Case No. 1401678/2022

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs M Butler	AND	(1) Mr M D Lawton
		(2) Mr N R Tozer
		(3) Ms J S Tozer
		(4) Ridgway Property Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 11 to 14 July 2023

EMPLOYMENT JUDGE J Bax
MEMBERS Ms L Fellows
Ms C Lloyd-Jennings

Representation

For the Claimant: Mr M Galinos (Claimant's husband)
For the Respondent: Mr J Anderson (Counsel)

JUDGMENT

The unanimous judgment of the tribunal is that:

1. **The claims of direct race discrimination are dismissed.**
2. **The claims of harassment related to race are dismissed.**
3. **The claims of direct sex discrimination are dismissed.**
4. **The claims of harassment related to sex are dismissed.**

REASONS

1. In this case the Claimant claimed that she had been directly discriminated against or harassed on the grounds of sex and race.

Background and Procedural Matters

2. The Claimant presented her claim on 18 May 2022. She notified ACAS of the disputes against all four Respondents on 9 March 2022 and the certificates were issued on 19 April 2022.

3. At a telephone case management preliminary hearing on 7 March 2023, Employment Judge Livesey discussed the issues and it was agreed that the issues to be determined were the following allegations of direct race discrimination or harassment in the alternative. At the start of the final hearing, and during it, the Claimant confirmed that the allegations below were allegations in relation to the protected characteristic of race only:

    (1) On the 9 February 2022, the First Respondent referred to a landlord in the following terms; "yes, unfortunately she is also South African";
    (2) The First Respondent failed to provide sales statistics as requested by the Claimant; her oral and emailed requests were ignored;
    (3) The First Respondent laughed in the Claimant's face 6 January and 10 February 2022 when she remined him about the need for him to make canvass calls, the need to provide his sales statistic and other parts of his role;
    (4) The Second and Third Respondent failed to take any, or any sufficient, action against the First Respondent when the Claimant complained about the First Respondent's conduct towards her, despite his admission of such;
    (5) The Second Respondent failed to consult with the Claimant over the changed status of the Torquay office and then required the staff to lie about it;
    (6) The Second and Third Respondent failed to provide the Claimant with a job specification until early February 2022;
    (7) The Second and Third Respondent had unreasonable expectations insofar as her role and workload was concerned, in particular, the viewings that she was expected to do in addition to her other tasks;
    (8) The Second and Third Respondents failed to respond and/or act upon the Claimant's assertion that her mental health was being affected by her work and/or the First Respondent's conduct which she brought to their attention on 31 January 2022;
    (9) The Second and Third Respondent made frivolous accusations against the Claimant on 16 February 2022;

4. The Claimant also confirmed at the start of the hearing that she brought an allegation of direct sex discrimination, or harassment in the alternative, namely: The Third Respondent referring to '69' as her favourite sexual position within the Claimant's hearing.

5. The Claimant's dismissal was discussed and she said it was brought about by the frivolous allegations made against her on 16 February 2022, which she says were motivated by her race. The dismissal was consequential on

this allegation. The claim of unfair dismissal, under the Employment Rights Act 1996, had been previously dismissed due to a lack of service.

6. There was also an issue in relation to time limits. It was agreed that any act before 10 December 2021 was potentially out of time.

7. It was also agreed that because the Claimant was seeking an award for personal injury that it would make sense that any remedy was dealt with at a separate hearing, so that appropriate medical evidence could be obtained.

The evidence

8. We heard from the Claimant and from Mr Galinos and Mr Flaherty on her behalf. For the Respondent we heard from Neil Tozer (Managing Director), Jennifer Tozer (Director) and Mr Lawton (Sales Valuer).

9. We were provided with a bundle of 354 pages, any references in square brackets within these reasons are references to pages in the bundle.

10. There was a degree of conflict on the evidence. We did not find this an easy decision to make.

11. The Respondents' witnesses were all cross-examined very forcefully and at times aggressively and in a sustained way. They all maintained their evidence in the face of the cross-examination and remained consistent in their accounts.

12. The Claimant also gave evidence in a measured way. There were some inconsistencies between her pleaded case and witness evidence, which she explained was due to her mental health and things coming back to her. We accepted that by the time she went off sick the Claimant was suffering from significant anxiety and depression. Her e-mails following alleged incidents were also not consistent with what she was alleging. We found this concerning. We did not think that the Claimant came with the intention to deceive, however we concluded that the Claimant had misconstrued or mis-remembered some of the events. The evidence of Mr Galinos was based on what the Claimant told him and he did not have first-hand knowledge of what happened.

The facts

13. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

14. The Fourth Respondent is a residential sales and lettings agency, operating from two offices in Paignton and Torquay.

15. In 2021 the Fourth Respondent took over Torquay Real Estate, which was jointly owned by Mr Lawton, the First Respondent, and Mr Lawton's brother. When the business was sold to the Fourth Respondent Mr Lawton was kept on as a Sales Valuer and Negotiator. We accepted that Mr Lawton has close family ties to South Africa, in that his sister lived, worked and was married in Johannesburg.

16. The Second Respondent, Mr Tozer, was and is the managing director of the Fourth Respondent. The Third Respondent, Mrs Tozer was and is a director of the Fourth Respondent and the wife of the Second Respondent.

17. The Claimant identifies as a White South African woman.

18. The Claimant started work for the Fourth Respondent on 4 October 2021 as a Sales and Lettings Manager. Her normal hours of work were 37.5 hours per week, with a basic salary and a non-contractual bonus scheme. The contract and her letter of appointment said her role was Sales and Lettings Manager'. It was a term in the contact that the first 6 months were a probationary period.

19. The Fourth Respondent had a part time lettings manager, who was due to leave its employment in mid-October 2021. The employee had a prolonged period of absence and much their role had been divided between other staff. This included rent receiving and payment of landlords, a large part of the role, which was being undertaken by Mrs Tozer and which continued to be undertaken by her when the Claimant started. The Respondent advertised for a sales and lettings manager.

20. The Claimant had 16 years' experience in the property letting and sales industry. The majority of the experience was in South Africa and about 4 years' experience in the UK. She had been a branch manager. She considered that she was very experienced.

21. The Claimant was interviewed for the role on 23 September 2021. At the interview the Claimant was told that it was a new role and there would be an element of trying to work out who did what. We rejected the Claimant's evidence that she was told that her main focus should be building the business and not to get involved with the daily running. The Claimant, as letting and sales manager, needed to line manage the team and as such would be involved in day to day running. We did not accept that the Claimant was told that Mr Lawton was problematic and he had been inherited and the Fourth Respondent had no choice about his working for them. We accepted

the Respondent's evidence that growing the business was part of the Claimant's role.

22. The Claimant reported to Mr and Mrs Tozer. The Claimant line managed the lettings team consisting of three people, the sales team consisting of two people and which included Mr Lawton and also the receptionist who worked for both teams. We accepted it was a small business consisting of the directors and 8 employees. We further accepted that all staff would 'muck in' and help out at the time the Claimant's employment started. The Covid-19 pandemic was causing disruption and staff were becoming infected, some were isolating or working from home and there were issues with childcare. We accepted the workload shifted amongst the staff and there was a need for flexibility.

23. The Claimant's relationship was cordial with Mrs Tozer when she started work. We rejected the Claimant's evidence that Mrs Tozer became aggressive and abusive and preferred the evidence of Mrs Tozer. We accepted that Mrs Tozer had said that she did not understand when the Claimant was referring to a property and Mrs Tozer did not know the back story and asked her to explain. We did not accept that she called out across the office as alleged by the Claimant.

The Claimant's role

24. The Claimant's role also involved sales negotiation, acting as the sales and lettings manager and line managing the staff. She was also required to issue notices to tenants, handle landlord and tenant queries, manage the Paignton and Torquay offices and manage staff absences and holidays. The Claimant also conducted viewings. The Claimant's role included delegating work to the other employees.

25. When the part-time lettings manager left in mid-October 2021, their tasks were spread between all remaining staff, including the Claimant.

Job specification

26. On 25 October 2021, the Claimant e-mailed Mr and Mrs Tozer setting out her understanding of what her role entailed. This included: growing the business, conducting viewings, negotiating sales/lettings, being the go to person for staff who could not resolve issues on their own and the go to person for clients when staff could not resolve issues. She was not given a job specification when she started work.

27. The Claimant asked for job specification on a number of occasions, including in writing on 26 January 2022. The specification was provided on 9 February 2022. The main purpose of the job was stated to be: generating

new property sales and building the lettings portfolio, managing the sales and lettings teams, ensuring the Fourth Respondent was compliant with UK legislation and giving a high level of service to customers and future customers. The Claimant replied by saying that 'viewings' was not on the list and asked if that was correct. A meeting was arranged to discuss the job description the following Friday, however Mr and Mrs Tozer contracted Covid-19 and it was not possible for it to take place.

28. We accepted the Respondents' evidence that the Claimant's role was new and there was not an existing job description. Further that staff absences, or self isolation meant that work was being juggled and the need to cover work meant that it had not been done before.

29. We accepted Mr Tozer's denial in cross-examination that the lack of a date on the job specification and the missing out of 'viewings' was an intention to deceive. The missing out of 'viewings' was inadvertent. We accepted discussion had taken place about what the role entailed and the Claimant had set this out in her e-mail dated 25 October 2021. The Claimant adduced no evidence of an intention to deceive and relied on an assertion only.

30. It was suggested to the Claimant, in cross-examination, that there was nothing disagreeable in the list of tasks. The Claimant responded by saying that not listing viewings was disagreeable and it should have been included.

<u>The Claimant's workload</u>

31. The Claimant undertook many viewings and we accepted that this took up a large amount of time and on some occasions she had bookings between 1030 and 1600. We accepted the Claimant's evidence that the staff would put viewings in her diary and that the staff were overloaded with work and therefore she did not think she could delegate that work to them. When the Claimant had a busy day of viewings it meant that she could not do other work.

32. Mr Flaherty was on the Kickstart programme. In January 2022, Mrs Tozer handed over his line management to the Claimant. This was a gradual process. Initially Mrs Tozer did the 1:1 meetings with him so that the Claimant could observe, then the Claimant started doing the meetings with Mrs Tozer shadowing.

33. In February 2022, Mrs Tozer told the Claimant that a colleague was undertaking a property qualification at Western College and the assessor had contacted her with concerns that the colleague was falling behind. The Claimant was asked to have a catch up meeting with the colleague, as line manager, in order to find out if there was anything the business could do to help them catch up. We rejected the Claimant's evidence that she was told

to get her to pass. We accepted that the colleague's course was put on hold so that they could catch up.

34. We accepted that the Claimant had a high workload and that it was putting a large amount of pressure on her. She was finding it difficult to cope and it had a negative effect on her mental health.

35. The Claimant said, when giving evidence, that what tended to show her workload and failure to provide a job description was race discrimination or harassment was that she had not been supported when she raised what happened on 6 January 2022 and she was not getting a response from Mr Lawton. She said this could only be because Mr and Mrs Tozer sided with him and were against her race. She said she was totally unsupported from the start and she took that as being against her because of her race and asserted another member of staff would be treated differently.

36. The Claimant accepted that Mr and Mrs Tozer never remarked, said or wrote anything which could be construed as a racially related or derogatory about race. The Claimant accepted that, apart from what she alleged happened on 9 February 2022, Mr Lawton never made a racially related remark or derogatory comment. The Claimant also accepted that she sent a message to a colleague, Ms Barter, that she did not think the Respondent could afford her. Mr and Mrs Tozer denied in cross-examination that they were taking advantage of the Claimant because she was a foreigner.

Events involving Mr Lawton

37. On the Claimant's first day, the Claimant was introduced to the team. The Claimant's evidence was that Mr Lawton turned his back to the Claimant when she was introduced . Mr Lawton's evidence, which we accepted, was that it was a working day and he said 'hello' when she was introduced and he then carried on with his work. Mr Lawton denied in cross-examination that he did this because he knew she was South African.

38. On 6 January 2023, the Claimant approached Mr Lawton's desk and stood within 2 feet of him. Due to staff catching Covid, it had been agreed that Paignton and Torquay staff would not mix and they would not approach other peoples' desks. We accepted Mr Lawton's evidence that he was regularly visiting his 95 year old mother and he had two children with impending exams and he did not want to catch Covid-19 and pass it on to them.

39. The Claimant's evidence was that she politely asked him to do 10 canvas calls a day, as requested by Mr Tozer, and he burst out laughing in her face and at the same time made a spitting action on the floor. She then went back to her desk humiliated and degraded. In her witness statement and in

oral evidence she said that they were alone in the office, however in the claim form she said that it was in front of other people. She explained that this was due to an uncertainty in her memory and the claim form was wrong.

40. Mr Lawton's evidence was that the Claimant stood close to him and he asked her to move away. He denied that he laughed in her face or made a spitting action. He later said to Mr Tozer that he might have been a bit short when she came up close to his desk. He also maintained that that other colleagues were present when the discussion occurred.

41. The Claimant was inconsistent about whether other staff members were present and maintained her witness statement was correct, whereas Mr Lawton said other staff members were present. She also accepted that there was an uncertainty in her memory and we were not satisfied she had accurately remembered the incident. We preferred the evidence of Mr Lawton and accepted he had been short with her when he asked her to move away from his desk, but he had not laughed in her face or made a spitting action. The Claimant went back to her desk and carried on working in a normal way.

42. Mr Tozer asked the Claimant to collect statistics to enable the directors to plan the pipeline and cashflow. The Claimant discussed the idea of statistics with Mr Lawton in December 2021. The Claimant was due to go abroad from Christmas and most of January. Her trip was cancelled due to the Covid-19 travel restrictions. They discussed the statistics on a couple of occasions and the Claimant asked for them. Mr Lawton was asked to say how many valuations he had done over the past week, the number he had set to do in the near future, detail the valuations in place and what was happening with them, e.g. waiting for a tenant to move out.

43. We did not accept that Mr Lawton generally failed to respond to the Claimant's e-mails or verbal instructions, however he did not provide the statistics to her promptly. The Claimant accepted that December was very busy and in January he had a very busy diary and if he did the statistics he would have to turn away other work. Mr Lawton gave some sales statistics to Laura on a Tuesday for her to give to the Claimant when Laura met her on that day, however it was not the information she was seeking. We did not accept that Mr Lawton was giving the statistics to Mr Tozer.

44. Part of the allegations was that between 11 January and 9 February, Mr Lawton refused to take or return the Claimant's calls or answer her instructions. We accepted Mr Lawton's evidence, after being taken through various examples in the bundle, that he did respond to her instructions. It was then put to him that he only responded if he earned commission on the piece of work. We accepted his evidence that he was not paid commission and only received a basic wage and any loss of sale did not affect him

financially. We accepted that he was not responding to the verbal request for statistics and this is dealt with later in the Judgment.

45. On 7 January 2022, the Claimant sent Mr Tozer a text message asking for an urgent meeting that day to discuss her job and Mr Lawton. Mr Tozer agreed to have a meeting at 1130. Mr Tozer thought the meeting was rearranged to 10 January because his diary recorded a meeting that day, however he could not recollect the specific day. The Claimant maintained it took place on the 7th. The parties agreed that there was only one meeting. At the meeting Mr Tozer diarised a meeting with Mr Lawton on 10 January. We considered it more likely that the meeting occurred on 7 January and that Mr Tozer had not correctly diarised the meeting with the Claimant and had been confused with the meeting with Mr Lawton.

46. No notes were taken at the meeting and there was a dispute between the parties as to what was discussed. At the meeting the Claimant and Mr and Mrs Tozer were present.

47. The Claimant's evidence was that she had reported Mr Lawton laughed in her face and made a spitting action. She also said that he was not answering her calls or e-mails. Further that she was in an emotionally broken down state and asked Mr Tozer to discipline Mr Lawton.

48. Mr and Mrs Tozer's evidence was that no mention was made about laughing in her face or spitting. Mr Tozer accepted that the Claimant raised that she was struggling to get statistics out of Mr Lawton. He thought the reference to ignoring e-mails and calls came from an e-mail on 11 January from the Claimant. It was not accepted that the Claimant was emotional at the meeting or that she asked for Mr Lawton to be disciplined. We accepted Mrs Tozer's evidence that if such an allegation had been made she would have contacted their HR advisers in order to discuss how to deal with the situation.

49. Our findings are set out after dealing with the conversation Mr Tozer had with Mr Lawton.

50. On 10 January 2022, Mr Tozer had a meeting with Mr Lawton. The Claimant's evidence was that Mr Tozer told her that immediately on starting the meeting Mr Lawton accepted he had been rude and abusive and he did not have much chance to say anything because this took the wind out of his sails. This made her feel violated and unprotected.

51. Mr Tozer's and Mr Lawton's evidence was that Mr Lawton did not say he had been rude and abusive. We accepted that Mr Lawton said he might have been a bit short when he asked the Claimant to move away because she was standing too close. Mr Tozer reminded him that the Claimant was

his line manager and he should give her the information requested, namely the statistics and Mr Lawton had said he had been busy. Mr Tozer denied saying that Mr Lawton had accepted he had been rude and abusive or that the comment had taken the wind out of his sails.

52. The following day the Claimant e-mailed Mr Tozer saying, that as a follow up to his meeting with Mr Lawton the previous day, that he needed to be told not to put his phone on do not disturb because there had been complaints in the offices. There was no mention about the alleged behaviour.

53. The first written refence to spitting was in the Claimant's grievance dated 21 February 2021. The Claimant had complained to Ms Barter in e-mails about Mr Lawton not responding to her but made no mention of spitting, laughing in her face or similar behaviour.

54. We preferred the Respondent's evidence. The e-mail of 11 January 2022 was not consistent with the Claimant being told that the wind had been taken out of Mr Tozer's sails and she felt violated and unprotected. Neither party took a note of the conversation on 7 January. The Claimant had referred to difficulties with memory due to her mental health in relation to other aspects of the case. We accepted Mrs Tozer's evidence that she would have contacted their HR adviser if any allegation of the type the Claimant says she made had been made. We did not accept that she referred to laughing in her face or spitting or she wanted Mr Lawton disciplined. When Mr Tozer told her of the outcome of the discussion he said that Mr Lawton accepted he might have been short when he asked her to move away, but he did not say that he accepted he had been rude or abusive.

55. The Claimant said in evidence that these matters occurred because of her nationality and relied upon Mr Tozer not supporting her and he had seen the state of her mental health. Further that Mr Tozer met Mr Lawton on 10 January 2022 and had not done anything about what was happening.

56. On 11 January 2022, Mr Lawton tried to stop the Claimant going to the Torquay office. We accepted that this was because there was concern about staff contracting covid and a risk of passing it between the offices.

<u>Change of status of the Torquay office</u>

57. On 19 January 2022, at a normal Wednesday staff meeting, Mr Tozer said that he was cancelling the Rightmove subscription for the Torquay Sales office and was rebranding it into a block management office and he would put relevant signage up. We accepted that a new company was formed to undertake block management work and it took over the lease for the office.

We also accepted that the monthly Rightmove bill was almost as much as an employee's monthly salary and that it was a significant expense and it was 'crippling' in the light of sales drying up.

58. The Claimant says they were told that Mr Tozer did not want to pay two subscriptions to Rightmove and so he was going to change the Torquay office into block management. The Claimant's evidence was that block management was not going to be done from Torquay but the Paignton office and if clients/customers walked into the Torquay office about sales or lettings they were to be told that they did not do sales or lettings from there and to contact the Paignton branch. The Claimant maintained that she had not misunderstood what they had been told. The Claimant said that sales were still being done at Torquay. The Claimant says that the staff were being asked to lie. Mr Flaherty gave evidence that the staff were asked to lie. We found the evidence of the Claimant and Mr Flaherty confusing.

59. Mr Tozer's evidence, which we accepted, was that he said that Torquay was being rebranded to block management and people were to be told that sales and lettings were being done from Paignton. If someone came into Torquay about sales or lettings the staff were asked to help as usual. He said that the only issue might someone from Rightmove coming in and that the official line was it was a block management office. Mr Tozer was cross-examined about the Torquay office advertising sales and lettings in July 2023. We accepted his evidence that the block management business gave consent for sales and lettings business to use their window space and they also used the window space of a mortgage broker and it was a common practice in the industry.

60. We accepted that block management was then undertaken from Torquay. We did not accept that the staff were expressly told to lie, however they thought by being asked to help people who came in was not consistent with the rebranding and they were uncomfortable with it.

61. The Claimant was not consulted about the change. We accepted that Mr and Mrs Tozer thought it was best for their business and the decision was taken by them as directors. They accepted in hindsight they should have discussed the matter with the Claimant in advance of the meeting. The Claimant's evidence was that she took this to be because she was White South African and referred to Mr Tozer saying the first line of defence to someone coming from Rightmove was to say they were only doing block management from Torquay and it showed him to be dishonest.

62. Mr Tozer held a further meeting with two employees on 25 January 2022 to clarify what was happening with block management and their concern that sales would be closed down. The Claimant was off sick with covid at this time. We accepted Mr Tozer's evidence that this was the meeting he was

referring to in the Grounds of Resistance when he said that the Claimant was not present at the meeting. It is notable that in the Grounds of Claim the Claimant said the meeting took place on 20 January 2022 and we considered that there was an element of confusion.

21 January 2022 onwards

63. On 21 January 2022, the Claimant went home ill, with what subsequently turned out to be Covid-19. She worked from home until 7 February 2022, but was unable to undertake viewings. Mr and Mrs Tozer were on leave on 7 February and they had both tested positive for covid by 10 February 2022, which meant they could not attend work and could not attend viewings. In that time Mr Lawton covered the Claimant's and Mr and Mrs Tozer's viewings work and dealt with more telephone calls and queries than usual. We accepted that this meant that he had very little time to prepare the statistics.

64. On 27 January 2022, the Claimant sent Mr Lawton an e-mail at 1456 asking for sales statistics and asked him to confirm receipt [p134]. This was the first e-mail instruction about sales statistics. On 28 January 2022, the Claimant e-mailed Mr Lawton, saying that she had seen he had been out for most of the day and asked if he had got the statistics together and she had not received a confirmation e-mail. Later that day she e-mailed Mr Tozer saying he had not responded to her e-mail asking for statistics and even if he had been busy he could have confirmed receipt of the e-mail. We accepted Mr Lawton's evidence that he was fully booked on those days and he did not think he had a chance to respond.

65. On 31 January 2022 the Claimant sent Mrs Tozer a WhatsApp message saying that the virus peaked on Saturday. She said she was feeling disturbed about her job and would like a discussion with Mr and Mrs Tozer sooner rather than later and it was affecting her mental health negatively.

66. Mr Tozer replied immediately, saying he hoped she was feeling better and a meeting could be organised at the end of the week. She was asked for her commission claim. The issue of commission then took over the text conversation, rather than the Claimant's concerns. We accepted the Claimant's evidence that this was because it was the end of the month and her commission claim was due. We accepted that when the Claimant returned to work on 7 February, Mr and Mrs Tozer were on leave and then they caught covid. A meeting took place on 16 February 2022.

67. The Claimant accepted that there had not been any pejorative words used about white South Africans and she said it was Mr and Mrs Tozer's behaviour that suggested it was connected to her nationality.

68. On 8 February 2022, the Claimant e-mailed Ms Barter and said Mr Lawton was being rude to her and refusing to answer her e-mails.

9 February 2022

69. On 9 February 2022, both offices attended the weekly staff meeting. The two offices were connected by a video call. Mr Tozer undertook a virtual tour of a property, which was being sold with a sitting tenant. There was a map of South Africa on the wall. The tenant also had a cat and there was a fish on the floor next to the cat's bowl. One of the staff asked if the tenant was South African and Mr Lawton replied.

70. The Claimant's evidence was that Mr Lawton replied, in response to a question about the tenant, 'Yes unfortunately she is also South African', which she considered was offensive and humiliating. She accepted in cross examination, that Mr Lawton made no other snide jokes or backhanded comments about South Africans.

71. Mr Lawton denied saying the word 'unfortunately' and said that he replied she was South African. We accepted that he knew the tenant from outside of work due to their children going to the same school and we accepted that he got on well with her. We also accepted that discussion took place about the fish and a staff member wondered if it was real. The fish was plastic and Mr Lawton joked about the fish.

72. Mrs Tozer also denied that the word 'unfortunately' was used. The incident was investigated as part of the Claimant's grievance and statements were taken from the staff, none of whom said that the word 'unfortunately was used. Reference was also made to the fish in the statements. We accepted that a joke was being made about the staff member who thought the fish was real.

73. The first time the Claimant raised this matter was in her grievance dated 21 February 2022, when she said it was in response to a question about a vendor being South African. In her claim form she said it was in response to whether a landlord was South African. The Claimant's accounts were not entirely consistent. On 10 February 2022, the Claimant e-mailed Ms Barter and said she wanted to share some positive news and that she and Mr Lawton had spoken that morning and resolved their differences. She also said she had seen a change around in Mr Lawton and was hoping for good results with Mr and Mrs Tozer [p153]. No mention was made about the 'South African' reference. The Claimant said that she was referring to the statistics issues, we did not accept this evidence. If Mr Lawton had made the remark alleged and it had caused the level of offence claimed it was unlikely that the Claimant would have said what she did in her e-mail the following day.

74. We preferred the Respondents' evidence. We did not accept that the word 'unfortunately' was used. Mr Lawton answered in a normal way that the tenant was South African and he made a joke about the plastic fish.

10 February 2022

75. On 10 February 2022, whilst alone in the office, the Claimant asked Mr Lawton for his statistics.

76. The Claimant's evidence was that Mr Lawton said that he did not have to give them to her and he had spoken to Mr Tozer and that Mr Tozer would tell her to back off. She got upset and raised her voice saying that he was sabotaging her job and he burst out laughing.

77. Mr Lawton's evidence was that prior to the Claimant arriving he had spoken to Mr Tozer about covering his appointments, due to Mr Tozer having Covid, and said that he had not had the time to complete the statistics. Mr Tozer told him not to worry because they had covid and it was not necessary to get them out that day. When the Claimant asked for the figures he said that Mr Tozer was not concerned if he had not provided them that day and explained it was because of his increased workload due to covering Mr and Mrs Tozer's work. The Claimant shouted at him, accusing him of sabotaging her job and saying she needed the statistics for her next meeting with Mr and Mrs Tozer. He denied bursting out laughing.

78. He later provided the statistics to the Claimant. After this the Claimant sent the e-mail referred to above at 11:59 hours on 10 February [p153]. In that e-mail she also said that she had received her job description in an envelope on her desk the day before and said that she thought they were firing her. There was no mention of an incident where Mr Lawton burst out laughing and caused her humiliation or distress, there was only a reference to having a talk and resolving their differences.

79. The e-mail was not consistent with the Claimant's version of events and we preferred Mr Lawton's account.

Alleged remark by Mrs Tozer

80. There was a disputed incident involving Mrs Tozer. The Claimant alleged in her witness statement that in February 2022 that she had asked Mr Tozer for a figure and he replied the amount was '69'. Mrs Tozer then shouted that 69 was her and Mr Tozer's favourite sexual position, which made the Claimant feel uncomfortable and intimidated. When cross-examined about her and Mrs Tozer's presence in the office in February the Claimant accepted it was unlikely to have been in February and suggested it was mid

to late January although she could not be specific. This was not something she raised in her grievance and the first mention of it was in her claim form. She said that she only brought it up because there were many points and her mental health was so bad it only came to her afterwards.

81. Mrs Tozer denied the incident ever occurred and remained steadfast in her position despite forceful cross-examination of her.

82. There was a lack of precision as to when the incident was alleged to have occurred and there was not any documentary evidence to support it. The Claimant effectively accepted that she had memory problems. We were not satisfied that the incident occurred and accepted Mrs Tozer's evidence.

Performance concerns

83. Mr and Mrs Tozer were concerned about the Claimant's performance and thought a more junior role might be more suited for her. The Claimant was aware that there was a problem, hence why when she was given her job description she thought that she was being dismissed.

84. On 16 February 2022 the Claimant attended a meeting with Mr and Mrs Tozer at which the following matters were discussed:
    (a) Communication with customers – not returning calls/responding to queries in a timely manner.
    (b) Providing inaccurate information/not following instructions. A significant part of this related to eviction notices for tenants and the need to obtain receipts proving service. We rejected the Claimant suggestion that this was petty, if notices are not correctly served it could prevent possession being taken by the landlord, if the tenant did not vacate the property. It was a serious matter.
    (c) Management of staff, in particular only one 1:1 had been carried out with Mr Flaherty and he had not completed his CV and the obligations for kick start were almost not met.
    (d) Prospecting/lead generation, in that it appeared very little had been done. The Claimant said that she did not have enough time due to carrying out viewings. Mr Tozer suggested that whilst she was isolating she could have undertaken prospecting if she was not sick. We accepted that there had been many viewings and problems had been caused by absences due to Covid-19.

85. We accepted Mr and Mrs Tozer's evidence that they thought there were performance issues and they were trying to manage them. We also accepted that they thought the matters were sufficiently serious to raise and they were not petty or frivolous.

86. The Claimant said that what tended to show this was racially motivated was her workload and failure to provide her job description. She said she was totally unsupported from the start and they had sided with Mr Lawton.

87. On 21 February 2022 the Claimant raised a grievance, in which she demanded compensation. This was the first time that she had mentioned discrimination and the incident on 9 February 2022 in relation to the allegation that Mr Lawton had said, 'yes unfortunately she's also South African.' The Claimant accepted in cross-examination that she raised a number of new matters at this stage. The Claimant started a period of sickness absence on this day and did not return to work.

88. On 22 February 2022, Mr Tozer had a meeting with Mr Lawton to discuss the allegation about the comment made about a South African, in which he denied making a racial remark.

89. On 24 February 2022, Mr Tozer informed the Claimant that he would respond in relation to her grievance by 3 March 2022.

90. On 28 February 2022, the Claimant messaged Ms Barter and said she thought that the Respondent was trying to get rid of her and suggested it was because they could not afford her and were pushing her to resign.

91. On 2 March 2022, the Claimant received a statement of fitness to work, backdated to 21 February, saying she was unfit to work with mixed anxiety and depressive disorder. We accepted that the effects were significant for the Claimant and that she was seeing a counsellor on an ad hoc basis. She was feeling very anxious which had started in November. She was struggling to sleep and did not feel she could work. The Claimant explained inconsistencies in her accounts as being related to her mental health condition and we concluded that she was struggling to accurately remember things at this time.

92. On 4 March 2022, the Claimant was invited to attend a grievance meeting on 9 March 2022, by Zoom. She was informed of her right to be accompanied. The Claimant replied by saying she would not participate in any procedure and she was not well enough to attend meetings or discussions. Mr Tozer responded by saying he would have liked to have the opportunity to investigate the matters further. He kept the option of a grievance meeting open until 16 March 2022, if she wanted to reconsider.

93. Mr Tozer undertook a detailed investigation and prepared an investigation report on 29 March 2022, which he sent it to the Claimant on 1 April 2022. The vast majority of the complaints were not upheld, including those about workload, the nature of her role, race discrimination on 9 February 2022 and

the points raised on 16 February, with the exception of changing a heading in the notes of the meeting on 16 February.

94. On 14 April 2022, the Claimant was invited to attend a probation review meeting on 20 April 2022. She did not respond and did not attend the meeting.

95. On 25 April 2022, the Claimant was dismissed for not passing her probation period. The reasons were the matters raised on 16 February 2022 and she had not responded to the invitation to attend the probationary review meeting and had not attended. They were not satisfied she had achieved the standard of work required. The Respondents were not challenged in relation to this decision.

The law

96. The Claimant relies upon the characteristics of race and sex, which are protected under s. 9 and 11 of the Equality Act 2010.

97. S. 13 of the Equality Act 2010 ("EqA") provides:

> 13 Direct discrimination
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

98. S. 26 EqA provides:

> 26 Harassment
> (1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.

99. The provisions relating to the burden of proof are to be found in section 136 of the EqA.

<u>Direct Discrimination</u>

100. With regard to the claim for direct discrimination, the claim will fail unless the Claimant has been treated less favourably on the ground of her race or sex than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The Claimant needed to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the Claimant.

101. We approached the case by applying the test in *Igen v Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):
"*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

102. In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment alleged. More than a difference in treatment or status and a difference in protected characteristic needed to be shown before the burden would shift. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. As to the treatment itself, we had to remember that the legislation did not protect against unfavourable treatment per se but less favourable treatment. Whether the treatment was less favourable was an objective question. Unreasonable treatment could not, of itself, found an inference of discrimination, but the worse the treatment, particularly if unexplained, the more possible it may have been for such an inference to have been drawn (Law Society-v-Bahl [2004] EWCA Civ 1070).

103. In Madarassy v Nomura International Plc [2007] EWCA Civ 33 Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant 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 act of discrimination". The Supreme Court in Royal Mail Group Ltd v Efobi [2021] UKSC 33 confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remained binding authority.

104. In Denman v Commission for Equality and Human Rights and ors [2010] EWCA Civ 1279, CA, Lord Justice Sedley made the important point that the "more" which is needed to create a claim requiring an answer need not be a great deal.

105. The function of the Tribunal is to find the primary facts and then look at the totality of those facts to see if it is legitimate to infer that the acts or decisions were done/made on prohibited grounds (Qureshi v Victoria University of Manchester [2001] ICR 863).

106. In every case the tribunal has to determine the reason why the Claimant was treated as she was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question." It is for the claimant to prove the facts from which the employment tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong), i.e., that the alleged discriminatory has treated the claimant less favourably and did so on the grounds of the protected characteristic. Did the discriminator, on the grounds of the protected characteristic, subject the claimant to less favourable treatment than others? The relevant question is to look at the mental processes of the person said to be discriminating (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07).

107. "Could conclude" means that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint. The test within s. 136 encouraged us to ignore the Respondent's explanation for any poor treatment until the second stage of the exercise. We were permitted to take into account its factual evidence at the first stage, but ignore explanations or evidence as to motive within it (see Madarassy-v-Nomura International plc and Osoba-v-Chief Constable of Hertfordshire [2013] EqLR 1072).

108. We needed to consider all the evidence relevant to the discrimination complaint, that is (i) whether the act complained of occurred at all; (ii) evidence as to the actual comparator(s) relied on by the claimant to prove less favourable treatment; (iii) evidence as to whether the comparisons being made by the claimant were of like with like; and (iv) available evidence of the reasons for the differential treatment.

109. Where the Claimant has proven facts from which conclusions may be drawn that the Respondent has treated the Claimant less favourably on the ground of the protected characteristic then the burden of proof has moved to the Respondent. It is then for the Respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed,

that act. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic. That requires the Tribunal to assess not merely whether the Respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question.

110. The circumstances of the comparator must be the same, or not materially different to the Claimant's circumstances. If there is any material difference between the circumstances of the Claimant and the circumstances of the comparator, the statutory definition of comparator is not being applied (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337). It is for the Claimant to show that the hypothetical comparator in the same situation as the Claimant would have been treated more favourably. It is still a matter for the Claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn (Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288).

Harassment

111. Not only did the conduct have to have been 'unwanted', but it also had to have been 'related to' a protected characteristic, which was a broader test than the 'because of' or the 'on the grounds of' tests in other parts of the Act (Bakkali-v-Greater Manchester Buses [2018] UKEAT/0176/17).

112. As to causation, we reminded ourselves of the test set out in the case of Pemberton-v-Inwood [2018] EWCA Civ 564. In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the prescribed effects under sub-paragraph (1) (b), a tribunal must consider both whether the victim perceived the conduct as having had the relevant effect (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). A tribunal also had to take into account all of the other circumstances (s. 26 (4)(b)). The relevance of the subjective question was that, if the Claimant had not perceived the conduct to have had the relevant effect, then the conduct should not be found to have had that effect. The relevance of the objective question was that, if it was not reasonable for the conduct to have been regarded as having had that effect, then it should not be found to have done so.

113. The Respondent referred us to Richmond Pharmacology v Dhaliwal [2009] IRLR 336 and that an employer cannot be held liable simply because the conduct has had the prescribed effect, it has to be reasonable that the consequence occurred. Further that it is important not to encourage a culture of hypersensitivity or create liability for every unfortunate phrase.

114. It was important to remember that the words in the statute imported treatment of a particularly bad nature; it was said in Grant-v-HM Land Registry [2011] IRLR 748, CA that "*Tribunals must not cheapen the significance of these words. They are important to prevent less trivial acts causing minor upset being caught by the concept of harassment.*" See, also, similar dicta from the EAT in Betsi Cadwaladr Health Board-v-Hughes UKEAT/0179/13/JOJ.

Time

115. Under section 123 of the Equality Act 2010 a complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates (s. 123 (1)(a)). Or such other period as the Employment Tribunal thinks just and equitable (s. 123 (1)(b)) For the purposes of interpreting this section, conduct extending over a period is to be treated as done at the end of the period (s. 123 (3)(a)) and this provision covers the maintenance of a continuing policy or state of affairs, as well as a continuing course of discriminatory conduct. The extension of time for entering into early conciliation is dealt with in Section 140B of the EqA. It was common ground that any incident before 10 December 2021 was potentially out of time.

Conclusions

Allegations of direct discrimination and harassment

116. The factual allegations were the same for the direct discrimination and harassment claims. We have considered each factual allegation and applied the various tests. The following matters are of general application to all allegations. The Claimant accepted that the only time there was a refence to 'South African in a context which was untoward was the alleged remark made by Mr Lawton on 9 February 2022. The Claimant accepted that there was no other incident when any snide remark, joke or untoward comment was made about South Africa or South Africans. We also accepted that Mr Lawton had close family ties to South Africa and he personally knew the tenant referred to on 9 February and he got on well with her.

117. The Claimant's submissions were effectively that Mr Lawton was abusive throughout and that Mr and Mrs Tozer were aware of this and did nothing and it was that behaviour which tended to show that she was being less favourably treated or harassed because of her race. The Claimant was effectively asking the Tribunal to infer that race was the motivating factor. However, apart from relying on 9 February 2022, the content of what was

said being in dispute, there was an assertion of discrimination/harassment rather than specific matters being demonstrated to be linked to the Claimant's race/nationality. An assertion or belief is not the same thing as proving primary facts that something has occurred.

118. The Claimant relied upon a hypothetical comparator. That comparator will be a sales and lettings manager with responsibility for generating business, of a similar experience, age and length of service and health conditions as the Claimant, but who was of a different racial background.

<u>On the 9 February 2022, the First Respondent referred to a landlord in the following terms; "yes, unfortunately she is also South African";</u>

119. There was a dispute of evidence as to what was said. We concluded on the balance of probabilities that Mr Lawton did not say the word 'unfortunately'. In closing submissions Mr Galinos said that Mr Lawton had been evasive by answering a question in cross-examination that he said, 'South African' and then later, 'she is South African. We did not consider that Mr Lawton was being evasive. He was asked specific questions and his evidence remained consistent. Mr Lawton said, yes she is South African and also made a joke about the plastic fish. We were not satisfied that the Claimant proved that the alleged comment was said. We were not satisfied that it was said with any malice or unpleasant tone.

120. The discussion related to the tenant and we were not satisfied that the Claimant adduced any primary facts that she was being treated less favourably than a hypothetical comparator. We did not accept that the untoward comment was made. We were not satisfied that if the tenant had been from a different nationality, for example English or Scottish and there had been map of those countries on the wall, Mr Lawton would not have said, 'yes she is English of Scottish' and made a joke about the plastic fish. We were not satisfied that the Claimant had discharged the initial burden of proof and the direct discrimination claim was dismissed.

121. In terms of the harassment claim. The Claimant failed to prove that the unwanted comment was said or that it was said with malice or an unpleasant one. We were not satisfied that confirming that the tenant was South African was unwanted conduct. The Claimant was objecting to the word 'unfortunately' and the tone used, which we did not accept had occurred. Confirming the nationality of someone is not in itself unwanted conduct. We did not accept that what the Claimant said was offensive had occurred and therefore we were not satisfied that the comment could have caused an intimidating, hostile or offensive environment for her.

122. Accordingly the claim of harassment was dismissed.

The First Respondent failed to provide sales statistics as requested by the Claimant; her oral and emailed requests were ignored;

123. It was suggested by the Claimant that Mr Lawton was being evasive when he was giving his evidence in relation to confirming whether he had orally discussed the need for statistics with the Claimant. Mr Lawton's witness statement confirmed that there had been oral discussions and we did not accept he was being evasive. Mr Lawton gave some statistics to Laura, however he did not give them to the Claimant as requested. We were also not satisfied that he had provided all of the information he had been asked for. He was reminded to provide the statistics on 10 January 2022 by Mr Tozer and that the Claimant was his line manager. He was further asked to provide the statistics on 27 and 28 January and did not respond. The statistics were provided on 10 February 2022.

124. We accepted that there were staff absences at this time due to covid infection and isolating. It was relevant that the Claimant was off work from 21 January 2022 to 7 February and was unable to do viewings. Mr and Mrs Tozer were on holiday on 7 February and then contracted covid and were unable to do viewings. It was Mr Lawton who was covering that work and was very busy as a result. We accepted that he had very little time to produce the statistics.

125. We did not accept that there was a general failure to respond to requests or communications, however there was a failure to provide the statistics. The Claimant suggested that Mr Lawton speaking to Mr Tozer about this in February 2022 undermined her, however we did not accept that assertion. Mr Lawton was speaking to Mr Tozer about other matters and said that he had not had the time to complete the statistics and was told not to worry. When this was relayed to the Claimant on 10 February we did not accept that he said she would be told to back off.

126. In closing submissions and in evidence the Claimant said what tended to show that this was because of race or related to race was that Mr Lawton had nothing but contempt for her and he had issues right from the start. We did not accept the evidence given in this respect. It was asserted that someone from the UK would not be treated this way.

127. The Claimant did not adduce any facts which tended to suggest that a hypothetical comparator would be treated any differently. Mr Lawton was very busy and struggled to provide the statistics at a time when he was covering other people due to their absences. There was no evidence that tended to suggest if Mr Lawton's line manager was from the UK that he would have provided the statistics earlier. We were not satisfied that the Claimant proved primary facts tending to suggest that an appropriate

comparator would have been treated differently or that it related to race. We rejected the only adverse comment relied upon by the Claimant had been made. Unreasonable conduct alone is insufficient to discharge the initial burden of proof. The Claimant failed to discharge the initial burden of proof and the direct discrimination claim was dismissed. In any event we were satisfied that Mr Lawton proved that the reason was he did not have sufficient time to do it in conjunction with his duties and covering for others and it was wholly unconnected to race.

128. In relation to harassment we accepted that the failure to provide the statistics was unwanted, however the Claimant still needed to adduce primary facts which tended to suggest it was related to race. There was no evidence of any untoward comment which could link it to race. There needs to be something more than unwanted conduct before the burden shifts. We were not satisfied that Claimant discharged the initial burden of proof. The claim was therefore dismissed.

129. We did accept that the Claimant considered that failing to do this was detrimental to her and she felt it was hostile and degrading. We accepted that there were impacts to her mental health, however we were not satisfied the cause was related to her race.

130. These claims were accordingly dismissed.

<u>The First Respondent laughed in the Claimant's face 6 January and 10 February 2022 when she remined him about the need for him to make canvass calls, the need to provide his sales statistic and other parts of his role;</u>

131. We found that Mr Lawton did not laugh in the Claimant's face and make a spitting action on 6 January 2022. We found that Mr Lawton had been short with the Claimant when he asked her to move away to ensure social distancing. In submissions the Claimant repeatedly said that Mr Lawton admitted that he had been a bit rude and that therefore undermined what he and Mr Tozer were saying about what Mr Tozer was told and how Mr Lawton responded when he met him. We rejected that submission. Mr Lawton did not admit to being a bit rude. He said he might have been a bit short when he asked the Claimant to move away, this is not the same as admitting that he had been rude and abusive. We accepted the evidence of Mr Tozer and Mr Lawton on this point.

132. On the basis that we were not satisfied that Mr Lawton laughed in the Claimant's face and made a spitting action we were not satisfied that the alleged less favourable treatment occurred. There was no evidence that if the Claimant had been from the UK anything different would have occurred. In the circumstances the Claimant failed to prove primary facts

tending to show less favourable treatment occurred because of her race/nationality or that it was related to her race/nationality.

133. In relation to the 10 February 2022, we found that Mr Lawton did not laugh in the Claimant's face, when she suggested that he was sabotaging her job. Accordingly we were not satisfied that the alleged behaviour had occurred. For the same reasons as for the incident on 6 January 2022, we were not satisfied that the Claimant had proved primary facts demonstrating that the incident occurred, that a hypothetical comparator would have been treated differently or that it was because of her race. Similarly she had not proved primary facts from which we could conclude that it was related to her race.

134. Accordingly the claims of direct discrimination and harassment were dismissed.

<u>The Second and Third Respondent failed to take any, or any sufficient, action against the First Respondent when the Claimant complained about the First Respondent's conduct towards her, despite his admission of such;</u>

135. This allegation related to the Claimant's alleged complaint to Mr Tozer on 7 January 2022, her e-mail on 28 January 2022 and in relation to the comment made by Mr Lawton on 9 February 2022.

136. In relation to 7 January 2022, we found that the Claimant had not referred to laughing in her face and making a spitting action. We found that she had said he was not responding to her requests for statistics and we accepted that she would have said she was not happy about it. Mr Tozer addressed this matter with Mr Lawton on 10 January 2022 and said he should provide the information requested. Mr Lawton also said he might have been a bit short with the Claimant. We were not satisfied that the Claimant complained about the matters she alleges were not addressed.

137. In relation to 9 February 2022, we were not satisfied that what the Claimant said happened, had occurred. Further she did not raise a complaint about it until her grievance on 21 February 2022, following which Mr Tozer fully investigated the matter.

138. In relation to the e-mail on 28 January 2022, there was no evidence as to what happened in response or the steps taken by Mr Tozer when the Claimant said Mr Lawton was not responding.

139. The Claimant needed to prove facts which tended to show that a sales and letting manager who was a UK national would have been treated differently and the difference was because of her race. There was no evidence that untoward racial remarks, comments or slurs had been made

and we rejected that the alleged comment on 9 February had occurred. Unreasonable conduct alone is not sufficient to discharge the burden of proof. Further we were not satisfied that there was any evidence tending to show that a hypothetical comparator would have been treated differently.

140. The Claimant relied on an assertion that Mr Lawton had abused her from the start of her employment, he was a racist and that Mr and Mrs Tozer were aware and they had sided with him. An assertion or belief is not the same proving facts tending to show something. We were not satisfied that race had been a factor in the events involving Mr Lawton as set out above and we did not find that he was a racist.

141. The Claimant failed to prove primary facts from which we could conclude that the way the Claimant's complaints were dealt with were influenced at all by her nationality/race or that a person with a different race or nationality would have been treated differently. Similarly the Claimant did not adduce any primary facts which tended to show that it was related to her race.

142. We accepted that the Claimant was not happy with the way the matters were dealt with and it was unwanted. However the initial burden of proof was not discharged in relation to it being related to her race or nationality.

143. The claims of direct discrimination and harassment were dismissed.

<u>The Second Respondent failed to consult with the Claimant over the changed status of the Torquay office and then required the staff to lie about it;</u>

144. There was a significant amount of evidence about whether or not Mr Tozer was asking the staff to lie. We accepted that the business needed to reduce its costs and the Rightmove fee was expensive. Mr Tozer did not believe he was asking the staff to lie and that what he was doing was within the agreement with Rightmove. Not all of the staff were of same view and were uncomfortable about it. We did not consider that this had a negative effect on Mr Tozer's credibility. The Claimant was not saying that 'being asked to lie' was an act of discrimination or harassment against her but it was the failure to consult her in advance.

145. The Claimant was not consulted in advance of the announcement and Mr and Mrs Tozer considered in hindsight that it would have been best to do so. The Claimant considered that this was unwanted and we accepted that a manager in a similar position would also consider it unwanted.

146. This was a small business and the decision was taken by the directors as way of trying to save cost to their business and save staff jobs.

147. In her evidence, the Claimant suggested that factors tending to show this was because of or related to race were Mr Tozer's referring to the first line of defence with Rightmove and it showed him to be dishonest. In closing submissions it was said on behalf of the Claimant that she was not consulted because she was South African and would not have agreed to it and if she had been a UK citizen she would have been consulted. We rejected that submission. If the Claimant did not agree with it there was no evidence to support that it was related to, connected with or because she was South African rather than her personal opinion on the matter.

148. There was no evidence adduced which tended to suggest that if the Claimant had been a UK national that she would have been consulted. Unreasonable conduct alone is not sufficient to shift the burden of proof. As set out above there were no incidents which tended to show that there was animosity towards South African people and the only matter the Claimant suggested was found not to have occurred. Mr and Mrs Tozer might have been wise to consult the Claimant, however we were not satisfied that she had discharged the initial burden of proof that her comparator would have been treated better or that it was because of her race. Similarly we were not satisfied that there was any evidence which tended to suggest that it was related to her race.

149. Accordingly the claims of direct discrimination and harassment were dismissed.

<u>The Second and Third Respondent failed to provide the Claimant with a job specification until early February 2022;</u>

150. The Claimant was not provided with a job description until 4 months after her employment started. To the extent it is relevant s. 1(4)(f) of the Employment Rights Act 1996 requires the Statement of Particulars of Employment to include the "title of the job the workers is employed to do or a brief description of the work for which he is employed." The Claimant's contract of employment had her job title within it.

151. We accepted that the Fourth Respondent faced a significant amount of disruption at this time, the role was new and there was not a previous job description for the role. The Claimant identified her understanding of the role on 25 October 2021.

152. The Claimant asserted that the lack of support given to her in relation to Mr Lawton and Mr and Mrs Tozer siding with him tended to show that this was because of her race or related to it.

153. The lack of a job description was something which was unwanted and we accepted that a reasonable employee would have considered it unwanted.

154. We were not satisfied that the Claimant adduced primary facts which tended to show a hypothetical comparator would have been treated differently. Unfavourable treatment is not the same as less favourable treatment. Further unreasonable conduct, in itself, is insufficient to shift the burden of proof. The lack of any incident in which Mr and Mrs Tozer made a negative or derogatory remark in relation to race or being South African was significant. The only incident the claimant could point to was with Mr Lawton and that remark 'yes unfortunately she is South African', was not accepted to have been made. The Claimant relies on failing to support her and the behaviour of Mr Lawton. We were not satisfied that the Claimant adduced facts which tended to suggest that a hypothetical comparator would have been treated better or that what occurred was because of her race.

155. Similarly we were not satisfied that the Claimant had proved primary facts tending to suggest that this related to her race.

156. We were not satisfied that the Claimant discharged the initial burden of proof for both the direct discrimination and harassment claims and they were dismissed.

157. In any event we were satisfied that the Respondents proved that the reason was because of workload, the role was new and they had not got round to doing it and it was wholly unrelated to race.

<u>The Second and Third Respondent had unreasonable expectations insofar as her role and workload was concerned, in particular, the viewings that she was expected to do in addition to her other tasks;</u>

158. In terms of the Claimant's workload we accepted that it was high and she was finding it difficult to cope and it was putting her under pressure. We accepted that it was likely it was having a negative impact on her mental health. The number of viewings prevented her from doing as much prospecting work as she wanted to.

159. We accepted that the level of workload was unwanted and it was reasonable for her to form that view.

160. The Claimant needed to prove primary facts that a hypothetical comparator would have had a lighter workload. The evidence of Mr and Mrs Tozer was that this was the role they had filled. It was also relevant that

there was a significant amount of disruption and staff were absent which caused other staff, including the Claimant, to cover viewings.

161. The Claimant submitted that someone who was born in the UK would know the laws, further there was a duty not to ensure an employee is overloaded. It was submitted that it was a case of taking advantage of a foreigner. This was an assertion and no evidence was adduced of someone from a different nationality, doing the same type of role, being given less work. We were not satisfied any evidence was adduced which tended to show that a hypothetical comparator would have been treated differently. It was relevant that the Claimant's CV said she had 16 years' experience in sales and lettings and had been a branch manager.

162. We repeat our general point about the lack of evidence that any untoward remark had been made. The Claimant relied on general behaviour, however unreasonable behaviour is not the same thing as less favourable treatment and on its own is insufficient to shift the burden of proof. A belief or an assertion is not the same as proving facts from which a conclusion could be drawn. We were not satisfied that the Claimant established primary facts from which we could conclude that a hypothetical comparator would have been treated differently or that it was because of her race. The claim of direct discrimination was dismissed.

163. Similarly the Claimant failed to adduce facts which tended to suggest it was related to her race and the claim of harassment was dismissed.

<u>The Second and Third Respondents failed to respond and/or act upon the Claimant's assertion that her mental health was being affected by her work and/or the First Respondent's conduct which she brought to their attention on 31 January 2022;</u>

164. The Claimant said that her mental health was being negatively affected on 31 January 2022. There was an immediate response that a meeting would be arranged. The Claimant returned to work on 7 February, when Mr and Mrs Tozer were on holiday and they then contracted Covid themselves. There was not a meeting until 16 February 2022, at which her performance concerns were discussed. We were not referred to a specific meeting at which the Claimant's mental health was discussed. The Claimant started a further period of sickness absence on 21 February 2022.

165. It may have been unreasonable not to arrange a meeting to discuss the Claimant's mental health, however that is not the same thing as not arranging a meeting because of the Claimant's race. For the direct discrimination claim, the Claimant needed to adduce primary facts tending to show that someone in the same circumstances as herself, with a similar

mental health symptoms and doing the same role would have been treated better.

166. We repeat our general point about the lack of evidence suggesting untoward remarks were made. The Claimant submitted that there was a duty of care to take care of her mental health. It was also submitted that Mrs Tozer did not contact HR, however this was not raised with her in cross-examination and no findings were made in relation to it. Unreasonable behaviour cannot itself found an inference of discrimination.

167. We were not satisfied that the Claimant adduced primary facts tending to show a hypothetical comparator would have been better treated or that what happened was because of her race. The initial burden of proof was not discharged and the claim of direct discrimination was dismissed.

168. Similarly we were not satisfied that the Claimant adduced primary facts that it was related to race and the claim of harassment was dismissed.

<u>The Second and Third Respondent made frivolous accusations against the Claimant on 16 February 2022</u>;

169. The Claimant said that the allegations made against her on 16 February were frivolous. At this stage the Claimant had not raised her grievance. We accepted that providing the correct proof a notice for possession had been served is a serious matter and that if there is a defect in the notice it could prevent a Court Order for possession being made. The matters raised related to ensuring that clients and customers were being properly and satisfactorily dealt with. It is incumbent on a manager to set an example. Matters concerning line management and the growth of the business are also important. These were things that an employer could consider important. We did not accept that the Claimant demonstrated that in themselves that the matters were frivolous or petty.

170. The Claimant relied upon the same matters to explain why the motivation was her race. On the Claimant's behalf it was submitted that Mr Lawton was an untouchable and the business could not afford to lose him and he would be defended to the hilt. This was an assertion and the way in which the grievance was subsequently investigated pointed the opposite way, namely that allegations were taken seriously. It was submitted that Mr Lawton had been racially abusive and offensive to the Claimant from the start. We did not find that those racially abusive or offensive incidents had occurred.

171. There was no evidence of untoward remarks or comments made by Mr and Mrs Tozer and we rejected that Mr Lawton had said the only matter alleged against him. The Claimant based her case on an assertion. We

were not satisfied that she adduced primary facts tending to show that a hypothetical comparator would not have been asked to attend a meeting to discuss these matters or that her race was a factor in the decision to speak to her. The claim of direct discrimination was dismissed.

172. In any event we were satisfied that the Respondents proved that the reason they raised the matters was because they were concerned about the Claimant's performance and that they considered the matters key parts of her role and that they were serious. We were satisfied the Respondents proved that it was in no sense whatsoever because of her race and the reason was performance.

173. We were also not satisfied that the Claimant adduced primary facts which tended to suggest it was related to her race. Therefore the claim of harassment was dismissed.

174. The Claimant said that her dismissal was a consequence of these matters being raised. We did not accept that direct discrimination or harassment occurred in relation to these matters and therefore we were not satisfied that there had been a discriminatory dismissal.

<u>The Third Respondent referring to '69' as her favourite sexual position in the Claimant's hearing</u>

175. We found as a fact that Mrs Tozer did not make the comment and therefore the basis of the allegation was not made out. Accordingly there could not be less favourable treatment or harassment on this basis and those claims were dismissed.

<u>Time</u>

176. As such all of the claims have been dismissed and therefore it was unnecessary to consider the issue of time.

_____
Employment Judge J Bax
Dated: 4 August 2023

Written Reasons sent to Parties on 21 August 2023

For the Tribunal Office