ms Durisova was discriminating against her, as Ms Durisova would not speak to others in the same insulting or patronising way because they were British or white European. Ms Durisova denies this conversation took place. The claimant does not deal with this matter in her witness statement. When asked about when she first formed the view that the respondent's behaviour was an act of race discrimination, her evidence was poor and equivocal. She indicated that it was not a clear thought until she returned to work in June 2021. Her oral evidence contradicts her pleaded case, which would put the claimant raising discrimination no later than 8 April 2021. Moreover, her oral evidence is inconsistent with her first grievance of 28 May 2021, which specifically alleged race discrimination. When asked why the claimant formed a view that there was race discrimination. Her oral evidence referred to the actions in June, and did nothing to explain why she may have formed the view that there was discrimination, at an earlier stage.

5.14 Further, on the claimant's documents and the initial representations made at the hearing, there had been numerous references to her curly hair, and this had led the claimant to believe that these references were race specific. However, in her oral evidence, she accepted that there had been no reference at all to her hair. It follows that her oral evidence significantly undermined the basis on which she proceeded prior to the hearing.

5.15 Taking into account the inconsistencies in the claimant's pleaded case and her oral evidence, and having regard to the respondent's evidence, we have preferred the respondent's evidence on this matter. The claimant did not allege race discrimination on 8 April. However, we do find that the claimant had become hostile to Ms Durisova who was finding it increasingly difficult to work with and to manage the claimant.

5.16 In early 2021, the respondent received an order from an American company, Oro Bianco, worth approximately £30,000. The company would provide up to £250,000 business a year. It was necessary for invoices to be raised and the goods to be boxed for export. The majority of boxes became stuck in U.S. Customs and this led to a flurry of activity and emails in order to have them released. The claimant was in charge of the project. There is dispute as to the instructions given to her by Ms Durisova. Part of the process of packing included producing a packing list. This list records the content of the box and is attached to the outside of the box. It appears that U.S. Customs found a number of the packing lists to be insufficient, and this may have caused, or contributed, to the delay. The claimant sought to suggest to us that she complied fully with the guidance given by others and the instructions given by Oro Bianco. However, we accept that Ms Durisova asked the claimant not only to follow the client's instructions, but also to ensure that all items were recorded properly on the packing list. We are satisfied that she failed to do so adequately. Ms Durisova became involved, and the packing lists were completed. This was a long and ongoing process, and the detail is of limited relevance. There was a delay. Ms Durisova had reasonable grounds to believe the claimant had not fully complied with her instructions, and that failure to comply had materially delayed the passage through U.S. Customs. This was important because the export was time critical, and delay potentially affected the ongoing business relationship.

5.17 Ms Durisova did become increasingly stressed and unhappy. She considered that the claimant had not followed her instructions. When she raised the matter with the claimant, she found the claimant to be resistant to suggestions for improvement of the packing lists and unhelpfully defensive. The claimant did not accept, at any time during her employment, or subsequently before us, that the packing list could have been improved, or that steps were appropriate to ensure there was no repetition in the future. In brief, she never accepted any responsibility or engaged positively to identify whether there were any failings which could be addressed and rectified.

5.18 At no time did Ms Durisova know for certain what caused the delay at U.S Customs. There was no realistic way of finding out. The difficulty with the packing list may have caused problems, and it was something she wished to address.

5.19 On 27 April 2021, Ms Durisova had a meeting with the claimant. She was frustrated and viewed the Oro Bianco delivery as a "fiasco." At the start of the conversations Ms Durisova said, "let's sort out this clusterfuck." Her

profanity was not directed at the claimant. It was a reference to the general difficulty and demonstrated Ms Durisova's depth of feeling. Ultimately, she apologised for use of that word when the claimant brought it up at a later time. We accept that Ms Durisova was seeking to discuss what had gone wrong and identify how the procedure could be improved. Central to that discussion was the need to ensure that the packing lists were done correctly. She wished to see a pro forma introduced. The claimant was resistant. The claimant became angry and said that she considered her packing list to be thorough. Ms Durisova disagreed. The conversation went badly. The claimant said, "I've had enough, I am done." She then went on to say, "We may as well call it a day. Ms Durisova asked whether the claimant was resigning, and she said, "Not on that paper," referring to a piece of paper. Ms Durisova interpreted this as a resignation. The matter was discussed the following day. The claimant's response in that interview acknowledged there was a resignation made in the heat of the moment. We have no doubt the claimant, on 27 April 2021, gave an oral resignation.

5.20 Ms Durisova and the claimant met the following day, 28 April. It is clear the relationship had seriously deteriorated. The meeting was recorded, and a transcript produced. There was extensive discussion about the underlying causes of the customs delay. However, the claimant was defensive. The conversation became increasingly negative and they did not agree a way forward. The claimant did not accept there was a difficulty with the packing lists. Ms Durisova insisted there was. Ms Durisova sought to hold the claimant to her resignation. She stated she would not overlook it, or the claimant's underlying behaviour, which Ms Durisova viewed as negative and inappropriate in the workplace. The claimant stated she did not like Ms Durisova's attitude or tone. It is apparent from the transcript that this was a lengthy and damaging meeting.

5.21 There was a further meeting on 29 April 2022 which was shorter. Ms Durisova agreed to the claimant taking time off. The claimant wished to seek advice. They agreeded she would return in the middle of the following week, after the bank holiday. Ms Durisova indicated that she would need to deal with the claimant's performance and behaviour. This led to a defensive and negative reaction by the claimant. Ms Durisova stated that the claimant's conduct was not meeting the respondent's expectations and there would then be discussions when she returned about her behaviour and performance, and need to improve, which would lead to measurable targets. It follows that Ms Durisova communicated at that point the claimant would be subject to some form of performance improvement plan and some form of monitoring. It was the detail which would be discussed when she returned.

5.22 On 30 April 2021, Ms Durisova sent a long letter headed "disciplinary hearing." It referred, in the body of the letter, to a capability hearing. There were seven numbered points. The first referred to a number of tasks, which the claimant had not dealt with. The second concerned the

failure to enter new Sage codes correctly. The third was largely concerned with the failure to draft the packing lists. The fourth was a general allegation of poor attitude when receiving instructions. The fifth was a general allegation about the level of documentation for clients. The sixth was a general allegation of poor behaviour towards other members of staff and "bullyish behaviour towards colleague." The seventh referred to her "personal presentation at work" and a reference to her wearing comfortable clothing.

5.23 The claimant took time off, initially as holiday. She did not attend the meeting on 4 May, as proposed. Therafter, she started a period of absence which continued until 4 June. She returned on 7 June 2021.

5.24 On 28 May 2021, the claimant filed a lengthy grievance. This concerned, essentially, the alleged behaviour Ms Durisova. She alleged Ms Durisova's behaviour had had been unfair, unreasonable, and discriminatory. It set out the claimant's version of events starting from 27 April 2021. It made a number of general allegations. She alleged management fostered a "blame culture." She objected to the word "clusterfuck". She objected to her verbal resignation being accepted. She referred to being told she could not have a "management title" and alleged this was discriminatory. She referred to her photo on the website being removed "begrudgingly." She objected to the reference to her appearance. She objected to the letter of 30 April being headed "disciplinary" but then referring to a capability hearing. The claimant's expectations were unclear. She was unable to explain in evidence what resolution she was seeking, if any.

5.25 As to the grievance itself it states, "It is clear in my mind that the conduct I've been subjected to Jana Durisova is unfair and capable of amounting to a fundamental breach of my contract of employment and I must expressly reserve my position generally and also to what I perceived to be the real reason I have been singled out by her." In that sense, it does not appear to seek any resolution, but instead alleges breach of contract and reserves her position.

5.26 The claimant's fit note expired on 4 June 2021. She returned to work on 7 June. The respondent did not contact the claimant before she returned to work or make it clear that the meeting scheduled for 4 May would continue as soon as the claimant returned to work.

5.27 In the claimant's absence, the respondent had received new office furniture. The claimant's personal belongings had been put in a box, as had another employee's. Ms Durisova had been using what had been the claimant's desk. The claimant was asked to sit at the adjacent desk. The meeting proceeded in the basement showroom. The claimant asked if she objected, but she did not. The claimant believed that she been ambushed in some manner, but did not seek an adjournment.

5.28 The claimant considered the reception to be frosty. Ms Durisova asked the claimant to attend a meeting, which went ahead on the morning of 7 June. The claimant attended with a colleague. Ms Durisova explained that she would go through the points raised in her previous letter concerning the claimant's performance and would then invite any comments, and she would also give the claimant an opportunity to voice her grievance. She raised a number of points in particular: the claimant's failure to follow instructions on Oro Bianco; the general failure to follow instructions; the claimant's behaviour to other members of staff; and her general presentation at work and her expectation of how the claimant should dress. She finished by saying "We will monitor this daily, but weekly we will have a meeting just to see how you perform…" The claimant was asked if she had any comments and she stated "No, not yet." She was then asked whether she would like to voice her grievance. The claimant stated, "You have my grievance already, so that's fine." Ms Durisova encouraged the claimant to expand, but she refused to. Ms Durisova agreed to respond in writing.

5.29 On 10 June 2021, Ms Durisova wrote to the claimant. The letter stated the claimant was to be issued with "an improvement notice." It confirmed she would be given daily tasks and targets with a view to improving. This would be monitored daily with a weekly meeting. If the claimant's performance did not improve, there would be a stage II capability hearing. It does not directly refer to the right to appeal. It confirmed that there was no reason to delay the performance improvement plan. The letter itself has five points of concern being: failure to complete assigned task on time and to the required standard; failure to follow instructions given by clients or by your manager; poor attitude in relation to your willingness to take reasonable instruction or adapt working practice to meet required standards; behaviour towards other members of staff; and personal presentation at work.

5.30 The performance improvement plan commenced immediately after the meeting. We accept that tasks were given by Ms Durisova to the claimant, and the claimant agreed to undertake those tasks. We also accept that Ms Durisova spoke to the claimant several times during each day concerning the tasks. Ms Durisova's perception was this was a natural part of the interaction. The claimant's believes she was micromanaged.

5.31 It is apparent that the tension did not ease. The claimant remained unhappy. She sent a further grievance on 11 June 2021, which contained detailed analysis of her perception of events on 7 June 2021, allegations concerning changes her working conditions; events on 8 June 2021; and the events on 9 June 2021.

5.32 The claimant kept a written account of each day. It is detailed and contains specific timings. It is apparent she was keeping a careful note, and this is indicative of significant unhappiness. In addition to objecting to the tasks she received, and the way she was managed, she expressed

confusion as to why her appearance had been criticised, and others had not. She concluded by saying -

> **I have been made to feel persona non grata, undervalued and undermined. I shall continue to do my best to make a positive contribution in such trying circumstances until such time as I must address this obvious campaign of attrition and victimisation against me in the most robust manner, or until this matter is settled.**

5.33 In her evidence, the claimant stated that she expected the grievance to be answered in writing. She identified no specific lines of enquiry or investigation which she believed the respondent should have followed.

5.34 The claimant worked for four days between 7 and 10 June 2022. On 11 June 2022, she started a period of absence; she never returned.

5.35 On 1 July 2021, Ms Durisova responded to the claimant's grievances in writing. We do not need to record the full content. This was a lengthy and detailed letter. We are satisfied that it dealt with all of the claimant's concerns; it provided a robust rebuttal. It reiterates Ms Durisova's view that the claimant's behaviour was unacceptable, and the claimant difficult to manage. As much of the grievance was the claimant's view of, and interpretation of, the relevant events, the response deals with the respondent's perception, and is a robust rejection of the claimant's version. The letter fails to identify adequately why the claimant's appearance was raised, or what aspects of her appearance were unsatisfactory, or when they occurred.

5.36 The claimant resigned on 2 July 2021. In her letter she objected to her treatment. She alleged she had been treated poorly because of her race. Despite the outcome letter, she stated her grievances remained outstanding, and to the extent they had been dealt with, the process was discriminatory. She stated, "Your bullying behaviour has made my position untenable and any bonds created have now been severed beyond repair. The four days of constant hectoring and unrelenting pressure I enjoyed upon my return were testimony to your desire to see me leave the company."

The law

6.1 Section 95(1)(c) of the Employment Rights Act 1996 states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances in which he or she is entitled to terminate it, with or without notice, by reason of the employer's conduct.

6.2 The leading authority is **Western Excavating ECC Ltd -v- Sharp [1978] ICR 221**. The employer's conduct which gives rise to constructive dismissal must involve a repudiatory breach of contract Lord Denning stated:

> **If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further performance. If he does then that terminates the contract by reason of the employer's conduct. He is constructively dismissed.**

6.3 In summary there must be established three things: first, that there was a fundamental breach on the part of the employer; second, the employer's breach caused the employee to resign; and third, the employee did not affirm the contract as evidenced by delaying or expressly.

6.4 In so called last straw dismissals there can be a situation where individual actions by the employer, which do not in themselves constitute a breach of contract, may have the cumulative effect of undermining the implied term of mutual trust and confidence. One or more of the actions may be a fundamental breach of contract, but this is not necessary. It is the course of conduct which constitutes the breach. The final incident itself is simply the last straw even if in itself it does not constitute a repudiatory breach. The last straw should at the least contribute, however slightly, to the breach of the implied term of trust and confidence.

6.5 The question of waiver has to be considered. A clear waiver, or simple passage of time, may demonstrate that the employee has affirmed the contract at any particular moment. However, it may be that a final incident would be sufficient to revive any previous incidents for the purpose of showing a breach of the implied term.

6.6 In cases where there has been a course of conduct, the tribunal may need to consider whether the last straw incident is a sufficient trigger to revive the earlier ones. In doing so, we may take account of the nature of the incident, the overall time spent, the length of time between the incidents and any factors that may have amounted to waiver of any earlier breaches. The nature of waiver is also relevant in the sense of was it a once and for all waiver or was it simply conditional upon the conduct not being repeated.

6.7 There is no breach of trust and confidence simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail (see Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] ICR 481, CA). The legal test entails looking at the circumstances objectively, ie from the perspective of a reasonable person in the claimant's position. (Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420, CA.)

6.8 **Omilaju v London Borough of Waltham Forrest 2005 ICR 481 CA** is authority for the proposition that the last straw does not have to be of the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last

straw must contribute, however slightly, to the breach of the implied term of mutual trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw. The test is objective. It is unusual to find a case where conduct is perfectly reasonable and justifiable, but yet satisfies the last straw test.

6.9 We must consider causation, the employee must show that he has accepted the breach, the resignation must have been caused by the breach and if there is a different reason causing the employee to resign in any event irrespective of the employer's conduct there can be no constructive dismissal.

6.10 The repudiatory breach or breaches need not be the sole cause of the claimant's resignation. The question is whether the claimant resigned, at least in part, in response to that breach. (**Nottinghamshire County Council v Meikle** [2004] IRLR 703, CA; **Wright v North Ayrshire Council** UKEATS/0017/13). Where there are mixed motives the tribunal must consider whether the employee has accepted the repudiatory breach by treating the contract of employment as at an end. Acceptance of the repudiatory breach need not be the only, or even, the principle reason for the resignation, but it must be part of it and the breach must be accepted. The tribunal notes the case of **Logan – v Celyn House UKEAT/069/12** and in particular paragraphs 11 and 12.

6.11 We note the case of Bournemouth University v Buckland 2010 IRLR 445 CA. the head note reads:

> **(1) In constructive dismissal cases, the question of whether the employer has committed a fundamental breach of the contract of employment is not to be judged by a range of reasonable responses test. The test is objective: a breach occurs when the proscribed conduct takes place.**
>
> **The following stages apply to the analysis of a constructive dismissal claim: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished *Malik* test applied; (ii) if acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) it is open to the employer to show that such dismissal was for a potentially fair reason; and (iv) if he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally, fell within the range of reasonable responses and was fair.**
>
> **It is nevertheless arguable that reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach. There are likely to be cases in which it is useful. But it cannot be a legal requirement…**

6.12 In **Malik v Bank of Credit and Commerce International SA 1997 IRLR 462**. The House of Lords confirmed that there is an implied duty of mutual trust and confidence as follows:

> **the employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.**

6.13 We would note that it is generally accepted that it is not necessary that the employer's actions should be calculated *and* likely to destroy the relationship of confidence and trust,[1] either requirement is sufficient.

6.14 Section 27 Equality Act 2010 provides:

> **(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.**

6.15 Prior to the Equality Act 2010 the language of victimisation referred to less favourable treatment by reason of the protected act. Under the Equality Act 2010, victimisation occurs when the claimant is subject to a detriment because the claimant has done a protected act or the respondent believes that he has done or may do the protected act.

6.16 We have to exercise some caution in considering the cases decided before the Equality Act 2010. However, those cases may still be helpful. It is not in our view necessary to consider the second question as posed in Derbyshire below which focuses on how others were or would be treated. It is not necessary to construct a comparator at all because one is focusing on the reason the treatment.

6.17 When considering victimisation, it may be appropriate to consider the questions derived from Baroness Hale's analysis in **Derbyshire and Others v St Helens Metropolitan Borough Council and others 2007 ICR 841**. However as noted above there is no requirement now to specifically consider the treatment of others.

> 37. The first question concentrates upon the effect of what the employer has done upon the alleged victim. Is it a 'detriment' or, in the terms of the Directive, **'adverse treatment'? But this has to be treatment which a reasonable employee would or might consider detrimental… Lord Hope of Craighead, observed in *Shamoon v Chief Constable of the Royal Ulster Constabulary***

[1] See, for example *Baldwin v Brighton & Hove City Council* [2007] IRLR 232

> **[2003] IRLR 285 at 292, paragraph 35, 'An unjustified sense of grievance cannot amount to "detriment"'.**
>
> **40. The second question focuses upon how the employer treats other people…**
>
> **41. The third question focuses upon the employers' reasons for their behaviour. Why did they do it? Was it, in the terms of the Directives, a 'reaction to' the women's claims? As Lord Nicholls of Birkenhead explained in *Khan*'s case [2001] IRLR 830, 833, paragraph 29, this**
>
> > **'does not raise a question of causation as that expression is usually understood ... The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'**

6.18 Detriment can take many forms. It could be simply general hostility. It may be dismissal or some other detriment. Omissions to act may constitute unfavourable treatment. It is, however, not enough for the employee to say he or she has suffered a disadvantage. We note an unjustified sense of grievance is not a detriment.

6.19 Although less favourable treatment under the old law involves some kind of disadvantage, the House of Lords has held that it does not have to do have damaging consequences. In **Chief Constable of West Yorkshire police v Khan 2001 IRLR 830 HL**, the West Yorkshire police argued that the claimant had not been treated less favourably because he would have been worse off had the reference been supplied. The less favourable treatment arose by the refusal to give the reference. Any other officer who did not have a race discrimination complaint pending would have been given a reference. Lord Scott made it clear in **Khan**:

> **There must also be a quality in the treatment that enables the complainant reasonably to complain about it. I do not think, however, that it is appropriate to pursue the treatment and its consequences down to an end result in order to try and demonstrate the complainant is, in the end, better off, or at least no worse off, than he would have been if he had not been treated differently. I think it suffices if the complainant can reasonably say that he would have preferred not to have been treated differently.**

6.20 The need to show that any alleged detriment must be capable of being objectively regarded as such was emphasised in **St Helens Metropolitan Borough Council v Derbyshire 2007 IRLR 540**. **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 IRLR 285** was cited and it was confirmed an unjustified sense of grievance cannot amount to detriment. That in our view remains good law. In **Derbyshire**, Lord Neuberger confirmed the detriment should be viewed from the point of view of the alleged victim. Rather than considering the 'honest and reasonable test as suggested in Khan' the focus should be on what constitutes a detriment. It is arguable therefore that whether an action amounts to victimisation will depend at least partly on the perception of the employee provided that perception is reasonable. It is this reasonable

perception that the employer must have regard to when taking action and when considering whether that action could be construed as victimisation. Detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment. The detriment cannot be made out simply by an individual exhibiting mental distress, it would also have to be objectively reasonable in all the circumstances. The stress and worry induced by the employer's honest and reasonable conduct in the course of his defence cannot, except in the most unusual circumstances, constitute a detriment. The focus should be on the question of detriment.

Reasons for unfavourable treatment.

6.21 When the protected act and detriment have been established, the tribunal must still examine the reason for that treatment. It must be shown that the unfavourable treatment of a person alleging victimisation was because of the protected act. A simple 'but for' test is not appropriate.

6.22 It is not necessary to show conscious motivation. However, there must be a necessary link in the mind of the discriminator between the doing of the protected act and the treatment. If the treatment was due to another reason such as absenteeism or misconduct the victimisation claim will fail. The protected act must be a reason for the treatment complained. It is a question of fact for the tribunal. **Chief Constable of West Yorkshire police v Khan 2001 IRLR 830 HL** is authority for the proposition that the language used in the Sex Discrimination Act 1975 is not the language of strict causation. The words by reason that suggest that what is to be considered, as Lord Scott put it, is "the real reason, the core reason, the causa causans, the motive, for the treatment complained of that must be identified." This in our view remains good law.

6.23 It is not necessary for a person claiming victimisation to show that unfavourable treatment was meted out solely by reason of his or her having done a protected act.

6.24 Lord Nicholls found in **Najarajan v London Regional Transport 1999 ICR 877**, HL, that if the protected act has a significant influence on the outcome of an employer's decision, discrimination will be made out. It was clarified by Lord Justice Gibson in Court of Appeal in **Igen and others v Wong and others 2005 ICR 931** that in order to be significant it does not have to be of great importance. A significant influence is an influence which is more than trivial.

6.25 The Employment Appeal Tribunal in **Martin v Devonshire Solicitors 2011 ICR 352** took the view that there could in principle be cases where an employer dismisses an employee (or subjects him or her to some other detriment) in response to the doing of a protected act, but where the employer could say that the reason for the dismissal was not the complaint as such but some feature of it which could properly be treated

as separable. It is not enough that the alleged detriment follows a protected act. The reason for the treatment must still be ascertained.

Subconscious motivation

6.26 The House of Lords in **Nagarajan** rejected the notion that there must be a conscious motivation in order to establish victimisation claims. Victimisation may be by reason of an earlier protected act if the discriminator consciously used that act to determine or influences the treatment of the complainant. Equally the influence may be unconscious. The key question is why the complainant received the treatment.

6.27 If the employee is in repudiatory breach of contract, the employer may affirm the contract or the employer may accept the breach and treat the contract as terminated. In the latter case, the employee will be summarily dismissed. If the employee's breach is repudiatory and it is accepted by the respondent the employee will have no right to payment for his or her notice period.

6.28 Section 136 Equality Act 2010 deal with the burden of proof.

> **(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.**
>
> **(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.**
>
> **...**

Conclusions

7.1 We first consider the claim of constructive unfair dismissal.

7.2 The claimant alleges, first, implied terms of first mutual trust and confidence and second, the duty to act fairly in disciplinary/capability processes and when imposing sanctions.

7.3 As to the second implied term, the claimant relies on **Chakrabarty v Ipswich Hospital NHS Trust** 2014 EWHC 2735 and **Burns v Alder Hey Children's NHS Foundation Trust** [2022] IRLR 306. We doubt that either case is authority for the existence of an implied term to act fairly in disciplinary/capability procedures, albeit the possibility is envisaged. In the Court of Appeal concerning the potential duty to act fairly, Singh, LJ stated at paragraph 47:

> **… there may be a narrower basis for an implied term that disciplinary processes will be conducted fairly, which is not conceptually linked to the implied term of trust and confidence.**

7.4 However, he made it clear at paragraph 48 the point was not being decided.

> **I would prefer to leave this important issue of principle open for a future case…**

7.5 Ms Gilbert contends that an implied term to act fairly in disciplinary and capability procedures must be implied. Further, she states that any breach of the term, such as could lead to a finding of procedural unfairness in the context of unfair dismissal, will be a fundamental breach of contract entitling employees to resign and treat themselves as constructively dismissed. We doubt that this can be right, and neither case relied on establishes that principle.

7.6 Even if a term is implied, it does not necessarily follow that every breach of it will entitle an employee to elect to accept the breach as fundamental and treat themselves as constructively dismissed. Introducing such an implied term may encourage employees to seek to identify any minor breach of procedure, and treat themselves as constructively dismissed, rather than deal with the merits of the allegations. This may seriously undermine good employment relations and inhibit the legitimate operation of disciplinary and capability procedures.

7.7 We observe that the existence of the term tells us little about breach. In the context of the implied term of mutual trust and confidence, it is only when an employer's behaviour is calculated to, or likely to destroy mutual trust and confidence, will any breach be fundamental, such that the employees can resign and treat themselves as dismissed. It may be that a similarly high test would be appropriate for breach of an implied term of fairness, and it is unclear there would be a clear distinction between the two implied terms in practice, at least in the context of constructive dismissal.

7.8 For the reasons that should become clear, we do not have to decide the point.

7.9 Did the respondent breach the term of mutual trust and confidence?

7.10 We first consider the matters specifically relied on in the claimant's issues.

7.11 We do not accept the respondent made false allegations of poor performance. The claimant had formed a negative view of Ms Durisova. The claimant, at times, refused to accept legitimate instructions and her attitude towards Ms Durisova became increasingly hostile. In addition, it is clear that the claimant made mistakes and underperformed. This is illustrated by her attitude towards completion of the Sage entries and her

refusal to engage adequately or at all with considering the deficiencies in the packing list. We have no doubt that Ms Durisova believed the claimant's performance was inadequate and needed to be addressed. She had grounds to do so.

7.12 It follows that Ms Durisova had clear examples of the claimant's poor conduct towards her.

7.13 It is unclear what the claimant has in mind when she says there was a failure to carry out further investigation into the poor performance. That is not a fair criticism. Ms Durisova, as part of her managerial function, sought to raise with the claimant, on numerous occasions, difficulties with her performance. We have outlined a number of the occasions above. The claimant was unreceptive to either constructive criticism or to direct instruction. This was most clearly illustrated in the Oro Bianco incident, when she refused to engage adequately or at all with Ms Durisova and became hostile.

7.14 We do not accept that there was no attempt to deal informally with the difficulties. For example, on 27 April, it is clear that Ms Durisova attempted to deal with the difficulties. Instead of engaging with the discussion about what went wrong, the claimant became hostile and defensive.

7.15 We accept that referring to the difficulties as a “clusterfuck” was robust language. However, it was a general reference to the situation and not a specific attack on the claimant. In that sense it was put forward neutrally. We do not see use the profanity as significant.

7.16 The fact that Ms Durisova witnessed the conduct and then conducted the capability procedure is not in our view inappropriate. This was a small employer. The claimant has identified no one else within the team who could, or should, have been involved. The reality is that the factual basis was clear and well known to both the claimant and Ms Durisova. Ms Durisova observed that the claimant was hostile to her and sought to manage it and engage with the claimant by setting standards and asking her to comply with instructions. Ms Durisova was not seeking to discipline the claimant for past conduct. She was attempting to impose standards of conduct and performance going forward.

7.17 Before us it was suggested the respondent should have engaged some form of outside help. Whilst that may have been a possibility, it is far from clear that it would have been practicable or helpful; it was not a breach of contract to failed to do so. Introducing a third party may itself lead to difficulties. If the claimant was no longer prepared to accept legitimate managerial instruction from Ms Durisova, the reality is the relationship was at an end and this may have given fair grounds for dismissal.

7.18 It is alleged the conduct of the hearing on 7 June did not comply with the respondent’s written capability procedure. We do not accept the specific

grounds cited. The claimant had a colleague present. Ms Durisova was the only relevant manager, and it is appropriate she conducted the meeting. The claimant understood the allegations. The claimant had several months off work. She had taken advice. She had filed a lengthy grievance. Had the claimant not understood the allegations, or required further investigation, she could have raised it. We do not accept there was a failure to provide information. We do not accept the claimant was given no opportunity to respond to information. It was the claimant who refused to engage in the conversation. The fact the hearing lasted only 10 minutes reflected the claimant's attitude and unwillingness to engage with the process.

7.19 We do not accept that the outcome was predetermined. There may be occasions when a capability hearing may seek to establish whether someone had fallen below standards, and this may require specific investigation. This was not one of those cases. The claimant's failures were clear. The meeting was not primarily concerned with whether blame could be apportioned to the claimant for specific failures, for instance the delay to the export of items to Oro Bianco. It was principally about the claimant's refusal to engage with a discussion about what went wrong, her unwillingness to accept instructions, and her hostility to Ms Durisova. There was no further need to consider whether the claimant had behaved inappropriately. We have no doubt the basis for Ms Durisova's belief that the claimant was acting inappropriately was well understood by the claimant. The meeting was more concerned with the practicalities of the performance improvement plan going forward. The fact the meeting was conducted in the showroom is irrelevant. The claimant consented to it being conducted there.

7.20 Issuing an improvement notice was not a breach of contract. There were clear rational reasons for doing so.

7.21 Finally, we do not accept the claimant was given no right of appeal. The right of appeal was in the policy, and failure to refer to it expressly is not itself a breach of contract. The claimant knew that she had the option of filing a grievance. We have no doubt that she understood that she could appeal.

7.22 In the issues, the claimant says the respondent’s action was discriminatory. Her allegations of direct discrimination harassment were withdrawn. We reject any allegation that any aspect of the capability procedure was discriminatory and we will consider this further below when considering victimisation.

7.23 In addition to complaints about the capability procedure, the claimant alleges that the respondent's approach to the investigation of the grievances was either a breach of the term of mutual trust and confidence or was at least a final straw.

7.24 It is said there was no adequate investigation of grievances. We do not accept this submission. The respondent sought to engage with the claimant to discuss the grievances. The claimant refused and insisted on a simple response in writing. It is unclear what, if any, further investigation the claimant envisaged. We have no doubt that Ms Durisova sought to engage with the grievance and she answered the points raised. Ms Durisova 's approach was not a breach of implied term of mutual trust and confidence.

7.25 We need to ask whether the employer without reasonable and proper cause conducted itself in a manner calculated and likely to destroy or seriously damaged the relationship of mutual trust and confidence. When considering this, it is necessary to stand back and understand the context, but at the same time, we need to consider the detail. The fact that the claimant's conduct was inappropriate, and justified the respondent taking action and commencing a procedure, does not give unbridled licence to the respondent to criticise. It is necessary to consider the totality of the letter of 30 April 2021.

7.26 The first five points in the letter are appropriate and we are satisfied the claimant understood what matters were being raised. Point 6 refers to the claimant's personnel file having a record of “bullyish” behaviour and there is reference to her "behaviour toward other members of staff." Ms Durisova was unable to give is any example of the behaviour, other than an incident some three years previously, which had been dealt with informally. There were no examples of current behaviour, other than her behaviour to Ms Durisova. Point 7 concerned her appearance and presentation at work. What was meant by that remained unclear, and it was never properly detailed. At best, it appears Ms Durisova disliked a pair of the claimant’s designer trousers that Ms Durisova viewed as to flimsy and pyjama like. At no time has Ms Durisova identified any other potential criticism of the claimant's clothes.

7.27 There is an overlap between capability and disciplinary procedures. If someone's attitude is poor, this may be because of a lack of capability or it may be deliberate, and this may be seen as conduct. Whatever the position, a capability procedure may be even less welcome to an employee than a specific allegation of misconduct. The potential for the procedure to be negative and divisive is obvious. An employer should have that difficulty in mind when embarking on the capability procedure. It is incumbent on the employer to be precise and clear. Moreover, the procedure should be focused.

7.28 In this case, the respondent chose to include two matters which were likely to be contentious. It was unwise to refer to the claimant's relationship to other members of staff, without there being specific examples. It was unwise to refer to the claimant's clothing when the allegation was unclear. Ms Durisova should have recognised that there had been a serious deterioration in the relationship. The point of the capability procedure should be to identify areas which needed to be

improved and give appropriate time and support to achieve that improvement. Ms Durisova should have known that inclusion of an unparticularised general criticism of her relationship to other members of staff and of the clothes the claimant wore could only serve to alienate and aggravate. Ms Durisova should have realized that such personal criticism would seriously undermine the relationship.

7.29 It was appropriate when the claimant returned to work to have the meeting. However, it would have been better to give the claimant specific notification in writing of the time. We do not accept the actual conduct of the meeting, or the general commencement of the performance improvement plan was a breach of contract. Ms Durisova did discuss specific tasks with the claimant, and they were agreed. Whilst this was unwelcome to the claimant, we do not see it as a breach of contract. However, Ms Durisova did allow herself to be drawn into excessive supervision and this could be seen as what is commonly termed micromanagment.

7.30 We have found that the inclusion of the irrelevant matters put the respondent in fundamental breach. It seriously damaged the relationship and ensured the process would be seriously undermined. It was either calculated to or likely to destroy any remaining relationship.

7.31 The excessive management during those four days contributed to the difficulties.

7.32 Was this a breach of the implied term of mutual trust and confidence? We have concluded that by including two poorly identified superfluous matters Ms Durisova fundamentally undermined any possibility of a successful capability procedure and this was either calculated to destroy the remaining trust and confidence or she should have realised it would be likely to destroy it. In those circumstances, the inclusion of those items was a fundamental breach.

7.33 It is arguable that the claimant affirmed the contract by not resigning immediately. However, we do not accept that. The claimant was ill. During her absence she filed a grievance. The grievance itself expressly reserved her position, and her continuing conduct is consistent with her reserving her position. The claimant did not affirm the contract.

7.34 We have considered whether her returning to work, and working for four further days was an affirmation contract. We do not believe it was. She had reserved her position. She had filed a grievance. She had challenged the assertion that her presentation was unacceptable. She was entitled to await the outcome.

7.35 As we have noted, the outcome to the grievance was largely thorough and robust. However, it was inadequate in at least two respects. First, it did not adequately explain what was meant by the claimant's behaviour towards other members of staff. Second, it did not adequately deal with

why there had been reference to her clothes worn at work. The failure to deal with those points was blameworthy and had the potential to be a final straw.

7.36 It follows that when the claimant resigned, the respondent was in breach of contract and it was open to the claimant to accept that breach and treat herself as constructively dismissed.

7.37 It is necessary to consider the reason why she resigned. Ultimately, we find that there are several reasons for her resignation.

7.38 We first need to consider the events of 27 April 2021.

7.39 We have considered the words used, and the subsequent conversation on 28 April. We have found that the claimant resigned, orally, on 27 April, as confirmed by her at the meeting on 28 April. Ms Durisova initially held the claimant to her resignation. She would have been entitled to do so. However, ultimately Ms Durisova elected to allow the claimant to withdraw her resignation.

7.40 When the claimant resigned on 27 April, it is clear that the claimant was refusing to engage with Ms Durisova and discuss constructively what led to the customs delay. Her attitude was so belligerent it is likely that the claimant was in breach of contract at that point. However, by allowing the claimant to withdraw her resignation the respondent affirmed the contract.

7.41 It follows that resignation was firmly in the claimant's my mind by no later than 27 April 2021, as she resigned on that date. Resignation remained in the claimant's mind and the fact she believed the respondent was in fundamental breach is contained in her May grievance. Resignation remained at the forefront of the claimant's mind when she returned to work on 7 June, and it was raised in her grievance of 11 June 2021. It is arguable that this grievance is clear evidence of the fact claimant had made up her mind to resign, it was only a question of when. The conclusion of the grievance makes it clear that she will continue to work in the interim, but her reference to addressing the "obvious campaign of attrition and victimisation" in a "robust manner" is a clear indication of her intention to resign.

7.42 The claimant did resign after she received the response to her grievance. We have considered the resignation letter. The claimant was dissatisfied with the reply. The resignation letter confirms that her reason was multilayered. She referred to her recent treatment. She alleged race discrimination. She complained about her treatment on her return to work. Part of the reason, undoubtedly, related to the accusations about her conduct towards other members of staff and her appearance. The respondent was in fundamental breach of contract, for the reasons we have given. The breach need only be a material reason, it does not have to be the sole reason or the principal reason for the resignation. We are satisfied it was a sufficient reason, in the sense it was material and not

trivial, for the resignation and therefore the claimant was constructively dismissed.

7.43 Was the dismissal unfair? The respondent's submissions fail to deal with the question of fairness, should we find the claimant was dismissed.

7.44 It is appropriate to consider the band of reasonable responses. Here the respondent believed the claimant's interaction with Ms Durisova was inappropriate and there were difficulties with her performance. However, Ms Durisova included irrelevant matters which could only serve to escalate conflict and to undermine, and in all likelihood destroy, the relationship. Including those matters was outside the range of reasonable responses. It follows that the approach taken to the capability procedure was so seriously tainted by these inclusions that it was outside the band of reasonable responses of a reasonable employer. No reasonable employer would have behaved that way. We therefore find that the dismissal was unfair.

7.45 We next consider the wrongful dismissal claim. The respondent was in breach of contract. The claimant resigned. She is entitled to receive notice pay. The respondent has failed to deal with this adequately or at all. The respondent's submission was that by resigning the claimant's waived her right to notice. We reject that submission.

7.46 There may be occasions when a claimant who resigns is not entitled to notice pay. If the respondent is not in fundamental breach, notice pay is not payable. If the respondent discovers, subsequently, some form of behaviour, for example theft, about which it knew nothing at the time dismissal, but which would have entitled it to dismiss, this may form a defence. There is nothing of that nature. The possibility remains that, if the claimant was in fundamental breach at the time of the resignation, it may have been open to the respondent to accept that breach and treat her as dismissed. It is likely that the claimant was in fundamental breach of contract on 27 April by refusing to engage and by refusing to accept reasonable instructions. We do not have to finally resolve the point, albeit this may be a matter relevant to our consideration of contributory fault in due course. The difficulty is that any fundamental breach on 27 April was not accepted, and the contract was treated as affirmed. The respondent has not argued before us that the claimant was in fundamental breach of contract at the point when she resigned in July. In those circumstances it would not be possible for the respondent to accept a fundamental breach and treat her as dismissed. As it would not have been possible at the date of the claimant's resignation for the respondent to terminate her contract for the claimant's fundamental breach, the claim for notice must succeed.

7.47 In the claim form, there is total failure to set out the specific detrimental treatment said to be victimisation. The issues as drafted by the claimant which have not been disputed by the respondent site a number of allegations of detrimental treatment. Some are unclear. Some are not adequately set out in the claim form.

7.48 We do not have to finally resolve whether any of the matters contained within the list of issues would require amendment (it is arguable that the inclusion of any would require formal amendment), as it is possible to consider the reason for the respondent's conduct.

7.49 We have considered all the allegations and the totality of the evidence. It is not necessary to dissect every line of the claimaint's issues to deal with the allegations of victimisation.

7.50 The allegations of victimisation are set out in the issues as follows:

> **17. Did the respondent subject the claimant to any detriments as follows:**
>
> **a. Failed to carry out a fair investigation of the allegations of poor performance and conduct in that the investigations did not comply with the written capability or disciplinary procedures or a fair procedure;**
> **i. No attempt to deal with informally (para 2 of the capability procedure; page 6 company handbook - disciplinary);**
> **ii. No or no adequate investigation of the allegations (para 5 of the capability procedure);**
> **iii. Jana Durisova was witness, investigator and decision maker.**
>
> **b. The conduct of the hearing on 7 June 2021, which did not comply with the respondent's written capability or disciplinary procedure, or a fair procedure in that:**
> **i. The claimant was not provided with any relevant information gathered as part of the investigation, relevant documents or witness statements in advance (para. 5.1 of the capability procedure);**
> **ii. The claimant was not given an opportunity to respond to information given by witnesses (para. 7.3 of the capability procedure);**
> **iii. the hearing lasted only 10 minutes and the purpose was apparently simply to confirm the implementation of a performance review plan rather than to give the claimant the opportunity to put forward her representations (para 7.4 of the capability procedure; page 6 company handbook – disciplinary);**
>
> **c. The outcome of the hearing was pre-determined;**
>
> **d. The hearing was conducted in the showroom which was open to customers.**
>
> **e. Issuing the Claimant with an improvement notice on 10 June 2021.**
>
> **f. The Claimant was not provided with an opportunity to appeal the decision.**
>
> **g. The Respondent did not carry out any / or any adequate investigation of the Claimant's grievances dated 26 May and 11 June.**

h. The Respondent did not uphold the Claimant's grievances dated 26 May and 11 June.

i. The Claimant was constructively dismissed.

7.51 The respondent has not sought to allege that the grievances of 26 May 2021 and 11 June 2021 were not protected acts. It accepts the claimant raised allegations of discrimination.

7.52 The respondent does not expressly deal with the potential defence under section 27(3). Ms Durisova's evidence makes it clear that she believes the allegations are false and her evidence could be interpreted as consistent with an allegation that they were made in bad faith. However, that is not advanced as a defence, albeit it is not expressly conceded.

7.53 For the purpose of this decision, we will accept that there are protected acts. We make it plain that we are not deciding whether any allegations were made in bad faith, as that defence is not expressly relied on by the respondent, albeit it is Ms Durisova's evidence that the claimant had no grounds for believing there was race discrimination.

7.54 We can deal with the allegations of detrimental treatment thematically. It is first necessary to consider whether factual circumstances said to be allegations detriment occurred at all. The issues as drafted by the claimant contain broad allegations, many of which are conclusions, as well as specific allegations of detrimental treatment.

7.55 It is alleged there was no fair investigation of the allegations. The approach to any investigation was fair. The reality is that Ms Durisova did undertake the only reasonable investigation she could in relation to the failings by seeking to engage the claimant in conversation. Any failure of investigation was caused by the claimant's refusal to cooperate with Ms Durisova. The claimant, effectively, prevented any further investigation.

7.56 It may be argued that there was some unreasonableness in the procedure, particularly with regards the allegations of difficult relations with other members of staff and of inappropriate appearance, as detailed above. However, if that conduct were unreasonable, it is not unexplained. It was a reaction to the claimant's aggression to Ms Durisova and that predated any protected act.

7.57 We accept the Ms Durisova was the main person involved and ultimately any decision was hers.

7.58 The conduct and venue of the hearing on 7 June is criticised and we have considered what happened on that date.

7.59 There is reference to the outcome being predetermined. To the extent this is an allegation detriment, it must be understood in the context that Ms

Durisova made up her mind to proceed with some form of improvement plan. The reality is that Ms Durisova had decided it would be necessary to have a performance improvement plan no later than 30 April 2021. To that extent, it can be said it was predetermined.

7.60 The claimant was issued an improvement notice.

7.61 We do not accept there was no opportunity to appeal.

7.62 We accept the respondent did not uphold the grievances.

7.63 We accept the claimant was constructively dismissed.

7.64 Having established what treatment did occur, the next question is whether the treatment itself was detrimental. It is not all unwelcome treatment which will be seen as detrimental. It is necessary to consider whether a reasonable employee, viewing the matter objectively, would consider the treatment to be detrimental.

7.65 Very little of the treatment itself could be seen as a detriment in this context. A reasonable employee would accept there were proper grounds for starting the capability procedure. It is difficult to see what the claimant envisaged by way of further investigation and a reasonable employee would observe that it was the claimant's actions which prevented further investigation of the recent events. There was no realistic possibility of another manager dealing with these matters. It was appropriate for Ms Durisova to deal with the matter. Given the claimant's hostility and clear evidence that she had been unwilling to accept basic instructions, putting in place a performance improvement plan was not detrimental. The claimant's view of events was unreasonable, and it was not unreasonable to reject her grievance. Rejection of the grievance cannot reasonably be seen as a detriment.

7.66 However, some of the treatment was detrimental. Inclusion of matters which should not have been included in the letter of 30 April and subsequently the failure to deal adequately with those matters, in in the grievance was detrimental. The claimant was constructively dismissed. We accept the dismissal was a detrimental treatment.

7.67 It follows that some of the allegations are made out factually. Moreover, some of the allegations could potentially be seen as detrimental treatment.

7.68 It is necessary for us to consider the mind of the decisionmaker. It is the claimant's case that her protected acts were the material reason for the alleged detrimental treatment. We must consider Ms Durisova's motivation – both conscious and subconscious.

7.69 It is the claimant's case that Ms Durisova was annoyed because the claimant had raised allegations of discrimination, which Ms Durisova believed were unfounded and inappropriate.

7.70 We have no doubt that Ms Durisova did consider the allegations of discrimination to be unfounded and in that sense inappropriate. The reality is that the allegations of discrimination were unfounded. The claimant's evidence on this point has been poor. She has now admitted that there was no such reference. The claimant has been unable to point to any material fact, other than possibly her allegation that she was treated differently to others, which could point to race as being a reason for her treatment.

7.71 Before us, initially, the claimant's case was put on the basis that the reference to her curly hair led her to believe she was being discriminated against. That contention was abandoned, and it was contradicted by the claimant's own evidence.

7.72 The claimant has not sought to say that there is no explanation for the unreasonable behaviour to which she was subjected. It may be possible to infer that that must be her case. However, it was not explored expressly with respondent's witnesses. For the reasons we have already given, we do not consider that there is a lack of explanation for any unreasonable behaviour.

7.73 Her oral evidence as to when she believed she had been subjected to race discrimination contradicted the stated position in her own grievance.

7.74 The reality is that there is no fact which could turn the burden. We do not accept that the claimant ever had clear rational grounds for believing there was race discrimination. Whilst we note that the allegation of race discrimination and harassment have been abandoned as discrete allegations, they still form part of the claim of constructive dismissal, and ultimately, are relied on for the purpose of turning the burden in the victimisation claim.

7.75 It is important to consider the basis for a race discrimination claim because the claimant's alleges that the fact Ms Durisova had formed the view the claimant discrimination allegation was unfounded caused her to retaliate. We find that Ms Durisova had reasonable and appropriate grounds for believing there was no discrimination.

7.76 The fact that there were no grounds for the discrimination claim, is not in itself a defence to a claim of victimisation. It is still necessary to consider the alleged victimiser's motivation.

7.77 Equally, it does not necessarily follow that because the respondent considered the claim of race discrimination to be unfounded, and in that sense inappropriate, that there is sufficient evidence to find that it was the protected act was a material reason for the treatment.

7.78 In extreme cases, it may be necessary to draw a distinction between the protected act itself and other relevant factors, such as the way it is

advanced. The mere fact that the context is a protected act, is not itself conclusive. However, we don't do not need to consider those lines authority[2] as we don't consider it relevant in this case.

7.79 For the claimant to succeed, we must determine that a protected act was a material reason for the alleged detrimental treatment. In considering this, we have regard to the totality of the treatment alleged by the claimant, even though some of that treatment would not, in our view, be seen as detrimental in any event.

7.80 There was a deteriorating relationship between the claimant and Ms Durisova. By 27 April 2021, that relationship had reached such a low the claimant resigned. Ms Durisova considered the claimant's behaviour towards her to be unacceptable. She considered the claimant's performance to be inadequate. Ms Durisova wished to address the matter. Ms Denisova's preferred route was to hold the claimant to her resignation, but she allowed the claimant to withdraw her resignation.

7.81 Ms Durisova Ms Durisova started a process which we have found was flawed. She included reference to the claimant's relationship with other members of staff and to the claimant's appearance. For the reasons we have given, that was either calculated to, or likely to destroy any residual confidence. Ms Durisova must have realised the claimant would be likely to resign at some point. All that occurred before any protected act, and before any reference to race discrimination. Ms Durisova was motivated by the claimant's hostility to Ms Durisova. Hers was a reaction to a relationship which had broken down. The remainder of Ms Durisova's approach to the capability procedure, and her relationship with the claimant, is entirely consistent with her approach to the breakdown which had occurred by no later than 27 April. She simply saw that process to an end. There is nothing to suggest that Ms Durisova would have taken a different approach had the claimant not raised an allegation of race discrimination.

7.82 It is of course possible that retaliation for protected acts became a further motivation. However, the fact that there are protected acts is not itself sufficient to turn the burden. The fact that Ms Durisova formed the view that the allegations were false and had no basis does not turn the burden in his circumstance when it is clear that the claimant had no reasonable basis for forming the belief, and in circumstances when her own evidence would suggest she had not formed that belief at the point she made the allegation. There is no failure of explanation for any unreasonable conduct which could be used to turn the burden. It follows the burden does not shift.

7.83 If we were wrong, and if the burden does shift, we have to be satisfied by the explanation on the balance of probability. The explanation is that the claimant was treated in the way that she was because of own conduct and

[2] See. e.g, *Martin v Devonshire Solicitors 2011 ICR 352*

performance and the need to address that behaviour. This explanation does explain the respondent's behaviour. In no sense whatsoever was the Ms Durisova 's behaviour because of any protected act. We accept her explanation on the balance of probability. It follows the claim of victimisation fails.

7.84 It will be necessary for there to be a remedy hearing.

7.85 We asked the parties to consider whether we should decide contributory fault. We have decided that it would be inappropriate for us to do so at this stage. We have made a number of findings which themselves may be relevant to our consideration of contributory fault. The parties should have presented oral evidence relevant to contributory fault and to any Polkey deduction. If either party wishes to file further evidence, that party will need to make a specific application and give reasons. We will set the matter down for hearing and invite the parties to make any application for further directions, as they see fit.

7.86 We would invite the parties to agree the remedy for wrongful dismissal. If that is not agreed, we will deal with it at the next hearing

_____

Employment Judge Hodgson

Dated: 3 March 2023

Sent to the parties on:

06/03/2023

For the Tribunal Office