# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms A Chindipha**

**Respondent:** **Under the Hammer Auctions Limited**

**Heard at:** **Birmingham by CVP**

**On:** **19, 20, 21 and 22 February (& in chambers on 22 March) 2024**

**Before:** **Employment Judge Flood**
**Mrs Hill**
**Ms Malatesta**

**Representation**

Claimant: In person
Respondent: Ms Thomas (Counsel)

# RESERVED JUDGMENT

1. The claimant's complaint of unauthorised deductions from wages contrary to Part II Employment Rights Act 1996 is well-founded. The respondent made an unauthorised deduction from the claimant's pay in respect of the period 1 December – 21 December 2022. The respondent is ordered to pay to the claimant the gross sum of £1,894.63 deducted from pay.

2. The claimant's complaints of breach of contract; direct race discrimination and race related harassment (contrary to ss 13 and 26 of the Equality Act 2010 ("EQA")) do not succeed and are dismissed.

3. The respondent's complaint of breach of contract in respect of an alleged failure to work between 6 October 2022 and 21 December 2022 is not well founded and is dismissed.

# REASONS

## The Complaints and preliminary matters

1. By a claim form presented on 24 April 2023, following a period of early conciliation between 12 March and 23 April 2023, the claimant brought complaints of race discrimination, breach of contract (notice pay) and unpaid wages against the respondent. The respondent defended the claim and also presented an employer's contract claim alleging that the claimant had breach the terms of her contract of employment by failing to work between 6 October and 21 December 2022.

2. There was a preliminary hearing for case management before Regional Employment Judge Findlay on 30 August 2023 where particulars of the complaints the claimant wished to bring were discussed. It was clarified that the claimant was bringing complaints of direct race discrimination and race related harassment as well as a complaint of wrongful dismissal in respect of 1 week's notice pay and unauthorised deduction of wages in respect of pay for December 2022. The claimant provided particulars of the acts she wished to rely upon in respect of the various complaints and these were recorded in a draft list of issues. The claimant's amendment application to add a disability discrimination complaint was refused.

3. The final list of issues agreed between the parties, based on that draft list of issues ("List of Issues") is set out below and referred to throughout the hearing.

Documents before the Tribunal

4. An agreed bundle of documents ('bundle') was produced for the hearing and where page numbers are referred to below, these are references to page numbers in the bundle. The respondent had also submitted two video clips relating to remote access and merchandising sizing which were not objected to. These videos were not referred to by either party in evidence so the Tribunal had no need to view them.

5. On the morning of the hearing, the claimant submitted a document consisting of a chain of e mail correspondence between herself and the respondent's solicitors in December 2023 relating to the disclosure process. In this correspondence, the claimant had stated that she believed that various documents had not been disclosed by the respondent including e mails sent to employees of the respondent. There was then an e mail from the respondent's solicitors stating that the respondent had disclosed all documents in its possession relevant to the issues in the claim. When raised at the outset of the hearing, the claimant stated that she felt that the content of the bundle of documents had not been agreed and that the respondent had been deliberately delaying the

process and had not included e mails that should have been included. Ms Thomas restated the respondent's position that it was in compliance with the disclosure process and that the respondent had conducted a search of its systems for all e mails sent by the claimant and all that were found had been included in the bundle. Reference was made to purported missing documents during the hearing but the claimant was unable to point to any specific document identifying it accurately by date or description that could have enabled a further search and on that basis we were satisfied with the explanation of Ms Thomas on behalf of the respondent.

6. At the start of the third day of the hearing (after her evidence was complete and the respondent's evidence was almost completed), the claimant made an application to add a number of additional documents. She explained that following questions from the Tribunal the previous day, she had been prompted to look at some photographs taken on her phone in particular relating to a trip to London on 19 October 2022 and she had discovered a number of photographs which she said supported her contention that she had been working. She also stated that she had contacted her mobile phone provider overnight who had confirmed to her verbally that no calls had been received on the morning of 21 December 2022, which she said contradicted the respondent's position. She stated that this was something they could confirm in writing within a day or so. The hearing was briefly adjourned to allow the claimant time to prepare a formal application in writing which she did by an e mail submitted at 11:15 that morning. This application sought to admit 22 numbered documents largely identifying photographs of what the claimant said showed her working on her company laptop on various dates between October and December 2022. The claimant asked all such documents to be admitted in the interests of fairness stating that it was only when asked a question by the Tribunal during the hearing that she thought to check her own phone for photographs about that issue and then noticed she had a number of photographs from different dates.

7. The respondent objected to this application. It stated that firstly having seen the documents, a number were not relevant (documents numbered 11, 13 and 21) and do not demonstrate what the claimant says or go to the issues in dispute. Ms Thomas submitted that it was not in the interests of justice to admit such documents which could be highly prejudicial at this very late stage of the hearing. She submitted that some of the documents were alleged to go to a key issue in the case namely whether the claimant working at the time, and that this has always been a key issue in the claim. It was submitted that the claimant has provided no good reason why such documents were submitted so late. She also made the point that if admitted the respondent would be seeking an adjournment to the hearing to properly consider the documents and call further evidence to rebut what it is said such documents show. It acknowledged that the claimant was a litigant in person, but that this was

not a fair way for her to conduct proceedings given that the bundle had been agreed since December and the claimant had been asked on many occasions whether she had any other documents she wished to add to the bundle.

8. The Tribunal adjourned to consider this application and then restarted the hearing to give its oral decision refusing this application. The Tribunal considered rules 29 (its general case management power) and rule 2 (the overriding objective to deal with cases fairly and justly) of the Employment Tribunal Rules of Procedure 2013. We noted that rule 2 included ensuring that the parties were on an equal footing, dealing with cases in ways that are proportionate to the complexity and importance of the issues, avoiding formality and being flexible, avoiding delay and saving expenses. The Tribunal also considered the principles relating to the disclosure and production of documents and evidence in rules 31 and 32 and the general principles and powers around disclosure the tribunal has which are coterminous with those of the county court in part 31 of the Civil Procedure Rules.

9. The key issue we had to determine was whether the documents in question were necessary to the fair disposal of the proceedings. That involved consideration firstly of the relevance of the documents and whether it is fair to both parties for the documents to be admitted. In relation to relevance, the documents the claimant wished to rely on related to the question as to what device she was working on during the disputed period between 6 October and 21 December 2022; the amount of work being carried out and in relation to the purported phone log, the timing of any phone call on 21 December 2022.

10. We considered the list of issues (page 38-40) set out below and determined that the documents in question only had limited reference to the claimant's claims of breach of contract, unlawful deduction of wages possibly the counterclaim. In relation to the claims for unpaid wages and indeed the counterclaim, the documents only have very limited relevance, as there was already evidence suggesting that the claimant carried out some tasks during this period. The main issue this goes to is whether the respondent had grounds to summarily dismiss her on 21 December 2022 and if not whether she was entitled to one week's notice pay. There was nothing in the list which was suggested to shed any light on the direct discrimination claim the complaints around events and clothing but even in relation to what took place on 21 December. The Tribunal did not, as the claimant suggests have to decide whether the respondent acted fairly, but whether what was done on this day was because of race. We had to consider what was in the mind of the alleged discriminator at the time of the events in question and the documents produced by her did not appear to have any relevance to that whatsoever. In relation to the harassment complaint, the acts themselves are not disputed, what we must consider is whether the acts were related

to race and whether they had the required purpose or effect, as set out in section 26 EQA, so again the documents are not relevant to this issue. The issue of what the claimant was doing in London is only very peripherally of relevance. The phone list the claimant says she will be able to produce shortly is a document that as yet does not exist and given that the method of calling her on that day was still in dispute (with the respondent's witnesses stating that they were unsure whether it was by mobile phone or other method) this is only of limited relevance and not determinative of this matter in any event.

11. We went on to consider the issue of fairness and whether it was in the interest of justice and carefully considered what the claimant said about why the documents were produced so late in the proceedings. Whilst she is a litigant in person, the explanation as to why the documents have been produced so late is not satisfactory as the question of what device she was working on has been central to this claim from very early on. The claimant had ample time to consider what documents she held that supported or otherwise were relevant to her case. We referred the parties to the Order of Regional Employment Judge Findlay paragraph 15 at page 35 of the bundle. This clearly highlighted what documents must be produced as part of the duty of disclosure.

12. We accepted that the respondent was very significantly prejudiced at this very late stage by the admission of new evidence and if it were admitted, the tribunal would have been like to have to adjourn the hearing to allow new evidence to be called by the respondent in response. This would have meant the hearing going off for very many months. Given what we say above about the relevance to the issues in dispute, it would not be proportionate, in the interests of justice or the interests of either party for this to take place. For these reasons we refused the application to admit these documents.

13. Evidence and submissions were completed by lunchtime on the final day of the hearing and as there was insufficient time for the Tribunal to complete its deliberations that day, the hearing was adjourned for a reserved decision to be made.

14. Unfortunately it has not been possible for the Tribunal to complete its deliberations and prepare its written judgment and reasons until now. The Tribunal sends its apologies to the parties for the delay in providing them with its decision.

## The Issues

15. The issues to be determined by the Tribunal were as follows:

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 13 December 2023 may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

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

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

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

1 .2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

The Tribunal will decide:

1.2.4.1Why were the complaints not made to the Tribunal in time?

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

2. Wrongful dismissal/Notice pay

2.1 What was the claimant's notice period? The parties say it was 1 week if the respondent terminated the contract.

2.2 Was the claimant paid for that notice period?

2.3 If not, was the claimant guilty of gross misconduct? / did the claimant do something so serious that the respondent was entitled to dismiss without notice? The respondent says that the claimant did not carry out her work after 6 October 2022 , and that from that date the claimant had not logged on to its system as required. It also says that on 21 December 2022 the claimant logged onto its system and sent customer files to her own account, deleting them from its system.

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

The claimant describes her protected characteristic as her colour and describes herself as black.

3.1 Did the respondent do the following things:

3.1.1 Fail to invite the claimant to launches and other events between November and December 2022;

3.1.2 Fail to provide the claimant with company clothing (T shirts and fleeces) from about October 2022;

3.1.3 Constructively dismiss the claimant on or about 21 December 2022

3.2 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 she Was treated worse than someone else would have been treated.

The claimant says she was treated worse than Tom Gilday and William Fisher. who are white employees of the respondent. She will provide any other names as above and/or she will rely upon a hypothetical comparator.

3.3 If so, was it because of race?

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

4.1 Did the respondent do the following things:

4.1.1 Did Inderjit Dubb send the claimant electronic messages saying she "took him for a mug" and say "You can go where you want, I am not fucking paying you";

4.1.2 Refuse to pay the claimant

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. Unauthorised deductions**

5.1 Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?

5.2 Were the wages paid to the claimant relating to December 2022 less than the wages she should have been paid?

5.3 Was any deduction required or authorised by statute?

5.4 Was any deduction required or authorised by a written term of the contract? '

5.5 Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?

5.6 Did the claimant agree in writing to the deduction before it was made?

5.7 How much is the claimant owed?

## Findings of Fact

16. In the judgment, the Tribunal has used initials to identify the people listed below rather than their full names in the interests of brevity. Other terms used may also be defined in a similar manner through the judgment.

Witnesses and other individuals

17. The following people attended to give evidence on behalf of the claimant:

    17.1.1 The claimant ('C')

18. The following people attended to give evidence on behalf of the respondent:

    18.1.1 Mr T Gilday ('TG'), Head of Operations at the respondent ('R');

    18.1.2 Mr W Fisher ('WF'), Head of Digital at R; and

    18.1.3 Mr I Dubb ('ID'), Director of R.

Credibility

19. We found that at times C's evidence was confused and contradictory. She gave different accounts of what was said to have taken place in her witness statement and in response to questions in particular as to the events of 21 December 2022. Her responses to questions were evasive at times and we did not find her suggestion that she was "*not IT savvy*" either a sufficient explanation as to why she would have been unable to access R's systems via a web browser on another device or at all convincing. We did not find her evidence on these key issues particularly reliable and where there was a dispute of fact tended to prefer the evidence of R's witnesses, in particular WF and TG who gave straightforward and clear accounts of the limited interactions they had with C, which were consistent with the limited documentary evidence we had before us.

20. To determine the issues, it was not necessary to make findings on all the matters heard in evidence. We have made findings though not only on allegations made as specific discrimination complaints but on other relevant matters raised as background. These findings may have been

relevant to drawing inferences and conclusions. We made the following findings of fact on the balance of probability:

20.1 C describes her protected characteristic as her colour and describes herself as black.

20.2 R is an organisation that facilitates online auctions for UK estate agents, processing and handling auction sales for properties marketed by its partner estate agents. R is owned jointly by ID and other members of his family, including his brother, Mr J Dubb. ID is also a shareholder and director of another company, an estate agency, known as Royal Estates. It was acknowledged that from time to time, C as well as other employees of R would be asked to carry out tasks for Royal Estates which included in C's case, checking a compliance policy (see page 101-2 ). We accepted the evidence of ID that there was no inherent conflict of interest here as the companies were separate legal entities and operated independently of each other, despite the shared ownership. This was not a matter of direct relevance to the claims before us in any event.

20.3 C was employed by R as Compliance Manager between 26 September and 21 December 2023. Part of her role was to manage complaints received by R. There was no job description issued to C at the start of her role and it appears that there was some difference of views as to what her role would entail. ID was clear that C was essentially employed to manage and respond to complaints that had been received. C was of the view that this was only a part of her role and she had a task to develop a compliance function within R and that she would ultimately be responsible for a team of people responding to complaints. We find that C was employed as Compliance Manager initially to manage and respond to complaints but it may well be that her role would have developed to the wider scoped role she had anticipated had it continued.

<u>Contracts and relevant policies</u>

20.4 C's contract of employment was shown at pages 53-56. This provided that she was required to work from 9:00 a.m. to 5:30 p.m., Monday to Friday. It provided for a probationary period of 3 months. It provided that C would be required to work remotely from home with 1 day a week if required from R's head office. It also provided that in the event of lateness/absenteeism that "*disciplinary action and/or loss of appropriate payment*" could follow. It also provided that the contract together with the attached Policies and Procedures set out the terms and conditions of her employment.

20.5 We were referred various policies and procedures of relevance to the issues in dispute throughout the hearing. This included at page 64 a section on Use of Computer Equipment which provided:

*"N) USE OF COMPUTER EQUIPMENT*

*In order to control the use of the Company's computer equipment and reduce the risk of contamination the following will apply:*
*a) the introduction of new software must first of all be checked and authorised by your Line Manager before general use will be permitted;*
*b) only authorised staff should have access to the Company'5 computer equipment;*
*c) only authorised software may be used on any of the Company's computer equipment;*
*d) only software that is used for business applications may be used;*
*e) no software may be brought onto or taken from the Company's premises without prior authorisation;*
*t) unauthorised access to the computer facility will result in disciplinary action; and*
*g) unauthorised copying and/or removal of computer equipment/ software will result in disciplinary action; such actions could lead to dismissal.."*

C agreed during cross examination that downloading company software on to a personal computer would be a breach of contract if it was not authorised.

20.6 We were also referred to the E-Mail and Internet Policy starting at page 64 which provided at page 65:

*"5) Procedures - Authorised Use*

*a) unauthorised or inappropriate use of the e-mail system may result in disciplinary action which could include summary dismissal."*

We were further referred to a further provision of this policy at page 66 which provided:

*"Any work content or material, or contacts or connections list, created by the Employee during the course of their employment, on any of their authorised social networking sites (ownership of which vests in the Company) shall remain, at all times, the property of the Company. Accordingly, upon termination of your employment, you shall hand over to the Company, the access rights to your accounts, together with any work content or material, and any contacts or connections list."*

20.7 We were also referred to a Confidentiality Agreement signed by C on 16 September 2022 (page 81) which provided at paragraph 5

*"You are to exercise reasonable care to keep safe all documentary or other material containing confidential information, and shall at the time of termination of your employment with us, or at any other time upon demand, return to us any such material in your possession."*

It also provided at paragraph 6:

*"Any breach of confidentiality may be regarded as misconduct/ gross misconduct and be the subject of serious disciplinary action which may result in your dismissal."*

C agreed in cross examination that emailing confidential documents to a personal e mail address would also be a breach of her employment contract.

20.8 C was issued with a laptop on or around 26 September 2022 when she commenced employment. She told us she was unsure of what software was on the laptop but said she used the Microsoft outlook, teams and possibly OneDrive applications. She was provided with a very brief introduction to her laptop by WF at the time it was issued to her lasting approximately 20-30 minutes. This was not a detailed training session and no documentation or checklist was completed. WF explained that although he could not recall how this occurred with C in general during such sessions he would provide the new starter with their user name and password and show them the main applications in use. This included the Microsoft office application accessed via a cloud based online login accessed via a browser (including Outlook and Teams) and a system called Dashboard which was the main interactive case management system used by R's employees for its online auction process. Each employee of R had a log in to access Dashboard and could see each item of activity that took place in relation to an online auction for a property. R also used a system called monday.com which was an application used to record and log complaints and every action that had been taken on each complaint received and outstanding matters. C was given access to this and ID, TG and some internal sales staff also had access to this system.

Teramind

20.9 R's IT equipment including its laptops issued to employees had been installed with an application called Teramind (which is a productivity management application which monitored, controlled, and secured R's IT equipment). This essentially recorded all use of a laptop on a time and date basis and kept a log of every single interaction that a user of the laptop had with the web pages and applications on that equipment. This was a tool used by R only when other red flags were indicated in relation to an employee' use of its systems and although they did not generally conduct surveillance, if there was an issue around conduct or performance, R would then check the Teramind data to see what was happening. We accepted the evidence of WF that every new starter at R was informed of the presence of the Teramind tracker upon being issued with a laptop. At pages 154 to 208 we saw an extensive data printout which R contended showed the use by C of her laptop and the web pages and applications she accessed between 3 October 2022 and 21 December 2022. C accepted that on some occasions the Teramind data did provide a record of her use of the company laptop on that day but

seemed to suggest that the data provided by R was incomplete or that it had been tampered with. She was unable to provide any evidence to support this contention. WF told us that as far as he was concerned that the Teramind data was "*incredibly accurate*" covering 100% of the usage of each laptop and he was unaware of any glitches having taken place. We were satisfied that the Teramind data printouts shown at pages 154 to 208 were a complete and accurate record of C's use of R's company laptop between 3 October 2022 and 21 December 2022. We found WF to be a convincing and reliable witness on this point and C was unable to provide any evidence to support her contention that this data was somehow unreliable, indeed relying on it to support her own case on a number of occasions.

Issues with laptop early October 2022

20.10 C said she contacted ID and WF on or around 3 October 2022 to let both know that her laptop was not working efficiently (see record of teams chat with WF at page 207). She explained that the track pad was not working and it was agreed that she should purchase a mouse herself and claim the cost of this back. C purchased a mouse from Argos on 7 October 2022 (see receipt at page 96-99). C said that WF asked her if she had another laptop and she informed him she had a MacBook. WF could not recall this discussion but admitted it could have taken place. We find that there was a conversation with WF around this time about the laptop's track pad being faulty as supported by C's subsequent purchase of a mouse.

20.11 C also said that she informed ID that during this "*down time*" she would continue to do research as to the best regulator the company needed to apply to looking at the Financial Ombudsman website and looking into different schemes but that she did not input any of this work carried out onto the company laptop (see page 197 showing access to this website). ID does not recall that such a conversation took place and there was no record of this on the Teramind data for that date. He accepts that as part of C's role, he may have asked to carry out research tasks about different regulatory regimes but considered this a small part of her overall role. We find that C was tasked with doing some research on regulatory regimes but that this was not linked or connected to the laptop issues she was having which were in fact only reported to WF and not ID on 3 October 2022.

20.12 Despite having issues with using her laptop C was able to access the functions on her work laptop at this time and we saw a large number of entries indicating she was carrying out various tasks throughout the working day on 4, 5 and 6 October 2022 (see pages 166-207).C suggested that although she was able to use her laptop, the problems with the trackpad were slowing her down. She was unable to point to any significant gaps in the Teramind data for those dates suggesting this was

the case. We find that although C may have had a problem with her trackpad she was during these dates functioning as normal and carrying out her duties on her company laptop. On these dates, the Teramind entries showed that C accessed her outlook e mail account on a regular basis as well as accessing Monday.com.

C's work from 7 October 2022 onwards

20.13 There was no record of C using her company laptop at all on the Teramind data between 7 October and 21 December 2022. We were satisfied that the entries at page 166 which showed the last activity on the claimant's laptop as being at 15:48 on 6 October 2022 and the next entry being at 09:49 on 21 December 2022 were genuine and accurate. C alleges that she continued to use her company laptop after this date and simply cannot explain why there is no record on the Teramind data of this being the case. C did carry out work tasks after 6 October 2022. In her witness statement at paragraphs 10 to 48, C set out in detail a number of tasks that she says were carried out that could be evidenced but alleged that she carried out significantly more work during this period. We were not able to make findings about such matters but were able to make a number of findings about what work was carried out.

20.14 On 10 October 2022 C sent a text message to ID asking a question about a case she was handling in respect of 36 West Street (page 100). On 19 October 2022, ID e mailed C asking for her comments on a 'bribary policy' [sic] and she replied the same day to say, "*Looks great!*" (pages 101-2). She sent an e mail later that day to ID asking if they could discuss the complaint the following day as she was feeling unwell and ID agreed with this (pages 103-5). C informed ID she was working on a complaint re 1 Gough Avenue and was drafting a response and had "*asked Seana to check a few things with managing agents*". It transpired that on this date C travelled to London by train she said to visit the Financial Ombudsman. This was not a visit that ID had instructed C to carry out or was aware of at the time.

20.15 On 20 October 2022 C had a 1:1 meeting with ID when he informed her he was happy with her work (see handwritten note on page 109). Despite this it was clear to us that there was a lack of oversight of what C was doing on a day to day basis by anyone at R who perhaps just assumed that C was dealing with the complaints coming in and responding to them in a timely manner without necessarily having the day to day awareness of this. There were short text messages between C and ID on 21 and 24 October 2022 (page 110). On 28 October 2022 C sent an e mail to ID asking him to approve a draft e mail which was to be sent to a complainant Ms S Watson (page 114). ID responded with some comments on the same day (page 115) and there were further messages when ID sent C a copy of some ts and cs she had requested (pages 115-119). C sent a further e mail to ID with the response to Ms Watson on 28 October 2022 (page 120). There were further text messages between C

and ID about a response on a Minores complaint on 31 October 2022 with C chasing for ID to check a response to the Ombudsman and ID responding the same day to confirm it was fine and could go out (page 123). C then asked for further information about an issue arising in respect of Mr Linsey to which ID then responded (page 123-4). C also contacted the Property Ombudsman (presumably about the Minores complaint) on that same date (page 128).

20.16 On 2 November 2022 C emailed ID about making a payment to a complainant and he responded on that date asking for further information so that the payment could be processed (page 125-6). C sent an email to ID on 8 November updating him on the status of the Minores complaint (page 127). On 23 November 2022, C forwarded on to ID an e mail she had received from the Property Ombudsman confirming that no further action was required on a particular complaint and it was closed (pages 130-132). On 28 & 29 November 2022, there was an exchange of e mails between C and ID relating to a complaint by Mr Daly with ID asking C what the position was, C confirming that a payment needed to be made, ID then making payment and C e mailing Mr Daly to inform him this had been done (pages 133-136). On 7 December 2022, ID e mailed some work for C to action relating to a complaint by Mr Harris which she acknowledged stating that she would gather more information on it (pages 143-4).

20.17 We find that during the period from 7 October 2022 until 20 December 2022 C was carrying out those work tasks she concerned herself with on another device not controlled by R, either her personal laptop or some other device e.g. a smartphone. C's suggestion that did not have the capability to access R's systems via a web browser on her own device was not at all convincing, given the Teramind data we do have showed C accessing various web based systems. On 21 December 2022, C was able to access her own personal e mail account via the Company's laptop on very many occasions via a web browser. It is striking that C's use of her company laptop started to show up on Teramind again after she had been alerted to the lack of data by TG on 21 December 2022. C's bare denial that the Teramind data was accurate without any explanation as to how it could have showed what it did, coupled with our other findings of fact set out here, led us to believe that C was not being honest in her account of what device she was in fact using during this period.

<u>Allegation re failure to invite C to launches/events in November/December 2022</u>

20.18 C did not address this in detail in her witness statement simply stating that she was not invited to a "*few launching events in London*" between 30 November and 3 December 2022. She agreed in cross examination that this allegation related to the Negotiator event held in London (which R confirmed was on 24-25 November 2022) and it is not in dispute that C was not invited to this event. When asked whether she agreed the event

was a conference for estate agents, she said she did know and agreed that she did not work directly with estate agents (other than Royal Estates). She agreed she was not involved in organising the event. When asked if she agreed that 4 other employees of R were not invited to the event as well as her, she said she did not know what their roles were (but that she was the only manager not invited). C did not ask to be invited and did not complain to anyone at the time about this (stating that this was because she was on probation). When C was asked what it was about not being invited to the event which led her to believe it was because of race, C said she felt left out and that there was a WhatsApp chat which shared messages and photos. She said she saw photos of R's attendees (pages 82 to 84) and there was no black person there which she said indicated a lack of diversity and that she was the only black person working for R at the time.

20.19 ID told us that this event was a conference for estate agents, for which R was a sponsor and that this was the main networking event of the year for residential estate and letting agents. He told us that invitations were limited to management and those in the marketing and sales teams and related support staff. The members of R that attended were as follows: ID and 4 family members who were owners of the business; the Commercial Sales Director; the Business Development Director; TG (as Operations Director); WF (as head of brand and IT) and a marketing manager (both who had set up and organised the event and lastly 4 members of support staff who worked directly in their roles with R's clients (estate agents). We accepted ID's unchallenged evidence that someone in a Compliance Management role was not an appropriate person to attend this event as she had no dealings with lettings or estate agents (only dealing with complaints from end users). 4 other members of staff at R were not invited and did not attend the event (all of whom were not black) (2 Software Developers; an E Mail Manager and a Content Creator). ID also told us that at the same event in 2021 a black member of staff who was then employed as Head of Sales did attend as a main speaker.

<u>Allegation re failure to issue C with branded merchandise</u>

20.20 C makes an allegation of direct race discrimination that from October 2022 onwards, R failed to provide her with company clothing (T shirts and fleeces). The only evidence she gives about this allegation is that she was asked for her size at the start of her employment in order that a fleece and t shirt with the company logo could be provided and that she never then was supplied with any such items. When asked further in cross examination she said that having been asked for her size, she did not know whether the items were ordered as she was never told by anyone that the items were ready to be collected. She agreed that she was not informed the items would be delivered to her nor was she aware of this being done for any other employee. She also agreed that she never asked anyone anything further about these items, chased them up

or asked that they be sent to her home address. She agreed that after her first day of induction, she only attended the office once which was the day of the Christmas party. ID told us that branded clothing was something they offered to staff, but as merchandise rather than a uniform anyone was required to wear. He said that the clothing for C arrived it R's office at some point in November 2022 after she was asked for her size and that it then remained in the office as she never attended (other than for the Christmas party) and never asked for it. He told us that it remained in the office still. He also said that this was supplied to other staff but this was collected and it had not been sent to anyone else previously. He denied that any failure to send this to C or advise her it was ready to be collected was connected to her race. There was little dispute on the facts here, but we find that branded merchandise was ordered for C; it arrived and C was not informed; and it was not sent to her but was left ready for her to collect in the office. R did not routinely send merchandise to staff or even inform staff it was there (as others attended more frequently and could have been advised in person).

Contact between C and TG on 17 November 2022

20.21 On 17 November 2022, there was an exchange of messages between TG and C where he asked her to attend the office for a catch up the following week. TG had been asked by ID to contact C as they had not seen her for a while. C agreed to attend the following Wednesday (23 November) "*mid morning*" (page 137-8). C did not attend on 23 November and at 11:33 a.m. sent TG a message asking him to call her and apologised stating that she had the meeting down for 1pm (page 139). TG asked if the meeting could be rescheduled for the following week. There was an exchange of messages on 29 November 2022 with C apologising and stating that she "*had to take emergency time off yesterday*" and asking whether it was possible to have a teams call later that day (page 140). The fact that it was proving difficult to get C to attend a meeting "*raised concerns with the Management Team*".

20.22 C was notified on 1 December 2022 that TG would become her line manager (page 141). TG was also managing a team of 4/5 agents who worked directly with buyers and sellers so it made sense for him to also manage C as the complaints she was handling came from buyers and sellers. TG started to review C's work and performance from early December 2022 and on 12 December, he contacted C via MS teams to discuss a particular complaint, when C responded asking to confirm which it was, TG asked C whether she was "*still using Monday.com to. keep on top of the complaints*" or where could he see an updated list of them. C replied that she was using it but needed to update it and had not updated it in a few days. TG then asked her to update it before they started their discussion and they could then work on it together (page 145). C responded to TG that she had a spreadsheet she was working from which she would use to update Monday.com which would take her

an hour after which time they could meet by teams so that C could give TG a run down. TG then asked C to send him the spreadsheet that she used. C responded to say she had deleted it and when asked by TG why she did that, she responded "*I'd moved it onto Monday.com*" (pages 146-147). When asked about deleting this spreadsheet during cross examination, C said that she had in fact deleted it "*in error*" and when asked by the Tribunal if she had considered going to her deleted items files on her laptop to retrieve it, C told us that did not think of doing this as she was not IT savvy and had not been asked to do this. We found that C's account about what she did with this spreadsheet was not reliable and we conclude that there was either no spreadsheet in existence at all, or if there was it had not been deleted as suggested. We concluded that for whatever reason C did not want to send this to TG when he asked for it, and this is why she told him that it had been deleted.

20.23 TG then sent a message attaching a screenshot of Monday.com stating that there had been no updates since November 9th (page 147). C responded that she was just adding them. There was then the following exchange (page 148):

*"TG: OK. All this should be updated how can you update Monday.com when you've just deleted your spreadsheet?This is really disappointing*

*C: I have the notes and e mails. I know when I am. Spreadsheet was just a list of the cases. They're all on Monday.com.*

*TG: This is so confusing. Please just update Monday.com so its transparent for us all to see".*

20.24 C then sent an e mail to TG setting out a list of the complaints she was dealing with and their status (page149). It listed 4 cases as closed; 2 as pending with pushbacks; and 2 with views to go out (one of which included a complaint re a Mr Irons for 56 Beech Rise). There were also 4 matters listed as "*Urgent – court case*" and "*Need case file*" which again included the case of Mr Irons, for 56 Beech Rise. C then forwarded on two other e mails to TG. TG responded at 11:37 a.m. on 12 December 2022 stating:

*"56 Beech Rise we have now lost this case which has cost us £13,250!*

*Can you let me know the last correspondence we sent out for this one"*

TG gave evidence that this case was list and that "*this was due to the Claimant not meeting the deadline as required by the complaint*" which had cost the business £13,250. The Tribunal asked R's witnesses further questions about this particular property and what had occurred in relation to it but they were unable to explain what actions C took after this exchange of correspondence or indeed what had taken place to cause R

to be required to pay this amount of money and how it says that C was responsible for this.

Decision to extend C's probationary period

20.25 On 20 December 2022, C was informed by ID (page 153) that he had carried out a probation review and attached a letter (page 219) to C informing her that her probationary period would be extended. The letter set out the reasons for this extension as follows:

*"- We believe you have performed less than we initially expected.*

*- We believe your output and time worked does not match our expectations.*

*- There has been multiple tasks not actioned which have been set by your manager and with no follow up, communication or reporting given.*

*- There has been multiple meeting scheduled with you, which you have failed to show up for."*

20.26 C was also informed that she would be required to attend the office one day a week (either Tuesday or Wednesday). The covering e mail finished with the following comment:

*"I hope that we can work on the areas of concern, and I have no doubt that we can turn things around, however If you have any questions in the meantime do not hesitate to contact me."*

Events of 21 December 2022

20.27 C's account of 21 December 2022 was that she logged on to her laptop as normal and started to carry out her duties. We saw that she sent an e mail to TG and ID at 09:57 a.m. headed 'Outstanding Tasks' which addressed matters such as a firm wide risk assessment and asking for a copy of its indemnity insurance; she also asked about what money laundering training had been carried out and made reference to registrations for the NCA and Financial Ombudsman. C said she was working as normal when she noticed at about 11:00 a.m. that remote control was taken of her laptop whilst she was working. She told us that she had deleted some files around this time which were drafts of documents that had already been sent and this was done "*to create space on the desktop*". She said she sent herself a copy of her employment contract. She then noticed that she was unable to access the system and texted WF at 11:41 a.m.to inform him of this and again on 11:45 to inform him that someone had taken remote access to her account (pages 221-223).

20.28 C did not give an account of any telephone conversations with either TG or WF on this day in her witness statement, save that she mentions being

dismissed over the phone. During her oral evidence she stated firstly that she could not recall a telephone call with WF on the day in question and then said there might have been a call but denied that she had been informed by WF about the lack of Teramind data. She then went to agree that she told WF that her laptop was not broken, stolen or lost and agreed she told him when asked that she had not used her personal laptop. She said she could not recall whether TG had called her on the day in question, then suggesting that it was her who contacted TG to inform him of her laptop not working.

20.29 R witnesses' account of the day was that ID, following the sending out of the letter extending C's probation, decided to check what C's work output was and asked WF on the morning of 21 December 2022 to investigate this (he thought this took place between 7am and 9.30am). WF told us that when ID asked him to do this he then checked R's Teramind application to look at the data relating to C's use of her company laptop. WF noted that C had not logged into her company laptop since 6 October 2022 (page 181). WF told us that he called C at approximately 9am to ask her to explain this lack of data (he could not recall whether this was by phone or by MS Teams) and when he asked C whether her laptop had been broken, stolen or lost that she said it wasn't and that she had been using it for the whole time of her employment. WF said he asked C whether she was using any other device as this was against R's policies and not allowed for insurance reasons and C said she wasn't.

20.30 WF informed ID of this and ID told us he then asked TG to call C and to invite her in for a meeting. TG gave evidence that he called C and asked her why there was no data showing her using her laptop and said that C said she had been using her personal laptop rather than her company laptop. He said that when he asked C to attend a meeting she said that it was not financially viable for her to do this and asked why she needed to come in and whether she was going to be dismissed. TG said he did not know as had just been asked to invite C in for a meeting but would ask ID and would call her back. ID gave evidence that it had become clear to him at this stage that C was not performing her role and was placing the business at risk by using her own personal computer to carry out company work. He explained that R issued its employees with laptops which had all the software and protection required for insurance purposes and that using her personal laptop in this way could have exposed the business if it became compromised, as C had access to bank details and personal information of users. He said he felt that he could not have someone in C's role with the responsibilities for compliance she had using a computer without the protections needed. He therefore decided that C would need to be dismissed, subject to her providing a rational explanation as to what had happened. We accepted this evidence. ID told TG that he did intend to dismiss C but wanted to give her the opportunity to explain herself and TD then said he phoned C again and told her what ID said .

20.31 At 9:59 am, after he had spoken to C, WF told us he noticed that C accessed her company laptop. He then told us that she sent a number of e mails from her company account to her personal yahoo e mail account. He said he became concerned that C had e mails open relating to customer accounts and then seconds later that an e mail was sent to her personal account and that this happened on a number of occasions (pages 159 and 165). He said he also noted that C's number of incremented e mails in her personal account was increasing by 1 (page 159). He also noted that C e mailed to her personal e mail her contract of employment; then deleted the e mail and deleted it from her deleted folder (page 155). He saw that C at one stage deleted an audio file relating to a complaint and a pdf document relating to another. He also noted that she had sent a draft document relating to another complaint (Mr Hussain) to her personal address (page 163). WF told us that having noticed that this "*suspicious activity*" was taking place, he became concerned and to protect the business he took remote control of her account and removed her access.

20.32 We find that C's account of what took place on this day was not convincing and confused and we accepted the evidence of ID, WF and TG about the events that took place entirely. This was supported by the Teramind data of what activities were taking place that day and the e mail sent by ID to C that same day. Their evidence was internally consistent and consistent with questions asked by C in cross examination. It also made logical sense in light of the events of the day with C being alerted by WF to the lack of data; then logging on; WF then noting activity that he felt was suspicious and then revoking her access. C's explanation that the only emails sent were her employment contract and her Student Contract did not add up as she agreed in cross examination that her student contract was received in her personal email account at 11.38 am and the email with her student contract was received at 10.38 am (which is also shown in the Teramind data at page 155). These are therefore different to the emails C can be seen sending and then deleting at 10.33.34 and again at 10.34.01 (page 159). We accepted R's submissions that on the balance of probabilities, whatever was deleted was sent to her personal email as the number of emails in the personal inbox increased from 90,309 to 90.311 at 10.34.10 and 10.34.11.

<u>Dismissal</u>

20.33 ID told us that C's further actions in deleting files and sending e mails to her personal account "*further cemented that the Claimant could not be trusted*" and he decided to dismiss her with immediate effect. He told us that C was dismissed for breaching the terms of her contract and committing gross misconduct by breaching R's Use of Computer Equipment Policy at N (g) (page 64); R's Email and Internet Policy as per O 5(a), 5(b)(iv) (page 65) and 5(c)(v) (page 66); and breaching R's

Confidentiality Agreement at paragraph 5 which was regarded as an act of gross misconduct at paragraph 6 (page 81). He said that when factoring all the above and how C was working, he believed C exposed R to a "*huge risk of fraud claims that could have serious repercussions for the Business which would invalidate our insurance*". ID was insistent that anyone in the same circumstances as C was at that time would have been dismissed irrespective of their race, given the belief he held at this time. We accepted that this was what ID believed at the time of dismissal.

20.34 On 21 December 2021, the claimant received an e mail from ID informing her that she would be dismissed with immediate effect (page 220). The e mail referred to a discussion having taken place earlier with TG "*regarding your performance and lack of output towards the business*". It went on to state:

*"You raised the point that you have been using your MacBook for work related tasks and that the reason your workload appears to be low.*

*This is hard to comprehend as log ins are only set to your work laptop and logs still reflect the same time worked that we have.*

*Nevertheless it is against our company policy to conduct business related tasks on anything other than work equipment."*

The letter informed C that she would be paid up to date and for any accrued holiday. It informed her that she could appeal within 7 days. It also asked her to return all company equipment by the end of the next day. C sent a text message to ID on 21 December 2022 asking him whether it was possible for her equipment to be collected from Birmingham New Street station the following morning. ID said no and the equipment must be returned to either R or the Royal Estates office.

20.35 As had been indicated in the dismissal letter, ID had intended at this time to pay C up to the date of termination of her employment. However he told us that later that day, he was looking at C's Linked In profile and saw that C was showing as being employed by the Parliamentary Health Ombudsman and was a director of a limited company called Johnian Corner. ID became upset and concluded at this time that C had been working for these two organisations at the same time as being employed by R and that this explained her lack of output and why she did not use R's equipment. He decided then that he would not pay C for that month up to the date of dismissal. ID sent a text message to C as follows:

"*Agnes, so you've been running 2 jobs at the same time right? Feel taken for a complete mug here. Make sure our equipment is returned tomorrow*"

C did not respond to this at the time. She accepted in cross examination that this message was sent to C because ID believed or assumed at the

time that C was working another job. She said she found it insulting but was unable to say how this message was connected to her race saying that "*it may be*". She stated that his behaviour was a continuation of the way ID had behaved to her during her employment but could not tell us what behaviour she was referring to.

20.36 C returned her company laptop and equipment in an uber taxi which arrived on 22 December 2022 (see messages at page 232-3). On 23 December 2022, C was not paid her wages for December as she was expecting and sent a message to ID asking by what time she would be paid that day. In a subsequent phone call ID informed her that she would not be paid and C said that during that call he said to C "*I am not paying you and you can go and fucking report wherever you want to*" and accused her of working another job. ID could not recall using those particular words but conceded he may have as he was angry. We find that ID did say words of that gist to C during that telephone conversation. We note that in a subsequent message to TG, C refers to this phone call with ID and that he used abusive language and said he was not paying her (page 230). When asked why C believed that this decision not to pay her was related to her race, C said that she felt ID would not have treated another employee in this way and that he felt he could speak to her in this manner because she was a black female.

20.37 C subsequently provided evidence that showed she had resigned from her employment with the Parliamentary Ombudsman before she started working for R (page 90). She has also provided evidence that her involvement in the Johnian Corner company was related to a business set up to sell merchandise to raise money for a school she attended in Zimbabwe and whilst she was a director, this was not a trading business (page 259-61). We accepted this evidence and concluded that C was not at the time of her employment with R working in a paid capacity for either the Parliamentary Ombudsman or Johnian Corner.

20.38 C initially commenced proceedings in the County Court to recover her unpaid wages but was later advised by ACAS that the Employment Tribunal was better suited to pursue her claim. She commenced early conciliation in these proceedings on 12 March 2023 and her early conciliation certificate was issued by ACAS on 23 April 2023. She presented his claim form on 24 April 2023.

## The Relevant Law

21. The relevant sections of the EQA applicable to this claim are as follows:

***4 The protected characteristics***

*The following characteristics are protected characteristics: …*
*Race…;"*

***13 Direct discrimination***
*(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".*

***23 Comparison by reference to circumstances***
*(1) On a comparison of cases for the purposes of section 13....there must be no material difference between the circumstances relating to each case."*

***26 Harassment***
*(1) A person (A) harasses another (B) if—*
*(a)A engages in unwanted conduct related to a relevant protected characteristic, and*
*(b)the conduct has the purpose or effect of—*
*(i)violating B's dignity, or*
*(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
*(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into*
*account—*
*(a)the perception of B;*
*(b)the other circumstances of the case;*
*(c)whether it is reasonable for the conduct to have that effect."*

***123 Time limits***
*(1) [Subject to [sections 140A and 140B],] proceedings on a complaint within section 120 may not be brought after the end of—*
*(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
*(b) such other period as the employment tribunal thinks just and equitable.*

*(3) For the purposes of this section—*
*(a) conduct extending over a period is to be treated as done at the end of the period;*
*(b) failure to do something is to be treated as occurring when the person in question decided on it.*

***136 Burden of proof***
*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
*(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

22. The relevant authorities which we have considered on the direct discrimination complaints are as follows:

Burrett v West Birmingham Health Authority 1994 IRLR 7, EAT is an

example of the proposition that it is for the tribunal to decide as a matter of fact what is less favourable treatment and the test posed by the legislation is an objective one. The fact that a claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment, although the claimant's perception of the effect of treatment is likely to be relevant as to whether, objectively, that treatment was less favourable.

Anya v University of Oxford & Another [2001] IRLR 377 **-** it is necessary for the employment tribunal to look beyond any act in question to the general background evidence in order to consider whether prohibited factors have played a part in the employer's judgment. This is particularly so when establishing unconscious factors.

Igen v Wong and Others [2005] IRLR 258 and Madarassy v Nomura International PLC [2007] IRLR 246.

The employment tribunal should go through a two-stage process, the first stage of which requires the claimant to prove facts which could establish that the respondent has committed an act of discrimination, after which, and only if the claimant has proved such facts, the respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. In concluding as to whether the claimant had established a prima facie case, the tribunal is to examine all the evidence provided by the respondent and the claimant.

Madarrassy vNomura International Ltd 2007 ICR 867 - the bare facts of the difference in protected characteristic and less favourable treatment is not "without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent" committed an act of unlawful discrimination". There must be "something more".

Nagarajan v London Regional Transport [1999] IRLR 572, HL,-The crucial question in every case was, *'why the complainant received less favourable treatment … Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?*'

Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830, [2001] ICR 1065, HL, - The test is what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously was their reason? Looked at as a question of causation ('but for …'), it was an objective test. The anti-discrimination legislation required something different; the test should be subjective: *'Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.*'

Bahl v Law Society [2003] IRLR 640 – "*where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is*

*subconsciously influenced by unlawful discriminatory considerations. But again, there should be proper evidence from which such an inference can be drawn. It cannot be enough merely that the victim is a member of a minority group. This would be to commit the error identified above in connection with the Zafar case: the inference of discrimination would be based on no more than the fact that others sometimes discriminate unlawfully against minority groups.*"

23. In relation to harassment the following authorities were relevant:

Richmond Pharmacology V Miss A Dhalliwell [2009] ICR 724. There are two alternative bases of liability in the harassment provisions, that of purpose and effect, which means that the respondent may be held liable on the basis that the effect of his conduct has been to produce the prescribed consequences even if that was not a purpose, and conversely that he may be liable if he acted for the purposes of producing the prescribed consequences but did not, in fact, do so. A respondent should not be held liable merely because his conduct has had the effect of producing the prescribed consequence. It should be reasonable that the consequence has occurred and that the alleged victim of the conduct must feel that their dignity has been violated or that an adverse environment has been created. Therefore, it must be objectively decided whether or not a reasonable person would have felt, as the claimant felt, about the treatment in question, and the claimant must, additionally, subjectively feel that their dignity has been violated, etc.

Grant v HM Land Registry & EHRC [2011] IRLR 748 CA emphasised the importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading,
humiliating or offensive environment was created: "*Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."*

Pemberton v Inwood [2018] EWCA Civ 564. Underhill J *"In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b)).*

24. **The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994** provides at article 3 that:

*"Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—*

*(a)the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;*

*(b)the claim is not one to which article 5 applies; and*

*(c)the claim arises or is outstanding on the termination of the employee's employment."*

And at article 4

*"Proceedings may be brought before an employment tribunal in respect of a claim of an employer for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—*

*(a)the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;*

*(b)the claim is not one to which article 5 applies;*

*(c)the claim arises or is outstanding on the termination of the employment of the employee against whom it is made; and*

*(d)proceedings in respect of a claim of that employee have been brought before an employment tribunal by virtue of this Order."*

25. In a claim for breach of contract, the question for the Tribunal is whether there has been a repudiatory breach of contract justifying summary dismissal. The degree of misconduct necessary in order for the employee's behavior to amount to a repudiatory breach of contract is a question of fact for the Tribunal to determine. The test set out in Neary and anor v Dean of Westminster [1999] IRLR 288 is that the conduct:

"*must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain [the employee] in his employment*".

26. In Briscoe v Lubrizol Ltd 2002 IRLR 607, CA, the Court of Appeal approved the test in Neary above and stated that the employee's conduct should be viewed objectively, and so an employee can repudiate the contract even without an intention to do so.

27. In the case of West London Mental Health NHS Trust v. Chhabra [2014] IRLR 227, the Supreme Court confirmed that in order for misconduct to amount to gross misconduct there does need to be some sort of "willful" or deliberate breach of the employee's duties.

28. Mgubaegbu v Homerton University Hospital NHS Employment Foundation Trust UKEAT/0218/17 (18 May 2018, unreported) Choudhury J The Tribunal must make its own findings of fact in relation to the breach in order to determine whether that breach was sufficiently serious to warrant immediate termination.

29. A must be satisfied, on the balance of probabilities, that there was an actual repudiation of the contract. It is not sufficient for an employer to prove that they had a reasonable belief that the employee was guilty of gross misconduct **-** Shaw v B and W Group Ltd EAT 0583/11. If the employer finds out after the employee has been dismissed that the employee was guilty of a fundamental breach of contract which would have justified summary dismissal the employer can rely on this to rebut a claim of wrongful dismissal - Boston Deep Sea Fishing and Ice Co v Ansell (1888) 39 ChD 339, CA.

30. **Section 13 ERA** provides that a worker has the right not to suffer unauthorised deductions from their wages. The relevant sections are set out in full below:

***"13. Right not to suffer unauthorised deductions.***

*(1) An employer shall not make a deduction from wages of a worker employed by him unless—*

*(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*

*(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*

*(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*

*(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*

*(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*

*(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the*

*purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

31. **Johnston** v Veritas Technologies (UK) Ltd [2023] 2 WLUK 410, the first question, before considering whether unlawful deductions have been made, is whether any sum is legally due in the first instance.

## Conclusion

32. The issues between the parties which fell to be determined by the Tribunal were set out above. We have approached some of the issues in a different order but set out our conclusions on each issue below:

Issue 3 – Direct race discrimination (EQA section 13)

33. C makes 3 allegations of direct race discrimination. To decide these complaints, we had to determine whether R subjected C to the treatment complained of (which is set out at paragraphs 3.1.1. to 3.1.3 of the List of Issues) and then go on to decide whether any of this was 'less favourable treatment', (i.e. did R treat C as alleged less favourably than it treated or would have treated others ('comparators') in not materially different circumstances). We had to decide whether any such less favourable treatment was because of either C's race or because of race more generally.

34. We applied the two-stage burden of proof. We first considered whether C had proved facts from which, if unexplained, we could conclude that the treatment was because of race. The next stage was to consider whether R had proved that the treatment was in no sense whatsoever because of race. We set out below our conclusions on these matters for each allegation listed in the List of Issues with reference to each paragraph number where the allegation is listed:

35. Issue 3.1.1 - Fail to invite C to launches and other events between November and December 2022;

36. We refer to our findings of fact at paragraph 20.18- 20.19 above. C was not invited to the Negotiator event on 24-15 November 2022 so the facts behind this allegation are made out. We therefore had to determine whether this was less favourable treatment and if so whether this was because of C's race. In respect of this allegation C says she was treated less favourably than TG and WF who are both white and a hypothetical comparator. We firstly conclude that neither TG or WF were in materially the same circumstances as C, and thus are not direct comparators and this is because they performed entirely different roles to her. TG was Operations Director, responsible for managing a team of 4/5 agents working directly with buyers and sellers (and would become C's line manager). WF was Head of Digital and was responsible along with the Marketing Manager for organising the event. Neither was in a

comparable role to C, who was employed as Compliance Manager. However, we have also considered whether failure to invite C to the Negotiator Event was because of her race and we conclude that C has not proved facts which could lead us to conclude that this was because of race. Even if she had, we conclude that R would have satisfied the burden of showing that the treatment was in no sense whatsoever because of race. We reach this conclusion because:

36.1 C did not seem to know that the event was targeted as a marketing event for estate agents and agreed that she did not on a day to day basis work with estate agents as part of her role. She was not involved in the organising of the event which might require her to attend.

36.2 We accepted R's explanation, that someone in a Compliance Manager role would not be expected to be invited to a marketing event as this was targeted at estate agents as a forum for encouraging the use of R's services. There was no connection between attendance at the event and C's day to day role.

36.3 4 other members of staff (all not black) were also not invited to the event.

36.4 C had adduced no evidence whatsoever to suggest that her race played any part in the decision making as to whether to invite her to the event. She has simply referred to a photograph of the event and noted that there was a "*lack of diversity*" on show in that photograph. She points to her race and unfavourable treatment but is unable to show the 'something more' that would connect the two.

37. For the above reasons, we conclude that this allegation is dismissed.

Issue 3.1.2 - Fail to provide the claimant with company clothing (T shirts and fleeces) from about October 2022

38. We refer to our findings of fact at paragraph 20.20. Branded company clothing was ordered and delivered to R's office for C but this was not collected by her from R's office, nor was it sent out in the post or otherwise delivered to her. Therefore the facts behind the allegation are made out in part in that R did not inform C that branded clothing had been delivered for her and was ready to collect and did not send it to her. We have considered whether this amounted to less favourable treatment and whether this is because of race. We were not satisfied that this was the case. We conclude this because:

38.1 Firstly there does not appear to be any difference in treatment as the claimant cannot identify that her two comparators, TG and WF, or anyone else real or hypothetical, would have had clothing sent to them or have been a similar position to herself. We accepted that the usual practice was to order clothing and leave it in the office for the employee

to collect when they attended. C did not attend and given the shortness of her tenure with R; this was not picked up.

38.2 C did not make any complaint about the clothing during her employment and this only appears to have arisen long after her employment terminated.

38.3 C has adduced no evidence whatsoever to connect any decisions made by R in relation to branded clothing to her race. We were no satisfied at all that the burden of proof shifted such that R would need to explain that any decision making was nothing whatsoever to do with race.

Issue 3.1.3 Constructively dismiss the claimant on or about 21 December 2022

39. In the first instance, C was not constructively dismissed on or about 21 December 2022, but we found that she was expressly dismissed on this date (see paragraphs 20.33 to 20.34). We have gone on to consider whether this was "less favourable treatment," (i.e. did the respondent treat C as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances). We would then go on to decide whether this was because of her race. We were not satisfied that C's race was the reason why she was dismissed for the following reasons:

39.1 C says she was treated worse than TG and WF. who are white employees of the respondent and also relies upon a hypothetical comparator. As to her named comparators, these do not appear to be appropriate comparators as they are not in any way in similar circumstances to C.

39.2 The claimant has offered no substantial or event any evidence to suggest that dismissal was related to her race. The claimant points to the fact that was dismissed and is black. However, she is unable to produce any other tangible evidence about the reason why the two facts were connected. On the other hand, ID has given clear and cogent evidence as to why C was dismissed which we accepted. C was dismissed because ID genuinely believed that C was in serious breach of R's policies on the use of technology when she was observed by him and WF to be deleting files and sending e mails to her personal account (see paragraph 20.33).

39.3 C cannot get anywhere close to showing the something more that is required to establish the first stage of the two stage burden of proof test. In any event the respondent has clearly established the reason for the dismissal, and we were satisfied that this was in no sense whatsoever related to the claimant's race.

Issue 4. Harassment related to race (Equality Act 2010 section 26)

40. The claimant also makes complaints of harassment relating race. In order to determine these complaints, we needed to decide whether the

claimant was subject to unwanted conduct of the type described; then determine whether the conduct was related to race. We are then required to consider whether the conduct had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, having regard to: (a) the perception of the claimant; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect. Dealing with each of the allegations in turn:

Issue 4.1.1 Did ID send C electronic messages saying she "took him for a mug" and say "You can go where you want, I am not fucking paying you"

41. We refer to our findings of fact at paragraph 20.35 and 20.36 and conclude that the facts behind this allegation were made out. We also conclude that it was unwanted. However C has not adduced any evidence to suggest that these comments made by text and by telephone call had any connection to her race. She agreed that race was not referred to explicitly. She makes the general allegation that ID would not have spoken to her in this manner had she not been black but really cannot explain why she contends that this is the case. We conclude that these comments were not related to race. The text message was sent by ID after he had looked up C's profile on Linked In and reached the conclusion that C had been working two jobs and that this explained her lack of activity on her company laptop. He became upset and communicated his conclusion to C and how it made him feel at that time. When speaking to C over the phone, there was a heated discussion about ID's decision not to pay C and he used a swear word, admitting he became angry and frustrated because he felt that C had taken advantage of R during her employment and had not carried out her full duties. We can see no connection whatsoever to race in this message or comment or the reasons for it. The claim for race related harassment fails on this ground alone. It is a key component of harassment under section 26 EQA that it must relate to the protected characteristic. This comment was not related to or on the grounds of race. Therefore the harassment claim of the claimant must fail on this ground alone. It is not necessary to go on to answer the remaining questions as to what the conduct's purpose or effect is. In any event our view is that this conduct could not be said to have the purpose that is required, and we also doubt that given the findings of fact and the evidence of the claimant even at its highest, that it had this effect.

42. This complaint of harassment against the respondent accordingly fails and is dismissed.

Issue 4.1.2 Refuse to pay the claimant

43. R refused to pay C for the period up to 21 December 2022 and he communicated this to her in the telephone conversation of 23 December 2022 (see paragraph 20.36). This decision of R not to pay her for the

month of December was very distressing for her and she explained that as a mother with young children she was devastated to hear this news in the run up to Christmas. The conduct was clearly unwanted and indeed was likely to have had the effect on the claimant that violated her dignity and created an or creating an intimidating, hostile, degrading, humiliating or offensive environment for her (although we were not satisfied this was the purpose). However before even going on to such matters we had to consider whether this related to race as the first stage of considering whether this was an act of unlawful harassment. We conclude that in no sense was the decision not to pay C anything at all to do with race. It was clear to us that ID decided not to pay C because of the discoveries made on 21 December 2022. Firstly ID discovered that C did not appear on review of the Teramind data to have carried out any work for R since 6 October 2022. Secondly what took place during the day relating to the use of the laptop caused him significant concern as to the risk posed to R. However at this stage, he had not decided not to pay C for December. He made this decision having reviewed C's Linked In profile and reached the conclusion that day that C had been working elsewhere whilst not working and being paid by R. That is abundantly clear from a brief review of the exchange and understanding the context. This was not related to race and we were entirely satisfied that the same steps would have been taken for any other employee in a similar scenario. It is unfortunate that this occurred as this caused significant financial distress for C and we believe ultimately led her to pursue her (significantly expanded) complaint in the Tribunal. Nonetheless, we were entirely satisfied that the decision not to pay C was unrelated to race and on this ground alone, her complaint must fail.

44. Given that none of the complaints for direct discrimination or harassment have succeeded, we do not need to go on to consider whether there was conduct extending over a period and if not, whether the claims were made within a further period that the Tribunal thinks is just and equitable. All the claims failed having been considered fully on their merits

<u>Issue 2. Wrongful dismissal/Notice pay</u>

45. It is not disputed that C's notice period was one week and that she did not work and was not paid for that period of notice. The one question to determine is whether R was entitled to terminate C's contract of employment as a result of her repudiatory breach in committing gross misconduct. R relies on a number of matters as constituting a repudiatory breach and our conclusions on each are set out below:

*Did C fail to carry out her work after 6 October 2022?*

46. R submits that C persistently failed to work her contracted working hours relying on C's own evidence as to the tasks she carried out; the lack of access to Monday.com since 9 November 2022 and the Teramind data. We refer to our findings of fact at paragraphs 20.13 to 20.17 above. C

was carrying out duties for R during the period from 6 October 2022 albeit her output may have not been as much as R was expecting or requiring. However it has not been shown by R and we cannot conclude on the balance of probabilities that any failings in the work actually carried out amounted to a fundamental breach repudiating her contract. By 17 November 2022, R was starting to have concerns about what C was doing in her role (see paragraphs 20.21- 20.24 above). It is in fact when TG was appointed as C's line manager and when he began to scrutinise her work on 12 December 2022 that these concerns really crystallised. This led to the decision to extend her probationary period. However R has not shown that there was a significant failure to carry out any duties at all as such to amount to a repudiatory breach of contract.

*Did C fail to use her company laptop as required from 6 October 2022 onwards and carry out work from a personal* computer*/device?*

47. We refer to our finding of fact at paragraph 20.9 (that the Teramind data accurately recorded C's use of her company laptop); at 20.17 (that C was carrying out work tasks on another device not controlled by C) and at 20.30/20.32 (where we accepted that C told TG had been using her company laptop). We accordingly conclude that C did carry out work from a personal computer in breach of R's Use of Computer Equipment Policy (see paragraph 20.5 above).

*On 21 December 2022 did C log onto R's system and send customer files to her own account, deleting them from its system?*

48. We refer to our findings of fact at paragraph 20.31 and 20.32. We were satisfied on the balance of probabilities that C sent at least two e mails with customer files to her personal e mail account and that C deleted an audio file and a pdf document relating to a customer account. We conclude that this amounted to a breach of R's E-Mail and Internet Policy (see paragraph 20.6) and the Confidentiality Agreement (see paragraph 20.7).

49. Based on these findings and conclusions, we also conclude that these breaches of contract amounted to a repudiation of contract by C. It was sufficiently serious to warrant the immediate termination of her contract of employment given what ID and WF told us about the risks to R's business and the data of its users. C's contract of employment provided that R's policies formed part of and constituted her terms and conditions of employment and C acknowledged that downloading software on to a personal computer without authorisation and e mailing confidential documents to a personal e mail address would amount to a breach of contract (paragraph 20.5 and 20.7 above).

<u>R's Breach of Contract Claim</u>

50. Although not identified in the List of Issues, we also at this point considered the claim made by R for breach of contract. This was contained in the ET3 and Grounds of Resistance submitted by R (pages 20 and 27-28) and is identified as follows:

*"As the Claimant did not login nor work from the 6th October 2022 until the 21st December 2022, she has breached the terms of her Contract of Employment and her contractual obligations and therefore the Respondent makes a claim for the Claimant's failure in fulfilling her part of the contract for the wages paid from 06 October 2022 until 21 December 2022 and for the losses suffered during the periods of time that the Claimant was not working or that she was not performing her contractual duties."*

R clarified during the hearing that it sought damages in respect of this alleged breach representing £13,250 which was the sum that R says it was required to pay as a result C's failures to respond to the complaint regarding 56 Beech Rise within the required timescale.

51. We refer to our conclusions at paragraph 46 above. Although C was in breach of her contract of employment in other regards, we were not satisfied that R had shown that C had committed a repudiatory breach of contract in this respect and thus this claim for breach of contract by R fails. Moreover we also refer to our findings of fact at paragraph 20.24. R made the bare assertion that the £13,250 loss had been caused by C's actions but was unable to support this with any evidence at all. Even if C had breached her contract in the manner relied up by R, it has not shown that it suffered any losses as a result of such a breach. For completeness we also conclude that in respect of the repudiatory breaches of contract that C was responsible, we were also unable to conclude that the losses claimed of £13,250 flowed from or were caused by such breaches. Indeed it is difficult to see how that could be said to be the case. On that basis, R's complaint for breach of contract fails and is dismissed.

Issues 5. Unauthorised deductions

52. We finally had to determine C's claim for unauthorised deductions from wages in respect of R's failure to pay her wages from 1 to 21 December 2022. It is not in dispute that R did not pay C during December (see paragraphs 20.35 and 20.36 above). The only issues that remained for the Tribunal to determine which were in dispute was whether C was entitled to be paid for the period between 1 and 21 December 2022. R submits that C was repeatedly absent from work and did not carry out her full duties between 1 and 21 December 2022 and therefore in accordance with her contract of employment this would result in loss of appropriate payment (see paragraph 20.4). It submits that C's failure to properly carry out her duties during this period, meant that R was entitled to withhold her wages completely or in the alternative for all but two days when there is evidence of actual work during December 2022.

53. We did not accept R's submissions on this point and they have not shown on the balance of probabilities that C completely failed to carry out work during the period 1 to 21 December 2022. There were clearly concerns as to her output and the quality of work that was being carried out (see our conclusions at paragraph 46 above in relation to the breach of contract claim. On that basis, as C remained employed and was (at least to some extent working and carrying out her duties) she is entitled to be paid in respect of that period. In respect of the sums due to her, C had claimed in her Schedule of Loss for the sum of £2265 being the full amount of gross pay due for December 2022. However C did not work a full month in December as her employment was terminated lawfully with effect from 21 December 2022. We therefore make an award in respect of the sum of £1,894.63 which is the gross pay due up to and including 21 December 2022.

**Employment Judge Flood**

Date: 23 April 2024

**Notes**

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