EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
	v
Mr Clive Phillips	Combined Technical Solutions Ltd

Heard at: **London Central Employment Tribunal**

On: **31 January – 6 February 2024**

Before: **EJ Webster**
Mr Pearlman
Mr Tansley

Appearances
For the Claimants: **Ms Aboagye (Lay representative and partner)**

For the Respondent: **Ms Fadipe (Counsel)**

JUDGMENT

1. The Claimant's claims for harassment related to race/nationality are not upheld.
2. The Claimant's claims for direct race discrimination are not upheld.
3. The Claimant's claim for constructive unfair dismissal is not upheld.

WRITTEN REASONS

4. An Oral Judgment was delivered to the parties on 6 February 2024 and a summary Judgment sent to the parties. The Claimant asked for written reasons by email dated 12 February 2024.

The hearing

5. We were provided with an agreed bundle numbering 252 pages, a cast list, a chronology and a suggested reading list. We were also provided with written witness statement for the following:

   (i) Nana Aboagye
   (ii) Derek Jean Baptiste
   (iii) Jonathon Opoku
   (iv) The Claimant
   (v) Nicholas Morris
   (vi) Peter Williams
   (vii) Lucy Dennis
   (viii) Andy Tucker
   (ix) Tamilvendan Rajendran
   (x) Shaun Morrison
   (xi) Michael Jays

6. Mr Baptiste, Mr Opoku, Mr Morris and Mr Williams did not attend the Tribunal and so less weight was attached to their statements as they could not be challenged by the Respondent. The Claimant indicated that he had no questions for Ms Dennis and accepted what she said in her statement and therefore the Respondent did not call her although they indicated that she was available if needed. We therefore read her statement and accepted the evidence given.

7. The Issues had been agreed at the preliminary hearing and remained unchanged save that the Claimant clarified that the basis for the Claimant's race discrimination claim was his accent and dialect. It was agreed by Ms Fadipe that this was helpful clarification of the basis of his claim.

8. The parties were notified at the outset that given that we only had 4.5 days (the Tribunal could not sit for ½ day due to member availability), it was unlikely that if we managed to deliver an oral judgment we would also have time for remedy and therefore suggested that the parties need not give evidence on this point. Our judgment is therefore in respect of liability only.

9. We want to note, without any disrespect or intent to patronise her, that we found Ms Aboagye's knowledge of the facts of the case, the documents in the bundle and her ability to cross examine the Respondent witnesses, impressive for a lay representative.

The Issues

10. <u>Time limits</u>

    a. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 17 September 2022 may not have been brought in time.
    b. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

i. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
ii. If not, was there conduct extending over a period?
iii. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period
iv. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
    1. Why were the complaints not made to the Tribunal in time?
    2. In any event, is it just and equitable in all the circumstances to extend time?

11. Harassment related to race (Equality Act 2010 section 26)

a. The Claimant is Black and of Caribbean origin. At the outset of the hearing Ms Aboagye confirmed that he relied upon his accent and dialect as being the basis for the discrimination.

b. Did the Respondent do the following things:

i. Made derogatory comments to other staff members about the Claimant's ability to work
ii. Tamil Rajendran told Kevin (CTS Engineer) to not assist the Claimant with decking work on or around 6 September 2022;
iii. Sean Morrison suspended the Claimant without good reason;
iv. Failed to inform the Claimant of the grounds for his suspension within a reasonable time frame;
v. Did not conduct a thorough or fair investigation. In particular:
    1. Tamil Rajendran was allowed to remain on-site during the investigation while the Claimant was excluded;
    2. Mr Morris provided a statement on the Claimant's performance when he had not raised any concerns about the Claimant's performance prior to this occasion;
    3. The investigators claimed to have spoken with one of the Claimant's witnesses Kevin (Mobile Engineer) but they had not done so as Kevin had been directed by management (Lucy Dennis) not to provide a statement;
    4. They stated they had obtained a statement from Derek Jean (Electrician Engineer) but he was not contacted and the statement purportedly provided by him was false;
    5. Albert was interviewed as a witness for both investigations although he had not worked with the Claimant and was not present when the incidents occurred and his statement was false.

vi. Applied the sanction of placing the Claimant on a 6-month probation with a written warning;
vii. Applied the sanction of a verbal warning for the Claimant not following the new shift pattern though the Claimant was on annual leave when this was issued;

viii. In relation to the appeal:

1. Unreasonably delayed in dealing with the appeal;
2. Failed to hold an appeal meeting;
3. Confirmed the original decision without reasonable further consideration/investigation;
4. At a meeting on 31 October 2022 at which a property manager at White City Place (Jonathan Opoku) was present, the question of "How do we deal with this Clive situation, we need to get rid of him" was discussed [Ms Aboagye clarified at this hearing that this was not a documented agenda item, but a topic of discussion];

ix. Caused the Claimant to resign and terminate his employment.

c. If so, was that unwanted conduct?
d. Did it relate to race?

12. Direct race discrimination (Equality Act 2010 section 13)

a. If conduct amounts to harassment, it cannot amount to direct discrimination: EA 2010, 212(1).
b. Did the Respondent do the following things:

i. The Claimant relies on the same acts as for harassment.

c. Did the Respondent's treatment amount to a detriment?
d. Was that less favourable treatment?

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.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

e. If so, was it because of race?

13. Unfair dismissal

a. Was the Claimant dismissed?

b. Did the Respondent do the following things:

i. Claimant relies on the allegations of harassment below, plus the changes to the Claimant's shift pattern following the TUPE transfer in July 2022 as set out at paragraph 7 of the claim form.

ii. Did that conduct breach the implied term of trust and confidence? The Tribunal will need to decide:

1. whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and
2. whether it had reasonable and proper cause for doing so.

c. Did the changes to the Claimant's shift pattern breach any other term of the Claimant's contract?
d. Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.
e. Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.
f. Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.

g. If the Claimant was dismissed, what was the reason or principal reason for dismissal [constructive dismissal only - i.e. what was the reason for the breach of contract]?
h. Was it a potentially fair reason?
i. Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

j. What declarations/recommendations should the Tribunal make? (The Claimant asks the Tribunal to recommend that the Respondent provide him with a reference.)

The Law

14. S136 Equality Act 2010 - The Burden of Proof

S.136(2) provides that if there are facts from which the court or tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of the EqA, the court must hold that the contravention occurred; and S.136(3) provides that S.136(2) does not apply if A shows that he or she did not contravene the relevant provision.

15. The EHRC Employment Code states that 'a claimant alleging that they have experienced an unlawful act must prove facts from which an employment tribunal could decide or draw an inference that such an act has occurred' – para 15.32. If such facts are proved, 'to successfully defend a claim, the respondent will have to prove, on the balance of probabilities, that they did not act unlawfully' – para 15.34.

16. The leading case on this point remains Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931. This was further explored in *Madarassy v Nomura International plc 2007 ICR 867, CA*; and confirmed in *Hewage v Grampian Health Board 2012 ICR 1054, SC*.

17. In the case of Igen, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place (on the balance of probabilities). If so proven, the second stage is engaged, whereby the burden then 'shifts' to the respondent to prove on the balance of probabilities, that the treatment in question was 'in no sense whatsoever' on the protected ground.

18. The Court of Appeal in *Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT*, gave guidelines as follows:

(i) it is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail

(ii) in deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many cases the discrimination will not be intentional but merely based on the assumption that 'he or she would not have fitted in'

(iii) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal

(iv) The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination — it merely has to decide what inferences could be drawn

(v) in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts

(vi) these inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information

(vii) inferences may also be drawn from any failure to comply with a relevant Code of Practice

(viii) when there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent

(ix) it is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act

(x) to discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground

(xi) not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment

(xii) since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden — in particular, the tribunal

will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or any Code of Practice

Direct Discrimination

19. 13 EqA "(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."

20. S13(2) EqA states

    For A to discriminate directly against B, it must treat B less favourably than it treats, or would treat, another person. The Tribunal must compare like with like (except for the existence of the protected characteristic) and so "there must be no material difference between the circumstances" of the claimant and any comparator. (*section 23(1), EqA 2010*).

21. The claimant has relied upon a hypothetical comparator. We have born in mind the guidance set out by HHJ Mummery in In *Stockton on Tees Borough Council v Aylott 2010 ICR 1278, CA*, According to Lord Justice Mummery: '*In this case the issue of less favourable treatment of the claimant, as compared with the treatment of the hypothetical comparator, adds little to the process of determining the direct discrimination issue. I am not saying that a hypothetical comparator can be dispensed with altogether in a case such as this: it is part of the process of identifying the ground of the treatment and it is good practice to cross check by constructing a hypothetical comparator. But there are dangers in attaching too much importance to the construct and to less favourable treatment as a separate issue, if the tribunal is satisfied by all the evidence that the treatment (in this case the dismissal) was on a prohibited ground*.'

22. We have therefore also considered what is referred to as the 'because of' or 'reason why' test to the claimant's assertions. We have considered, the subjective motivations — whether conscious or subconscious — of the respondents in order to determine whether the less favourable treatment was in any way influenced by the protected characteristic relied on. As set out in *Nagarajan v London Regional Transport 1999 ICR 877, HL* we have considered the relevant mental processes of the respondents and the context in which they made their decisions. As Lord Nicholls put it, '*Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on [protected] grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances*.'

23. We have reminded ourselves that it does not matter if the motive is benign or malign. This is set out in the EHRC Employment Code (see para 3.14). In other words, it will be no defence for an employer faced with a claim under S.13(1) to show that it had a 'good reason' for discriminating.

24. We have also reminded ourselves that the protected characteristic need not be the main reason for the treatment provided it is the 'effective cause'. (*O'Neill v*

Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor 1997 ICR 33, EAT).

25. Harassment – s26 Equality Act 2010

S26 (1)A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and

(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…..

(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

(5)The relevant protected characteristics are—

….

race

26. The EHRC code, which we look to for guidance, sets out what is meant by 'related to' in paragraphs 7.9-7.11. It states that related to has a broad meaning and that the conduct under consideration need not be because of the protected characteristic.

27. The Claimant must establish first that the conduct is unwanted and then whether, taking into account all of the circumstances of the case it is reasonable for the conduct to have the stated effect. This is an objective test with a subjective factor of hearing in mind the perception of the claimant.

28. The gravity of the conduct is a key part of the objective assessment. Some complaints will fall short of the standard required. Elias LJ in Land Registry v Grant [2011] ICR 1390 CA (para 47):

… even if in fact the [act complained of] was unwanted, and the Claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.

Constructive Unfair dismissal

29. S95(1)(c) Employment Rights Act 1996 (ERA 1996)

(1)For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) … only if)
….
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

30. In Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 Lord Denning stated:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

31. An employee can resign in response to a series of breaches of contract or a course of conduct by their employer which, taken cumulatively, amounts to a breach of the implied term of trust and confidence. It is possible for the final incident in the chain to be, in itself insubstantial. The test is whether, viewed objectively, the course of conduct showed that the employer, over time, had demonstrated an intention to no longer be bound by the contract of employment.

32. *In Waltham Forest v Omilaju [2004] EWCA Civ 1493*, the Court of Appeal had to decide whether there can be a constructive dismissal where the employer's final act which prompted the resignation is found by the tribunal to be reasonable conduct. The Court of Appeal ruled that the key question was whether the final straw was the last in a series of acts or incidents that cumulatively amounted to a repudiation of the contract by the employer.

33. In their judgment for Omilaju the Court of Appeal gave the following guidance.

(i) The final straw must contribute something to the breach, although what it adds might be relatively insignificant:
(ii) The final straw must not be utterly trivial.
(iii) The act does not have to be of the same character as earlier acts complained of.
(iv) It is not necessary to characterise the final straw as "unreasonable" or "blameworthy" conduct in isolation, though in most cases it is likely to be so.
(v) An innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as destructive of their trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

34. This guidance and other aspects of how to consider a constructive unfair dismissal case were summarised in the case of Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 the Court of Appeal listed five

questions that need asking in order to determine whether an employee was constructively dismissed:

(i) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
(ii) Has he or she affirmed the contract since that act?
(iii) If not, was that act (or omission) by itself a repudiatory breach of contract?
(iv) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.)
(v) Did the employee resign in response (or partly in response) to that breach?

Facts

35. We have only made findings in relation to the matters which assisted us in reaching our conclusions. Where we have not mentioned evidence or matters that were discussed before us that does not mean we have not considered it, it means that it was not relevant to our conclusions.

36. The Claimant was employed as a fabric technician at White City from March 2018. He was originally employed by Vertex Services Group Limited who were contracted to carry out property maintenance services at White City Place. In July 2022 the contract for property maintenance was awarded to Combined Technical Solutions Limited (CTS) (the Respondent) and the Claimant's contract was transferred to them under TUPE.

37. Due to caring responsibilities for his nephew, the Claimant had an agreed shift pattern of 10am-7pm. A written contract in the bundle suggested that he was contracted to work a shifts of either 7-4, 8 – 5 or 10-7. However the Claimant stated, and we accept, that it had been agreed by Vertex that he only had to work the 10-7 shift. He also had what we would describe as an offer letter in the Bundle [p 79] that indicated that he was to be employed only working the 10-7 shift.

38. It appears that the Respondent was not aware of this arrangement at the point of transfer. They assumed that everyone worked according to the pattern set out in the written contract. They therefore assumed that this meant the Claimant could too and rostered him accordingly. We think that when the Claimant raised the fact that he could not start until 10am this caused the Respondent, and in particular Mr Williams, some concern and possibly some irritation. Even during these proceedings, some of the managers we heard from appeared reluctant to accept that this was the Claimant's agreed working hours and/or that it was a contractual entitlement that be protected under TUPE. It is also clear that they were negative about this situation and that was born out by their witness statements many of which use language such as him 'refusing' to work his shift pattern and painting his concerns about the shift pattern in a negative light. We

accept, that apart from Mr Morrison, none of the people working with the Claimant saw the offer letter at page 79. Nevertheless, it was clear that the Claimant was consistent in stating that he had only ever worked the late shift and he was clear in indicating why. It was also clear that the Respondent was not particularly happy with that.

39. In August 2022, following a period of leave, the Claimant arrived at work at a time that did not fit with the shift roster that had been sent out in his absence. According to that roster he was due to start work on one of the early shifts.

40. He was therefore called to a meeting with Mr Williams and Mr Rajendran on 31 August 2022. At that meeting the Claimant stated that he wanted to gain additional skills and experience and was told by Mr Williams that this would only be possible if he attended work at 7am. We heard from Mr Williams, Mr Morrison and Mr Tucker that the reason this training had to take place so early was that a plant walk around always took place at the outset of the day i.e. before the client was in the building or at least whilst it was still quiet. That plant walk around was a key part of learning the next steps though we were not given detail of why or how. Mr Williams was only meant to be attending the site in the initial stages of the contract as he was a Director and was only there to get the new contract and systems of working bedded in. Then he would hand over primarily to Mr Morrison and Mr Tucker. We accept therefore that when the Claimant indicated that he wanted to increase his skills, Mr Williams indicated that he was willing to provide the Claimant with some training but to do that he would need to do some of the early shifts to attend the plant walk around. We think, on balance, that the Respondent was irritated by the Claimant's insistence on working the late shifts only as it had not been the basis on which they had tendered to do the work and, at first at least, they would have preferred for the Claimant to be more flexible. We expect that they probably made that clear and we consider that Mr Williams' offer to train up the Claimant was at least in part, an effort to get him to work the early shifts and see if that was a sufficient carrot to convince him not to insist on only working the late shifts.

41. We are sure that at least some of that frustration or exasperation is likely to have been communicated to the Claimant by Mr Williams as would some of the Respondent's desire for him to change his shifts.

42. Following that meeting, the Claimant sent an email raising various concerns including that his hours ought not to be changed, that he had received a written warning and that he had been accused of being late on 31 August 2022. He also said that he considered that this was bullying behaviour and raised his desire to be upskilled and paid more.

43. Following that Mr Williams and Mr Tucker held another meeting with the Claimant on 1 September. They wanted to attempt to resolve the matter informally which is allowed for within the Respondent's grievance process. We accept that their main aim in having that meeting was to clarify that they had not given the Claimant a formal warning and to clear up any misunderstandings from the meeting the day before. We accept that no formal warning was given to the Claimant on 31 August. They had understood the Claimant's explanation

as to why he was late even if they were not happy with his desire to only work the late shifts they did not think that he was deliberately late and had not given him a warning of any sort. At no time was the Claimant sanctioned for not working the flexible shift pattern and we do not think that the Respondent intended to do so at any time.

44. However they also wanted the Claimant to work the earlier shifts, particularly if he wanted upskilling and they asked him again to sign his contract which had a flexible shift pattern in it. It is clear even from their witness evidence that at this point they did not simply accept that the Claimant ought not to be asked to work the early shifts. In evidence both Mr Williams and Mr Tucker said that at this stage they did not know about the document at page 79. They also said that they had little or no information from the previous employer to confirm this working pattern.

45. In the meeting of 1 September, they told the Claimant that if he wished to continue with his allegation of bullying that he would need to notify HR which the Claimant accepts that he did not. There was nothing to suggest that any of the misunderstandings about the level of warning given to the Claimant arose because of the Claimant's accent or dialect. The Claimant misunderstood what Mr Williams was saying regarding the correlation between the upskilling opportunities on the early shifts and the need to accept the flexible shifts forever. However we consider that the Claimant was probably very anxious about the apparent disregard that Mr Williams and Mr Tucker were paying to his previous working pattern and its importance to him and his family. We wonder if they would have taken such an approach to a woman who indicated that she needed to do the school run. Nevertheless, we consider that the source of the tension at this stage from their point of view was only the Claimant's shift pattern. They indicated that a pay rise could be considered once the contract was up and running and/or if the Claimant upskilled and they told him how to gain those additional skills.

Disagreements with Mr Rajendran

46. Mr Tamil Rajendran was the Claimant's supervisor. The Respondent had different systems of work to that of their predecessor. Although the list of jobs that needed doing by the engineers remained online, Mr Rajendran had overall responsibility for ensuring that the work got done and that the resources he had available (namely people) were used appropriately. He therefore required people to check in with him both in terms of the work that they had done but also before they moved on to the next jobs or provided assistance to colleagues.

47. The Claimant clearly did not like this new system of work. He considered that Mr Rajendran's role was in essence redundant. He could log in and see what work needed completing and then do it. He did not, in his view, need to tell anyone else about it or seek their permission if he wanted to do it differently. One example he relies upon as an incident of discrimination was that Kevin was told not to assist the Claimant with decking work on or around 6 September 2022. We find it more likely than not that Mr Rajendran did ask Kevin not to assist the Claimant at that moment as he needed Kevin to do something else.

However we do not consider that this occurred because Mr Rajendran did not understand the Claimant due to his accent or in any way because of his nationality or race. The Claimant had not told Mr Rajendran in advance or sought his permission to have two people carrying out the decking work. He was not refusing assistance, he was just asking Kevin to do something else and complete his work before assisting the Claimant or indicating to the Claimant that he would find someone else to assist him with the decking.

48. We were also told about an App called Forsite which everyone working at White City Place had to download onto their phones and log in and out of when on site. The App was something put in place by White City Place and was not operated by the Respondent. White City Place made it clear to the Respondents that it was a mandatory part of the contract that all people on site used the App.

49. It came to the Respondent's attention that the Claimant was not using the App despite it being an express requirement by the client. The Claimant continued to fail to download the App despite regular staff briefings as to its importance for the client. It was suggested that he had clearly explained that he needed assistance downloading the App as any App on his phone had been downloaded by someone else and he was not sure how to use his phone in this way. It may be that the Claimant had such difficulties but we do not accept that the Claimant had communicated that to anyone at the Respondent. He gave us no detail on who he had told and when. We find, on balance, that he remained silent as to any problems and therefore it was reasonable for the Respondent to believe that he did not want to account for his time or work whilst on site when coupled with his vocal refusal to account for his time to Mr Rajendran.

50. There was then a disagreement between the Claimant and Mr Rajendran on 7 September 2022. Mr Rajendran stated that the Claimant was being uncooperative and he refused to comply with his request to give an update on the work he had done by the end of the day.

51. The Claimant was then off sick from 9 September until 30 September. Subsequently another incident occurred on 10 October 2022. Mr Rajendran raised a complaint about this incident. He considered that the Claimant had sworn at him and refused to agree with the systems of work, in particular, the need for Mr Rajendran at all and the need for the Claimant to update him on the works that he had done. (p129). He raised his concerns about the Claimant's behaviour with Mr Morrison.

Suspension and disciplinary investigation

52. Mr Morrison then decided to suspend the Claimant. There is some disagreement as to the date on which the Claimant was suspended (either the day of the disagreement or a day later). We think that nothing turns on this point. The Claimant was suspended because he appeared to be refusing to listen to his supervisor. Given that the Claimant accepted in cross examination and in response to an answer from the Tribunal, and in his witness statement that it was entirely unnecessary to have to report back to Mr Rajendran and that he did not like this change to his working life, it is entirely plausible that he was

actively insubordinate at this point or perceived as such by his supervisor. This was the reason for his suspension.

53. The Respondent's disciplinary process states at paragraph 2.1.8 (pg87) that

"Serious or repeated failure to follow reasonable requests or instructions;"

Is an example of conduct/performance that will normally be addressed through implementation of the Company's disciplinary procedure.

54. The Respondent's disciplinary process also states (p 88) that:

"2.4.1 The Company reserves the right to suspend an employee from work, normally for no more than five working days, while a disciplinary offence is being investigated.

2.4.2 Employees will be advised if the suspension is likely to last longer than five working days.

2.4.3 Suspension is not regarded by the Company as disciplinary action. The Company shall inform the employee of the reason for the suspension."

55. There then followed an investigation into the disciplinary situation. This was carried out by Mr Tucker. Mr Tucker interviewed the Claimant, Mr Morrison, Mr Rajendran and Albert Okereafor. Part of the Claimant's claim is that this investigation was inadequate overall, that Mr Okereafor ought not to have been interviewed and that Mr Morrison ought not to have provided a statement raising concerns about the Claimant's performance when he had not raised those concerns previously.

56. The statements given by Mr Okerafor and Mr Morrison for the purposes of that investigation are not particularly positive about the Claimant. Mr Morrison raises two key issues. One is that the Claimant has failed to attend some team meetings despite being told about them directly by him and one was that the Estate benches were taking a long time to be completed. Ms Aboagye, in her cross examination of Mr Morrison established that there was only one Friday after Mr Morrison started work when he and the Claimant overlapped given the various absences that the Claimant had either with ill health, holiday or suspension. Whilst we found this line of questioning useful and convincing, having looked at the statement provided on page 235, Mr Morrison simply refers to weekly team briefs as opposed to them definitely occurring on a Friday and he only alludes to two specific non attendances. The Claimant's evidence was clear that he did recall speaking to Mr Morrison during a lunch break and not attending a meeting on that occasion. This suggests that even if the number of occasions is not agreed, it is agreed that the Claimant did not always attend team briefings when he knew that he ought to. With regard to the painting of the benches we do not accept that Mr Morrison had not raised this directly with the Claimant. Mr Tucker gave evidence, which we accept, that the benches were a key contract requirement and that he had spoken to the Claimant about the need for the benches to be prioritized and that the Claimant was being paid

overtime to complete them. We therefore consider that it ought to have been clear to the Claimant before he read Mr Morrison's statement for the purposes of the disciplinary investigation, that the Respondent and Mr Morrison, as the contract manager, needed the work to be completed and were concerned about the lack of progress. There was no suggestion that the Claimant misunderstood instructions or nuances of communication because of his dialect or accent or nationality. The allegation for the purposes of this claim were that the Respondent misunderstood the Claimant because of his dialect etc. There was therefore no explanation as to how or why the Claimant would not have understood that the Respondent wanted the benches completed quickly and that this was not occurring as quickly as Mr Morrison wanted.

57. With regard to the statement by Mr Okereafor. We heard evidence that he had been present during one of the disagreements with Mr Rajendran and therefore it was appropriate to speak to him. Mr Okereafor goes on to discuss wider aspects of the Claimant's behaviour which may be less relevant but it is clear in any event that the wider comments are not relied upon for the purposes of the disciplinary process.

58. Whilst we understand that the Claimant found the process difficult and did not like some of his colleagues' opinions we consider that the Respondent speaking to relevant witnesses and then providing that evidence to the Claimant so that he can respond, is a necessary part of a disciplinary investigation. It was also a contractual part of the process given the Respondent's disciplinary process and the guidance in the ACAS code.

59. It is not clear who else or what else ought to have been done to make this a robust investigation that the Claimant would have considered thorough. It may have been inappropriate to ask other members of staff and therefore broaden the pool of people who knew about the allegations against him. To do so, would have increased any issues of trust and confidence that the Claimant had with the Respondent if others also had negative things to say about him. The Claimant has not suggested others who ought to have been spoken to who would have changed the Respondent's perspective or assessment of the Claimant's relationship with Mr Rajendran.

60. We accept Ms Dennis' evidence that she did not tell Kevin not to give a statement as this was not challenged by the Claimant. It is not clear to us what evidence Kevin could have given though the Claimant says that he could have given evidence about how he was told not to assist the Claimant. It is not clear to us that this would have been relevant to the allegations of insubordination made against the Claimant rather it may have been relevant to the Claimant's grievance. The Claimant's statement does not suggest anyone else who the Respondent ought to have spoken to.

61. As a result of his investigation, Mr Tucker concluded that the incident warranted disciplinary action but that he did not think it ought to result in the Claimant's dismissal.

62. By email dated 25 October 2022 the Claimant was invited to a disciplinary meeting on 27 October 2022. The information collected as part of the investigation was sent to the Claimant at the same time. Unfortunately, Mr Tucker was not aware that the Claimant was on leave. When the Claimant did not attend the meeting Mr Tucker contacted Ms Aboagye to see if the Claimant was alright. Both Ms Aboagye and the Claimant were upset about this intrusion into their holiday. We find that it was a poor oversight by Mr Tucker not to have considered whether the Claimant was on leave at this time particularly given his episodes of ill health previously.

63. Nevertheless we consider that the welfare check was just that and there was no malice in Mr Tucker's actions nor that he was in any way motivated by the Claimant's race, accent or dialect.

Claimant's grievance

64. As a result of this contact and the other issues that had preceded it, the Claimant raised a grievance on 27 October 2022 saying that he felt bullied, racially profiled, that his concerns were being overlooked, that he was being treated badly because he had refused the new shift pattern and that Mr Rajendran was lying about what had occurred on 10 October. He also raised concerns about his pay level and considered that others were being paid more.

65. He gave more information about his grievance this on 3 November 2022. On 8 November, Mr Jays was appointed to investigate the Claimant's grievance. The Respondent decided to stay the disciplinary process whilst the grievance was investigated.

66. Mr Jays interviewed the Claimant, Mr Williams regarding the pay and benefits issue, Mr Derek Jean Baptiste and Mr Rajendran. His record keeping was not very good. He said that this was because he had changed laptops since the investigation.

67. One assertion put by the Claimant was that he had not spoken to Mr Baptiste and then had lied in his grievance outcome and said that he had spoken to Mr Baptiste and based one of his conclusions on this fictitious discussion.

68. Mr Jays said that he had definitely spoken to Mr Baptiste because otherwise he would not have referred to the conversation in his outcome letter. Mr Baptiste, has given a statement to these proceedings which says that the Claimant did not swear but there is nothing in the statement to say that he did not speak to Mr Jays about the Claimant. In the Whatsapp messages between the Claimant and Mr Baptiste at the time, Mr Baptiste says that they are using his name out of context because "they haven't spoken to me". He says that it had not been officially recorded and there is no time or date. The implication is clear and it is because of these messages that the Claimant has framed his claim as he has.

69. Mr Jays, in cross examination said that he did not formally interview Mr Baptiste but that he did speak to Mr Baptiste to follow on from a comment by the Claimant during the grievance meeting and he took it into account. He concludes, as a result of speaking to Mr Baptiste, that the Claimant did not

intend to swear at Mr Rajendran – he just swore. This is a more positive take on the situation than that which Mr Rajendran had reported so it is not clear as to why this caused either Mr Baptiste or the Claimant so much concern. We accept that lying about having spoken to someone would be concerning – but given that the account given by Mr Baptiste accords with what the Claimant also conceded happened at the time (that he swore but not at Mr Rajendran) it makes it very plausible that an informal conversation between Mr Jays and Mr Baptiste occurred. Mr Jays accepts that this was the correct version of events because Mr Baptiste has supported the Claimant's account. For those reasons we think it is more likely than not that Mr Jays did speak to Mr Baptiste and Mr Baptiste supported what the Claimant said occurred.

70. Mr Jays wanted to discuss the grievance outcome with the Claimant. This occurred on 23 November 2024. The grievance was not upheld but the Claimant was told that he would be able to continue working the 10-7 shift.

71. The Tribunal raised a significant number of questions about the regularity with which the Claimant had to work any shifts other than the 10-7 shift. Nobody seemed to have a definitive record. The Claimant said that it occurred 3 or 4 times. The Respondent witnesses varied between saying just the once when Mr Williams did the walk around, not knowing at all and 2-3 occasions.

72. We find that it was more than once and are willing to accept the Claimant's evidence on this point. Nevertheless, we also consider that from the time that Mr Morrison was in post (from 1 September 2022), he was very clear that the Claimant did not need to work anything other than his 10-7 shift pattern whilst they considered how to make it work. It was accepted by Mr Morrison that other engineers would need to change the way that they worked but that this was not an insurmountable challenge and he was working on trying to fix it. We found Mr Morrison's approach that he wanted a team pulling together and that he was focused on how to achieve that given that he was new to the team and the role, plausible.

73. It is also clearly communicated to the Claimant again, as part of the outcome to his grievance, that he would only need to work the 10-7 shift. This was not in dispute by the Claimant.

74. We were taken to a document which the Claimant says he was sent, where he remained on a variable shift pattern during November and December. This was explained by Mr Morrison as being an error and that he did not know how it had occurred but that he was clear that the Claimant would not have been asked to work these shifts. We conclude that if the Claimant had raised concerns about this roster, he would have been removed from the roster and put back on his 10-7 shift pattern. However he did not raise it with anyone. We do not think that his conclusion that he would have to work these variable shifts was reasonable by this stage. He had been reassured by two managers that he only needed to work the 10-7 shift pattern and he told us that he understood that at the time that he resigned. He therefore ought reasonably to have understood that this roster, put together by someone other than Mr Morrison, could have been questioned and amended. As we have detailed above we accept that the

Respondent's initial response to the Claimant's shift position was negative, however we also accept that this was rectified and Mr Morrison had explained his approach to the Claimant and the Claimant had understood that. In those circumstances, a shift roster issued in error could not reasonably have prompted the Claimant to be so worried that he could not have queried it with his managers.

Disciplinary outcome and resignation

75. Once the outcome had been given, the Respondent decided to restart the disciplinary process. The Claimant was invited to a disciplinary meeting by email on 25 November with the meeting to be on 29 November.

76. On 29 November, the Claimant appealed against the grievance outcome. The grievance was initially acknowledged by Duncan Gray (p221) on the same day saying that Mr Jays was unwell. Mr Jays then acknowledged receipt on 1 December and informed the Claimant that a different manager would be appointed to consider the appeal.

77. On 1 December 2022, the Claimant was given the disciplinary outcome by letter. That said that he was being given a first written warning that would remain on his record for 6 months. There was no mention in that letter of him being on probation.

78. The Claimant resigned on 5 December 2022. He said in his resignation letter (p223) that he was resigning due to a breakdown of trust and confidence owing to the way that his grievance and the disciplinary process were handled.

79. In answer to questions by us, the Claimant indicated that he could not envisage going back to work if his grievance was not upheld and if he had to work with Mr Rajendran any more. We consider that his concerns are best summed up in the email he sent to himself on 14 October 2022 (p 137 albeit this was never sent to the Respondent). He said as follows:

"I explained to Tam that in my role as a fabric technician, for the past four years at white city place I have not needed any supervision to complete tasks, and that any immediate and jobs of urgency are usually notified to me via the manager or client. I explained that I recognise Tam's role in supporting me in ways such as calling out contractors to support me in my role and ordering parts. I explained to Tam I need him to continue to support me in a collaborative role rather than [sic] supervision in my personal opinion."

80. In essence, if he was going to continue being asked to work under Mr Rajendran's supervision and if he was going to continue having to report his work and account for his time, he did not want to work there anymore.

81. The Claimant accepted in evidence that at the time he resigned he knew he was not going to be asked to work anything other than the late shift, but said that he felt he could no longer trust his colleagues because they had been negative about his behaviour and his commitment to or ability to do his job. He said that unless that situation could be rectified he could not return to work.

82. As a result of his resignation the appeal against the grievance outcome was not heard.

Miscellaneous

83. The Claimant asserted that there was a conversation on 31 October 2022 in front of Mr Opoku whereby some Respondent managers discussed how to get rid of the Claimant. Mr Opoku was a property manager for White City place i.e. the Respondent's client.
84. Mr Opoku provided a written witness statement to the Tribunal though he did not attend. That witness statement makes no reference to this incident at all. The Claimant was not at the meeting so could not given evidence as to whether it occurred. None of the Respondent witnesses had recollection of this matter and we heard evidence that it would be highly unlikely that this would be discussed with or in front of their client because it would paint them in a bad light.
85. Given that Mr Opoku could have given written evidence on this point but chose not to and the Respondent has given a plausible explanation as to why it is unlikely that this occurred, on balance we prefer the Respondent's account and find that this comment was not made.

Conclusions

Limitation

86. The Respondent argued that any incident that occurred before 17 September is potentially out of time. There are few incidents that actually occurred before 17 September that are relied upon for the claims. The main incident that arises before that date is the requirement for the Claimant to work a varying shift pattern. That clearly arises from the date of transfer (1 July 2022) and certainly a conversation is had about this matter on 31 August. During that conversation the Claimant believes that he was given a written warning and that his request for increased pay was refused. The Claimant is also given a new contract on 29 July 2022 which he did not sign.

87. The Claimant then raises his concerns about the conversation on 31 August by an email that evening and has another conversation on 1 September. He relies upon both of the conversations for the purposes of his grievance which he submits on 27 October 2022.

88. The issue of the Respondent giving a written warning in the meeting of 31 August did not occur as a question of fact. We consider however that a conversation or discussions regarding the issues surrounding the Claimant's contract after the TUPE transfer including his pay and conditions and his shift pattern continue throughout the remainder of his employment and certainly after 17 September. We therefore consider that the incidents relied upon are potentially part of an ongoing act or series of incidents and therefore the Claimant's claims in relation to this matter are in time. If we are wrong in that, the Respondent is not put to any disadvantage by us extending time to consider the claims. It is a relatively short period of time, the Claimant has raised concerns about all of the issues in his grievance dated 27 October and, at least

in part, this matter is alluded to in his resignation letter. The Respondent was therefore aware of this as a matter of concern and knew that thye had to respond to this issue throughout the preparation for the claim. The Claimant considered that he had raised this issue and wanted it to be dealt with throughout his employment and until the outcome of his grievance. That outcome post dates 17 September. We therefore consider that it is just and equitable to extend time to consider any aspect of this matter which arose before 17 September because the Respondent was aware of the matter, has not been disadvantaged, the time frame is small and the disadvantage to the Claimant of not being able to have this claim considered outweighs any disadvantage to the Respondent.

The Burden of Proof

89. The burden of proof in discrimination claims is for a Claimant to establish a set of facts from which an employment tribunal could decide or draw an inference that discrimination has occurred in the absence of any explanation. If they establish that, then the burden of proof shifts to the Respondent to provide a non-discriminatory reason for the treatment.

90. In this case, for the majority of the issues that we have had to decide, the Claimant has not put forward any evidence whatsoever that his treatment was either caused by or related to his race, national origins, accent or dialect. We heard no evidence or supposition about how a comparator might have been treated in the same circumstances. Some questions were put to the Respondent witnesses about whether it was possible that they had misunderstood the Claimant because of his accent or dialect but we had no evidence of how the Claimant considers that this actually affected any of the situations we have made findings about.

91. Where there is a comparator, real or otherwise, it is established law there must be ‘something more’ than simply pointing at unfair treatment and then saying it is because of race/nationality etc. (Anya v University of Oxford). The Claimant gave no evidence about comparators being treated differently save that he said some engineers were given higher pay deals. That situation is not particularly relevant to the claims we have had to determine but from the evidence we were provided with, we find that any pay difference occurred because they did different jobs with different skills and because their previous employer was offering them higher deals and they wanted them to stay. The Claimant had not, to the best of our knowledge received any better offers of pay. No other information or comparison with people, real or hypothetical was carried out by the Claimant.

92. Instead, what we have been presented with in terms of evidence is a series of events that the Claimant did not like. There is simply no evidence upon which we could infer or understand that the Claimant’s race played any part whatsoever in the motivation for those incidents or that those incidents were related to the Claimant’s race, nationality, accent or dialect - even where we have found them to be unfair. We therefore consider that the Claimant has failed to shift the burden of proof.

93. We nevertheless address each issue relied upon in turn and consider whether the reason why (even in part) any of them occurred was race or whether the treatment related to the Claimant's race.

Made derogatory comments to other staff members about the Claimant's ability to work

94. The Claimant has clarified that the comments made are those made by Mr Morrison and Mr Okereafor for the disciplinary process. Given that they were expressly asked to provide their comments for the purposes of the disciplinary investigation, we conclude that they needed to provide their opinions – though of course they ought not be needlessly derogatory and they must not be motivated by discrimination. We have found that their opinions were relevant to the issue of the Claimant's behaviour towards Mr Rajendran and reflected their opinions of the Claimant and were relevant to the issue under investigation. Mr Okerafor was present at one of the incidents complained about and worked as part of a team with the Claimant albeit that he had a different job. Mr Morrison had plainly spoken to the Claimant about attending meetings. We accept that there is some doubt as to whether they could have been about his attendance at Friday meetings but even the Claimant accepted that Mr Morrison had spoken to him about attending a meeting whilst he was at lunch so clearly there had been some conversations around this matter. We do not consider that either colleague's comments were unnecessarily derogatory even if the Claimant did not like what they said.

95. The Claimant has put forward no explanation as to how these comments relate to the Claimant's accent or dialect or nationality generally nor that either Mr Morrison or Mr Okereafor made these statements because of the claimants accent/dialect or nationality. There was no misunderstanding regarding these incidents and they gave the statements as part of an investigation into related matters. We consider that a hypothetical comparator (e.g. a white person who spoke with received British pronunciation or another 'British' accent) who was being investigated for insubordination and who had behaved in the same way as the Claimant, would have had similar statements written about them.

96. We therefore consider that this issue was not directly discriminatory or harassment related to race.

Tamil Rajendran told Kevin (CTS Engineer) to not assist the Claimant with decking work on or around 6 September 2022;

97. It was accepted by Mr Rajendran that he told Kevin not to assist the Claimant but he explained this as being because he needed Kevin to do something else and that he would arrange for someone else to assist the Claimant at a time that he could spare them. We again note that nothing about this behaviour was even suggested to have been related to the Claimant's accent/ dialect/race/nationality or because of it. It was an example of the Claimant's dislike of the new system of working which meant that someone else decided who did what and when and that included who assisted the Claimant if he needed it.

98. We conclude that a hypothetical comparator (e.g. a white person with a British accent) who had similarly asked a colleague to assist him when they had other work to be done and had not checked first with their supervisor, would have had their colleague be told not to assist them at that point in time.

Sean Morrison suspended the Claimant without good reason;

99. Mr Morrison did have a reason to suspend the Claimant. Whilst suspension is rarely a neutral act, Mr Morrison's reason to suspend the Claimant was that he was refusing to follow management requests. We have accepted that this was the real reason for the Claimant's suspension.

100. That the Claimant does not agree with the reason and even if we as a panel, or a different employer may not have suspended him in the same circumstances is irrelevant. The point is that there was a genuine reason for suspending the Claimant which fell within the Respondent's disciplinary procedure as being a potential act of misconduct and it was the sole reason for the suspension. There is therefore no factual finding that it was not a good reason.

101. Further there was absolutely no evidence to suggest that someone else who had refused to work according to Mr Rajendran's requests in the same way that the Claimant did, and who had sworn during a meeting with him, would not have been suspended in the same way.

Failed to inform the Claimant of the grounds for his suspension within a reasonable time frame

102. The Claimant was told about the grounds for his suspension by Mr Morrison on the day that he was suspended. We have accepted Mr Morrison's evidence that he took the Claimant through that information when he suspended him. There is therefore no factual basis for this ground of claim.

Did not conduct a thorough or fair investigation. In particular:

Tamil Rajendran was allowed to remain on-site during the investigation while the Claimant was excluded;

103. The reason Mr Rajendran was allowed to remain on site was because no allegations of insubordination had been made against him. Whilst we can understand that the situation may have felt unfair to the Claimant, he accepted that it was his behaviour that was being complained about, not Mr Rajendran's.

104. Even if there was some unfairness because the Claimant had complained in a grievance about being bullied by Mr Rajendran, the Claimant has not established any evidence that even suggests that this occurred for a reason relating to his accent or dialect or because of his accent or dialect.

Mr Morrison provided a statement on the Claimant's performance when he had not raised any concerns about the Claimant's performance prior to this occasion;

105. Mr Morrison had raised his concerns about the Claimant's performance with the Claimant beforehand when he had asked him to attend meetings. However it is possible that more detail was given in this statement and/or it was the first time that the Claimant had understood that this behaviour was causing significant concerns. We have found that the Claimant ought reasonably to have understood that there were concerns about how quickly the benches were being completed though perhaps this had not been framed as a concern about his performance as opposed to a general concern regarding the speed of the work.

106. However, there is nothing to suggest that Mr Morrison added this information because of the Claimant's accent or dialect or for a reason relating to that. Mr Morrison clearly understood the Claimant and his explanation for not attending meetings. He remained concerned about it though and felt that it impeded the Claimant's work as part of the team. He was preparing a statement about relevant matters to inform an investigation and made it cover the issues he had with the Claimant. We consider that he would have treated a comparator in the same circumstances in the same way. The treatment did not relate to the Claimant's nationality, race, accent or dialect or occur because of them.

The investigators claimed to have spoken with one of the Claimant's witnesses Kevin (Mobile Engineer) but they had not done so as Kevin had been directed by management (Lucy Dennis) not to provide a statement;

107. This did not occur as described. Ms Dennis' evidence that she had not instructed Kevin to not provide a statement was not challenged.

They stated they had obtained a statement from Derek Jean Baptiste (Electrician Engineer) but he was not contacted and the statement purportedly provided by him was false;

108. We have found that Derek Jean Baptiste was spoken to albeit not formally and not properly recorded by Mr Jays**.** We find on balance that he would not have recorded it in the grievance outcome if he had not spoken to Mr Baptiste. The facts of this allegation therefore did not occur as described.

Albert was interviewed as a witness for both investigations although he had not worked with the Claimant and was not present when the incidents occurred and his statement was false.

109. It is accepted that Albert was interviewed for both investigations. However Albert had been in the same place as the Claimant for one incident that was relevant. Mr Rajendran confirmed that Albert has been witness to the incident on 10 October and therefore it was relevant for him to be interviewed. In any event the Claimant confirmed in evidence that he did not think that Albert's statements were made because of the Claimant's accent or dialect or related to them either.

Applied the sanction of placing the Claimant on a 6-month probation with a written warning;

110. The Claimant was not placed on a 6 month probation though he did receive a written warning. This incident did not therefore occur as described.

Applied the sanction of a verbal warning for the Claimant not following the new shift pattern though the Claimant was on annual leave when this was issued;

111. No verbal sanction was imposed on the Claimant. He was asked to attend a meeting to discuss his attendance. At the meeting he explained his historic right to work a certain shift pattern. Whilst we have accepted that Mr Williams may not have been happy about this, we find that any discontent occurred because this shift pattern did not fit with their intended shift patterns for the engineers on this contract and was irritating to them.

112. We do not believe that this was justifiable annoyance in the circumstances because the Claimant's shift pattern ought to have been protected by TUPE, but we do not consider that there has been any evidence to suggest that it arose because of the Claimant's race or nationality/accent dialect. The reason behind the treatment was the TUPE transfer. Had a person with a British accent who also transferred

In relation to the appeal:

1. Unreasonably delayed in dealing with the appeal;
2. Failed to hold an appeal meeting;
3. Confirmed the original decision without reasonable further consideration/investigation;

113. There was no delay in dealing with the Claimant's grievance appeal. The Claimant's appeal (29 November) was acknowledged on the same day and the Claimant was told that the person dealing with it was off sick but would deal with it on his return. Two days later the manager, having returned from sick leave, responded and said that it would be referred to HR. He indicated what the next steps would be and that there may be a short period of time whilst an appropriate manager was found to hear the appeal. The Claimant then resigned on 5 December which was only 6/7 days after he had submitted the appeal and at a time that he had been told that it was being dealt with. In the circumstances we do not find that this amounted to a delay.

114. We also consider that there has been no evidence provided that any delay was related to the Claimant's accent or dialect or because of it. We consider that nothing suggested that a person with a British accent or of a different nationality/race would have been treated any differently in the same circumstances.

115. Given that the Claimant had then resigned there was no reason for the Respondent to continue with the grievance appeal.

At a meeting on 31 October 2022 at which a property manager at White City Place (Jonathan Opoku) was present, the question of "How do we deal with this Clive situation, we need to get rid of him" was discussed [Ms Aboagye clarified at this hearing that this was not a documented agenda item, but a topic of discussion];

116. Mr Opoku's witness statement does not give any evidence that this occurred. We do not accept that it did. As stated during the Respondent's evidence to the Tribunal, Mr Opoku was part of the client team and therefore they would not have wanted to discuss how they were dealing with members of staff in front of him. We agree. It is not plausible that such a conversation would have occurred in front of a member of the client team and we have no evidence from Mr Opoku that it occurred. The factual basis for this claim is therefore not made out.

Caused the Claimant to resign and terminate his employment.

117. We consider that the Claimant resigned because he no longer wanted to work in this role according to the new roles and systems of work which the Respondent was insisting upon. There is nothing in any of the evidence we have heard that suggests that the Respondent introduced these systems for a reason related to or because of the Claimant's race/nationality/dialect or accent. This was a situation that occurred to everyone working on this contract – those who had transferred under TUPE and those that were brought in by the Respondent.

118. The Claimant did not like the new systems but he was not treated differently to anyone else, he was simply being required to change the way he worked. We therefore do not accept that this occurred as described.

Direct Discrimination and Harassment related to race conclusions

119. In summary, whilst we have addressed each individual incident separately we have found that none of the treatment complained of was done because of the Claimant's race, nationality, accent or dialect. The reason why for each incident has been discussed above. Further the Claimant has not demonstrated that he was treated differently than any hypothetical comparator would have been in the same circumstances. The Claimant's direct race discrimination claims are therefore not upheld.

120. The Claimant has also not demonstrated that any of the treatment complained about was related to his race, nationality, accent or dialect. None of the incidents on the face of it were related to that characteristic. We heard no evidence to link any of the comments, actions or incidents that occurred to the Claimant's race, nationality, accent or dialect.

121. We accept that suspending the Claimant, taking disciplinary action against him and requiring him to work variable shifts could all amount to treatment that could have created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. However we have found

that we had no evidence to suggest that any of these actions related to the Claimant's race, nationality, accent or dialect. We are aware that this is a different test to that under the direct discrimination 'reason why' test. However there has been no evidence to link the treatment even tangentially to the Claimant's accent or dialect.

122. We therefore do not uphold the Claimant's claim for race-related harassment.

Constructive unfair dismissal

123. To succeed with a claim for constructive unfair dismissal, a Claimant must show that they have resigned in response to a fundamental breach of contract. A fundamental breach can occur either due to a one off breach or a series of breaches that cumulatively amount to a fundamental breach. The 'last straw' in such a series of breaches need not be significant or itself a fundamental breach.

124. The Claimant has relied upon the same incidents as those he says are acts of harassment related to race or direct discrimination plus the refusal to honour his shift patterns post TUPE transfer.

125. Taking the acts of harassment/ discrimination relied upon. Of the incidents that we found factually happened as dsecribed, we do not consider that any of them amount to a repudiatory breach of contract whether in isolation or collectively. Had the incidents that occurred been discriminatory then clearly that would have been a breach of the contract. However we have concluded that none of them were and all of them have been adequately explained by the Respondent as either being part of the contract (e.g. suspension in line with their disciplinary policy) or reasonable acts to investigate the grievance against the Claimant and the grievance brought by the Claimant.

126. We accept that the requirement to work a variable shift pattern occurred on at least two occasions and probably 3 or 4. We accept that this was in breach of the Claimant's contract which either expressly or by custom and practice, allowed him to only work the 10-7 shift. Had the Respondent continued to impose a variable shift pattern on the Claimant without agreement then this could have amounted to a repudiatory breach of contract.

127. However the situation did not continue and the Respondent rectified the breach. At the point of resignation the Claimant had clearly been told by at least two different managers that he only needed to work the 10-7 shift. The requirement to work different shifts had ended from 1 September at the very latest.

128. Although the Claimant's trust in the Respondent may have been dented at the point at which they took over the contract because of their requests that he work the early shift; by the time he decided to resign they had clearly rectified that situation and told him about their decision. He had accepted that and continued to work with them.

129. We were taken to a document which the Claimant says he was sent, where he remained on a variable shift pattern during November and December**.** We however accept Mr Morrison's evidence that this was likely to be an administrative error and that the Claimant knew (or ought reasonably to have known) and understood that Mr Morrison would not require the Claimant to work any other shifts and he had told the Claimant that. This was also formally confirmed in the outcome to the Claimant's grievance. He therefore cannot reasonably have believed that the roster he was sent was going to be imposed. Further, he did not query the roster and suggest that there had been an error. Instead he resigned.

130. Further and more importantly, we do not think that this was the reason he resigned in any event. The Claimant confirmed this in his answers to questions by the Tribunal. He said that the reason he was resigning was because he did not want to continue to have to report or account for his work to Mr Rajendran and that he no longer felt able to work with colleagues who had a negative opinion of him. We conclude that the reason he resigned was because he did not want to work under the new systems that had been introduced by the Respondent. In particular he did not want a supervisor, and he did not want to have to account for his time whilst on site. In response to questions by the Tribunal the Claimant indicated that he could not return to working with Mr Rajendran because Mr Rajendran had complained about him. This does not amount to the Claimant resigning in response to a fundamental breach of contract. The Claimant only wanted a supervisor that did not supervise. He may have been able to do his job perfectly well before the Respondent took over, but that does not mean that the Respondent was not entitled to ask him to work differently and report to Mr Rajendran nor does it mean that Mr Ranjendran and other managers were not allowed to challenge the Claimant's refusal to work in the way that they asked him to. To manage someone and to ask them to work differently does not amount to a breach of contract let alone a fundamental breach of contract entitling him to resign.

131. The Claimant's claim for constructive unfair dismissal is therefore not upheld.

Employment Judge Webster

Date: 22 February 2024

JUDGMENT and SUMMARY SENT to the PARTIES ON

5 March 2024

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FOR THE TRIBUNAL OFFICE