



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S. Famojuro

**Respondents:** (1) Boots Management Services Limited  
(2) Mrs E. Walker

**Heard at:** East London Hearing Centre

**On:** 27-30 June 2023  
and in chambers on 4 July 2023

**Before:** Employment Judge Massarella  
Ms J. Clark  
Prof. J Ukemenam

**Representation**

**Claimant:** Mr N. Toms (Counsel)

**Respondents:** Ms P. Leonard (Counsel)

## RESERVED JUDGMENT

The judgment of the Tribunal in relation to the First Respondent is that: -

1. the Claimant's claims of harassment related to race at Issues 5(a)(i) to (vii) succeed;
2. all other claims of harassment related to race, and the claims of direct race discrimination, are either not well founded, or cannot be considered because the equivalent harassment claims have been upheld; they are dismissed;
3. the claim of unfair (constructive) dismissal succeeds.

The judgment of the Tribunal in relation to the Second Respondent is that: -

4. the claims of harassment related to race at Issues 5(a)(i) to (vi) succeed;

5. **the claims of direct race discrimination are dismissed because the equivalent harassment claims have been upheld.**

## REASONS

### Procedural history

1. The Claimant presented his first case on 19 November 2020 against both Respondents, after an ACAS early conciliation period between 20 and 27 October 2020. At that time he was still employed. The claims against the Second Respondent (Mrs Walker) relate to her conduct on 18 July 2020 (below at para 14 onwards).
2. The Claimant presented his second case, against the First Respondent only, on 2 July 2021, after an ACAS early conciliation period between 26 May and 25 June 2021, complaining of unfair (constructive) dismissal and race discrimination.
3. Originally, the two cases were listed to be heard separately; the first case was listed for a final hearing in October 2021. That hearing was postponed about a week before it was due to be heard because of the ill-health of one of the participants.
4. There was a preliminary hearing for case management on 20 December 2021, at which Employment Judge T. Brown consolidated the two cases, approved an agreed list of issues, listed the cases to be heard on these dates and made orders for preparation.

### The hearing

5. We had an agreed bundle of 335 pages. We were provided with a cast list and chronology.
6. We heard evidence from the Claimant and, on behalf of the Respondent from: Mrs Emma Walker (pre-registration pharmacy technician); Ms Nicole Daley (pharmacy adviser); Mr Adam Barton (pharmacist store manager); and Mr Joe Barnes (store manager). With the Tribunal's permission Mrs Walker and Ms Daley gave evidence remotely (by CVP).
7. We read into the case on the morning of the first day and began to hear evidence in the afternoon.
8. Both Counsel produced helpful written submissions and supplemented them orally. We are grateful to them for their assistance.
9. The issues in the agreed list are shown as italicised subheadings at the relevant point in our findings of fact below. Our findings and conclusions are unanimous. In reaching them, we had regard to all the evidence to which we were referred and to Counsel's submissions. The fact that we do not refer to every point made should not be taken as an indication that we did not consider it.

10. The Tribunal apologises to the parties for the delay in sending out this judgment, which was caused by the competing demands of other cases.

### Findings of fact

11. The Claimant is black and of Nigerian national origin. His employment with the Respondent as a relief pharmacist began on 3 March 2012. He worked nine hours a week until April 2015, when he reduced to seven hours a week. He worked every other weekend, usually eight hours on Saturday and six on Sunday. When he was working in a particular pharmacy, he was the responsible pharmacist, charged with its safe and effective running.
12. Each of the Respondent's pharmacy stores had its own branch code; the relevant code appeared on each prescription to show where it would be dispensed.
13. The Claimant's line manager was Ms Stephanie Hayes; she was the store manager at the Claimant's base store, which was Branch 0937. The Claimant also worked as a locum for other employers.

### The events of 18 July 2020

14. On Saturday 18 July 2020, the Claimant was assigned to work as the responsible pharmacist at the Respondent's Silva Island Way branch in Wickford, Essex (store 5444). Covid restrictions were in place at that time: only one customer/family unit was allowed in the store at any one time; other customers had to wait outside.
15. This store was relatively small. There was a step down from the counter area, where the staff worked in view of the public, into the main area where customers could access the shelves. At the back of the store there was a passageway leading to a back office/staff room.
16. Also working on that day were Mrs Walker and Ms Daley; they were junior to the Claimant in that context; they are both white. Their line manager, and the store manager of this branch, was Ms Amy Munson, who was not at work on that day; she is also white.

*Issue 5(a)(i) [Harassment, direct discrimination]: on the 18th July 2020 at the First Respondent's pharmacy store in Wickford, Essex, the Second Respondent and Nicole Daley refused to assist the Claimant with filing bagged items or scripts*

17. Because the pharmacist was in charge, he could delegate duties to others, as appropriate. Although the pharmacist usually filed bagged items and scripts himself, it was reasonable for him to ask others to assist. On the morning of 18 July 2020, the Claimant asked Mrs Walker and Ms Daley if they would help with filing bagged items. Ms Daley replied that filing away scripts was not their job, it was the pharmacist's job. The Claimant replied that in his experience the team helped the pharmacist to file.
18. Ms Daley accepted at the hearing that she said that this was not her job, it was his. Ms Daley said for the first time in cross-examination that there was a 'two-hour queue outside the door'. Neither witness had said this in their contemporaneous statements and interviews or in their witness statements for

the Tribunal, although Mrs Walker had said it in her oral evidence, which preceded Ms Daley's, but in another context. We find it was not true.

19. Mrs Walker said in evidence that she and Ms Daley 'both had jobs to do, we had to get on with our own work' and that they had a 'discretion' as to whether to comply with the Claimant's request. In an internal interview she said something different: that the Claimant was simply leaving the filing for them to do and they told him that the pharmacist normally did the filing themselves.
20. While filing away bagged items, the Claimant realised that he had inadvertently placed the bagged labels on the underside of about half a dozen bags of the smallest size; this would make them more difficult to identify on the shelves. Ms Daley was at the computer; he asked her to generate fresh labels. Ms Daley replied that he should file them as they were. The Claimant pointed out that if they were filed with the labels on the underside, the labels would not be visible. Ms Daley said nothing and did not reprint the labels. Her explanation in cross-examination was that she did not do this 'because I was serving'. If that is right, she could have done it when she had finished serving; she did not.

*Issue 5(a)(ii) [Harassment, direct discrimination]: the Second Respondent and Nicole Daley refused to assist the Claimant in dealing with the prescription of an Asian customer which had been sent to a different store operated by the First Respondent*

21. An incident took place towards the end of the afternoon. The Claimant described it in a typed account, which he wrote on the day and emailed to Ms Hayes.
22. Mrs Walker and Ms Daley made handwritten statements about what they said had happened. Their evidence was that they made them on the day. We think that is unlikely. Ms Daley wrote the date and time of the statement: '18/7/20 16:30 p.m.', by which time the incidents described in her statement had not finished: the Claimant's phone records, which were in the bundle, confirm that his second phone call to Ms Hayes (para 61 below) was made at 16:37. Mrs Walker wrote the same time at the beginning of her statement, although it is unclear whether it is meant to be the time of the incident or the time of the statement. Whichever it is, it is wrong: it is too late to be the time at which the incident began; it is too early to be the time at which the statement could have been written. What is striking is that both Ms Daley and Mrs Walker wrote the same time at the beginning of their statements.
23. They both say in their witness statements for the Tribunal that Ms Munson asked them to write statements with a view to making a complaint about the Claimant. They denied cooperating on their statements; we think they probably did; there were striking similarities between the two statements, both what was included and what was left out. We find they probably wrote them early the following week. Ms Munson also produced a typed statement of her own, which is dated 18 July 2020, but appears to have been emailed to Mr Robert Beale on 22 July 2020. Its language suggests it was not written on the day.
24. At around 4 p.m. an Asian customer, accompanied by her mother, came into the store to collect a prescription. Ms Daley's evidence in her witness statement was that when the customer entered the store 'I was restocking the shopfloor with a basketful of products. I left this task to go and assist the customers'.

25. Ms Daley examined the prescription and discovered that it had been sent to be dispensed at another store. She asked Mrs Walker which store it was; Mrs Walker said it was the Basildon store, which was five miles away. Ms Daley told the customer that she would have to go and pick it up from Basildon. The patient was confused.
26. In her oral evidence Mrs Walker said that the patient volunteered that she normally went to Basildon. She did not say that in her contemporaneous statement (nor did Ms Daley). She said something different: that the patient did not seem to understand and that she, Mrs Walker, explained to her that 'at some point she had been nominated to that store, either by the GP or the store'.
27. In their witness statements both Ms Daley and Mrs Walker wrote what they say happened next: the Claimant overheard this exchange, came over to the counter, grabbed some paper, asked the patients for their name and address, did not say anything else (including explaining to the customers what he was doing), but simply walked to the back of the store. Mrs Walker said that the Claimant 'was slamming things as I could hear noises and I then heard him speaking to the Basildon store on the telephone'. Ms Daley expressly denied that the Claimant said anything to her or that she replied to him. She also said that the Claimant was 'storming around the pharmacy and seemed agitated'. We note that Mrs Walker said nothing about the Claimant storming around the store in her contemporaneous interview.
28. We find that account was untrue. In fact, what happened was that the Claimant came over and said that the store could call the Basildon store on behalf of the customers to ask for the prescription to be released. That this is the case is confirmed by Ms Munson's note later in the month in which she recorded that Ms Daley had told her that the Claimant was displeased with her because she would not make the call on behalf of the customer.
29. Both Ms Daley and Ms Walker then said that it was usual for patients to make such calls. The Claimant said again that the store could make the call. Ms Daley asked: 'Who should make the call?' The Claimant asked Ms Daley to do it. In front of the customers, Ms Daley refused and snapped at the Claimant: 'maybe you should call them up!' To respond in this way in front of a customer to a senior member of staff was disrespectful and insubordinate.
30. It was perfectly normal for a member of staff in the pharmacy to call another pharmacy to ask for a prescription to be released so that it could be dispensed. The only evidence to the contrary was Mrs Walker's oral evidence, which was that 'sometimes' stores say that the patient must phone themselves for reasons of confidentiality. There was no mention of this in her witness statement, in which she wrote: 'When a prescription has been dispensed at a different store, we can ask them to release it which would return it back to the cloud/spine, and then another store can dispense it'.
31. In her oral evidence Mrs Walker accepted that the Claimant asked Ms Daley to phone the Basildon store. When this was pointed out to Ms Daley in cross-examination, she continued to reply: 'not as I can remember'. When taken to Ms Munson's note she accepted that the exchange 'must have' taken place. She then let slip that the Claimant 'had the hump *because I wouldn't call*' [emphasis added]; she then stopped herself. She then explained that, because of the Covid

pandemic they were so busy that there was 'no way I could do that, I was on the front counter'. She then repeated her evidence that the Claimant 'did not ask me to call'. That was not true.

32. Both Mrs Walker and Ms Daley left the fact that the Claimant asked Ms Daley to call Basildon, and that Ms Daley refused, out of their contemporaneous statements; nor did they mention it when interviewed during the internal process; nor did they include it in their witness statements for the Tribunal. We find that this confirms that they put their heads together about their evidence at each stage. Omitting this has the effect of making the Claimant's actions (according to them: barging in, taking over the situation without giving them the chance to sort it out, indeed without even explaining what he was doing) appear unreasonable, almost irrational.
33. There were further serious inconsistencies and/or untruths. In her oral evidence, Mrs Walker said for the first time that the customer said she was happy to phone Basildon herself; indeed, at one point she said that the customer had, in fact, gone outside and made the call, although she changed her evidence almost immediately to say that the customer had merely agreed to make the call. She also suggested for the first time that the reason why Ms Daley did not offer to call was because there was a 'two-hour queue' of customers outside the shop. That was untrue: we remind ourselves of Ms Daley's evidence that, when the customers came into the store, she was restocking shelves; it is inconceivable that she would have been doing that, if there were a two-hour queue of customers waiting to be seen. When Ms Daley subsequently gave her evidence, she repeated this untruth.
34. At one point in cross-examination, Mrs Walker said: '[the Claimant] was calm and professional up until the whole situation [with the customer] then he just flipped'. We note that, in her witness statement, Mrs Walker said something different: that the Claimant had been 'rude' earlier in the day. Asked in what way, Mrs Walker referred to a conversation she had with him about a personal matter (which we need not go into in this judgment). She relied on the fact that the Claimant had a 'look on his face' which made her feel that 'I was somehow wrong'. Then, in answer to a question from one of the Tribunal lay members, Mrs Walker again said that, prior to the incident with the customers, 'we were getting on... We were chatting, I told him about my [personal issue], he told me about his children... It was not until this whole situation which was blown out of context that he started to change'.
35. When the Claimant phoned the Basildon store, the prescription was immediately released without any difficulty. He then asked Mrs Walker to dispense it. Mrs Walker asked the customers to wait outside while she did so. Ms Daley then approached him and said: 'after all, it was not my fault that the prescription was sent to the other store'. Mrs Walker said: 'No, it wasn't'. The Claimant checked the prescription, called the customers back into the store and gave it to them.

#### The exchange with Ms Daley when the Claimant asked her to leave

36. Some twenty minutes later, the Claimant calmly approached Ms Daley, who was in the store area and asked if he could have a private word with her in the staff room. There was a male customer in the store at the time. There are conflicting accounts as to who was serving him; we think it was probably Mrs Walker; we

think it unlikely that the Claimant interrupted Ms Daley while she was serving a customer.

37. Ms Daley gave a very different description of what happened: that the Claimant appeared at the back of the store and said: 'Nicole get out here now!' In her internal interview she said that he said 'Come here now.' We note the difference between these accounts; we find that the Claimant did not say either of these things; they are both exaggerations. We note that Mrs Walker accepted in oral evidence that the Claimant attempted to speak to Ms Daley in private; she omitted that important detail from her statement and criticised him for speaking to her in front of a customer.
38. Ms Daley said in her witness statement that she asked for there to be a witness 'as I was genuinely uncomfortable about going into a private room with Mr Famojuro, given the way that he was speaking to me. I wouldn't go out there with him as I felt extremely threatened by the way he shouted and I felt more comfortable speaking with him in front of Mrs Walker'. In her oral evidence she said she refused 'because of how aggressive he was with me... If he wasn't aggressive, I would have gone'. Ms Daley considered that there was no apparent reason for the Claimant asking to speak to her in private, given that she continued to refuse to accept that she had not earlier refused to assist the customers by phoning the Basildon store.
39. In her oral evidence Mrs Walker said that Ms Daley 'had the right to say no. If a young girl does not want to go out the back with a man and wants there to be a witness, she has the right to do so...if she felt unsafe as a woman.' There had been no suggestion previously that the Claimant's sex was a factor in this situation. Asked what Ms Daley was afraid of, Mrs Walker said that the Claimant's 'tone was very loud, aggressive'. It was pointed out that she did not say that in her witness statement. She replied: 'I remember him being loud, louder, he had a raised voice'. Asked which of these descriptions was the most accurate, Mrs Walker said 'he had a raised voice'. She accepted that the Claimant had not been aggressive but added 'he did not need to shout, did not need to raise his voice'. We note that immediately after acknowledging that the highest she would put it was that the Claimant had 'a raised voice', she described the Claimant as 'shouting' before correcting herself. We find she was willing to exaggerate her account to the Claimant's disadvantage.
40. Ms Daley's evidence in her witness statement was that the Claimant 'was in close proximity to me, shouting that I needed to leave. Somebody shouting at you in such close proximity is always intimidating'.
41. We do not accept Ms Daley's evidence. We think it probable that the Claimant was firm; he was not aggressive and he did not shout. We had ample opportunity to observe the Claimant in the course of the hearing: he is a quietly-spoken, courteous person.
42. We do, however, accept that Ms Daley began to cry when the Claimant asked her to leave. She refused to speak to the Claimant in private and said that she would only speak to him in the pharmacy in the presence of Mrs Walker.
43. The Claimant reminded Ms Daley that he was the responsible pharmacist and responsible for the safe and effective running of the pharmacy. Mrs Walker said:

'I am the technician'. The Claimant asked her not to interrupt. The Claimant told Ms Daley that because of the way she was behaving and her refusal to assist the customer earlier, he wanted her to leave the pharmacy for the rest of the day.

44. The Claimant's explanation for asking Ms Daley to leave was that, because of the way she had conducted herself during the day, in particular her refusal to follow his request to assist the customer by phoning Basildon, he was not confident that she would comply with his requests thereafter. In his view, she had failed to serve a Boots customer and, in doing so, had undermined him as the responsible pharmacist. Plainly, there would have been different ways of handling the situation on both sides: the Claimant might have assigned other duties to Ms Daley. But we find that his request was not unreasonable in the circumstances. Equally, Mrs Walker and Ms Daley might have responded in a different way to the Claimant's initial instruction, for example by seeking to de-escalate the situation. Unfortunately, they did the opposite: Mrs Walker, Ms Daley and Ms Munson escalated the situation, to the point where all three of them turned on the Claimant.

*Issue 5(a)(iii) [Harassment, direct discrimination]: the Second Respondent telling the Claimant he would have to leave and that she and Ms Daley were not prepared to work with him any longer*

45. Mrs Walker told the Claimant that he was 'out of order', that Ms Daley was not going to leave and that if anyone was going to leave it would be him and that she and Ms Daley would not work with him. In oral evidence Mrs Walker said that she was 'protecting her colleague and friend'.
46. She told Ms Daley to phone Ms Munson, which she did. It was suggested by Mrs Walker that Ms Daley was 'sobbing and incoherent'. We think it unlikely that, if that were true, Mrs Walker would have asked her to make a telephone call. We think it probable that there were moments during her call to Ms Munson where Ms Daley became upset and handed the phone to Mrs Walker.
47. Meanwhile Mrs Walker finished serving the male customer and apologised to him for anything he had overheard. He suggested that Mrs Walker lock the door to the store after he left, which she did. The Claimant, Mrs Walker and Ms Daley were now on their own in the shop.

*Issue 5(a)(iv) [Harassment, direct discrimination]: the Second Respondent shouting at the Claimant including whilst he was speaking on the telephone to his line manager and later saying to him, 'That's it. Amy has asked you to leave. Hand over the CD keys and get out'*

48. While Mrs Walker and Ms Daley were speaking to Ms Munson, the Claimant went to the staff room to call his own line manager, Ms Stephanie Hayes. Ms Hayes made a written note of her conversations with the Claimant. She still works for the Respondent, but she was not called to give evidence, we infer because her evidence would have been unhelpful to the Respondent's case; her record of what the Claimant said to her on the day is consistent with his account to the Tribunal.

49. While the Claimant was speaking to Ms Hayes, Mrs Walker accepts that she approached him and tried to interrupt his conversation with her. In her witness statement Mrs Walker wrote:

‘At one point, I remember him saying that “this is really bad we are trained to help customers yet she is not doing what she should” or words to that effect. I considered that he was taking the situation out of context. I got a little bit defensive and said that he was lying.’

Asked what the lie was, Mrs Walker said ‘that Ms Daley had refused to help the customer, in my opinion it was not true’. She said that it was ‘not OK for him to fabricate a story and lie about me and my colleague’.

50. In fact, the Claimant was neither lying nor taking the situation out of context: Ms Daley had not done what she should have done, which was to help the customer in the way the Claimant had asked her to do. We accept his evidence that Mrs Walker was shouting at this point, in an attempt to be heard by Ms Hayes. In her oral evidence, Mrs Walker did not accept that she had done anything wrong. The Claimant had retreated to the staff room to have a private conversation with his line manager; Mrs Walker followed him and tried to interrupt the call by shouting over him. That was disrespectful and unprofessional. It is clear that she was very agitated indeed. We agree with Mr Toms’ submission that this is hardly the action of someone who felt threatened and bullied by the Claimant.
51. When the Claimant went back into the store, Mrs Walker approached him and said: ‘Samson, you need to leave, we are not ready to work with you any longer’. The Claimant said the decision was not hers to make. He went back to the staff room to defuse the situation. Mrs Walker then approached him and said: ‘that’s it. Amy [Munson] has asked you to leave. Hand over the CD [controlled drugs] keys and get out’. The Claimant again reminded her that it was not her place to ask him to leave.

*Issue 5(a)(vii) [Harassment, direct discrimination]: Amy Munson, Store Manager, who was not present in the store immediately believing the allegations made by the Second Respondent on the telephone about the Claimant, shouting at him down the telephone that he was an utter disgrace and asking him to leave the store without hearing his side of the story.*

52. We note that Ms Munson had reached this decision without speaking to the Claimant or hearing his version of events. Mrs Walker said in oral evidence for the first time that Ms Munson ‘had tried several times to talk to him to no avail’. That was untrue: Ms Munson did not ask to speak to the Claimant before telling Mrs Walker to ask him to leave; that happened later.
53. Ms Daley then made a second call to Ms Munson. Ms Daley said in her contemporaneous statement that the Claimant ‘snatched my phone aggressively and ended the call’. That was not true: Ms Munson asked Ms Daley to pass the phone to the Claimant, which she did. The phone was on speaker; Ms Munson did not ask to speak to the Claimant privately, which we found surprising. The Claimant says that Ms Munson’s voice was so loud that he tried to turn the volume down and accidentally disconnected it. We believe his account; hitting the wrong button on someone else’s phone is easily done.

54. Ms Daley called Ms Munson back. She accepts that Ms Munson started shouting at the Claimant. Mrs Walker accepts that Ms Munson said to the Claimant: 'You're an utter disgrace for making Ms Daley cry' and asked him to leave the store. That is confirmed in Ms Munson's written account.
55. In giving this instruction, Ms Munson may have forgotten that, if the responsible pharmacist leaves a store, it must close.
56. Mrs Walker's description in oral evidence of the Claimant's demeanour at this point was as follows: 'his voice was raised, he was shouting, his voice was raised, he was loud'. We note again her willingness to use different terms interchangeably. Again, Mrs Walker said 'I was defending my colleague and me, we were two women'. Asked what she meant by this, she replied: 'one of us was very young, we felt threatened as women, he was very aggressive, he was a bully'. None of these very serious allegations had previously been made. We disbelieve them.
57. We observed the demeanour of all three witnesses over some considerable time. The Claimant, who is quietly spoken, was calm and courteous throughout and willing to make concessions when appropriate. By contrast, both Mrs Walker and Ms Daley were volatile, defensive and (as we have already recorded) quick to make fresh allegations when flaws in their original evidence were pointed out.

*Issue 5(a)(vi) [Harassment, direct discrimination]: the Second Respondent accusing the Claimant of being aggressive and threatening to call the police*

58. There is no dispute that Mrs Walker threatened to call the police. She says the reason why she did so was that the Claimant was shouting at her, 'towering over her' and had made her flinch. Mrs Walker said that 'I was near the step, I could have fallen down'.
59. Mrs Walker also said that the Claimant had pulled down his facemask. The Claimant accepted that at one point he did do so. We think it highly unlikely that he 'towered over' Mrs Walker: there is a significant height difference between them, but the Claimant is not physically intimidating. We do not believe that he shouted or was aggressive. We think that is an exaggeration on the part of Mrs Walker and Ms Daley; they continued to exaggerate in their oral evidence before us. As for the reference to Mrs Walker's being near the step and fearing she might fall, that was also not true: Mrs Walker mentioned this in her internal interview, but by reference to a later moment, when the Claimant was about to leave the store:

'I then asked if he could carry on working with us and he said no and was storming out. He barged past [Ms Daley] and I was stood by a step and he barged past me and I could have fallen down.'
60. Mrs Walker told the Claimant he was being aggressive and threatened to call the police. There was no justification for her doing so. If there had been, it is inconceivable that within a short period of time (and on her own account quoted in the previous paragraph above) she would have asked the Claimant to stay so that the store could remain open (see also below at para 64). If the Claimant had behaved in the aggressive manner Mrs Walker and Ms Daley described, it begs the question: why did they not go through with making a complaint about

him, as Ms Munson had suggested they should; and why was the Claimant not dealt with under the disciplinary procedure or referred to his professional regulator?

61. At this point the Claimant returned to the staff room and made a second call to Ms Hayes. Her note records the following:

‘I then spoke to Samson again and he explained that the situation had escalated and the doors were still locked to the public, and now the two dispensers had told him if he does not leave they will call the police. He told me this made him feel incredibly unsafe for himself and the pharmacy and thought it best if he left. I asked him if they could trade through the door and keep away from each other as the store was closing shortly anyway, that way allowing the patients to still get their medication. He told me he felt too unsafe for that. We agreed he would sign out as RP and explain clearly to the girls that this meant they could not trade or hand out prescriptions.’

62. Ms Daley said in cross-examination that Ms Hayes asked the Claimant to leave. Asked if the Claimant was speaking to Ms Hayes on speaker phone, she accepted that he was not. Asked how she heard what Ms Hayes said, Ms Daley said that ‘she must have told him to leave’. We note her willingness to present her own speculation as fact.

63. At the end of her note, Ms Hayes’ gave a description of the Claimant’s demeanour during these conversations with her.

‘Samson was calm during every call I had with him that afternoon and spoke clearly and professionally. It was very clear that Samson had the best interest of the patients and customers as well as the reputation of Boots at the front of his mind. Samson was clearly incredibly shaken by this, so much so I even checked that he was able to drive, but he told me he would be OK. He told me he has never been treated in such a manner, especially as a professional and was deeply hurt by this event and that he wanted a full investigation into the matter as he now feared for the patients. I could hear [Mrs Walker] in the background of one phone call but could not hear precisely what she was saying. As far as I can see Samson has never had any incident like this before since joining the company in May 2012.’

*Issue 5(a)(v) [Harassment, direct discrimination]: the Second Respondent and Ms Daley being abusive and insulting to the Claimant by saying the following: ‘Samson, you have a bad reputation; you have been like this since I have known you’ (Second Respondent); ‘Surprising - a grown man with three kids behaving like this’ (Ms Daley); ‘God knows how he got them’ (Second Respondent); and telling the Claimant that she hoped some cakes a colleague had offered to give him were poisoned (Second Respondent).*

64. After his second call with Ms Hayes, the Claimant went back into the store, carrying his belongings. Mrs Walker, with Ms Munson’s agreement, asked the Claimant to stay in the shop for the last half hour, so it would not have to close.

65. The Claimant queries why, if he behaved in the aggressive fashion Ms Walker described, she asked him to stay and why he was not disciplined and referred

to his professional regulatory body. He points out that he was the one pushing for an investigation.

66. The Claimant then said to Mrs Walker that she had always had a reputation for being rude. Mrs Walker accepts that she replied: 'Samson, you have a bad reputation; you have been like this since I have known you'. Mrs Walker says that she did this in retaliation for what the Claimant had said.
67. The Claimant alleges that Ms Daley said to him: 'Surprising - a grown man with three kids behaving like this'; and that Mrs Walker replied, 'God knows how he got them'. In her witness statement Ms Daley denied saying this but, in cross-examination, agreed 'I did say it was surprising a grown man with children would behave like this'. In cross-examination, Ms Daley said she 'did not remember' Mrs Walker's remark, even though in her witness statement she had written that 'Mrs Walker may have said something along those lines'. Mrs Walker's oral evidence was that she did not remember either statement. The Claimant says that he told Mrs Walker that not everyone felt that way about him and mentioned that a colleague, with whom he had a good working relationship, had offered him some cakes in the staff room, if he happened to be in the same store as her. The Claimant alleges that Mrs Walker replied: 'I hope they are poisoned'. Mrs Walker denied this.
68. We are satisfied these things were said; we think it very unlikely the Claimant would have chosen to make them up. By this stage, Mrs Walker and Ms Daley plainly felt empowered to be as rude as they liked to the Claimant's face.
69. The Claimant also says that Mrs Walker had said to Ms Daley earlier in the day that he talked too fast and that she never understood a thing he said. While it is right that the Claimant occasionally speaks quickly and is occasionally difficult to understand, it is not right to say that his speech is not generally understandable. We find that this remark was made by Mrs Walker to Ms Daley within the Claimant's earshot and that it was disrespectful to speak about him in this way.

#### The Claimant's departure from the store

70. Mrs Walker told Ms Munson that the Claimant left the store without signing out. Failing to do so would have been a serious conduct issue. Ms Munson told Mr Barton at her interview with him that she believed she had evidence of this.
71. In fact, when the Claimant left the store, he signed out in the register (a large, hardcopy book). Mrs Walker and Ms Munson would have seen this, had they checked. We note again their willingness to make allegations against the Claimant without foundation.
72. Mrs Walker also alleged that the Claimant did not properly deal with the controlled drugs keys, which involved sealing the packet and signing across it. In fact, she alleged that he simply threw the keys at her. Ms Daley's oral evidence, by contrast, was that he 'handed them over' but that he did not put them in a bag and sign it as he was meant to do.
73. Mrs Walker also wrote in her handwritten statement that she asked the Claimant if he had put the fencino patches back in the controlled drugs cupboard and he said that he had 'but told me that I could check it as he wouldn't.' In her witness

statement she wrote: 'I asked [the Claimant] if he had put the medications back in the CD cupboard, to which he said "yes". He told me I could check, as he wouldn't be doing so'. In her oral evidence this changed subtly to 'I asked if he had returned the patches; he said yes, check if you want to'. She did not repeat the allegation that he said he would not check himself. Ms Daley's evidence in her witness statement was that the Claimant 'stated that we should put the controlled drugs away ourselves', which is completely at odds with Mrs Walker's evidence. In oral evidence Ms Daley initially maintained that he did say this; she then changed her evidence to say that Mrs Walker 'asked him did you put drugs away and he said that for us to check ourselves'. Asked about this again by one of the Tribunal members, Ms Daley reverted to say that 'he said we should put them away ourselves'.

### The Claimant's grievance

74. The Claimant raised a grievance regarding the incident on 18 July 2020. Apart from some minor details, the account of the events of 18 July 2020 in the grievance is consistent with his other accounts.

*Issue 5(b), 8 and 13(b) [Harassment, direct discrimination, constructive dismissal]: the delay of the First Respondent [Ms Faux and Mr Barton] in investigating his grievance presented on the 18th July 2020*

*Issues 5(b), 8 and 13(b) [Harassment, direct discrimination, constructive dismissal]: the delay of the First Respondent [Mr Barton] in investigating his grievance presented on the 18th July 2020*

*Issue 5(c), 8 and 13(a) [Harassment, direct discrimination, constructive dismissal]: the failure of the First Respondent [Mr Barton] to properly investigate his grievance*

*Issues 5(e), 8 and 13(d) [Harassment, direct discrimination, constructive dismissal]: the failure of the First Respondent [Mr Barton] to investigate the circumstances of the store closure and/or failure to report the store closure*

### The timeline of the investigation

75. On 29 July 2020, the Claimant was contacted by Ms Sarah Faux who told him that she had been asked to investigate the grievance. She asked him when he was available to meet. The Claimant replied the next day, proposing Sunday 2 August 2020, with 12 August 2020 as an alternative. He was keen for the process to begin. The Claimant's preference was for the meeting to take place on a Saturday or Sunday, as these were his working days with Boots; he worked for other employers during the week; in our view, that was a reasonable request.
76. Ms Faux replied later the same day that she could not do the weekend of 2 August and that she was on leave for two weeks commencing 10 August 2024. She asked if she could come during his week off (i.e. the following week).
77. On 3 August 2020, Ms Faux chased the Claimant for an update on his availability. The Claimant replied the next day, explaining that he was spending his week off on holiday with his family but that he would be happy to meet the following Sunday, 9 August 2020.

78. On 6 August 2020, Ms Faux replied saying that she was 'also on leave and I will be away'. She said would arrange a date when they were both back from leave. On 8 August 2020, the Claimant emailed to say that he understood Ms Faux was on leave from 10 August 2020. He agreed they could meet when she returned.
79. On 14 August 2020, the Claimant emailed Ms Faux asking for CCTV evidence to be retrieved, viewed and stored.
80. If we assume that Ms Faux returned from leave on 24 August 2020, there was no contact between her and the Claimant for over four weeks.
81. The Claimant took two days' compassionate leave on 29 and 30 August 2020; his mother-in-law had died.
82. On 23 September 2020, the Claimant chased Ms Faux, asking when the meeting would take place and how long the investigation would take. Ms Faux replied the same day, saying that she thought the Claimant was on compassionate leave. She asked for dates on which he could meet. On 28 September 2020, the Claimant emailed Ms Faux, proposing dates in the first week of October. He offered weekdays as well as weekends in order to speed up the process. Ms Faux did not reply.
83. On 20 October 2020, the Claimant contacted ACAS.
84. On 21 October 2020, Mr Mark Pitt, the Claimant's trade union director of defence, emailed the Respondent asking for an update. Later the same day Ms Faux emailed Ms Lisa Rankin, the Respondent's pharmacist deployment manager, asking if the Claimant could be made available on 7 November 2020 for a two-hour meeting. She also emailed the Claimant to tell him what she was proposing. The next day, Ms Rankin emailed Ms Faux to say that 'on the 7<sup>th</sup> I've no contingency to move there or aci [sic] anywhere [sad face emoji]'.  
85. On 23 October 2020, Ms Faux wrote to the Claimant, asking him to attend a meeting on 7 November 2020 Two days later she emailed the Claimant to say that 'an official letter will be with you in the next few days'.
86. On 26 October 2020, the Claimant emailed Ms Faux, asking for details of the meeting on 7 November 2020.
87. On 27 October 2020, the ACAS certificate was issued.
88. On 30 October 2020, the Claimant emailed Ms Faux, thanking her for the formal letter and informing her that he would be having a member of the PDA Boots representative team present virtually; he asked for this to be facilitated.
89. On 3 November 2020, the Claimant emailed Ms Faux, asking for the meeting to be moved to 12 November 2020 to enable him to be represented. Ms Faux replied, saying that she would see what she could do. On 4 November 2020, Ms Faux emailed to say that she was not available on that date; she asked the Claimant to give her some alternative dates. On 5 November 2020, the Claimant emailed Ms Faux, proposing alternative dates.

90. The hearing was finally arranged for 19 November 2020. This was over four months since the incident about which the Claimant was complaining and over twelve weeks since Ms Faux returned from her leave.
91. The grievance hearing, conducted by Mr Adam Barton, went ahead on that day. It was agreed that there would be a follow-up meeting. On the same day the Claimant presented his first ET1.
92. On 1 December 2020, Mr Barton wrote to Mr Hala Jawad (PDA representative), informing him that Ms Faux had Covid; she was the only person with the key to the filing cabinet which contained statements about the incident.
93. On 4 December 2020, the Claimant emailed Ms Stephanie Hayes, the Claimant's line manager, informing her that he would be away from 6 to 20 December for his father's funeral in Nigeria.
94. On 15 December 2020, the Claimant emailed Mr Barton, asking about progress in the investigation and informing him that he was available for a virtual follow-up meeting. Mr Barton responded, saying that his area manager was arranging a day for him to conduct interviews. He also said that there was no CCTV in store.
95. On 28 December 2020, the Claimant emailed Mr Barton asking about the progress of the investigation.
96. On 2 January 2021, Mr Barton emailed the Claimant, telling him that the interviews with staff would take place on 5 January 2021.
97. On 3 January 2021, the Claimant emailed Mr Barton again, raising an issue he had raised at their meeting in November: he asked what steps had been taken to initiate to make a formal PIERS report, which he believed was required when a pharmacy store closed unexpectedly, as had happened on 18 July 2020. He also provided a timeline of the investigation so far, as Mr Barton had asked him to do. We found it very surprising that the Claimant was expected to provide information the Respondent should have had in its possession.
98. On 5 January 2021, Mr Barton interviewed Mrs Walker, Ms Daley, Ms Munson, Ms Faux, Ms Teelockhand and Ms Hayes.

#### The quality of the investigation

99. The single most serious failure in Mr Barton's approach was the almost complete failure properly to investigate whether race was a factor in the treatment of the Claimant.
100. The only question Mr Barton asked Ms Daley about the Claimant's allegations of race discrimination was framed almost apologetically: 'I have to ask but was there any racially discriminating comments made?', to which she replied 'No, definitely not.' It was no part of the Claimant's grievance that overtly racist comments were made. Mr Barton asked Mrs Walker a similar question; she gave a similar answer. In an extremely brief note of a telephone call with Ms Teelockhand, Mr Barton recorded that she said: 'NEVER HEARD ANYTHING that could be described as discriminatory (racial or otherwise)' [*original format*

*retained*]. This investigation failed to consider the possibility that race was a factor in any meaningful way.

101. Mr Barton failed to ask questions about Mrs Walker's and Ms Daley's behaviour on the day. He asked no questions about the filing/bagging/printing issues. He did not probe in any way the obvious anomalies in the accounts given by Mrs Walker and Ms Daley, including the fact that Mrs Walker threatened to call the police because of the Claimant's purported aggression, and then asked him to stay so that the store would not have to close.
102. There were other fundamental gaps in the investigation: Mr Barton did not ask Mrs Walker whether the Claimant had asked Ms Daley to phone the Basildon store; he did not probe Ms Daley's denial that he did, in the light of Ms Munson's statement; he concluded that they could not call the Basildon store as this would disrupt the normal repeat prescription process, notwithstanding the fact that this was not an explanation either of them advanced and he had praised the Claimant for doing just that.
103. Mr Barton tried to contact a witness (the male customer referred to at para 47). He made no attempt to contact the two Asian customers, whose evidence might support the account of the Claimant; the Respondent had contact details for them. This was a serious flaw. More than that, it suggested that Mr Barton was not approaching the investigation even-handedly. A further indicator of this was the fact that Mr Barton asked Mrs Walker and Ms Daley what they wanted by way of an outcome from the grievance. Given that this was not their grievance, indeed they were the subject of the complaint, that was an inappropriate question.
104. Mr Barton failed to ask Mrs Walker and Ms Daley about some of the specific allegations the Claimant made. Probably the Claimant's most serious allegation was in relation to Mrs Walker's threat to call the police. Mr Barton did not ask either Mrs Walker or Ms Daley about it. It only came up (briefly and in passing) when Ms Daley volunteered that it had happened. Mr Barton did not enquire at all into what caused Mrs Walker to say it. Mrs Walker did not mention it, other than to say that her husband was a police officer and he told her that she could have pressed charges against the Claimant for his conduct.
105. It is right that Mr Barton spoke to a number of people about the 'culture' in the store including the current, Mauritian, pharmacist. He seems to have accepted without further thought that because none of those people identified a general culture of racism, there could not have been a single incident of racism.
106. We make these criticisms while acknowledging the fact that an internal investigation, conducted by someone who is not a lawyer or a professional investigator, is unlikely to have the same degree of forensic rigour. But there is a basic level of competence in an enquiry of this sort, below which an investigation is simply not fit for purpose. In our view, that was the case here.
107. To be fair to Mr Barton, he had had no specific training in how to conduct grievances into serious allegations of discrimination. His previous, general training into conducting grievances was some ten years earlier. In our judgement, he was not equipped to carry out this process effectively. The size

of the organisation is such that the Respondent ought to have been able to assign someone who was so equipped.

108. We do not accept the Claimant's criticism that Mr Barton failed to look into the non-reporting of the store closure. He dealt with it expressly in his outcome letter.

*Issue 5(c), 8 and 13(c) [Harassment, direct discrimination, constructive dismissal]: the failure of the First Respondent [Mr Barton] to uphold the Claimant's grievance presented on the 18th July 2020*

109. On 15 January 2021, the grievance outcome letter was sent. Mr Barton summarised the Claimant's complaints and some of the evidence. Apart from upholding the Claimant's complaint about the delay in the grievance process, he dismissed all the other complaints.

110. Mr Barton's primary task was to decide whether the events happened in the way alleged by the Claimant and whether race was a factor. He avoided doing so by saying that there was no evidence, or no corroboration, or no third-party confirmation, that the key events happened as described by the Claimant. So, for example, in relation to Mrs Walker threatening to call the police, he wrote:

'My findings are that Emma confirms that comments made about calling the police are correct. She claims that she felt intimidated about the close contact nature of the exchange which could constitute assault under common law. She also alleges that you barged past her, on the steps into the dispensary, nearly making her fall. In Nicole's statement, she also suggests that in the heat of the exchange you were inadvertently spitting, implying that a mask was not being worn at the time. I conclude this point by saying both parties agree that there was a significant escalation of tensions in a highly emotive situation with comments from both parties adding to this. As with previous points made - the lack of any credible independent evidence makes it impossible to determine any decision either way.'

111. Even on a common-sense, non-technical approach, that is not a basis for dismissing a grievance. There was evidence of what happened: it was, on one side, Mrs Walker's and Ms Daley's evidence and, on the other side, the Claimant's evidence. It was Mr Barton's job to decide whom he believed; he failed to do that; he thereby avoided coming to any firm conclusions.

112. Mr Barton dismissed the race discrimination aspect of the grievance in one short paragraph on the basis that there had 'never been previous concerns of this nature' at the store and the Asian customer had since become a regular repeat customer. He concluded: 'After interviewing the colleagues present on the day of 18<sup>th</sup> July, I am unable to find any evidence of racial profiling'.

113. We note that there were certain complaints that the Claimant made which were unarguably correct, in particular the fact that Ms Munson concluded that the Claimant was in the wrong without speaking to him. Despite the fact that Ms Munson accepted that she 'should not have called him disrespectful [presumably, *disgraceful*] for making a young girl cry', he made no adverse findings about her conduct.

*Issue 8 and 13(a) [Harassment, direct discrimination, constructive dismissal]: [Mr Barnes'] failure properly to investigate the Claimant's grievance at the appeal stage*

114. On 22 January 2021, the Claimant appealed against the outcome of his grievance. On 11 February 2021, the Claimant attended an appeal hearing with Mr Joe Barnes. On 12 February 2021, the Claimant sent an updated appeal letter. On 5 March 2021, Mr Barnes interviewed Ms Munson.
115. In our view, Mr Barnes did not address the obvious deficiencies in Mr Barton's process and outcome, which meant that he did nothing, apart from securing some concessions from Ms Munson, to cure them. In particular, he did nothing to probe further the conduct of Mrs Walker or Ms Daley; he did not even meet them. His enquiry into these matters was superficial and lacked insight.

*Issue 5(c), 8 and 13(c) [Harassment, direct discrimination, constructive dismissal]: the failure of the First Respondent [Mr Barnes] to uphold the Claimant's grievance appeal*

116. On 12 March 2021, the appeal outcome letter was sent to the Claimant. Mr Barnes concluded that Ms Munson could have handled the situation 'in a more professional manner', that it was wrong to call the Claimant 'disgraceful for making a young girl cry' and that she should have spoken to him before proceeding. He said that she would be writing a letter of apology.
117. The central ground of the Claimant's appeal is that there was a 'flawed interview process and vital evidence was not sought'. Mr Barnes concluded (as he explained at paragraph 17.5 of his witness statement) that the only deficiency was Mr Barton's failure to ask certain questions of Ms Munson. In view of the fundamental flaws we have identified above, that conclusion was simply not open to him. His statement that 'I concluded that all other investigations were completed thoroughly' is, in our view, perverse.
118. The appeal was little more than a rubberstamping of the original, flawed process, with some minor concessions to the Claimant by way of a promised apology from Ms Munson, which was then not carried through until some time after his resignation.
119. In our view, Mr Barnes ought either to have allowed the appeal and ordered the matter to be reinvestigated by a different person, or simply re-heard the grievance himself.

*Issues 5(e) and (f) are alleged to be harassment related to race on the grounds that the alleged failure to investigate led or would lead to a perpetuation of the matters the Claimant had complained about.*

120. On 3 April 2021, the Claimant resigned on notice. In his letter, he referred to the prolonged nature of the investigation. He summarised his original concerns about the way Mrs Walker, Ms Daley and Ms Munson had treated him on 18 July 2020. He criticised the failure properly to investigate his allegations of discrimination by Mr Barton and Mr Barnes. He expressly referred to the fact that, some three weeks after Mr Barnes' appeal outcome was sent to him, he still had not received an apology from Ms Munson. He was further aggrieved by this and regarded it as a reflection of his experience of being ignored throughout the process.

121. We find that the Claimant resigned in response to these matters and that, if a last straw is needed, the failure by Ms Munson to apologise within a timely period provided it.

*Issue 5(f), 8 and 13(e) [Harassment, direct discrimination, constructive dismissal]: the failure of the First Respondent [Mr Barnes] to procure that its Mrs Munson sent the Claimant an apology in accordance with the grievance outcome.*

122. On 12 May 2021, Ms Munson sent a letter of apology to Mr James Greaves, asking him to forward it to the Claimant on her behalf. She wrote:

‘To Samson,

Hope this finds you well.

I have been made aware by Joe Barnes of how you felt during and after the incident that happened in store 5444 on 18/7/2020.

I wanted to let you know that I'm sorry that you felt this way. I believe the issues on the day in question were difficult for all involved. I accept responsibility for the role I played, but hope you appreciate that I was trying to handle that issue in the best way that I could over the phone and based on the information that I was being provided. For the avoidance of doubt, I can confirm that none of my actions were motivated by racism.

Yours sincerely’

123. Had the Claimant not already resigned when he received this, in our view it would have provided him with an apt last straw. We agree with Mr Toms’ submission that this was ‘the classic formulation of a non-apology’ and must have rubbed salt in the Claimant’s wounds. It does not even reflect the errors which Ms Munson acknowledged making to Mr Barnes and which he referred to in his outcome letter (para 116).
124. On 26 May 2021, the Claimant contacted ACAS again. His employment terminated on 20 June 2021. On 25 June 2021, ACAS issued the second certificate. On 2 July 2021, the Claimant lodged his second ET1. In October 2021, the two claims were consolidated.

Mrs Walker and Ms Daly’s evidence about their attitude to race

125. Mrs Walker told the Tribunal that she could not have been influenced by the Claimant’s race because, having worked with the company for 25 years, she made a lot of friends with pharmacists, two of whom were black Nigerian women who came to her wedding; one of them sang. She also invited several Asian pharmacists to her wedding. Moreover, the full-time pharmacists in the store, Ms Teelockhand, was Mauritian; the current pharmacist is Vietnamese.
126. When asked whether race played a part in her treatment of the Claimant, Ms Daley became very ; she tried to ask the Claimant’s Counsel questions (for example, ‘what has race got to do with it?’).

## The law

### Harassment related to race

127. Harassment related to race is defined by s.26 EqA, which provides, so far as relevant:

(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.

(5) The relevant protected characteristics are—

...

race

...

128. The Court of Appeal in *Pemberton v Inwood* [2018] ICR 1291 gave guidance on the correct approach to these provisions (*per* Underhill LJ at [88]):

**'In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (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). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.'**

129. The use of the wording 'unwanted conduct *related to* a relevant protected characteristic' was intended to ensure that the definition covered cases where the acts complained of were associated with the prescribed factor as well as those where they were caused by it. It is a broader test than that which applies in a claim of direct discrimination (*Unite the Union v Nailard* [2018] IRLR 730).

130. In *Raj v Capita Business Services Ltd* [2019] IRLR 1057 at [53] Heather Williams QC held that, in relation to the question of whether the conduct related to the protected characteristic, the burden of proof provisions in s.136 EqA requires the Tribunal to consider whether the facts were such that, absent any other explanation for it, the ET could conclude that it did (stage 1); if so, it must go on to consider whether the Respondent shown that, in fact, it was not (stage two).

The relationship between harassment and other forms of discrimination

131. Elias LJ in *Land Registry v Grant* [2011] ICR 1390 at [47] held that sufficient seriousness should be accorded to the terms ‘violation of dignity’ and ‘intimidating, hostile, degrading, humiliating or offensive environment’.

**‘Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.’**

132. He further held (at [13]):

**‘When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.’**

133. S.212(1) EqA provides that the concept of ‘detriment’ does not include conduct that amounts to harassment. Thus, a Claimant cannot succeed in a claim of both harassment and direct discrimination, or harassment and victimisation, in respect of the same conduct, since a finding of direct discrimination and victimisation necessarily involve findings of detriment. However, there is nothing in the statutory language to prevent him from advancing claims in the alternative by reference to these causes of action in respect of the same conduct.

Direct discrimination

134. S.13(1) EqA provides:

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

135. The question whether the alleged discriminator acted ‘because of’ a protected characteristic is a question as to their reasons for acting as they did; the test is subjective (*Nagarajan v London Regional Transport* [1999] ICR 877, per Lord Nicholls at 884). Lord Nicholls considered the distinction between the ‘reason why’ question from the ordinary test of causation in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065 at [29]:

**‘Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the “operative” cause, or the “effective” cause. Sometimes it may apply a “but for” approach...The phrases “on racial grounds” and “by reason that” denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.’**

136. It is sufficient that the protected characteristic had a ‘significant influence’ on the decision to act in the manner complained of; it need not be the sole ground for the decision (*Nagarajan* at 886).

137. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical comparator; and

secondly going on to consider whether that treatment is because of the protected characteristic, here race/religion.

138. More recently, the appellate courts have encouraged Tribunals to address both stages by considering a single question: the ‘reason why’ the employer did the act or acts alleged to be discriminatory. Was it on the prohibited ground or was it for some other reason? This approach does not require the construction of a hypothetical comparator: see, for example, the comments of Underhill J in *Martin v Devonshires Solicitors* [2011] ICR 352 at [30].
139. In *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010 at [36], the Court of Appeal confirmed that a ‘composite approach’ to an allegation of discrimination is unacceptable in principle: the employee who did the act complained of must himself have been motivated by the protected characteristic.
140. It is an essential element of a direct discrimination claim that the less favourable treatment must give rise to a detriment (s.39(2)(d) EqA). There is a detriment if ‘a reasonable worker would or might take the view that [the treatment was] in all the circumstances to his detriment’ (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at [35]). An unjustified sense of grievance does not fall into that category.

#### The burden of proof in discrimination cases

141. The burden of proof provisions are contained in s.136 EqA:
- (1) This section applies to any proceedings relating to a contravention of this Act.
  - (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
  - (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
142. The operation of the burden of proof provisions was summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 at [18]:
- ‘It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.<sup>1</sup> He explained the two stages of the process required by the statute as follows:
- (1) At the first stage the Claimant must prove “a *prima facie* case”. That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving “facts from which the Tribunal could conclude that the Respondent ‘could have’ committed an unlawful act of discrimination”. As he continued (pp. 878-9):
    - “56. ... The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal ‘could conclude’ that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.
    - 57. ‘Could conclude’ in section 63A(2) [of the Sex Discrimination Act 1975] must mean that ‘a reasonable Tribunal could properly conclude’ from all the evidence before it. ...”
  - (2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

<sup>1</sup> *Madarassy v Nomura International plc* [2007] ICR 867, CA

**“He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim.”**

**He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.’**

143. As for the ‘something more’ required to shift the burden, Sedley LJ observed in *Deman v Commission for Equality and Human Rights* [2010] EWCA Civ 1279 at [19]:

**‘the “more” which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.’**

144. Giving a wholly untruthful response when discrimination is alleged may indicate that the allegation is well-founded, and therefore shift the burden of proof, although it will not always do so: lies may be told for many different reasons (*per* Underhill LJ in *Otshudi* at [37]).

145. Giving a number of inconsistent explanations may also shift the burden to the Respondent, see for example *Birmingham City Council v Millwood* [2012] EqLR 910 (*per* Langstaff P) at [26]

**‘What is more problematic is the situation where there is an explanation that is not necessarily found expressly to be a lie but which is rejected as opposed to being one that is simply not regarded as sufficiently adequate. Realistically, it seems to us that, in any case in which an employer justifies treatment that has a differential effect as between a person of one race and a person or persons of another by putting forward a number of inconsistent explanations which are disbelieved (as opposed to not being fully accepted), there is sufficient to justify a shift of the burden of proof.’**

146. The consequence of the way that s.136 EqA works is that, if a respondent fails to show that the relevant protected characteristic played no part in its motivation for doing the act complained of, a tribunal is not obliged to make a positive finding as to whether or how it did so: indeed one of the reasons for the (partial) reversal of the burden of proof which it effects is that it can often be very difficult for a claimant to prove what is going on in the mind of the putative discriminator (*per* Underhill LJ in *Otshudi* at [44]).

147. The Court of Appeal in *Anya v University of Oxford* [2001] ICR 847 at [2, 9 and 11] held that the Tribunal should avoid adopting a ‘fragmentary approach’ and should consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

#### Time limits in discrimination cases

148. S.123(1)(a) Equality Act 2020 (‘EqA’) provides that a claim of discrimination must be brought within three months, starting with the date of the act (or omission) to which the complaint relates.

149. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated and ending with the day of the early conciliation certificate does not count (s.140B(3) EqA). If the time limit

would have expired during early conciliation or within a month of its end, then the time limit is extended so that it expires one month after early conciliation ends (s.140B(4) EqA).

150. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. The leading authority on this provision is *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530, in which the Court of Appeal held that Tribunals should not take too literal an approach to determining whether there has been conduct extending over a period: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs in which an employee was treated in a discriminatory manner.

151. A disciplinary investigation which comprises a number of steps or stages is an act extending over a period (*Hale v Brighton and Sussex University Hospitals NHS Trust*, UKEAT/0342/16/LA). Choudhury P held (at [44]):

**‘That outcome avoids a multiplicity of claims. If an employee is not permitted to rely upon an ongoing state of affairs in situations such as this, then time would begin to run as soon as each step is taken under the procedure. Disciplinary procedures in some employment contexts - including the medical profession - can take many months, if not years, to complete. In such contexts, in order to avoid losing the right to claim in respect of an act of discrimination at an earlier stage, the employee would have to lodge a claim after each stage unless he could be confident that time would be extended on just and equitable grounds. It seems to me that that would impose an unnecessary burden on claimants when they could rely upon the act extending over a period provision.’**

152. The Tribunal may extend the three-month limitation period for discrimination claims under s.123(1)(b) EqA where it considers it just and equitable to do so.

153. Time limits are to be observed strictly in ETs. There is no presumption that time will be extended unless it cannot be justified; quite the reverse (*Robertson v Bexley Community Centre* [2003] IRLR 434 at [23-24]).

154. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. There are statutory time limits, which will shut out an otherwise valid claim unless the Claimant can displace them. Whether a Claimant has succeeded in doing so in any one case is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the Tribunal of first instance which is empowered to answer it (*Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 *per* Sedley LJ at [31-32]).

155. This is a broad discretion. In exercising it, the Tribunal should have regard to all the relevant circumstances. Some factors are likely to be relevant in all cases. HHJ Auerbach summarised them in *Wells Cathedral School Ltd v Souter* (2021) EA-2020-00801 at [31-33]:

**‘As a matter of law, there is no particular feature that must necessarily be present in order for a just and equitable extension to be granted, nor that, if present, is automatically sufficient to warrant such a grant. However, some factors are, as it is put, customarily relevant. In every case the implication of refusing to extend time will be that the claimant will not be able to have a complaint adjudicated on its merits, as they would, had time been extended. Conversely, the effect of granting an extension of time will be that a respondent will be obliged to defend a complaint**

on its merits, and exposed to the risk of losing, in a way that would not be so, were time not to be extended.

There are also some essential legal considerations that flow from the statutory time limits framework itself, that form part of the general backcloth in every case, in particular, the inherent importance attached to observance of time limits for litigating, and finality in litigation, even where, as here, there is considerable flexibility in the test that the tribunal must apply when deciding whether or not to extend time. It is also established that the onus is on a claimant to persuade a tribunal that there is some good reason why it would be just and equitable to extend time in the given case.

Beyond those basic principles, what factors are relevant and how to weigh them up in the given case are matters for the employment tribunal.'

156. Other factors will usually include: the reason for the delay; whether the Claimant was aware of her rights to claim and/or of the time limits; whether she acted promptly when she became aware of her rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).
157. The fact that the Claimant was pursuing internal resolution by way of a grievance is a factor which may be taken into account, although it is not determinative (*Apelogun-Gabriels v London Borough of Lambeth* [2002] IRLR 116 at [16]).

#### Unfair (constructive) dismissal

158. S.94 of the Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer. S.95(1) ERA provides that he is dismissed if he terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct ('a constructive dismissal').
159. If there is a constructive dismissal, s.98(1) ERA provides that it is for the employer to show that it was for one of the permissible reasons in s.98(2) ERA, or some other substantial reason. If it was, s.98(4) ERA requires the Tribunal to determine whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.
160. The employee must show that there has been a repudiatory breach of contract by the employer: a breach so serious that he was entitled to regard himself as discharged from his obligations under the contract.
161. The Claimant relies primarily on a cumulative breach of the implied term of trust and confidence. The applicable principles were reviewed by the Court of Appeal in *London Borough of Waltham Forest v Omilaju* [2005] IRLR 35 (at [14] onwards):

'The following basic propositions of law can be derived from the authorities:

1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761.

2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Malik v Bank of Credit and Commerce International SA* [1998] AC 20, 34H-35D (Lord Nicholls) and 45C-46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to *destroy or seriously damage* the relationship (emphasis added).

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at *objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para [480] in Harvey on Industrial Relations and Employment Law:

"[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."

The last straw principle has been explained in a number of cases, perhaps most clearly in *Lewis v Motorworld Garages Ltd* [1986] ICR 157. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:

"(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (See *Woods v W. M. Car Services (Peterborough) Ltd*. [1981] ICR 666.) This is the "last straw" situation."

Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim "*de minimis non curat lex*") is of general application.'

162. In determining whether there has been a breach of the implied term, the question is not whether the employee has subjectively lost confidence in the employer but whether, viewed objectively, the employer's conduct was likely to destroy, or seriously damage, the trust and confidence which an employee is entitled to have in his employer: *Nottinghamshire County Council v Meikle* [2005] 1 ICR 1 (at [29]).

163. It is important to apply both limbs of the test. Conduct which is likely to destroy/seriously damage trust and confidence is not in breach of contract if there is 'reasonable and proper cause' for it: *Hilton v Shiner Ltd Builders Merchants* [2001] IRLR 727 (at [22- 23]).
164. Where there are mixed motives for the resignation, the Tribunal must determine whether the employer's repudiatory breach was an effective cause of the resignation; it need not be the only, or even the predominant, cause: *Meikle* (at [29]).
165. The employee must not delay his resignation too long or do anything else which indicates affirmation of the contract: *W.E. Cox Toner (International) Ltd. v Crook* [1981] ICR 823 (at 828-829). What matters is whether, in all the circumstances, the employee's conduct shows an intention to continue in employment, generally by continuing to work: *Chindove v William Morrison Supermarket plc*, UKEAT/0201/13 at [25-26].

### **Conclusions: time limits in the discrimination claims**

166. The dismissal is in time for all purposes. We are satisfied that the grievance/appeal process leading up to the resignation constituted conduct extending over a period, by analogy with the *Hale* case (above at para 151).
167. The claims arising out of the events of 18 July 2020 are two days out of time. They cannot constitute conduct extending over a period, linked to the conduct of the grievance process, because we have rejected those claims as claims of race discrimination below. The Claimant requires an extension of time.
168. We accept his evidence that he was relying on his trade union to present the claims in time. The authorities are clear that this fault should not be laid at the feet of the employee. The delay is very short and had no impact on the cogency of the evidence; there was no suggestion that either Respondent was prejudiced in any way by it; Ms Leonard accepted in her oral submissions that the only prejudice to the Respondents was that they would not benefit from the protection of the strict time limits. If time is not extended, the prejudice to the Claimant would be obvious and very substantial. We also had regard to the fact that the Claimant was pursuing an internal grievance process which was delayed by the Respondent's conduct.
169. Balancing all these factors, we have concluded that it is just and equitable to extend time.

### **Conclusions: harassment related to race and direct discrimination**

#### The events of 18 July 2020

170. We consider the events of 18 July 2020 initially through the lens of the Claimant's claim of harassment related to race.
171. Mrs Walker, Ms Daley and Ms Munson treated the Claimant adversely, both in front of customers and in their absence. The treatment escalated as the day went on, from dismissive discourtesy (Issue 5(a)(i)) to open insubordination (Issue 5(a)(ii), (iii) and (iv)) to highly personalised abuse (Issue 5(a)(iv), (v), (vii)). Mrs Walker's threat to call the police (Issue 5(a)(vi)) was the most extreme of

the acts. For a black man to be reported to the police for aggression against two white women, in the absence of any third-party witnesses, is potentially a very serious matter indeed. The conduct alleged was unwanted.

172. We have no doubt that, subjectively, the Claimant found their treatment of him on 18 July 2020 distressing and humiliating. He said so in his grievance and maintained the position consistently thereafter. By the end of the day, as he told Ms Hayes (paras 61 and 63) he was shaken and feared for his safety.
173. We are satisfied that, taken together, the conduct had the effect of creating a hostile, humiliating and offensive environment for the Claimant and violated his dignity. We have concluded that those terms are proportionate in these circumstances.
174. We are also satisfied that it was reasonable for the conduct to have that effect. The Claimant is an experienced professional of many years' standing; he is a dignified, sensitive and courteous man. It was clear to us that the events of that day had a very grave effect on him.
175. In relation to the events of 18 July 2020, we considered whether there was evidence from which we could reasonably conclude that the Claimant's race significantly influenced Mrs Walker's, Ms Daley's and Ms Munson's treatment of him. We had regard to the following factors:
  - 175.1. Mrs Walker, Ms Daley and Ms Munson made no overt racist comments;
  - 175.2. we have no reason to doubt Mrs Walker's evidence that she is friendly with other black colleagues, but the fact that a person has black friends does not mean they cannot discriminate in other contexts;
  - 175.3. Ms Daley said that she had called the police on a violent boyfriend, who was white; however, the Claimant was not violent, and it was Mrs Walker who threatened to call the police;
  - 175.4. Mrs Walker, Ms Daley and Ms Munson (all of whom are white) supported each other unreservedly, while giving no support to the Claimant (who is black);
  - 175.5. Mrs Walker felt able to comment disrespectfully on a black colleague's speech to a white junior colleague (Ms Daley) within earshot of him (para 69);
  - 175.6. both Mrs Walker and Ms Daley sought to characterise the Claimant as behaving aggressively towards them, when we have found that he did not do so; that they elaborated on this allegation in their oral evidence to the Tribunal, sometimes resiling from it almost immediately, was particularly striking;
  - 175.7. Mrs Walker repeatedly gave evidence as to these matters, both at the time and to the Tribunal, which was inconsistent (paras 19, 26, 32, 39 73), contradictory (para 30, 34) and exaggerated/untruthful (paras 28, 33, 39, 52, 56, 59, 71);
  - 175.8. Ms Daley repeatedly gave evidence about these matters, both at the time and to the Tribunal, which was inconsistent (para 32, 73),

contradictory (para 31, 67, 73) and exaggerated/untruthful (paras 18, 28, 31, 33, 37, 41, 53);

- 175.9. Ms Munson did not give evidence at all (either orally or by way of a statement); the only explanation provided for this was that she no longer worked for the Respondent and had declined to take part in the proceedings. There was no application for a witness order.
176. We were particularly concerned by the inconsistent and untruthful evidence given by both witnesses who attended the hearing. We concluded it could not be explained by frailty of memory; their accounts appeared to us to be distorted and exaggerated. Their repeated allegations of aggression could reasonably lead us to the conclusion that Mrs Walker and Ms Daley were stereotyping (or racially profiling) the Claimant as an aggressive black man, when all he was doing was seeking to assert his authority, in circumstances where they were undermining it. We also noted the absence of any evidence from Ms Munson. Taken together, we have concluded that the Claimant has proved facts from which we could reasonably conclude that Mrs Walker's, Ms Daley's and Ms Munson's treatment of the Claimant was significantly influenced by (and therefore related to) his race.
177. We are satisfied that the burden passes to them to provide an adequate non-discriminatory explanation for their conduct.
178. We deal with their explanations for each of the individual incidents in turn (taking them in the order in which they appear in our findings of fact above).
- 178.1. Issue 5(a)(i): as we have already recorded, Mrs Walker and Ms Daley gave contradictory evidence as to why they refused to assist the Claimant. The explanation relied on by Ms Leonard in her closing submissions is that there was a two-hour queue outside the shop. We have already rejected that explanation (para 18). If Ms Daley was serving a customer (para 20), she has not adequately explained why she did not help when she had finished doing so.
- 178.2. Issue 5(a)(ii): their initial explanation was that the Claimant did not ask them to assist the customers, which we have found was not true (para 27 onwards); in our judgement, none of their subsequent evidence satisfactorily explained why Ms Daley did not simply do what the Claimant asked them to do and call the Basildon store on behalf of the customer; the Claimant did this himself and the problem was swiftly resolved; Ms Daley's final explanation repeated the suggestion that there was a two-hour queue, which was untrue.
- 178.3. Issue 5(a)(iii): Mrs Walker's explanation in her witness statement as to why she asked the Claimant to leave was that she was 'shocked at Mr Famojuro asking Ms Daley to leave and I told him she had done nothing wrong.' Ms Daley had done something wrong: she had refused to follow a reasonable instruction from the responsible pharmacist. The fact that Mrs Walker disagreed with Mr Famojuro's decision that Ms Daley should leave is not an adequate explanation for asking him, a senior colleague, to leave, especially as she knew this would mean that the store would have to close.

- 178.4. Issue 5(a)(iv): Mrs Walker's explanation for shouting out that the Claimant was lying, in an attempt to be heard by Ms Hayes, was that it was not true that Ms Daley had refused to help the customer. It was true (para 50). Mrs Walker was telling the truth when she told the Claimant that Ms Munson had asked him to leave. However, she gave no explanation for why she used the language she did ('Hand over the CD keys and get out').
- 178.5. Issue 5(a)(vii): Ms Munson gave no explanation at all to the Tribunal as to why she made her mind up about what had happened without speaking to the Claimant.
- 178.6. Issue 5(a)(vi): Mrs Walker's explanation for threatening to call the police was that the Claimant was behaving aggressively, shouting at her and towering over her, causing her to be fearful of falling down the step. We have found (para 58 onwards) that he did not do so.
- 178.7. Issue 5(a)(v): We accept that Mrs Walker told the Claimant he had a bad reputation in retaliation for his making a similar comment about her. Mrs Walker and Ms Daley gave no adequate explanation as to why they made the other insulting remarks (para 67 onwards); Mrs Walker does not recall making them; we have found that she did.
179. We have concluded that Mrs Walker, Ms Daley and Ms Munson have not provided the Tribunal with an adequate, non-discriminatory explanation for why they behaved as they did. Consequently, they have not discharged the burden on them to show that there was no discrimination and these claims of harassment related to race must succeed.
180. Because we have upheld the harassment claims, we do not go on to consider the direct discrimination claims in relation to these events.

#### The Respondent's handling of the grievance

181. Turning to the discrimination claims relating to the grievance, we have concluded that the Claimant has not proved facts from which we could reasonably conclude that the conduct of Ms Faux, Mr Barton or Mr Barnes was motivated by considerations of race.
182. We think it more likely that Mr Barton and Mr Barnes were completely out of their depth. They had received no training in dealing with discrimination complaints. They both had a simplistic understanding of what discrimination is (hence Mr Barton's focus on whether racist language was used); we think they probably did not understand what the Claimant meant by racial profiling. Mr Barnes frankly accepted many of the flaws in his approach in the course of cross-examination.
183. Had these matters been raised as claims of victimisation, we might have been persuaded that the Claimant has proved facts from which we could conclude that they were motivated, in part at least, by the fact that the Claimant had brought a complaint of race discrimination, as opposed to a complaint of, for example, insubordination. We might have concluded that there was a pattern of delay, avoidance and obfuscation which suggested that the decision-makers were shying away from the fact that this grievance raised serious and difficult

issues of race. However, the case was not pleaded on that basis and so cannot be considered in that light.

**Conclusions: constructive dismissal**

184. We note that the Claimant did not rely on the events of 18 July 2020 as an element of the alleged breach of the implied term of trust and confidence. Although we found that surprising, it was a matter between him and his legal representatives.

Did the alleged events set out at paragraphs 13(a) to 13(e) separately amount to a breach of the Implied Term by the Respondent?

In the alternative, did the totality of the alleged events set out at paragraphs 13(a) to 13(e) above comprise a series of actions, with the last straw being the Respondent's failure to ensure the outcome of the grievance in the form of the agreed apology from Ms Munson was provided (13(e)) cumulatively amount to a breach of the Implied Term by the Respondent?

185. While some periods may be accounted for by the Claimant's unavailability (his week's holiday in August; his weekend's compassionate leave at the end of August; his absence to attend his father's funeral in December), we are satisfied that the overall period taken to complete this investigation (some six months from the incident to the report) was plainly excessive.
186. There are two periods of particular concern: from 24 August to 23 October 2020, when Ms Faux took no action to progress matters other than a single request to the Claimant to provide his availability (which he did); and 28 September to 21 October 2020, when there was complete radio silence from the Respondent.
187. It is the employer's responsibility to ensure that a grievance is dealt with within a reasonable period. In these circumstances, it was also, in our judgement, obliged to ensure that meetings with the Claimant could take place at the weekend, since that was when he worked for the Respondent. We acknowledge that Covid presented particular difficulties during this period, and that pharmacies were under pressure. However, Covid also gave rise to alternative solutions for arranging interviews to be carried out remotely. Whatever the pressures, there was a duty on the Respondent to ensure that this serious grievance was dealt with within a reasonable period. It failed to discharge that duty.
188. Turning to the adequacy of the investigation, it will be clear from our findings of fact above (para 99 onwards) that we considered Mr Barton's investigation and outcome to be grossly inadequate. Mr Barnes then failed to address those inadequacies in any meaningful way (para 114 onwards). His only achievement was to secure an undertaking from Ms Munson to apologise to the Claimant. She did not do so within a reasonable period. There was no, or no satisfactory, explanation for these failures.
189. We reminded ourselves that a failure properly to deal with a grievance will not necessarily amount to a breach of the implied term. However, in this case, we are satisfied that the failures which we have described above, were so fundamental that they were likely (viewed objectively) seriously to damage the relationship of trust and confidence between employer and employee. To be

clear: we think the delay, in itself, was sufficient to amount to a breach; the poor quality of Mr Barton's investigation and outcome also amounted, in itself, to a breach, as did the poor quality of Mr Barnes' approach. Plainly, taking the three things together, there was also a cumulative breach.

190. For the reasons we have already set out, the Respondent has not persuaded us that it had reasonable and proper cause for these failures.

If the Respondent is found to have breached the Implied Term under paragraphs 13(a) to 13(e) above, did that breach amount to a repudiatory breach of the Implied Term by the Respondent?

191. It is settled law that any breach of the implied term is a repudiatory breach.

Did the Claimant resign in response to the breach?

192. We have no doubt that the Claimant resigned, in part at least, in response to the serious failures in the process which profoundly undermined his confidence in the Respondent. Ms Leonard relies on the fact that the Claimant had recently moved to Colchester and suggested that he did not want to continue to work in South Essex. We were not persuaded by this. The distance is not great, and the Claimant often travelled considerable distances as a relief pharmacist. Even if it were a material factor, it is enough that the Respondent's breach was also a material factor; it need not be the sole, or even the main, reason for the resignation.

Did the Claimant waive the breach/affirm the contract?

193. The Claimant received the grievance appeal outcome on 18 March 2021 and resigned on 3 April 2021. We do not consider that the delay is such that it amounted to an affirmation of the contract, nor do we think that the fact that he resigned on notice amounted to affirmation. We do not think that the Claimant requires a last straw. If he does, then the failure of Ms Munson to make the apology which had been promised to him within a reasonable period provides it. The Respondent appears to have taken no steps to ensure that the very limited remedy which had been provided to the Claimant by Mr Barnes was put into effect.
194. Accordingly, the Claimant was constructively dismissed. The Respondent relies on some other substantial reason/conduct as potentially fair reasons for the dismissal on the basis that the Claimant 'made hostile comments, shouted and removed his mask'. The Claimant did not shout; he did make a single adverse comment about Mrs Walker's reputation and he did remove his mask. In our judgment these two matters were not sufficient grounds for the dismissal (which in a constructive dismissal means the acts by the Respondent which constitute a breach of the implied term). They may, however, give rise to an argument in relation to contribution, which we will consider at the remedy stage.

## **Remedy**

195. There will be a one-day remedy hearing to determine the compensation to which the Claimant is entitled. The parties shall provide their dates to avoid from January 2024 onwards to the Tribunal by no later than 16 October 2023. The

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hearing will then be listed and orders for preparation made. If the parties reach agreement as to remedy, they must notify the Tribunal immediately.

**Employment Judge Massarella  
Date: 7 October 2023**