

RESERVED JUDGMENT



EMPLOYMENT TRIBUNALS

Claimant: Miss X

Respondent: Y Ltd

Heard at: Leeds Employment Tribunal (hybrid)
Before: Employment Judge Deeley, Mr D Crowe and Mr J Howarth

On: 12, 13 and 14 January 2024

Representation

Claimant: CP (claimant's mother)

Respondent: EL (respondent's Managing Director)

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1. The claimant's complaints of:
 - 1.1 Direct race discrimination;
 - 1.2 Discrimination arising from disability; and
 - 1.3 Constructive (unfair) dismissal;fail and are dismissed.

REASONS

INTRODUCTION

Tribunal proceedings

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- 2. This claim was case managed at a preliminary hearing on 16 August 2023 by Employment Judge Moxon, who prepared a list of issues for the claim with the parties' consent.
- 3. We considered the following evidence during the hearing:
 - 3.1 a hearing file of documents, which the Tribunal collated by adding both parties documents into one pdf folder and paginating it before providing copies to both parties (neither party had produced a combined set of hearing documents prior to the hearing);
 - 3.2 brief written witness statements and oral evidence from:
 - 3.2.1 the claimant;
 - 3.2.2 the respondent's witnesses:

Name	Role at the relevant time
1) EL	Director
2) IS	Manager

- 4. Neither party provided sufficient evidence in their witness statements to enable the Tribunal to make proper findings of fact in relation to the claim. The Tribunal (with the consent of both parties) therefore asked supplementary questions of all three witnesses in order to provide both sides with the opportunity to cross-examine each other's witnesses regarding their evidence.
- 5. We also considered the helpful oral submissions made by both parties.

Adjustments

- 6. We asked both parties if they wished us to consider any adjustments to these proceedings. We noted that the claimant may have difficulties related to her medical condition and agreed adjustments including: frequent breaks, ending the first day of the hearing early at the claimant's request, asking IS to turn off his camera when observing the hearing remotely and arranging for the claimant to attend via audio link from a Tribunal conference room on the third day of the hearing.
- 7. We also reminded both parties that they could request additional breaks at any time if needed.

Anonymity Order

- 8. This Reserved Judgment is subject to an anonymity order under Rule 50 of the Tribunal's Rules of Procedure.

RESERVED JUDGMENT**CLAIMS AND ISSUES**

9. We discussed the claims and issues in detail at the start of the hearing and the Tribunal provided the list of issues set out below to the parties, with the factual allegations summarised in the table below.

Table A – all factual allegations			
Date	People involved	What was said or done?	Type of discrimination complaint and comparators (if applicable)
1. 6 June 2021 to early July 2021	IS	At the start of the employment did the claimant's line manager, IS, repeatedly mispronounce her first name?	Direct race discrimination
2. October 2022	EL	During a meeting in October / November 2022 between the claimant and EL, company director, did EL in response to her reaction to customer complaints about her, that she would benefit from being thicker skinned? <i>This is accepted by the respondent but it is denied that it was in relation to her disability.</i>	Discrimination arising from disability
3. October or November 2022 (a few weeks after the discussion regarding customer complaints)	EL	During a meeting in October / November 2022 between the claimant and EL, company director, did EL question the claimant's attitude and describe her as aggressive?	Direct race discrimination
21 November to 5 December 2022		<i>Claimant on sick leave.</i>	
4. 9 December 2022	IS	During a meeting on 9 th December 2022 was the claimant removed from working bistro events and weddings? This is accepted by the respondent but it is contended that this was due to the claimant having a poor relationship with the events manager, JF, and that removing that responsibility was one of an agreed number of changes to her working	Discrimination arising from disability

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Table A – all factual allegations			
Date	People involved	What was said or done?	Type of discrimination complaint and comparators (if applicable)
		practices to support her after sickness absence.	
5. 5 February 2023	EL	In 5 th February 2023, did EL disproportionately reprimand the claimant for having left the safe key in an insecure place? The claimant says that she was the only supervisor spoken to whereas the respondent says that there were two supervisors on shift at the material time and they were both reprimanded.	Constructive dismissal <i>[the claimant clarified during the hearing that this was not a complaint of discrimination]</i>
6. February 2023	IS and/or EL	In February 2023 did IS and / or EL reprimand the claimant for not ordering stock when this was not her responsibility? The respondent contends that stock ordering was one of her responsibilities and there had been a failure to order stock.	Constructive dismissal <i>[the claimant clarified during the hearing that this was not a complaint of discrimination]</i>
7. 28 February 2023	EL	During a meeting on 28 th February 2023 between the claimant and EL, did EL question the claimant's attitude and describe her as aggressive? The respondent accepts that this was said during the meeting but that it was as a consequence of complaints about the claimant by customers and a supplier and was not related to her race.	Direct race discrimination
2 to 28 March 2023		<i>Claimant on sick leave from 2 March 2023 to termination of employment.</i>	
8. 28 March 2023		Claimant's employment with immediate effect, following her email to TM (HR).	Constructive dismissal

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TIME LIMITS

1. *Given the date the claim form was presented and the dates of early conciliation, any complaint about discrimination about things that happened **before 12 January 2023** may not have been brought in time.*
2. *Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:*
 - 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 *If not, was there conduct extending over a period?*
 - 2.3 *If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?*
 - 2.4 *If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:*
 - 2.4.1 *Why were the complaints not made to the Tribunal in time?*
 - 2.4.2 *In any event, is it just and equitable in all the circumstances to extend time?*

DIRECT RACE DISCRIMINATION (S13 EQUALITY ACT 2010)

The claimant described herself as being of “mixed race: Caribbean and white” for the purposes of her race discrimination claim.

1. *Did the Respondent treat the Claimant do the things set out in Table A that the claimant says were direct race discrimination?*
2. *If the respondent did the things set out at Table A, was that less favourable treatment? The claimant compares herself to a hypothetical white employee.*

DISABILITY STATUS (S6 EQUALITY ACT 2010)

The respondent accepts that the claimant’s condition of anxiety and depression is a disability for the purposes of s6 of the Equality Act 2010 at the times relevant to this claim (see paragraph 42 of Case Management Orders).

DISCRIMINATION ARISING FROM DISABILITY (S15 EQUALITY ACT 2010)

3. *Did the Respondent treat the Claimant do the things set out in Table A that the claimant says were disability discrimination?*

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4. *If so, was that unfavourable treatment?*
5. *The respondent accepts that the claimant took sick leave from:*
 - 5.1 *21 November to 5 December 2022; and*
 - 5.2 *2 March to 28 March 2023;**because of her anxiety and depression (see paragraph 42 of Case Management Orders).*
6. *If so (as set out at paragraph 5 above), was this because of ‘something arising’ in consequence of the claimant’s disability (as set out at paragraph 5 above)?*
7. *Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:*
 - 7.1 *to support her to cope with customer complaints; and*
 - 7.2 *to support the claimant to return to work.*
8. *The Tribunal will decide in particular:*
 - 8.1 *was the treatment an appropriate and reasonably necessary way to achieve those aims;*
 - 8.2 *could something less discriminatory have been done instead;*
 - 8.3 *how should the needs of the claimant and the respondent be balanced?*

CONSTRUCTIVE (UNFAIR) DISMISSAL – S98 EMPLOYMENT RIGHTS ACT 1996

9. *Was the claimant dismissed?*
 - 9.1 *Did the respondent do the things set out in Table A?*
 - 9.2 *Did those events (taken separately or together) breach the implied term of trust and confidence? The Tribunal will need to decide:*
 - 9.2.1 *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*
 - 9.2.2 *whether it had reasonable and proper cause for doing so.*
 - 9.3 *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.*
 - 9.4 *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.*

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- 9.5 *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.*

FINDINGS OF FACT

Context

10. This case is heavily dependent on evidence based on people's recollection of events that happened some time ago. In assessing the evidence relating to this claim, we have borne in mind the guidance given in the case of *Gestmin SGPS -v- Credit Suisse (UK) Ltd* [2013] EWHC 3560. In that case, the court noted that a century of psychological research has demonstrated that human memories are fallible. Memories are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. External information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all.
11. The process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to the parties. It was said in the *Gestmin* case:
- "Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."*
12. We wish to make it clear that simply because we do not accept one or other witness' version of events in relation to a particular issue does not mean that we consider that witness to be dishonest or that they lack integrity.

Background

13. The respondent's business provides contract catering services (on a third party basis) to the Y Estate (a stately home owned by the Y Trust (the "**Trust**")). They operate from various venues within (or close to) the Y Estate, including:
- 13.1 outsource catering on behalf of the Y Trust at the CY café, on the terrace and some of the events that took place at the CY café (e.g. coach tour bookings) – this was where around two thirds of the respondent's workforce of approximately 45 staff at that time were based;
 - 13.2 special events (including weddings, corporate events and ticketed dining events during the winter months); and
 - 13.3 the MB café, based in Y Village.
14. The respondent's staff at the relevant times for this claim included:

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Name	Role at the relevant time
1) EL	Director and majority shareholder
2) IS	Manager
1) CBT	Deputy Manager (joined in November 2022 as the respondent's first Deputy Manager)
2) JF	Events Manager
3) CL	Team Leader
Ms AT	Team Leader
4) TM	Finance and HR Assistant (employed by the Trust, but provided additional support to the respondent)

15. The respondent also worked closely with NH, the Head of Commercial Operations for the Trust. NH was the key stakeholder in the client relationship between the respondent and the Trust.
16. The claimant was initially employed by the respondent as a member of their Front of House staff. She undertook this role for 25-30 hours per week whilst finishing her college course. The claimant was promoted to Team Leader in September 2021, working around 30-35 hours per week. She was based at the CY café for the vast majority of the shifts that she worked for the respondent.

Allegation 1 – pronunciation of the claimant’s name by IS (from 6 June to around 6 July 2021)

17. The claimant stated that IS repeatedly mispronounced her first name during the first four weeks of her employment. In relation to this issue:
 - 17.1 the claimant was working approximately 25-30 hours per week for the respondent at this time, with varying shift patterns. She states that she saw IS on a daily basis (except for when it was her day off);
 - 17.2 IS stated that he probably worked with the claimant three to four times per week maximum, because they often worked different shifts and because he was responsible for three different sites (including the CY café, where the claimant normally worked at that time);
 - 17.3 the claimant and IS agree that he mistakenly pronounced her first name phonetically as ending with an “iss” sound rather than an “ise” sound;
 - 17.4 IS accepts that he mispronounced her name for the first couple of weeks, but stated that he stopped doing so when the claimant corrected him;
 - 17.5 the claimant states that IS continued to mispronounce her name for a couple of weeks after she corrected him. She also stated that IS got her ‘mixed up’ with CL, whom the claimant describes as also of being of mixed race;

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- 17.6 IS disputes this and stated during his evidence that he thought it was just for the first couple of weeks of the claimant's employment because the claimant never raised the issue again;
- 17.7 IS also stated that he had not come across the claimant's first name before and it was a genuine mispronunciation.
- 18. We concluded that IS did mispronounce the claimant's first name for the first two weeks of her employment, but we accept IS's evidence that he stopped after she corrected him. We concluded that it was not due to the claimant's race because:
 - 18.1 the claimant did not raise any concerns regarding this matter with IS or EL, including in her later grievance dated 7 March 2023 which referred to other allegations of race discrimination; and
 - 18.2 we note that the claimant was provided with additional working hours and promoted to the role of Team Leader shortly afterwards by the respondent; and
 - 18.3 the claimant stated in her own evidence that there were no further incidents that she states amounted to race discrimination involving IS after this date. The claimant's only other allegation of race discrimination related to a meeting with EL that IS did not attend in February 2023 (see our findings of fact relating to Allegations 3 and 7 below).

Claimant's disability (anxiety and depression)

- 19. The claimant was diagnosed with anxiety and depression before she started working for the respondent. The respondent accepts that:
 - 19.1 the claimant's condition amounts to disability for the purposes of the Equality Act 2010; and
 - 19.2 the respondent was aware that the claimant suffered from panic attacks.
- 20. We note that the claimant had a return to work meeting with IS in early December 2022 after a short term sickness absence resulting from her anxiety and depression, when they discussed potential triggers for her anxiety and depression. Further details regarding that meeting are set out in our findings of fact relating to Allegation 4 below.

Allegation 2 – meeting in October/November 2022 between EL, the claimant and other supervisors

- 21. Both parties agree that in a meeting in October/November 2022, EL referred to the need to have a 'thick skin' in relation to staff's reaction to customer complaints.
- 22. We find that during this meeting:
 - 22.1 EL held a meeting with the three supervisors (the claimant, AT and CL) about the running of the CY café;

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22.2 the claimant stated in her evidence that EL wanted to speak with the three of them about the running of the café and what needed to be done to make things easier, particularly as the busy Summer holidays period had just ended;

22.3 the claimant stated that EL spoke with all three supervisors regarding some recent customer complaints, some of which related to the cleanliness of the café. The claimant accepted that none of the customer complaints that EL spoke about at that particular meeting referred to the claimant specifically;

22.4 the claimant recalled during her evidence that EL said in relation to customer complaints that:

"[EL] said that "people need to have a thicker skin". I didn't think that was fair because [EL] and [IS] know that I suffer from anxiety and depression.";

22.5 the Tribunal asked the claimant why she believed that EL had made the comment in relation to her disability. She stated that:

"Because of how he said it – I felt it was aimed at me, based on fact I had anxiety and depression – been quite hectic over last few months. Being busy did trigger my anxiety a little bit."

22.6 the claimant confirmed during her evidence that EL did not use the word 'aggressive' about her or question her 'attitude' during that particular meeting. She stated that these words were used during her later meeting with EL in February 2023 (at which neither of the other Team Leaders were present – please see our findings of fact for Allegation 7);

22.7 EL stated that he suggested that the claimant would benefit from being thicker skinned because hospitality is a difficult area to work in and customers can be challenging. EL stated:

"It was meant in a way that was intended to be constructive – the industry is very customer facing, lots of interaction with public who are not always nice. It can be quite challenging. I have worked in the industry now for seven or eight years – having a thick skin is quite an important thing. It became clear that [Miss Y] was quite upset by that comment – that was certainly not the way it was ever intended. I apologised in the meeting that followed on from that."

23. We concluded that EL's comment was intended to be constructive feedback for all three Team Leaders, not just the claimant. EL did not make that comment in relation to the claimant's disability. The key reasons for our conclusion are:

23.1 all three supervisors were present at the meeting, not just the claimant;

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- 23.2 the claimant herself stated that the context of the meeting was a general discussion around the running of the café, following on from a hectic Summer trading period;
- 23.3 the comment related to the general customer complaints that EL raised with all three supervisors;
- 23.4 it is well known that the hospitality industry can be difficult and that some customers make unwarranted complaints, particularly given the customer facing nature of the roles in the industry; and
- 23.5 we note that EL apologised to the claimant at their next meeting, when she raised the comment as an issue.

Allegation 3 – meeting with EL ('attitude' and 'aggressive' comments)

24. Please refer to our findings of fact on Allegation 7.

Allegation 4 – removal of claimant from bistro events and weddings

- 25. The claimant was on sick leave from 22 November to 5 December 2022 and the reasons for her absence were recorded in her return to work form as “anxiety and stress” and as ‘mixed anxiety and depressive disorder’ in her GP’s fit note. The GP’s fit note did not suggest any adjustments to her role or duties.
- 26. The claimant returned to work and the respondent held a return to work meeting on 7 December 2022. We read a copy of the return to work form, which was signed by the claimant and by IS on 9 December 2022.
- 27. We note that the claimant’s absence was the third period of absence in a 12 month period, but that neither of her previous absences were related to her disability.
- 28. The claimant stated that she was struggling with JF’s management approach during group booking events at the CY café. IS stated that these were going to stop for the next couple of months (because of the time of the year), but that he would carry out training on managing staff with JF. The notes state that the training was intended to “reduce pressure [he] put on other members of staff”. IS also noted that the appointment of CBT as the respondent’s new Assistant General Manager in November also helped to provide a ‘buffer’ against such pressure.
- 29. We note that the respondent agreed to make several adjustments to the claimant’s duties at the return to work meeting, including:
 - 29.1 continuing the claimant’s working pattern of having two consecutive non-working days, plus at least one hour per week for office administration;
 - 29.2 the claimant would be given the opportunity to shadow CBT during the MB café’s Sunday lunches after Christmas.
- 30. We note that the claimant did not shadow CBT during Sunday lunches at the MB café and at weddings. She did work with CBT at least bistro event in January or

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early February 2023 because we have seen the customer complaint that related to that event.

31. We accept IS's evidence that the reason why no formal work shadowing had been arranged by the time of the claimant's resignation before the claimant went on long term sick leave on 2 March 2023 (which continued until her resignation on 28 March 2023) included:

- 31.1 there were very few weddings during the Christmas and Winter period;
- 31.2 the MB café was only open three days per week during the Winter period and IS had to rota shifts for the existing café staff as a matter of priority;
- 31.3 IS also had to ensure that there were sufficient staff working at the CY café, where the claimant normally worked.

Allegation 5 – safe key incident (5 February 2023)

32. The respondent has a safe for cash and other valuables at the back of the kitchen in the CY café. The safe was emptied every Monday by TM, who took the cash to the bank.

33. The claimant was working in the CY café on 5 February 2023. The claimant stated that she did not lock the safe and left the key in the safe overnight. The claimant stated that AT came down from the Terrace to put the cash from her till into the safe and left the key in the safe for the claimant to do the same. The claimant stated that she forgot to put her cash till into the safe and that the key was still in the safe when she went home.

34. The claimant realised her mistake after she left work that evening. The claimant did not have a key to the respondent's premises. The claimant messaged IS to tell him about her mistake. The claimant's message stated:

"Hi [IS] I have a confession to make

I have forgotten to put the cash tray in the safe [emoji] I have also forgot to lock the safe from when I went in to get the cash bag!

I am extremely sorry [emoji]"

35. The claimant also forwarded the same message CBT to tell him about her mistake.

36. TM also emailed a photo of the cash till and safe with the key in it to the management WhatsApp group with a comment:

"Why has this not been in the safe since closing Sunday!!"

37. EL responded, asking who was responsible for closing the CY that day. IS responded:

"It was Miss Y, she messaged me to let me know and I forgot to pass it on. I'll take responsibility for that one"

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38. EL asked the claimant by a message dated 9 February 2023 who was on closing and she responded:

"It was me and [CL]

We accidentally left the cash tray and the safe unlocked. However I informed [IS] and [CBT] straight away about this and I was ignored.

...

We are very sorry and it was an accident"

39. The claimant's case is that at the meeting on 28 February 2023 between her and EL:

39.1 EL "disproportionately reprimanded" her for leaving the safe key in an insecure place;

39.2 EL only spoke to her and not the other two supervisors on shift at that time.

40. The Tribunal asked the claimant what she meant by 'disproportionately reprimanded'. The claimant stated:

"Because I was the only one who had it brought up in meetings, I received messages about it – everyone was like "Miss Y, make sure you don't leave safe key in" – but it was not just me, [CL] was also a supervisor on that shift. I said in my messages 'we are taking responsibility' – that was me and [CL]."

41. The claimant also stated during her evidence that:

41.1 CBT left the key on the side in the kitchen, but that he had not been reprimanded for doing so; and

41.2 the respondent reprimanded her again for the safe key incident the grievance investigation meeting on 7 March 2023.

42. The Tribunal asked the claimant why she viewed the discussion at the grievance investigation meeting on 7 March 2023, given that she raised the safe key incident in her grievance letter. The claimant stated:

"We'd discussed this point before – I've sent my messages to higher management. It was brought up again – I thought it was a dig at me, I didn't know how many times I could apologise."

43. IS stated during his evidence that:

43.1 he spoke to the claimant and to CL separately regarding the safe key incident;

43.2 the conversations that he had with each of them were in similar terms.

44. EL stated that:

44.1 he was not aware that CBT had left the key on the side in the kitchen and therefore had not raised this issue with CBT;

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- 44.2 IS informed him during the following week that the safe was left unlocked after Sunday's trading. EL then messaged the respondent's management WhatsApp Group (consisting of EL, IS, CBT, JF, TM, the claimant, CL, AT, another supervisor and the executive and sous chefs) to ask who was responsible for closing on that Sunday. The claimant stated that it was her and CL, she apologised on their behalf and explained what had happened;
- 44.3 EL stated that he did not send any further messages at that time to the claimant. This was because the café was closed from Monday to Thursday at that point and he needed to speak to IS about the incident;
- 44.4 IS then brought up the safe key incident again, after receiving an email from NH on 17 February 2023 which raised NH's concerns regarding the claimant's behaviour towards customers (see the findings of fact set out under Allegation 6 below; and
- 44.5 EL was not aware that CBT had left the safe key in an insecure place because no one told him about this.
45. We concluded that EL did not 'disproportionately reprimand' the claimant for the safe key incident. We accept EL's evidence that:
- 45.1 a full week's takings were contained in the safe on that Sunday evening, because TM took the cash to the bank every Monday. There were serious security implications arising from the incident;
- 45.2 the respondent's insurance policies were also compromised, for example because no insurance cover would be provided for theft from an open safe;
- 45.3 the trigger for raising the safe key incident again at the meeting between EL and the claimant on 23 February 2023 was the customer complaint and the complaint from NH regarding the claimant (see our findings of fact on Allegation 7 below).
46. In relation to the meeting on 7 March 2023, we concluded that it was the claimant herself (as part of her grievance letter), not EL, who raised the safe key incident at the grievance meeting in March 2023. Therefore, it was appropriate for the respondent to discuss this issue with the claimant as part of their investigation into her grievance.

Allegation 6 – ordering stock (5 February 2023)

47. The claimant alleges that on 5 February 2023, IS and/or EL reprimanded her for not ordering stock. The claimant states that this was not her responsibility. We note that the claimant's grievance letter (which her mother wrote on her behalf) stated:

“Also, the last Miss Y knew [AT] placed orders on a Monday which is Miss Y's day off.”

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48. The claimant stated during her evidence that kitchen staff frequently forgot to order stock and would ask her to pick up additional items on her journey to work. We accept IS and EL' evidence that they were not aware of that issue. We also accept IS's evidence that he did not have line management responsibilities for the kitchen staff.

49. IS recalled one specific incident when the claimant failed to place a cake order. He stated during his evidence that:

49.1 he asked the claimant to place an order for cakes with the respondent's supplier on a Monday or Tuesday, in AT's absence;

49.2 the claimant failed to carry out this order, even though she knew that she either had to email or call the supplier, using the contact details listed in the office. For example, there was a series of WhatsApp messages dated 8 August 2022 in the hearing file which evidence that the claimant placed orders on 8 August 2022 in AT's absence.

50. We also note that EL sent a message to the respondent's management WhatsApp group on 27 February 2023, which included reference to stock ordering. The members of that group consisted of EL, IS, CBT, JF, TM, the claimant, CL, AT, another supervisor and the executive and sous chefs.

"A few observations from visiting the CY [café] just now

Drinks fridge unstocked

Specials board not filled in

Floor dirty

No Peroni other than 0%

No Cakes

Music inappropriate

Ice cream freezer messy

Crisps not stocked"

51. We concluded that:

51.1 EL was not involved in these discussions – the claimant and IS spoke about this issue, without involving EL;

51.2 we accept that AT was the supervisor who normally ordered stock. However, she was not on shift seven days per week and we concluded that in AT's absence that responsibility fell on the claimant, CL and JF;

51.3 IS had a very clear recollection of asking the claimant to order cakes for the café from their supplier when questioned by the claimant's representative. By way of contrast, the claimant did not refer to the stock

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ordering process either in her witness statement or in her oral evidence to the Tribunal;

51.4 IS' discussions with the claimant regarding stock ordering were appropriate. The respondent did not have any cakes to sell on that particular day because the claimant had not placed the order that IS requested. This obviously had a knock on impact on the café's ability to trade and the profits made that particular day; and

51.5 our conclusions are supported by the contemporaneous documents, including IS's email of 17 February 2023 which listed as part of his concerns:

“Not fulfilling her duties, constantly forgetting to put orders in when asked by other supervisors to help out, leaving the business low on stock”; and

IS was neither aware of nor responsible for any concerns regarding the kitchen staff's supplier orders (or missing orders).

Allegations 3 and 7 – meeting with EL ('attitude' and 'aggressive' comments)

Date of meeting

52. The claimant stated at the Tribunal's preliminary hearing and in her evidence today that she had two meetings with EL (one in November 2022 and the other on 23 February 2023), during which he questioned her 'attitude' and described her as 'aggressive'. EL stated that the discussions to which the claimant referred took place on 23 February 2023.

53. We concluded that the discussions must have taken place on 23 February 2023 (not in November 2022) because they related to a customer complaint that referred specifically to the claimant and an email of concern from NH, both of which were sent to the respondent in February 2023.

54. We therefore concluded that no similar meeting took place in November 2022. The claimant accepted in her oral evidence to the Tribunal that she was somewhat confused as to the dates of events.

Complaints received

55. A customer sent a complaint to the respondent, via its Facebook page relating to a bistro event that the respondent held on 5 February 2023. EL saw the complaint and wanted to discuss this with the claimant. The customer complaint stated:

“Rather than comment on FB [Facebook] I thought I would send a private review:

Poor Welcome.

Terrible, slow service (rudest waitress ever experienced – slammed each course down on the table, no eye contact, no explanation of any course) served pudding

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before steak course and she walked off so we had to call someone else over. No cutlery for some courses?!

Only expensive wines left!

Cold plates. Took way too long to serve.

Overall as you can tell we are extremely disappointed and would not recommend, especially for the price.”

56. Around the same time, IS received an email setting out concerns relating to the claimant’s behaviour towards customers from NH (the Trust’s Head of Commercial Operations). NH stated:

“I’ve just been in the CY café and I witnessed some appalling behaviour from Miss Y with a customer.

She was incredibly rude and dismissive of him and his query, I was embarrassed to have witnessed such behaviour.

Happy to discuss further with details but this needs addressing.”

57. IS discussed NH’s email with her. NH wrote a more detailed account of the incident stating:

On 17th February at approximately 2pm, I was in the cafe with [IS]. The cafe was quiet and two other staff were present.

A gentleman approached the till area and spoke to Miss Y, I believe it was about ordering a coffee. There seemed to be some confusion about whether the coffee had been ordered, or whether the gentleman was trying to order with Miss Y.

The gentleman was of Asian descent and Miss Y made it clear that she was finding it hard to understand him, it was however, her tone and behaviour around this that concerned me.

She spoke very loudly and with a rude tone towards the gentleman, who was clearly distressed by the whole situation. There were a couple of other team members around her, who quite quickly disappeared from the situation, leaving Miss Y as the only person beside myself, [IS] and the gentleman in the cafe servery space. Nevertheless, Miss Y was still loudly saying ‘I still don’t understand what’s going on’ while the gentleman was still in the cafe.

[IS] went over and handed the gentleman his drink, which he had pre-ordered and paid for, and he quickly left the cafe.”

58. IS then emailed EL and stated:

“Afternoon [EL],

I wanted to get this down in an email following a number of issues over the last couple of week with Miss Y.

Firstly - ongoing issues with the tills

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Unable to complete refunds properly meaning discrepancies with the cash up, this will be put down to lack of training but I have been through this with her before and if she's not sure, why is she not asking for help?

Safe left with keys in and till left out - yes she passed it onto management but it shouldn't've happened in the first place.

General attitude

recently there have been a number of occasions when Miss Y has been upset by guests being abrupt with her, she has done nothing wrong, however having seen it with my own eyes today, her attitude to customers with is enough to anger anyone. I'm not surprised people get mad with her.

Not fulfilling her duties, constantly forgetting to put orders in when asked by other supervisors to help out, leaving business low on stock..."

Discussions during meeting on 23 February 2023

59. EL and the claimant met on 23 February 2023 to discuss these matter. Both sides agree that during the meeting, EL shared a document containing most of the emails and Facebook message with the claimant and they discussed the concerns raised.

60. Both sides also agree that the word 'aggressive' was used in relation to the claimant's behaviour, but they disagree as to the context in which that word was used.

61. EL states that he used the word 'aggressive' to describe the claimant's behaviour towards customers. The claimant's evidence on this issue was somewhat confused and she provided different answers when questioned by the Tribunal during her oral evidence, compared to her witness statement.

61.1 The claimant stated in response to a question from the Tribunal panel:

"I can't remember the exact question – but he was describing the complaint. I explained how I dealt with the complaint – he said I was being an aggressive and had an attitude.

I felt it was how I said my response which was what I said to the customer – I felt that he was saying I was being aggressive.

I said my exact response that I said to the customer to EL – the same way, calmly."

61.2 The Tribunal panel then asked:

"Was he saying the way you were speaking to him [ie EL] was aggressive?"

The claimant stated:

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“That’s how I interpreted it – I said the exact same as I said to the customer, to EL – EL said you see that there [i.e. the customer complaint], that comes across as aggressive.”

62. We therefore concluded that EL did not say that the claimant was behaving ‘aggressively’ during their meeting. Rather, EL stated that the claimant’s behaviour towards the customer came across as aggressive.
63. We also note that during the grievance outcome letter later noted that the feedback to the claimant on this issue could have been handled better.
64. The claimant has alleged that these comments were made because of her race (i.e. direct discrimination). The Tribunal therefore asked IS and EL about other instances where complaints were or would be raised with staff:
- 64.1 EL stated that he would have raised specific complaints with any member of staff. He stated that he viewed the claimant’s response to the customer as ‘aggressive’, regardless of the rights or wrongs of the situation, and would have raised the complaint with another hypothetical white employee in a similar manner as he did with the claimant;
- 64.2 IS stated that he had dealt with similar customer complaints with other white members of staff in a similar manner.
65. The claimant did not provide any evidence to suggest that customer complaints regarding white members of staff had been handled in a different manner.
66. The claimant was then absent on sick leave from 2 March 2023 until her employment ended on 28 March 2023. The claimant’s initial GP’s fit note ran from 2 March to mid-March 2023 and stated that the reason for her absence was “Mixed anxiety and depressive disorder”. The note did not suggest any adjustments which may assist her to return to work. The claimant’s second sickness absence note for three weeks from 17 March 2023 stated that her absence was due to “Anxiety and depression” and again did not suggest any adjustments to assist her to return to work.

Claimant’s grievance

67. The claimant’s mother prepared a grievance and resignation letter on behalf of the claimant. The letter was dated 6 March 2023, but was handed to the respondent at a meeting on 7 March 2023 attended by the claimant, her mother, EL and IS.
68. The letter stated:
- “Subject: Harassment/bullying/unacceptable language/racism and unconscious bias*
- Please accept this letter as a formal grievance.*
- There are a number of things that [have] happened in the work place. This behaviour has been ongoing for the last few months. I feel that I have been used as a scape goat..”*

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69. The letter then set out the points that the claimant wished to raise as part of her grievance and concluded:

"I have tried resolving this matter by having a meeting with EL and IS but I am not satisfied with the outcome. Consequently, I would like to formally raise my concerns through a grievance in accordance with the company's grievance procedure. The reason for this is to investigate the concerns which I have raised, with a view to resolving these then as soon as possible.

I understand that a grievance meeting will be arranged in which we can discuss this matter and try to resolve these concerns..."

70. TM wrote to the claimant on 10 March 2023, acknowledge receipt of her grievance and stated:

"Your letter covers some serious allegations that we would want to investigate. However, at this stage neither your letter nor the previous meeting where you presented this to us provide enough information to allow a proper investigation to occur. Further details are required to better understand the nature of the grievance, including who these allegations are made against, which protected characteristics are under consideration and when incidents may have occurred.

Therefore, we should now arrange for an investigative interview to be held with your Line Manager so that we may listen, clarify and confirm the details of the above, which will then allow targeted evidence gathering to occur as part of an investigation. The meeting will also allow you to explain how you think the grievance should be resolved.

If you have supporting evidence, such as documents or names of witnesses, we would request you bring these to the meeting or to be sent in advance. This meeting will be about gathering further information only and you should not expect any responses on specific grievances at this stage.

We envisage the grievance process to progress as follows, though this may be subject to change as the investigation unfolds:

- 1. Meeting to clarify details of the grievance claim*
- 2. Investigation to be undertaken*
- 3. Formal response to the grievance claim once investigation is completed*
- 4. Meeting to review the findings of the investigation.*

We are conscious that Miss Y is currently signed off sick with a doctor's note until 16th March 2023 so would propose a date is fixed once this period has passed. If she would like to meet sooner, then we are open to that possibility. You may bring a companion with you to the investigative interview if you wish, please see the Grievance Policy for further information on companions and the role they can play in the process."

Claimant's resignation

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71. The claimant and her mother attended the follow up meeting arranged by TM on 21 March 2023. The claimant provided further details regarding her grievance at that meeting. The claimant referred to a 'hostile vibe' in the minutes of that meeting. The Tribunal asked her about this comment and she stated:

"When I first started there, I was just doing it to help out – was going to work with EL' wife doing beauty therapy. But there was Covid – she EL needed help.

Finally she got beauty room up and running – I started working for her as well as EL, but then I left her work because I was struggling and could not do it. From there on, the vibe was different – I felt like EL was annoyed at me for leaving his wife 'in the lurch'. I was the main employee at the time. Ever since January 2023, there was a hostile vibe between us."

72. EL denied that there was a 'hostile vibe' between him and the claimant in his evidence. He explained the difficulty in recruiting staff in the hospitality sector and stated that he was happy to have the claimant as part of the respondent's team. We note that the claimant was promoted by EL to the role of supervisor a few months after she joined the respondent. We also note that the claimant and EL appeared to have a good working relationship for the majority of her employment. For example, he messaged her on 6 November 2022 stating:

"Quick one to say a huge well done this weekend Miss Y, it got very very busy and you dealt with it all incredibly well. Well done and thank you. You smashed it"

73. The claimant's mother prepared a resignation letter for the claimant, which she sent (on behalf of the claimant) to TM on 28 March 2023. The letter stated that the claimant was resigning with immediate effect.

74. The Tribunal asked the claimant why she resigned at that time, when her grievance investigation was ongoing. The claimant stated:

"I resigned because I didn't feel like my treatment would have changed and I didn't feel like I could go back and work there any more. I didn't feel like that there was the correct support there for me to be able to go back into the workplace."

75. We asked the claimant to clarify what she meant by 'correct support' and she stated:

"I mean support with my mental health and also support with doing my job there – numerous times I asked for training to make it better/easier and I was ignored each time."

Grievance investigation

76. We do not need to make findings of fact relating to TM' conduct of the investigation into the claimant's grievance. This is because the claimant resigned before the start of that investigation and therefore the investigation itself (and its outcome) cannot form part of the reasons leading to her resignation. In addition, the claimant has not brought any other complaints relating to the conduct of the investigation itself.

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77. However, we note that the claimant stated in relation to TM's conduct of the investigation:

"I felt like she was trying her hardest and trying to approach the situation with empathy and sympathy – but I also feel she was a little out of her depth as well. I just feel like there was some parts where she struggled a bit, probably because she didn't do many grievance meetings and interviews/investigations."

78. TM issued a detailed five page grievance outcome letter on 10 May 2023. The letter concluded:

"Finally, I'd like to take this opportunity to thank you for your hard work whilst you were employed by HF + DP, you were a popular and valued member of the team. I am sorry that your employment with us ended in the way that it did and that you felt you had suffered mistreatment whilst you were employed here. I hope that by providing this letter together with the report outcome, it will provide you with some closure regarding these matters."

Claimant's evidence on time limits

79. The Tribunal asked the claimant why she did not present her claim within the Tribunal's normal time limits. The potential "cut off" date for any complaints was events that happened on or after 12 January 2023, given that the dates when the claimant:

- 79.1 engaged in ACAS early claim conciliation were 11 April to 23 May 2023; and
- 79.2 her claim was validly presented to the Tribunal on 21 June 2023 (the claimant's original claim was presented on 30 May 2023 but was rejected due to a defect in the ET1 form).

80. The claimant stated that:

- 80.1 she has access to and is able to use the internet to look up matters;
- 80.2 she did not wish to bring a complaint regarding Allegation 1 in 2021 because she had only just started work. The claimant stated: *"it's a thing that happens to me all of the time, wherever I go – it gets to a point where I try to ignore it"*;
- 80.3 she was not aware of the possibility to bring Tribunal claims until the beginning of January 2023, shortly before her mother spoke to ACAS to seek advice on the situation;
- 80.4 the claimant thought that matters could be resolved via the grievance process after she submitted her grievance on 7 March 2023;
- 80.5 she was working and was not absent on sick leave, until her sickness absence from 2 March 2023 which continued until her employment terminated.

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RELEVANT LAW

81. The Tribunal provided both parties with a copy of the summary of the Relevant Law set out below.

DIRECT DISCRIMINATION (s13 EQA)

82. Section 13 of the Equality Act 2010 provides that:

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

83. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur in the employment context, which includes the employer dismissing the employee or subjecting the employee to any other detriment.

84. There are two key questions that the Tribunal must consider when dealing with claims of direct discrimination:

84.1 was the treatment alleged ‘less favourable treatment’, i.e. did the respondent treat the claimant less favourably than it treated or would have treated others in not materially different circumstances;

84.2 if so, was such less favourable treatment because of the claimant’s protected characteristic?

85. However, the Tribunal can, in appropriate cases, consider postponing the question of less favourable treatment until after they have decided the ‘reason why’ the claimant was treated in a particular way (*Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337 HL).

86. In relation to less favourable treatment, the Tribunal notes that:

86.1 the test for direct discrimination requires an individual to show more than simply different treatment (*Chief Constable of West Yorkshire Police v Khan* 2001 ECR 1065 HL);

86.2 an employee does not have to experience actual disadvantage for the treatment to be less favourable. It is sufficient that an employee can reasonably say that they would have preferred not to be treated differently from the way an employer treated or would have treated another person (cf paragraph 3.5 of the EHRC Employment Code); and

86.3 the motive and/or beliefs of the parties are relevant to the following extent:

86.3.1 the fact that a claimant believes that he has been treated less favourably does not of itself establish that there has been less favourable treatment (see, for example, *Shamoon*);

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86.3.2 in cases where the conduct is not inherently discriminatory, the conscious or unconscious 'mental process' of the alleged discriminator is relevant (see, for example, *Amnesty International v Ahmed* 2009 ICR 1450 EAT); and

86.3.3 for direct discrimination to be established, the claimant's protected characteristic must have had a 'significant influence' on the conduct of which he complains (*Nagarajan v London Regional Transport* 1999 ICR 877 HL).

87. The Tribunal also notes that if an employer treats all employees equally unreasonably, it is not appropriate to infer discrimination (see, for example, *Laing v Manchester City Council & another* 2006 ICR 1519 EAT and *Madarassy v Nomura International plc* 2007 ICR 867 CA).

Comparators

88. To be treated less favourably implies some element of comparison. The claimant must have been treated differently to a comparator or comparators, be they actual or hypothetical, who do not share the relevant protected characteristic. The cases of the complainant and comparator must be such that there must be no material difference between the circumstances relating to each case (section 23 Equality Act 2010 and see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285).

89. It is for the claimant to show that any real or hypothetical comparator would have been treated more favourably. In so doing the claimant may invite the tribunal to draw inferences from all relevant circumstances and primary facts. However, it is still a matter for the claimant to ensure that the tribunal is given the primary evidence from which the necessary inferences may be drawn. The Tribunal must, however, recognise that it is very unusual to find direct evidence of discrimination. Normally, a case will depend on what inferences it is proper to draw from all the surrounding circumstances.

90. When considering the primary facts from which inferences may be drawn, the Tribunal must consider the totality of the facts and not adopt a fragmented approach which has the effect of 'diminishing any eloquence the cumulative effects of the primary facts' might have on the issue of the prohibited ground (*Anya v University of Oxford* [2001] IRLR 377).

DISCRIMINATION ARISING FROM DISABILITY (S15 EQA)

91. The right not to suffer discrimination arising from disability is set out at s15 of the EQA:

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if –

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(a) *A treats B unfavourably because of something arising in consequence of B's disability, and*

(b) *A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

(2) *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

92. The Tribunal must have regard to the guidance in Simler P in *Pnaiser v NHS England* [2016] IRLR 170 regarding the problem of multiple causes in the 'because of' analysis, and a chain of links in the 'something arising' analysis. In summary:

92.1 First, the tribunal must identify whether the claimant was treated unfavourably and by whom. It must then determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant; and

92.2 the tribunal must then establish whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

93. The EAT in *Sheikholeslami v University of Edinburgh* [2018] IRLR 1090 (paragraph 96) held that s15 requires the Tribunal to consider "two distinct causative issues" when considering whether the 'something' alleged arose in consequence of B's disability. The EAT set out the issues as follows:

"(i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability?"

The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the 'something' was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."

Proportionate means of achieving a legitimate aim

94. The Tribunal must apply an objective test when considering whether there was a proportionate means of achieving a legitimate aim, having regard to the respondent's workplace practices and organisation needs (see, for example, the EAT's decision in *City of York Council v Grosset* (UKEAT/0015/16), as approved by the Court of Appeal ([2018] EWCA Civ 1105).

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95. We note that the Tribunal must make its own assessment as to whether 'proportionate means' have been used to achieve a legitimate aim.

BURDEN OF PROOF

96. The burden of proof is set out at s136 EQA for all provisions of the EQA, as follows:

136 Burden of proof

...

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

...

(6) A reference to the court includes a reference to -
(a) an employment tribunal;

...

97. The Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 approved guidance given by the Court of Appeal in *Igen Limited v Wong* [2005] ICR 931, as refined in *Madarassy v Nomura International plc* [2007] ICR 867. In order for the burden of proof to shift in a case of direct discrimination it is not enough for a claimant to show that there is a difference in status and a difference in treatment. In general terms "something more" than that would be required before the respondent is required to provide a non-discriminatory explanation.

98. Mummery LJ stated in *Madarassy*: "*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*"

99. In addition, unreasonable or unfair behaviour or treatment would not, by itself, be enough to shift the burden of proof (see *Bahl v The Law Society* [2004] IRLR 799). The House of Lords held in *Zafar v Glasgow City Council* [1998] IRLR 36) that mere unreasonable treatment by the employer "casts no light whatsoever" to the question of whether he has treated the employee "unfavourably".

100. The guidance from caselaw authorities is that the Tribunal should take a two stage approach to any issues relating to the burden of proof. The two stages are:

100.1 the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This can be described as the prima facie case. However, it is not enough for the claimant to show merely that he has been treated less favourably than

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those identified or than he hypothetically could have been (but for his disability); there must be “something more”.

- 100.2 if the claimant satisfies the first stage, out a prima facie case, the burden of proof then shifts to the respondent. Section 123(2) of the Equality Act 2010 provides that the Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. The standard of proof is again the balance of probabilities. However, to discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of the protected characteristic.
101. However, we note that the Supreme Court in also stated that it is important not to make too much of the role of the burden of proof provisions. Those provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they are not required where the Tribunal is able to make positive findings on the evidence one way or the other.

TIME LIMITS

102. The provisions on time limits under the EQA are set out at s123 EQA:

123 Time limits

(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;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

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(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

CONSTRUCTIVE (UNFAIR) DISMISSAL

103. In order to bring a claim for unfair dismissal under s111 of the ERA, the claimant must first show that her resignation amounted to a 'dismissal', as defined under s95(1) ERA.

s95 - Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) and section 96, 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."

104. The claimant must show the following key points to demonstrate that her resignation amounted to a dismissal under s95(1) of the ERA:

104.1 that a fundamental term of her contract was breached;

104.2 that she resigned in response to that breach; and

104.3 that she did not waive or affirm that breach.

105. Employees sometimes rely on a particular act or omissions as being the 'last straw' in a series of events. In the case of *Omilaju v Waltham Forest Borough Council* [2005] IRLR 35 it was held the last straw may not always be unreasonable or blameworthy when viewed in isolation. But, the last straw must contribute or add something to the breach of contract.

Mutual trust and confidence

106. The implied term of mutual trust and confidence was held in the cases of *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 642 (as interpreted by the EAT in *Baldwin v Brighton and Hove City Council* [2007] IRLR 232) as follows:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

107. It is not necessary for the employer to intend to breach the term of trust and confidence (*Leeds Dental Team Ltd v Rose* [2014] IRLR 8): *"The test does not require an ET to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or*

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seriously damage the relationship of trust and confidence then he is taken to have the objective intention...”.

108. In *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833, Underhill LJ considered previous caselaw and held that the Tribunal must consider the following questions:

“(1) 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?”

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) 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 Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation...)

(5) Did the employee resign in response (or partly in response) to that breach?”

APPLICATION OF THE LAW TO THE FACTS

109. We applied the law to our findings of fact and reached the conclusions set out below.

Allegation 1 – pronunciation of the claimant’s name by IS (from 6 June to 6 July 2021)

110. We concluded in our findings of fact that:

110.1 IS did not mispronounce the claimant’s first name after she pointed out his mistake to him on or around two weeks into her employment with the respondent;

110.2 IS would have mispronounced the first name of a hypothetical white employee in the same manner, until his mistake was pointed out to him;

110.3 therefore the mispronunciation was not because of the claimant’s race.

111. In any event, we concluded that the claimant was outside of the Tribunal’s normal time limits and it would not be just and equitable to permit this complaint to proceed for the following key reasons:

111.1 the claimant could have researched bringing Tribunal complaints using the internet at any time. The claimant was aware that she could present a Tribunal complaint in early January 2023 but did not present a valid complaint until 21 June 2023 (although she attempted to do so on 30 May 2023);

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- 111.2 the claimant has not raised any race discrimination allegations relating to the period between July 2021 and 28 February 2023 (we note that the claimant complained of race discrimination at a meeting in October/November 2022 which the Tribunal found actually took place on 28 February 2023, please see the findings on Allegations 3 and 7);
 - 111.3 the claimant made a single complaint of race discrimination relating to IS. Her only other complaint of race discrimination related to EL' conduct of the meeting on 28 February 2023. There is no evidence of any "continuing act" for time limit purposes;
 - 111.4 therefore even if the Tribunal had decided that it was just and equitable to extend time limits, the Tribunal would only have extended the time limit for presenting her complaint to early January 2023;
 - 111.5 the claimant is therefore outside of the time limits for complaining of Allegation 1. Even if IS did repeatedly mispronounce the claimant's first name (and would not have done so in relation to a hypothetical white employee), the Tribunal would have struck out this complaint as being outside of the Tribunal's time limits.
112. The claimant's complaint of direct race discrimination relating to Allegation 1 therefore fails and is dismissed.

Allegation 2 – meeting in October/November 2022 between EL, the claimant and other supervisors

- 113. EL accepted that he stated words to the effect of "*people need to have a thicker skin*", in the context of discussing customer complaints that were not directed at any individual in particular.
- 114. We concluded in our findings of fact that EL's comment was intended to be constructive feedback for all three Team Leaders, not just the claimant. EL did not make that comment in relation to the claimant's disability. The key reasons for our conclusion were:
 - 114.1 all three supervisors were present at the meeting, not just the claimant;
 - 114.2 the claimant herself stated that the context of the meeting was a general discussion around the running of the café, following on from a hectic Summer trading period;
 - 114.3 the comment related to the general customer complaints that EL raised with all three supervisors;
 - 114.4 it is well known that the hospitality industry can be difficult and that some customers make unwarranted complaints, particularly given the customer facing nature of the roles in the industry; and
 - 114.5 we note that EL apologised to the claimant at their next meeting, when she raised the comment as an issue.

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115. We accept that the words ‘thicker skin’ could amount to unfavourable treatment because the claimant was particularly concerned about any potential link with her disability. We note that legal concept of ‘unfavourable treatment’ does not require any element of comparison with non-disabled comparators (unlike claims of ‘less favourable treatment’ for direct discrimination). In addition, an individual’s motivation for such treatment is not relevant to the legal concept of ‘unfavourable treatment’.
116. However, we concluded that EL’s comment did not amount to discrimination arising from disability because the ‘something arising’ that the claimant complained of was her sickness absences from 21 November to 5 December 2022 and from 2 to 28 March 2023. These sickness absences took place after EL’ comments in the October/November 2022 meeting. They therefore cannot (as a matter of the timing of events) be the ‘something arising’ because those absences had not yet taken place.
117. We note that the claimant could have pleaded a different ‘something arising’ from disability as part of her discrimination arising from disability (e.g. additional sensitivity towards perceived criticism). However, this was not the case that the claimant put forwards in her claim form or at the preliminary hearing, where the list of issues (or questions) that this Tribunal had to decide was finalised.
118. The claimant’s complaint of discrimination arising from disability relating to Allegation 2 therefore fails and is dismissed.

Allegation 3 – meeting with EL (‘attitude’ and ‘aggressive’ comments)

119. Please refer to our conclusions on Allegation 7.

Allegation 4 – removal of claimant from bistro events and weddings

120. We concluded that some adjustments were put in place on the claimant’s return to work following her sickness absence from 22 November to 5 December 2022, as set out in our findings of fact.
121. We concluded that the respondent had not yet arranged for the claimant to undertake formal work-shadowing of CBT during Sunday lunches at the MB café and at weddings could be ‘unfavourable treatment’ for the purposes of the claimant’s complaint of discrimination arising from disability.
122. However, we accept the respondent’s explanation as to why that formal work-shadowing had not yet been arranged (see our findings of fact on Allegation 4). The reasons for that were related to the claimant’s sickness absence from 21 November to 5 December 2022, in that the respondent agreed these measures with the claimant as part of a package of support to assist her to manage her health when performing her role after her sickness absence.

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123. We concluded that the respondent had not yet arranged work-shadowing for the claimant when she went on sick leave on 2 March 2023 (and subsequently resigned on 28 March 2023) because the work was simply not available for the claimant to do at that point in time. In particular:
- 123.1 the claimant was struggling to work with JF on events, because she was unhappy with his management style. This was recognised by IS, who stated that he would put in place management training for JF;
 - 123.2 there were very few weddings during the Christmas and Winter period;
 - 123.3 the MB café was only open three days per week during the Winter period and IS had to rota shifts for the existing café staff as a matter of priority;
 - 123.4 IS also had to ensure that there were sufficient staff at the CY café, where the claimant normally worked.
124. The respondent's treatment of the claimant was therefore a proportionate means of achieving its aims of supporting the claimant to return to work and to cope with customer complaints.
125. The claimant's complaint of discrimination arising from disability relating to Allegation 4 therefore fails and is dismissed.

Allegation 7 – meeting on 28 February 2023

126. The claimant has alleged that the comments made by EL at the meeting on 28 February 2023 amounted to direct race discrimination. We concluded that EL:
- 126.1 discussed the claimant's attitude towards work, as set out in the emails sent by NH and IS; and
 - 126.2 described the claimant's behaviour towards the customer during the incident on 17 February 2023 described in NH' email as 'aggressive'.
127. We note that the burden of proof is on the claimant to demonstrate a prima facie case that these comments were made to her because of her race (and would not have been made to a hypothetical white employee). We have concluded that the claimant has failed to discharge that burden of proof. The comments made by EL resulted from the feedback that he had received from NH and IS. We accepted EL' evidence that he would have raised such feedback with a hypothetical white employee.
128. We therefore concluded that the comments made by EL during the meeting did not amount to less favourable treatment of the claimant because of her race. EL would have met and raised the complaints with a hypothetical white employee in the same way that he raised them with the claimant.

Constructive dismissal complaint – Allegation 5 (safe key incident), Allegation 6 (ordering stock) and all other allegations

RESERVED JUDGMENT

Allegation 5 (safe key incident)

129. We concluded that the claimant was not ‘disproportionately reprimanded’ in relation to the safe key incident. We note that the claimant accepts that leaving the key in the safe was a serious breach of security and that is why she apologised to IS (on behalf of herself and CL) for the error. We also note that the full week’s taking for the CY café were in the safe that evening (because banking cash took place on a Monday) and that the respondent would have been unable to claim for any theft under its insurance policy.
130. This matter was raised initially via WhatsApp, discussed between IS and the claimant and was later discussed at the meeting on 28 February 2023 between the claimant and EL. In the meantime, IS had held a similar discussion with CL (who was also a supervisor on shift that night). The reason why EL did not discuss this issue with CL was because NH had not raised any complaints regarding behaviour towards customers by CL.
131. We also note that this matter was discussed during the meeting on 7 March 2023. This was because the claimant herself had raised the issue in her grievance letter which she handed to EL and IS during that meeting.

Allegation 6 (ordering stock)

132. We accepted IS’s evidence that whilst AT normally ordered stock, ordering stock was a supervisor responsibility and that the claimant and CL performed this responsibility in AT’s absence. We also accepted IS’s evidence that the claimant failed to order any cakes, when instructed to do so, with the result that the CY café did not have any cakes to sell the next day.

All allegations taken separately or together

133. We have therefore concluded that the respondent’s conduct under each of the allegations (taken separately or together) did not amount to a breach of the implied term of trust and confidence, entitling the claimant to resign and treat her contract as at an end. The claimant’s complaint of constructive (unfair) dismissal therefore fails and is dismissed.

CONCLUSIONS

134. The claimant’s complaints fail and are dismissed.

**Employment Judge Deeley
5 March 2024**