



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss M Patel

v

Thames Water Utilities Ltd

Heard at: Reading Employment Tribunal (by CVP)
On: 22-26 May 2023

Before: Employment Judge Forde
Members: Mrs D Ballard
Mr D Bean

Representation

For the Claimant: Mrs Patel-Vithalani
For the Respondent: Miss Tharoo, Counsel

RESERVED JUDGMENT

1. The claimant's claims of direct race discrimination, direct sex discrimination and constructive dismissal do not succeed and are dismissed.

REASONS

The Hearing

2. The hearing was a remote video hearing.

The Claims

3. The claimant presented two claims to the tribunal against the respondent. The the first claim she complained of having suffered two forms of discrimination, namely on the basis of her sex and race. Her claim form presented on 24 September 2021 under case number 3320761/2021.
4. The claimant resigned from her employment, the last day of her employment being 31 January 2021. She then made a second claim, under case number 3305102/2022, of constructive unfair dismissal basing her claim on two bases' namely that she had been subjected to discriminatory

conduct and/or the respondent had engaged in conduct towards her which when considered in totality amounted to a breach of the implied duty of mutual trust and confidence.

5. Following a preliminary hearing before EJ Hyams on 11 August 2022 a number of issues were discussed including the claims that the claimant pursued and the issues to be determined by the tribunal at the full merits hearing. Following that hearing it was clear that the claimant was pursuing two claims of direct discrimination within the meaning of section 13 of the equality act 2010 ("EQA 2010") because of sex and/or race. The second claim is as I have said above, a claim of constructive unfair dismissal in which the claimant alleges that there has been a breach of the implied duty of mutual trust and confidence.
6. It appeared to EJ Hyams at the time of the preliminary hearing that the claimant had not provided sufficient clarity around the substance of her claims. It was ordered that the claimant be permitted to set out her claims in her witness statement which was ordered to be provided in advance of the respondent's witness statements so that the respondent could understand the claims it had to meet. EJ Hyams explained the applicable law to the parties and explained to the claimant that in order to succeed in her claim of direct discrimination she would have to put before the tribunal evidence which, if accepted, would enable the tribunal to find that there are facts which it could, in the absence of an explanation from the respondent, draw the inference that the conduct which the claimant claims was discriminatory was indeed direct discrimination within the meaning of section 13 of the EQA 2010. If there are no such facts found by the tribunal then the claim of direct discrimination will be likely to fail.
7. It was explained to the claimant the nature of the evidence that she would have to put into her witness statement indicated that the respondent acted in a discriminatory manner towards her. Further, it was made clear to the claimant the evidential issues that would have to be covered in her witness statement. Specifically, it was explained to the claimant that she would have to explain in her statement why she says that the respondent's conduct towards her was less favourable treatment because of her sex or race.
8. The case management order following the preliminary hearing made clear that the tribunal discussed with the parties the importance of a named comparator and within that the importance of the named comparator's circumstances not being materially difference from those of the claimant. Following this, the claimant was advised by EJ Hyams to state in her witness statement

“the persons with whose treatment by Mr Brittain (her line manager but one), she compares with Mr Brittain's treatment of her that she claims was discriminatory, (2) the reason why says that those person's circumstances were not materially different from her's so far is relevant, and (3) in what way she claims that Mr Brittain's conduct of those other persons was more favourable than his conduct towards her. In addition, the claimant was told that she would have to state in terms in relation to each of the areas

identified as being the issue to be determined in the case, the way in which she was treated less favourably than a man or woman or a person of a different ethnicity would have been treated”.

Liability Issues

9. The liability issues for the determination of the tribunal were as follows:

Discrimination

10. Was the claimant treated to any extent less favourably because of her race and/or sex by Mr Brittain in regard to (1) the allocation of work, (2) her pay, (3) the times when she was given permission to take holiday, (4) the allocation of time and/or money for studying for a professional examination, (5) promotion?
11. In answering that question, the following questions will arise:
12. Has the claimant satisfied the tribunal that there are facts from which the tribunal could, in the absence of an explanation from the respondent, decide that Mr Brittain’s conduct was to any extent less favourable treatment of the claimant because of her sex and/or race?
13. If so, has the respondent satisfied the tribunal on the balance of probabilities that sex and/or race was not a significant factor i.e., more than trivial, cause of the manner in which the claimant was treated by Mr Brittain?
14. Alternatively, applying the decision of the house of lords in Shamoon v Chief Constable of Royal Ulster Constabulary [2003] ICR 337, what was the reason for that treatment?

Unfair/Discriminatory Dismissal

15. Did the respondent breach of the implied terms of trust and confidence by its act or omissions towards the claimant?
16. If so, applying Wright v North Ayrshire Council [2014] ICR 77, did the conduct which constituted that breach play a part in the claimant’s resignation?
17. If so, did the conduct which constituted that breach of the implied terms of trust and confidence include conduct which was less favourable treatment of the claimant because of her sex and/or race i.e., direct discrimination because of sex and/or race?
18. If so, did that discriminatory conduct materially influence the conduct that amounted to that breach of the implied duty of trust and confidence?

Procedure

19. Prior to the hearing there had been some correspondence between the parties and the tribunal in relation to a number of matters concerning the directions. In short, the claimant's representative, Mrs Patel-Vithalani, raised her concern that the respondent had delayed in providing its witness statements meaning that it had failed to comply with the tribunal's order as regards the provision of its witness statements. This delay and non-compliance resulted in an application for strike out which was listed to take place at the start of the hearing.
20. In her submissions on the application to strike out, Mrs Patel-Vithalani explained that there had been multiple failures by the respondent to submit documentation on time and that its witness statements had been submitted 10 working days before the hearing. Further, there had been 7 pages of additional documentation to consider which had been submitted late. All of this, she said, placed an unfair burden on her as a non-professional representative to prepare the claimant's case for the full merits hearing. However, she explained that the claimant was ready to present her case and had considered the material. Notwithstanding, she pursued an application on behalf of the claimant under rules 37(1)(b) and (c) of the 2013 rules, namely that the respondent's conduct had been unreasonable and/or non-compliant with tribunal orders. The respondent through Miss Tharoo explained that witness statements had been provided on 3 May 2023, in advance of the hearing, but acknowledged that the orders had not been complied with. Notwithstanding, Miss Tharoo suggested it would be inappropriate and disproportionate to strike out the respondent's case on the basis of the non-compliance.
21. The tribunal's decision in respect of the application to strike out was that the application was dismissed on the basis that it would be a disproportionate step to strike out the respondent's claim on the basis of non-compliance, particularly in the circumstances where the claimant had not suffered any prejudice as a direct consequence of the respondent's non-compliance. Strike out was considered to be a disproportionately harsh sanction and particularly so where the claimant was ready to proceed. Accordingly, it was found that the threshold for strike out was not met.
22. Mrs Patel-Vithalani made mention of another issue which she had raised in correspondence with the tribunal, namely that EJ Hyams had ordered that the exchange of witness statements should be sequential. She explained that she had taken legal advice on this order and as a result of that advice she had determined that the direction in respect of the exchange of witness statements amounted to an error or unfairness. I explained to Mrs Patel-Vithalani that the purpose behind this direction was so as to enable the claimant to clearly set out the claims that she was making which had been difficult to determine from her very lengthy claim form and had been made no less clearer following a response provided to a tribunal order that she provide further and better particulars of her claim. It was clear from the order of EJ Hyams in respect of witness statements that the claimant's witness statement would stand as her evidence and of all of the factual issues that had to be determined in the case.

23. The hearing had been listed for 5 days to hear the claim. It was anticipated that the first day would be a reading-in day. Following that the second day would be for the claimant's evidence to be heard and the following day was for the respondent's evidence to be heard followed by submissions.
24. The claimant, who had provided a witness statement together with ones for Mr Jennings-D'costa and Mr Ribahuddin Ahmad. The respondent called 4 witnesses, namely Mr Simon Brittain, Miss Shilpa Puri, Mr Martin Padley and Mr Tim Horton. It was clear from the witness statements that Mr Horton, against whom the majority of the claimant's allegations of discriminatory conduct were directed and the claimant would have to give evidence for the longest periods. As it turned out, the claimant's witnesses (including the claimant) gave evidence for 6 ½ hours. Mr Brittain gave evidence for over 7 ½ hours, Mr Padley gave evidence for 3 hours, Miss Puri gave evidence for 3 ½ hours and Mr Horton gave evidence for 1 ¼ hours. This means that in total, the claimant was afforded nearly 15 hours to explore the evidence with her witnesses.
25. I make this observation here because the claimant's representative has in submissions and during the course of the hearing observed that the claimant was not assisted by the tribunal insofar as the time allowance granted to her to cross examine the respondent's witnesses. A further observation or criticism made by Mrs Patel-Vithalani was that she was not allowed to assist the claimant in terms of navigating the bundle during the course of her cross examination by Miss Tharoo. Specifically, Mrs Patel-Vithalani was prevented from locating pages from within the bundle when the claimant was unable to think of a particular document which might assist her answer. A contrast was drawn between that approach and what was permissible which was guidance provided by Miss Tharoo to both the claimant and other witnesses at the request of the tribunal to locate documents which were identified by various witnesses (including the claimant) during the course of their evidence but which the exact location within the bundle which ran to 727 pages.

The Facts

26. The claimant gave evidence first. The claimant was employed by the respondent since 2011 in a number of different roles. At the times material to the claimant's claims, she was employed within the respondent's Direct Managed Capital programme (referred to in this judgment as "DMC") which involved her looking after the capital expenditure for all of the respondent's waste treatment sites. She had been employed within the DMC team since September 2018. Because of the nature of the allegations and the way in which the evidence failed to be evaluated by the tribunal, the tribunal had to form a view as to the quality of evidence heard from the live witnesses who appeared before it.
27. Insofar as the claimant was concerned, the tribunal found her evidence at times to be evasive, difficult to follow and difficult to believe at times. When asked a number of questions by Miss Tharoo which resulted in answers which did not align with the way in which she intended the claim to be

projected, the claimant became in the tribunal's view unreasonable insofar that she was unwilling to accept a situation of obvious conflict within her evidence. Further, at times, the claimant appeared to believe that she had an entitlement to a number of the rights that she appeared to be asserting as amounting to discriminatory conduct particularly in respect of Mr Brittain towards her. For reasons that set out in this judgement, the tribunal has at critical points found Mr Brittain's evidence to be preferred to that of the claimant.

28. Returning to the background, and whilst working in the DMC team, she initially reported to Mr Rashid Hussain who was a level 6 manager. The claimant was a level 7 analyst within the DMC team. There was another level 7 analyst within the team, Miss Deepjal Malla, although she left the team in July 2020. Mr Simon Brittain was Mr Hussain's line manager. Mr Hussain moved to a different role within the respondent in November 2019. It was Mr Brittain's evidence that Mr Hussain continued to provide some support to the level of around 1 ½ days support to the DMC team following his redeployment.
29. On 1 September 2020 Miss Puri was appointed to the level 6 role within the DMC team. It was at this point she became the claimant's line manager. However, in the period between Mr Hussain leaving this team and Miss Puri's appointment, Mr Brittain was the claimant's line manager. In fact, for a large period, Mr Brittain and the claimant were the only people working within the DMC team.
30. On 12 April 2021 the claimant submitted a grievance which was considered by Mr Padley, who in due course prepared a detailed investigation report and outcome letter dated 16 July 2021. At that time, Mr Padley had investigated as key issues what the claimant alleged to have been bullying by Mr Brittain, discrimination by Mr Brittain and discrimination by Miss Puri. The claimant linked these allegations to matters concerning her pay, her training, her application for a new role, her leave requests, rumour being spread about her and an amalgam of miscellaneous matters. Mr Padley did not uphold the claimant's grievance which she subsequently appealed and the appeal was conducted by Mr Horton. Mr Horton's outcome, dated 8 October 2021, did not uphold the claimant's appeal which was pursued upon almost identical grounds to that of her grievance.
31. The claimant resigned on 30 December 2021 and her last date of employment was 30 January 2022.
32. It was the claimant's case that she had been informed during her interview for the role that she had within the DMC team, that there would be a total of 3 full-time employees, including herself, at level 7. However, after joining the team of 3 September 2018, there were 2 level 7 employees namely herself and Miss Mahler with 2 level 5 managers namely Mr Brittain and Mr Hussain. Consequently, this amounted to a shortage of staff which would be exacerbated once Miss Mahler went on maternity leave. The claimant asserted that Mr Hussain informed her that the claimant would have to take

responsibility for both level 7 and level 6 tasks, while the team was short of staff. Thereafter, due to what the claimant described as financial constraints, the respondent was unable to recruit level 7 cover, which in turn meant that the claimant was undertaking work for which she believed lay above her grade and in respect of which she was not being properly remunerated. The claimant's evidence supports the allegation she makes here by making criticism about the conduct of Mr Brittain and specifically in relation to what is asserted to have been his disregard for the work that she was undertaking.

33. Mr Brittain's evidence was opposed to that of the claimant. In fact, his evidence on this issue was consistent with that of his witness statement. In short, while he accepted that there were staff shortages, his evidence was that the respondent was in a period within its investment cycle which meant that certain new tasks would come up from time to time which would be allocated to members of staff who could undertake the work and this would have included the claimant. However, the tribunal was unable to detect any evidence that the claimant was given any work at a level above that of a level 7. The tribunal accepts Mr Brittain's evidence that in an ideal world there would have been 2 level 7s throughout the period. The tribunal finds that this indicates that there would have been an abundance of level 7 work for the claimant to have done without being asked to undertake level 6 work. There is no evidence to support the claimant's assertion that she was routinely performing work at a level 6 grade. In October 2019, the claimant wrote a business justification document as part of a request to pay placed before Mr Brittain. It is clear from Mr Brittain's response to Mr Hussain, who received the claimant's request, that the task that she had identified as forming part of her justification was tasks integral to her level 7 job. There is no indication either from Mr Brittain or Mr Hussain, who did not give evidence before the tribunal nor provided a witness statement, that the claimant was undertaking work at a higher grade.
34. The tribunal accepts the claimant may have had at times a high workload and, at times periods of workload pressure and that she undertook elements of tasks which may have been assigned to a level 6 manager, such as the preparation of budgets. But we do not find that these factors indicate that she was working routinely or consistently at a level 6. Further, we accept Mr Brittain's evidence that at no point was Miss Patel asked by him to share level 6 or level 7 duties with Mr Hussain. We find that Mr Hussain was responsible for the level 6 tasks and Miss Patel was responsible for the level 7 tasks. When Mr Hussain left the team, Mr Brittain took over as Miss Patel's line manager. During this time, we accept and find that Mr Brittain did not allocate the claimant any work beyond her expected level and that she was not asked to undertake any managerial tasks.
35. During the period where it was just Mr Brittain and the claimant in the DMC team, we accept what Mr Brittain says, namely;

“11. There were therefore periods where it was just myself and Miss Patel in the team. During these periods, I called on other analysts in other teams for additional support as required. I absorbed roughly 95% of the level 6 tasks and the rest of the

level 6 tasks simply did not get done during the short period where is was just myself and Miss Patel in the team as I prioritised the business critical tasks and the tasks that were less business critical fell into a backlog which was picked up by Miss Puri when she joined the team”.

36. Additionally, we find that when Miss Puri was recruited into the team as level 6 line manager to the claimant, Miss Patel was not responsible for the training of either Miss Puri or Mr Ahmad who worked at level 7 together with the claimant.

Pay-rise Request

37. The claimant’s evidence that she made a verbal request for a pay-rise in May 2019, in the period from August to October 2019 to Mr Hussain, she submitted a business justification in respect of her pay-rise request in October 2019, and made further requests for a pay-rise in March-April 2020. All of her requests for a pay-rise were rejected. In short, it is the claimant’s assertion that the rejection of her requests for a pay-rise was in the face of evidence that she had been performing either above specification for her level or undertaking work above her level did, in her view, amount to discrimination on the base of either race or sex. Reported at this allegation, the claimant observes that the feed-back that Mr Brittain had obtained from other managers familiar with the claimant’s work, as well as his own assessment, amounted to a level described as “DE” or “Delivers as Expected”. It is the claimant’s assertion that in order for her to have achieved the pay-rise in line with her request, she would have had to have achieved an assessment of her work as being at “AE” or “Above Expectations”. All of this led the claimant to form the view that she was unreasonably refused a pay-rise on numerous occasions by Mr Brittain and that Mr Brittain had deliberately downgraded his assessment of her work so as to enable him to avoid providing her with the rise that she felt that she deserved.
38. The respondent’s case in this regard differs to the claimant’s evidence and in particular in relation to timeline suggested by the claimant. In an email from Mr Hussain to Mr Brittain on 9 October 2019, Mr Hussain wrote to Mr Brittain in the following terms:

“Simon,
In May 2019 Mohini [the claimant] raised that she would like her salary reviewed, and at that time I didn’t feel there was sufficient justification to do so and the timing wasn’t great, this continued to be the case with the pay freeze, however, in her last one to one Mohini raised it again, and I said I would support her in seeking a pay-rise. She has now wrote a business justification case and is requesting for her salary to be reviewed.
For what its worth I do support the business case and think her salary should be reviewed, however I haven’t said this to her as I still wasn’t sure what the current climate is like for pay increases, but at the very least I did want to make sure I did support her in submitting her request for a pay review.”

39. In response, Mr Brittain emailed Mr Hussain on 10 October 2019 with the following:

“Rashid,
When I read the justification my first thought was that isn't this just Mohini's job?
The timings still not great and if you recall we did offer Mohini a bit more redacted
so I would expect a better output.
Regards Simon”.

40. It was the respondent's case primarily through Mr Brittain's evidence that he was unaware of any pay requests made to Mr Hussain by the claimant until the 9 October 2019 email from Mr Hussain (see above). Further, from the above exchange, it can be seen that the claimant was required to submit a business justification document which she did. The claimant alleges as part of her allegations of discrimination that Mr Brittain did not consider the document although it can be seen from the above passage that he appears to have done so. Certainly, it was Mr Brittain's evidence before the tribunal that he did consider the document but reached the view that the claimant had not done enough to justify an “out of cycle pay increase” i.e., a pay increase that was not linked to the formal performance review process that the respondent undertook annually. Mr Brittain made clear that he did not consider that the matter set out in the document prepared by the claimant suggested that she was doing anything more than she was required to in her role. Given that an out of cycle pay increase could only be justified in exceptional circumstances and that the circumstances presented to him by the claimant's output did not amount, in his view, to exceptional circumstances, there is no justification for the claimant's request for a pay increase. This it is said amounts to a clear, non-discriminatory reason for Mr Brittain's decision with regards to the claimant's pay request.
41. It is accepted that Mr Brittain and the claimant spoke to each other in around November 2019 and during the course of that conversation the claimant expressed her unhappiness at not being awarded the pay rise. However, the parties differ as to the consequence of that conversation. As explained earlier, in this judgement, where a conflict of evidence arises between Mr Brittain and the claimant, the tribunal, for the reasons expressed, prefer the evidence of Mr Brittain and this applies in this instance. In particular, the tribunal note and accept what Mr Brittain says in his statement at paragraph 24;
- “Miss Patel made further pay-rise increase requests in 2020/2021. I rejected these requests for a pay-rise as Miss Patel's salary was reflective of her performance which was rated as “Delivering Expectations”. Miss Patel's salary was actually £1,000 above the mid-point for her grade and I was comfortable that Miss Patel was being remunerated fairly on the level of work she was doing”.
42. Furthermore, the claimant alleges that during a feedback session Mr Brittain responded to one of the claimant's complaints that she should avoid histrionics and was told “don't be such a drama queen”. The claimant is criticised for not having raised this allegation as part of her grievance, however, this specific allegation was not put to Mr Brittain in cross examination by Mrs Patel-Vithalani and accordingly, no finding is made as regards to whether or not Mr Brittain did or did not make this comment.

43. Having weighed up the evidence heard and presented in written form, the tribunal formed the view that the claimant had not been able to evidence any discriminatory conduct arising from the pay negotiations that she says occurred.

Expenses

44. At paragraph 5 of her witness statement, the claimant raises a further complaint of discrimination against Mr Brittain for his failure to allow some expenses claims that she raised in respect of travel to meetings at other sites operated by the respondent. In respect of the one item of expense which the claimant produced at the tribunal, it could be seen that Mr Brittain had rejected what was later found to be a legitimate claim and had done so on the basis that he did not consider the expense claim to be a permitted expense within the respondent's relevant expense policy. The respondent's case here is that Mr Brittain, having been advised of the correct position under the expense policy, subsequently approved the expense and did so within a very short period of time. Mr Brittain accepted that this was a mistake on his behalf and insisted that the refusal was not based for reasons of discrimination as alleged by the claimant, but due to his lack of familiarity with the relevant policy.
45. We find that the claimant's explanation falls substantially short of an allegation which of itself could amount to a finding of discrimination on either sex or race. In fact, it was notable that the claimant was unable to identify how this allegation amounted to discriminatory conduct or indeed the detrimental treatment she suffered as a consequence of the approval being provided to her albeit delayed.

Promotion

46. Here the claimant alleges that she had been unfairly treated by Mr Brittain, by him interviewing her for the level 6 position within the DMC team, in July 2020. In short, it was the claimant's case that it was the respondent's broader policy to conduct interviews for internal positions by way of a panel rather than an individual manager undertaking the task. In cross examination, Mr Brittain accepted that he had interviewed not only the claimant but also Miss Puri who was the successful candidate. It is worthwhile noting that Miss Puri shares the same characteristics as the claimant in that she identifies as being female and Asian.
47. In cross examination, the claimant was asked how the treatment she received differs to that Miss Puri received and how that amounted to discrimination on the basis of race and sex. The claimant's answer to this question was that there should have been a second person in the interview. When it was pointed out that this did not answer the question and that the claimant had complained about the interview process, which applied equally to Miss Puri who shared her characteristics, the claimant repeated she had suffered discrimination because there was one person in the interview i.e., Mr Brittain. Thereafter, the claimant agreed that she had been interviewed

in the same way as Miss Puri but stated that she had not been interviewed in the same way as Miss Puri asserting “not in terms of race and sex”.

48. When asked by the judge how the lack of a second interviewer could be linked to an act of discrimination linked to her sex or race, the claimant was unable to explain her claim. In any event, the claimant was unable to identify a basis for less favourable treatment when all of the candidates that Mr Brittain interviewed for the level 6 position, including the successful candidate, were interviewed by him on his own. Accordingly, the tribunal was unable to find that this allegation amounted to discrimination of any kind or as alleged by the claimant.

Rumours

49. The claimant alleged that Mr Brittain had communicated to others within the DMC team that the claimant was “sour” at having not been promoted following her unsuccessful application to attain the level 6 position within the team. As a consequence, the claimant alleges that this led to rumours spreading within the team and when she was alerted to the rumours, she was informed by her co-workers that Mr Brittain had been the source of the rumours. Mr Brittain denied being the source of rumours and indeed denied being aware that any rumours of this nature had been discussed within the DMC team. In her evidence, which is consistent with the responses provided during the course of the grievance process, the claimant was not prepared to provide details of from whom she had heard the rumours, specifically who attributed the rumours to Mr Brittain. Unsurprisingly, it was submitted by Miss Tharoo on behalf of the respondent that there is no evidence which links alleged rumours to the claimant. In fact it is the respondent’s case that Mr Brittain was not party to the spreading of rumours, evidence in support of this is provided from the note of Mr Horton’s meeting with Mr Hussain, in which he described Mr Brittain as not being party to gossip and “never talked about anything”.
50. The tribunal find this allegation unproved.

Annual Leave

51. In terms of requests for annual leave, the tribunal was able to review the respondent’s policy which the claimant accepted was the relevant policy insofar as requesting leave was concerned. The process for taking annual leave requires employees like the claimant to obtain the approval of their line manager before taking annual leave.
52. There is a dispute between the parties as to whether or not the claimant raised issues relating to all of the leave requests which failed to be considered by the tribunal as forming part of her claim in her grievance and her grievance appeal. In 2018, the claimant asserts that she requested 4 weeks of annual leave in February 2019 but that this was rejected by Mr Brittain because Miss Mahler was due to be on maternity leave at this time. This would have meant that for a 4-week period there would be no level 7

members of the team available. It is the claimant's case the following discussions with Mr Brittain, she was permitted to take 3 weeks of annual leave.

53. In 2019, there were further discussion with regards to the claimant's request to take an extended period of leave. Prior to obtaining permission to take leave, the claimant booked flights to India. The claimant's case is that she was prevented from taking leave by Mr Brittain.
54. In 2020, the claimant says that she was asked to take her leave in February but was instructed by Mr Brittain to change her leave to March 2020. The claimant says that Mr Brittain's refusal to provide approval upon her request was itself unreasonable and amounts to discrimination. As matters turned out, the claimant was not able to travel to India to visit her parents in March 2020 due to the covid-19 pandemic. Subsequently, she received an alert from the travel agency who arranged her flights, that she could travel at the beginning of 2020. As stated above, she booked her flights and then requested leave. This leave request was not approved initially but it was subsequently. The claimant alleges that the failure to provide approval at the time of her initial request amounts to discrimination.
55. As before, the issues arising from the leave requests were a matter of dispute between the parties and it fell to Mr Brittain to respond to the allegation raised by the claimant. In each instance, the tribunal found that Mr Brittain's explanation was one which was more credible, cogent and supported by evidence within the bundle. Furthermore, the claimant accepted in cross examination that Mr Brittain had to consider the timing of leave and the length of leave before approving the leave requests. The tribunal made note of the claimant's evidence when under cross examination here. Miss Tharoo asked the claimant why she had only mentioned the leave request in 2020 in her grievance (see page 419 of the bundle) and the claimant responded by saying that she had mentioned to Mr Padley during the course of her grievance meeting that her grievance was to cover all of the holiday requests which she had included in her witness statement. As she had done during the course of her cross examination, the claimant asserted that the notes of the grievance meeting were incorrect but also accepted that she had not raised a concern or correction in relation to the contents of the grievance notes. The tribunal finds that explanation to be incredible. It is inconceivable that Mr Padley whose evidence the tribunal accepted in full, would have missed the claimant's grievances raised in respect of the periods of leave that were contained within her witness statement but not in her grievance. When it was put to her that nowhere was it said that Mr Brittain had not considered her grievance request in 2018/2019, the claimant replied "I did" and further went on to say "he must have missed it".
56. Secondly, in relation to the leave request for April 2019, Miss Tharoo asked the claimant whether it was reasonable for Mr Brittain to reject the request on the basis of Miss Mahler's maternity leave, on the basis that it was a request for 4-weeks continuous leave and there was no other level 7 employee within the department. The claimant responded "I do". Miss

Tharoo then asked why the claimant considered it discriminatory if she agreed that it was appropriate for her leave request to have been rejected. The claimant's response was "I didn't understand the question. No I don't". The following passage of cross examination continued from this point.

"Miss Tharoo: no one else took 4-weeks leave in one go.

Claimant: no but I have been left alone in the office.

Miss Tharoo: but for what length of time.

Claimant: a few days to a week.

Claimant: no. Due to my leaves, I was only doing L7 tasks. Different if I'm only doing L6 tasks.

Miss Tharoo: are you really saying that the initial reaction for 4-weeks when there was no other level 7 in post?

Claimant: yes, there was L7 who could.

Miss Tharoo: you were offered 3 weeks not 4 weeks by Mr Brittain. This is an example of him being flexible.

Claimant: no, it is Mr Hussain who approved it".

57. At this point Miss Tharoo took the tribunal to page 615 of the bundle which is part of the transcript of a conversation between Mr Padley and Mr Hussain. In it, Mr Hussain can be seen to say "she is talking shit on this". By the "this" Mr Hussain is referring to the issue of holiday requests and makes clear that it was his view that the leave case should be rejected at that time and in fact it was Mr Brittain who approved the leave. In response to this being put to the claimant, the claimant's response was "that's not what Mr Hussain told me".
58. In respect of each leave request, the tribunal finds Mr Brittain's explanations to be reasonable, namely that it was important for him to consider the extent of cover within the team given the length of leave the claimant was requesting. Furthermore, in relation to the leave request for September 2020, the tribunal finds that the claimant was in breach of the respondent's policy with regards to the request for leave and that further, Mr Brittain went above and beyond what was necessary to ensure that cover was in place so that the claimant could take the leave that she had requested. By contrast the tribunal finds that the claimant's evidence was inconsistent and at times incoherent.
59. It is also noted by the tribunal that during the course of her cross examination by Miss Tharoo and as identified above, one of the claimant's justifications for her leave request was that a level 6 could cover her work as a level 7 because she was undertaking level 7 tasks only. The tribunal finds that this is another example of the claimant providing evidence which runs counter to another aspect of her claim namely that she was undertaking work at level 6 when in fact the evidence that the tribunal heard from the claimant's own mouth was that she was undertaking work at level 7.
60. There was a further allegation where the claimant states that she wanted to take time off at short notice but was refused by Mr Brittain. It is within this allegation that the claimant asserts that Mr Brittain said the words "come on, you Asian girls are hardworking". Again, this was an allegation not raised in

the claimant's grievance of appeal but which the claimant asserts she had made mention of to Mr Padley. The tribunal rejects that allegation as the detail of this allegation does not appear in the grievance notes seen by the tribunal and previously approved by the claimant. Therefore, the first allegation that both the comment and the leave rejection had occurred, was when the claimant's witness statement was seen by the respondent. Most pertinently, neither allegation was put to Mr Brittain during the course of his cross examination which extended to some 7 ½ hours. Accordingly, the tribunal rejects the claimant's evidence in this regard and does not find that there is an allegation which could amount to one of discrimination on the bases claimed.

Career Development

61. This aspect of the claimant's claim centred upon her wish to undertake a ACCA course funded by the respondent. It is the claimant's case that this was first raised with the respondent in March 2020 but she was told by Mr Brittain that her request would not be approved because she did not work in the finance directorate of the respondent. What followed was a series of correspondences between primarily Miss Puri and the claimant which resulted in the claimant submitting a business case to support the approval of the course. Aligned to this was input from Miss Puri and about with the tribunal heard from her in respect of the efforts she undertook to ensure that the approval the claimant sought was obtained.
62. It was accepted in evidence by Mr Brittain that he had made an error in that he had assumed that the course would not be available to members of the respondent's staff who did not sit within the respondent's finance directorate. Once disabused of this misconception and following review of the business case, the claimant's request was approved by Mr Brittain on 12 March and the claimant was made aware of this on the same day.
63. It is the claimant's case that Mr Brittain's refusal to approve the course upon her initial request amounted to discrimination. She asserts that Mr Brittain should and probably was aware of the correct policy but was being indifferent or difficult towards her and that his failure to approve the course amounted to discrimination on the bases of sex and race. By the time the claimant had raised her grievance on 11 April 2021, she had the approval to attend the course for just under a month. It is the tribunal's finding that on the basis the approval was granted to the claimant that the claimant's claim in this regard is not made out in terms of her allegations of discrimination are concerned.

Constructive Dismissal

64. The claimant resigned on 30 December 2021 by email (see page 6671) of the bundle. At that time, she gave no reasons for her resignation. She worked her period of notice and her last day of work was 30 January 2022.
65. According to her witness statement, she alleges that her resignation was caused by conduct. Specifically, she states that due to no changes being

made to her pay or career development or promotion, she started to look for jobs within the respondent. In addition, she raised her concerns on being discriminated against by her manager Miss Puri which led to the grievance process. In evidence, the claimant stated that her claim was against Mr Brittain. In summary, she identifies the following issues as amounting to allegations of breach of the implied duty of mutual trust and confidence which in turn precipitated her resignation:

- a) A failure to obtain an alternative internal role within the respondent having received good feedback during interviews from interviewers.
- b) An alleged failure to commit to timelines within the grievance process.
- c) Having to submit more information and answers during the course of the grievance process.
- d) Being asked to work on weekends, during periods of annual leave and on sick days.
- e) If an alleged failure against the respondent to consider or provide an alternative location for her to work at during discussions which occurred while following a period of sick leave.
- f) An alleged failure to find a manager sufficiently independent of Mr Brittain to investigate her grievance.
- g) A failure on the part of the respondent to allow the recording of the grievance discussions which were typed by a transcriber who was present in the meetings.
- h) A failure to provide any career development, training or study courses.
- i) A failure to remove management work from her task list and objectives.
- j) Boycotting her from the team by not copying her into work emails after the conclusion of the grievance.
- k) Changes to the company policies alleged to have been made by the respondent after the commencement of her grievance.
- l) A failure by the respondent to acknowledge or follow up on complaints made to HR.
- m) An allegation that the claimant was forced into raising a grievance when in fact she had not wanted to do so.
- n) A failure to inform the claimant of Mr Brittain's attendances at work conferences following the claimant's grievance.

- o) A failure to be considerate in providing leaves requested during the period of covid-19, substance of which have been addressed above.
66. The evidence on behalf of the respondent to the allegations raised above were provided in the main by Mr Brittain and Miss Puri. All of the allegations the claimant makes in support of her claim of constructive unfair dismissal were not accepted by the respondent.
67. In relation to the allegation that the claimant applied for other jobs within the respondent but did not receive any feedback on unsuccessful applications, it has been pointed out and it is accepted by the tribunal that the claimant only able to exemplify two occasions where she had requested feedback, that those examples occurred in October 2020, which was more than one year before her decision to resign. The respondent submits that this extended period does not demonstrate a breach of the implied duty of mutual trust and confidence.
68. In respect of the grievance, the respondent's evidence is that the person it had first appointed to investigate the grievance was replaced following a complaint raised by the claimant by Mr Padley. In evidence, Mr Padley pointed out that he was new to the organisation and that it was inevitable that all of the managers sitting above Mr Brittain's level would have some familiarity with each other. The tribunal found that the decision to appoint Mr Padley was an appropriate one and not one that could be criticised in the way that the claimant sought to do so on the basis that it was felt that he was insufficiently distanced from Mr Brittain's line manager such that he was tainted by bias in his fact finding and decision making that he was tasked to take on as part of the grievance process.
69. In respect of the recording of grievance meetings, it is the respondent's case that there was someone in each meeting who was taking notes and those notes were subsequently transcribed and sent to the claimant. It is noteworthy that the claimant has not raised an issue with regards to the content of those notes until the hearing of her claim. The tribunal does not accept that the respondent's conduct in refusing the claimant's request was unreasonable. It follows that this was not in breach of the implied term.
70. The claimant alleges that the extent of Mr Padley's investigation limited the number of individuals who were interviewed as part of the process. This is rejected by Mr Padley and consequently by the respondent. The tribunal finds that the extent of Mr Padley's investigation was proportionate and reasonable and consequently, does not find in favour of the claimant in relation to this allegation of a breach of the implied terms.
71. Similarly, in terms of the length of the grievance process the tribunal finds that the time taken to conclude it was unreasonable or unduly long.
72. In relation to the allegation that she had been boycotted by her team, the claimant draws the tribunal's attention to a series of emails which in fact post dated her resignation. The claimant's case is that she should have been included in the emails. In relation to a further email in which the

claimant asserts that she should have been copied into other emails which concerned instructions being sent by Miss Puri or Mr Brittain to other team members and not the claimant. The tribunal accepts and finds that it was clearly reasonable to not copy the claimant into emails that did not concern her.

73. As the tribunal found (see above) that the claimant did not undertake management duties above her grade, the claimant's allegation that there was a failure to remove management work from her is not founded. Additionally, the tribunal finds that the claimant's allegation that the objectives set for her by the respondent were reasonable and appropriate for level 7.
74. In relation to the allegation that the respondent failed to inform her of Mr Brittain's attendance at an off-site meeting on 29 October 2021, Miss Puri explained in evidence that it was clear to all concerned that it was to be a meeting of the DMC team and therefore, Mr Brittain, as manager of the DMC team would be attending that meeting. Again, the tribunal found that this was a reasonable position for the respondent to have taken and it was within the claimant's gift to have requested details of the attendees of the meeting had she been concerned about it. Further, the point made in submissions on behalf of the respondent is that the off-site team meeting took place on 29 October 2021 and that the claimant resigned over 2 months later on 30 December 2021. While it is suggested by the respondent that the reason behind the claimant's request was for her to take up another role that she had found, the tribunal finds that the respondent's failure to inform her of Mr Brittain's attendance at the off-site meeting is not one which could amount to either discriminatory conduct or conduct which could equate to a break of the claimant's employment contract with the respondent.

The Law

75. The claimant pursues 2 claims of direct discrimination namely on the base of her race and sex. She alleges that she has received less favourable treatment because of those 2 protected characteristics. Protection in employment from direct discrimination is provided by way of section 13 (1) of the equality act 2010 (EQA) which provides that
- “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”.
76. In addition, section 14 of (EQA) makes provision for combined (also referred to as “dual”) discrimination, in that complaints can be based on the combined affect of two protected characteristics.
77. In order to succeed in her claim, the claimant has to prove facts from which a tribunal could conclude, in the absence of any other explanation, that the respondent has committed an act of direct discrimination. If those circumstances exist, the tribunal is obliged to uphold the claim unless the employer can show that it did not discriminate.

78. In considering the evidence, the tribunal has been mindful of the extensive and well-known case law when considering the position as to the burden of proof, matters that the tribunal should properly consider, as falling to the respondent to explain. It was correctly submitted by Miss Tharoo that burden of proof does not shift simply on the claimant establishing a difference in status and a difference in treatment. These issues of their own without more, cannot amount to sufficient material from which a tribunal could conclude this had occurred. As per Mummery LJ and Madarassy v Nomura International Plc [2007] ICR 867 paragraph 56 remarked:

The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent “could have” committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

Constructive Dismissal

79. The law with regards to constructive dismissal and how it relates to the claimant’s claim are set out extensively in the case management order that preceded this judgement. What is said in the case management order is not reproduced here and the parties are referred to paragraphs 15 to 25 of that order.
80. In short, the claimant asserted that she had been constructively dismissed within the meaning of section 95 (1) (c) of the employment rights act 1996 and section 97 (7) (b) EQA. Paragraph section 95 (1) (c) of ERA 1996 states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer’s conduct. In order to claim constructive dismissal, the claimant must establish that there was a fundamental breach of contract on the part of the respondent, that the breach caused the claimant to resign, the claimant did not delay too long before resigning thus affirming the contract and losing the right to claim constructive dismissal. Section 39 (7) (b) EQA states “by an act of B’s (including giving notice) in circumstances such that B is in entitled, because of A’s conduct to terminate the employment without notice”.

Analysis and Conclusions

81. In conducting our analysis, the tribunal considered whether the allegations occurred as alleged. Where the tribunal was satisfied in relation to the facts, the tribunal then went on to apply the legal tests for direct discrimination on the basis of race and sex to the facts found. The same applied to the claimant’s claim of constructive unfair dismissal.

82. Based on the tribunal's factual findings, the tribunal is satisfied on the balance of probabilities that the findings of facts above do not discharge the evidential burden in the way required by section 13 of EQA 2010 insofar as the claimant's allegations of race and sex are concerned. In short, where there was a factual dispute between the parties, the tribunal preferred the evidence provided by the respondent's witnesses and in particular Mr Brittain, Miss Puri and Mr Padley over the account provided by the claimant whose allegations were largely unsupported by evidence and whose oral evidence we have already pointed out to have been inconsistent and unreliable.
83. In terms of the claimant's claim of work allocation, Mr Brittain's evidence was that the respondent was at a period in its investment cycle which meant that new tasks would come up which would be allocated to members of the team, some of which were allocated to the claimant. The claimant was unable to provide any evidence that she was working at a higher level apart from a bare assertion. We accept that the claimant had a high workload and may have had, at times, periods of workload pressure and that the claimant undertook elements of tasks which were assigned to L6 or higher such as the preparation of budgets but we do not find that these factors indicate that she was working at an L6 level.
84. We considered what the claimant had to say in relation to her allegations of discrimination in respect of pay and expenses but find that Mr Brittain's explanations in relation to pay was a reasonable one supported by the evidence within the bundle. In addition, the allegation concerning expenses, we accept Mr Brittain's evidence that the error was an inadvertent one and was remedied in any event. Put simply, the tribunal does not find that this allegation is not made out.
85. Similarly, with regards to promotion, the claimant was unable to provide any evidence above that of difference, between her treatment and others, which could justify an allegation of discrimination either on the basis of sex or race. It is noteworthy, that the person who was appointed to the position that she sought namely L6 within the DMC team, was Miss Puri who shares her very same characteristics.
86. Turning to leave, the tribunal does not accept the claimant's evidence insofar as the allegations concerning extended leave and short leave are concerned. Further, insofar as the claimant's allegations concerning the ACCA training is concerned, the tribunal finds that the claimant received approval to attend the course but simply chose not to do so. The tribunal finds that this does not form the basis of an allegation of discrimination such that the burden is discharged within the meaning of section 136 EQA 2010.
87. As set out, the claimant's claim of constructive unfair dismissal based on the factual allegations detailed and considered in paragraphs 64-74 above, are not founded.

88. It therefore follows that for the reasons stated the claimant's claim fails and is dismissed.

Employment Judge Forde

Date: 3 August 2023.....

Sent to the parties on:3 August 2023

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For the Tribunal Office