EMPLOYMENT TRIBUNALS

Claimant: Ms S Bikar

Respondent: Activate Learning

Heard at: Reading **On:** **5, 6, 7, 8, 9, 12, 13 June 2023**

Before: Employment Judge Shastri-Hurst, Mrs C Baggs, Ms H Edwards

Representation
Claimant: in person
Respondent: Miss M McGee

JUDGMENT having been sent to the parties on 24 July 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant brings claims of constructive unfair dismissal, notice pay, direct race discrimination and harassment in relation to race. The ACAS early conciliation period commenced on 2 June 2021, and ended on 14 July 2021. The claim was presented on 3 August 2021.

2. The claimant worked for the respondent from 2 January 2018 until her resignation with immediate effect on 26 August 2021. She held the position of Food Service Coach.

3. The claimant was managed throughout the duration of her employment by Darren Blanks, Group Operations Catering Manager. Her direct supervisors were “Chris” and then, as of 14 May 2019, Sandie Culshaw; both held the position of Café Manager.

4. The claimant claims that, throughout her period of employment, she was subjected to various acts that amounted to discrimination and harassment. She says that this series of events led her to a position where she had to resign, without giving notice.

5. The alleged perpetrators are:

   5.1. Rhys Freemire;
   5.2. “Chris”;
   5.3. Ann Gough;
   5.4. Darren Blanks;
   5.5. Sandie Culshaw;
   5.6. Brandon Foster;
   5.7. Kerry Roberts;
   5.8. Hadley Brophy (although the race allegation against him was withdrawn on Day 5);
   5.9. “Julie”.

6. The respondent defends the claims. Firstly, it denies that some of the allegations of discrimination factually happened as the claimant alleges, or at all. Further, it denies that any of the factual allegations, to the extent they took place, were because of or related to the claimant’s race.

7. In terms of the discrimination/harassment claims, the respondent also initially relied upon the statutory defence under section 109 of the Equality Act 2010 (“EqA”), in that it alleged that it took all steps there are reasonable for an employer to take to prevent its employees from discriminating in the way alleged. This argument was (very sensibly) not pursued by the time we reached submissions.

8. Furthermore, the respondent denies that there was a breach of the implied term of trust and confidence, so as to give the claimant the right to treat herself as summarily dismissed. Again, initially, the respondent sought to argue that, if we were to find there had been a constructive dismissal, that dismissal was in any event fair. By the time of closing submissions, this argument was (again, very sensibly) not pursued.

9. Regarding the claimant’s notice pay claim, the respondent accepts that it did not pay her any notice pay. It argues that, because the claimant resigned without notice (and was not constructively unfairly dismissed on their case), she had no right to notice pay.

10. The claimant represented herself, and the respondent was represented by Miss McGee. We are grateful to them both for the manner in which they conducted the hearing. On the first two days, Ms McGee attended by video, due to having tested positive for Covid-19. She was able to join us in person from the third day onwards.

11. In reaching our conclusions, we have had the benefit of an agreed bundle of 277 pages (referenced as [X], as well as the claimant’s additional bundle of 34 pages (referenced as [C/X]). The agreed bundle expanded over the course of the hearing, as the respondent added a few pages, and the claimant sent several emails with numerous attachments to the Tribunal over several days. Neither party took any exception to any of the additional documents being included in the bundle. With those additions, the agreed bundle finished at page 311.

12. We have also had the benefit of hearing evidence from the claimant, as

well as evidence on behalf of the respondent from the following witnesses:

12.1. Rhys Freemire ("RF") – Vocational Catering Coach
12.2. Ann Gough ("AG") – Food Service Assistant
12.3. Sandie Culshaw ("SC") – Café Manager
12.4. Hadley Brophy ("HB") – Human Resources Business Partner;
12.5. Darren Blanks ("DB") – Group Operations Catering Manager.

13. References to their statements are [AB/WS/X] where AB are the initials, and X is the paragraph number. In the case of the claimant's witness statement, there are no paragraph numbers, and so "X" represents the page number.

Preliminary issues

14. On the first morning of the hearing, three applications were raised:

14.1. The respondent's application to change its name from Activate Learning Education Trust to Activate Learning;
14.2. The respondent's application to admit a statement of Mr Brophy; and,
14.3. The claimant's application for an anonymity order to protect her name and address.

15. We permitted the respondent's two applications, and rejected the application made by the claimant, although we explained that there was no need for the claimant's address to appear in our judgment. Further detail is set out below in relation to each application.

Respondent's name change

16. There was some confusion at an earlier hearing regarding the respondent's name. The claim was brought against Activate Learning however, in the Grounds of Resistance, the correct name was said to be Activate Learning Education Trust. At the preliminary hearing in this case, the respondent asked for its name to be changed from Activate Learning to Activate Learning Education Trust: this request was granted. It transpired that this was simply due to a miscommunication between the respondent's then representative, Mr Brown (counsel), and HB.

17. HB had been surprised to learn that the respondent's name had been changed to Activate Learning Education Trust, and confirmed to us that the correct identity of the respondent (her employer) is Activate Learning.

18. Our attention was taken to the following documents, all of which refer to Activate Learning:

18.1. The claimant's contract of employment – [249];
18.2. The claimant's offer of employment – [43];
18.3. The claimant's payslips – [273].

19. Due to the information before us, as set out above, we concluded that the correct identity of the respondent (the claimant's employer) was Activate

Learning, and so granted the application to restore the name of the respondent accordingly.

Respondent's additional statement

20. The respondent sought permission to rely upon a statement from HB.

21. It transpired that HB had been the person within the respondent to collate the witness statements and send them to the respondent's solicitor on 8 November 2022. On doing so, HB had accidentally left off his statement, attaching four other statements, despite stating in the email that he was attaching all five statements.

22. The respondent's solicitors simply forwarded on the four statements, without checking who they were from and whether all expected statements were attached.

23. The fact that HB's statement had not been sent to the respondent's solicitors, and therefore had not been disclosed to the claimant, only became apparent when Ms McGee held a conference with the respondent's witnesses less than two weeks before the final hearing (on or around 25 May 2023). A week or so after that conference, the statement was sent to the claimant: it is unclear to us why it took a week to rectify the mistake.

24. It was Ms McGee's position that this failure to send the claimant the statement was simply a mistake. She submitted that the respondent would be prejudiced if it was not permitted to adduce the HB statement, as it goes directly to two of the allegations in this claim (issues 3.2.11 and 3.2.12), and is the only statement to address those two issues.

25. The claimant objected to the admission of HB's statement, on the following grounds:

    25.1. It was unfair that she had been able to comply with the case management orders despite being a lay representative, and the respondent's had failed to do so yet would not suffer any penalty;

    25.2. The claimant was concerned that her statement had been sent to the respondent before HB's statement had been sent to her. She had not seen proof of when HB's statement had been written and sent off to the respondent's solicitors. Her concern was that HB's statement had been written with the benefit of sight of the claimant's statement.

26. Ms McGee told us that HB's witness statement had been written at the same time as the other four; importantly, before sight of the claimant's statement. It was not amended after it was written. We accepted this information: Ms McGee has a duty to the Tribunal not to mislead us or misrepresent the truth to us and we have no reason to doubt this information.

27. The Tribunal decided to admit the statement of HB. It was clearly a

mistake that HB's statement had not been disclosed at the same time as the four other statements from the respondent. It was written prior to the respondent having sight of the claimant's statement, and had not been changed in light of the claimant's statement. The evidence it contains is relevant to the issues in the case.

28. Considering the balance of prejudice, if the statement were not admitted, there would be prejudice to the respondent, as it would mean that two of the claimant's allegations of discrimination would go unanswered with evidence. Conversely, the claimant had received the statement on 1 June 2023, and therefore had had sufficient time to prepare her cross-examination for HB. Nothing in the witness statement could be said to be surprising or require supplementary evidence from the claimant. Balancing the prejudice to both sides in either permitting or rejecting HB's witness statement, we concluded that there would be greater prejudice to the respondent, and therefore determined to admit the statement.

Claimant's anonymity request

29. The claimant gave evidence under oath about the need for an anonymity order. She told us she thought it would be difficult to move on and get closure on this dispute, knowing that her address and name were in the public domain. This was particularly given that she told us she had suffered a lot as a result of the treatment she had received at the hands of the respondent. The claimant was fearful of reprisals, such as the kind she allegedly experienced at the hands of Brandon Foster (Issue 4.1.6). The claimant also had concerns about being able to obtain new employment with this information in the public domain; she held concerns that a new or prospective employer may look at any judgment.

30. The respondent objected to any anonymity order being made. Ms McGee submitted that there was no reason in this case to depart from the presumption of open justice as the starting point. She also reminded us of the case of **R v Legal Aid Board ex p Kaim Todner [1999] QB 966**, in which it was held (at paragraph 8) that:

> "[i]t is not unreasonable to regard the person who initiates the proceedings as having accepted the normal incidence of the public nature of court proceedings".

31. Ms McGee also pointed out that, if any new employer took against her for having brought a Tribunal claim, she would potentially have a claim of victimisation against them under s27 of the Equality Act 2010.

32. The law on anonymisation orders is as follows. The Tribunal has the power to make an anonymisation order under r50 of the Rules. R50 provides:

> "(1) a tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.

> (2) in considering whether to make an order under this rule, the tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.
> (3) such orders may include –
> …
> (b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record; …"

33. An order must be "necessary" for one of three reasons:

    33.1. In the interests of justice;
    33.2. To protect a Convention Rights; or,
    33.3. To protect confidential information as defined in s10A ETA (this is not relevant here).

34. Furthermore, under Rule 50(2) the Tribunal is required to give "full weight" to the principle of open justice and the Convention right to freedom of expression when exercising its discretion under Rule 50(1).

35. The test in such cases is a balance of the competing Convention rights of right to a private life, right to a fair and public hearing, and right to freedom of expression.

36. The default starting point is the fundamental principle of open justice, meaning that judgments (and hearings) are public. It is for the claimant to prove, with clear and cogent evidence, that the Tribunal should move from this default position. However, there will be times when a derogation from that principle is appropriate.

37. We are assisted by the *Practice Guidance (Interim Non-Disclosure Orders) [2012] 1 WLR 1003*, which provides the following key points:

    37.1. Applications to restrain publication always engage Article 10 of the European Convention of Human Rights ("ECHR") and s12 of the Human Rights Act 1998 (both refer to freedom of expression). Article 8 of the ECHR may also be engaged (right to respect for private and family life). Articles 8 and 10 have equal weight;

    37.2. Open justice is a fundamental principle and the general rule is that hearings and judgments are public;

    37.3. Derogation from this principle is wholly exceptional and limited to what is strictly necessary for the proper administration of justice or to achieve its purpose;

    37.4. The burden of establishing a derogation from this principle lies on the party making the application. This must be done with clear and cogent evidence;

    37.5. A derogation from the principle is not discretionary; sufficient exceptional grounds either exist, in which case it must be granted, or they do not and it must be refused;

37.6. Parties cannot consent to the making of an order under r50.

38. We did not grant an anonymity order. In relation to the claimant's address, there is no need for that to appear in our judgment, and so there was no need for an order anonymising it.

39. In terms of the claimant's fear of reprisals; Brandon Foster already knew the claimant. We have no good evidence upon which to find that it is a real possibility that the disclosure of the claimant's name would lead to any further recrimination from any other third party.

40. We concluded that there was no need to put an anonymity order in place: it is not necessary in the interests of justice, neither is it necessary for the protection of the claimant's Convention Rights. We were not satisfied that the claimant had provided us with clear and cogent evidence enabling us to depart from the starting point of open justice.

41. The claimant has obtained a new job. Her new employer will know that she has the protection of s27 of the Equality Act (protection from victimisation) should they decide to subject her to a detriment or dismiss her due to this claim.

42. Another issue of anonymity arose part way through the claimant's evidence. At the time of working for the respondent, she also had a second job with another employer. She asked that the name of that employer be anonymised. We considered that there was no need to reference that other employer by name, and so there was no need for an anonymity order: we will simply avoid referencing that employer by name.

Issues

43. The issues for the Tribunal to consider were set out in the case management order dated 15 June 2022.

44. The only addition to that list is to include the issue of time limits. The issues for the Tribunal to consider are:

0. Time limits

Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 3 March 2021 may not have been brought in time.

0.1 Were the discrimination and harassment complaints made within the time limit in section 123 EqA? The Tribunal will decide:

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

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

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

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

0.1.4.1 Why were the complaints not made to the Tribunal in time?
0.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1. Unfair dismissal

1.1 Was the Claimant dismissed? Constructive dismissal

1.1.1 Did the Respondent do the following things:

1.1.1.1 the same matters said to amount to harassment and / or direct race discrimination;

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

1.1.2.1 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

1.1.2.2 whether it had reasonable and proper cause for doing so.

1.1.3 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.

1.1.4 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.

1.1.5 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.

1.2 If the Claimant was dismissed, what was the reason or principal reason for dismissal?

1.3 Was it a potentially fair reason?

1.4 Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

2. Notice pay

2.1 What was the Claimant's notice period?

2.2 Was the Claimant paid for that notice period?

2.3 If not, was the Claimant guilty of gross misconduct (doing something so serious that the Respondent was entitled to dismiss without notice)?

3. Direct discrimination (Equality Act 2010 section 13)

3.1 The Claimant describes herself as British Indian;

3.2 Did the Respondent do the following things:

3.2.1 In January 2018, Chris (Supervisor) calling the Claimant two-faced after she complained;

3.2.2 On 2/2/2018, the Claimant was shouted at by Chris and Rhys causing the Claimant to leave work in tears;

3.2.3 On 2/05/2018, Rhys and Chris shouted at the Claimant and stated "yeh fuck off don't want you here";

3.2.4 October 2018, Rhys stating continuously that "Asians don't take showers";

3.2.5 October 2018, the Claimant was not asked to join the team breakfast whereas all other staff were. Rhys stating to the Claimant that his left over toast was "all the Claimant deserved";

3.2.6 May 2019 Ann shouting at the Claimant in front of customers and calling her a "bitch";

3.2.7 In 2019, after a panini had burned, Rhys stating "oh look it looks like Suzanna";

3.2.8 From 2018 – 2021, Rhys would mock the Claimant's accent and stating she came to the UK for a British Passport;

3.2.9 On 3 December 2019, Rhys assaulted her with a plastic knife causing injury to her face;

3.2.10 In December 2019, Julie (HR) asking the Claimant whether everyone was nice to her at her other part-time job;

3.2.11 In December 2019, Kerry stating that being around the Claimant was "like being in a playground";

3.2.12 In December 2019, Hadley Brophy stating that if the Claimant went to the Police to report the knife incidence, the college would not help her and that it may affect her job;

3.2.13 In December 2019, Ann and Sandie stood in the kitchen door and would not let the Claimant pass;

3.2.14 In 2020, Rhys stating to Darren that "he doesn't want a meeting with the fucking bitch";

3.2.15 On 18/09/2020, Sandie asked the Claimant if she had female genital mutilation (FGM);

3.2.16 Between 2018 – 2021 Rhys stating that the Claimant should "find another job" and that the Claimant's "sort are not wanted here";

3.2.17 Between 2020 – 2021, Rhys refusing to work with the Claimant;

3.2.18 Between 2020 – 2021, the claimant was excluded by Rhys, Ann and Sandie from discussions about new plans for food service;

3.3 Did the Respondent's treatment amount to a detriment?

3.4 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 they were treated worse than someone else would have been treated (a hypothetical comparator). The Claimant says her treatment was worse than White and / or Black African employees.

3.5 If so, was it because of race?

4. Harassment (Equality Act 2010 section 26)

4.1 Did the Respondent do the following things:

4.1.1 In 2021, the Claimant heard Rhys and Sandie talk about the Claimant being 3 minutes late;

4.1.2 In 2020 – 2021 Chef Dave would only call her colleague Ann to come and see the menu but would exclude the Claimant;

4.1.3 In 2021, the Claimant heard Rhys and Sandie talking about her and they stated she was "desperate for a fuck" as [her] partners is in India;

4.1.4 On 26/06/2019, Darren Blanks judging the Claimant, by saying "I don't know why you're bothering" in connection with her preparing documents for her spouse's visa;

4.1.5 In 2021, Brandon not wanting her to serve him in the café;

4.1.6 On 20/06/2021 Brandon scaring her outside of work;

4.1.7 In May 2021 Darren Blank breaching the Claimant's confidentiality, by telling Brandon Foster about her concerns when he had asked him not to do this;

4.1.8 On 24/03/2021, the Claimant was told she was not entitled to take a break due to only working a 5 hour shift, yet other colleagues who worked longer shifts were allowed to take extra breaks over and above their legal entitlements;

4.2 If so, was that unwanted conduct?

4.3 Did it relate to race?

4.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

4.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

5. Remedy

5.1 To what remedy or remedies is the Claimant entitled.

Law

Constructive unfair dismissal

45. A claim for constructive unfair dismissal arises from s95 of the Employment Rights Act 1996 ("ERA"):

> "(1) For the purposes of this Part an employee is dismissed by his employer 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."

<u>The implied term</u>

46. The implied term of trust and confidence has been defined in **Malik v Bank of Credit and Commerce International SA [1997] IRLR 462** as:

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

<u>Fundamental breach of contract</u>

47. It is not enough for a claimant to show that a respondent has behaved in a manner that is unwise or unreasonable. The conduct must equate to a breach of contract based on the objective contractual test – **Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27.**

48. The question is not whether a reasonable employer would have concluded that there was no breach, but whether on the evidence before us we consider that such a breach has occurred.

49. We remind ourselves also that the intention of the employer is irrelevant (**Leeds Dental Team Ltd v Rose [2014] IRLR 8**). Conversely, it is not enough for an employee subjectively to feel that a breach has occurred (**Omilaju v Waltham Forest London Borough Council [2005] IRLR 35**). Nor is it sufficient to prove that the employer did not believe that the breach was fundamental in order to successfully defend a constructive unfair dismissal claim (**Millbrook Furnishing Industries Ltd v McIntosh [1981] IRLR 309**).

Resigning in response

50. The fundamental breach need not be the sole cause of the resignation, provided it is an effective cause. (**Jones v F Siri & Son (Furnishers) Ltd [1997] IRLR 493**). This means that the employee must resign, at least in part, because of the fundamental breach (**Nottinghamshire County Council v Meikle [2004] IRLR 703**).

Affirming the contract

51. An employee must make up her mind "soon" after the conduct that she alleges amounts to a fundamental breach (**Western Excavating**), otherwise she will lose her right to rely upon the breach to terminate her contract. There is no time window within which an aggrieved claimant must resign, it is a question of fact in each case, and a reasonable period will be allowed.

52. Ms McGee provided us with the case of **Fereday v South Staffordshire NHS Primary Care Trust [2011] All ER (D) 05 September**. In that case, the Tribunal found that the claimant had affirmed her contract. After the fundamental breaches of contract, the claimant had sought to actively argue that certain terms of her contract should be exercised in her favour. These terms related to sick pay.

53. The situation in **Fereday** is somewhat different from the scenario we have in this case in relation to sick pay. Here, the claimant was on sick leave for some time before she resigned, however there was no argument over pay that resulted in her positively seeking to enforce the sick pay terms of her contract. Although she continued to be paid sick pay, that is a different scenario from one in which an employee actively seeks to enforce their contract following fundamental breaches.

The last straw

54. The Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978** approved **London Borough of Waltham Forest v Omilaju [2005] IRLR 35**, which set out various propositions of law relevant to the issue of the last straw in a constructive unfair dismissal case:

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

…

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

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

15. The last straw principle has been explained in a number of cases, perhaps most clearly in *Lewis v Motorworld Garages Ltd [1985] IRLR 465, [1986] ICR 57*. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:

"(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? … This is the "last straw" situation."

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

…

19. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust

> and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.
>
> 21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.
>
> 22. Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has ben undermined is objective…"

55. The Court of Appeal in **Kaur** held that, if the last straw matter is one part of a course of conduct that amounts to a breach of the implied term of trust and confidence, then it is irrelevant that the claimant may have affirmed his/her contract after each of the earlier incidents in that course of conduct. A last straw revives the right to accept the employer's repudiatory breach, and resign.

56. Furthermore, the Court of Appeal in **Kaur** set down a list of questions the Tribunal should ask itself when dealing with last straw cases (paragraph 55):

> "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 (applying the approach explained in **Omilaju [2005] ICR 481**) 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?"

Breach of contract (notice pay)

57. Here, the question is, as a matter of fact, was there a breach of contract in that the employer failed to pay the employee their contractual notice pay?

58. This requires consideration of who fundamentally breached the contract first:

58.1. If the respondent fundamentally breached the claimant's contract, and she is successful in her constructive unfair dismissal claim, then she will succeed in this claim;

58.2. If, however, the respondent did not fundamentally breach the claimant's contract, then the claimant, by not giving the requisite contractual notice but resigning with immediate effect, would have breached her contract. This would enable the respondent to treat itself as released from its obligation to pay notice pay.

59. In short, this claim stands or falls with the constructive unfair dismissal claim.

Direct race discrimination

60. Employees are protected from discrimination by s39 EqA:

> "(2) An employer (A) must not discriminate against an employee of A's (B) -
> …
> (d) by subjecting B to any other detriment."

61. Direct discrimination is set out in s13 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."

62. There are two parts of direct discrimination: (a) the less favourable treatment and (b) the reason for that treatment. Sometimes, however, it is difficult to separate these two issues so neatly. The Tribunal can decide what the reason for any treatment was first: if the reason is the protected characteristic, then it is likely that the claim will succeed – **Shamoon v Constable of the Royal Ulster Constabulary [2003] UKHL 11**.

<u>"Because of": reason for less favourable treatment</u>

63. In terms of the required link between the claimant's race and the less favourable treatment she alleges, the two must be " inextricably linked" - **Jyske Finands A/S v Ligebehandlingsnaevnet acting on behalf of Huskic: ECLI:EU:C:2017:278**.

64. The test is not the "but for" test, in other words it is not sufficient that, but for the protected characteristic, the treatment would not have occurred – **James v Eastleigh Borough Council [1990] IRLR 288**.

65. The correct approach is to determine whether the protected characteristic, here race, had a "significant influence" on the treatment – **Nagarajan v London Regional Transport [1999] IRLR 572**. The ultimate question to ask is "what was the reason why the alleged perpetrator acted as they did? What, consciously or unconsciously, was the reason?" - **Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48**. This is a question of fact for the Tribunal to determine, and is a different question to the question of motivation, which is irrelevant. The Tribunal can draw inferences from the behaviour of the alleged perpetrator as well as taking surrounding circumstances into account.

66. If there is more than one reason for the treatment complained of, the question is whether the protected characteristic (in this case, race) was an effective cause of the treatment – **O'Neill v Governors of ST Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372**.

Harassment

67. The definition of harassment is set out at s26 EqA:

> "(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, mediating 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 to have had the effect."

Purpose or effect

68. S26 makes it clear that it is sufficient for the unwanted conduct to have the effect set out in s26(1)(b): it is not necessary for that to be the purpose of the alleged perpetrator. Harassment may still be made out where there is teasing or banter, without any malicious intent.

69. In terms of effect, the alleged perpetrator's motive is irrelevant. The test is both subjective and objective. First, it is necessary to consider what the effect of the conduct was from the claimant's perspective (subjective element). If it is found that the claimant did suffer the necessary effect set out in s26(1)(b), the next stage is to consider whether it was reasonable for the claimant to feel that way.

70. Furthermore, it is not necessary for the conduct to be aimed directly at the claimant. A claim can succeed if it was reasonable for the claimant to feel that their environment had been made intimidating, hostile, degrading, humiliating or offensive, whether or not any language or conduct is specifically aimed at them.

Related to the protected characteristic

71. The causal link required for harassment is much broader than that for direct discrimination. The requirement is that the conduct must be related to the protected characteristic, in this case race. There is no protection from general bullying within the EqA: harassment will not be proven where someone is picked on or singled out, unless that treatment is related to a protected characteristic.

72. There is limited guidance from the higher courts as to what is meant by "related to". Some guidance has been given by the Court of Appeal in the case of **UNITE the Union v Nailard [2018] EWCA Civ 1203**. The facts of this case were that the respondent had failed to deal with the claimant's sexual harassment complaint. The Employment Tribunal found that, because the failure related to a grievance regarding harassment, that was sufficient to find that the failure was itself an act of sexual harassment. The Court of Appeal found the Tribunal had got it wrong. The Tribunal had not made findings as to the thought processes of the individuals who failed to deal with the grievance; therefore, it could not be found that the failure itself was an act of sexual harassment. A finding would have to be made that those who failed to deal with the grievance were guilty of sexual harassment. The tribunal had, in effect, used the "but for" test; in other words, they found liability on the basis that, but for the grievance, there would have been no failure. This is not the correct legal test under section 26.

Burden of proof

73. The burden of proof for discrimination claims is set out in s 136 EqA:

> "(1)This section applies to any proceedings relating to a contravention of this Act.
>
> (2)If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3)But subsection (2) does not apply if A shows that A did not contravene the provision."

74. This means that, first, it is for the employee to prove that he/she suffered the alleged treatment – **Laing v Manchester City Council and another 2006 ICR 1519**.

75. Then, if there is evidence from which the Tribunal could find that the respondent's conduct was discriminatory, it must look to the respondent to prove that the conduct in question was not tainted by discrimination.

76. The Supreme Court has been keen to state that it is important not to place too much emphasis on the burden of proof – **Efobi v Royal Mail Group Ltd 2021 ICR 1263:**

> "[while] the burden of proof provisions in discrimination cases…are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination – generally, that is, facts about the respondent's motivation…they have no bearing where the Tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law".

Findings of fact

77. The claimant started work at the respondent as a Food Service Coach on 2 January 2018. The respondent provided her with an offer of employment

dated 18 December 2017 - [43]. With that offer, the respondent sent to the claimant a copy of the General Terms and Conditions of Employment – [249-264].

78. The claimant worked term times only, and worked 5 hours a day, initially from 0930 to 1430. Legally, she was therefore not entitled to a break. However, in her interview, she was told that she would get a break, and this was honoured by the respondent.

79. The other members of the team, including RF, SC and AG, all worked over 6 hours a day. They therefore were legally entitled to breaks. They would also have the occasional, unauthorised break, such as to go for a cigarette, for example.

80. The layout of the refectory was such that there was a square kitchen in the middle, then to one side was the coffee servery with sandwiches and so on, and on the opposite side was the servery for hot food and the deli. The claimant primarily worked on the hot food side. RF primarily worked on the coffee side.

81. This set-up later changed, around 2020 during the Covid-19 pandemic to a set-up which was more like a bar set-up. The layout was one big area, with minimal seating in the front area. RF explained that one had to walk through the bar and through the seating, to get to a door like a serving hatch for hot food.

82. The refectory served students, staff and visitors; at lunchtimes it would be particularly busy. Generally, there would be one person on the coffee side, and three people on the hot food/deli side.

83. When the refectory was quiet, it was possible for a person standing in the kitchen to hear someone at either the coffee or hot food serving point. At busy periods, such as lunchtime, it would not be possible to hear in the same way.

84. The respondent also engaged student volunteers to work at the refectory four days a week. They were primarily trainee chefs, however the staff, including the claimant, were involved in their training.

85. During the Covid-19 pandemic, the refectory closed, other than to provide a service for 10-15 vulnerable students. The claimant did not work at the respondent during the pandemic.

January 2018

86. From early on in the claimant's employment, issues arose which she reported to DB.

87. The first complaints that appear to have been made to DB are at [52] and [53]. Both were sent on 31 January 2018, less than one month after the commencement of the claimant's employment.

88. The first incident (not one which forms an allegation before us) was

reported to DB around the time it occurred in the email from the claimant at [52]. There, she stated that she told Chris during a lunch service that the deli had run out of tuna, to which he responded that she should send a student to get more. She then said that she was only telling him, to which his response was to say "Jesus" angrily. The claimant then reports that Chris wanted to speak to her after her shift, with RF present. Her email to DB records that she said to Chris "I was only telling him what had happened and it was a misunderstanding".

89. The claimant recorded that Chris went on to become angry. She stated that "I didn't think this was professional and very unfair" - [53]. The claimant did not mention in this email to DB that she thought Chris had acted in this way because of her race.

Allegation 3.2.1 – on 31 January 2018, Chris called the claimant two-faced after she complained

90. The second incident occurred shortly after: the claimant alleges that Chris, her supervisor, called her two-faced after she complained.

91. This situation arose from some students being rude to the claimant. The claimant mentioned this to Chris in his office. When it became apparent Chris was not going to do anything, the claimant told the students that she would go to DB instead.

92. Both emails sent by the claimant on 31 January 2018 recall this incident, of Chris calling the claimant two-faced - [52/53] (the date is apparent from the duplicate on [C/9]).

93. At least one of these emails is in response to DB's email at [C/10] on 31 January 2018, in which he offers to investigate the incident. On [55] there is an email dated 1 February 2018 (date from the duplicate at C/11), in which the claimant says she "would like to speak to someone higher...Marcin has seen me work well and hard... I have heard Chris behaved like this with the girl who worked before me and she left".

94. We have not heard from Chris about this incident, and it does not appear that the respondent in fact denies this happened. The respondent's point on this is that the phrase was not said because of the claimant's race.

95. We accept that Chris did say that the claimant was two-faced in the context set out by the claimant at [53]. The respondent wanted to investigate this, and the claimant asked for the matter to be escalated. This led to an unsuccessful mediation process. We find that the respondent escalated the matter when it was requested by the claimant.

96. Clearly Chris and the claimant did not have a good working relationship. In terms of the reason for Chris' conduct, we are satisfied that the reason he accused the claimant of being two-faced was that he was angry and frustrated that she went to DB, over Chris' head, to complain. Even on the claimant's evidence, this appears to be the reason for Chris' behaviour.

Allegation 3.2.2 - on 2 February 2018, Chris and RF shouted at the claimant causing her to leave work in tears

97. On 2 February 2018, the claimant alleges that Chris and RF shouted at her, causing her to leave work in tears.

98. The claimant was adamant about the date being correct; she was clear in her cross-examination of RF that she was sure the date on which this incident happened was 2 February 2018.

99. In his evidence, RF stated that he was sure he had been on holiday at that time: his daughter's birthday is 1 February, and he told us he had videos on his phone of being on the beach in Weymouth on holiday on 2 February 2018. This evidence was clear and specific, and well-reasoned. We therefore accept that RF was not at work on the day in question, and so was not involved in any incident involving the claimant on 2 February 2018.

100. In relation to Chris' involvement, again, we have not heard any evidence from Chris. It again appears to be the respondent's case that, if there was some shouting, it was not because of the claimant's race, and RF was not involved.

101. We find that Chris did shout at the claimant on 2 February 2018. Based on our findings so far, there is a pattern of Chris having a short fuse when it came to the claimant. We are satisfied, on the evidence that we have seen and heard, that the reason for Chris' shouting, on this occasion and previously, was that he found the claimant not easy to work with, and was still annoyed that she had "gone over his head" to DB at the end of January 2018.

Allegation 3.2.3 – on 2 May 2018, RF and Chris shouted at the claimant and stated "yeh fuck off we don't want you here"

102. We note that there is a three-month gap between this allegation and Allegation 3.2.2.

103. There is no contemporaneous evidence of this specific allegation. We have been taken to DB's response to what was evidently an email from the claimant raising the matter – [C/15], however, we have not seen the original complaint. DB's email makes no mention of any specific details.

104. The allegation is set out in the claimant's Further and Better Particulars at [26c]. There is no mention of Chris here, which is inconsistent with [C/WS/6] in which the claimant accuses Chris along with RF. It is also inconsistent in that at [26c] the claimant accuses DB of being present and not doing anything, whereas in [C/15], which is contemporaneous, DB clearly did take action.

105. We accept that DB was not present when this incident was said to have occurred; his email at [C/15] does not suggest he was, and is corroborative of his assertion in evidence that he had seen that the

claimant had been upset by something.

106. DB spoke to RF on this occasion, asking him "to be more considerate". This suggests to us that DB would, on his own initiative as manager, follow up matters as he explained to us in evidence. Namely, having received a complaint from the claimant, he would go and speak to the alleged perpetrator and then report back to the claimant: this is exactly what we find he did here.

107. On balance, we are not satisfied that factually this incident occurred as alleged by the claimant:

107.1. We have not seen any contemporaneous evidence to support this allegation; and

107.2. The claimant's evidence on this point is inconsistent.

September 2018

108. The claimant was off sick for a period during September 2018 with a chest infection. During that period of ill health, she kept in touch with DB: for example, see [60]. In that email, she commented "Hi to Chris and RF".

Allegation 3.2.4 – in October 2018, RF stating continuously that "Asians don't take showers"

109. There is a five month break between this allegation and Allegation 3.2.3.

110. The allegation as to RF's statement "Asians don't take showers" is made at [75]; there is no date on this email, however reference is made to "Friday 12th". On Sunday 14 October 2018, at [74], the claimant sent another email, stating that the incident had been on her mind all weekend. We therefore understand that this specific incident is said to have occurred on Friday 12 October 2018. There is nothing on the evidence to suggest that RF stating this phrase was "continuous"; we have evidence of something being said on an isolated occasion.

111. The fact that the claimant's email says that she was thinking about the incident over the weekend we find means she did not report it to DB instantly, but waited and thought about it over the weekend. In the email at [74], there is no mention of the specific phrase used by RF.

112. The emails at [74] and [75] are odd, in that the one on [75] is exactly the same as [74], but with an additional couple of paragraphs added in to give more detail of the Asian showers comment, and also the toast comment (see Allegation 3.2.5 below).

113. We accept RF's evidence at [RF/WS/4] that he:

> "mentioned to another member of staff that my Asian group of friends at school used to use lots of aftershave to [cover up] when they hadn't showered (sic)"

114. He told us that this was said as part of a light-hearted conversation, and it was only when this incident was mentioned later that he was aware the

claimant had been upset by the conversation.

115. We accept that those words were not directed at the claimant. The context of RF's words was about his male friends from school; therefore, it is unlikely, on the balance of probabilities, that his words would have been specifically aimed at the claimant. The reason for RF stating those words was that he was recollecting something of his school friends to a colleague.

116. We find that the claimant misconstrued what she had heard and, thinking about it over the weekend, managed to misremember the precise words that RF had used.

117. We find that the matter occurred as RF explained because:

117.1. We find it unlikely that RF made such an overtly racist comment ("Asians don't take showers"), given we have been provided with no context within which this alleged phrase was used. On the claimant's case this comment came out of the blue;

117.2. The nature of the claimant's complaint shifted from "Asians don't take showers" to (in her cross-examination of RF) "you smell, Asians don't take showers";

117.3. In the claimant's email at [75], she states that both DB and "Marcin" (from HR) were present when this statement was made by RF. We find that, had DB heard such a comment, he would have followed this up of his own volition. We have heard/seen no evidence that DB did follow this up of his own volition. Therefore, we find that DB did not hear any such comment;

117.4. When RF was asked questions by the Tribunal on this point, he remembered that the claimant had said "I do shower and I like to smell nice". This statement is not inconsistent with the claimant misconstruing the conversation and wishing to point out that she did shower;

117.5. The claimant waited until the Monday to complain, and therefore had time to compound a mistaken memory.

2019

Allegation 3.2.5(a) – in October 2018, the claimant was not asked to join the team breakfast whereas all the other staff were.

118. The evidence we heard from those who attended the breakfasts in question was that these were not breakfasts to which an invitation was required. RF's evidence was that it was seen as a good idea to come in a bit early on a Friday, when they could take advantage of the breakfasts being better (the menu was different on a Friday), and sit and chat about anything that had arisen that week. This was not a formal breakfast meeting to which an invitation was required, it was more an opportunistic time to get together to discuss anything necessary.

119. We accept that the claimant, on commencing her employment, was not informed that she could attend these breakfasts. It would have been a helpful and welcoming step for the claimant to be informed of the breakfasts and welcomed to them at the commencement of her employment.

120. These breakfasts started at 0900, before the claimant got to work at 0930. We can understand how the claimant would have felt left out, given that she would arrive halfway through. However, we find that she was not deliberately excluded from these breakfasts.

121. The claimant, in her cross-examination, told us that DB asked her in August 2018 "why don't you come [to the breakfasts]?". The claimant's evidence to us was that she did not at this stage as RF said "I don't want her here". This comment from RF is not in [C/WS], in which she says that she was only asked in October 2018 by DB to come to breakfast.

122. The first time the allegation of RF saying "I don't want you there" came up was in the Tribunal's questions, not in [C/WS], and not in her initial explanation in cross-examination.

123. Therefore we are not satisfied that RF did make this comment of "I don't want you there".

124. In any event DB again told the claimant she was free to join them in October 2018. Still the claimant did not attend the breakfasts.

125. We do not accept that the claimant was excluded from these breakfasts. In fact, the claimant was invited to attend the breakfasts twice, in August, and again in October 2018.

Allegation 3.2.5(b) – in October 2018, RF stating to the claimant that his leftover toast was "all the claimant deserved"

126. The claimant alleges that RF said that his leftover toast was "all the claimant deserved". This is at [C/WS/5].

127. This incident is mentioned at [76] which is a near contemporaneous email sent by the claimant complaining about this incident. In that email, the claimant records that RF said to her "…he picked up the left-over toast and asked if I want it". This is different from the allegation as it appears in the claim, there is no reference in [76] to RF saying that the toast was "all she deserved".

128. Furthermore, the claimant's position on this point altered during the course of the case. In cross-examination, she said that RF did say "all you deserve" and that she had complained to DB about this verbally. It would in that case seem odd to leave this out of an email (that at [76]) complaining about the same event.

129. Then, during her cross-examination of RF, the claimant put to RF that he had said "'ere, do you want it?" about some toast from his plate and that

what he should have said was "there is some toast left, would you like some". It was not suggested to RF that he had said the "all you deserve" comment. From this, it appears that the claimant's complaint relates to the manner in which RF offered her toast.

130. RF and DB's evidence was that there was a central plate of toast, as some people would want toast and some would not, and there would always be too much on the central plate. The claimant denies this, and told us that RF had offered her toast from his own plate.

131. We find it more likely than not that, with an informal breakfast, a communal plate of toast would be a likely occurrence.

132. In terms of the words used, RF's evidence in cross-examination was that he had said "there's some toast if you'd like some". DB's recollection was that the claimant entered and said "where's mine?", to which RF responded "there's some toast left".

133. We find that RF said "ere, do you want some?" to the claimant, for the following reasons:

133.1. DB gave supportive evidence that something along these lines was said, in that RF offered the claimant some toast;

133.2. There was no complaint by the claimant of the words "left over toast is all you deserve" in the email complaint on [76];

133.3. The claimant's evidence on this point contradicted the way in which she put this allegation to RF;

133.4. Having heard RF speak for some time, we find he is more likely to have used the words "'ere, do you want some?".

134. We find that this is what was said, and that RF did not say that left over toast was all the claimant deserved.

Allegation 3.2.6 – in May 2019, AG shouting at the claimant in front of customers and calling her a "bitch"

135. It was accepted by AG that she called the claimant a "bitch" on one occasion. Therefore, factually, we accept that this occurred. We have also seen the email from the claimant on the evening of the event at [74] which recalls the "bitch" comment. We note that there is no mention of the claimant thinking that this was connected to the claimant's race in this email.

136. We accept that using this word in front of staff, students and visitors was unwise and unprofessional.

Allegation 3.2.7 – on 13 May 2019, after a panini had burned, RF stating "oh look it looks like Suzanna"

137. This is said by the claimant to have occurred the day before SC started work. SC started on 14 May 2019, so this must have occurred on 13 May

2019.

138. The first time this is reported in an email within the bundle is on 24 June 2019 – [72/73].

139. In her cross-examination, the claimant said that she reported this incident to DB on 1 May 2019: evidently it cannot have happened on this time-line, as the incident did not occur until 13 May 2019.

140. Further, in [C/WS], the claimant does not make reference to a verbal conversation with DB on this matter. We therefore do not accept that there was a verbal conversation on this issue between DB and the claimant.

141. We do however accept that the claimant may have mentioned this in another email, before 24 June 2019: this is what DB told us, and is consistent with [C/WS].

142. We note that this allegation, along with the "showers" allegation (Allegation 3.2.4) are the only allegations that overtly reference the claimant's race. All the other allegations are not expressly racist in content. We also note that those two allegations are some 7 months apart.

143. We find it unlikely that, if RF was of the nature to make overt racist comments, such statements would be made at a 7-month interval. In other words, if RF was inclined to make such overt comments, they would be more regular. Further, the claimant, who tends to report every incident that affects her, would have reported more overtly racist comments.

144. We remind ourselves that we have not upheld the claimant's allegation that RF said "Asians don't take showers". This, we find, makes it even more unlikely that RF would have made the panini comment.

145. We are not satisfied that RF made the comment as alleged under this allegation.

June 2019

146. We have referred above to the claimant's email of 24 June 2019 – [73]. This is the first time, looking at the documents we have been taken to in the bundle, that the claimant made an assertion of discrimination connected to her race. She stated:

> "Sadly I have had issues since I started this job. From many of my previous emails you will see that I have had comments regarding my race, and in general disliked. I have reported every incident to you so you have a record…I also do not want to have comments made about my race."

147. In this email, the claimant sets out why she thinks RF is at this point ignoring her. The reason is that the claimant and RF had had a slight altercation involving AG – [73].

Allegation 4.1.4 – on 26 June 2019, DB judging the claimant, by saying "I don't know why you're bothering" in connection with her preparing

documents for her spouse's visa

148. During the claimant's cross-examination of DB, the context of this allegation became clearer to us. It transpires that the claimant had asked DB whether she could print off some wage slips as she did not have a printer. DB's evidence to us was that he could not remember the reason for her needing to print wage slips, but had presumed it was for the claimant's spouse's visa. DB offered her a college printer, as she received a certain amount of printer credit with her employment.

149. The claimant referenced that she had complained to DB in an email about this exchange; however we have not seen that email.

150. We find that, for DB to have said something such as "I don't know why you're bothering" would be a contradiction to his other conduct in this case; we find he was supportive, professional, and polite in his exchanges with the claimant and others.

151. We do not accept that DB said "I don't know why you are bothering".

Allegation 3.2.9 – on 3 December 2019, RF assaulted the claimant with a plastic knife causing injury to her face

152. Both RF and the claimant agree that an incident happened on the morning of 3 December 2019. The beginning circumstances appear to be broadly agreed. Both stated that, initially at least, the conversation was one that was light-hearted and full of banter. AC confirmed this, telling us that she remembered thinking that it was nice to see the two individuals getting along.

153. We note that, following this knife incident, the claimant remained for the duration of her shift on 3 December, and did not raise an issue about the incident. It was only the following morning that the claimant brought to the attention of DB what had happened, both in person and in an email. The email is at [56], and says:

> "he aimed for my face and knew exactly what he was doing. He then threw the knife towards Ann. Ann and I looked at each other. We said something that RF gets carried away"

154. The claimant in [C/WS/8] says she went to her doctor that same day, after work presumably, and pointed us to the GP letter at [268]. That letter is in fact dated 2 January 2020, and does not record an appointment on 3 December 2019. The letter is approximately one month following the incident. This letter simply records what the claimant told her GP.

155. We have been shown no good evidence at to why there would have been a change in atmosphere from one of banter, to one of malicious intent to harm, which is what the claimant is alleging here.

156. We also note that the respondent investigated this allegation (and in fact completed a LADO referral, although this was later). The investigation found that there was no further action needed. We have not seen the investigation notes, however we have no good evidence to lead us to

conclude that the investigation was unreasonable, or the outcome flawed.

157. In terms of the injury, we note that AC told us she saw a scratch on the claimant's cheekbone on the 3 December 2019. DB told us that, on the following morning, he initially could not see any mark, but then the claimant went to the bathroom to rub off her foundation. On her return, he could see a mark to the side of the claimant's mouth/chin. We have seen a photo that was taken by the claimant, although it is not entirely clear when this was taken, at [271].

158. We are not satisfied that RF went for the claimant deliberately or maliciously with a knife as alleged; we are not satisfied that RF "assaulted" the claimant. We find that the knife left RF's hand at some point, and that the knife made contact with the claimant's face, but that there was no deliberate intent on the part of RF to injury the claimant.

Allegation 3.2.10 – in December 2019, Julie (HR) asking the claimant whether everyone was nice to her at her other part-time job

159. The claimant sent an email to DB about this incident on 10 January 2020, at [C/17]. This email is the second time that the claimant makes a generalised statement that treatment occurred because of her race – [C/18].

160. We have not heard from Julie as to the circumstances of this incident. We accept factually that Julie asked about the claimant's other workplace being nice to her, and querying whether the staff there liked the claimant.

161. In [C/WS/9], the claimant's complaint about these questions appears to be that she did not see the relevance of them. Other than the issue of relevance, the questions are innocuous.

162. Factually we are satisfied that the claimant was asked these questions by Julie. We find that the reason for those questions being asked was simple curiosity and small talk between colleagues. There is no good evidence to point to any other motivation.

Allegation 3.2.11 – in December 2019, Kerry stating that being around the claimant was like being in a playground

163. On 10 January 2020, the claimant reported this matter to DB at [C/17]. In that email, the statement said to have been made by Kerry is "it is like being in a playground". This same phrase also appears on [C/18]. It is about this phrase that she complains to DB.

164. This is inconsistent with [C/WS], in which the claimant records that Kerry is reported to have said "being around [the claimant] is like being in a playground".

165. We have seen an email from the claimant on 13 January 2020 to HB in which she says that SC told her that Kerry had said "being around C is like being in a playground" – [298]. This email is several days after the 10 January 2020 email, and we consider that the claimant's account is likely

to be more accurate on 10 January compared to 13 January.

166. Kerry did not give evidence and SC was not asked about this point, despite being the one who reported the statement to the claimant.

167. HB gave evidence to the Tribunal about his understanding of this phrase regarding the playground. His understanding of the playground comment was that this referred to the refectory generally, not the claimant specifically. This understanding was gleaned from his own experience of the refectory, and from having weekly catch ups with Kerry.

168. We accept that it was reported to the claimant that Kerry said "it is like a playground", in that the meaning of playground was that the refectory itself was like a playground, not anything specific about the claimant. We have heard and read about kitchen spats between various members of staff, and have read on the claimant's evidence in the email of 10 January 2020 at [C/17] that Kerry had to be called to intervene during one such spat. We accept that describing the refectory environment like a playground was accurate.

169. We therefore do not uphold this allegation as specifically alleged, but find that Kerry said that the refectory "is like a playground".

Allegation 3.2.12 – in December 2019 , HB stating that if the claimant went to the police to report the knife incident, the college would not help her and that it may affect her job

170. We found HB, in his conduct during the hearing as HR representative for the respondent, and during the giving of his evidence, to be courteous, dignified, professional and straight forward.

171. We accept his account of this discussion, that, when the claimant told him she may go to the police, HB responded that ([HB/WS/3]):

> "she was well in her right to do so, but explained that it was likely that the internal investigation would then have to stop while the police carried out their own investigation".

172. We note that this would have been a perfectly proper process, had the claimant pursued matters with the police.

173. We find that the claimant genuinely misunderstood what HB said: that his indication that the internal investigation would have to stop was misconstrued as meaning that the respondent would not help her.

174. We therefore do not uphold this allegation on the facts, but find that HB's words were as he set out in his witness statement.

Allegation 3.2.13 – on 19 December 2019, Ann and Sandie stood in the kitchen door and would not let the claimant pass

175. The claimant's evidence was that this happened on her arrival at work, which would have been at around 0930hrs. SC's evidence was that, on the claimant's arrival at 0930 each day, SC would move from her position

downstairs, with RF and AG, to counting the money upstairs. This was because three people were required to be in attendance downstairs. On the claimant's arrival, the claimant could relieve SC, freeing SC up to do other managerial duties.

176. The claimant said that SC was not upstairs on this occasion. We find that, on the claimant's arrival, SC would have been downstairs, due to the requirement for three people to be manning the area. However, on seeing the claimant arrive, SC would have been making her way upstairs.

177. Neither AG nor SC remember this incident, and claim it did not happen.

178. The claimant's evidence on this point changed:

178.1. at [C/WS/10], the claimant recorded that AG and SC "stood in my way to cause an obstruction. I waited for them to let me pass";

178.2. in the near contemporaneous email from 10 January 2020, at [C/17-18], the claimant reports that "as I've entered the café SC and AG have stood in [the] entrance to [the] kitchen by [the] panini machine. I just about had enough space to pass through";

178.3. then in cross-examination, the claimant stated "I did stand for a while and I tried to move through and they did move".

179. We accept that there may have been an occasion where SC and AG may have been in the claimant's way, but we find that this was not deliberate. In none of the three different versions of the claimant's evidence does she suggest that she had to ask the two women to move out of the way, or that they refused to do so, for example. This is why SC and AG do not remember the incident, because it was not a deliberate act by them, but an accidental blocking of the claimant's path.

2020

180. We have referenced the email of 10 January 2020 several times so far. We note that in this email we have the second reference to race – [C/17-18]:

> "for the last two years in this employment I have experienced degrading treatment. Mostly because of my race and Ethnicity…It's easier for you, Marcin, HR to say move on but I have been scarred by racist comments on my face and mentally."

Allegation 3.2.14 – in 2020 RF stating to DB that "he doesn't want a meeting with the fucking bitch"

181. The claimant alleges that this was a statement made by RF in response to the suggestion that the two take part in a mediation process following the plastic knife incident.

182. The claimant mentions mediation in various of her emails sent in January 2020:

182.1. 10 January 2020 – [C/17-18]:

> "I shouldn't feel uneasy and worried about coming to work. I am currently on medication and receiving help from my doctor. So I think the mediation is not going to help as it's from this college I have faced such things…If RF does want to apologise to me he can do so in writing. But so far he has not said sorry which shows he has no regrets. The knife incident happened on third December. It was worded to me by you on eighth January he will have the opportunity to say sorry … thank you, but I do not need to attend any further meeting. … I do not want to attend any meeting. It will set me back";

182.2. 13 January 2020 – [297] – HB to the claimant:

> "It is a shame that you have rejected a mediation meeting as this would have really helped in kicking 2020 off on a positive note, however I have advised DB to respect your wishes"

182.3. 13 January 2020 – 298 – the claimant to HB (in response):

> "Yes my reasons for rejecting is because it was only worded to me that a meeting will be held to see if RF apologises…Of course I don't want a meeting if I've also heard from Sandy, Kerry has said I'm like being in a playground after she has seen me in tears";

182.4. 13 January 2020 – [299] – HB to the claimant (in response):

> "A mediation meeting would have been a great opportunity for us all to sit around a table, and make clear to each other what we expect going forward. For clarity – I had agreed with DB in December (long before police involvement) that a mediation meeting would be good and that RF could also take it as an opportunity to formally apologise to you";

183. There is nothing to support the claimant's allegation in writing from around the time of the alleged incident, and that is despite us having seen several emails from that period in January 2020 as set out above. We also note that the claimant has set out in these contemporaneous emails the reason she decided not to attend a mediation with RF. Had RF said "I don't want a meeting with the fucking bitch", we find that it is more likely than not that the claimant would have (a) complained and (b) cited that as her reason for not taking part in mediation at the time. We note that she did raise it in an email on 13 August 2021, over 18 months after the event - [221].

184. On balance, we find it is more likely than not that RF did not make this statement.

Allegation 3.2.15 – on 18 September 2020 – SC asked the claimant if she had female genital mutilation (FGM)"

185. SC's evidence on this is that she asked the claimant if FGM was something that was as prevalent in India as it was in some parts of Africa.

186. Having heard SC's evidence, we find that it was SC's nature to placate and smooth situations over. For example, when the claimant disagreed with something SC said in evidence, SC would back down and say "ok".

187. We are not satisfied that SC would say something so insensitive as to directly ask the claimant whether she had been the victim of FGM. We find it more likely that SC, knowing of the claimant's ethnic origin, asked her a question in which she also mentioned her understanding of the level of FGM in her (SC's) own country of origin.

188. SC's account is also supported by AG's evidence. It may well be that the claimant honestly misunderstood what SC was saying, and took it as a personal question about her, however we find as a fact that this is not what happened.

2021

Allegation 3.2.8 – From 2018 – 2021 – RF would mock the claimant's accent and stating she came to the UK for a British passport

189. There are three places in the bundle where mimicking is mentioned:

189.1. [169] – 28 May 2021 the claimant to Bernard Grenville-Jones, Group Executive Director ("BGJ"): "RF mimics one student…". There is no complaint from the claimant within the bundle to which we have been pointed that records the claimant complaining that RF mimicked or mocked her accent;

189.2. [C/15] – 2 May 2018 DB to the claimant: "I also said about mimicking and this needs to stop". This email from DB does not state who was doing the mimicking, or about whom the mimicking was taking place;

189.3. [215] – from DB to Melanie Goddard ("MG") in HR: "I have asked her to be aware of mimicking of students, or indeed anyone". This suggests that DB had only ever heard a specific complaint about the mimicking of a student. We find that, had the claimant mentioned that RF mimicked her to DB, then this would have appeared in this communication as well.

190. This allegation is said to have occurred repeatedly over a three-year period. We find that we would have seen more complaints about this in the bundle, if it had happened consistently: instead we have one issue in 2018, and one in 2021 which appears a reference back to the incident in 2018. Further, given that the claimant was someone who records complaints in writing, we find that, if she had been mimicked as alleged, we would see complaints from her in the bundle about such direct mimicking.

191. On the evidence we have heard and seen, we are not satisfied that there was mimicking or mocking of the claimant's accent by RF.

192. No official complaint was made by the claimant regarding mimicking. The claimant said in her cross-examination that she had wanted to take it further but was never guided in how to do so. DB's evidence was that the claimant did not want to take it further.

193. We do not accept that the claimant was unaware of how to make a complaint. We make the following general observations:

193.1. In several emails, the claimant stated that she did not want to take matters further – for example, [74/75];

193.2. The claimant was offered the opportunity to progress matters on occasions – for example on 31 January 2018, DB emailed the claimant to say "I would like to investigate this for you...";

193.3. DB asked Chris and the claimant to write statements following the January 2018 incident and then emailed the claimant at [C/10] to say "I would like to meet up with you both to talk this out once I read both statements". This is a specific example of the process that DB explained to us he undertook when an issue was raised with him: he would speak to the alleged perpetrator and then report back to the claimant;

193.4. In HB's email of 13 January 2020 – [299] – "You were offered the opportunity to make a formal grievance by me and later by Kerry however you chose not to";

193.5. In HB's other email of 13 January 2020 – [297] – "We have policies and procedures at Activate Learning that are there to ensure that issues are dealt with both thoroughly and fairly";

193.6. In HB's email of 10 February 2020 – [300] – "Please be reminded that there is a grievance policy – should anything occur this year which you feel to be in breach of your dignity at work, I encourage you to use it or get in touch with me so that I can coach you in terms of using it";

193.7. We find that HB and the claimant had a good working relationship. If the claimant had any concerns she did want to escalate, we find she could and would have gone to HB;

193.8. When the claimant did indicate that she wanted to take matters further, this was done – for example, in 2018 when the claimant reported the issues with Chris, she said "I would like to speak to someone higher…" – [55]. Following this, HR followed up on this matter and attempted to hold a mediation.

193.9. The claimant's evidence is that she made requests verbally of DB to take matters this further. However, this does not tie in with what we have seen and heard from the claimant. If the claimant had asked verbally for matters to be escalated, we find that she would have also put requests in writing (like on [55]). Further, if her requests had not been acted on, we find that she would have put something in an email to DB saying "why aren't you doing anything?";

193.10. We note that, on several occasions, DB took it upon himself to act on complaints raised by the claimant: for example, his emails at

> [C/15] reporting that he had spoken to RF, and at [215], raising matters in confidence with SC to ensure that any issues are "nipped in the bud". We find that, had the claimant asked DB to escalate anything, he would have done so, or at least would have pointed her in the direction of HR;

194. We have heard little about the second part of this allegation that RF said to the claimant that "she came to the UK for a British passport". RF denies that this was ever said. In the claimant's cross-examination of RF, she agreed with [RF/WS/9], that he had never mentioned anything about her immigration status or made reference to the claimant's partner. We find that RF was simply not interested in these matters. Therefore, we consider it more likely than not that he did not make this comment.

Allegation 3.2.16 – between 2018 – 2021 RF stating that the claimant should find another job and that the claimant's sort are not wanted here

195. This allegation only appears in the 28 May 2021 email to BGJ – [167]. Throughout a three-year period, we have only seen that the claimant raised this as a concern once. Given the amount of emails she sent to DB during the course of her employment, raising issues about RF's (and other colleagues') behaviour, we find that, had this happened, the claimant would have reported it more frequently.

196. RF denies that this comment was made by him. No other witness states that they heard this phrase from RF.

197. We find, on balance, that RF did not make this statement.

Allegation 3.2.17 – between 2020 and 2021 – RF refusing to work with the claimant

198. In [C/WS/10], the claimant says that her hours were changed to be 0900 to 1400 because RF did not want to work with her. These new hours meant that there would be no need for the claimant and RF to work alone together (just the two of them), as had been the case when the claimant worked 0930 – 1430, when they would be alone together for 30 minutes.

199. The claimant's explanation of the reason for changing hours however altered during the course of the hearing. The claimant sent SC a text, submitted by the claimant during the course of the hearing, which in fact demonstrates that it was the claimant who wanted to change her hours: 9 September 2020 text:

> "Morning Sandie…I will come for 9.30am as usual. I been thinking about 9am start. If I'm going to finish after 2pm then no point starting early. Reason I was thinking of starting earlier was to push for early start and finish at [other employer] to (sic)."

200. On the basis of this contemporaneous evidence, we find that the claimant's hours altered at her instigation, and not because of RF's refusal to work with her.

201. In any event, we accept that RF, by 2020, did not engage with the claimant on a personal level. By this time, the allegations against RF were mounting up. Given our findings above and below, we accept that RF felt that the claimant wanted him to leave. We do not find that the claimant did in fact want him to leave. However, we accept that the state of their relationship was such that it was unhealthy for them to be working closely together.

202. Factually, we accept that RF limited his contact with the claimant where possible, but did not expressly refuse to work with her.

Allegation 3.2.18 – Between 2020 and 2021, the claimant was excluded by RF, AG and SC from discussions about new plans for food service

And

Allegation 4.1.2 – In 2020 to 2021, Chef Dave would only call the claimant's colleague Ann to come and see the menu but would exclude the claimant

203. As it transpired on the evidence, these allegations are one and the same.

204. The claimant's evidence on this allegation altered during the course of her evidence. She in fact said that she did attend discussions, other than one about the appropriate box in which to pack nachos. The claimant sent an email about nachos on [119] on 15 May 2021; however she did not complain in that email about being left out of any discussion.

205. The Tribunal checked with her what precisely she alleged that she was excluded from. The claimant's answer was that "sometimes I wasn't invited to [team discussions]". This again is a question of the claimant thinking she needed to be invited, whereas we find that there was just a general rounding up of people in an informal manner. We heard from the the claimant and respondent witnesses that Chef Dave would just call people over for a chat around the work station; he may not always call each and every name, but the whole team present would make their way to him for these discussions.

206. We find that, from the respondent's perspective, it was important from a health and safety point of view that all members of staff were involved in these meetings, as the risk of non-compliance or lack of information would be too high. DB told us that "we needed to have everyone there". It would therefore not have been in the respondent's interest to exclude any one of their employees from these discussions.

207. We find that the claimant was not excluded by Chef Dave, or by RF, AG and SC, from discussions about the food service.

Allegation 4.1.1 – in 2021, the claimant heard RF and SC talk about the claimant being 3 minutes late

208. We have not been taken to any document in the bundle in which the claimant reports this incident. Further, this allegation was not put to SC by

the claimant; the Tribunal asked SC about this point.

209. SC's evidence was that, if the claimant was running late, she would text SC and SC would respond that that was fine.

210. RF's evidence in his cross-examination by the claimant was that "I don't recall it, it is not my responsibility…not my role, your time-keeping and your job responsibility was nothing to do with me, no reason for me to comment, not my responsibility".

211. We are not satisfied that this allegation occurred as pleaded. We have no contemporaneous evidence supporting the claimant's allegation. We also accept that RF was not concerned about matters that were not his responsibility. Finally, the work environment at the respondent appears to have been fairly flexible: letting the claimant take breaks to which the claimant was not legally entitled, for example (see Allegation 4.1.8 below). Therefore, it would seem at odds with this flexible approach for SC to be watching the clock in the way suggested.

Allegation 4.1.3 – in 2021, the claimant heard RF and SC talking about her and they stated she was "desperate for a fuck" as her partner is in India"

212. This allegation is said by the claimant to have arisen when RF and SC were observing a young couple on the grass outside, in the claimant's words "having a kiss and a cuddle".

213. If a phrase along the lines of "desperate for a fuck" was used, we are not satisfied that it was aimed at the claimant. We find that, if it was said, it was aimed at the students.

214. The claimant said that she thought the comment was about her because RF and SC knew that her spouse was living abroad. We find that she assumed that it was her that was being discussed because she knew they held this knowledge.

215. We also note an inconsistency in the claimant's evidence. During cross-examination, the claimant said that RF and SC turned to the claimant and then made the comment. However, in [C/WS] she did not say that RF and SC were looking at her when this comment was made.

216. It does not make sense for RF and SC to turn around, having seen what they have seen and then aim a comment at the claimant. This is particularly the case given that, by this time in the chronology, RF and SC were being careful in their approach to the claimant, as they felt like they were walking on egg shells. It would seem contradictory to then willingly provoke the claimant.

217. We therefore reject this allegation.

Allegation 4.1.8 – on 24 March 2021, the claimant was told she was not entitled to take a break due to only working a 5 hour shift, yet other colleagues who worked longer shifts were allowed to take extra breaks over and above their legal entitlements

218. We find that SC did say to the claimant that she was not entitled to take a break, however this is not the end of SC's statement on this. The claimant, in this allegation, has left out the (highly relevant) context.

219. This complaint came up on 22 March 2021, from the claimant to DB – [117]. The allegation was that, when the claimant asked how long her break was, and queried 20 minutes, SC said "no way, you shouldn't be getting a break at all and its only because DB said you go onto work at [other employer]".

220. The facts regarding the claimant's breaks are as follows:

    220.1. At interview the claimant was told she could have a break (that she would be paid for);

    220.2. The claimant was legally not entitled to a break;

    220.3. Everyone else on her team was entitled to a break, because they worked over 6 hours;

    220.4. The claimant was given a break to which she was not legally entitled, and others may on occasion have had breaks to which they were not legally entitled;

    220.5. The claimant asked SC about breaks and SC said "you are not entitled, but DB gives you them because of your second job, so I will too";

    220.6. At no stage was the claimant denied a break, albeit she was not legally entitled to one.

221. We therefore do not understand this allegation, and reject it. SC told the claimant that, although she was not entitled to a break (which is legally correct), SC would honour the arrangement DB had with the claimant.

222. The claimant told us during her cross-examination of SC that she did not take breaks after this point as she only wanted to take what she was legally entitled to. If she chose to deny herself breaks that she was permitted by SC, that is a matter for the claimant. We do however note at [120] on 24 March 2021, the claimant asked DB "let me know how many minutes break tomorrow". We are therefore not satisfied that the claimant did not take breaks from this point onwards, as the claimant suggested to us.

223. There are numerous emails between DB and the claimant on this point at [102-105]. They do not add anything to our findings on this allegation, other than we are satisfied that DB dealt fully with the claimant's enquiry, and did so in a professional and courteous manner.

Allegation 4.1.5 – in May 2021, Brandon not wanting her to serve him in the café

224. Looking at the emails around this allegation, the chronology was as follows:

224.1. 15 May 2021 – email from the claimant to DB at [120]. The claimant says "I am being ignored by BF. For what reason I don't know";

224.2. 18 May 2021 – there is an incident between C and BF in the cafeteria;

224.3. 19 May 2021 – SC sent an email to DB at [124] in which SC reports that BF complained that the claimant had refused to serve him. SC reports BF's complaint that the claimant asked why he was ignoring her: BF then said he was not, to which the claimant responded that "it seems that you never want me to serve you why is that?". Words were exchanged and BF left the café without purchasing any food.

224.4. 19 May 2021 – the claimant's email to DB at [128] reporting that SC had raised with her that BF has "letters not letter for HR". The claimant reported that BF approached her on 18 May 2021 asking why she had reported him to DB;

224.5. 19 May 2021 – DB replied, wanting to talk tomorrow. He wrote "I can confirm I personally asked Brandon if he had any issues with being served by yourself and this was said in a friendly manner to see if he had any reasons towards what you had felt? Although no details shared?". DB explained that "he couldn't let this behaviour develop…" and that BF "genuinely looked confused and stated no and was happy to be served by you or anyone, he just wants his food";

224.6. 20 May 2021 at 02.22hrs – [131] the claimant explained to DB that she could not come to work as she was too upset and ill. The claimant stated that she did not refuse to serve BF. We note that, during the course of the chronology, this is the first time that anyone made an allegation that the claimant had done something improper, or unprofessional. We find that this allegation, of unprofessionalism, was particularly upsetting for the claimant, and left her very distressed.

224.7. 20 May 2021 – [126] – DB emailed the claimant, stating he would like to meet.

225. In terms of the incident on 18 May 2021, there is a conflict in evidence as to what started the discord between the claimant and BF on this day. The claimant says at [128] that it was BF who started the discussion by stating "why have you reported me?". Whereas it was BF's position that the claimant asked first why BF had been ignoring her.

226. We find that both comments were likely to have been made, although we make no finding about what started the conversation. We also find that BF left on 18 May 2021 without purchasing anything from the cafeteria.

227. We are not satisfied that, at any time prior to 18 May 2021, there was an issue between BF and the claimant. There is no reason we have heard of why there would have been an issue between the two individuals on or before 18 May 2021. For some reason, the claimant had determined that there was a problem between them, and sought to raise this with DB. We find that DB then spoke to BF as he sets out in his email to the claimant. This then led BF to ask the claimant why she had complained about him: this is consistent with BF not understanding there to be an issue between the two individuals, and therefore being surprised that the claimant had raised an issue with DB.

228. We find that BF did not refuse to be served by the claimant, and so we reject this allegation.

Allegation 4.1.7 – in May 2021 DB breaching the claimant's confidentiality by telling Brandon Foster about her concerns when she had asked him (DB) not to do this

229. We note DB's contemporaneous email in which he sets out to the claimant what he said to BF: "I personally asked Brandon if he had any issues with being served by yourself?" – [128]. DB did not specifically say that the claimant had complained, although we accept it would be easy to infer this from DB's question.

230. We note the claimant's response on [132], "it's ok if you did ask him", although we accept that this was said after the event.

231. The question becomes whether DB's words to BF were a breach of the claimant's confidentiality.

232. Looking back on the claimant's initial email to DB about BF, on 15 May 2021, she states "I don't expect you to say anything, I just brought it to your attention". There is no express mention or request for DB to keep the claimant's email confidential, unlike in other emails the claimant had sent. We note however that the claimant's evidence at [C/WS/12] was that, as well as emailing DB, she spoke to him face to face about this matter, and asked him to keep it confidential.

233. DB felt that he had to follow this up, in his position as manager. DB did not expressly state to BF that the claimant had made a complaint. He neutrally raised an issue with BF that had been brought to his attention.

234. We do not find that DB breached the claimant's confidentiality in doing so, and therefore reject this allegation.

May 2021

235. On 21 May 2021 the claimant attended a meeting with Gaelle Distel ("GD") of HR – [155]. This arose following the claimant's email of 20 May 2021, in which she informed DB that she would be off work sick. DB sought to progress this complaint and the claimant's health issue by discussing it with GD, who then arranged a meeting with the claimant. In that meeting,

the claimant discussed several of her allegations, and GD reassured her that BF had not made a formal complaint about her.

236. In that meeting, GD suggested that the claimant may be referred to Occupational Health ("OH"). The claimant misinterpreted this, eventually stating that GD did not believe her. GD responded saying "please don't put words in my mouth".

237. On 28 May 2021 the claimant emailed several complaints to BGJ – [167]. In this email, the claimant records the following allegations:

237.1. You Asians don't have showers;

237.2. The panini comment;

237.3. The plastic knife incident;

237.4. BF ignoring the claimant;

237.5. DB breaching the claimant's confidence;

237.6. RF saying "find another job, we don't want you here";

237.7. RF mimicking a student;

237.8. Not being invited to breakfast on Fridays;

237.9. RF asking the claimant if she wanted the leftovers.

238. In this email, the claimant sets out that she thinks RF's behaviour is racially motivated. It is not clear on reading this email that the claimant was accusing anyone else of race discrimination/harassment.

239. BGJ responded swiftly, stating that "we will act immediately" – [167].

240. On 1 June 2021, the respondent undertook an "employee suspension risk assessment" in relation to both RF and DB – [175-184]. No suspensions were in fact implemented at this time.

241. On 2 June 2021, a LADO referral was done regarding RF's alleged conduct – [94].

242. On 2 June 2021 also, the claimant started the ACAS early conciliation process.

243. The following day the respondent sent a letter to the claimant stating that it would treat her complaints to BGJ as a formal grievance – [204]. This letter states that the respondent understood that the claimant was not well enough to proceed with the grievance at that time. The letter states:

> "should this change prior to your return to work, please do not hesitate to contact me and I will arrange a suitable date for all parties".

244. The claimant responded to this letter on 7 June 2021; the claimant sent an

email to MG stating that she wished to be left alone for now, due to her being off work with work related stress.

Allegation 4.1.6 – on 20 June 2021, Brandon scaring her outside of work

245. BF is not here to give evidence as to what happened at this incident.

246. We note that the incident of which is complained is BF giving the claimant a "very bad stare…a very bad unkind stare" – [217].

247. In this email from the claimant on 25 June 2021, the claimant complains about two matters involving BF: one being the stare on 20 June, the other being a matter of which there are no details, and the claimant (unusually for her) did not record the date.

248. In [C/WS], the claimant records that there were three incidents in June, on 2, 11 and 20 June 2021. One of those incidents, on 11 June, is the allegation that BF called the claimant a "Paki". We find it bizarre that this is only said in [C/WS], nowhere else, and that neither party has picked up on this point during the hearing. We find that the Paki comment did not happen, for the following reasons:

248.1. The claimant's near contemporaneous email sent on 25 June 2021 does not record it;

248.2. Had this comment been made, we find that, given the claimant's tendency to report incidents, she would have reported this one. Given that the claimant reported a bad stare, we find that the Paki comment (which objectively at least is so much more severe) would also have been recorded;

248.3. We accept that the claimant was unwell at the time of the 25 June 2021 email being sent. However, if she was able to complain about a bad stare, we consider that she would have been able to complain about a "Paki" comment.

249. In terms of the bad stare on 20 June 2021, we find that BF may well have looked at the claimant in a way that the claimant considered to be a bad look. However, we are not satisfied that BF in fact gave her a bad look. We also note that the claimant's evidence on this point expanded during this case. In evidence, she said that BF cycled towards her, making her remove a foot to stop her bike: this does not appear in the email of 25 June 2021 or in [C/WS].

250. We are not satisfied that BF did give the claimant a bad stare on 20 June 2021. We therefore reject the allegation that BF scared the claimant outside of work.

2021

Lead up to resignation

251. The ACAS early conciliation period ended on 14 July 2021, and the

claimant presented her claim form to the Tribunal on 3 August 2021.

252. On 13 August 2021, HB emailed the claimant – [221]. In this email, he stated that he was getting in touch to see how the claimant was. He ended the email with:

> "I also wanted to let you know that as you have been too unwell to engage with the internal grievance that you have raised, we have not moved forward with it, so when you are well enough to discuss this, please let me know and we will proceed".

253. The claimant responded stating that she chose not to progress the grievance, as the case was progressing to the Tribunal – [221]. She followed this up with a second email reiterating her point and wishing to make it crystal clear that she did not seek for BGJ to raise a grievance for her – [223].

254. On 27 August 2021 at 0044hrs, the claimant resigned with immediate effect, stating at [226]:

> "I feel I can no longer work in this job as the long series of events mentioned in my doctor [sic] letter attached have caused me suffering with bad health".

255. She states that her resignation took effect from 26 August 2021.

256. The GP letter mentioned by the claimant is at [227], and reads:

> "This is to confirm that the bullying, harassment and racial abuse that Ms Bikar has suffered at the City of Oxford College has had a serious adverse effect on her mental health. As a consequence of this, she has had to resign from her job there on medical grounds".

257. The claimant told us that she wanted to stay on with the respondent, in order to be able to obtain the paperwork she needed to complete the visa application for her spouse. However, she said she was unable to do this due to her health. This is corroborated by the GP's letter cited above.

258. When the claimant's evidence on the reason behind her resignation is examined closely, her evidence was in fact that she did not wish to resign, but did so on the advice of her GP, due to her ill health. She resigned from her second job at the same time.

259. The claimant made the point that she wanted to remain in the respondent's employment (despite the alleged fundamental breaches) but could not do so due to her health.

Conclusions

Direct race discrimination – s13 EqA

Allegation 3.2.1 – on 31 January 2018, Chris called the claimant two-faced after she complained

260. We have accepted that, factually, this incident occurred, and Chris called the claimant "two-faced".

261. None of the emails sent from the claimant at the time (Jan/Feb 2018) complain that Chris' behaviour is due to race. In fact, the sentence in the email at [55], "I have heard Chris behaved like this with the girl who worked before me and she left", suggests that Chris treated others in the same way. We have no evidence to suggest that the girl referenced was of the same race as the claimant: we find it more likely than not that, if the girl had been British Indian, the claimant would have raised it with us.

262. We note that there are three emails in the documents to which we have been taken that reference race discrimination:

    262.1. 24 June 2019 [72/73] – to DB
    262.2. 10 January 2020 [C/17-18] – to DB
    262.3. 28 May 2021 [167] – to BGJ

263. Therefore, the earliest allegation of race discrimination we have seen is 18 months after Chris shouted at the claimant. That email does not make the specific allegation that Chris shouted because of the claimant's race.

264. We find that there is no good evidence from which we could find that Chris' treatment of the claimant in calling her two-faced was because of the claimant's race. We accept that the reason for him calling her this was frustration or anger at the claimant mentioning that she would (in his eyes) go over his head to DB.

265. This allegation of race discrimination is not upheld.

Allegation 3.2.2 - on 2 February 2018, Chris and RF shouted at the claimant causing her to leave work in tears

266. As above, there is no good evidence from which we could find that Chris shouted at the claimant because of her race.

267. Furthermore, the claimant does not make that causal connection anywhere, other than in the generalised statements to which we have already referred.

268. This allegation of race discrimination is not upheld.

Allegation 3.2.3 – on 2 May 2018, RF and Chris shouted at the claimant and stated "yeh fuck off we don't want you here"

269. We have not upheld this allegation on the facts.

270. This allegation of race discrimination is therefore not upheld.

Allegation 3.2.4 – in October 2018, RF stating continuously that "Asians don't take showers"

271. We have accepted RF's evidence that he "mentioned to another member of staff that my Asian group of friends at school used to use lots of aftershave to [cover up] when they hadn't showered" – [RF/WS/4].

272. We remind ourselves that this is a direct discrimination claim, not a harassment claim (for which, as explained above, the causative link is much broader).

273. We are not satisfied that there is any less favourable treatment of the claimant in RF making this comment.

274. In any event, on the words RF spoke as we have found them to have been, we conclude that RF was not significantly influenced by the claimant's race when making this comment. He was referencing his own experience of a group of friends he had at school.

275. This allegation of race discrimination is therefore dismissed.

Allegation 3.2.5(a) – in October 2018, the claimant was not asked to join the team breakfast whereas all the other staff were.

Allegation 3.2.5(b) – in October 2018, RF stating to the claimant that his leftover toast was "all the claimant deserved"

276. We have not upheld these allegations on the facts.

277. These allegations of race discrimination is therefore not upheld.

Allegation 3.2.6 – in May 2019, AG shouting at the claimant in front of customers and calling her a "bitch"

278. We have found that AG did call the claimant a "bitch". However, in terms of her reason for doing so, there is no evidence from which we could infer that AG's behaviour was significantly influenced by the claimant's race. There was no complaint that this was racially connected at the time of the claimant raising it with DB – [74].

279. In fact, in relation to AG, the claimant's case on this point is that AG knew that RF did not like the claimant, and so treated her detrimentally for this reason – [C/WS/6]. Therefore, even on the claimant's own case, the reason for AG's treatment was her understanding that RF disliked the claimant, rather than being because of the claimant's race.

280. This allegation of race discrimination is not upheld.

Allegation 3.2. 7 – on 13 May 2019, after a panini had burned, RF stating "oh look it looks like Suzanna"

281. We have not upheld this allegation on the facts.

282. This allegation of race discrimination is therefore not upheld.

Allegation 3.2.8 – From 2018 – 2021 – RF would mock the claimant's accent

and stating she came to the UK for a British passport

283. We have not upheld this allegation on the facts.

284. This allegation of race discrimination is therefore not upheld

Allegation 3.2.9 – on 3 December 2019, RF assaulted the claimant with a plastic knife causing injury to her face

285. We have found that this incident did not occur as the claimant alleged. However, we have found that a plastic knife made contact with the claimant's face, and it was RF who had been messing about foolishly with it prior to the claimant's injury.

286. In any event, we find that there are no facts from which we could infer that this behaviour by RF was significantly influenced by the claimant's race.

287. We recognise that we have found RF made a comment about Asian friends and aftershave (above). However, given our findings on that allegation, we are not satisfied that the aftershave comment is sufficient for us to draw an inference that the claimant's race was the effective cause of RF's actions on 3 December 2019.

288. We therefore do not uphold this allegation of race discrimination.

Allegation 3.2.10 – in December 2019, Julie (HR) asking the claimant whether everyone was nice to her at her other part-time job

289. Factually, we find that this incident did occur. However, the asking of these questions from Julie, although deemed to be irrelevant questions by the claimant, does not constitute less favourable treatment. The treatment in asking those questions was entirely innocuous.

290. In any event, there is no suggestion anywhere in the bundle that this specific act was motivated (whether consciously or unconsciously) by the claimant's race. The claimant's witness statement does not link Julie's questions to race in any way. [C/17] is the contemporaneous email about this incident, which, again, does not link this to race.

291. Therefore, we do not uphold this allegation of race discrimination.

Allegation 3.2.11 – in December 2019, Kerry stating that being around the claimant was like being in a playground

292. We have not upheld the specific allegation on the facts. We have found that Kerry stated that "it was like a playground" in the refectory.

293. As we have said above, we find that this comment was not made specifically about the claimant.

294. In any event, nowhere in the claimant's witness statement, or in [C/17] does the claimant suggest that this incident was because of her race. There is no evidence from which we could conclude that Kerry, in her

comment, was significantly influenced, whether consciously or not, by the claimant's race.

295. This allegation of race discrimination is therefore not upheld.

Allegation 3.2.12 – in December 2019 , HB stating that if the claimant went to the police to report the knife incident, the college would not help her and that it may affect her job

296. We have not upheld the specific facts as alleged by the claimant in relation to this allegation.

297. In any event, the claimant made it clear, following HB's evidence, that she no longer seeks to pursue this as an allegation of race discrimination.

298. For completeness, we find that HB's conversation with the claimant about the college needing to halt proceedings whilst a police investigation took place was not in any way influenced by the claimant's race. He was simply setting out what would be an appropriate course of action, so that the claimant was fully apprised of the effect of following a police investigation in relation to the college investigation process.

299. Furthermore, nowhere in the claimant's witness statement does the claimant suggest that HB's comments were because of her race.

300. We dismiss this allegation of race discrimination.

Allegation 3.2.13 – on 19 December 2019, Ann and Sandie stood in the kitchen door and would not let the claimant pass

301. We have not upheld this allegation on the facts.

302. In any event, the claimant accuses neither woman in her email of 10 January of acting because of the claimant's race. There is no good evidence before us from which we could infer that AG and SC's conduct was significantly influenced by the claimant's race. In fact, we have found that any blocking of the claimant's path was not deliberate.

303. This allegation of race discrimination is not upheld.

Allegation 3.2.14 – in 2020 RF stating to DB that "he doesn't want a meeting with the fucking bitch"

304. We have not upheld this allegation on the facts.

305. This allegation of race discrimination is therefore not upheld

Allegation 3.2.15 – on 18 September 2020 – SC asked the claimant if she had female genital mutilation (FGM)"

306. We have not upheld this allegation on the facts.

307. This allegation of race discrimination is therefore not upheld

Allegation 3.2.16 – between 2018 – 2021 RF stating that the claimant should find another job and that the claimant's sort are not wanted here

308. We have not upheld this allegation on the facts.

309. This allegation of race discrimination is therefore not upheld.

Allegation 3.2.17 – between 2020 and 2021 – RF refusing to work with the claimant

310. We have found that RF did orchestrate it so that he did not have to work with the claimant where possible, and chose to keep matters limited to purely work issues. However, the wording of the allegation is that RF refused to work with the claimant; we reject that allegation.

311. To the extent we need to consider whether RF, in limiting his contact with the claimant, committed an act of race discrimination, we conclude as follows.

312. As we have already set out above, we accept that RF kept his distance as he was concerned about what other allegations may be made against him by the claimant. Given our findings in relation to other allegations made against RF, we accept that RF's motivation was to keep himself safe from further allegations.

313. This was the reason for RF's lack of engagement with the claimant. We find there is no good evidence from which we could infer that this treatment was because of the claimant's race. In any event, we are satisfied that RF acted for non-discriminatory reasons.

314. This allegation of race discrimination is therefore rejected.

Allegation 3.2.18 – Between 2020 and 2021, the claimant was excluded by RF, AG and SC from discussions about new plans for food service

315. We have not upheld this allegation on the facts.

316. This allegation of race discrimination is therefore not upheld.

317. Therefore, none of the direct race discrimination claims are upheld.

Harassment – s26 EqA

318. None of the 8 factual allegations of harassment were upheld, and therefore the harassment claim fails.

Time limits – s123 EqA

319. We note that there was an issue as to whether the discrimination and harassment claims were brought within the correct time frame. Given that we have dismissed these claims on the merits, we have not needed to

consider time limits and therefore we do not make any findings on this issue.

320. We still need to consider the constructive unfair dismissal claim. This is not just a discriminatory constructive unfair dismissal claim. In other words, the dismissal claim does not automatically fail because the discrimination and harassment claims have failed. We are required to consider whether, on the facts as we have found them to be, there was a fundamental breach of the implied term of trust and confidence.

Constructive unfair dismissal

321. The allegations that we found factually occurred are as follows:

321.1. Allegation 3.2.1 (Chris shouting);
321.2. Allegation 3.2.2 (Chris shouting);
321.3. Allegation 3.2.4 (to an extent) (shower/aftershave comment);
321.4. Allegation 3.2.6 (bitch comment);
321.5. Allegation 3.2.9 (to an extent) (plastic knife incident);
321.6. Allegation 3.2.10 (question regarding other employment).

322. Given that we have rejected the other complaints made by the claimant, we must now consider whether these 6 allegations above constituted a fundamental breach of contract.

323. We remind ourselves of the **Malik** definition of the implied term of trust and confidence:

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

324. Furthermore, the conduct in question must equate to a breach of contract based on the objective contractual test – **Sharp.**

325. We are satisfied that none of these six allegations as we have found they occurred are sufficient to amount to a fundamental breach of contract, whether considered independently or together. Some of the six incidents are unreasonable and unprofessional (3.2.1, 3.2.2, 3.2.6, 3.2.9), however that is not sufficient to amount to a fundamental breach of contract.

326. There was therefore no fundamental breach of contract, and so the claimant's constructive unfair dismissal claim fails at this first hurdle.

Reason for resignation

327. In any event, in terms of the reason for resignation; we are not satisfied that the claimant left in response to the alleged breaches (whether allegations 3.2.1, 3.2.2, 3.2.4, 3.2.6, 3.2.9 and/or 3.2.10 specifically, or all of the allegations of discrimination and harassment).

328. We have found that the claimant did not want to leave her employment, but needed to due to her health.

329. The claimant says that the cause of her ill health was the alleged discrimination/harassment. However, to say that her resignation was then due to the allegations would be to apply the "but for" test: but for the allegations, the claimant would not have become ill and so would not have resigned. This does not satisfy the causal test required for constructive unfair dismissal, which requires that the claimant must resign (at least in part) in response to the fundamental breach(es).

330. We therefore conclude that the claimant did not resign in response to any of the allegations (3.2.1-3.2.18 and 4.1.1-4.1.8). Therefore, her constructive unfair dismissal claim would have failed at this stage in any event.

Affirmation

331. In relation to Allegations 3.2.1, 3.2.2, 3.2.4, 3.2.6 3.2.9 and 3.2.10, the last of these happened in December 2019. Even if these constituted a fundamental breach of contract (individually or combined), this run of events concluded in December 2019.

332. The claimant went off work sick in May 2021, 17 months after the last of the factual allegations we have upheld (3.2.10). She resigned in August 2021: this was 20 months after allegation 3.2.10.

333. The claimant was not made sick by the things that happened in 2018 and 2019, but continued working. We find that these matters happened so far in advance of the claimant's resignation that she affirmed her contract, and in fact positively asserted her contract in March 2021 by raising a query as to the correct legal position in regards to her breaks.

334. The claimant therefore affirmed her contract so as to mean that, even if allegations 3.2.1, 3.2.2, 3.2.4, 3.2.6, 3.2.9 and 3.2.10 amounted to a fundamental breach, she waived her right to accept that breach.

335. Therefore, her constructive dismissal claim must fail at this point too.

Notice pay

336. The respondent was not in breach of the claimant's contract, as we have concluded within our reasons for dismissing the constructive unfair dismissal claim.

337. Therefore, the claimant was not entitled to treat herself as released from her obligation to provide her contractual notice. The claimant was therefore in breach of her contract by not giving notice, and so is not entitled to her notice pay.

Post-script

338. The Tribunal understands that lengthy waiting times are not helpful to the parties, and recognises that it is regrettable that it has taken so long for this judgment to be produced.

Employment Judge Shastri-Hurst

Date 8 March 2024

REASONS SENT TO THE PARTIES ON
12 March 2024

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FOR THE TRIBUNAL OFFICE