EMPLOYMENT TRIBUNALS

Claimant: **Mr T Afolabi-Brown**

Respondent: **Evolve Facility Services Limited (A subsidiary of The Riverside Group)**

Heard at: **Liverpool** **On:** **27 & 28 February 2023 and 1, 2, & 3 March 2023**

Before: **Employment Judge Liz Ord**
Tribunal Member Graham Pennie
Tribunal Member John Murdie

Representation:

Claimant: **Mr Nicholas Bidnell-Edwards (Counsel)**
Respondent: **Mr William Chapman (Counsel)**

JUDGMENT having been given orally on 3 March 2023 and the written record having been sent to the parties, subsequent to a request for written reasons in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure, the following reasons are provided:

REASONS

The Complaints and Issues

1. The claimant complaints of victimisation on the grounds of race, direct race discrimination, and constructive dismissal.

2. The claimant is of black ethnicity.

3. The following list of issues was agreed at the outset of the hearing:

1 **Time Limits – Discrimination claims**

1.1 Given the date the claim form was presented on 9 December 2020 and the effect of early conciliation commenced on 25 October 2020, any complaint about something that happened before the relevant date (which might be 26 July 2020) may not have been brought in time.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010. The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (allowing for an early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (allowing for an early conciliation period extension) of the end of that period?

1.2.4 If not, were claims made within such a further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstance to extend time?

2 -

3 **Victimisation (Equality Act 2010 section 27)**

3.1 Did the Claimant do a protected act or acts as follows:

3.1.1 Email to Darren Lauritzen of 5 April 2019

3.1.2 Email to Brian Egan of 10 July 2020

3.2 Did the respondent believe that the Claimant had done or might do a protected act, in that he might make an allegation of racial discrimination?

3.3 Did the respondent do the following things:

3.3.1 The Claimant was not afforded redundancy when put at risk. Specifically, between August and October 2020, Ashley Gough and/or Mr Lauritzen ignored the Claimant/refused to respond with an outcome

replying to/or agreeing to his repeated requests for redundancy, and a redundancy payment; and

3.3.2 On 12 October 2020 Ashley Gough informed the Claimant he would not receive a redundancy payment;

3.3.3 When the Claimant's employment terminated on 16 October 2020 he was not paid a redundancy payment.

3.4 By doing so, did it subject the Claimant to detriment?

3.5 If so, had the Claimant proven facts from which the Tribunal could conclude that it was because the Claimant did a protected act or because the respondent believed the Claimant had done, or might do, a protected act?

3.6 If so, has the respondent shown that there was no contravention of section 27?

4 **Direct Discrimination (Equality Act 2010 section 13)**

4.1 For the purpose of his race discrimination the Claimant relies on section 9(1)(a) of the Equality Act 2010 (EQA). The Claimant relies on his skin colour i.e. black.

4.2 Do the following amount to less favourable treatment because of the Claimant's race pursuant to section 13 of the EQA, when compared to another (real or hypothetical) whose circumstances are not materially different to his own:

4.2.1 That the Claimant was denied training opportunities (the Chartered Construction Manager course about which he emailed on 23 August 2017);

4.2.2 The Claimant was denied opportunities for advancement and promotion – the Claimant suggests he should have been supported to become a regional manager in September 2020;

4.2.3 The Claimant was not afforded redundancy when put at risk. Specifically, between August and October 2020, Ashley Gough and/or

Mr Lauritzen ignored the Claimant/ refused to respond with an outcome replying to/or agreeing to his repeated requests for redundancy, and a redundancy payment; and

4.2.4 On 12 October 2020 Ashley Gough informed the Claimant he would not receive a redundancy payment; and

4.2.5 When the Claimant's employment terminated on 16 October 2020 he was not paid a redundancy payment.

4.3 Who would be the Claimant's hypothetical comparator?

4.4 The Claimant relies on a Senior Asset Officer, who was white British.

4.5 Who has the Claimant identified as his actual comparators?

4.6 The actual comparators relied upon are: Ms Karen Pearce and/or Ms Anne Sutton regarding 4.2.2 and 4.2.4; Mr Sam Norman and/or Mr Thomas Fairburn regarding 4.2.1; and Mr Stephen Elliott regarding 4.2.3.

5 **Constructive Dismissal**

5.1 Objectively assessed, has the Respondent breached the implied term of trust and confidence in acting in a manner either calculated, or likely to destroy or seriously to undermine mutual trust and confidence?

5.2 Do the following amount to breaches of the implied term of trust and confidence?

5.2.1 That the Claimant was denied training opportunities (the Chartered Construction Manager course about which he emailed on 23 August 2017);

5.2.2 The Claimant was denied opportunities for advancement and promotion – the Claimant suggests he should have been supported to become a regional manager in September 2020; and

5.2.3 The Claimant was not afforded redundancy when put at risk. Specifically, between August and October 2020, Ashley Gough and/or Mr Lauritzen ignored

the Claimant/ refused to respond with an outcome replying to/or agreeing to his repeated requests for redundancy, and a redundancy payment.

5.3 Did this entitle the Claimant to regard his contract as rescinded and resign?

5.4 When did this take place? The Claimant resigned his position 24 September 2020, with his last date of employment being 16 October 2020.

5.5 Did the Claimant resign, at least in part, in response to any breaches of the implied term?

5.6 The Respondent alleges the Claimant resigned to take up alternative employment on 19 October 2020.

5.7 In the event that it is determined the Claimant was constructively dismissed is the Claimant entitled to a basic award and/or compensatory award in accordance with sections 118 to 124 ERA 1996, and if so to what amount? In determining this the Tribunal should consider the following:

5.7.1 Whether or not any loss has been reasonably mitigated?

6 **Remedy**

6.1 How much should the Claimant be awarded?

6.2 In the event that the Tribunal determines that the Claimant has been unlawfully discriminated against, what level of compensations should be ordered? In determining this, the Tribunal should consider the following:

6.2.1 What loss did the Claimant suffer?

6.2.2 Whether the Claimant has taken reasonable steps to mitigate his loss?

6.2.3 Whether or not the Claimant is entitled to an award for injury to feelings and if so, what level should this be in accordance with the Vento guidelines?

Evidence

4. The tribunal had before it the following evidence:

a. Document bundle of 409 pages;

b. Witness statement bundle of 128 pages;
c. Lucy Watson - Witness statement, Supplementary Witness Statements x 2;
d. Draft list of issues; List of issues.
e. Cast list;
f. Chronology;
g. Respondent's chronology;
h. Notes of redundancy consultation meetings with employees Gavin Bell (19/2/2021); Karen Pearce (17/2/2021) and Nicola Martin (19/2/2021).
i. Letter to Clive Rodney dated 27/1/2021 confirming grievance withdrawn;
j. Family Tree showing contractual relationship between respondent and The Riverside Group and others;
k. Claimant's skeleton argument;
l. Respondent's response to issues;
m. Respondent's submissions.

5. It heard evidence on oath from:

    a. the claimant, and remotely from his witnesses Parmjit Cheema and Clive Rodney, (both former Asset Officers with The Riverside Group).
    b. on behalf of the respondent, Ashley Gough (HR Business Partner with Mears), Darren Lauritzen (Senior Partnership Manager with Mears) and Lucy Watson (HR Legal Advisor with Mears).

The Law

A – Constructive Dismissal

6. As per section 95(1)(c) of the Employment Rights Act 1996, an employee is constructively dismissed if:

    "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".

7. In Western Excavating (ECC) Ltd v Sharp [1978] ICR 221, Lord Denning put it as follows:

    "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 so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

8. A resignation in response to conduct by the employer which falls short of being a breach of a fundamental term, is simply a resignation.

9. To succeed in a claim for constructive dismissal, the employee must establish that:

- The employer was in breach of a term of the contract of employment; and
- The breach was a repudiatory one, entitling the employer to resign; and
- The employee resigned because of that breach of contract.

10. The burden of proof is on the employee to establish each of the above.

11. The implied term of trust and confidence was formulated by the HLs in Malik and Mahmud v BCCI [1997] ICR 6060 as being an obligation that the employer shall not:

    "Without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

12. In Leeds Dental Team Ltd v Rose [2014] ICR 94, EAT, the EAT confirmed that the test of whether there was a repudiatory breach of contract is an objective one:

    "the test in such cases is not whether the employee has subjectively lost confidence in the employer but whether, objectively speaking, the employer's conduct is likely to destroy or seriously damage the trust and confidence that an employee is entitled to have in his employer".

13. In Frenkel Topping Ltd v King UKEAT/0106/15/LA the EAT warned about the dangers of setting the bar too low. That decision makes it clear that acting in an unreasonable manner is not sufficient.

14. In Morrow v Safeway Stores plc [2002] IRLR 9, it was held that a breach of the duty of trust and confidence will always be repudiatory.

15. A breach of the implied term of trust and confidence may consist of a series of actions on the part of the employer that cumulatively amount to a repudiation of the contract, with the employee resigning in response to the final incident. The final incident or "last straw" does not, of itself, have to amount to a breach of contract.

16. The Court of Appeal in Omilaju v Waltham Forest London Borough Council 2005 ICR, CA confirmed that, to constitute a breach of trust and confidence based on a series of acts or omissions, the last straw does not have to be of the same character as the earlier acts, and nor does it have to constitute unreasonable or blameworthy conduct. However, it must contribute to the breach of the implied term of trust and confidence.

B - Race Discrimination

17. The relevant legislation is contained in the Equality Act 2010 (EqA).

18. Race is a protected characteristic under section 4 EqA.

19. Direct discrimination and victimisation are types of "prohibited conduct" under the EqA.

20. Section 39 EqA states that:

    (1) …..

    (2) An employer (A) must not discriminate against an employee of A's (B)-
    (c) By dismissing B;
    (d) by subjecting B to any other detriment.

    (3) …..

    (4) An employer (A) must not victimise an employee of A's (B) –
    (c) by dismissing B;
    (d) by subjecting B to any other detriment.

21. The burden of proof is set out in s136 EqA, which provides:

    (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 (2) does not apply if A shows that A did not contravene the provision.

22. This is a two staged test. At the first stage, the claimant must prove (on a balance of probabilities) facts from which the tribunal could decide discrimination had taken place (the prima facie case). At the second stage, (only engaged if the first stage is passed) the burden shifts to the respondent, who must prove (on a balance of probabilities) a non-discriminatory reason for the treatment.

23. If it is very clear from the evidence that the case succeeds or fails, it is not necessary to use the two staged burden of proof. If the tribunal is able to make a firm finding that there are no facts from which it could say discrimination had taken place, the shifting burden of proof is unlikely to be material.

24. In Hewage v Grampian Health Board [2012] IRLR 870, SC, the Supreme Court said of the burden of proof provisions:

    "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

25. Decisions are frequently reached for more than one reason. Provided the protected characteristic or, in a victimisation claim, the protected act, had a significant influence on the outcome, discrimination is made out – Nagarjan v London Regional Transport [1999] IRLR 572, HL.

26. **Direct discrimination** (s13)

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.

27. There are two parts to consider, namely, whether the employer:

a. Treated the person less favourably than it treated others, and
b. Treated the person in that way because of a protected characteristic.

28. A tribunal may look at all the material before it when determining unfavourable treatment, including the conduct of the alleged discriminator before or after the act about which the particular complaint is made – London Borough of Ealing v Rihal 2004 IRLR 642, CA. The tribunal was entitled to draw an inference of a culture of racial stereotyping that influenced management decisions, from figures showing that no non-whites held senior management positions within the claimant's department.

29. However, as Lord Justice Peter Gibson said in Chapman v Simon 1994 IRLR 124, CA, "a mere intuitive hunch ….that there has been unlawful discrimination is insufficient without facts being found to support the conclusion".

30. There must be material from which the tribunal could properly draw an inference of discrimination. Where the employer behaves unreasonably, that does not mean that there has been discrimination, but it may be evidence supporting that inference if there is nothing else to explain the behaviour – Anya v University of Oxford and anor 2001 ICR 847, CA.

31. There must be some basis for finding that unreasonable conduct (even if less favourable treatment than that meted out to a comparator) was motivated by the protected characteristic relied upon; see for example Messeri v Royal Hospital for Neuro-Disability ET Case No.2301983/2020 where it was held that the employer's conduct had not been motivated, consciously or subconsciously, by race based on the fact that the claimant was Italian. Nor could an inference of discrimination reasonably be drawn. The reason for the unfair treatment was a lack of care, attention to detail and focus, rather than a discriminatory motivation.

32. Qureshi v Victoria University of Manchester and anor 2001 ICR 863, EAT, provided that a tribunal must look at the totality of its findings of fact and decide whether they add up to a sufficient basis from which to draw an inference that the respondent has treated the complainant less favourably on the protected ground.

33. **Victimisation** (s27)

(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.

34. Therefore, to establish victimisation a claimant must prove two things:
a. That they were subjected to a detriment, and
b. That it was because of a protected act.

35. A three stage test for establishing victimisation was set out in Derbyshire and ors v St Helens Metropolitan Borough Council and ors 2007 ICR 1065,HL by Baroness Hale and Lord Nicholls. Adapting their guidance to the phrasing of the EqA, the test is:

- Did the alleged victimisation arise in any of the prohibited circumstances covered by the EqA?
- If so, did the employer subject the claimant to a detriment? and
- If so, was the claimant subjected to that detriment because of having done a protected act, or because the employer believed that the claimant had done, or might do, a protected act?

36. The prohibited circumstances are set out in S39(3) and (4) EqA. S39(4) is set out above and is the relevant provision in this case.

C – Time Limits - Discrimination

37. The time limit for Equality Act claims appears in section 123 as follows:

(1) Proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of three months starting with the date of the act to which the complaint relates, or

(b) such other period as the Employment Tribunal thinks just and equitable …

(2) …

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

38. The onus of proving it is just and equitable is on the claimant.

39. Robertson v Bexley Community Centre t/a Leisure Link *2003 IRLR 434,* CA - It is for the applicant to convince the tribunal that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule.

40. Southwark London Borough Council v Afolabi 2003 ICR 800, CA - whilst S33 Limitation Act provides a useful guide for tribunals, it need not be adhered to slavishly, provided it left no significant factor out of account in exercising its discretion. The Court suggested there are almost always two factors which are relevant: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent.

41. Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96 considered the circumstances in which there will be an act extending over a period.

"…….the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."

42. The tribunal has also taken account of the caselaw referred to by the parties' counsel.

Findings of Fact

43. The tribunal found the following facts proved on the balance of probabilities.

Background

44. Evolve Facility Services Limited (the respondent) was a wholly owned subsidiary of The Riverside Group, which was in the business of social housing. Riverside Direct was created in July 2018 as a subsidiary of the respondent. The day to day management of the respondent's employees was undertaken by Mears Limited under a partnership agreement.

45. The respondent worked out of two operational hubs, Dartford in the South and Leicester in the Midlands. The Riverside Group was unionized (Unite) and the senior Unite representative was Brian Egan. The claimant was a member of the union.

46. The claimant's continuous employment with the respondent was from 18 January 2016 to 16 October 2020, when his employment ended due to his

resignation on 25 September 2020. He was TUPE transferred from The Riverside Group to Riverside Direct (the respondent's subsidiary) on 31 July 2018. His role was Senior Asset Officer based at the Dartford office. There were three such roles, the other two being held by Karen Pearce (Dartford) and Anne Sutton (Leicester).

Restructuring

47. From early in 2019, the respondent planned to restructure the business and this raised the possibility of redundancies (see Redundancy Proposal D202-203). Darren Lauritzen (Senior Partnership Manager with Mears) led the process from July 2019, supported by Ashley Gough (HR Business Partner).

48. On 10/7/2019 the Asset Management Team were briefed about the proposed restructure (D205) and the possibility of the number of Senior Asset Officers being reduced from 3 to 2. The claimant was not present at the meeting and gave his apologies. Mr Lauritzen sent an email to the affected employees on 12/7/2019 (D209) attaching the meeting notes and inviting feedback. The claimant did not write back.

49. The proposals were discussed face to face with the claimant and on 19/8/2019 Mr Lauritzen emailed the 3 Senior Asset Officers asking for their views on what they believed the best way forward would be (D214). There was no written response from the claimant.

50. For personal reasons, Mr Lauritzen was off work from September 2019 to January 2020. However, there was another meeting on 22/11/2019 held by Ashley Gough (D216), to discuss next steps, which the claimant attended. There was then a lull in the process until mid 2020 when a further restructuring review took place.

51. In accordance with the Riverside Redundancy and Redeployment Procedure (D164-180) collective consultation was undertaken with Unite and meetings were held on 3/7/2020 (D228), 6/8/2020 (D264) and 8/9/2020 (D275). These were generally attended by Mr Egan, Wendy Mason (employee representative), Mr Lauritzen and Mr Gough.

52. The 3 roles of Senior Asset Officer were discussed and Mr Egan was told that there were 3 jobs ringfenced in the new structure for these 3 employees, one of which was the claimant. It was agreed policy that Mr Egan would keep his membership informed and that was the expectation of management.

53. On 17/8/2020, Ashley Gough emailed personally those employees who were at risk or redundancy, and this included the claimant (D271). He listed the posts that were at risk and said that consultation meetings with Brian Egan would continue. He only referred to potential redundancy and emphasised that this was not to say the claimant would be made redundant. He said that Riverside Direct intended to fill all of the posts in the new structure from within the pool of affected employees on a ring-fenced basis wherever possible, and would continue to look for redeployment opportunities within Riverside Direct, The Riverside Group and Mears.

54. The proposed restructuring, which was the subject of collective consultation during the summer of 2020, never proceeded to a conclusion. Nobody was made redundant at that time.

The claimant's position

55. The claimant was offered a new job with a different company unconnected to the respondent's group, namely Golding Homes, which was confirmed by email on 1/9/2020 (W33). The salary was £52,000 per annum, nearly £10,000 more than he was earning with the respondent. He accepted the offer on 2/9/2020.

56. The claimant's new employer requested that he give them a start date as soon as possible (W32). On 1/9/2020, he emailed Brain Egan saying *"I am anxious to leave Riverside and would welcome your advice on the best way to do this."*

57. Also on 1/9/2020, the claimant emailed Ashley Gough (D285) asking him to confirm exactly how much his redundancy package was, and saying *"…in the event that I find another job, can you please let me know when my end date for leaving Riverside Direct would be so I can collect my redundancy payment."* He chased up a reply from Mr Gough on 10/9/2020 (D285). He did not tell the respondent about his new job.

58. On 7/9/2020 he emailed Brian Egan again (W28) saying *"….I have now received a very good job offer from another organisation which I have already accepted. The organisation is extremely keen for me to start as soon as possible once I have agreed a leaving date with Riverside……I want to take my redundancy package and leave the business…."*

59. On 15/9/2020 the claimant emailed Mr Gough again (D284) and, amongst other things, he wrote *"……I have made several verbal and written requests regarding my redundancy package and the redundancy consultations, to no avail. I fear this failure in providing me with my redundancy package has been a hindrance in me pursuing alternative employment, as at every point of my searches and interviews, prospective employers have enquired as to my possible start date, to which I am unable to provide a firm response."*

60. On 16/9/2020, Mr Gough responded (D283) giving him provisional redundancy payment figures totalling £8,737.07, and warning him that *"…this illustration should not be taken as an indication that voluntary redundancy has been agreed."* The provisional redundancy figure was less than the annual salary increase in the claimant's new job.

61. Mr Gough gave unchallenged evidence, which we accept, that the 16/9/20 was when he replied to everyone who had requested provisional redundancy figures. He thought the claimant just wanted an illustration and there was no reason to prioritise his answer, or deal with his request any more quickly than others. Mr Gough did not know that the claimant had another job.

62. On 18/9/2020, the claimant emailed Mr Gough (D282) saying he was willing to termination their relationship by 23/9/2020 without further consultation, and requesting that his enhanced redundancy payment be uplifted to £18,000 in consideration of the additional work he had undertaken during Karen Pearce's absence. There was some urgency in the tone of the email.

63. The claimant chased up a reply on 21/9/2020 (D289) and on 22/9/20 Mr Gough responded (D280) saying he was on leave but would discuss the matter with Darren Lauritzen the following day. On 23/9/2020 the claimant again wrote to Mr Gough (D280) stating that it was imperative that he engaged with him that day.

64. In the absence of a response, the claimant gave notice to Mr Gough and Mr Lauritzen by email on 24/9/2020 of termination of his employment (D287). In it he complained about his redundancy package not being addressed with the priority he expected, and suggested that the lack of response to his request for an uplift in redundancy monies was an affirmation of his proposal. He said his notice period would commence on 25/9/2020 with 16/10/2020 being his last day of employment. He said he had wanted to commence his notice on 23/9/2020 and take the notice period as garden leave, but he had not received a response.

65. On 12/10/20 Mr Gough wrote to the claimant (W45) saying he had spoken to Mr Lauritzen who, being mindful of the claimant's previous e-mails, had asked him to provide an update. In the email Mr Gough said there had been discussions with Unite and a number of changes had been made to the proposals. He had no instructions to offer or accept voluntary redundancy, the claimant was ringfenced for 2 comparable jobs, and there was a clear expectation the claimant was going to secure one of these posts. Mr Gough explained that resignation was separate from redundancy and under those circumstances, there would not normally be any redundancy payment.

66. On 15 October 2020, Mr Lauritzen held an exit interview with the claimant and said there was a role for him in the new structure. However, the claimant was not willing to stay.

67. His effective date of termination was 16/10/2020. Even at this stage, he had not told the respondent about his new job. No individual consultation had taken place and no decisions had been made to make any specific individuals redundant. Accordingly, the claimant was not given any redundancy payment.

68. The claimant compares himself to another employee, Stephen Elliot, who was made redundant and got redundancy pay. However, he was in a different position. He was not employed by the respondent, but by The Riverside Group, who had taken him through individual consultation.

Culture within the respondent's business group

69. The Riverside Group had a multi-ethnic workforce, although the management structure was entirely white. The claimant alleged there was a culture of institutional racism within the respondent company.

70. There were a few employees, referred to at the hearing as "the unhappy squad" who appeared disgruntled with their lot, and some of whom alleged racism. The claimant called two of them as witnesses, namely Parmjit Cheema and Clive Rodney. The claimant provided written statements from another two witnesses, Paul Trueman and Doris Yaa Tweneboah, but as they did not give oral evidence and there was no opportunity to test their statements, we gave them no weight.

71. Ms Cheema (an Asian employee) gave evidence that there was a culture of bullying and racism within Mears and she referred to what she described as the degrading and bullying manner of the Operations Manager, James McCarthy. However, in a complaint she made to Brian Egan in 2020 about this, which detailed the employees she believed were effected (mainly from the Leicester office), the list contained both white and ethnic minority staff.

72. Mr Rodney (a black employee) gave evidence that he had not been given a company car, whereas other white employees had. However, after raising a grievance in December 2020, he was provided with a van and then a car and he withdrew his complaint.

73. Riverside Direct took the concerns of its employees seriously and sent out a survey questionnaire to staff asking about work culture and any potential discrimination. The vast majority of responses reflected no experience of discrimination at work.

74. Ms Cheema agreed in cross examination that the survey results were not particularly concerning of a culture of racism.

75. There is no evidence that the claimant raised any issues of discrimination or issues connected to discrimination in any way, during his employment with the respondent.

Claimant's email to Darren Lauritzen of 5 April 2019

76. The claimant's colleague, Karen Pearce, had been absent from work for periods of time over several years and the claimant was asked to carry out some of her duties. He was disgruntled about the level of additional work he was expected to do and met with Darren Lauritzen to discuss his concerns.

77. His email of 5/4/2019 (W18 &19) reflected what had been discussed. In it he talks of lack of support and the length of time Ms Pearce had been absent (dates of absence Exhibit 1 to Lucy Watson's WS – 24/2/23). He said the additional work was impacting on his performance and well being, and he conveyed a keenness to know what cover would be put in place for Ms Pearce. In short, the issues were all about workload.

78. There was no hint in the email that the claimant believed or was alleging anything connected to race discrimination, and neither was there any evidence produced to this effect. Neither was there anything within the context of writing the email which could be said to convey an allegation of discrimination. Any suggestion of discrimination was simply absent. We

cannot infer that the claimant was saying or doing anything that might be construed as connected to a concern of racial discrimination.

79. There is no evidence that the email was seen by anybody else until over a year later in the Autumn of 2020, when potential redundancy was discussed. Consequently, we find that only Mr Lauritzen had knowledge of it. We have considered what was in the mind of Mr Lauritzen when he read the email and whether he believed the claimant had made or might make an allegation of racial discrimination.

80. We looked for any evidence of the context in which the email was written that might be taken to show there was a concern of discrimination. The claimant had never complained of race discrimination at any stage prior to leaving the respondent's employment. There is no evidence that any discrimination took place which Mr Lauritzen knew about, and which might lead him to believe the claimant was alleging discrimination or something connected to discrimination. The 5/4/19 email was written before the "unhappy squad" complaints were made. Therefore, there is no background of discrimination against which to consider the email.

81. Mr Lauritzen did not reply to the email. We asked ourselves whether this could infer that he thought the claimant might allege discrimination and was trying to avoid it.

82. In evidence, Mr Lauritzen said that he took the email as being a record of the meeting he had just had with the claimant and did not think a reply was necessary. The email refers to the conversation at the meeting and it records the claimant being encouraged and looking forward to improvement strategies. It is not obvious from the email that the claimant was expecting a reply. The claimant never raised the matter again until September 2020 and this suggests that he expected nothing more at the time the email was written.

83. We find that the lack of a reply is not evidence of Mr Lauritzen thinking the claimant might allege racial discrimination.

84. We considered the claimant's allegation that Mr Lauritzen's response to the email was to whisper to the claimant the next time he saw him "not to send such e-mails". We asked ourselves whether this was evidence that Mr Lauritzen thought the claimant might allege racial discrimination.

85. Mr Lauritzen flatly denied the allegation. He came across as a genuine, straightforward witness, and we prefer his evidence to that of the claimant's on this point. We find that no such whispering took place.

86. We examined the email carefully to establish whether there was anything in it that might lead Mr Lauritzen to think an allegation of racial discrimination might be made. The email only relates to workload and the claimant asking for support during Ms Pearce's absence. We cannot read anything else into it. There is nothing that could lead Mr Lauritzen to think the claimant might allege racial discrimination.

87. There is no evidence to suggest that it was in Mr Lauritzen's mind that the claimant had alleged or might allege discrimination. He did not turn his

mind to this possibility, as it was simply not something he had any cause to consider.

Claimant's email to Brian Egan of 10 July 2020

88. On 20/7/20 the claimant wrote a private email to Brian Egan (W20) complaining about the additional work he had to do during Karen Pearce's absence and asking what legal options were available to him to claim compensation. We asked ourselves whether this email became known to management.

89. Whilst Mr Egan and Mr Lauritzen were in contact, this was regarding collective consultation about the proposed restructuring and not about individual employees. Mr Lauritzen's evidence was that Mr Egan would attend consultation meetings with lists of questions for both himself and Mr Gough to answer. Mr Egan would book a room out and go back to his membership to provide answers to the questions. That process related to discussing the re-structure on a general basis, and did not involve individuals' circumstances.

90. Mr Lauritzen said he knew nothing about the email of 20/7/2020 and he did not discuss anything with Mr Egan about the claimant's concerns.

91. Mr Gough said in evidence that he was in contact with Mr Egan, but only on matters of restructuring and not with respect to any individual employee. He said he was unaware of the email.

92. Both Mr Lauritzen and Mr Gough came across as credible witnesses and we accept their evidence on these points. Given that the respondent was dealing with collective consultation with the trade union at this stage, and individual consultation had not begun, we take the view there would be no reason for Mr Egan to show the email to management.

93. We therefore find that the claimant's email to Mr Egan was not brought to the attention of Mr Lauritzen or Mr Gough or anyone else in the respondent's management team. Management were unaware of it. Therefore, the respondent did not have knowledge of the email, and it could not have caused the respondent to think the claimant had made or might make an allegation of race discrimination.

94. In any event, there is nothing in the email from which an inference of racial discrimination could be drawn. There are no hints of concerns about discrimination. The claimant was upset about his workload and that is the extent of the mater.

Training

95. The claimant complains that he was denied training opportunities in that he was not funded to undertake a Chartered Construction Manager course. On 23 August 2017 he emailed Mark Spouge, his former line manager (D197; W17), saying he would like to go on this professional development course at a cost of £2,635 + VAT. There is no evidence of a response. Neither is there any evidence of the claimant chasing a response or applying again or appealing.

96. The cost of the course was well above the threshold of what the respondent group would support (£1,500 limit), and there is no evidence that the claimant offered or agreed to pay the balance. Neither is there evidence of whether the course was of any benefit to the respond group, as opposed to just the claimant, which normally was a criterion.

97. The claimant compared himself to another employee, Sam Norman (Compliance Inspector) who applied to go on a course and was funded. Mr Norman's course, however, was within the financial limit.

98. The claimant also compared himself to another employee, Thomas Fairburn (Administrator), who he said went on a course. There is no record of Mr Fairburn applying for sponsorship for any course. We find that no such application for a course was made.

99. The claimant did not complain that his lack of funding was race discrimination at the time, or at any time before resigning from the respondent company.

Advancement and promotion

100. The claimant complains that he should have been supported to become a regional manager in September 2020. There is no evidence that he ever suggested being promoted to regional manager, or to any other position at this time or at all. Neither is there evidence that he had aspirations to become a regional manager, or that this was made known to management.

101. The claimant gave no details of any opportunities for advancement that he was interested in, and gave no details of the post(s) he believed he should have been selected for. He never asked to be considered for promotion.

102. Mr Lauritzen's evidence was that there were no more senior posts available at that stage for the claimant to apply for. We accept his evidence.

103. Whilst the claimant compared himself to Karen Pearce and Anne Sutton, neither of these employees were promoted over the claimant.

Discussion and Conclusion

Whether there was a culture of institutional racism

104. The management structure of the respondent was entirely white and the respondent accepts that, like many organisations, there was an under-representation of ethnic minority employees at senior level. However, that is not in itself a basis from which to draw an inference of racial discrimination.

105. There was a small group of employees, both white and ethnic minorities, who appeared dissatisfied at work for various reasons. The

respondent took the concerns of its staff seriously and sought to understand any potential cultural or social issues by sending out a survey questionnaire. This demonstrates a proactive and responsive attitude on the part of the respondent to resolving employees' concerns.

106. The results demonstrated that most of the staff had no cultural or social concerns. They were not reflective of institutional racism. This was admitted in cross examination by Parmit Cheema. Whilst Clive Rodney put in a formal grievance of race discrimination, he withdrew it once he was given a company car.

107. Bringing these matters today, we do not believe there is sufficient evidence before us to conclude that there was a culture of institutional racism. We find that there was no such culture.

Section 27 victimisation claims (section 3 of the list of issues)

3.1 Did the Claimant do a protected act or acts as follows:

3.1.1 Email to Darren Lauritzen of 5/4/2019

108. The email to Darren Lauritzen was all about the additional workload the claimant said he was undertaking during Karen Pearce's absence. There was no hint of any concerns of discrimination and none can be inferred from the context in which the email was written.

109. Consequently, for these reasons (as more fully set out in the findings of fact above), we conclude that the writing of this email was not a protected act.

3.1.2 Email to Brian Egan of 10/7/2020

110. The email to Brian Egan was a private communication and the respondent's management did know about it at the relevant time. In any event, there was nothing within it that could be construed as an allegation of racism.

111. Consequently, for these reasons (as more fully set out in the findings of fact above), we conclude that the writing of this email was not a protected act.

3.2 Did the respondent believe that the claimant had done or might do a protected act, in that he might make an allegation of racial discrimination?

112. Only Darren Lauritzen had sight of the email of 5/4/2019. There is nothing within the context of writing the email or within the email itself that suggests the claimant had made an allegation or might make an allegation of race discrimination. Nor is there anything in Mr Lauritzen's actions that could be construed as a belief of such an allegation or potential allegation.

113. Consequently for these reasons (as more fully set out in the findings of fact above), we conclude that the respondent did not believe the claimant had done or might do a protected act.

3.3 Did the respondent do the following things:

3.3.1 The claimant was not afforded redundancy when put at risk. Specifically, between August and October 2020, Ashley Gough and/or Mr Lauritzen ignored the claimant/refused to respond with an outcome replying to/or agreeing to his repeated requests for redundancy, and a redundancy payment.

114. It is correct that the claimant was not afforded redundancy when put at risk.

115. The claimant was not ignored. Both Mr Lauritzen and Mr Gough expected the claimant's trade union representative, Mr Egan, to keep him informed of the collective consultation outcomes and the ringfencing of the Senior Asset Officers' roles. That was Mr Eagan's function. It was not for management to do this.

116. With respect to the claimant's request for information about his redundancy package on 1/9/2020, which he chased up thereafter, Mr Gough replied on 16/9/2020, just over 2 weeks' later and after being on leave. This was a reasonable timeframe for a enquiry of that nature and was the same date he responded to all requests for redundancy pay illustrations. The claimant was treated no differently to others.

117. There was no reason for Mr Gough to think the claimant's request was so urgent that it warranted a response ahead of others. In any event, the urgency only arose out of the fact the claimant had a new job to go to and wanted to secure a redundancy payment before he left. He had not been open or straight with the respondent as to the reasons for requesting a reply so quickly, and had not told anyone in management about his new job.

3.3.2 On 12 October 2020 Ashley Gough informed the claimant he would not receive a redundancy payment;

118. That is correct.

3.3.3 When the Claimant's employment terminated on 16 October 2020 he was not paid a redundancy payment.

119. That is correct.

3.4 By doing so, did it subject the claimant to detriment?

120. No. The claimant was not subjected to a detriment. He was not entitled to a redundancy payment. He had not been made redundant.

121. The proposed restructuring, which was the subject of collective consultation during the summer of 2020, never proceeded to a conclusion. Nobody at the respondent company was made redundant at that stage

and nobody at the respondent company received a redundancy payment. The claimant was treated no differently to others. There is no good reason as to why he might have an expectation of receiving a redundancy payment.

3.5 If so, had the claimant proven facts from which the tribunal could conclude that it was because the claimant did a protected act or because the respondent believed the claimant had done, or might do, a protected act?

122. Given our conclusions above, this is not applicable.

3.6 If so, has the respondent shown that there was no contravention of section 27?

123. Given our conclusions above, this is not applicable.

Section 13 Direct Discrimination claims (section 4 of the list of issues)

4.2 Do the following amount to less favourable treatment because of the Claimant's race pursuant to section 13 of the EqA, when compared to another (real or hypothetical) whose circumstances are not materially different to his own:

4.2.1 That the claimant was denied training opportunities (the Chartered Construction Manager course about which he emailed on 23 August 2017).

124. This allegation is significantly out of time. It is not linked to any other acts to allow us to treat it as conduct extending over a period or a continuous state of affairs. The claimant accepted at the hearing that he had made no case for us to consider our discretion to extend time on the basis it was just and equitable to do so. Consequently, time is not extended, and we have no jurisdiction to hear this complaint.

125. In any event, there is no evidence that this was racial discrimination. The claimant did not complain of discrimination at the time. The one comparator he put forward, who had a course funded, was in materially different circumstances, and therefore, not on the same footing.

126. Consequently, regardless of the time limitation issue, there are no facts from which an inference of racial discrimination could be drawn. This allegation is unfounded.

4.2.2 The claimant was denied opportunities for advancement and promotion – the claimant suggests he should have been supported to become a regional manager in September 2020.

127. The claimant never made it known to management that he was seeking promotion and in any event, in September 2020, there was no vacancy for a regional manager.

128. He suggests that Karen Pearce and Anne Sutton were promoted over him. They were not. The claimant was not treated any less favourably than they were.

129. Consequently, there are no facts from which an inference of racial discrimination could be drawn. This allegation is unfounded.

4.2.3 The Claimant was not afforded redundancy when put at risk. Specifically, between August and October 2020, Ashley Gough and/or Mr Lauritzen ignored the Claimant/ refused to respond with an outcome replying to/or agreeing to his repeated requests for redundancy, and a redundancy payment.

130. We refer to our above conclusions relating to victimization allegation 3.3.1 and 3.4 and adopt the same reasoning.

131. Nobody from the respondent company was made redundant at that time. The claimant's comparator, Stephen Elliot, was in a materially different situation in that he was not employed by the respondent and had gone through individual consultation with his own employer, The Riverside Group.

132. The claimant's requests for redundancy and a redundancy payment were not ignored and he received an illustration at the same time as others who had asked for it.

133. For these reasons, there are no facts from which an inference of racial discrimination could be drawn. This allegation is unfounded.

4.2.4 On 12 October 2020 Ashley Gough informed the Claimant he would not receive a redundancy payment.

134. We refer to our above conclusions relating to victimization allegation 3.3.2 and 3.4 and adopt the same reasoning. We repeat our conclusions under allegation 4.2.3 with respect to the claimant's comparator, Stephen Elliot, who was in a materially different situation.

135. Consequently, we find there are no facts from which an inference of racial discrimination could be drawn. This allegation is unfounded.

4.2.5 When the Claimant's employment terminated on 16 October 2020 he was not paid a redundancy payment.

136. We refer to our above conclusions relating to victimization allegation 3.3.3 and 3.4 and adopt the same reasoning. We repeat our conclusions under allegation 4.2.3 with respect to the claimant's comparator, Stephen Elliot, who was in a materially different situation.

137. Consequently, we find there are no facts from which an inference of racial discrimination could be drawn. This allegation is unfounded.

Constructive dismissal claims (section 5 of the list of issues)

5.1 Objectively assessed, has the Respondent breached the implied term of trust and confidence in acting in a manner either calculated, or likely to destroy or seriously to undermine mutual trust and confidence?

5.2 Do the following amount to breaches of the implied term of trust and confidence?

5.2.1 That the Claimant was denied training opportunities (the Chartered Construction Manager course about which he emailed on 23 August 2017).

138. There is no evidence that the training policy had been breached and, in any event, it is unlikely it was a term of the contract.

139. We refer to our above conclusions relating to direct discrimination allegation 4.2.1. The amount of money the claimant asked for was above policy and there is no evidence that he offered to pay the balance. He did not apply again and did not appeal. There is no evidence of any complaint being made about it. We find there was no breach.

140. In any event, this matter occurred in 2017, some considerable time in the past. There is no causal connection between his resignation and not getting training in 2017. Given the long passage of time, if there was any breach, the claimant affirmed it.

5.2.2 The Claimant was denied opportunities for advancement and promotion – the Claimant suggests he should have been supported to become a regional manager in September 2020.

141. We refer to our conclusions above relating to direct discrimination allegation 4.2.2. There is no record of the claimant suggesting he should be promoted and no details of any roles available. The claimant has been vague in his allegation and not provided specific detail. The claimant has given no evidence of complaining about missing out on promotion opportunities, or any lack of support to progress to a higher position.

142. Consequently, we find there was no breach of contract.

5.2.3 The Claimant was not afforded redundancy when put at risk. Specifically, between August and October 2020, Ashley Gough and/or Mr Lauritzen ignored the Claimant/ refused to respond with an outcome replying to/or agreeing to his repeated requests for redundancy, and a redundancy payment.

143. We refer to our above conclusions regarding direct discrimination allegation 4.2.3. Eventually, the claimant accepted that he was not entitled to a redundancy payment but relied on legitimate expectations. However, nobody was given a redundancy payment at that stage. The letter of 17/8/20 was not interpreted by any other employee as an indication that a redundancy payment was to be made and it cannot objectively be read that way. It was simply indicating that employees were

at risk. Any expectation the claimant had of receiving a redundancy payment at that stage was misplaced.

144. Therefore, there was no breach of contract.

5.3 Did this entitle the Claimant to regard his contract as rescinded and resign?

145. No. The respondent did not breach the employment contract. These allegations do not satisfy the last straw test. Neither singularly nor cumulatively do they amount to a breach of trust and confidence.

Overall Conclusion

146. The claimant's complaints of victimisation, direct racial discrimination and constructive dismissal are not well founded and are dismissed.

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Employment Judge Liz Ord
Date 4 July 2023

JUDGMENT SENT TO THE PARTIES ON
6 July 2023

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions
Judgements and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.