EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss Mayuri Manjula	**v**	(1) Immigration and Nationality Services Limited; and (2) IANS Solicitors Limited

Heard at: Cambridge (by CVP)

On: 17, 18, 19 and 20 July 2023
23 and 24 October 2023
In Chambers: 25 October 2023

Before: Employment Judge L Brown

Members: Ms L Gaywood and Mr Rob Allan

Appearances
For the Claimant: In person
For the Respondent: Mr Hoyle, HR Consultant

RESERVED JUDGMENT

1. The Claim for Unfair Dismissal, against the Second Respondent contrary to s.94 of the Employment Rights Act 1996 ("ERA"), succeeds.

2. The Claim for Wrongful Dismissal against the Second Respondent succeeds.

3. The Claim for Unauthorised Deductions from Wages, in relation to unpaid wages, contrary to s.13 of the ERA 1996, against the Second Respondent succeeds.

4. The Claim for Direct Race Discrimination on the grounds of race, contrary to s.13 of the Equality Act 2010 ("EqA") against the Second Respondent, succeeds.

5. The Claim for a Failure to Provide a Statement of Particulars, contrary to s. 38 of the ERA 1996, against the Second Respondent succeeds.

6. The Claim for Indirect Race Discrimination contrary to s.19 EqA 2010, against the First and Second Respondent fails.

7. All remaining claims against the First Respondent are dismissed.

REASONS

Introduction

8. This matter, in terms of what took place at the Preliminary Hearing on the 21 April 2023, and at the First and Second adjourned Final Hearing, has a most complicated procedural history which will be summarised below.

The Claims

9. By way of an ET1 claim filed on the 18 August 2022 the Claimant brought claims for Unfair Dismissal, Wrongful Dismissal, Unauthorised Deductions from Wages, Indirect Race Discrimination, and a Failure to Provide a Statement of Particulars of Employment. At the date of her dismissal, she was employed by the Second Respondent.

10. On the 29 September 2022 the First and Second Respondent filed their ET3 form denying all claims.

The Case Management Hearing on the 21 April 2023

11. A preliminary hearing for case management took place by CVP on the 1 April 2023. The Case Management Order of Employment Judge Brady ("the Brady CMO"), arising from a Case Management Hearing which took place on 21 April 2023, summarised the issues in dispute in this case.

12. The Brady CMO set out the following claims and issues' although some paragraphs were identified (as underlined below) in the Brady CMO as not being in dispute. In addition, this Tribunal also dealt with and allowed the addition of a claim, at the outset of the hearing, for Direct Race Discrimination, and that is set out and underlined at paragraph 6.2 below. The detail of this additional claim being added is dealt with in detail later in this Judgement.

Brady List of Issues with additional claim of Direct Race Discrimination added by this Tribunal: -

The Complaints

44*. The claimant is making the following complaints:*

44.0 Unfair dismissal
44.1 Indirect Race Discrimination
44.2 Unlawful Deduction of Wages
44.3 Notice Pay
44.4 The Claimant also states that she has not received Terms and Conditions of Employment and claims under section 38 of the Employment Act 2002.

The Issues

45. The issues the Tribunal will decide are set out below.

*1**. Employment status***

1.1 Was the Claimant an employee of the Respondents within the meaning of section 230 of the Employment Rights Act 1996? The Respondent does not dispute this.

1.2 Was the Claimant an employee of the Respondents within the meaning of section 83 of the Equality Act 2010? The Respondent does not dispute this.

1.3 Were the Respondents associated employers under section 218(6) of the ERA 1996. (The Respondents accepts that the Claimant was employed by Respondents 2 when her employment ended)

2. Time limits

2.1 Given the date the claim form was presented and the dates of early conciliation, any complaint may not have been brought in time. The Respondents accepts that the claim form was presented within time of the Claimant leaving the 2nd Respondents employment.

2.2 Was the discrimination complaint made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

2.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

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

2.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

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

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

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

2.3 Was the unfair dismissal / unauthorised deductions / Notice Pay complaint made within the time limit in section 111 / 48 / 23 of the Employment Rights Act 1996? The Tribunal will decide:

2.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination / act complained of / date of payment of the wages from which the deduction was made etc? The Respondents accepts that the claim form was presented within time of the Claimant leaving the 2nd Respondents employment.

2.3.2 unauthorised deductions If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

2.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

2.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

*3**. Unfair dismissal***

3.1 Was the Claimant dismissed? Respondents says the Claimant was not dismissed but handed in her notice. Respondents will apply to amend the Grounds of Resistance to reflect this. Claimant says Respondents told her to hand in her notice and in any event after she had done so, she then received an email saying that she was dismissed.

3.2 What was the reason or principal reason for dismissal? The Respondents says the reason was conduct in that the mutual trust and confidence had broken down by the Claimant seeking employment elsewhere. The Tribunal will need to decide whether the Respondents genuinely believed the Claimant had committed misconduct.

3.3 If the reason was misconduct, did the Respondents act reasonably in all the circumstances in treating that as a sufficient

reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

3.3.1 there were reasonable grounds for that belief;

3.3.2 at the time the belief was formed the Respondents had carried out a reasonable investigation;

3.3.3 the Respondents otherwise acted in a procedurally fair manner;

3.3.4 dismissal was within the range of reasonable responses.

3.4 What was the reason or principal reason for dismissal? The Respondents says the reason was a substantial reason capable of justifying dismissal, namely the Respondents says the reason was conduct in that the mutual trust and confidence had broken down by the Claimant seeking employment elsewhere.

3.5 Did the Respondents act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

4. Remedy for unfair dismissal

4.1 The Claimant does not seek reinstatement.

4.2 If there is a compensatory award, how much should it be? The Tribunal will decide:

4.2.1 What financial losses has the dismissal caused the Claimant?

4.2.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

4.2.3 If not, for what period of loss should the Claimant be compensated?

4.2.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

4.2.5 If so, should the Claimant's compensation be reduced? By how much?

4.2.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

4.2.7 Did the Respondents or the Claimant unreasonably fail to comply with it by [specify alleged breach?

4.2.8 If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?
4.2.9 If the Claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

4.2.10 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

4.2.11 Does the statutory cap of fifty-two weeks' pay or £86,444 apply?

4.3 What basic award is payable to the Claimant, if any?

4.4 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

5. Wrongful dismissal / Notice pay

5.1 What was the Claimant's notice period?

5.2 Was the Claimant paid for that notice period? <u>The Respondents accepts that the Claimant was not paid for the notice period.</u>

5.3 If not, was the Claimant guilty of gross misconduct? / did the Claimant do something so serious that the Respondents was entitled to dismiss without notice?

6. Indirect discrimination (Equality Act 2010 section 19)

6.1 A "PCP" is a provision, criterion or practice. Did the Respondents have the following PCP:

6.2 Migrant workers were requested to work overtime without pay.

6.3 On 03 March 2022 Migrant workers were told there would be no annual leave or sick leave and that they would be working 10 hours a day for 6 days a week.

6.4 Requiring Migrant workers work on the weekends.

6.5 Migrant workers were told they would be paid overtime for weekend working and then they were not.

6.6 Did the Respondents apply the PCP to the Claimant?

6.7 Did the Respondents apply the PCP to persons with whom the Claimant does not share the characteristic, e.g., UK citizens or would it have done so?

6.8 Did the PCP put persons with whom the Claimant shares the characteristic, e.g., migrant workers from India at a particular disadvantage when compared with persons with whom the Claimant does not share the characteristic, e.g. UK Citizens, in that the emails were only distributed to the migrant workers. The Respondents says that the British National that the Claimant refers to (Maria Esguerra) was part of a different department and held a managerial role which is why she was not included in the emails.

6.9 Did the PCP put the Claimant at that disadvantage?

6.10 Was the PCP a proportionate means of achieving a legitimate aim? The Respondents says that its aims were:

6.10.1 Business needs

6.11 The Tribunal will decide in particular:

6.11.1 was the PCP an appropriate and reasonably necessary way to achieve those aims.

6.11.2 could something less discriminatory have been done instead.

6.11.3 how should the needs of the Claimant and the Respondents be balanced?

6.2 Direct Race Discrimination (Equality Act 2010 section 13)

6.2.1 This claim was added by Judge L Brown at the hearing on the 18 July 2023 pursuant to her general case management rules under Rule 29 of the Employment Rules of Procedure.

6.2.2 The Claimant is a non-British National migrant worker, and she compares herself with British-National workers.

6.2.3 Did the Respondents treat the Claimant less favourably on the grounds of race and in particular as a non-British-national migrant worker compared to British-national workers on the 9 March 2022 after she advised Mr Refugio that she was

resigning, and by their later alleged dismissal of the Claimant that day?

6.2.4 Was that less favourable treatment?

6.2.5 The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

6.2.6 The Claimant says she was treated worse than the following British-national workers: -

6.2.6.1 Maryam Sufi who left in September 2020.
6.2.6.2 Luca Theodorou who left in October 2021.
6.2.6.3 Martin Patrick who left in June 2021.

7. Remedy for discrimination or victimisation

7.1 Should the Tribunal make a recommendation that the Respondents take steps to reduce any adverse effect on the Claimant? What should it recommend?

7.2 What financial losses has the discrimination caused the Claimant?

7.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

7.4 If not, for what period of loss should the Claimant be compensated?

7.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

7.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

7.7 Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

7.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

7.9 Did the Respondents or the Claimant unreasonably fail to comply with it?

7.10 If so, is it just and equitable to increase or decrease any award payable to the Claimant?

7.11 By what proportion, up to 25%?

7.12 Should interest be awarded? How much?

8. Unauthorised deductions

8.1 Did the Respondents make unauthorised deductions from the Claimant's wages and if so, how much was deducted? The Respondents accepts that the final wages were not paid to the Claimant and will attempt to resolve the matter prior to the final hearing.

9. Remedy

9.1 How much should the Claimant be awarded?

9.2 Any other remedy? Schedule A2 Trade Union & Labour Relations (Consolidation) Act 1992 cases

9.3 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

9.4 Did the Respondents or the Claimant unreasonably fail to comply with it?

9.5 Is it just and equitable to increase or decrease any award payable to the Claimant?

9.6 By what proportion, up to 25%? Schedule 5 Employment Act 2002 cases

9.7 When these proceedings were begun, was the Respondents in breach of its duty to give the Claimant a written statement of employment particulars or of a change to those particulars?

9.8 If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

9.9 Would it be just and equitable to award four weeks' pay?

13. At the case management hearing, which resulted in the Brady CMO, the Respondents had applied to strike out the Claimants claim for Unfair Dismissal ("Strike Out Application"). Because the Claimants claim had transferred from the First Respondent to the Second Respondent on the 23 January 2022 the Respondents contended that due to the two Respondents not being associated employers, within the meaning of s.231 of the Employment Rights Act 1996, that the Claimant did not have the required service of two years continuous employment with the Second Respondent to bring a claim. However, at the case management hearing the Respondents withdrew their application for a strike out, conceding they could not argue that her claim for Unfair Dismissal had no reasonable prospect of success.

14. Paragraph 40 of the Brady CMO summarised the following about the Response of both the First and Second Respondents: -

"The claim is about Unfair Dismissal, Indirect Race Discrimination, Notice Pay and the Unauthorised Deduction of Wages. The respondent's defence is that the claimant was not dismissed, but that she resigned. This is contrary to the Grounds of Resistance that has been filed. The Respondent says that this is an error and will write to the Tribunal to request to amend the Grounds of Resistance."

15. As a result, it was ordered at paragraph 9 of the Brady CMO as follows:

The Respondent must write to the Tribunal and the other side by 05 May 2023 setting out their application to amendment the Grounds of Resistance.

16. No such application to amend the Grounds of Resistance was ever made by the First or Second Respondent.

Concession by the Respondents on Continuous Service

17. In relation to the Strike Out Application, on 7 June 2023, Mr Tidy from Croner Law then conceded, as follows in an email to the Claimant: -

> *"Dear Mayuri*
>
> *We are no longer contesting the continuous service point. This was contested by my client without any legal knowledge or assistance on the matter. Hopefully, this means we do not need to bother you with evidence of your work.*
>
> *Kind regards*
>
> *Jacob"*

18. At no point did Mr Hoyle dispute, during the final hearing and on behalf of the Respondents, that the email in paragraph 17 above ("the Tidy Email") was

anything other than a full concession by the First and Second Respondents on this part of their defence.

Procedure

19. The Claimant gave evidence at the First Hearing and called evidence from: -

- Mr Kurotimi M. Fems;
- Mr Gilbert Taylor;
- Ms Tanyatorn Autchayawat;
- Mr Oladimeji Oladapo.

20. The Claimant also relied on a joint Written Statement entitled 'To Whom It May Concern' from: -

- José Rodrigo Barrozo;
- Wiggle Gey Castro;
- Mark Joseph Hui; and
- Princess Gilese Oxicino.

As these witnesses did not attend the First and Second Hearing, we did not attach any weight to their joint statement.

21. The Respondents called Mrs Germin Mohamed, a qualified Solicitor and Director of the Second Respondent, to give evidence at the Second Hearing but did not call anyone else.

22. There was also a written witness statement from a Parak Chouhan on behalf of the Respondent. We did not attach weight to this statement as this witness did not attend the hearing.

23. There was also a written witness statement from Mr Ian Refugio on behalf of both Respondents. We did not attach weight to this statement as this witness left the hearing before he could be cross-examined.

24. We had a bundle of documents prepared by the Claimant that was referred to by both parties at the hearing and was 95 pages long.

25. The bundle of documents was supplemented throughout the hearing by the following documents emailed to the Tribunal: -

(a) Correspondence regarding disclosure between the parties.

(b) Statement of Particulars of employment sent to the Claimant by the First Respondent dated the 4 February 2019.

(c) Letters of appointment for the medical appointments of Mrs Germin Mohamed.

(d) A variety of email correspondence between Mr Refugio and some of the witnesses together with screenshots of WhatsApp messages.

The Hearing on the 17, 18, 19 and 20 July 2023 ("the First Hearing")

First Postponement Application

26. Prior to the hearing commencing, the Respondents applied for a postponement of the hearing on the grounds of the ill health of their witness Mrs Germin Mohamed, and due to the medical appointments of Mrs Germin Mohamed but this was refused by Judge Quill **(**"First Postponement Application").

Second Postponement Application

27. This Hearing commenced at 10.00 am on 17 July 2023. Initially there were technical problems as the clerk to the hearing could not hear me and the parties also had difficulties hearing me speak. The parties at my request left the hearing and rejoined but the sound problems remained and so I adjourned the hearing until 10.30 am while the clerk sought technical help. At 10.30 am whilst the Claimant could now hear me Mr Hoyle for the Respondents could not, and it was also very difficult for me to hear what he was saying. I ascertained that he was applying for a postponement of the hearing on the basis he had only received the Claimant's witness statements on Saturday 15 July 2023 ("Second Postponement Application"). I noted there were five witness statements, including the Claimant's witness statement.

28. Due to the technical difficulties, and upon concluding the hearing would not be able to go ahead until those technical difficulties had been overcome, I ordered the hearing would be postponed until the next day on the 18 July at 10.00 am, as this would give the Respondents time to read the Claimant's statements and would also allow the Tribunal time to overcome the difficulties with the CVP hearing technology.

29. The hearing then recommenced at 10.00 am on the 18 July 2023. The clerk and all parties stated they could hear me clearly. Mr Hoyle stated that he could not hear me as well as he would like to. I said in that case he would have to attend in person in Cambridge. He said this was not possible and I asked him where he was based and he replied Nottingham. I pointed out that he would clearly be able to attend in Cambridge the next day at the very least. He stated he would continue with the hearing and tell me if he had difficulties hearing me. After this point no difficulties in hearing me were reported by Mr Hoyle.

Amendment of the Claim and the introduction of a claim of Direct Race Discrimination

30. At the outset of the adjourned hearing on day two of the hearing I raised the issue of the Claimants claim of indirect race discrimination. I explained that in accordance with the recent case of *D v E 2023 EAT* it was established law that a provision, criterion or practice ('PCP') had to be neutral and apply to everyone in the workforce for such a clam to be brought, and that the PCP's defined (as set out in paragraph 6 of the Brady CMO inserted into paragraph 12 above) did not appear to me to be neutral PCP's as the PCP's as set out in the Brady CMO were stated as being PCP's only applicable to the migrant workers employed by the Respondents and as such were framed in a discriminatory way.

31. I added that in any event it was clear to the me that this claim also appeared to be a claim about direct race discrimination. In particular I read out the following passage from the Claimant's ET1 form which stated: -

'I believe I am owed £7930.29 by IANS Group. I believe that I am eligible for compensation of 10,000 pounds under discrimination on the basis of immigration status in that a British national would not have been treated the same way I was when I informed the Respondents of my intention to leave the employment. I was mentally distraught and devastated as the Respondents called me selfish, ungrateful for the opportunity given and accused me of a breach of trust for wanting to switch employment. I was mentally disturbed and was extremely stressful during this time as I had no other means of income to support myself in the UK.'

32. I asked the Claimant if this claim set out in her ET1 form was in effect her asserting that if a non-migrant worker/British-national worker had resigned they would not have been treated in this way. She confirmed that this was what she was saying. I explained to her that this was in fact a direct race discrimination claim in relation to the alleged treatment of her and then her alleged forced resignation/alleged dismissal by the Respondents of her that day. She confirmed that she understood what I was explaining to her in that she was accusing the Respondents of direct discrimination in that part of her ET1.

33. I therefore stated that of my own initiative and under my case management powers, under Rule 29 of the Employment Tribunal Rules of Procedure, that I proposed to add, subject to what the Respondents had to say, a claim of Direct Race Discrimination.

34. I then heard from the Respondents' representative who objected in the strongest terms to her claim being amended in this way. He stated that the Claimant was a qualified solicitor. That she had had ample opportunity and was properly qualified to plead her own case. He stated that his colleague, Mr Tidy, who had previously conducted this case and attended the previous preliminary hearing before Judge Brady had commented to him that the Claimant had arrived with detailed written submissions which set out her claim for Indirect Race Discrimination only. He said that claim referred to migrant workers not Indian nationals, and as a consequence the claim related to migrant workers generally not an Indian worker specifically.

35. He said he objected to the re-pleading, and he objected to it being re-pleaded by this Tribunal and that he was here to defend an indirect discrimination claim and not a direct discrimination claim and that it was wholly unfair to do this to his client on day two of the hearing. No other prejudice was cited by Mr Hoyle other than they had prepared to defend the claim on the basis of indirect discrimination not direct discrimination. He did not point towards any particular evidence that would be needed to defend the claim of direct race discrimination which they did not have available at this hearing.

36. I pointed out that the case of *Selkent Bus Company v Moore [1996] ICR 836* was the well-known authority, and that where an amendment was simply a relabelling of something plain on the face of the claim form, as here, a relabelling of the claim could be permitted. I said it could not be disputed that it was plain from the face of the claim form that there was an allegation of direct race discrimination in relation to the events on the day that the Claimant left her employment on the 9 March 2022.

37. The Claimant stated that while she was a qualified solicitor, she was a newly qualified solicitor with no experience in litigation. She pointed out that she qualified in India and had no litigation experience. She pointed out that while she did her training in the UK, she didn't get any experience in litigation and specialised in immigration law. She said she was a litigant in person and the Respondents, despite being a law firm, had hired representation in the form of employments solicitors but she couldn't afford to do the same. She said she shouldn't be held to the standard of a professional representative and that would not be a level playing field.

38. At this point the Claimant then added that she had also, in her skeleton argument, referred to Harassment. I asked whether she made a specific application at the last open preliminary hearing for a claim of Harassment to be added and she said she did not make that application, but it was referred to in her skeleton argument submitted at that hearing. She clarified that she assumed Harassment was part of Indirect Race Discrimination. She also said that at the last open preliminary hearing, and after the Respondents read her skeleton argument, they conceded that they were no longer to applying to strike out her claims.

39. I clarified if she meant they had dropped the application to strike out her Unfair Dismissal claim, in that it was said the First and Second Respondents were not associated employers and therefore she did not have the required continuous service of two years employment. She clarified she did mean that they withdrew the strike out application in relation to the Unfair Dismissal claim.

40. I pointed out that the case management order did not refer to any claims of Harassment. I asked if she was applying to add Harassment to her pleaded claims and she said that she was.

41. Mr Hoyle then submitted that she had received the Brady CMO summarising her claims at p.29 of the bundle and she had had the opportunity to say if it was wrong or incomplete and that they had had no opportunity to deal with any harassment claim, and that it would be a very unsafe thing to do for this Tribunal to second guess Employment Judge Brady. He submitted that that application should be refused and that it would not be right or proper to add another new claim, and with no reference in the claim form to harassment Selkent could not apply.

42. We then adjourned for fifteen minutes at 10.20 am to consider the Respondents objections to the introduction of a claim of direct race discrimination and harassment. We considered the relevant legal tests.

The Law on the Amendment Application

43. In particular in *Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore [1996]* UKEAT/151/96 the EAT provided helpful guidance on the consideration of applications to amend, per Mummery J:

(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:

(a) The nature of the amendment

Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of time limits

If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions e.g., in the case of unfair dismissal, S.67 of the 1978 Act.

(c) The timing and manner of the application

An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made

earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.

44. Whilst the Selkent factors will often be highly relevant to whether an amendment application is granted or not, this will not always be the case since the Tribunal is not engaged in a tick-box exercise; see *Abercrombie v Aga Rangemaster Ltd* [2014] ICR 209 CA.

45. Notably, even when an amendment would involve adding an out of time claim, this will not necessarily be decisive; see *Transport and General Workers Union v Safeway Stores Ltd* (2007) UKEAT/0092/07. Ultimately, the interests of justice require a balancing exercise.

46. The body of case law which has developed in connection with amendment applications was considered by the EAT in Vaughan v Modality Partnership [2021] IRLR 97, per HHJ Tayler:

20. In Abercrombie Underhill LJ went on to state this important consideration, at para [48]:

'Consistently with that way of putting it, the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted.'

21. Underhill LJ focused on the practical consequences of allowing an amendment. Such a practical approach should underlie the entire balancing exercise. Representatives would be well advised to start by considering, possibly putting the Selkent factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions. It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment. Representatives have a duty to advance arguments about prejudice on the basis instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment

that causes no real prejudice. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim.

22. Refusal of an amendment will self-evidently always cause some perceived prejudice to the person applying to amend. They will have been refused permission to do something that they wanted to do, presumably for what they thought was a good reason. Submissions in favour of an application to amend should not rely only on the fact that a refusal will mean that the applying party does not get what they want; the real question is will they be prevented from getting what they need. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence. This is not a risk-free exercise as it potentially exposes a weakness in a claim or defence that might be exploited if the application is refused. That is why it is always much better to get pleadings right in the first place, rather than having to seek a discretionary amendment later.
[…]

24. It is also important to consider the Selkent factors in the context of the balance of justice. For example:

24.1. A minor amendment may correct an error that could cause a claimant great prejudice if the amendment were refused because a vital component of a claim would be missing.

24.2. An amendment may result in the respondent suffering prejudice because they have to face a cause of action that would have been dismissed as out of time had it been brought as a new claim.

24.3. A late amendment may cause prejudice to the respondent because it is more difficult to respond to and results in unnecessary wasted costs.

25. No one factor is likely to be decisive. The balance of justice is always key.

47. HHJ Tayler reiterated some of these points recently in Chaudhry v Cerberus Security and Monitoring Services Ltd EA-2020-000381-OO, when he emphasised that Tribunals should remain focused on the balance of injustice and/or hardship of allowing or refusing the amendment.

48. In *Chandhok v Tirkey* [2015] ICR 527 EAT, per Langstaff P it was said as follows:

16 […] The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a

witness statement, nor a document, but the claims made— meaning, under the Employment Tribunals Rules of Procedure 2013 (SI 2013/1237), the claim as set out in the ET1.

17 … the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.

18 In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.

49. In the case of *Cocking v Sandhurst (Stationers) Ltd* [1974] ICR 650 at 657BC it is stated that:

"In deciding whether or not to exercise their discretion to allow an amendment, the Tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties, including those proposed to be added, if the proposed amendment were allowed or, as the case may be, refused."

50. We also had regard to the case of *Parekh v London Borough of Brent* [2012] EWCA Civ 1630 [2012] EWCA Civ 1630 where it is made clear a list of issues is not a pleading and a Tribunal is not required to adhere to it 'slavishly.'

51. In Selkent it was established that Tribunal must have regard to the nature of the amendment, the applicability of time limits and the timing and manner of the application. The amendment proposed by this Tribunal was a relabelling of a claim apparent from the face of the ET1 form and this was not disputed by the Respondents during the hearing. As to the manner of the application this did not apply as this was introduced by this Tribunal pursuant to my case management powers under Rule 29 and in accordance with the interests of justice.

52. On the issue of time limits we had regard to the fact that in this case the relabelling of the claim of direct race discrimination was outside the statutory time limit, but this was only one factor we had to consider. In accordance with Selkent we had to consider whether this amendment was minor or significant, but in particular we considered that it was 'the addition or substitution of other labels for facts already pleaded to,' in that the adding of the direct race discrimination claim was simply a new label for what was set out on the face of the ET1.

53. In any event on the issue of the timing of the amendment of the claim in the Vaughan case HHJ Taylor referred to the reasoning of this test by Underhill P, as he then was, in the case of Safeway Stores. He stated that on a correct reading of Selkent the fact that an amendment would introduce a claim that was out of time was not decisive against allowing the amendment but was a factor to be taken into account in the balancing exercise.

Decision on Amendment

54. After adjourning to make our decision at 10.35 am the hearing recommenced and we gave our decision, which was that the Claimant be permitted to pursue her claim of direct race discrimination on the grounds that the Claimant alleged that as a non-British national migrant worker she was treated less favourably because of race compared to a British-national worker.

55. I stated that we had balanced the hardship between the parties and the prejudice to each party when reaching our decision. In particular that the allegation of direct race discrimination had been on the face of the ET1 from the outset and the Respondents would not be prejudiced in any way by this allegation which had always formed part of the Claimants claim. The hardship to the Claimant of not being allowed to pursue this claim as direct race discrimination was obvious. She would lose the right to bring a claim for direct race discrimination on one of the major allegations in her case that being the events that occurred on the last day of her employment by the Respondents.

56. The Respondents were already responding to the allegation made by the Claimant i.e., about the manner in which Mr Refugio was alleged to have treated the Claimant on the 9 March 2022, in their witness statements, and there was no

hardship caused to them in relation to being able to defend, at this stage, a claim of direct race discrimination.

57. After balancing the hardship and prejudice between the parties we found the hardship and prejudice to the Claimant of not being able to bring this claim was greater to the Claimant than any hardship or prejudice to the Respondents of defending this claim and I therefore ordered that the claim of direct race discrimination be added to the Claimant's claims.

58. Sometime later in the hearing I revisited the claim of direct race discrimination and asked the Claimant to confirm which incidents this claim of direct race discrimination related to. The Claimant confirmed that it related to the events on the 9 March 2022 when she advised Mr Refugio that she was resigning, and her dismissal when he insisted, she resign that day, but that her other claim prior to the events of that day still related to indirect race discrimination on the basis of the pleaded PCP's.

Comparators

59. I asked the Claimant to provide her comparators for the direct race discrimination claim and she provided them by email to the Tribunal and they were defined as:

    (a) Maryam Sufi who left in September 2020.
    (b) Luca Theodorou who left in October 2021.
    (c) Martin Patrick who left in June 2021.

Application to add a claim of Harassment.

60. In relation to the application that the Claimant had made to add a claim of harassment this application was rejected. There was no mention of harassment on the grounds of race on the face of the ET1 form and the Claimant, despite using the word harassment in a written skeleton argument, had not made any application to add that claim at the previous open preliminary hearing before Judge Brady.

61. This would be the introduction of a new claim significantly outside the limitation period. ACAS conciliation started on the 08 June 2022 and if the harassment claim related to her treatment on the 9 March 2022, then she was seeking to introduce that claim 11 months outside the limitation period, assuming she had at least one month to issue such a claim from the date of the ACAS certificate, date B, which was issued on the 19 July 2022. This meant such a claim would have had to have been brought by the 19 August 2022, 11 months before the date of the application by the Claimant on the 19 July 2023. When balancing the hardship between the parties the hardship to the Respondents was greater. They would have an entirely new cause of action to defend during the hearing which they were not prepared for.

62. We had regard to the caselaw above, and in particular Selkent and Chandok, but also took into account of the case of Vaughan on the issue of the timing of the amendment of the claim as set out in the Vaughan case where HHJ Taylor referred to the reasoning of this test by Underhill P, as he then was, in the case of Safeway Stores, and where he stated that on a correct reading of Selkent the fact that an amendment would introduce a claim that was out of time was not decisive against allowing the amendment but was a factor to be taken into account in the balancing exercise.

63. However, and on balance we did not consider we should allow the introduction of a new claim of harassment outside the statutory time limits of 11 months, particularly where such a claim was not evident on the face of the ET1 form, and this was therefore not a case of relabelling as with the case of direct race discrimination. We found that allowing the introduction of a harassment claim would cause severe hardship and prejudice. In Selkent it was said: -

    'An amendment may result in the Respondents suffering prejudice because they have to face a cause of action that would have been dismissed as out of time had it been brought as a new claim.'

64. This claim if brought as a new claim would in all likelihood have been dismissed as out of time. In addition, the Claimant had not pursued any formal application before Judge Brady and although the Claimant stated that she thought harassment was part of a claim of indirect race discrimination we did not find her legal ignorance on this issue should outweigh the prejudice to the Respondents that they would suffer if we allowed the claim to be added in at this late stage**.**

Third, and Fourth Postponement Applications during the First Hearing

65. On the second day of the hearing, Tuesday the 18 July, prior to cross-examination of the Claimant commencing, the Respondents stated that Ms Germin Mohamed would not be able to attend the Tribunal on Thursday the 20 July as she had two medical appointments, one in the morning and one in the afternoon, but that she would be available on the Friday 21 July. I explained that this case, though listed for five days, would not take place on Friday the 21 July as I was on annual leave that day and the Tribunal would only be sitting for four days until the 20 July 2023.

Third Postponement Application

66. Mr Hoyle then applied for the hearing to finish part-heard and be postponed at the end of the next day on the Wednesday the 19 July. This was in effect the third application for a postponement of the hearing ("Third Postponement Application").

67. I suggested that the Respondents witness, i.e., Mrs Germin Mohamed, could give her evidence first that day on the 18 July instead of the Claimant. Mr Hoyle

objected to this and asserted the Claimant should go first as he was certain he would get concessions from the Claimant during cross-examination. I asked Mr Hoyle to email me the medical evidence upon which Mrs Germin Mohamed relied for her non-attendance on Thursday the 20 July 2023, and that we would consider it first before making our decision.

68. Later in the hearing and after the lunch break, I advised Mr Hoyle that after having considered the medical evidence we had decided Mrs Germin Mohammed could give evidence the next day on the Wednesday 19 July in the morning, after the cross examination of the Claimant had ended and before her witnesses gave evidence, and that her evidence would be interposed, and that his application for the hearing to finish early on the 19 July was refused.

69. Mrs Mohamed then addressed me directly and said she was not comfortable giving evidence ahead of the Claimants witnesses and I replied that was the decision of this Tribunal and it would stand.

Fourth Postponement Application

70. On the third day of the hearing, on Wednesday the 19 July, at the outset the issue of a postponement was raised again ("Fourth Postponement Application"). Mr Hoyle stated Ms Mohammed's need to attend her medical appointments on the Thursday 20 July was urgent. Her interposed evidence was anticipated to start that day on Wednesday the 19 July, and he applied in effect for an adjournment of the hearing by close of play on Wednesday the 19 July, on the grounds that on the Thursday the 20 July he said he would be without instructions from Mrs Germin Mohamed,

71. I stated that there had been no need for Mrs Mohamed to make medical appointments for the Thursday 20 July while a Tribunal hearing was taking place. They were outpatient appointments for medical treatment. I said I was unimpressed that following the First Postponement Application being made on these grounds, before this hearing commenced, and they were refused by Judge Quill, that she had gone ahead and made these appointments for the 20 July while a hearing was taking place, and that this medical evidence was not evidence of an inability to attend the hearing due to ill-health as she was here at the hearing. I said under Rule 30(A) there had to be exceptional circumstances to postpone the hearing. After some discussion he asked me to hear directly from Mrs Mohamed as this was a 'sensitive matter.'

72. Mrs Mohamed then explained to me she had an abscess on her breast that needed draining urgently and that originally, she had an appointment for Monday the 17 July, the first day of the hearing, but had cancelled it when the First Postponement Request had been refused and had re-arranged it for the Thursday the 20 July. She advised she had done so as it needed draining urgently. She then stated she could cancel her Thursday morning appointment but would be unable to attend the hearing on the Thursday afternoon as that was when the abscess would be drained.

73. We retired to make a decision. We then returned and stated that as in effect this hearing would go part-heard in any event by close of play on the 21 July, we therefore granted the application for the hearing to finish by no later than 1.30 pm on Thursday the 21 July so that Mrs Mohamed could receive her urgently required medical treatment that afternoon. I relisted the part-heard hearing for the 23-25 October 2023.

Disclosure applications by the Respondents and the Claimant

74. An issue then arose about the lack of disclosure from the Respondents on the issue of whether the First and Second Respondents were associated employers. The Claimant stated that Mr Tidy had conceded this point of continuous employment between the First and Second Respondents in the Tidy Email, and as a result there was no reference about any of this in her witness statement, but that Mr Hoyle had now apparently reopened the issue again. She asked if she would need to cross-examine on this issue. I said as we had not yet determined this matter of whether that point had been conceded by the Respondents she would need to do so.

75. I suggested she may prefer for disclosure on this point before cross-examining Mrs Mohamed and she agreed she would. She said there was no disclosure in the bundle when she prepared it for the hearing as she thought the issue was no longer in dispute. Further discussion then took place, and it was agreed that the Claimants last witnesses evidence would finish on the morning of the Thursday 20 July and that Mrs Mohamed would not give evidence until the relisted hearing in October 2023. I explained her evidence would no longer be interposed that day of the 19 or the next day of the 20 July as had originally been ordered by me. I said that it would be unsatisfactory for her to be under oath during the months between the end of the hearing and the hearing restarting on the 23 October 2023, as she was likely to be if she commenced giving evidence on that day or on the next day on Thursday the 20 July until leaving for her medical appointment at 1.30 pm. The Claimant did not object to this.

76. In the event the evidence of the Claimants last witness, ran on into the morning of the Thursday the 20 July, and after that witness concluded on the morning of the 20 July, the disclosure applications made by both parties ran until around 1.30 pm when the hearing concluded part heard.

77. On Thursday 20 July 2023 disclosure applications were made by the Respondents for all emails between the Claimant and her witnesses relating to the preparation of their witness statements. Mr Hoyle asked for an order for disclosure directly against each witness in support of the Claimant, and for an order that all their emails to the Claimant, and all her emails to them, together with all attachments be ordered to be forwarded by each witness to Mr Hoyle.

78. He said the reason for this application, which he made against the Claimant's witnesses individually, and not against the Claimant, was that he suspected and indeed asserted, that she had coached her witnesses and amended their statements after they prepared them. He pointed out that when you studied the metadata, she was the author of the statements and in some of the statements of her witnesses she had clearly gone in and out of the documents at certain points, thereby evidencing her amending and coaching the witnesses.

79. The Claimant responded saying she had not coached them or amended their statements, that she was happy to admit she sent a template to them all to help them when preparing their statements, and that therefore showed her as the author of the statements in the metadata, but at no point had she amended their statements. She asserted the simple act of opening and closing the documents would make it look like an amendment, but she hadn't amended them. She said she was happy to send the initial emails sent to her witnesses with the templates attached to Mr Hoyle.

80. At this point, Mr Hoyle responded and said: -

'you are lying, and I can prove it – your demeanour just changed when you gave that explanation and you have become animated whereas before you have not been.'

81. I had already stopped Mr Hoyle's cross-examination of the Claimant's witness on this issue of metadata, and what it showed, as we did not have the metadata in front of us that he was referring to, and nor did the Claimant, and it was a highly technical issue. The Claimants witnesses had already had the allegation of the Claimant coaching them put to them all by Mr Hoyle and it seemed unnecessary to me for Mr Hoyle to put it in that way to her, i.e., that her denial of tampering during his disclosure application was a lie as evidenced by her changed demeanour at that point in the hearing. In particular he had already cross-examined her and her witnesses on this issue, and their evidence was now finished, and this was simply now an application for disclosure from him subsequent to that very forceful cross-examination.

82. I noted that the Claimant looked distressed and appeared to be fighting back tears. I stated to Mr Hoyle that Judges were specifically discouraged from drawing inferences from changes in the demeanour of witnesses as this could be due to cultural differences and different people reacted differently to being called liars. I said that it was quite oppressive of him to comment on her alleged changed demeanour, when she objected to his application and gave her account of why her witnesses statements showed her to be the author of their statements, and to respond by saying she was lying, and that he could prove it by reference to her change in demeanour.

83. The Claimant objected to his application for specific disclosure, though said she would voluntarily send the email with the original template attached that she had sent to each witness.

Rejection of Respondents Disclosure Application

84. We then adjourned to make our decision. On our return I advised of our decision. I advised Mr Hoyle that his application was rejected on the following grounds: -

(i) We had an application by the Respondents for disclosure of all emails between the Claimant and her witnesses in relation to the preparation of their witness statements. Mr Hoyle had said this was relevant because he said the Claimants witnesses had been coached or influenced in the writing of their statements by the Claimant. In particular that in paragraph three of their witness statements, where reference was made to the British nationals who worked with the Respondents, that this paragraph was the same in each witness statement of the Claimant's witnesses, and he asserted that because of this there must have been coaching and undue and improper influence by the Claimant in telling them what to write in their witness statements. He stated that he wished to see the actual e-mail trails – that he wanted them forwarding to him with the attachments so he could study the metadata - and that he thought it would show that there had been evidence of the Claimant amending the witnesses witness statements.

(ii) I stated that this application was not successful, and we were not persuaded that it would show that the Claimant had made amendments to the substance of the witness statements. We had concluded that all this metadata would show was that the Claimant had made amendments of some sort, and that it may have been a formatting issue, or she may have been hitting the return bar, and that having considered this application under my powers under Rule 31, which concerned an order against a third party that they disclose documents – i.e. witnesses, and Mr Hoyle had said the application was against the witnesses themselves not against the Claimant - that whilst we did as a Tribunal have a power to make an order for production of documents from third parties, we only should do so if we think it meets the relevant legal tests which I then dealt with.

(iii) Overall, I said we considered this a fishing expedition. Mr Hoyle had extensively cross examined the Claimant and her witnesses on the issue and we would draw our own conclusions on whether or not the Claimant sought to influence or tamper with the witnesses' statements. She had given a clear explanation to us in response to this application of how she did send the witnesses templates to use in preparing their statements, and she had even offered to send to Mr Hoyle those emails she sent to the witnesses attaching a template for them to use, and that this explained why she was the author of the documents. I said we made no order that the Claimant should forward those emails to the Respondents, but if she chose to do so she may.

(iv) I stated that we considered the application entirely disproportionate to the issue in accordance with recent cases such as Santander UK plc and others v

Bharaj UKEAT/0075/20, and that we had reminded ourselves of the legal tests set out in that case as follows: -

a. Is the application for specific disclosure proportionate to the issues? The issue here was about the allegation that witnesses had been coached by the Claimant. We decided the application was not proportionate to that issue. Mr Hoyle had extensively cross examined the Claimant and all her witnesses on that issue, and we were able to draw our own conclusions on the allegations of coaching, and undue and improper influence by the Claimant over her witnesses and the application made was not proportionate to that issue.

b. We only had to order specific disclosure if we thought it was necessary for fairly disposing of the proceedings. We did not consider the issue to be of such relevance that it was necessary to make the order sought to fairly dispose of the proceedings, i.e. to order all of the Claimants witnesses forward to Mr Hoyle all emails between them and the Claimant on the issue of witness statements and the finalising of the statements, with all attachments so he could study the metadata in the attachments in order to fairly dispose of the proceedings. It was not at all clear to us in particular in any event that the e-mails, the attachments and the metadata in the documents would show if such coaching of her witnesses took place so we considered this the order was not necessary for fairly disposing of the proceedings.

c. Overall, we considered the application to be little more than a fishing expedition. Mr Hoyle had stated that he 'took some risk' in making the application as the documents 'might not' show what he was alleging and in our view this statement more than any showed that this was a simple fishing expedition in the hope he would uncover some improper conduct by the Claimant.

85. The Claimant then asked me to make an order of some sort to stop Mr Hoyle being so oppressive in his conduct of the proceedings. At this point I noted the Claimant was still looking very distressed and appeared to be trying not to cry. I responded stating that there was no such order I could make, and Mr Hoyle was entitled to conduct his advocacy as forcefully as he chose but if I thought at any point, I had to intervene I would do so.

86. Mr Hoyle then complained about my previous use of the word 'oppressive' in describing his allegation during the application for disclosure, that the Claimant was lying, and which was proven by her changed demeanour, and stated he 'was taking advice' about my use of the word 'oppressive' in relation to him. He said the definition of 'oppressive' was the misuse of power and control and as he was neither a solicitor or a barrister, he had no power or control. This

appeared a strange assertion as he did have power and control as an advocate cross-examining in the Tribunal and his particular qualifications had no bearing on the issue of whether any particular allegations, he put to the Claimant about her were oppressive or not.

87. I replied that I had made a statement that his allegation against the Claimant of lying, by reference to her changed demeanour in court, was oppressive in the context of the application for disclosure being made at that point in the hearing, and I did not say he was an oppressive advocate. I pointed out that the Claimant was a litigant in person and that I must have regard to that when ensuring a fair hearing for all parties.

88. In particular when telling Mr Hoyle during the hearing I thought his allegation about the Claimant's changed demeanour was oppressive I had regard to the Equal Treatment Bench Book where it is stated at paragraph 17 that: -

Judges must be aware of the feelings and difficulties experienced by litigants in person and be ready and able to help them with the court process, especially if a represented party is being oppressive or confrontational.

89. There then followed a discussion about disclosure prior to the next hearing. In particular this concerned the issue of whether the First and Second Respondents were associated employers or not under the ERA 1996 s.231, and whether the First and Second Respondent should be treated as associated on the test of 'control', and whether one was a company of which the other (directly or indirectly) had control, or whether both were companies of which a third person (directly or indirectly) had control.

Claimant's Disclosure Application

90. The Claimant stated she wanted evidence of all work done for the First and Second Respondents over the last three years. She complained that this point had been conceded by Mr Tidy in the Tidy Email, but Mr Hoyle was now running the argument again. I stated that on the point of whether it had been conceded this Tribunal would consider that when delivering Judgment on the issue. She also requested copies of all her annual leave requests during her employment with both Respondents.

91. I reminded Mr Hoyle we had not accepted that he could re-open this argument of continuity of employment between the First and Second Respondent and this would be addressed by us in our Judgment. He took no issue with this approach.

92. I pointed out to the Claimant that her application for evidence of all work done by her for the Respondents over three years was a very long period of time and

asked why evidence for the last month with the First Respondents, and for the last month with the Second Respondents would not be sufficient. She agreed this would be more proportionate.

93. Mr Hoyle then objected to any disclosure on this and said it was all 'a fishing expedition' and the information sought was 'privileged and confidential'.

Rejection of Claimant's Disclosure Application

94. We considered the Claimants application. We decided the documents sought did not assist on whether the First or Second Respondents had control of the other and were associated employers under s.231 of the Employment Rights Act 1996, and that instead details of ownership of the companies would assist more on this point as this would evidence who had control of the companies and that we should order disclosure of the last set of company accounts of both the Respondents.

95. We also decided that the P45 and P60 of the Claimant for each Respondent would assist on the issue of continuity of employment.

96. We therefore refused the application for disclosure of work allocation to the Claimant by the First and Second Respondent, but other orders were made as set out below on specific disclosure.

Order to Disclose Company Accounts

97. I proceeded to make the Orders as set out below to ensure that both parties were ready for the adjourned Hearing on 23 to the 25 October 2023, and the hearing then concluded. In particular I ordered that;

> *3.* ***Disclosure***
>
> *3.1 By 28 September 2023, the Respondents will send to the Claimant and the Tribunal the following documents: -*
>
> *3.1.1 A copy of the P45 and P60 for the Claimants employment with the First Respondents.*
>
> *3.1.2 A copy of the P60 for the Claimants employment with the First Respondents.* ***[Note this should have been a reference to the Second Respondent].***
>
> *3.1.3 A copy of the full company accounts of the First and the Second Respondents for their financial year ending in April 2022, and for the avoidance of doubt any such accounts prepared and filed by the Respondents during the Claimants last year of employment with both the First and Second Respondents.*

3.1.4 The First and Second Respondent shall by the 28 September 2023 disclose to the Claimant all her requests for annual leave made during her employment with them.

Hearing on the 22 and 23 October 2023 ("Second Hearing")

Breach of Tribunal Orders

98. At the outset of the Second Hearing, we were advised by Mr Hoyle that the First and Second Respondent would not comply with Order 3.1.3 made by the this Tribunal (in paragraph 97 above) to disclose the accounts of the First and Second Respondent. He said they refused to do so on the grounds that the company accounts were "confidential."

99. We were surprised and disappointed that the First and Second Respondent decided to breach the order of this Tribunal.

100. In the event the only order complied with was order 3.1.1. and 3.1.2 above and order 3.1.4 was also not complied with. No explanation was given about that non-compliance.

Application for this Tribunal to Recuse itself on the grounds of Apparent Bias

101. At the outset of this Second Hearing, Mr Hoyle told us that he had some 'house-keeping matters to raise,' and then referred to an Appeal that had been lodged with the Employment Appeal Tribunal the previous day on 22 October 2023. He referred to a first instance case which he gave to this Tribunal. He said that case referred to helpful Authorities on the issue of apparent bias. We read the first instance case, but we were not bound by this first instance case in any event.

102. Mr Hoyle reminded us that at the previous Hearing, I, the Employment Judge of this Tribunal, had used the word "oppressive" when I spoke to him during the part of the Hearing where the Claimant was responding to his Application for specific disclosure.

103. In essence, Mr Hoyle accused this Tribunal of bias, i.e., the way I, as the Judge, on behalf of this Tribunal conducted myself in the way I spoke to him, was a form of bias; or at least created the risk of a perception of apparent bias.

104. As set out above during that Application by the Respondents for specific disclosure, it was not in dispute that I intervened and said to Mr Hoyle that I thought he was being oppressive to the witness.

105. This exchange, between myself and Mr Hoyle, was set out in my written Reasons of my Case Management Order sent at the request of Mr Hoyle. In particular, at paragraph 52 onwards of my decision, I set out what the issue was, what Mr Hoyle said and what I said to Mr Hoyle. In relation to that exchange between myself and Mr Hoyle at the Hearing, Mr Hoyle submitted that this was sufficient to create the impression in the mind of a fair minded and reasonable observer that there was a risk of and a real possibility of bias. Mr Hoyle quite rightly pointed out that bias does not need to be proved, simply that there has to be an appearance of or a risk of an appearance of bias.

106. We retired to consider the application and we considered the legal authorities on this point.

107. The case of *Porter v Magill* [2002], establishes the test for apparent bias which is a two-stage process. The two-stage test that we must follow is the suggestion that the Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the Judge was biased.

108. Bias means a prejudice against one party or its case for reasons unconnected to the legal or factual merits of the case. It goes on to say that if the test of apparent bias is satisfied, the Judge is automatically disqualified from hearing the case and considerations of inconvenience, costs and delay are irrelevant as set out in *Man O'War Station Limited v Auckland City Council* [2002].

109. Having considered the matter in detail we rejected the application for this Tribunal to recuse itself on the grounds of a risk of apparent bias.

110. In essence, Mr Hoyle accused this Tribunal of conduct bias, i.e., that the way I, as the Judge, on behalf of this Tribunal conducted myself in the way I spoke to him, was a form of bias; or at least created the perception of apparent bias.

111. Case Law has established that trained legal representatives (it does not define whether that means Solicitor, Barrister or just an experienced Advocate such as Mr Hoyle) will largely be expected to take conduct by a Tribunal in their stride. For example, in *Bird v Sylvester* EAT0037/06, the Employment Appeal Tribunal held that the Tribunal Chairman, as they were then known, telling a Solicitor to "get on with it" did not even arguably taint the fairness of the Hearing. The comment was made to the Claimant's Solicitor during a break in hearing the Claimant's evidence.

112. Another example which we think is on all fours with this case, is the case of *Kidd v Commissioner of Police of the Metropolis* EAT0191/17. During the Hearing KS's Barrister made an allegation of professional misconduct against her opponent. The Employment Judge invited 'KS', as she is known in this

case, to withdraw the allegation and apologise. He then raised his voice and cut short her explanation asking, "…have you learned your lesson?", adding "…don't you tell us how to do our job".

113. The EAT said, in their view, the Judge could not be criticised for forming a dim view of her conduct of the case and that although he may have gone a little over the top in his criticisms, hostilities towards an Advocate were not to be equated with hostility towards a party. Finding against a Claimant, expressing views in robust terms and being exasperated by the process did not necessarily indicate apparent bias, and viewing the events in context the EAT considered that a fair minded and properly informed observer would not have thought that there was a real possibility of bias.

114. It is not disputed that I said to Mr Hoyle that I thought he was being "oppressive" towards the witness, and I said that in the context of what he had said about her demeanour during the specific disclosure Application. I later clarified to him that I had not called him an oppressive Advocate generally, but it was in the context of that Application.

115. Whilst Mr Hoyle may have taken great offence at this, my criticism of him as an Advocate is not to be equated with hostility by this Tribunal towards his client, the First and Second Respondent, in accordance with the case of *Kidd*. In our view, Mr Hoyle's Application for this Tribunal to recuse itself had to fail because the matter he complained of was my criticism of him, and not of his client, the Respondents in this case.

116. In reaching this decision we also reminded ourselves of *Automobile Pty Ltd v Healy* [1979] I.C.R. 809, which stated that an Employment Tribunal was not entitled to withdraw from a case simply because one of the parties alleged a lack of confidence in it during the Hearing.

117. This Tribunal unanimously concluded that there was no risk in this case and in the circumstances of this case that would lead a fair minded and informed observer to conclude that there was a real possibility of bias, in that I, as the Judge of this Tribunal, was biased when telling Mr Hoyle, I thought he was being oppressive to the Claimant.

118. We concluded that my criticism of Mr Hoyle had been confused in the application for recusal with perceived apparent bias towards the Respondent for which there was no evidence and for that reason, the Application for Recusal on the grounds of apparent bias was rejected.

Application to amend the Response

119. On the first day of the part-heard hearing, the issue of the Tidy Email was revisited by this Tribunal, and the email and its contents was considered by us prior to the hearing starting. Under my case management powers, and under Rule 29, we considered again the issue of whether the Respondents could re-

open the issue of the admission made in the Tidy Email and the concession made that the two Respondents were associated employers.

120. Having considered that there was a clear concession in the Tidy Email we concluded that in order for the Respondents to try and re-open this issue they would have to apply to amend their Responses to re-introduce this part of their defence, and if such an amendment was allowed then any submissions on this point would be heard during closing submissions. It was notable that no evidence about this issue was contained in the witness statement of the Respondents.

121. When the hearing commenced, I pointed out to Mr Hoyle that on the issue of opening up again the issue of whether the First and Second Respondent were associated employers, as conceded in the Tidy Email, that he would have to apply to amend the Responses to re-introduce this issue. We invited both parties to address us on the issue.

Application to amend the Response of the First and Second Respondent

122. An application to amend the response of both Respondents was then made by Mr Hoyle. In relation to the submissions by Mr Hoyle on why the Respondents should be allowed to amend their Response and why we should allow them to resile from the admission in the Tidy Email, we were simply told by Mr Hoyle that he had now taken the case over from Mr Tidy. He then made submissions on the merits of the legal issue itself.

123. The Claimant submitted that they should not be allowed to resile from their previous admission. The Claimant said the prejudice to her was greater as she now had to prove something she did not previously have to prove.

Rejection of application to Amend

124. We retired to consider this issue. We did not regard a change in fee earner as something that was in any way significant for the Respondents amendment application. It is of course very common and routine for the advocate for a party to change during the proceedings in the Tribunal. On this occasion the same organisation still represented the Respondents, this being Croner Law.

125. In considering the amendment application, we considered that if we refused the Respondents application to amend, they would be unable to argue that the Claimant lacked continuous service of over two years for her unfair dismissal claim, but we also considered that the prejudice to them had been caused by their own actions in making a clear concession after receiving legal advice. Considering the law on where the balance of prejudice lay, in our view it clearly lay with the Claimant who would have a further legal issue that she must prove were we to allow the amendment.

126. We had regard to the circumstances of this case and the injustice and hardship that may be caused to either of the parties and in particular the case law referred to above in the context of the previous amendment applications.

127. In *Cocking v Sandhurst (Stationers) Ltd* and anor 1974 ICR 650, NIRC it was established that we must have regard to all the circumstances of the case. Part of the circumstances of this case were that the Respondent conceded a legal point after taking legal advice and then made an application to re-introduce at the final hearing it with no substantive reason given.

128. It was striking that on the one hand the Respondents wished to reintroduce this part of their defence, but on the other hand had not complied with a court order to disclose documents that were highly relevant to this issue, i.e. the company accounts of both Respondents which would have shown who was in control of the First and Second Respondents, something that would have assisted us in determining the point of associated employers under s.231 of the ERA 1996.

129. Having balanced the hardship and prejudice between the parties, and having regard to where that greater hardship lay, we concluded that it lay with the Claimant and so the application to amend this part of the Respondents Response was therefore refused and the concession in the Tidy email that the First and Second Respondents were associated employers pursuant to s.231 of the ERA 1996 therefore stood.

Fifth and Sixth Application to postpone the Second Adjourned Hearing

Fifth postponement application

130. By email to the Tribunal on the 18 October 2023 the Respondents made an Application for Postponement of the part-heard Hearing which was to commence on 23 October 2023 ("Fifth Postponement Application"). The application stated as follows: -

Dear Sirs

I write with regard to the above hearing which is due to recommence on Monday 23rd October.

Upon request of the respondent, written reasons for a decision made at the previous, part heard hearing were handed down to parties on the 12th September.

My client instructs me that they wish to appeal the decision of the previous Tribunal. The last day in which they can do so is Tuesday 24th which is day 2 of the reconvened hearing.

The appeal shall be drafted and sent to the Employment Appeal Tribunal within the 42-day timeframe, and our attention must now focus on the drafting and filing of that appeal.

We therefore respectfully ask that this matter is referred to the duty judge or legal officer at the earliest convenience so that the matter can be adjourned pending a decision from the Employment Appeal Tribunal.

Yours Sincerely

Simon J Hoyle

131. The basis of this Application was simply that they were lodging an Appeal against the 'the decision of the previous Tribunal' but no details were given as to what part of this Tribunals previous case management orders they were appealing, and at this point the only decisions made were in relation to four postponement applications, and two disclosure applications. It was notable that this Fifth Application was made five days before the Hearing was to take place and no explanation was given as to why they had to leave the preparation of any Appeal to the EAT until just five days prior to this Hearing.

132. We refused this Fifth Application for Postponement prior to the part-heard hearing on the 23 October 2023. Rule 30 (a) states as follows:

30A.— (1) An application by a party for the postponement of a hearing shall be presented to the Tribunal and communicated to the other parties as soon as possible after the need for a postponement becomes known.

(2) Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the Tribunal may only order the postponement where—

(a)all other parties' consent to the postponement and—
(i)it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or
(ii)it is otherwise in accordance with the overriding objective;
(b)the application was necessitated by an act or omission of another party or the Tribunal; or
(c)there are exceptional circumstances.

133. In accordance with Rule 30(A) applications made for postponements of hearings, less than seven days prior to a hearing, can only be granted in exceptional circumstances, or where consented to by all parties, and a stated intention to lodge an appeal against case management orders did not fall within the definition of 'exceptional circumstances.'

Sixth Postponement Application

134. On 23 October 2023, the Respondents then made another Application for Postponement of this Second Hearing ("Sixth Postponement Application"). This time it was premised on the fact that Mr Refugio, against whom many of the allegations were made, and who was present at the adjourned hearing, had to leave the Hearing no later than around 12.45pm to catch an aeroplane to Dubai due to his business interests.

135. By way of background, at the First Hearing Mr Refugio had not been present, and this was stated to be due to the fact that he was in Dubai. Mr Hoyle asked me about the attendance of Mr Refugio at the next Hearing and the issue of him giving evidence from abroad, which was from Dubai, part of the United Arab Emirates. I stated that Mr Hoyle would need to write to the Tribunal to make this request and the usual procedures would then be followed.

136. When Mr Hoyle made this Sixth Postponement Application on the morning of the Second Hearing, he had not taken any steps to write to the Tribunal to try and arrange for Mr Refugio to give evidence from Dubai. There was no dispute that Mr Hoyle on behalf of the Respondent, had failed to take any steps to write to the Tribunal so that the Taking of Evidence Unit could be contacted.

137. In any event, I also noted that the United Arab Emirates is not a jurisdiction with whom the UK has a standing arrangement for the giving of evidence from abroad.

138. The Respondents, therefore, despite knowing for three months about this re-listed Hearing, took no steps whatsoever to write to the Tribunal to deal with Mr Refugio giving evidence from Dubai. We found it remarkable that he was able to be present on the morning of the 23 October 2023, and despite being able to arrange to be present on 23 October 2023 we were not warned at the outset of the hearing at 10.00 am by Mr Hoyle that Mr Refugio would have to leave the Hearing at around 12.45pm that day.

139. Instead, what happened was this Tribunal dealt with, and refused, a Recusal Application of this Tribunal on the grounds of apparent bias. We then went on to deal with an Amendment Application to the Respondent's defence. Those two Applications took nearly two hours on the morning of the Hearing on the 23 October 2023, with no mention being made of Mr Refugio having to leave by lunchtime that day.

140. By the time we had delivered our oral decisions on both the Recusal Application and the Amendment Application, at around 12.15 am Mr Hoyle made the Sixth Postponement Application and he said that Mr Refugio had to leave to catch a plane by no later than 12.45 am.

141. Mr Hoyle, rather unusually, therefore then went to ask that if the Sixth Postponement Application was to be refused, that his client Mr Refugio be sworn into the Witness Box simply to take the Oath, and so that he could state that his Witness Statement was true to the best of his knowledge, information and belief. This was a highly unusual request as it was made quite clear that he would then immediately be asked to be released from the Witness Box so that he could leave the Hearing.

142. We retired but then refused the Sixth Application for Postponement. Mr Refugio had been aware for over three months about this Hearing and in the view of this Tribunal he could easily have arranged not to have to fly to Dubai until the Hearing had concluded. No specific evidence was put to us as to why that had not been possible. However, we granted this request as it made no particular difference either way, as it was a matter for this Tribunal whether or not to attach weight to Mr Refugio's witness statement on which he was not cross examined due to leaving the hearing early.

143. After refusing the Sixth Application for Postponement, and after Mr Refugio took the Oath and confirmed his Witness Statement was true to the best of his knowledge, information, and belief, he left the Second Hearing at around 12.45pm.

144. We note at this point that during the First and Second Hearing there were no less than nine preliminary Applications by the Respondent, six were for postponements of the Hearing, one for specific disclosure, one for recusal, and one for amendment of the defence. This Tribunal's time was taken up equally with preliminary Applications by the Respondent as it was hearing evidence.

Findings of Fact

145. From the information and evidence before me, we made the following findings of fact. We made our findings of fact on the balance of probabilities, considering all of the evidence, both documentary and oral, which was admitted at the Hearing. We do not set out in this Judgment all of the evidence which we heard, but only our principal findings of fact and those necessary to enable us to reach conclusions on the issues to be decided.

146. Where it was necessary to resolve conflicting factual accounts, we have done so by making a judgement about the credibility or otherwise of the witnesses we heard, based upon their overall consistency and the consistency of the accounts given on different occasions and set against any contemporaneous documents. We have not referred to every document we read or were directed to or taken to in the findings below, however, that does not mean they were not considered.

Background

147. By the time of the Claimant's dismissal on 9 March 2022, the Claimant had been employed by the First, and latterly the Second Respondent, for three years. In her witness statement she referred to being employed by Immigration and Nationality Services Limited, the First Respondent as a Business Development Manager and that her employment commenced with them on 4 February 2018 (Paragraph 1 of WS). There was initial confusion caused about this date when we reached our decision as the ET1 Claim Form referred to a commencement date of 4 February 2019. That was also the date carried over into the Claimant's Schedule of Loss (page 40 and 41). Her submissions also referred to her employment commencing on the 4 February 2019, and the Statement of Particulars of Employment was also dated the 4 February 2019, and so we found that her employment commenced on the 4 February 2019 and that she had continuous service of over three years at the date of dismissal on the 9 March 2022.

Continuous Employment with the First and Second Respondents

148. The Statement of Particulars of Employment issued by the First Respondent referred to a contractual notice period of four weeks in favour of the Claimant in her employment with the First Respondent. When the Claimant's employment commenced with the Second Respondent on the 24 January 2022 no contract of employment was issued by the Second Respondent, or a replacement Statement of Particulars of Employment.

149. Following the commencement of the Claimant's employment with the First Respondent on 4 February 2019, the Claimant carried out her work as Business Development Manager for the First Respondent. We found that although the offer letter was from the First Respondent the Claimant was being trained by Ms Maryam Sufi, an Immigration Solicitor employed at the Second Respondent, and the Claimant's day to day role involved handling all Immigration case work for the Second Respondent which included engaging, advising clients and assisting senior solicitors with case work for the Second Respondent. We found the reason for this unusual arrangement was that her Visa issued in 2019 only permitted her to be employed by the First Respondent.

150. The Claimant had qualified as a Solicitor in India, and while working for the First Respondent we found that she took, and passed the appropriate qualifications in the United Kingdom to qualify as a Solicitor and that this was entirely funded by herself.

151. Upon qualifying as a Solicitor, we found that the Second Respondent then obtained a sponsor license, and that the Claimant's work visa was then extended on the 23 January 2022 by the Second Respondent, and she was then employed by the Second Respondent as a newly qualified Solicitor from the 24 January 2022 onwards. The Certificate of Sponsorship set out a start date of the 24 January 2022 which was to expire on the 23 January 2024 [page 58 of the bundle].

152. We found that when her employment with the Second Respondent commenced on the 24 January 2022, the Claimant's contract of employment with the First Respondent was therefore varied so that she became employed by the Second Respondent, and the terms of her employment, save for an increased salary, remained the same.

153. In the alternative, when the Claimant commenced her employment with the Second Respondent, we find that the Claimant was employed on the same terms of employment to those she was employed on by the First Respondent, as no reference was made by either party to new terms of employment applying to her employment with the Second Respondent.

154. We found that on the issue of whether the First and Second Respondents were associated employers, as defined in s.231 of the Employment Rights Act 1996, this was conceded by the Respondent in the Tidy Email and therefore the Claimant had continuous employment from 04 February 2019 until the 09 March 2022 of three years. This also established that the Claimant held the qualifying period of employment as required in Section 108(1) of the Employment Rights Act 1996 for an unfair dismissal claim.

155. In relation to her continuous employment, and in any event, even had this issue not been conceded in the Tidy email, it was not in dispute that Mr Ian Refugio was the owner of both the First and Second Respondent and as a finding of fact we found that he, as a third party, had control of both the First and Second Respondent as he was the owner of both firms for the purposes of s.231 of the Employment Rights Act 1996. The following was said in the Response of both the First and Second Respondent: -

"Both Respondents 1 and 2 are owned by Mr Ian Refugio, whilst Mrs. Germin Mohamed is a joint Director with Ian Refugio for Respondent 2."

Dismissal of other employees

156. The Claimant asserted in paragraph 3 of her Witness Statement that the First and Second Respondent, which she referred to as "IANS Group", had several unfair business practices that were indirectly discriminatory towards internationally sponsored migrants. This of course mirrored the reference to indirect discrimination in the Case Management Summary.

157. We also heard evidence from the witnesses at the hearing on behalf of the Claimant about the same type of treatment of them by the First Respondent. This was background information about the business practices of the First Respondent, and the Second Respondent, and how, Mr Refugio treated his employees.

158. The evidence of the witnesses to this Tribunal, and in particular, Mr Kurotimi M. Fems, Mr Gilbert Taylor, Ms Tanyatorn Autchayawat, and Mr Oladimeji

Oladapo all of whom were migrant workers, and of how they were treated by the First Respondent, was accepted by this Tribunal, and we found that in all cases it involved them being dismissed by the First Respondent without being paid notice monies and/or their wages due at termination. We found them all compelling and believable witnesses. We did not find, as suggested by Mr Hoyle, that they had been coached by the Claimant in their witness statements, and that they had been 'put up to it' by the Claimant in deciding to give evidence.

159. We therefore found that Mr Refugio on behalf of the First and Second Respondent had a pattern of dismissing other migrant employees without paying them their notice monies and/or other monies owed to them.

160. At the date of this Hearing, over a year and a half since the Claimant was dismissed from her employment at the Second Respondent, she has still not been paid the wages she is owed, as admitted by the Second Respondent, nor has she been paid anything for her notice period, which is also admitted as owed by the Second Respondent.

161. We found that Mr Refugio, on behalf of the First and Second Respondent, would simply decide not to pay sums of money lawfully due to departed migrant employees such as Mr Kurotimi M. Fems, Mr Gilbert Taylor, Ms Tanyatorn Autchayawat, and Mr Oladimeji Oladapo, and the Claimant.

Email of 1 April 2020

162. The Claimant referred to an email [Paragraph 5 of her Witness Statement], which she asserted was sent by the Director, Mr Refugio to all employees, including the Claimant, and which stated that the terms of their employment and their wages would be paid going forward based on a percentage value of the business generated by them each, at the end of the month. The document itself did not show the date of it being sent, nor did it show the recipients of the message, but there was no dispute that, as set out by the Claimant, it was sent on the 1 April 2020. That email stated that they had all been paid 75% of their monthly gross wages and they aimed to pay the remaining 25% owed to them. They were urged to collect some debts if they wished to be paid their wages.

163. It went on to say that they were changing the terms of their employment from April 2020 due to Covid and that their wages would be paid based on revenue performance. The email went on to say,

> *"This means that your wages will be paid according to the equivalent percentage of the value of the business you generated at the end of the month. Zero means zero."*

The email then stated that they must respond to the email no later than 9.30am on Thursday 2 April 2020 and if they did not accept the new terms of employment as varied above, that:

> *"…you are leaving your post effective immediately. If I do not receive a response from you by 9.30, consider you have been made redundant from 9.31am".*

164. It was not in dispute that this email had been addressed to "all employees". What was not clear to us was whether it had been sent to all employees at the First Respondent as well as all employees at the Second Respondent. However, on the balance of probabilities, as this email was about the purported survival of the First and Second Respondents' business during Covid, we find that it was sent to all employees of both the First and Second Respondents, but that it would not have been intended to apply to the two non-migrant employees of the Second Respondent Mr Ian Refugio and Mrs Germin Mohamed. In any event whether it was sent to either all employees of the First or Second Respondent, or to both, it had no material bearing on the outcome of this claim by the Claimant for indirect race discrimination for reasons we set out below in our conclusion section in this Judgment.

165. The Claimant stated as follows at paragraph 17 of her witness statement: -

> "17. Paragraph 12 and 17 of the defence statement, page 24 and 25 of the bundle, states that Respondent 2's whole business relates to Immigration law and 97% of their employees are currently international migrants on Skilled Worker visas and that they are a multi-cultured organisation dealing and working with people of many different nationalities. I believe by virtue 97% of the respondent's employees being internationally sponsored migrants, it has been easier for the employer to put down business practises and criteria in place which are primarily discriminative against the sponsored migrants and exploitative in nature. This also made it easier for the employer to unfairly dismiss sponsored migrants and use this a lesson for the rest of the internationally sponsored workforce to learn. When unfairly dismissed, the internationally sponsored migrants have more pressing issues at hand, i.e finding a new job to ensure their income and legal stay in the UK, therefore none of them had the resources or time in their hands to persue an employment claim against the respondents which worked toward the respondent's advantage."

166. We found that the reference to the 97% of the Second Respondents business being migrant employees, meant that the remaining 3% of the workforce of the Second Respondent, these being the British Nationals, were Mr Refugio and Mrs Mohamed themselves.

167. The Claim for Indirect Discrimination was seemingly brought against both the First and Second Respondents but the need to identify the separate comparator pools with each Respondent was never put at all by the Claimant throughout her case.

168. We found that the employees of the Second Respondent, this being Mr Refugio, and Mrs Germin Mohamed, who were both British Nationals, and who made up the 3% of the Second Respondents workforce that were not in the disadvantaged migrant worker group, were not in fact subjected to the imposition of the PCP, i.e. the new terms of employment as set out in the email sent on the 1 April 2020 i.e. the PCP contended for by the Claimant in her claim form.

169. We found that all the sponsored migrants, as set out in the Claimant's Witness Statement, then accepted the new terms of their employment, before the stated deadline of 9.30am on 2 April 2020.

170. At paragraph 7 of the Claimant's Witness Statement, she points out that two of her colleagues, Oladimeji Oladapo, who gave evidence to this Tribunal, and an employee called David, who did not give evidence to this Tribunal, were asked to work at the weekends. Both of them refused to assist in this due to Covid and as a result on 30 May 2020 the Director dismissed both of them.

171. We found, as referred to in the Claimant's Witness Statement, that the Claimant became afraid for her position and employment in the company and that she could never say no to any of the Director's requests, even if it was beyond the scope of her job description. We found that if he asked her to stay back at work and work late, or to work at the weekends, that she felt compelled to do so. We found that the Claimant, having seen how other employees were dismissed if they did not comply with Mr Refugio's demands, was afraid for her position with the First Respondent.

Email of 3 March 2022 to employees of the First Respondent

172. We found, as recorded in an email from Mr Refugio on 3 March 2022, that Mr Refugio told Michael Morillo, Tanyatorn Autchayawat, Gilbert Taylor, Kurotimim Fems, Floyden de la Cruz and Jonathan Antonio, all of whom worked for the First Respondent, that they had all failed to meet the agreed target for January and February of that year in 2022, and he went on to say that he would defer the termination of their employment to the month of March on the following conditions, which included working ten hours a day, six days a week, including Saturdays beginning the next day.

173. Mr Refugio added that there would be no annual leave or holiday entitlement for the month of March 2022 for anyone, that he would double their targets, generating and collecting team sales in the amount of £249,750 and that they would work independently as a team without any form of sales support from himself and they would provide comprehensive daily reports by email.

174. Ms Maria Esguerra worked for the First Respondent, and she was a British National worker. In the List of Issues there was a reference to the non-migrant worker Maria Esguerra. We found that she was not subjected to the email sent

in March 2022 as she was copied into it as opposed to being a direct recipient. The List of Issues set out as follows: -

> "The Respondents says that the British Nationals that the Claimant refers to (Maria Esguerra) was part of a different department and held a managerial role which is why she was not included in the emails."

175. However, we found that that this email was not sent to the Claimant as by this time in March 2022 she was working for the Second Respondent. We did not therefore find that this could be the basis of her claim for indirect race discrimination as she did not receive this email, and as such it was not a PCP applied to her.

Overtime

176. Part of the Claimant's claim is that she was owed overtime by the Respondents as set out in her ET1 Claim Form. This issue was relevant both to the Claimant's claim for unauthorised deduction from wages, and for her indirect discrimination claim where she says as a migrant worker she was forced to work overtime and British Nationals were not, and we therefore made the following findings of fact.

177. In the Claimant's payslips in the Bundle (pages 86 – 88) there was no reference to any overtime payments. We considered the fact that she had never in fact been paid any overtime up to the date of leaving. However, the issue was whether she had a contractual right to such payments.

178. We had regard to the Claimant's Offer Letter with the Respondents, this being the only evidence of what her terms of employment were with the Second Respondent.

179. Her Offer Letter contained at page 47 of the Bundle, did not refer to the entitlement to be paid overtime, and we found no evidence of a contractual right to overtime.

180. We also accepted Mrs Germin Mohameds evidence that she had never been paid overtime and that it was not standard practice to pay it in the legal industry. We therefore found that the Claimant had no contractual right to be paid overtime payments, and we did not find on the evidence that she established that Mr Refugio had agreed to pay her for overtime worked.

Dismissal of the Claimant on the 9 March 2022

181. The Claimant told Mrs Mohamed some time at the beginning of February 2022 that she had a job offer from KPMG as newly qualified solicitor. We had regard to the 'Welcome to KPMG' email dated 16 February 2022 (Page 78) of the bundle showing that the Claimant's new employer KPMG was working towards a start date of 23 May 2022. In addition, Mrs Mohamed's evidence set out that

the Claimant approached her in February to advise her that she had accepted an offer of employment from KPMG.

182. We found that after being offered a position at KPMG LLP on 09 February 2022, with a provisional start date of 23 May 2022, that the Claimant then had several conversations with her supervisor Mrs Germin Mohammad about her new job with KPMG and that she was intending to resign. We found that a two months' notice period was discussed as Mrs Germin Mohamed needed to train some paralegals and conduct a proper handover of the Claimant's case load.

183. We found that Mrs Mohammed advised the Claimant that she should tell Mr Refugio in person that she would now be leaving. As a result of Mrs Mohammed advising her to do this, the Claimant arranged a meeting with Mr Refugio, and she was accompanied by Mrs Mohammed to that meeting on 9 March 2022.

184. The Claimant's account of what happened in that meeting is set out in detail in her ET1 Claim Form, and in her witness statement. She describes Mr Refugio's reaction in detail. The Claimant stated that during the meeting she advised Mr Refugio that she had accepted an offer from KPMG and that she was happy to give more than four weeks' notice as her start date with KPMG had not been fixed, [paragraph 9 of witness statement]. She stated the response she got from the Director was *"extremely scarring"*.

185. She stated and we found that the managing director, Mr Ian Refugio was visibly unhappy and began shouting at her. We found that he raised his voice and said: -

> *"You plan to leave the employment? I extended your visa and now you plan to leave? What about the visa costs? You influenced me to pay for your visa and now you say you want to leave! I am disappointed that I trusted you!"*

186. She gave evidence that she was shocked and taken aback by his reaction, and then told him that she did not actively apply for this job but KPMG themselves reached out to her and it was too good an opportunity. In reply he stated:-

> "*If KPMG is offering you a job now, you should have said No, it's not the right time for me now and that I am happy with where I am."*

187. We found that Mr Refugio then started banging on the table and said: -

> *"You are in breach of the employment contract and my trust. You have breached the company's trust. I will make you pay for this. I will recover the costs from you. My mistake that I trusted you!"*
>
> We found that he went on to call the Claimant *"selfish, ungrateful and disloyal"* to him and the company by accepting another job offer. We found

the Claimant was intimidated by his reaction and was struggling to control her tears.

188. We found that he told her he was extremely disappointed and that the company had extended her Work Visa and she was leaving before the end of the extended Visa period.

189. The Claimant recounted, and we found, that afterwards Mrs Mohammed said that his response was emotional and that she should not take it to heart. At paragraph 4 of her Witness Statement, Mrs Germin Mohamed admitted, and we found, that Mr Refugio did raise his voice in response to the Claimant resigning. She said this was to be expected considering the amount of time, money and effort he had invested in the Claimant.

190. The Claimant also gave evidence, and we found, that her work colleague Ms Tanyatorn Autchayawat came up to her desk to see *"if she was okay"* and told her that she could hear what had happened and told her to take deep breaths and then fetched her some water.

191. It was a central plank of the Respondents' defence throughout the Hearing that Mr Refugio, despite being emotional, did not shout at her or bang the table. However, we heard from the witness for the Claimant, Ms Tanyatorn, who was sitting near the office, that she could hear raised voices and shouting. We found her a credible witness.

192. The emails from Mr Refugio to the Claimant as set out in the Bundle, also displayed his extreme displeasure at her resignation and in particular, he told her,

> *"On this occasion you have broken the company's trust and we do not see any value for you to work any longer from the date of your notice."*

193. We also had regard to the tenor of the emails where Mr Refugio told the Claimant that he considered she was in breach of her Skilled Worker Visa Sponsorship and employment contract and that he would recover from her the financial liabilities incurred by the company and that she would not be paid for the days she had not worked [page 65 of the Hearing Bundle]. This was an aggressive response to the Claimant's resignation and was in accordance with our findings that he behaved aggressively towards her in the meeting on 9 March 2022.

194. We found that the account of the meeting by the Claimant was made out and on the balance of probabilities we find that the Respondent, Mr Refugio, did react in an intimidating and threatening manner, that he raised his voice, slammed his hands on the table and made the accusations set out.

195. During the meeting, and after the Claimant had advised she was willing to give more than four weeks' notice, i.e., two months' notice, we find that she was told they did not wish her to work for them for the next few months as she had offered to do, and that they wished her to give in her notice immediately.

196. We find that as a result the Claimant resigned and gave notice on the 9 March 2022, and clarified in her email of the 11 March 2022 that she was giving her contractual notice of four weeks.

197. We find that she was then told she must confirm her resignation in writing that day, which she did by email [page 66 – 67 of the Hearing Bundle]. At 5.30 pm on the 9 March 2022, she emailed the Respondent stating that she was informing him of her resignation and was handing in her notice.

198. After that, we found that the Respondent replied at 6.55pm on the 9 March 2022 saying he accepted her resignation to take effect immediately and that her last day of work was that day, 9 March 2022.

199. The Claimant replied [page 65 – 66 of the Hearing Bundle] stating that she was devasted and disappointed that it had been decided she could not work her four weeks' notice period and she did not understand why he would not want her to work her notice period. She repeated that she was required to give four weeks' notice and that her last working day should be 7 April 2022 and that she was more than willing and able to work her notice period. She reiterated that she did not agree to not work her notice period but as the company had decided for her not to work her notice period, she was expecting to receive payment of four weeks' in lieu of notice.

200. The Respondent replied [page 65 of the Hearing Bundle] stating that he accepted she must give four weeks' notice when ending her employment, but there was no provision for the company to accept such a period of notice and as she had, in his words on this occasion,

> *"You broke the company's trust, and we do not see any value for you to work any longer from the date of your notice. In addition, your previous performance at work and whether you agree with the company's decision is irrelevant in respect of this issue."*

201. We refer to the Respondents' defence and in particular paragraph 10 [page 24 of the Hearing Bundle] where it was stated,

> *"Therefore, to be suddenly informed that she intended to leave the company led to Respondent Two no longer trusting her presence within the business premises, which is why she was dismissed without notice."*

202. We also note that in the Brady CMO at paragraph 3.1, Employment Judge Brady set out as follows: -

> *"3.1 Was the Claimant dismissed?*
>
> > *"The Respondent says the Claimant was not dismissed but handed in her notice.* ***The Respondents will apply to amend the grounds of resistance to reflect this****. The Claimant says the Respondent told her to hand in her notice and in any event after she had done so, she then received an email saying that she was dismissed."*

203. No Application to Amend the defence of the Respondents was ever made by Mr Hoyle and this admission that she was dismissed must therefore stand. In any event, even if an Application to Amend the defence had been made, and had been granted, it would still have been the finding of this Tribunal that she was dismissed by the Respondent during her notice period. The Claimant expressed a clear wish to work her notice period and this was denied her in no uncertain terms by the Respondent, and this, we found, amounted to a dismissal during her notice period.

204. We therefore found that upon the Claimant resigning and giving four weeks' notice on 9 March 2022, that on the same day the Claimant was summarily dismissed with immediate effect by the Respondent during her four weeks' notice period.

Comparators and Burden of Proof

205. It was clarified during the Hearing that the comparators the Claimant was relying on were as set out in her email to the Tribunal, and which was sent after I asked her to confirm her comparators for her direct race discrimination claim, and which she sent to the Tribunal on 18 July 2023. Her comparators, who were non-migrant British National workers, were Maryam Sufi, Luca Theodorou and Martin Patrick, and they all left the employment of the Second Respondent during 2020 and 2021. She gave evidence that the Second Respondents did not treat them in the same way when they resigned, and they were not subjected to intimidating behaviour. This was not refuted by the Second Respondents during the Hearing, and Mr Refugio did not give evidence to this Tribunal on this or any other issue.

206. Mrs Germin Mohamed however stated that one of them, Maryam Sufi, had resigned by email so there would have been no opportunity for Mr Refugio to respond in an aggressive manner to her. However, having found that Mr Refugio and the Second Respondent did treat the Claimant, a non-British migrant worker, in an aggressive manner, and that there were facts from which this Tribunal could infer discrimination, it was for the Respondents to prove that there was a non-discriminatory reason for the difference in treatment between the Claimant and her comparators including Maryam Sufi.

207. During cross examination, Mrs Germin Mohamed confirmed that Ms Sufi, a British national who left the company in September 2020, was not treated in the same manner as the Claimant for leaving but that the circumstances of Ms Sufi's case were different in that she was a Solicitor. However, the Claimant was also a Solicitor at the time of her dismissal and no compelling evidence was adduced for the difference in treatment of the Claimant and Ms Sufi, and we did not find there were any materially different circumstances between the Claimant and one of her comparators Ms Sufi.

208. In relation to Mr Luca Theodorou, Martin Patrick, and Ms Sufi, no emails were produced by the Second Respondent to show that British Nationals were emailed in an angry manner after they resigned.

209. In relation to Ms Maryam Sufi, a British national who joined the Second Respondent in February 2018, we found that she was a Solicitor like the Claimant and was the most directly comparable comparator and we found that she was not treated in the same aggressive manner as that of the Claimant when she resigned from the Second Respondents employment.

210. In light of our findings of fact of the treatment of the Claimant, and of other migrant workers who gave evidence at the hearing, we found facts from which we could infer that direct race discrimination of the Claimant had taken place. Having found that the burden of proof shifted to the Second Respondent, and in particular having found that Mr Refugio had subjected the Claimant to such intimidating behaviour on the 9 March 2022, we asked ourselves whether Mr Refugio had provided any evidence that amounted to a non-discriminatory reason for the treatment of the Claimant on the 9 March 2022.

211. Mr Refugio chose not to give evidence and we did not hear from him on any of these matters. Mrs Mohamed did give evidence that the difference in treatment between the Claimant and Ms Suffi was for non-discriminatory reasons, and in particular that Mr Refugio was angry due to the money he had invested in her and not due to race. However we preferred the Claimants evidence on this, which was that as Mr Refugio had incurred costs in obtaining a visa for her to work as a Solicitor for the Second Respondent, and that this was due to her being a migrant worker, that this was the real reason he was angry with her for resigning.

212. The burden of proof having shifted to the Second Respondent, following our findings of fact from which we could infer direct race discrimination may have occurred, we therefore find that the Second Respondent failed to prove a non-discriminatory reason for the treatment of the Claimant on the day of her dismissal on the 9 March 2022, and that the aggressive behaviour to her that day and her summary dismissal with effect from that date amounted to direct race discrimination of the Claimant, and this is dealt with in more detail in our conclusions below.

Submissions

213. We do not recite the submissions in full that were made by the Claimant and the First and Second Respondents, but they were fully considered in reaching our decision.

214. During closing submissions Mr Hoyle stated that Mr Refugio's reaction to the Claimant was simply one of disappointment because they had invested a lot of time and money in her and that he would have treated a British National who worked for him in the same way. However, Mr Refugio chose of his own volition not to give evidence to the Tribunal and the submissions of Mr Hoyle were not based on the evidence of Mr Refugio and were only based on the evidence of Mrs Germin Mohamed.

215. During closing submissions when the Claimant referred to her indirect race discrimination claim, I pointed out to her once more that the discriminatory PCP's, such as the ones apparently relied on by her in this claim, in that migrant workers were asked to do particular things, whereas non-migrant workers were not, could not be the basis of an indirect discrimination claim as it was not a neutral provision, criterion or practice applying to those with the protected characteristic of race, and to those without the protected characteristic of race i.e. British National workers.

216. She stated that she had not understood this but that in any event, the emails she relied on went to everyone and by everyone she was referring to everyone at the First Respondent and the Second Respondent.

217. At this point in her submissions, the Claimant stated that having now understood she could not rely on a discriminatory PCP she did not know if it was too late to change this part of her claim. She said she left it in the hands of the Tribunal. She did not at this point make an Application to Amend her claim despite being aware that she could do so from the earlier part of the proceedings when her claim was amended to add a claim of direct race discrimination in relation to the events on the day of her dismissal.

218. Mr Hoyle during submissions stated that the fair reason relied on by the Second Respondent in dismissing the Claimant was a breakdown in trust and confidence which amounted to some other substantial reason.

219. He admitted that the Second Respondent owed the Claimant the sum of £923.46 in respect of outstanding wages and notice pay of £659.49 for one week's minimum statutory notice.

The Law and Conclusions

Jurisdiction and Time Points

220. ACAS conciliation commenced on the 8 June 2022 ("Date A") and ended on the 20 July 2022 ("Date B"). The Claimant was dismissed on the 9 March 2022 and so she contacted ACAS on the last day of the primary limitation period. Considering the extension of time provided by ACAS Early Conciliation, the latest date by which any claim could be presented in time would be 20 August 2022. Proceedings were issued on the 18 August 2022 within one month of Date B and so her claim for Unfair Dismissal, and also Wrongful Dismissal, was brought within time as conceded by the Second Respondent in the List of Issues.

221. At the date of her dismissal the Claimant alleged she was owed notice pay, a month's salary and also overtime pay. Those sums were outstanding at the date of her dismissal and so her claim for Unauthorised Deductions from Wages would have arisen on the date she should have been paid her notice pay at the end of that month in which she was dismissed. Assuming a payroll date of the 31 March 2022 and considering the extension of time provided by ACAS Early Conciliation, the latest date by which any claim could be presented in time would be 20 August 2022 and so her claim for Unauthorised Deduction from Wages was brought within time.

Indirect Race Discrimination

Email of the 1 April 2020

222. The first alleged act of indirect race discrimination referred to by the Claimant was contained in an email that was sent on the 1 April 2020, although this was not specifically referred to in the List of Issues, but we address it in any event in this Judgment, as it is potentially relevant to whether there was conduct extending over a period of time. Primary limitation on this alleged act expired on the 30 June 2020. ACAS were not contacted until the 8 June 2022 nearly two years later outside the primary limitation period and so the extension of time provided by ACAS early conciliation could not apply and this claim was presented out of time.

Email of the 3 March 2022

223. The second alleged act of indirect race discrimination referred to by the Claimant occurred in an email sent on the 3 March 2022. This was referred to in the List of Issues in the Brady CMO. Primary limitation expired for this act on the 2 June 2022 and the Claimant did not contact ACAS within the limitation period and instead contacted ACAS six days outside the primary limitation period on the 8 June 2022 and so the extension of time provided by ACAS early conciliation could not apply and this claim was presented out of time.

Conduct extending over a period

224. We had to consider whether the Claimant could prove that there was conduct extending over a period which could be said to be done at the end of the period ending on the date of her dismissal on the 9 March 2022, for both of the emails of the 1 April 2020, and the email of the 3 March 2022, and whether such conduct was accordingly in time pursuant to s123(3)(a) of the Equality Act 2010? ('EqA').

225. If the test at above was not made out, we then had to consider whether any complaint was presented within such other period as the Tribunal consider just and equitable pursuant to s123(3)(b) EqA?

226. In relation to the claims under the EqA the Claimant complained of the way she, and other migrant workers had been treated in relation to the contents of the emails sent on both the 1 April 2020 and the 3 March 2022, and as this time period could only have started when the email was sent on the 1 April 2020 and then potentially ended when she was eventually dismissed on the 9 March 2022 we found as set out below.

227. Pursuant to s.123 of the EqA 2010 it is provided that: -

> *(1) … proceedings on a complaint within section 120 may not be brought after the end of —*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
> *(b) such other period as the employment tribunal thinks just and equitable.*
>
> *(3) For the purposes of this section—*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period.*

228. We found that the sending of the email on the 1 April 2020 was a one-off discrete act and that accordingly the time limit for bringing such a complaint would have expired on the 30 June 2020. By the time this complaint had been presented on the 18 August 2022 the proceedings had been presented approximately twenty-six months out of time. The Claimant did not address us on this limitation point nor give any evidence about why she did not issue proceedings earlier than she did.

229. In reaching this conclusion we had regard to the case of *South Western Ambulance Service NHS Foundation Trust v King* [2020] IRLR168 EAT, where the EAT set out that when a claimant wishes to show that there has been 'conduct extending over a period' — i.e. a continuing act — for the purposes of s.123(3)(a) EqA 2010, he or she will need to set out a series of acts, each of which is connected with the other, to demonstrate that either they are

instances of the application of a discriminatory policy, rule or practice, or because they are evidence of a continuing discriminatory state of affairs.

230. Whilst there was evidence of migrant workers being put under pressure by the Respondents during Covid and in April 2020 to only be paid 75% of their salary, we found this email was a one-off discrete act. The subsequent email sent on the 3 March 2022 we found was unconnected with the email sent on the 1 April 2020.

231. We then considered whether this complaint was presented within such other period that we considered just and equitable pursuant to s.123(3)(a) of the EqA 2010. The Claimant made no submissions about this issue of the claim for indirect discrimination on the grounds of race being presented out of time, and we took into account by the time she brought this claim she was a qualified solicitor.

232. We found that it was open to the Claimant to contact ACAS at the time this first email was sent to them on the 20 April 2020 and to then issue proceedings on this allegation alone. We did not find that the period within in which she presented her claim some twenty six months out of time was within a period of time we considered just and equitable, and as such we found that we had no jurisdiction to hear this claim and this claim for indirect discrimination based on the email of the 1 April 2020 is dismissed.

233. In relation to the sending of the email on the 3 March 2022 we had regard to the fact this claim could not benefit from the ACAS extension as she did not contact them within the primary limitation period by the 2 June 2022. As such time for presenting this claim expired on the 2 June 2022 and the claim was presented on the 18 August 2022 nearly eleven weeks out of time.

234. The Claimant made no submissions about this issue of the claim for indirect discrimination on the grounds of race being presented out of time, and we took into account by the time she brought this claim she was a qualified solicitor.

235. We found that it was open to the Claimant to contact ACAS soon after this email was sent to them on the 3 March 2022 and to then issue proceedings.

236. We did not find that the period within in which she presented her claim some eleven weeks out of time was within a period of time we considered just and equitable, and as such we found that we had no jurisdiction to hear this claim arising out of the emails of the 1 April 2020, and the 3 March 2022 and this claim is dismissed.

Non-neutral PCP

237. In any event, despite our finding that the Claimants claims for indirect race discrimination were presented out of time and therefore failed due to lack of

jurisdiction, we still go on to set out our conclusions on those claims in any event.

238. For reasons already referred to in this Judgment the claim for Indirect Race Discrimination was based on a non-neutral PCP and in accordance with the case of *D v E 2023 EAT* even had this Tribunal extended time for the claims to be brought the claims would have failed in any event.

239. In particular we address the tests set out in the Brady CMO in any event in relation to the email of the 3 March 2022 sent to employees of the First Respondent as follows: -

6.1 A "PCP" is a provision, criterion or practice. Did the Respondents have the following PCP:

6.2 Migrant workers were requested to work overtime without pay.

240. We found the employees of the First Respondent were asked to work overtime without pay but we did not find it was a PCP applied to the whole workforce of the First Respondent as it was not applied to Maria Esguerra a British National worker. We did not find this was a PCP applied by the Second Respondent.

6.3 On 03 March 2022 Migrant workers were told there would be no annual leave or sick leave and that they would be working 10 hours a day for 6 days a week.

6.4 Requiring Migrant workers work on the weekends.

6.5 Migrant workers were told they would be paid overtime for weekend working and then they were not.

6.6 Did the Respondents apply the PCP to the Claimant?

241. We found that the First Respondent did apply the PCPs at 6.3, 6.4, and 6.5 above to migrant workers but at this point the Claimant did not work for the First Respondent and was working for the Second Respondent, so they did not apply the PCP to the Claimant. We did not find this was a PCP applied by the Second Respondents.

6.7 Did the Respondents apply the PCP to persons with whom the Claimant does not share the characteristic, e.g., UK citizens or would it have done so?

242. We did not find that the First Respondent applied this PCP to persons with whom the Claimant did not share the characteristic. We found that they did not apply it to Maria Esguerra a British National worker. We did not find that this PCP was applied by the Second Respondent.

6.8 Did the PCP put persons with whom the Claimant shares the characteristic, e.g., migrant workers from India at a particular disadvantage when compared with persons with whom the Claimant does not share the characteristic, e.g. UK Citizens, in that the emails were only distributed to the migrant workers? The Respondents says that the British National that the Claimant refers to (Maria Esguerra) was part of a different department and held a managerial role which is why she was not included in the emails.

243. Having found that the PCP was not applied to others by the First Respondents and in particular that it was not applied to those who did not share the characteristic of race, i.e., Maria Esguerra, then we found that this PCP was not made out.

6.9 Did the PCP put the Claimant at that disadvantage?

244. As the Claimant was no longer working for the First Respondent when this email was sent by the First Respondent it did not put her at that disadvantage. We did not find it was a PCP applied by the Second Respondent.

Unfair Dismissal

245. The Claimant was continuously employed by the Respondent for more than two years and in those circumstances had the right not to be unfairly dismissed by it (section 95 of the Employment Rights Act 1996).

246. Section 98 of the Employment Rights Act 1996 ('the Act') provides that:

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it
(a) …

(b) relates to the conduct of the employee,

> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

247. The correct approach for the Tribunal to adopt in considering section 98(4) of the ERA (as set out in *Iceland Frozen Foods v Jones* [1982] IRLR 439) is as follows:

> *"… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

248. The ACAS Code of Practice on Disciplinary and Grievance procedures sets out matters that may be taken into account by tribunals when assessing the reasonableness of a dismissal on the grounds of conduct, as follows:

> "Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions, or confirmation of those decisions. Employers and employees should act consistently. Employers should carry out any necessary investigations, to establish the facts of the case. When investigating a disciplinary matter take care to deal with the employee an affair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against it. Be careful when dealing with evidence from a person who wishes to remain anonymous. In particular, take written statements that give details of the time, place, dates as appropriate, seek cooperative evidence

> check that the person's motives are genuine, and assess the credibility and weight to be attached to their evidence. Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made. Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct. And its possible consequences to enable the employee to prepare to answer the case of the disciplinary hearing. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements within the notification. At the meeting, the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should also be given a reasonable opportunity to ask questions, present evidence, and call relevant witnesses. They should also be given the opportunity to raise points about information provided by witnesses. Employers should allow an employee to appeal against any formal decision made."

249. For guidance on the level of investigation and on the Respondent's belief that an act of misconduct has occurred, *British Home Stores v Burchell* [1979] IRLR379 provides as follows:

> "What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

250. As at the time of the Claimant's dismissal, the Tribunal has to ask:

(i) did the Respondent believe the Claimant was guilty of the misconduct alleged,

(ii) if so, were there reasonable grounds for that belief,

(iii) at the time it had formed that belief had it carried out as much investigation into the matter as was reasonable in the circumstances, and

(iv) was the decision to summarily dismiss the Claimant within a range of reasonable responses open to an employer in the circumstances (*Yorkshire Housing Ltd v Swanson [2008] IRLR609*)? The range of reasonable responses test applies as much to the procedure which is adopted by the employer as it does to the substantive decision to dismiss (*Sainsbury's Supermarkets Limited v Hitt* [2003] IRLR 23).

251. The employer cannot be said to have acted reasonably if he reached his conclusion in consequence of ignoring matters which he ought reasonably to have known and which would have shown that the reason was insufficient (*W Devis & Sons Ltd v Atkins* [1977] IRLR314, HL).

252. An employee can challenge the fairness of a dismissal if an agreed procedure was not correctly followed (*Stoker v Lancashire County Council* [1992] IRLR 75).

253. The fairness of the procedure adopted by an employer is to be assessed at the end of the internal process, including any appeal process. (*Taylor v OCS Group Limited* [2006] IRLR613). The process must be considered in the round. Smith LJ stated:

> "If [the Tribunal] find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceedings with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or review, but to determine whether due to the fairness or unfairness of the process procedures adopted, the thoroughness or lack of it of the process and the open mindedness or not, of the decision maker, the overall process was fair, notwithstanding any deficiencies at the earliest stage."

254. Case law has identified that the reason for dismissal will be a set of facts known to the employer at the time of dismissal or a genuine belief held on reasonable grounds by the employer which led to the dismissal (*Abernethy v Mott, Hay & Anderson* [1974] IRLR213, CA).

Polkey

255. Recent case law has moved away from the distinction between a finding of Unfair Dismissal on procedural grounds as opposed to dismissal on substantive grounds such as in *Gover and ors v Propertycare Ltd.* [2006] ICR1073, CA; *Thornett v Scope* [2007] ICR236, CA; *Software 2000 Ltd v Andrews and Ors* [2007] ICR 825, EAT; and *Contract Bottling Ltd v Cave and Anor* 2015 ICR146, EAT.

256. While all these cases recognise the remarks made by Lord Prosser in *King and ors v Eaton Ltd (No.2)* the courts are increasingly drawing back from the view that there is a clear dividing line between procedural and substantive unfairness, and as a result that line is no longer used to determine when it is and is not appropriate to make a Polkey reduction.

257. In *King and Ors v Eaton Ltd* (Lord Prosser observed):

> "[T]he matter will be one of impression and judgement, so that a tribunal will have to decide whether the unfair departure from what should have happened was of a kind which makes it possible to say, with more or less confidence, that the failure makes no difference, or whether the failure was such that one cannot sensibly reconstruct the world as it might have been."

258. In the event of an unfair dismissal the Tribunal must determine what would have been likely to have occurred if a fair procedure had been adopted, in accordance with the guidance in *Software 2000 Ltd v Andrews* [2007] IRLR 569. The EAT stated:

> "If the employer seeks to contend that the employee would or might have ceased to be employed in any event, had fair procedures being followed, or alternatively, would not have continued in employment indefinitely, it is for him to adduce relevant evidence on which he wishes to rely."

259. However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the Tribunal may take the view that the whole exercise of seeking to reconstruct what might have been so riddled with uncertainty that no sensible prediction based on that evidence can properly be made."

Applying the Law to the Facts

Polkey

260. Mr Hoyle submitted that had the Second Respondent sat down and explained to the Claimant that they no longer wished to employ her during the notice period due to all the time and money invested in her the outcome would have been the same and so any procedural unfairness in summarily dismissing her made no difference to the outcome.

261. We found this a difficult submission to follow. If an employer decides they no longer wish to employ an employee during their notice period following their resignation, and due to a perception by the employer of a breakdown in trust and confidence then, that will not entitle them to summarily dismiss the employee. At most it could only lead to them wrongfully dismissing them and making a compensatory payment for their notice pay or exercising a PILON

clause and making a payment in lieu of notice. No such PILON clause existed in the terms and conditions of the Claimants employment.

List of Issues - ***3.1 Was the Claimant dismissed? Respondents says the Claimant was not dismissed but handed in her notice. Respondents will apply to amend the Grounds of Resistance to reflect this. Claimant says Respondents told her to hand in her notice and in any event after she had done so, she then received an email saying that she was dismissed.***

262. The Respondents never applied to amend their Grounds of Resistance and so the first question we had to answer was whether the Claimant was dismissed?

263. Mr Hoyles submissions on the dismissal of the Claimant during her notice period were difficult to follow. He asserted that for the Claimant to have been dismissed during her notice period there must have been some dismissal that was automatically unfair. The legal basis of this submission was not at all clear.

264. In an email of the 11 March 2022 after the Claimant reiterated in an email that day that she was giving four weeks' notice of her resignation Mr Refugio replied as follows:

> "Firstly, it is accepted that you must give a four weeks' notice when ending your employment, but there is no provision for the Company. to accept such period of notice. I refer you to your employment contract. In other words, allowing you to complete your notice period is at the Company's discretion. On this occasion, you broke the Company's trust, and we do not see any value for you to work any longer from the date of your notice. In addition, your previous performance at work and whether you agree with the Company's decision is irrelevant in respect of this issue.

265. We comment at this juncture on the acceptance by Mr Refugio that the Claimant was obliged to give four weeks' notice to the Second Respondent. This feeds into our finding that the Claimants contract of employment with the First Respondent was varied so that it then became her contract of employment with the Second Respondent. In particular we refer to the case *Khatri v London Central Mosque Trust Ltd and anor EAT 0110/12* K. In that case the Claimant had originally been employed by LCMT Ltd, a mosque, to teach at a weekend school. Her role then developed into being the manager of a nursery run by and held in the mosque, but which was set up as a separate company. Her payslips, P46, time sheets and various other documents all identified the nursery as her employer. The EAT upheld an employment tribunal's decision that at the outset K's employer was LCMT Ltd, but by the end of it she was employed by the nursery. The EAT held that as with any implied variation, 'the identity of the employer can also be altered by an implied agreement constituted by conduct'. The fact that Mr Refugio referred to a four week notice period was relevant to

our finding the same terms and conditions of employment the Claimant had with the First Respondent also applied to her employment with the Second Respondent either by variation of her original contract when she became employed by the Second Respondent, or by the implication of those terms of employment into her employment with the Second Respondent.

266. Whilst it was never disputed in this case that the Claimant was employed by the Second Respondent we found on the facts of this case as in *Khatri* that the Claimant's contract was varied so that the Second Respondent became her employer in place of the First Respondent. We therefore found her contract of employment was simply varied without the terms being changed and therefore her notice period at the date of dismissal was four weeks. We did not find that it was the statutory minimum notice period of three weeks as contended for by Mr Hoyle

267. We found the Claimant was dismissed by the Second Respondent on the 9 March 2022 just some hours after she resigned. We found that this was a situation where the Claimant having resigned the Second Respondent then decided to bring forward her date of termination and in so doing this amounted to a summary dismissal of the Claimant.

268. Where, after an employee gives notice to terminate their employment, and, during that period of notice the employer summarily dismisses them, the employee will be considered to have been dismissed despite the fact that they first gave notice to terminate their contract, as set out in the case of *Harris and Russell Ltd v Slingsby* [1973] 3 All ER 31, [1973] IRLR 221).

269. If, after the employee has given notice, the employer takes advantage of a contractual right to make a payment in lieu of notice ("PILON clause"), there is no dismissal *Marshall (Cambridge) Ltd v Hamblin [1994] ICR 362, [1994] IRLR 260).* However, in this case there was no PILON clause in the Claimants contract of employment. It simply stated as follows: -

> Please ensure you let us have at least four weeks' notice in writing, email will do if you want to leave the. [**we note that words were missing at this point in the paragraph]** Should we end your employment we will give you the notice period you are entitled to under the law, unless you are sacked for gross misconduct where there would be no notice entitlement.

270. In the absence of a PILON clause the Second Respondents actions, in refusing to accept the Claimants four weeks' notice when she resigned, which were due to expire four weeks after the 9 March 2022 on the 6 April 2022, and instead treated her employment as having ended on the 9 March 2022, and told her she could not work her notice, then we found that this amounted to a summary dismissal of the Claimant on the 9 March 2022.

List of Issues - 3.2 What was the reason or principal reason for dismissal? The Respondents says the reason was conduct in that the mutual trust and confidence had broken down by the Claimant seeking employment

elsewhere. The Tribunal will need to decide whether the Respondents genuinely believed the Claimant had committed misconduct.

271. The Claimant was summarily dismissed by the Second Respondent. The Grounds of Resistance cited that there was a breakdown in trust and confidence between the Claimant and the Second Respondent due to her misconduct. This was based on her obtaining another role elsewhere.

272. The Brady CMO referred to whether the Respondents held a genuine belief in her misconduct, but also referred to the breakdown in trust and confidence. In essence therefore the Brady CMO cited two potentially fair reasons for dismissal, the first being misconduct and the second for some other substantial reason based on a breakdown in trust and confidence.

273. We did not find that the Second Respondent held a genuine belief that the Claimant had committed misconduct. Instead, we found they would simply not entertain her working her notice as she had offended Mr Refugio by obtaining alternative employment. We found that could not amount to a genuine belief that she had committed misconduct.

274. We found that the potentially fair reason for dismissal, which the Respondents cited in submissions, was a breakdown in trust and confidence.

> ***List of Issues - 3.3 If the reason was misconduct, did the Respondents act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:***
>
> ***3.3.1 there were reasonable grounds for that belief;***

275. We did not find that the Second Respondent had any reasonable grounds for believing that the Claimant had committed an act of misconduct.

> **3.3.2 At the time the belief was formed the Respondents had carried out a reasonable investigation;**

276. There was no investigation whatsoever carried out by the Respondents into what they claimed to regard as misconduct.

277. In the absence of any procedure being followed whatsoever the summary dismissal of the Claimant without any warning fell outside the reasonable range of investigations of any other reasonable employer and was therefore procedurally unfair.

3.3.3 the Respondents otherwise acted in a procedurally fair manner;

278. We found that no procedure whatsoever being adopted prior to dismissing the Claimant that the Second Respondent did not act in a procedurally fair manner

and the decision to dismiss her summarily was outside the range of the reasonable range of procedures of any other reasonable employer.

3.3.4 the dismissal was within the range of reasonable responses.

279. We did not find that the dismissal was within the reasonable range of responses, and we find the decision to dismiss her was outside the reasonable range of responses of any other employer.

280. Simply put, the Claimant finding another job with another employer could neither amount to misconduct, nor could it, in the circumstances of this case, justify a dismissal based on a breakdown in trust and confidence between the Claimant and Second Respondent. Employees finding new roles and leaving their employment is an everyday event and this simple fact alone in the circumstances of this case could not justify the summary dismissal of the Claimant.

List of Issues - 3.4 What was the reason or principal reason for dismissal? The Respondents says the reason was a substantial reason capable of justifying dismissal, namely the Respondents says the reason was conduct in that the mutual trust and confidence had broken down by the Claimant seeking employment elsewhere.

281. The principal reason for dismissal was defined as misconduct but there was also a reference in the Brady CMO to a 'substantial reason capable of justifying dismissal'. We have found the principal reason for dismissal was due to Mr Refugio being outraged at the simple act of the Claimant finding alternative employment. This could only potentially fall under the category of a breakdown in trust and confidence i.e., some other substantial reason.

3.5 Did the Respondents act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

282. The Second Respondent did not act reasonably in all the circumstances in treating the Claimant's actions, when she advised Mr Refugio in the meeting of the 9 March 2022, i.e., that she was intending to resign due to finding a new role, as a reason for dismissing the Claimant. Whether this was viewed as an act of misconduct by the Second Respondent, or whether they concluded it destroyed all trust and confidence between them, neither potentially fair reason relied on by the Second Respondent could justify, or amount to a sufficient reason for the summary dismissal of the Claimant by the Second Respondent in these circumstances.

283. We did not find this was a dismissal that was only procedurally unfair as opposed to being substantively unfair.

284. We did not find that we could reconstruct the world as 'it might have been,' had Mr Refugio followed a fair procedure, and consulted in some way before he summarily dismissed the Claimant.

285. Accordingly the Claimants claim for Unfair Dismissal succeeds and we find it was both procedurally and substantively unfair.

Wrongful Dismissal

286. Having found the Claimant was entitled to a four week notice period we found that when she was summarily dismissed by Mr Refugio on the 9 March 2022 that this amounted to wrongful dismissal and accordingly this claim for Wrongful Dismissal succeeds in the sum of four weeks salary.

Unauthorised Deductions From Wages

287. The Claimants claims for unpaid wages partially succeeds as follows: -

286.1 The Respondents admitted that they owed unpaid wages for salary owed and this claim succeeds.

286.2 The Respondents admitted that they owed a minimum of one week's statutory notice, but this Tribunal finds in addition to one week's statutory notice the Claimant is owed the remainder of the four-week contractual notice this being a further three weeks' notice and this claim succeeds.

286.3 The claim for overtime payments fails.

Direct Discrimination

288. We had to determine the following issue:-

6.2 Direct Race Discrimination (Equality Act 2010 section 13)

: -

6.2.1 This claim was added by Judge L Brown at the hearing on the 18 July 2023 pursuant to her general case management rules under Rule 29 of the Employment Rules of Procedure.

6.2.2 The Claimant is a non-British National migrant worker, and she compares herself with British-National workers.

6.2.3 Did the Respondents treat the Claimant less favourably on the grounds of race and in particular as a non-British-national migrant

worker compared to British-national workers on the 9 March 2022 after she advised Mr Refugio that she was resigning, and by their later alleged dismissal of the Claimant that day?

6.2.4 Was that less favourable treatment?

6.2.5 The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

6.2.6 The Claimant says she was treated worse than the following British-national workers: -

6.2.6.1 Maryam Sufi who left in September 2020.
6.2.6.2 Luca Theodorou who left in October 2021.
6.2.6.3 Martin Patrick who left in June 2021.

289. Section 13 of the Equality Act 2010 provides: -

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

290. In cases of alleged direct discrimination, the Tribunal is focused upon the 'reasons why' the Respondent acted (or failed to act) as it did. That is because, other than in cases of obvious discrimination (this is not such a case), the Tribunals will want to consider the mental processes of the alleged discriminator(s): *Nagarajan v London Regional Transport [1999] ICR877*.

291. In order to succeed in his claims under the Equality Act the Claimant must do more than simply establish that she has a protected characteristic and was treated unfavourably: *Madarassy v Nomura International Plc [2007] IRLR246.* There must be facts from which we could conclude, in the absence of an adequate explanation, that the Claimant was discriminated against.

292. This reflects the statutory burden of proof in section 136 of the Equality Act 2010, but also long-established legal guidance, including by the Court of Appeal in *Igen v Wong [2005]* ICR931. It has been said that a Claimant must establish something "more", even if that something more need not be a great deal more: Sedley LJ in *Deman v Commission for Equality and Human Rights* [2010] EWCA Civ.1279. A Claimant is not required to adduce positive evidence that a difference in treatment was on the protected ground in order to establish a prima facie case.

293. It is for the Tribunal to objectively determine, having considered the evidence, whether treatment is "less favourable". Whilst the Claimant's perception is, strictly speaking, irrelevant, his subjective perception of his

treatment can inform our conclusion as to whether, objectively, the treatment in question was less favourable.

294. The grounds of any treatment often must be deduced, or inferred, from the surrounding circumstances and in order to justify an inference one must first make findings of primary fact identifying 'something more' from which the inference could properly be drawn. This is generally done by a Claimant placing before the Tribunal evidential material from which an inference can be drawn that they were treated less favourably than they would have been treated if they had not had the relevant protected characteristic: *Shamoon v RUC* [2003] ICR337.

295. 'Comparators', provide evidential material. But ultimately, they are no more than tools which may or may not justify an inference of discrimination on the relevant protected ground, in this case disability. The usefulness of any comparator will, in any case, depend upon the extent to which the comparator's circumstances are the same as the Claimant's. The more significant the difference or differences the less cogent will be the case for drawing an inference.

296. Discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it.

297. It is only once a prima facie case is established that the burden of proof moves to the Respondent to prove that it has not committed any act of unlawful discrimination, so that the absence of an adequate explanation of the differential treatment becomes relevant: *Madarassy v Nomura [2007]* EWCA Civ.33.

298. In our discussions regarding the Claimant's direct discrimination complaint, we have held in mind that we are ultimately concerned with what happened on the day of the 9 March 2022 when the Claimant advised that she was intending to resign from her employment.

299. We compared her treatment to her most direct comparator, Maryam Sufi who left in September 2020 and who was a British National. No evidence was adduced by the Second Respondent that she was subjected to similar treatment to that which the Claimant was subjected to by Mr Refugio. The treatment of the Claimant compared to Ms Sufi, both of whom were solicitors employed by the Second Respondent, together with the facts as found by this Tribunal of the treatment of the Claimant on the 9 March 2022 meant we had found facts from which we could infer discrimination in accordance with *Igen -v- Wong* and *Madrassey* and that this shifted the burden to the Second Respondent to establish a non-discriminatory reason for the treatment of the Claimant on the day she was dismissed.

300. Whilst the Second Respondent, tried to assert that the treatment of the Claimant was not connected to race, i.e., that she was a non-British national migrant worker, Mr Refugio chose to leave the hearing on the morning of the second hearing and chose not to give any evidence to this Tribunal. We have therefore attached no weight to his written statement, and the only evidence we heard from the Second Respondent on the treatment of the Claimant by Mr Refugio was from Ms Germin Mohamed. We preferred the Claimants evidence to the evidence of Ms Germin Mohamed.

301. In the absence of an explanation from Mr Refugio himself, which was tested on cross examination, about the reasons for Mr Refugio's treatment of the Claimant, we found that on the balance of probabilities the reason for his treatment of the Claimant, and for his dismissal of her, was on the grounds of race, and we drew an inference that it was due to the Claimants race as a non-British national migrant worker and that she was treated less favourably by the Second Respondent because of her protected characteristic of race.

302. s23(1) EA 2010 provides that:

> On a comparison of cases for the purposes of section 13 [direct discrimination] … there must be no material difference between the circumstances relating to each case.

303. Mr Hoyle submitted that the comparators the Claimant compared herself to were materially different to the Claimant in that they were members of the sales team of the First Respondent. However, he was referring to the email sent to the employees of the First Respondent in March 2022. These were not the chosen comparators of the Claimant for this claim which were identified as Maryam Sufi who left in September 2020, Luca Theodorou who left in October 2021, and Martin Patrick who left in June 2021.

304. Mr Hoyle did not address in his submissions the fact that one of the chosen comparators of the Claimant, Maryam Sufi, was also a Solicitor and who left the Second Respondents employment, and she was a British National. Mrs Germin Mohamed did not deny during cross-examination that Maryam Sufi was not subjected to the same treatment as the Claimant. We found there was no material difference between the Claimant and one of her chosen comparators Maryam Sufi a British national worker.

305. In any event, as cited by Rimer LJ in *Lockwood v Department of Work and Pensions and Cabinet Officer* [2013] EWCA Civ 1195 at [34] the following was said:

> The whole purpose of the comparison is as an aid to seeing whether or not the way in which the comparator was, or would have been, treated in the relevant circumstances supports the Claimant's allegation that he was subjected to less favourable treatment on the ground of the protected characteristic.

306. In the case of *Hewage v Grampian Health* Board [2010] UKSC 37 the question of whether a comparator is appropriate is one of "fact and degree", and it established that the circumstances of the complainant and the comparator need not be identical.

307. In Lord Hoffman's comments in *Watt v Ashan* [2008] ICR 82, [para 36-37] it was said that "It is probably uncommon to find a real person who qualifies… as a statutory comparator" as a materially similar comparator will be "rare in ordinary life".

308. In any event if we go straight to the reason for the treatment, rather than looking at one of the Claimants chosen comparators, Ms Sufi, we found there was clear evidence which pointed to direct discrimination of the Claimant. It was inexorably clear to us that the reason for Mr Refugio's aggression to the Claimant was because the First Respondent had enabled her to come and work in the UK as a migrant worker, and that the Second Respondent then obtained a visa for her to be employed by them as a Solicitor, and that as a result, he felt she was somehow indebted to both the First and Second Respondent and should not have sought employment elsewhere.

309. Elias P in *Islington London Borough Council v Ladele* [2009] ICR 387 [EAT] [2] at [41] said as follows:

> The logic of Lord Hoffmann's analysis is that if the Tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then again it is unnecessary to determine what are the characteristics of the statutory comparator? This chimes with Lord Nicholls' observations in Shamoon to the effect that the question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly: "employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was."

310. Ladele has recently been approved by the EAT in *Dr G Kalu v Brighton & Sussex University Hospitals NHS Trust & Others UKEAT 0609/12/BA (Langstaff P)*. So, when asking ourselves the 'reason why' the Second Respondent treated the Claimant this way and then dismissed her we found it was due to her status as a migrant non-British national worker, and thus was on the grounds of her race and national origin.

311. Mrs Mohamed on behalf of the Second Respondent stated they had invested a lot of money in helping the Claimant come to the UK and qualify as a Solicitor, and that this was the reason for Mr Refugio's anger towards the Claimant and that it was not because of her race i.e., being a migrant worker whose visa he had funded. However, we found that the Claimant had paid for

all her costs of her conversion course to qualify as a solicitor in the UK, and that the money the Second Respondent resented having invested in the Claimant was in effect the cost of the sponsorship of her Tier 2 Visa. By definition they only spent these sums on migrant workers and so we found that it was by reason of her race, and being a non-British National migrant worker, that led to Mr Refugio being so affronted by her resignation and subjecting her to the treatment that he did.

312. We did not need to find Mr Refugio consciously decided to treat her in that manner when he became angry and aggressive and decided to summarily dismiss her because she was a migrant worker. In *Martin v Devonshires Solicitors* UKEAT/86/10 [2011] ICR 352, [2011] All ER (D) 345 (Mar) a distinction was made between "motive" which is irrelevant, and "motivation" which is not. We believe the motivation for Mr Refugio on behalf of the Second Respondent in becoming angry and dismissing the Claimant was because she resigned after the First and Second Respondents had assisted her with being in the UK by employing her for over three years.

313. As a tribunal we must bear in mind that a discriminatory motive may be sub- or unconscious as established in *Geller v Yeshurun Hebrew Congregation UKEAT/190/15,* [2016] ICR 1028, [2016] All ER (D) 229 (Mar)). We find that the discriminatory motivation in becoming angry and dismissing her may well have been unconscious on the part of Mr Refugio but that it was still motivated by race and was discriminatory on the grounds of race.

314. We found that the less favourable treatment on the grounds of race contrary to s.13 of the EqA 2010 was being shouted at and being treated aggressively by Mr Refugio on behalf of the Second Respondent in the accusations he made to her in the meeting on the 9 March 2022 and then by summarily dismissing her on behalf of the Second Respondent on the 9 March 2022 and thus the Claimants claim for direct race discrimination succeeds..

315. The Claim for a failure to issue a Statement of Particulars, contrary to s. 38 of the ERA 1996, against the Second Respondent succeeds.

316. This claim will now be listed for a remedy hearing for two days to take place by CVP, and the parties are to provide dates of availability in the next six months in the next 14 days.

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Employment Judge L Brown

Date: 3 December 2023
Amended on 12 December 2023
Sent to the parties on: 19 December 2023

For the Tribunal Office.