EMPLOYMENT TRIBUNALS

Claimant: **Ms Donna Henry**

Respondent: **Results Education t/a Results UK**

Heard at: London South (in person)

On: Between 28 May 2024 and 6 June 2024

Before: Employment Judge Cox (Chairman) (by CVP on 28 May 2024)
Tribunal Member Grace Mitchell
Tribunal Member Graeme Anderson

Appearances

For the Claimant: In person

For the Respondent: Ms Bryony Clayton (counsel)

Reserved Judgment

The unanimous judgment of the tribunal is that:

1. The complaint of unfair constructive dismissal is not well-founded and is dismissed.

2. The complaints of a) direct race discrimination, b) indirect race discrimination and c) harassment related to race were not presented within the applicable time limit, but it is just and equitable to extend the time limit.

3. The complaint of direct race discrimination is not well-founded and is dismissed.

4. The complaint of indirect race discrimination is not well-founded and is dismissed.

5. The complaint of harassment related to race is not well-founded and is dismissed.

6. The complaint of being subjected to a detriment for making a protected disclosure was not presented within the applicable time limit. It was reasonably practicable to do so. The complaint of being subjected to a detriment for making a protected disclosure is therefore dismissed.

Reserved Reasons

1. These reasons are the unanimous judgment of the tribunal. Numbers in [square brackets] refer to page numbers in the trial bundle.

Claims and Issues

2. The claimant was employed by the respondent as a Finance Manager between 6 June 2018 and 10 December 2020.

3. The claimant withdrew a claim for wrongful dismissal at an earlier stage in the proceedings and was given permission to amend her initial claim to include a complaint of indirect race discrimination by Employment Judge Cheetham KC at a case management hearing in November 2022. She now brings the following complaints:

    3.1 Unfair constructive dismissal (section 94 & 98 of the Employment Rights Act 1996 ("ERA")) following the claimant's resignation on 10 September 2020;

    3.2 Direct race discrimination (S 13 of the Equality Act 2020 (EqA);

    3.3 Indirect race discrimination (s 19 EqA);

    3.4 Harassment related to race (s.26 EqA);

    3.5 Protected Disclosure detriment ("Whistleblowing") (ss 43A,43B,43C,47B ERA).

4. The parties had agreed a list of issues arising from these complaints to be determined by the tribunal. These are attached to these written reasons.

The Hearing

5. The claimant represented herself. The respondent was represented by Ms Bryony Clayton of counsel.

6. We began by considering an application by the claimant to postpone the hearing. This application took up half of the first day. It was made against a background of neither party having served on the other their witness statements. This unsatisfactory situation had arisen because the detailed procedural timetable had been suspended with the consent of all parties and an Employment Judge to enable judicial mediation to take place. When that

had failed to result in settlement neither party had properly engaged to exchange witness statements. Indeed the claimant had not completed her witness statements which she told the tribunal were in a 'raw' state.

7. We refused the claimant's application to postpone for the reasons given orally at the time and gave case management directions which in broad terms permitted the claimant to rely on her particulars of claim as her witness statement with permission to adduce a supplementary witness statement overnight for herself and a witness statement for a Mr Makau, her only proposed other witness. The directions also provided for both parties to serve hard and e-copies on the other and on the tribunal of all witness statements by 10 am on Day 2 (Wednesday). There was also provision for the claimant to be provided with an accessible copy of the correct updated trial bundle. Although she had seen the version dated March 2024 which had contained all of the relevant disclosed documentation, it had been updated subsequently to include case management materials. The updated copy served on her by the respondent was not in a readable form for her. She was understandably concerned and distressed that she did not have sight of all of the matters that were given by the respondent to the tribunal. In the event the tribunal had not been able to pre-read witness statements from the respondent or the main bundle and we re-assured the claimant that the respondent had not obtained any advantage over her.

8. The claimant told us that Mr Makau was located in Kenya. We explained that she would need to have made an application much earlier for permission for him to give oral evidence from abroad. We indicated that if Mr Makau provided a written witness statement we would consider whether to admit it on the basis of its relevance, but warned that even if admitted it would only be given little if any weight because it could not be tested by cross-examination. The Respondent was given the opportunity to consider whether it would wish, if the statement were admitted, to pose written questions of Mr Makau. A similar issue arose for the respondent. Mr Oxley was resident in Sweden and due to family illness preferred to give evidence from there. The respondent's application, however, for permission for him to give evidence from abroad had also not been made in adequate time. The respondent preferred not to seek postponement on that basis and in the end arranged for Mr Oxley to travel to the UK to give his evidence.

9. We took a reading day on Day 2 and set out a provisional hearing timetable designed to allow the claimant time to prepare her supplementary witness evidence, to consider and prepare questions in response to the respondent's witness evidence and to facilitate Mr Oxley's travel to the UK. During Day 2 the claimant provided her supplementary witness statement and a statement by Mr Makau.

10. The substantive hearing commenced on Day 3 but the start was again delayed. First, a copy of a safeguarding report by Ms Kirk made on 9 March 2020 which had been missed out of the bundle was dealt with. Then it appeared that there were errors in Mr Makau's proposed statement and we gave permission for an amended and sworn version to be provided overnight with those errors corrected. The respondent objected but the claimant sought

permission to admit the statement into evidence and identified at least one issue (indirect discrimination Issue 15.) to which the evidence was potentially material. We confirmed again that the statement would be given little weight, and that if the respondent chose not to ask written questions the facts set out in the statement would not be taken as admitted. On the morning of Day 4 (Friday) the respondent confirmed that it did not intend to put questions to Mr Makau).

11. The respondent in turn sought permission to rely on an email dated 29 May 2024 with an attachment from Ms Hargreaves. This related to Ms Hargreaves' recollections of conversations which the claimant alleged to have been public interest disclosures in August and December 2020. Ms Hargreaves did not provide a witness statement. This was, in effect, late (unsworn) witness evidence. Ms Clayton was unable to give any explanation as to why Ms Hargreaves had not been put to proof earlier and there was no good reason why this evidence was so late. We explained to the claimant the factors we would consider in deciding whether to allow the late evidence and invited the claimant to say whether or not she objected. After discussion the claimant decided not to object and so the email was admitted into evidence.

12. The claimant's evidence in chief began at 11.15 am and continued until the end of Day 3. It was not complete by 4:45pm and would require another two hours. Before the end of the day the tribunal therefore agreed an order and timetable of witnesses, and for an early lunch to be taken on Day 4 to accommodate a work commitment of the claimant. The witness timetable provided for Ms Kirk's evidence to be given instead on Monday to ensure there was adequate time for it, and for as early a finish as possible because she was giving evidence by CVP from New Zealand and therefore her evidence would be given effectively late into the night. The respondent was also tasked with finding some missing reports by Mr Jones, a barrister engaged to conduct a grievance investigation. The claimant's concern was that Mr Jones was not independent and that the missing interviews were all ones from people who she felt might have spoken more favourably of her. These were eventually provided on Day 6 (Tuesday) although none was in a form readable or viewable by any party or by the tribunal. Mr Jones confirmed in an email that he had interviewed all those on his list of interviewees. He said that all documents and recordings had been provided to the respondent contemporaneously. The position remained unresolved.

13. On the morning of Day 4 (Friday) we agreed to an application, foreshadowed the day before, for Ms Blackaby to give evidence via CVP to facilitate her greater flexibility around childcare obligations. The respondent then told us that Ms Kirk had informed the respondents overnight that she could not give evidence on Monday because she had a medical treatment appointment on Saturday which would preclude her from being able to give evidence after Friday. There had been no prior notice of this restriction, and no evidence was adduced. The result was that the claimant was put in the position of having to prepare her questions for Ms Kirk at short notice and unexpectedly early. She was also to have her evidence interrupted to be resumed on Monday and during that period unable to discuss her evidence with anyone. She very

properly objected to this, and there was a discussion about how the position could be managed within the timetable. After discussing the time she needed to prepare and the time needed to complete her questioning of Ms Kirk, we adjourned at approximately 10:10 until 14:30. Although she said she felt under some pressure, in the end she agreed that three and a half hours preparation time was sufficient for her to adjust and prepare. We indicated that these delays meant that any remedies hearing would need to be re-fixed for a later appointment.

Evidence

14. We were provided with a main bundle, a remedies bundle, cast list and chronology and witness statements and the additional ad hoc documents referred to above.

15. The claimant gave oral evidence on her own behalf, and Mr Makau's written statement was read.

16. The respondent's witnesses were:

    16.1 Ms Sarah Kirk. Ms Kirk was employed between July 2019 and June 2022 in the role of Head of Secretariat, Global TB Caucus ("GTBC"), an organisation for which the respondent was the host. In that role she and employees of GTBC came into contact with the claimant in connection with financial reporting and payments to GTBC staff/consultants.

    16.2 Mr Naveed Chaudhri. Mr Chaudhri was a member of the respondent's management team as Head of Campaigns. He dealt with safeguarding complaints made against the claimant and other matters concerned with comparators and promotion;

    16.3 Ms Kelly Blackaby (Eaton). Ms Blackaby was a volunteer trustee on the respondent's Board of trustees and HR professional. She gave evidence about her conduct of a grievance submitted by the claimant;

    16.4 Ms Sudtharalingam: Mr Sudtharalingam was a trustee and latterly the co-chair of trustees of the respondent. She was the board safeguarding lead and gave evidence about the conduct of a safeguarding report by the claimant and other matters concerning the operations of the respondent;

    16.5 Mr Pett: Mr Pett was co-chair of the respondent's board of trustees. He gave evidence of his actions in connection with the role of Head of Operations and more generally about race awareness activities.

    16.6 Mr Oxley: Mr Oxley was the Executive Director (in effect the CEO) of the respondent and the claimant's line manager.

17. We spent time explaining to the claimant the purpose of and a possible approach to cross-examination of witnesses. The claimant and all of the respondent's witnesses were cross-examined.

Submissions

18. We took some time to explain how the claimant might structure her submissions and what topics would be most important for our decision Both parties provided us with oral closing submissions. Ms Clayton provided full written submissions as well. The claimant provided some supplementary written submissions by email on the morning of Thursday 6 June. We took these into account.

19. In reaching our decision we took into account all of the written and documentary evidence to which we were referred and everything that was submitted to us although in these written reasons we set out only those matters which were most critical to our decision.

20. We considered our decision in chambers on Wednesday 5 and Thursday 6 June 2024. We were unable to complete our deliberations in time to deliver an oral judgment and informed the parties in the afternoon of Thursday 6 June that we would reserve our judgment.

Findings of Fact

21. We make the following findings of fact. Where matters were disputed, we made our findings on the balance of probabilities. Our findings are based on the totality of the evidence before us.

22. The claimant was employed from 6 June 2018 as Finance Manager. The terms of her employment were set out in an employment contract [131]. The contract at paragraph 16 incorporated by reference a pre-existing (January 2015) grievance policy and procedure document [103].

23. As a manager, the claimant was required by clause 10 of her contract to give 3 months' notice [132]. She gave 3 months written notice on 10 September 2020 [311], expiring on 10 December 2020. She received a P45 for that period.

24. She continued to work for the respondent after the end of her notice period. She worked a total of 69 further hours. That work consisted of handover and support for her successor until 2 March 2021. She did not engage with other members of staff during that period. Her successor pressed the respondent to pay the claimant for her time and the claimant was paid at an hourly rate equivalent to her previous salary and received a separate P45 for that period.

25. The respondent is a charity registered in the UK. Its charitable purpose is to create the public and political will to end poverty. It has a certain level of income from unreserved funds which are used to fund its operating expenditures and staff salaries, including its Management Team (“MT”) salaries. It grows its activities by attracting grants which it administers on behalf of donors (including in particular ACTION Gates – part of the Gates family charitable foundation). It also developed by providing ‘hosting’ services to other charitable organisations. It employed about 20 employees including

its management team and a further 20 or so employees who worked within the wrapper of 'hosted' organisations.

26. 'Hosting' for other charitable organisations was in effect an administrative, finance and HR back-office function. The hosted organisations included Global TB Caucasus ("GTBC"). Hosted organisations, including GTBC, had their own allocated staffs, although those staff members were also employees of the respondent. Mr Oxley was ultimately responsible as the Executive Director of the respondent for the employees and operational management functions of hosted organisations. He described them as separate business units within the respondent. GTBC paid a sum of 15% of its grant income to the respondent to host its back-office functions. Hosted organisations, including GTBC, had to provide both narrative and financial reports to their own donor organisations to explain how donors' funds had been spent. Ms Kirk was the Head of the Secretariat of GTBC, the senior staff member of that hosted organisation responsible for its charitable operations and programmes. Ms Kirk joined the respondent as an employee in that capacity in February 2019. A Ms Kate Townsend was employed as GTBC's Europe Manager and a Ms Daeun Jung and Ms Lucy Foster were employed as a more junior staff members. All had interactions with the claimant as part of their work. GTBC's operations were conducted on the ground through 'consultants'. Consultants were self – employed individuals in local countries who were paid through the respondent's finance function. Mr Makau was until December 2019 a local consultant of GTBC in Kenya. He was engaged on an annual renewable contract basis. His contract was not renewed for the year starting 1 January 2020. The reason given for this was that Ms Kirk judged that his performance was unsatisfactory.

27. The respondent was structured and operated internally, in broad terms, as follows. It was overseen by a board of trustees and volunteer trustees. The board of trustees operated via various sub-committees to deal with specific functional areas. Ms Soha Sudtharalingam was co-chair of trustees. Mr Pett was co-chair and served on the finance and HR sub-committees of the board and (from January 2020) as the inaugural member of an Equality, Diversity and Inclusion ("EDI") board working group. Ms Blackaby was a volunteer trustee who chaired the HR sub-committee. Ms Kate Hargreaves (who did not give evidence) was Head of the Finance sub-committee of the board.

28. From 2015 the respondent's executive operation was managed by a four-person Management Team ("MT"). Until late 2020 the MT consisted of Mr Chaudhri as Head of Campaigns (or Head of Grassroots), Lucy Drescher (Head of Parliamentary), Mr Lally-Francis (Head of Policy) and Aaron Oxley. Mr Oxley was the Executive Director - in effect the CEO of the respondent. HR, office and IT management, fundraising, and finance and oversight responsibilities were distributed amongst MT members.

29. Mr Oxley reported directly to the Board of Trustees. He also reported directly to some donors. He was the most senior staff member. Mr Oxley assumed responsibility for developing the activities of the respondent, developing finance processes and budget and grant management. Ms Drescher was the MT member who assumed responsibilities for finance oversight, fundraising

and grant reporting.

30. In September 2017 the respondent had formulated a plan [104] to recruit a fifth 'Head of...' to be a member of the MT. The new role was to be designated 'Head of Operations'. The Head of Operations role was envisaged as requiring a person of equivalent maturity and experience - 'calibre' - as the existing MT members. The Head of Operations was expected to take the lead in three main areas: (i) HR management and recruitment, (ii) Office Management and, critically (iii) Finance and Fundraising. The plan envisaged that the (then) Finance Officer who reported to Mr Oxley would instead report to the new 'Head of Operations'. One advantage of this which was expressly envisaged would be to reduce Mr Oxley's line management headcount.

31. The number of MT members was constrained because their salaries (of approximately £54,000) along with other staff salaries needed to be met from unrestricted funds. In other words their salaries (along with other staff salaries) were funded from the percentage management overhead charged to grants and hosted organisations which the respondent administered [108]. Because of the funding constraints the plan to appoint a Head of Operations was not put into effect in 2017.

32. Between November 2017 and February 2018 the respondent had adopted a staff structure [116] and (to address concerns expressed in an earlier staff survey [110]) a provisional professional development plan [124].

33. Staff structure: Below MT level (MT members were designated "Heads of....") the respondent adopted four professional staff levels: Co-ordinator/Assistant, Officer, Senior Officer and Manager. Level definitions and Pay levels were adopted for each grade up to 'Executive Director',

34. Professional development plan: professional development planning guidelines were set out. It provided [128] in connection with professional development planning that: "*Line management responsibilities are always created after careful consideration of the needs of the organisation to best deliver our strategic objectives and will only be done after a consultation with staff affected by any proposes changes'*. However, the document was not in a final form and expressly recognised [126] that many parts of it had been prepared with the role requirements of 'advocacy' staff in mind, and that "*there is more work to be done for Operational Staff (Finance and Fundraising). Before this document can be considered final, we need to incorporate additional thinking for these staff".*

35. The previous finance officer resigned in 2018. We reject the claimant's unsupported allegation that the previous finance officer resigned because Mr Oxley refused to appoint her to the post of Finance Manager (or that if he did that it was anything to do with the finance officer's race). When she left there was a 6 month backlog of work.

36. The claimant joined the respondent on 6 June 2018 as 'Finance Manager' [131]. She was the only staff member with this designation at that stage. Her salary was £38,537 FTE pro-rated for a four-day week. Her contract explained

that if she was dissatisfied with any disciplinary decision she should apply to the executive director, and if she had a grievance she should apply to her line manager.

37. When she was appointed, the claimant was line managed by Mr Oxley in accordance with previous practice. It was not a term of her employment that she would report to the Executive Director, but this was the practice.

38. At the time she was recruited the claimant was not told about the plan to appoint a Head of Operations who would ultimately oversee the finance function. The plan was revived in substantially the same form in May 2019 [229-239].

39. We find that the claimant was aware of it from at least December 2019. The plan specifically envisaged that the Finance Manager, who was by then the claimant holding that title, would report to the new Head of Operations. A budget for the Head of Operations appointment was presented to the Board in December 2019 for payment from April 2020.The claimant would have been involved in preparation of that budget as part of her role. Mr Oxley expressly told the claimant about the plan to appoint a Head of Operations in January 2020 [271-3]. It was discussed with her at their 1:1 monthly meeting. The report of that meeting (which was accessible and editable by both Mr Oxley and the claimant) suggests that the specific role of the Head of Operations in relation to the finance department and the claimant's continued role as the person in charge of the finance operation day to day was discussed. It records: *"Important that the person understands but does not want to run finance. They have to have overseen this before"*. A job description was circulated to the board in June 2020. We find that the contents of that job description were discussed with the claimant at around that time as well.

40. In the event funding uncertainty continued and the appointment of a new Head of Operations did not happen until early October 2020. This was after the claimant had given her notice.

41. The finance function provided the day-to-day work needed for providing management and budget information, making payments necessary for the respondent and its hosted organisations and preparing reports for grant donors and also for the board of trustees.

42. When the claimant took over management of the finance function in June 2018 the function was in disarray and there was a 6-month backlog of information to be processed as well as the ongoing need to manage day to day tasks of payments and preparation of reports. The claimant's department was under very significant work pressure from the beginning. Evidence from contemporaneous WhatsApp messages between the claimant and Mr Oxley throughout the claimant's employment show that the claimant frequently worked on her days off and was contacted regularly after hours, and even while she was ill, by Mr Oxley.

43. One of the tasks which the claimant undertook, and was encouraged by Mr Oxley to undertake, was to put in place systems and procedures to impose

greater financial discipline. Those procedures included for hosted organisations, including GTBC after consultation with them, the setting of a calendar of defined dates for fortnightly payment runs, and related deadlines for lodging with the finance department payment requests and supporting paperwork in advance of payment dates. Ad hoc payment requests falling outwith the procedures involved the claimant and her overworked departmental staff in additional, sometimes time-consuming tasks.

The Safeguarding Policy

44. On a date that was not made clear, but in 2018 the respondent instigated a Safeguarding Policy [446] in response to reports of abuse by Oxfam workers in Haiti in 2018. Training on the policy was provided to staff including the claimant as a new employee, and to those in management and at board level who were responsible for implementing the policy.

45. The document defined safeguarding as '*all actions taken by organisations to protect their personnel from harm and from harming others, and to protect others from third parties*" [Paragraph 1.2]. One of the purposes of the document was to provide a clear procedure that will be implemented when safeguarding issues arise [Paragraph 1.3] and one of its stated policies was *"Ensuring that the organisation has absolute clarity as to how incidents and allegations will be handled should they arise, including reporting to the relevant authorities."* [Paragraph 2d]. In addition to children and vulnerable adults who are commonly the target beneficiaries of such policies, the respondent extended this policy to its staff, volunteers, consultants and trustees. This application of the policy to these groups was provided for in Section 9 of the policy.

46. We interpose at this point to observe, as we explain below, that many of the issues arising in this case appeared to us to result from the respondent dealing with allegations of bullying between employees initially under the umbrella of an imperfectly applied or explained safeguarding policy and process rather than by reference to a separate anti-bullying policy and the usual grievance procedure, which might have been more clearly understood.

47. Clause 9.1 of the policy provided "RESULTS UK is committed to safeguarding everyone in our organisation at all times, including protecting staff, trustees volunteers and consultants from inappropriate behaviour such as bullying and harassment by other members of staff, trustees, consultants and volunteers". The respondent committed itself to: "setting an organisational culture that prioritises safeguarding of staff, consultants and trustees, so that it is safe for those affected to come forward, and having adequate safeguarding policies, procedures and measures to protect people and ensuring that these are shared and understood".

48. So far as relevant the Safeguarding Policy also provided as follows:

9.3 Abuse of staff, consultants and trustees

9.3.1 Workplace abuse comes in many forms: violence, harassment, threatening or aggressive behaviour and bullying. This abuse can have serious physical or psychological damage.

9.3.2 For practical purposes, those making a complaint usually define what they mean by bullying or harassment – something has happened to them that is unwelcome, unwarranted and causes a detrimental effect. If a person complains they are being bullied or harassed, then they have a grievance which must be dealt with regardless of whether or not their complaint accords with a standard definition (ACAS, Bullying and Harassment at Work).

9.3.2 (sic) Workplace bullying is a pattern of mistreatment from others in the workplace that causes either physical or emotional harm. It can include such tactics as verbal, nonverbal, psychological, physical abuse and humiliation. ACAS characterises bullying as offensive, intimidating, malicious or insulting behaviour, an abuse or misuse of power through means that undermine, humiliate, denigrate or injure the recipient (The Equality Act 2010 – guidance for employers). The impact on the individual can be the same as harassment and the words bullying and harassment are often used interchangeably in the workplace.

9.3.3 Harassment as defined in the Equality Act 2020 is unwanted conduct related to a protected characteristic (set out below)....Unwanted behaviour could be: • spoken or written words : threats or abuse; ...physical behaviour including physical gestures and facial expressions....

9.5 What is Harassment

9.5.3 Employers have a 'duty of care' for all their employees. If the mutual trust and confidence between employee and employer is broken - for example through bullying and harassment at work – then an employee can resign and claim constructive dismissal at an Employment Tribunal on the grounds of breach of contract...

9.7 Procedure for reporting an allegation of abuse or harassment of staff

All complaints, allegations or suspicions must be taken seriously.

9.7.1 The procedure outlined below must be followed whenever an allegation is made that a member of staff has been abused or harassed, or when there is a suspicion that this is the case.

9.7.2 Promises of confidentiality should not be given as this may conflict with the need to ensure the safety and welfare of the person involved. However, the member of staff should be reassured that the allegation will not be shared amongst staff of RESULTS UK beyond the Safeguarding Officer and potentially a member of management team or the board of trustees.

9.7.5 When a Safeguarding Officer is contacted, if appropriate, he or she will raise the safeguarding concern or allegation firstly with the named member of management team unless that member of management team is named in the allegation or if the staff member does not feel comfortable with the issue being raised with them for whatever reason, in which case the Safeguarding Officer should contact the Board safeguarding lead directly.

9.7.8 If a member of staff does not feel comfortable attending the office to carry out their day to day work due to a safeguarding issue or concern, provision should be made for them to work from home.

9.7.9 A full record shall be made within 24 hours of the disclosure including any other relevant information using the 'Initial Cause for Concern Form'.

9.8 Procedure for management team and the board of trustees responding to an allegation of

abuse or harassment by staff.

9.8.1 When a complaint of bullying or harassment is made, RESULTS UK must choose whether the allegation should be investigated as a grievance or disciplinary matter. In general, RESULTS UK will investigate the complaint as a grievance initially and if it is upheld, the information gathered will be used to take disciplinary action.

9.8.2 In dealing with a complaint, inquiries should first be made as to whether the alleged victim wants to take formal or informal action. If the victim does not want to make a complaint but unacceptable behaviour has been noticed or reported it should still be considered whether an investigation is appropriate.

9.8.3 Informal action may sometimes be suitable in instances where the behaviour has not been repeated or is not serious in nature. Informal measures may include:

9.8.4 A manager or Safeguarding Officer approaching the alleged bully or harasser to discuss the behaviour and make them aware of RUK's zero tolerance approach to harassment. The employee should be notified that under informal proceedings, the manager's role is solely one of support and assistance and that disciplinary action can only take place if there is a formal investigation. Written records should be kept of the complaint and any action taken in order to assist in any future proceedings that may arise if the behaviour does not stop.

9.8.6 Once the complaint has been received by the Safeguarding Officer and escalated upwards to a manager or trustee, the manager or trustee should arrange a meeting with the alleged victim and let him or her know they have the right to be accompanied to this meeting. This meeting will be used to gather more information on the complaint.

9.8.8 Allegations of abuse or harassment should be investigated immediately and, if it is deemed necessary, the accused member of staff should be temporarily suspended on full pay while this investigation takes place.

9.8.9 The members of staff involved should be regularly updated while the investigation is taking place.

9.8.12 Where an informal resolution is not possible, the employer may decide that the matter is a disciplinary issue which needs to be dealt with formally at the appropriate level of the organisation's disciplinary procedure.

49. In summary, the Safeguarding Officer's role (SGO) involved monitoring and keeping a record of safeguarding complaints or reported concerns. The line manager's role in such cases was to support the staff member making the disclosure and ensuring the correct procedures are followed. The Board were expected to be kept informed about allegations and of the progress of investigations and should be consulted as to appropriate action.

Working arrangements: context for the Safeguarding complaints

50. GTBC ran a large number of consultants across multiple continents and had foreign government level activities including with MPs. More than other hosted organisations, it had to engage with the complexities of foreign banking and currency transactions and international cash payments. Ms Kirk was often travelling. Particular process concessions were put in place over time in discussions with the claimant, GTBC staff and Mr Oxley to accommodate these difficulties. A particular concession was for Ms Kirk and GTBC to lodge

supporting paperwork for signature by Ms Kirk on Monday instead of the previous Friday ahead of a payment run.

51. Inevitably occasions arose when the claimant needed to arrange for urgent payments to be made which had not been filed in time for the established payment process (even as adapted for GTBC).

52. We find that in general the claimant strongly preferred and sought to insist on formal compliance with the procedure before authorising payments. Equally Ms Kirk and her head office staff would frequently find themselves needing to make urgent payments, and having to deal with the additional complexity arising from the foreign nature of much of their financial transactions.

53. Although on such occasions the claimant would, in general ultimately make adjustments and allow for payments outside of the established procedures, the constant tension between her defending her procedures and GTBC staff needing to get payments made resulted in constant friction and mutual frustration. Friction developed, in particular, between the claimant and Ms Kirk. It is common ground that by at least early 2020 the working relationship between the claimant who led the finance function, and the GTBC staff – in particular Ms Kirk - had become 'challenging'.

54. The claimant was also responsible for keeping financial records up to date, and compiling information for the purpose of the preparation of reports for hosted organisations, to grant donors or to support applications for grants, and internally by Mr Oxley to the Board. The WhatsApp messages show that the claimant undertook work to customise and improve the collection and presentation of such information.

55. We find that in general the claimant and Mr Oxley enjoyed a good and co-operative working relationship. Mr Oxley regarded her work highly. WhatsApp messages show that a functioning and collaborative working relationship continued between them until the claimant's departure in December 2020. On 13 December 2018 he said "*I love having you as a Finance Manager!*". On 25 March 2019 he thanked the claimant for her 'patience and strength', On 28 April 2020 he told the claimant that "*I think you are a much better line manager than you think you are*". The respondent recognised the excellence of the claimant's early work with a salary increase in March 2019 (backdated to January 2019) to £42,120 FTE and a one off-bonus payment of £900. By this time the claimant had also become a Fellow of the ACCA, a status of which she told us (with justification) she was very proud.

<u>The February/March 2020 Safeguarding Incidents/Safeguarding Reports</u>

56. As we have found, GTBC staff regularly failed to comply with the systems the claimant had established for submitting payment requests and providing information for reports The claimant considered that this unnecessarily increased the strain on her and her staff. By early 2020, despite initial working relationships being good, the relationship between the claimant and Ms Kirk had deteriorated into personal animosity.

57. On about Thursday 20 February 2020 Ms Kirk had messaged the claimant to ask if details of expenses to be paid could be lodged on Friday for consultant payments to be processed, but not signed off by Ms Kirk until Monday in accordance with the established procedure for GTBC. The claimant agreed to apply the procedure. She says that Ms Kirk then said that that was great "because she could go to the pub". The claimant told us that she felt that Ms Kirk was abusing the special privileges put in place to accommodate Ms Kirk's travel commitments and that she believed Ms Kirk was not in fact travelling.

58. We find that whether or not Ms Kirk was in fact travelling, or had returned from travel, her request to apply the Monday sign off was a reasonable one as it was an established procedure which she was free to request.

59. On Monday 24 February a payment to reserve a hotel in South Africa which had been booked by GTBC for a large conference involving a number of members of parliament of African countries – a flagship event for GTBC – was brought to the claimant for payment in that round. This was after the Monday signing deadline. The claimant refused to pay it in that payment round. The claimant and Ms Kirk clashed about this issue.

60. There was a difference in the evidence of the claimant, Ms Kirk and Mr Oxley about these events.

61. In her safeguarding complaint (see below) and in her evidence before us the claimant reported that Ms Kirk pestered her on 25 February 2020 demanding that the hotel bill be paid. She reported that she spoke to Mr Oxley complaining that the request was late and Mr Oxley had said that he would speak with Ms Kirk. She said that on 28 February 2020 Ms Kirk cut her out of an email chain dealing with remittance advices.

62. The claimant also described a meeting between them on 3 March 2020 at which she reported that she was pressed to pay the Hotel invoice, pressured by Ms Kirk to tell untruths to the hotel to explain the delayed payment and asked if she wanted Ms Kirk to report to Mr Oxley that they were breaking the hotel contract. The claimant described a 'tense' conversation that went round in circles and when she went to leave Ms Kirk had raised her hands and asked if she was OK. She reported that she felt threatened and had been subject to emotional bullying for insisting on applying the agreed payment procedures correctly in an attempt to intimidate her to make the hotel payment. The claimant asked her to move and said she'd had enough and left.

63. We observe that although the claimant's ET1 refers to harassment/bullying by K Thompson – a junior finance worker at GTBC – her safeguarding complaint does not refer to any conduct by Ms Thompson which could be reasonably characterised in that way. It refers only to Ms Thompson having approached the claimant regarding payment.

64. Ms Kirk by contrast told us that the claimant said she should tell the hotel that the payment would be made in the next payment round. Ms Kirk had replied that it was a business critical to adhere to the payment or GTBC would be in breach. When the claimant insisted on paying in the next round, and Ms Kirk

continued to press for payment so there would not be a breach of contract, the claimant stormed out of the room. Ms Kirk said she (Ms Kirk) went to see Mr Oxley to try to get the payment made.

65. Mr Oxley told us this was a flagship event, there were in fact a large number of MPs whose bookings were the subject of the contract with the hotel and that there was a large reputational risk if the hotel were to pull out which they might if they were not paid. He regarded it is a reasonable management request that the sum be paid.

66. We find that Ms Kirk did put pressure on the claimant to effect the hotel payment, and accept that she excluded her from an email chain in order to avoid having to argue about payment procedures. However, the need to make the payment was plain and in the face of the claimant's initial refusal to process the necessary transfer it was reasonable for Ms Kirk to put pressure on the claimant to be flexible and to make the payment. We find that the two argued and the claimant left the room. Ms Kirk put up her hands and asked if the claimant was OK as she made to leave. She did not physically bar the claimant's exit.

67. In the event although by 6 March 2020 [160] it was known to all that the event had been postponed due to COVID, the claimant arranged for the sum to be paid.

68. On the same day, 6 March 2020, the claimant made a safeguarding complaint [279] to Hannah Nixon. The report of the complaint reflected the claimant's view of matters referred to above. Ms Nixon was the designated safeguarding officer. The claimant chose to report to her because she did not wish to make the complaint initially to Mr Oxley as her line manager.

69. There were working relationships and office-based friendships between Mr Oxley and Hannah Nixon on the one hand and Ms Kirk on the other. The claimant believed these were deep relationships, but we find that these did not extend beyond normal office relationships.

70. Ms Nixon's report dated 7 March records, and we find, that she spoke to Ms Sudtharalingam on the evening of Friday 6 March to discuss the claimant's safeguarding complaint and that Ms Sudtharalingam and Ms Nixon agreed that this was an issue that should be dealt with by Mr Oxley as a line management issue. The report states, and we accept, that Ms. Nixon told the claimant that it was recommended to her that the matter be dealt with by Mr Oxley and that the claimant accepted that that would be the next step.

71. Ms Nixon spoke to Mr Oxley about this on or before Saturday 7 March 2020. We were told by Mr Oxley, and accept, that he was only given a summary of the information about the incident in order for him to deal with it as a line management issue and was not given a copy of the safeguarding complaint form itself, because that would be a breach of the safeguarding policy on confidentiality. He demonstrated the same understanding in WhatsApp exchanges with the claimant in November 2020.

72. It was not clear what information he was given by Ms Nixon. Although he

understood that the complaint was to be dealt with as a line management issue, there were no contemporary records of how it was dealt with. We find that it was not the subject of a disciplinary investigation, nor was it processed by Mr Oxley as a grievance in accordance with the grievance policy.

73. Ms Kirk also put in a safeguarding complaint on 9 March 2020. In that complaint she refers to the incidents above, but also to (i) a pattern of behaviour on the part of the claimant, potentially amounting to bullying, in her conduct of finance department interactions with Daeun Jung and (ii) to concerns said to have been expressed by Lucy Foster (GTBC Administrator) and Kate Thompson (GTBC Europe Manager) about working with the claimant. Ms Kirk said she had in response herself taken over the task of working with the claimant to relieve her staff from having to do so. The particular complaint by Ms Kirk herself was that she had been ostracised from a staff meeting on 9 March 2020 when the claimant had in front of other staff moved her chair away from Ms Kirk, and as a result Ms Kirk left the meeting. She filed a safeguarding complaint on the basis that she regarded the conduct of the claimant as potentially bullying of her and Ms Foster and Ms Thomson.

74. In her evidence before us the claimant's account of the staff meeting was that Ms Kirk entered the staff meeting and moved her chair to sit right next to the claimant and put her hand on the claimant's leg. The claimant found this unacceptable and moved her chair away from Ms Kirk. The claimant did not make a report or complaint at the time that Ms Kirk had touched her leg, it does not appear in any written accounts at the time or subsequently and she did not mention it in her original witness statement. The claimant suggested that we should infer that Ms Kirk's safeguarding complaint was not genuine but part of a 'playbook'. She asserted that Ms Kirk had done a similar thing when Mr Makau had criticised her.

75. We would add here that when the claimant gave her evidence, and indeed made her submissions, she became agitated and emotional, and at times raised her voice to emphasise points of importance to her. When she did so, she would usually apologise immediately afterwards and calm herself. Our impression was that this was borne out of frustration at wanting to present her case well and to have it understood clearly and her feeling that at some points she could not find the right words or was not managing to do that as well as she wished. She otherwise conducted her case in a measured and skilful manner. We observe, however, that if similar frustrations were affecting her during disputes about payments, that colleagues might have interpreted her response as aggression.

76. We are satisfied that the claimant moved her chair in the meeting away from Ms Kirk and that Ms Kirk then left the room. We do not have sufficient evidence before us to infer that the report about this by Ms Kirk was merely a tactic, and the claimant did not satisfy us that that was the case. Likewise, the claimant did not satisfy us on the evidence that Ms Kirk had touched her leg. We would have expected the claimant to have mentioned this issue at the time.

77. Ms Kirk's complaint was made to Mr Chaudhri as the MT safeguarding lead

[281A]. He discussed the complaint with Lucy Drescher (board member). Both agreed that there was no safeguarding action to take and that the matter should be referred to Mr Oxley for line management action. We find that Mr Chaudhri did report the facts in outline to Mr Oxley. There is, again, no written record of what Mr Oxley was told.

78. The claimant says [paragraph 7 of her witness statement] that she asked Hannah Nixon if anyone had spoken to Ms Kirk about the claimant's safeguarding complaint and that Hannah Nixon did not respond except to say that the claimant should stay at home if she felt unsafe. In so doing Ms Nixon was doing what the safeguarding policy indicated she should do. Her role as safeguarding officer was now at an end because the matter had been referred to Mr Oxley to be dealt with as a line management issue.

79. It was at about this time that concerns were rising about COVID and the respondent began planning for remote working. The respondent began fully remote working from 16 March 2020. National Lockdown commenced on 23 March 2020. The practical effect was that Ms Kirk and the claimant were no longer physically together in an office environment. The respondent continued with remote working until 2021, after the claimant had left.

80. Following the passing on of outline details to Mr Oxley about each complaint, Mr Oxley told us, and we find, that he decided that he could manage the situation in an informal way. He regarded his role as being to de-escalate the tension.

81. We accept his evidence that at around the time of the complaints he spoke to Ms Kirk about how she could modify her behaviour and GTBC processes, and double down on getting her team to get payment requests and information to the finance department on time. He told her that repeated pressuring of the claimant to pay the bill was 'not OK' and if there was a need for an unexpected payment she should go through Mr Oxley who would then speak to the claimant.

82. He also spoke to the claimant. He told us, and we find, that he emphasised that he supported her in applying processes but that on occasion she needed to be flexible. These conversations did not take place in the course of a specific appointment for the purpose of discussing her complaint. He told us, and we find, that he spoke to her about the matter in the course of their regular 1:1.

83. We find that in his conversations with the claimant he did not explain to her (i) that he was dealing with her safeguarding complaint or (ii) that it had been decided by the safeguarding officer that it should be dealt with as a line management issue, or (iii) that he had decided it was to be dealt with by way of an informal management response. He did not explain to her (as envisaged by the safeguarding policy) that she could pursue a grievance. He did not pursue any investigation. He did not expressly talk to her about the allegation of bullying she made against Ms Kirk. He told us that he did not tell the claimant about the possibility of pursuing a grievance because he considered that in light of the claimant's behaviour towards other staff members that a grievance investigation might lead to the claimant's position becoming untenable – in

other words she might end up worse off if the whole history were investigated. We were not persuaded that this was a conscious reason in his mind at the time as to why he did not then inform the claimant about the grievance process. We accept that Mr Oxley did not consider that the incident reported by the claimant amounted to bullying. He considered that it was the consequence of the claimant's refusal to carry out a reasonable management request.

84. We find on balance that he did not regard the conduct of either the claimant or Ms Kirk as particularly serious and expected that the effect of remote working would be that the problems between them would go away as a result.

85. There were no further contacts from Mr Oxley about the claimant's complaint before she gave in her notice. There were no further requests for information about her complaint by her to Mr Oxley either, although her failure to press for information about her complaint with more urgency is more readily explicable during a period when everyone had other priorities.

EDI and-race related Initiatives

86. In July 2020, following reports of the murder of George Floyd in the United States and the publicity surrounding it which led to the Black Lives Matter movement, the respondent produced a board level paper concerned with how the respondent as an organisation should respond to the societal issues arising [290]. This document was emailed to, in particular a support grouping of black female staff. That group had been formed by or with the support of the claimant and she provided a written response on 17 September 2020 on behalf of the group [302].

87. Mr Pett told us that an EDI working group had been set up at board level in January 2020 and work was done by the board to consider inclusive recruitment: see also Mr Chaudhri's witness statement at paragraph 26. The claimant told us, and we accept, that notwithstanding that she was involved with staff recruitment, and that Mr Pett said that an online meeting about change and BLM took place in November 2020 she was not aware of such work. The respondent did not collect data about the ethnic and racial make-up of its work force.

88. There is evidence from the WhatsApp messages [193-194] that in late August 2020 the claimant provided information and resources herself to Mr Oxley ahead of a conference he was attending on these issues. Mr Oxley responded with "*Thanks Donna. Some of these look like questions for me and for RESULTS....all of this will be useful to feed into RESULTS' own work and thinking' and after the session he reported that there was 'lots of follow up planned'.*

89. Mr Chaudhri told us, and we accept, that the respondent has participated since 2018 in an initiative to help people from under-represented communities to gain a first job in international development. He also referred to a session on power and privilege in international development at the respondent's National conference in September 2020. He told us that there had not been any unconscious bias training because of scepticism about the efficacy of such

training on its own.

90. The Respondent approved a budget, of which the claimant was aware through her Finance Manager role, of £17,500 for 2021 for the purpose of funding EDI/anti-oppression work. By the time her grievance was investigated in May 2021, that money had not yet been spent, although staff had individual training budgets which they could use to take such training if they wished, although there was no evidence that such courses were actively promoted to them.

91. Mr Chaudhri described the position as being 'a process of organisational learning' which we find was an apt and accurate description of the respondent's activities.

Failure to appoint the claimant as Head of Finance

92. At some point 'in the weeks before the new Head of Operations was due to start', the claimant asked Mr Oxley to be appointed as Head of Finance.

93. Mr Oxley did not agree to the claimant being given that title. He told us, and we find, that he refused because it would fall outside of the established management and pay structure, and that the title 'Head Of....'' was a Management Team level designation. Our conclusion is supported by the professional levels definitions document [116]. The business had already identified a need for a Head of Operations covering a range of competencies and experience and there was no Head of Finance role. He was not willing to agree to awarding the claimant a meaningless 'Head of Finance' job title.

Events leading up to the claimant's resignation

94. On 27 August 2020 the claimant asked Hannah Nixon for a copy of her report of the claimant's safeguarding complaint and Ms Nixon provided this [419]. We find, as reported in Ms Nixon's evidence to Mr Jones and her note of the call, that the claimant was angry and critical of her abilities as a safeguarding officer and that the claimant told her not to do or report anything further.

95. The claimant contended before us that Ms Nixon had changed or misrepresented the position in her report in that (i) she had misstated that the claimant 'agreed' to a resolution through line management/Mr Oxley when she had not, and (ii) that she had changed wording from '[Ms Kirk] threatened her' to 'the claimant 'felt threatened'. She alleged Ms Nixon did this because she was a friend of Ms Kirk and she wanted to protect her. We find that she did not raise this with Ms Nixon [419] and we were not satisfied on the evidence that Ms Nixon amended the document or deliberately misrepresented the position in this way or for the reason alleged by the claimant. Such a serious allegation would require stronger evidence. We find that Ms Nixon's report was typed up at the same time as she spoke to the claimant [419] and accurately recorded the discussion with the claimant as she understood it.

96. The claimant did not read the report in August. Although she may have read the report as early as 19 November 2020 (there is a WhatsApp reference which may refer to it [210]) in her interview with Mr Jones [382] she said she never read the report until shortly before her Union rep wrote a letter on 8

December 2020. In any event, she did not read the report until long after the conversation, and we consider that her recollection of events may have been influenced by the development of her dissatisfaction more generally with the respondent's conduct towards her. We find the contemporaneous note was genuine and accurate.

97. On 8 and 10 September 2020 the respondent held Zoom-based line manager training meetings.

98. The claimant says that in the course of these meetings Mr Oxley was publicly dismissive of her. She says that he logged off while she was speaking, that he left the call while she was speaking and when he rejoined sarcastically asked if he had missed much. He also said that emotional intelligence was an attribute required of a line manager – and the claimant felt this was directed at and critical of her personally. It was not in issue that these incidents occurred.

99. Mr Oxley said, and we accept, that there were good reasons for all of them and none was directed at the claimant personally (for example he had signalled the need to break off to attend a medical call if it came through, which it did, during the meeting, and that he experienced technical problems).

100. In the hearing the claimant very fairly accepted in cross-examination that the incidents were not in fact directed at her, but that at the time she felt that they were. We find that none of these actions were directed at the claimant.

101. The claimant resigned by letter on 10 September 2020. In her resignation letter [311] she gave 3 months' notice and stated: "The last two years spent at Results have been both interesting and challenging. I wish you, and Results the best for the future with the important work it is doing, during this truly challenging time."

102. In the letter the claimant did not mention the reasons for her resignation. She told us that when she used the word 'challenging' she was incorporating all of the reasons for her resignation which she now relies on. We do not accept that that word can bear that weight of meaning.

103. Mr Oxley acknowledged the letter and thanked the claimant for her work in the past and her plan to work her full notice [197].

<u>Events following the claimant's resignation</u>

104. The claimant continued to work her full notice period of 3 months. During that time she carried out day to day finance work and actively participated in the process of recruiting her successor, collaborating with Mr Oxley in that task.

105. A conversation with Mr Oxley took place on or about 15 September 2020 following her resignation. The claimant says she raised the issue of his not having dealt with her safeguarding complaint in that conversation, although she was not specific about what was said, and she did not mention the issue of her complaint in her resignation letter of around this time.

106. On 14 October 2020 the claimant called Hannah Nixon. In that call she was

upset and insulting and told Hannah Nixon that she was a bad safeguarding officer [420].

107. The replacement Head of Operations was appointed in October 2020.

108. In the period leading up to 19 November 2020 Ms Kirk and the claimant were required to co-ordinate in the preparation of an important end of year donor report for GTBC. There was a clash online between them about their respective responsibilities for providing financial content for that report.

109. On 19 November 2020 Ms Kirk made a safeguarding report against the claimant. In that report she said that the claimant had asked her if she knew that she (the claimant) had previously made a safeguarding complaint about her. Ms Kirk reported that she felt that this was an implicit threat that if she continued to ask the claimant to provide the financial information which she (Ms Kirk) believed the claimant was required to provide that the claimant would make another complaint about her [282]. Ms Kirk made the complaint to Mr Chaudhri. He discussed it with Hannah Nixon who declined to engage with it, and then with Kate Thompson as the other safeguarding officer. The potential conflict with Ms Thomson's previous involvement with issues with the claimant was noted. Following discussion between them they determined that the appropriate response was a referral to Mr Oxley for line management action.

110. On the same day the claimant had contacted Mr Oxley by WhatsApp [210] and said she needed to discuss her safeguarding report and why nothing had happened. He initially declined to see her copy of the safeguarding report itself (although stating that she could send it if she wished he said that that was not how the process worked). He told her that she could escalate through the safeguarding process to Hannah Nixon if she was not happy with how the safeguarding complaint had been dealt with. The claimant told him that nothing had happened. A conversation took place later. The claimant said that she formed the impression that Mr Oxley was dismissive because he considered that the matter should be now be regarded as in the past. We consider that he likely held that view.

111. On 10 December 2020 Mr Oxley prepared an exit Interview form recording his conversation with the claimant [372]. He offered her the opportunity to submit an amended document reflecting her thoughts and views on what was discussed [324]. In Mr Oxley's draft the claimant references a letter dated 8 December 2020 from Mr Luthra, her workplace Union Rep [322]. That letter had stated:

Dear Aaron, Naveed and Alan.

I'm writing in my capacity as Unite Union Workplace Representative at RESULTS UK. This letter is addressed to Aaron and Alan as you are the two current JNCC management team (MT) representatives, and to Naveed as you are a MT member of the safeguarding team.

The Union has been made aware of a number of apparent failings in the way a safeguarding complaint from a Unite member was handled by management,

the board and the safeguarding officer responsible for the case. I must stress that at this stage, on the complainant's wishes, I will not be discussing the details of the case itself. At this point in time the complainant only seeks to ensure that the way their case was dealt with does not happen again to another staff member in future. In doing so this letter is intended to underline to all concerned some of the steps that should be taken when a staff member reports a safeguarding issue, according to RESULTS UK's safeguarding policy. These steps are:

- 9.7.5 When a Safeguarding Officer is contacted, if appropriate, he or she will raise the safeguarding concern or allegation firstly with the named member of management team unless that member of management team is named in the allegation or if the staff member does not feel comfortable with the issue being raised with them for whatever reason, in which case the Safeguarding Officer should contact the Board safeguarding lead directly.

This clearly states that should the complainant not wish for the issue to be raised with management, then the alternative avenue available is through the Board safeguarding lead. As 9.7.6 details, when the complainant opts for this route the Board safeguarding lead should then take the case to the Board:

- 9.7.6 The named member of the Management Team will raise the allegation or concern with the Board safeguarding lead, who will share this with the rest of the Board and ensure that appropriate investigatory and/ or disciplinary action is taken.

When a complainant exercises their right for their case not to be elevated through RUK management, this states that the board has the power to conduct an investigation and/or take disciplinary action. The complainant should also be asked if they seek to take informal or formal action:

- 9.8.2 In dealing with a complaint, inquiries should first be made as to whether the alleged victim wants to take formal or informal action. If the victim does not want to make a complaint but unacceptable behaviour has been noticed or reported it should still be considered whether an investigation is appropriate.

According to the safeguarding policy, see: 9.8.6; 9.8.9; 9.8.10; 9.8.12; 9.8.13, there are a number of subsequent actions that then must be taken for formal action to proceed. These include, the board safeguarding lead arranging to meet the complainant and informing them they have a right to be accompanied, a formal investigation, regular updates for the alleged victim, an offer of counselling, a full written report of the RUK investigation and its findings, and an offer both parties the right to appeal.

On the complainant's wishes, I am the only Union representative aware of this case and on their behalf, I would like to stress the complainant's wish for confidentiality and sensitivity in handling this issue. As mentioned above, the

purpose of this letter and any subsequent meeting is to ensure that RESULTS' safeguarding procedures are being followed and are working as effectively as they should be. As a matter of urgency I would encourage you to reiterate to safeguarding officers and the safeguarding board lead that they must refer to the steps in the RUK Safeguarding Policy for any future cases they receive.

If you are able to meet to discuss this further, I would welcome the opportunity to do so, but to reiterate I will not be able to discuss the details of the case.

112. The claimant took time to reflect and submitted an amended Exit Interview document to the respondent on 4 March 2021 [338; 327] In her amended exit report the claimant also asks for Kate Hargreaves to be shown the document and her original safeguarding report. She notes that she does not wish her replacement to get any fallout from this and noted that Mr Oxley had apologised to her (the claimant) for both personal and procedural failures in how the case was handled and committed to action.

113. On 14 April 2021 following the end of her handover the claimant lodged a grievance [339]. The respondent agreed to deal with the claimant's grievance even though her employment had already come to an end by that time.

114. Ms Blackaby contacted the claimant to discuss the grievance. In the event, the claimant was unhappy about her grievance being investigated internally by the respondent and so the board approved an external independent barrister, a Mr Jones, to investigate and prepare a report.

115. The claimant argued before us that Mr Jones was not independent and that his report failed to take account of evidence from interviewees who would likely have said favourable things about the claimant. Mr Jones had previously worked for the respondent's solicitor, Ms Griffiths, some ten years before, and before he went to the bar. We tried to access the missing transcripts of interviews as explained above but were unable to access their content. Whilst it was unsatisfactory that the contents of all of the interviews were no longer accessible, we find that Mr Jones carried out his work independently as would be expected of a barrister subject to professional standard regulation. We note that he disclosed to the claimant details of his limited connection with the respondent's solicitor and the claimant took no objection to his acting at the time.

116. Mr Jones report was submitted on 28 June 2021 [508]. He summarised Ms Henry's complaints as follows:

(i) Being consistently undermined in her role as Finance Manager between January 2019 and December 2020;

(ii) Being singled out for treatment by the alleged perpetrators;

(iii) Bullying and/or harassment by Mr Oxley on the grounds of race;

(iv) Being denied the opportunity for continuous professional development

since June 2018; and

(v) A failure to address a safeguarding concern raised on 2 March 2020.

117. He found against the claimant except on complaint (v). On that complaint he found that the safeguarding policy was inadequate and unfit for purpose and that the claimant's complaint under it had not been adequately addressed.

Analysis

118. We consider the relevant law and our conclusions in relation to each of the separate heads of complaint brought by the claimant.

119. In reaching our conclusions we have considered the written and oral submissions of the parties in full, whether or not they are specifically referenced.

Constructive Unfair Dismissal

Relevant Law

120. S95(1)(c) ERA 1996 provides that an employee is dismissed by his or her employer for the purposes of claiming unfair dismissal if.....the employee terminates the contract under which s/he is employed (with or without notice) in circumstances in which s/he is entitled to terminate it without notice by reason of the employer's conduct.

121. A claimant must show (see *Western Excavating (ECC) Ltd v Sharp*, 1978 ICR 221):

121.1 a breach of contract by the employer;

121.2 that that breach is sufficiently serious to justify the employee resigning: a fundamental breach or if the breach is not itself fundamental, it must be the last (the last straw) in a series of incidents which justify a claimant resigning; and

121.3 That the claimant left in response to the breach and not for some other, unconnected reason.

122. The test of a fundamental breach is whether or not the conduct of the guilty party is sufficiently serious to repudiate the contract. The test is an objective one. It is a question of fact and degree for the tribunal to assess.

123. Where an employer breaches the implied term of trust and confidence, the breach is 'inevitably' fundamental. In Mahmud v Bank of Credit and Commerce International SA 1997 ICR 606, the implied term of trust and confidence was defined as follows: '*the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and*

employee'.

124. In assessing whether or not there has been a breach, what is significant is the impact of the employer's behaviour on the employee rather than what the employer intended. The vital question is whether the impact of the employers' conduct on the employee was such that, viewed objectively, the employee could properly conclude that the employers were repudiating the contact: see Brown v Merchant Ferries Ltd 1998 IRLR 682 (in the Northern Ireland Court of Appeal). It is not a defence to a claim for constructive dismissal that the employee failed to raise a grievance in response to the employer's conduct: Tolson v Governing Body of Mixenden Community School [2003] IRLR 842, EAT.

125. In 'final straw' resignations the test is as follows: viewed objectively, does the course of conduct show that the employer had, over time, demonstrated an intention to no longer be bound by the contract of employment? The final straw may not be blameworthy or unreasonable but must not be utterly trivial: Omilaju v Waltham Forest London Borough Council [2005] 1 All ER 75).

126. Where there is more than one reason why an employee leaves a job a tribunal must determine whether the employer's repudiatory breach was an effective cause of the resignation. However, the breach need not be 'the' effective cause: Wright v North Ayrshire Council 2014 ICR 77, EAT. 'The crucial question is whether the repudiatory breach played a part in the dismissal', and even if the employee leaves for 'a whole host of reasons', he or she can claim constructive dismissal 'if the repudiatory breach is one of the factors relied upon': Abbycars (West Horndon) Ltd v Ford EAT 0472/07. Also the employee does not need to state the reasons in their resignation letter, but there must be sufficient evidence from which a tribunal can infer the reasons for the resignation.

127. A claimant must not delay too long in terminating the contract in response to the employer's breach, otherwise they may be deemed to have waived the breach so that the repudiatory conduct is not an effective cause of the resignation, or he/she may be found to have affirmed the contract. The employee 'must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged': per Lord Denning MR in Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA : Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA, although given the pressure on the employee in these circumstances, the law looks very carefully at the facts before deciding whether there really has been an affirmation.

128. In Leaney v Loughborough University 2023 EAT 155, the EAT summarised the general principles on affirmation of contract in a constructive dismissal case, noting that affirmation may be expressly communicated or may be implied from conduct. Mere passage of time prior to resignation will not, in itself amount to affirmation. However, given the ongoing and dynamic nature of the employment relationship, a prolonged or significant delay may give rise to an implied affirmation because of what occurred during that period. Where the

injured party is the employee, the proactive carrying out of duties or the acceptance of significant performance by the employer by way of payment of wages are liable to be treated as evidence of implied affirmation. However, that will not necessarily be the case if the injured party communicates that he or she is considering his or her position or makes attempts to seek to allow the other party some opportunity to put right the breach of contract before deciding what to do. In an unfair constructive dismissal claim, the act of giving notice cannot by itself constitute affirmation. However, where an employee resigns with notice but, despite doing so, acts in a way that is consistent with affirmation, he or she may be taken to have affirmed the contract.

129. An employee can exercise his or her right to rely upon the breach at any time while it is continuing. If the last straw incident is part of a course of conduct that cumulatively amounts to a breach of the implied term of trust and confidence, it does not matter that the employee had affirmed the contract by continuing to work after previous incidents which formed part of the same course of conduct. The effect of the last straw is to revive the employee's right to resign: Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1, CA.

130. The Court of Appeal in Kaur by way of guidance to tribunals listed the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed:

130.1 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?

130.2 has he or she affirmed the contract since that act?

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

130.4 if not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?

130.5 did the employee resign in response (or partly in response) to that breach?

130.6 Last straw cases should be contrasted with those where there is a one-off act by the employer that merely has ongoing consequences. Thus, where an employee is demoted, allegedly in breach of contract, that employee should act promptly upon being demoted rather than wait and then, at a later date, seek to rely on a continuing drop in wages as representing an ongoing breach.

131. If dismissal is established then in accordance with section 98 of the Employment Rights Act 1996 ("the ERA"), the Tribunal should approach the question of whether the dismissal is fair based upon the following two stages:

131.1 First, the employer must show the reason for the dismissal and that it is one of the six potentially fair reasons set out in section 98(1) and (2) of

the ERA;

131.2 If the employer is successful in the first stage, the tribunal must then consider whether the employer acted reasonably in dismissing the employee for that reason under section 98(4) of the ERA. According to the wording of section 98(4) of the ERA, the determination of this question depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.

Constructive Unfair Dismissal: Analysis and Conclusions

Issue 1.1: Bullying and harassment during conversations/meetings

132. Conversations took place on 20, 25, 28 and 3 March 2020 between the claimant and Sarah Kirk. The context was that in relation to a regular payment run for consultants Ms Kirk asked for the established late approval procedure to be applied which allowed her to sign off on Monday requests that had been filed on Friday. The claimant believed from a comment made by Ms Kirk about being able to go to the pub that Ms Kirk was not travelling and concluded that the late approval procedure was being abused by Ms Kirk. We were not persuaded that Ms Kirk was in fact abusing the system or that from that comment alone there were reasonable or sufficient grounds for the claimant to so conclude.

133. On Monday the claimant was told by GTBC staff and then by Ms Kirk that there was a contractual obligation for the respondent on behalf of GTBC to pay the hotel reservation. The claimant had not been told in advance of the need to pay this sum urgently. She refused to pay it in that payment run. The conversations were tense and challenging. The claimant was complaining about Ms Kirk's/GTBC's failure to abide by the established procedures which she felt obligated to protect. Ms Kirk was extremely anxious that non-payment of a contractual obligation to the Hotel could result in cancellation which could cause serious reputational damage to GTBC, and was pressurising the claimant to make the payment. Whilst on separate occasions both left meetings in frustration with the other, we were not satisfied that there was physical contact between the two or that Ms Kirk's conduct in holding up her hands and asking of the claimant was OK could reasonably be understood as seeking to prevent the claimant from leaving. Ms Kirk's requests for payment were reasonable management requests, notwithstanding that they were made (and possibly could have been made) earlier or in time. The claimant's decision to take a stand on procedures in the context of, in particular, the hotel payment, and to represent that she would refuse to make the payment (although ultimately she did) was the cause of the verbal pressure and escalation into an argument.

134. In these circumstances we had difficulty in framing the considerable tension surrounding this issue as bullying and harassment of the claimant by Ms Kirk.

135. The claimant did not establish proof of bullying by Ms Thomson.

136. The respondent's actions in this regard were not a breach of any duty owed to the claimant.

Issue 1.2: repeated failures by the respondent to deal with the claimant's bullying complaint

137. The claimant made her complaint under the safeguarding policy on 6 March 2020.

138. The safeguarding policy was introduced as a response to media concern about abuses by charity workers operating abroad. Doubtless with the best of intentions it was extended to employees in the office in the UK but at the expense of a separate anti-bullying policy. It appears to us that the safeguarding policy was therefore used by staff (including the claimant and Ms Kirk) who wished to complain about alleged bullying. Although the safeguarding policy envisages the possibility of referral to line management, and grievance and/or disciplinary outcomes, it puts these in place behind initial safeguarding processes, in which in appropriate cases safeguarding officers could determine that conduct should be referred to external agencies. The combination of what are essentially distinct functions in a single policy led to, we consider, confusion at all levels, and justified confusion at least on the part of the claimant.

139. The claimant's initial safeguarding complaint was dealt with by Hannah Nixon, who was the female safeguarding officer appointed under paragraph 3 of the Policy. She arranged to speak to Ms Sudtharalingam as the Board safeguarding lead because the claimant had initially not wanted to raise it with Mr Oxley. We find that in doing so Ms Nixon followed the procedure envisaged by paragraph 9.7.5 of the policy.

140. Ms Sudtharalingam and Ms Nixon agreed that the matter should be dealt with by the claimant's line manager. Ms Nixon passed that suggestion on to the claimant and the claimant at least did not take issue with that proposed course at the time.

141. The policy at paragraph 9.7.6 envisages that the board safeguarding lead would (i) share the complaint with the rest of the Board and (ii) ensure that appropriate investigatory /disciplinary action is taken. Ms Sudtharalingam did not report the complaint to the board. She appears to have taken the decision herself (in consultation with Ms Nixon) that the incident should be dealt with as a line management issue. This was not in accordance with the Policy but the claimant did not know of this at the time of her resignation.

142. The policy envisages (at paragraph 9.8.1) that the respondent (not the safeguarding officer or Board lead on their own) should decide whether to investigate the incident (as a grievance or disciplinary matter). Informal resolution may be suitable in non-serious cases (clause 9.8.3). But Clause 9.8.2 envisages that before a decision to proceed in that way is taken, inquiries should be made to see if the complainant wishes to make a formal complaint

or not. Although the claimant acquiesced in a referral back to Mr Oxley, she was not asked whether she wanted to make a formal complaint by Ms Sudtharalingam or by Mr Oxley. She was not advised by either of them about her right to make a formal complaint. There is no evidence that an active decision was taken by the respondent whether to conduct an investigation (as envisaged by clause 9.8.1 and 9.8.2). The respondent acted in breach of the safeguarding policy in these respects.

143. Once they had told the claimant that the matter was to be passed to Mr Oxley, and Ms Nixon had provided a summary of the matter (undocumented) to Mr Oxley, both Ms Nixon and Ms Sudtharalingam regarded their functions under the policy as complete. Neither explained this to the claimant. The respondent acted in breach of the policy in this respect.

144. The claimant's report to Hannah Nixon and thence (we infer) to Mr Oxley referred to what was in effect an isolated disagreement rather than any longer or repeated pattern of behaviour. We find on the balance of probabilities that Ms Sudtharalingam regarded what she knew of the incident as non-serious. The policy envisaged at 9.8.3 that informal action might be appropriate if the behaviour is not serious in nature. We find that Mr Oxley was of a similar view and, given that shortly after these events the respondent moved to remote working, that the lack of physical interaction between the claimant and Ms Kirk would likely result in the matter becoming a non-issue. Given our conclusions about the seriousness of the matters referred to, the adoption of the informal steps taken by the respondent was consistent with the policy and a response which a reasonable employer could take (although the correct process of consultation with the claimant was not undertaken).

145. Mr Oxley did not have a specific meeting with the claimant about the claimant's complaint which he by now understood in summary. We have found that he talked with both the claimant and Ms Kirk in general terms about flexibility on the one hand and following process and deadlines on the other. The respondent did therefore take steps in response to the claimant's complaint. However, Mr Oxley did not at any time tell the claimant that these steps/discussions were the respondent's response to her safeguarding complaint and/or that no other action would be taken unless she raised a grievance because it was being dealt with informally. He says that he left it to the safeguarding team to report back to the claimant. This was not in accordance with the expectations set out in clause 9.8.1 or 9.8.2 of the policy. The respondent acted in breach of the policy in this respect.

146. In response to a request from the claimant on 27 August 2020 Ms Nixon provided the claimant with a copy of her complaint report. Ms Nixon acted in accordance with the policy in so doing. As regards the angry exchange on 14 October 2020 Ms Nixon had reasonably regarded her role and duties as at an end by this point, and that the claimant expressly told Ms Nixon that she did not want her to take any further steps or report her concerns. Ms Nixon did not fail to deal with the claimant's complaint on this occasion.

147. On 15 September and 19 November 2020 [210] the claimant raised the matter of her complaint with Mr Oxley, latterly in a WhatsApp message. She asked to

have a conversation with him about her complaint: '*I need to understand why nothing happened*'. Mr Oxley's response was to the effect that it was not his job to resolve the safeguarding complaint and that the safeguarding team had internal processes for escalation. His response was correct so far as he saw it, but he failed to address his own failure to consider the claimant's complaint with her or to inform her of what he had done/decided not to do and why.

148. Both Hannah Nixon and Mr Oxley assumed that the other had explained to the claimant how her complaint was being dealt with in connection with the safeguarding policy. In fact neither did so.

149. When the claimant's employment ended, Mr Oxley apologised for the personal and procedural failures in how the case was handled. Subsequently the respondent conducted a grievance investigation which accepted that there were failings in the way the policy had been applied to the claimant.

Issue 1.3: Was the claimant effectively demoted by not being appointed to the Head of Finance Role

150. We have no hesitation in rejecting this head of claim.

151. Since before the claimant joined, the respondent had established Professional Level definitions [116] and a Professional Development Framework [124]. 'Head of' appointments were particularly sensitive to funding constraints and, unlike promotions from more junior levels where retention was an issue for the respondent, more senior level promotion was by way of competitive interview.

152. More significantly, the claimant had before the claimant joined, planned as soon as funding permitted, to appoint a suitably experienced candidate to fulfil a multi-faceted role designated as Head of Operations. That role was envisaged as having operational oversight/line management responsibility for the finance function among others.

153. Although the claimant was not told of this plan when she joined, she became aware of it by December 2019 through the budgeting process, and discussed it express with Mr Oxley in January 2020 and so would have been well aware of the expectation that she would report to the new appointee.

154. Although we recognise that status, or the perception of status, is important in employment contexts, and that the claimant felt that her status was enhanced by reporting directly to the Executive Director, she had no contractual entitlement to report to the Executive Director, and there was simply no 'Head of Finance' role for which the claimant was unreasonably rejected.

155. There is therefore, objectively viewed, no breach of any duty owed to the claimant arising from not appointing her to a non-existent role or not awarding her a 'Head of Finance' job title in circumstances where there was a clear professional levels structure, whether that job title entailed a higher salary or not, and, no reasonable objective ground for the claimant to conclude that the respondent's failure to appoint her to such a role amounted to conduct likely to destroy mutual trust and confidence.

Issue 1.4: Was Mr Oxley dismissive of the Claimant during a Zoom meeting on 10 September 2020

156. It was discussed during the hearing and accepted that as drafted the List of Issues did not reflect the claimant's complaints that Mr Oxley was dismissive in on-line meetings in the period 8 to 10 September 2020, not limited to the 10 September.

157. We accept that in the course of these meetings Mr Oxley became disconnected while the claimant was speaking and asked if he had missed much when he rejoined. He also logged off at one point to take a medical call. He also said in the course of one meeting that emotional intelligence was an attribute required of a line manager.

158. However, none of these acts by Mr Oxley were directed at the claimant – a matter she accepted in cross-examination. We accept that she felt at the time that they were, but there was, in our judgment, no reasonable objective basis for the claimant to reach that conclusion from those actions in all the circumstances, even taking into account her legitimate concern that her safeguarding complaint had not been dealt with. In any event, we consider that looked at in the round these actions were no more than trivial.

159. There is therefore no reasonable basis, objectively viewed, upon which the claimant could conclude that this conduct was likely to destroy the relationship of trust and confidence.

Issue 2: Did the above acts alone or together amount to a breach of the duty of trust and confidence ?

160. In summary:-

160.1 The claimant was not subjected to bullying or harassment by Ms Kirk or her staff in March 2020. Whilst there was an argument about the making of a business critical GTBC payment with both parties asserting their positions, and whilst the working relationship between the claimant and Ms Kirk by that time had deteriorated somewhat, Ms Kirk's request was a reasonable one and the conduct which we find occurred did not amount to bullying or harassment;

160.2 The claimant was not effectively demoted by not being appointed as Head of Finance – no such role existed;

160.3 The claimant was not the object of conduct by Mr Oxley on 8-10 September which, objectively viewed, was publicly dismissive of her, and was in any event trivial.

160.4 The respondent did act in breach of the safeguarding policy in the particular respects identified above: the claimant was not asked whether she wanted to pursue a grievance, her right to do so was not communicated to her and the (otherwise objectively reasonable) decision by the respondent to deal with the matter informally was not communicated to the claimant.

161. The safeguarding policy is not referenced directly in the claimant's contract of employment, nor was it signed (or requested by the respondent to be signed) by the claimant so far as appears in the evidence. However, the claimant's contract of employment at paragraph 16 references to the Grievance Policy, and the Safeguarding Policy itself, for example at paragraph 9.8.1., envisages that in general complaints would be investigated as a grievance and (at paragraph 9.8.2) that complainants would be asked whether they wished to pursue formal or informal action. The option of informal action is also provided for in the Grievance Policy document at paragraph 1. Where Mr Oxley did not follow up with a discussion with the claimant following the referral to him of her complaint under the Safeguarding Policy that amounts to, in effect, a failure by the respondent also to give effect the Grievance Policy which is incorporated by reference into the terms of the claimant's employment contract. Without undertaking too technical an analysis, we consider that we should approach the question of breach on the basis that the conduct we have identified as being in breach of the policy amounted to breaches of the claimant's contract of employment.

162. Taking the conduct as a whole and having regard to the impact of the employer's behaviour on the employee rather than what the employer intended, however, we are not satisfied that the breaches were such that, viewed objectively, the claimant could properly conclude that her employers were repudiating the contract.

163. In reaching that conclusion we took note of the fact that the claimant did not raise any issues with anyone about it before she contacted Ms Nixon in late August 2020 or Mr Oxley until after her resignation, but we considered that this delay ought not weigh significantly in the balance against the claimant because during this period of lockdowns the claimant would be expected quite reasonably to have been occupied with other concerns around COVID. On the other hand during this period of remote working we consider that potentially more serious concerns about Ms Kirk's behaviour and physical escalation and intimidation would inevitably and reasonably have been regarded by all involved as involving somewhat lower risk once all interactions became remote.

164. On the basis of this conclusion the claimant's claim for unfair constructive dismissal cannot succeed. However, in case we are wrong we express our conclusions on the remaining issues relevant to the unfair dismissal claim.

Issue 3: Did the above acts separately or together cause the claimant to resign on 10 September 2020 ?

165. We find that the reason for the claimant's resignation was a combination of the allegations at Issues 1.2 (failure to deal with the claimant's bullying complaint), 1.3 (the failure to appoint her as Head of Finance) and 1.4 (her perception of publicly dismissive conduct).

    165.1 We are not satisfied that the actions of Ms Kirk towards the claimant in March 2020 were still a factor in her decision to resign by September 2020 (although that conduct provided a context for the failure to

investigate her complaint about it). We find that after 6 months of no physical or other recorded engagement between them during remote working, the events of March 2020 themselves were no longer a factor. It appears from her amended Exit Interview notes [328] that she refused to work with Sarah Kirk in October 2020 when the Gates donor report needed to be prepared. She noted that his was her 'personal protest' against the failure, as she considered it to be, to deal with her complaint, and although she says she was proud of standing up to Ms Kirk she does not dwell further on the original incidents.

165.2 We conclude in particular that the breaches of the safeguarding policy which we have found to have occurred (the failure to apply the safeguarding policy correctly and the failure to communicate relevant information to the claimant) was a relevant factor in the claimant's decision to resign. Although the claimant did not mention this in her resignation letter, this is not determinative. There is evidence from which it is possible to infer that this was a relevant factor in her decision. First, the claimant asked Ms Nixon for a copy of the report on 27 August 2020 before she resigned. After her resignation she referred to the failure to deal with her complaint in her Union Rep's letter dated 8 December 2020 and in her Exit Interview with Mr Oxley on 10 December 2020.

165.3 The claimant's unsuccessful request to be appointed as 'Head of Finance' and her perception at the time that Mr Oxley's actions on 8 and 10 September were being directed at her were also factors in her decision to resign, although neither of these episodes amounted to, or could objectively reasonably be considered to be conduct amounting to breaches of any duty. Both of these factors were based on misapprehensions by the claimant or proceeded from heightened sensitivities on her part.

166. It is our view that during the period of lockdown and remote working the claimant constructed an unreliable retrospective narrative, born out of the apparent lack of action in response to her complaint, that Mr Oxley, Ms Nixon and Ms Kirk were closer than merely work colleagues and they (and others) were ganging up against her or were antipathetic to her. With the looming appointment of a Head of Operations to whom she was to report, she came to believe that she was no longer as valued a member of staff as she had once been. This is why she resigned. The claimant told Ms Hargreaves that she retrospectively came to see these and other matters through the lens of race.

Issue 4: Affirmation and Last Straw

167. It follows from our conclusions that the last act or omission on the part of the employer which triggered the claimant's resignation was the omission by the safeguarding team or Mr Oxley to consult her about the decision to pursue informal resolution and her right to pursue a formal route. We do not consider that the responses of Ms Nixon to the claimant's contact in August and (after the claimant's resignation) in October 2020 amounted to breaches. We have rejected the claimant's contention that the last straw act could be the events of 8 to 10 September 2020.

168. Had we not determined that the conduct relied upon by the claimant did not amount to a fundamental breach or a breach of the implied term of trust and confidence, we would have concluded that the claimant had affirmed the contract after the relevant breach for the following reasons.

168.1 The claimant was aware (or it appeared to her) that no action was being taken in response to the safeguarding complaint. She made the complaint on 6 March 2020. She did not take any action at all between early March and 27 August 2020 to follow up on her complaint.

168.2 Mere delay is not sufficient to amount to affirmation, and as we have said in the context of Lockdown, we would afford her a considerable degree of latitude in treating the length of that period as a factor in considering whether she should be found to have affirmed her contract of employment at some point after early March. However, in the period between March and August 2020 she continued to work remotely, to discharge her duties in full, to participate in an employees' race awareness WhatApp group and to lead engagement with management on that topic. She was paid and accepted her full salary in that period.

168.3 After 27 August 2020 when she received the report of her complaint, she did not read it until November or December 2020 or take any action in relation to it at all other than her conversation with Ms Nixon at the end of October 2020.

168.4 Her letter of resignation made no reference to the failure to deal with her complaint. She refers to 'looking forward' to continuing to work with Mr Oxley and other staff during her notice period and to leave the finance department in a good condition when she leaves. We reject her submission that her use of the word 'challenging' sufficed as a shorthand record of her dissatisfaction with the omission to deal with her complaint. She certainly did not reserve her position in relation to that matter.

168.5 She continued to work her notice period, during which she collaborated closely with Mr Oxley to recruit a successor to her position, and continued to carry out her daily departmental duties in return for salary payments .

168.6 During all of this period the language used was not consistent with a belief that the respondent had acted in a matter calculated or likely to destroy trust and confidence, and was consistent with an intention on the part of the claimant to continue with her work (we wish to record our view that it was very much to her credit that she took justifiable pride in the work she had done to improve the position in the finance department and sought to hand it over in a good condition to her successor).

168.7 Even at the stage of her Union Rep's letter on 8 December 2020 she did not expressly reserve her personal position in relation to the safeguarding procedure. Rather it stated that her concern was that other staff would be dealt with differently.

168.8 After 10 December until 6 March 2021 the claimant continued to engage with her successor to support her. Although she was not engaging with other employees, she did accept payment.

168.9 She submitted an amended Exit Interview record, and engaged the respondent's formal grievance policy by letter on 14 April 2020.

169. Taking a broad, objective view of these facts we consider that the claimant's conduct was consistent with an intention to remain subject to her contract so that her conduct amounted to affirmation.

Direct Race Discrimination

Applicable Law

170. EqA s 13 provides that (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.

171. The claimant must therefore identify an actual or hypothetical comparator whose circumstances are the same, or not materially different from those of the claimant, but without the relevant protected characteristic: EA s 23(1). That is to say the comparator's circumstances must be sufficient to enable an effective comparison: Hewage v Grampian Health Board [2012] UKSC 37.

172. S 136(2) EqA deals with the burden of proof. If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred.

173. The first step is to determine, on the balance of probabilities, the primary facts proved, including any appropriate inferences which can be drawn from those facts. The burden at this stage is on the claimant and a respondent's explanations are disregarded.

174. If the claimant has proven the facts sufficient to support this conclusion at Stage 1, the burden of proof shifts to the respondent to prove, again on the balance of probabilities, that what happened to the claimant was 'in no sense whatsoever' because of the relevant protected characteristics – in this case race.

175. It is not sufficient for a claimant merely to prove a difference in protected characteristic and a difference in treatment. Something more is required: Madrassy v Nomura International plc [2007] EWCA Civ 33. Unfair or unreasonable treatment on its own is not enough to shift the burden: Glasgow City Council v Zafar [1998] IRLR 36. It is important for the tribunal to stand back from the detail and look at the cumulative picture: Anya v Oxford University [2001] IRLR 377 CA.

176. The test posed by the section is an objective test. The mere fact that a claimant believes they have been treated less favourably does not suffice. There must have been, objectively, less favourable treatment: eg Burrett v

West Birmingham Health Authority 1994 IRLR 7, EAT.

177. A tribunal should expect cogent evidence for the respondent's burden to be discharged. But the respondent only has to prove that the reason was not the forbidden reason, it does not need to show that it acted fairly or reasonably : Law Society v Bahl [2004] EWCA Civ 1070. Tribunals must be careful to test simplistic defences that a respondent was disorganised, inefficient or generally unfair: Komeng v Sandwell MBC UKEAT/0592/10.

178. In determining whether a claim for direct discrimination succeeds, the Tribunal must ask itself in all cases the reason why the treatment complained of occurred, and whether it was because of the protected characteristic: Shamoon v Royal Ulster Constabulary [2003] UKHL 11. If the decision in question was significantly (that is more than trivially) influenced by the protected characteristic, the treatment will be because of that characteristic.

179. The reason why a person acted as he or she did is a question of fact, but their reasons may be conscious or unconscious: CC of West Yorkshire v Khan [2001] ICR 1065 HL (obiter) at paragraph 39 per Lord Nicholls : R (on the application of E) v the Governing Body of JFS and the Admissions Appeal Panel of JFS and others [2010] IRLR 136 SC per Lord Phillips (p) at paragraph 21.

180. Where a tribunal feels able to and does make an explicit finding as to the reason for the claimant's treatment, it is not an error of law to do so, and in so doing the application of the above guidelines on the stage 1 and stage 2 reverse burden of proof approach becomes otiose: Fraser v University of Leicester UKEAT/0155/13/DM; Hewage v Grampian Health Board [2012] IRLR 870 SC.

181. There must be a causal connection between the characteristic and the treatment based on the wrongdoers' conscious or subconscious reason for doing what they did: Nagarajan v London Regional Transport [1999] IRLR 572. It is usually the state of mind of the person carrying out the act which is determinative of the question, but where that person is acting on information or instructions provided by another person whose actions are due to their conscious or unconscious bias, the thought processes of the supplier of the information or instructions must be considered in relation to their own actions rather than those of the person carrying out the treatment directly : CLFIS v Reynolds [2015] ICR 1010.

Analysis and Conclusions

182. The claimant describes herself as BAME.

183. **Act 1:** (Failure to promote to Head of Finance)

184. The claimant did not fail to promote the claimant to the Head of Finance position. There was no such position and none was envisaged within the respondent's professional staffing levels plan. No-one else who was not BAME was appointed to such a post.

185. Further, and as a general observation, the actual comparators relied upon by the claimant by reference to whom her treatment is to be judged as less favourable were not employees whose circumstances were not materially different from those of the claimant to enable an effective comparison to be made. None was in an analogous Manager role in the respondent's professional levels structure.

186. This complaint therefore fails.

187. **Act 2:** (failure to promote training/awareness linked to race/unconscious bias or any other initiative to deal with racism in the workplace which affected the claimant).

188. Summarising our factual findings above: Mr Pett explained that at the relevant time the respondent had not conducted any diversity monitoring and that although there was a Board level EDI working group, employees were not aware of that group or its work. On the other hand on 8 July 2020 [296] the respondent produced a draft document proposing organisational responses to the issues of BLM and anti-oppression, to which the claimant's BAME women's staff group WhatApp group made a written response [302], in August 2020 Mr Oxley and the claimant exchanged information and views on this issue in a WhatsApp exchange, there was a budget for racism awareness training of £5k in 2020. Mr Oxley adopted a suggestion by the claimant to increase the budget for anti-racism awareness work to £17,500 for 2021, although that sum had not been spent by the time the claimant left. Although individual staff training budgets could be spent on awareness training, there was no evidence that such use was promoted by the respondent. There was scepticism in the MT about the efficacy of unconscious bias training so none was provided. In addition the claimant told us that on one occasion on a zoom call Mr Oxley turned away and did not respond to her suggestion that outside resource needed to be brought in to further this issue, but Mr Chaudhri had a post call exchange with her about training providers.

189. We consider that the position was aptly expressed by Mr Chaudhri as being that the respondent, a small organisation, was in a process of organisational learning.

190. We do not accept that as a matter of fact there was a failure to promote race training at all.

191. In any event, the problem with this complaint is that, as Ms Clayton submitted, even if it is accepted that the respondent could have chosen to do more to promote racism awareness training (and although providing such training might be regarded by employers as good practice there is no legal obligation on employers to do so) such a failure would be a general one that applied to all employees. As between the claimant and a hypothetical or any actual comparator who was encouraged to obtain or received training, there was no less favourable treatment of the claimant because of her race. This complaint is therefore rejected.

192. **Act 3:** (failure to deal effectively with the claimant's safeguarding complaint):

193. The relevant facts we have found are set out above. Ms Nixon and Ms Sudtharalingam on the safeguarding side, and Mr Oxley on the line management side each failed in one of more respects to deal with the claimant's complaint properly in accordance with applicable policies and procedures.

194. However, we are satisfied that the reason for the unsatisfactory treatment of the claimant was not because of the claimant's race, and that her race was not a factor in her treatment.

195. This is a case in which we consider that it is possible and appropriate to reach a decision on the facts as to the reason for the treatment of the claimant by these individuals. We remind ourselves of the need for caution when faced with defences that the respondent was generally unfair or inefficient. However we are entirely satisfied that the reason why these individuals each treated the claimant as they did was because of the failure by each of them individually properly to understand or to apply a confusing procedural framework which conflated, or at least failed clearly to distinguish between, on the one hand safeguarding concerns and related roles and responses and on the other hand grievance and disciplinary matters and procedures. The result was that safeguarding confidentiality concerns limited the transfer of relevant information between them, and their concern to keep safeguarding and grievances procedurally separate resulted in inadequate explanations being given to the claimant about her options and about how and by whom the matter was being dealt with.

196. Mr Jones who conducted the grievance investigation reached a similar conclusion about the limitations of the procedural framework.

197. So far as we can tell from the evidence concerning the safeguarding complaint by Ms Kirk against the claimant, this was also dealt with informally without any record or investigation. In this respect it appears that non BAME staff were treated in the same (flawed) way.

198. We therefore reject this complaint.

199. **Act 4:** (Mr Oxley's public dismissal of the claimant on 8-10 September)

200. This claim fails because, as explained above, we find that viewed objectively there was no public dismissal of the claimant by Mr Oxley. We accept his explanations for his conduct.

201. The complaint of Direct Race Discrimination is therefore not well founded and is dismissed.

Harassment

Relevant Law

202. Section 26 of the EA provides (so far as relevant) that:

(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.

203. The unwanted conduct may be intended to violate the claimant's dignity or create the relevant environment, or it may have that effect. Harassment may therefore be either intentional or unintended.

204. The words in the statute describing the relevant effect and characteristics of the environment are salutary. It is important not to encourage a culture of hypersensitivity. The claimant must have felt or perceived their dignity to have been violated, mild upset or offence is not enough: Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT.

205. When assessing the effect of a remark the context in which it is given is always highly material: Land Registry v Grant (EHRC Intervening) [2011] ICR 1390. Nazir and Aslam v Asim and Nottinghamshire Black Partnership UKEAT/0332/09 [2010] ICR 1225

206. A tribunal must consider all of the acts relied upon together in determining whether or not they might be regarded as harassment: Driskel v Peninsula Business Services Ltd [2000] IRLR 151. The conduct must be related to the protected characteristic: *Harvey* para 426.01.

207. In deciding whether conduct is unwanted, some kinds of conduct may be clearly unwanted. But where the tribunal is considering conduct to which a person may be unduly sensitive, the question becomes whether that person has made it clear that he/she finds that conduct unacceptable. Provided that objection would be clear to a reasonable person, any repetition will generally constitute harassment: Whitley v Thompson (EAT/1167/97).

208. Where reliance is placed on the creation of the relevant adverse environment, a tribunal should adopt a two-stage test: Pemberton v Inwood [2018] EWCA Civ 564: (i) Did the claimant genuinely perceive the conduct as having that effect? and ii) Was that perception reasonable ?

209. An environment is a 'state of affairs'. It may be created by a single incident but the effects are of longer duration: Weeks v Newham college of Further Education UKEAT/0630/11.

210. Finally, we note that EA s 212 provides that harassment is not a detriment. A tribunal cannot therefore find that the same conduct was both harassment and discrimination.

Analysis and conclusions

211. The conduct relied upon by the claimant is

211.1 Failure to promote her to Head of Finance [Issues 11.1]; and

211.2 From June 2018 failure to promote training/awareness linked to race [Issues 11.2] .

212. Our factual findings above on these complaints are repeated. In considering our conclusion we have taken both complaints into account together.

213. We find that the claimant's complaint of harassment on the grounds of race is not well founded. Our reasons are as follows.

214. The context of the failure to appoint the claimant to the role of Head of Finance is, was we have said, that no such role existed within the professional levels structure (although we note that the professional development plan remained provisional and envisaged that more work would need to be done in connection with development of operation staff including finance), and critically there were existing plans in place to appoint a Head of Operations to oversee not only the finance function but fundraising and office facilities as well. The claimant was aware of the planned and imminent appointment and did not complain at any time during her employment that that plan was unwanted or unacceptable to her.

215. Even if she held the view that her non-appointment violated her dignity or created the prescribed environment, in our judgment it was not an objectively reasonable view to have held in all the circumstances.

216. In relation to the second complaint, we proceed on the basis, favourable to the claimant, that although we do not consider that there was a culpable failure on the part of the respondent to promote racism awareness training, that the harassment complaint could be made out in principle if the claimant reasonably considered that the respondent's efforts were limited and as so limited amounted to unwanted conduct which had the prescribed effect on her dignity or created the proscribed environment.

217. The claimant emphasised to us that more should have been done to respond to the societal changes which resulted from the death of George Floyd and the rise of the Black Lives Matter movement. In the staff response in July 2020 [302] some concrete suggestions were made, but nothing stated that there was a deadline or urgency to take any particular step, no specific problems were identified which were (or could be) said to necessitate specific or time-bounded management action. The societal changes and increased awareness of issues of race more generally were relatively new developments to which the respondent's management were formulating a response, and considering feedback from staff. The claimant did not make clear during her employment that the claimant's actions amounted in her view to harassment.

218. In all the circumstances, we consider that such a view, if it was held, would not objectively be a reasonable one. The circumstances relied upon by the claimant did not in any event, taken together, create an environment which

could reasonably be perceived as humiliating, offensive, hostile or intimidating.

219. We add at this stage that the claimant's evidence and her submissions before us were that as she had looked more deeply into materials about race and privilege, and reflected on comments made to her by other members of staff and that she had retrospectively come to see the matters which occurred during her employment in a different, and discriminatory, light. Whilst this may explain why she pursued a grievance and brought proceedings later, it tends to show that she was not making clear at the time to those around her that the respondent's conduct in the respects above was unacceptable to her and/or humiliating, degrading or hostile etc.

Indirect Discrimination

Applicable Law

220. Section 19 of the Equality Act 2010 provides as follows:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

221. The burden is on the claimant of proving the PCP and that there is an affirmative answer to the elements in subsection 2 a) b) and c). If the claimant proves that the answer to the foregoing questions is yes, the employer may nevertheless show that the PCP is a proportionate means of achieving a legitimate aim. The burden of establishing that justification is on the employer.

222. The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality, work to the comparative disadvantage of people with a particular protected characteristic … The resulting scrutiny may ultimately lead to the conclusion that the requirement can be justified …". Homer v Chief Constable of West Yorkshire Police [2012] IRLR 601 per Lade Hale. Indirect discrimination can be intentional or unintentional: Enderby v Frenchay Health Authority [1993] IRLR 591 ECJ.

223. The question whether the PCP relied upon is, in fact, a PCP is one of fact for

the Tribunal: Allonby v Accrington and Rossendale College [2001] EWCA Civ 529, [2001] IRLR 364, CA. There is no need for a claimant to show that a person who shares her protected characteristic cannot comply with the PCP.

224. A 'PCP' is no more than a way of doing things: it may or may not be a written process or policy: British Airways plc v Starmer [2005] IRLR 862). The individual elements of provision, criterion and practice are to be given a liberal and purposive interpretation and the question for the Tribunal is whether apparent discrimination results from something which might properly be described by any or all of those labels and if so whether it can be justified: Harrod v CC of West Midlands Police [2017] EWCA 191, [2017] IRLR 539 per Bean LJ and United First Partners Research v Carreras [2018] EWCA Civ 323.

225. But Simler LJ in Ishola v Transport for London [2020] EWCA Civ 112, [2020] IRLR 368, [2020] ICR 1204 cautioned that :

> *"In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP."*.

226. The PCP being complained of must be one which the alleged discriminator applies or would apply equally to persons who do not have the protected characteristic in question: it is not necessary that the PCP was actually applied to others, so long as consideration is given to what its effect would have been if it had been applied. Solitary disadvantage does not give rise to indirect discrimination but it may be appropriate to aggregate a solitary employee with others known to have the same characteristic and known to be potentially affected in the same way — a lone female worker, for example, could claim indirect discrimination on the basis of the way a particular policy would affect a hypothetical group of female staff: Eweida v British Airways plc [2010] ICR 890, CA per Lord Sedley.

227. There is no requirement for a claimant to prove why a PCP puts a group at a disadvantage: Essop v Home Office [2017] UKSC 27) but it is generally necessary for a claimant to adduce evidence tending to show that persons who share her protected characteristic (though not necessarily all of them) are placed at a particular disadvantage by the PCP and that she is also at that disadvantage. The correct approach is first to identify the relevant group disadvantage and then to consider whether the claimant suffered that disadvantage.

228. What constitutes a 'disadvantage' depends on the facts of the case and is not defined in the Equality Act. But we draw assistance from those cases which shed light on the meaning of the word 'detriment' in the Act (see, for example,

Shamoon v Chief Constable of the RUC [2003] IRLR 285). The EHRC Employment Code states that 'disadvantage' is to be construed as 'something that a reasonable person would complain about — so an unjustified sense of grievance would not qualify but it is enough that the worker can reasonably say that they would have preferred to be treated differently': EHRC Employment Code paragraph 4.9. A disadvantage does not have to be quantifiable, and the worker does not have to experience actual loss (economic or otherwise).

229. Proving that the disadvantage affects the cohort of people who share the claimant's characteristic may involve consideration of pools of employees (so called Group detriment), statistical evidence, expert or other evidence.

230. If the tribunal finds that there has been discriminatory conduct the respondent may prove that there is an objective justification for that conduct. The burden is on the employer to provide both an explanation and justification. Generalisations are not sufficient. Operational needs may amount to a legitimate aim. The EAT summarised the principles tribunals must apply in assessing this issue in City of Oxford Bus Services Ltd t/a Oxford Bus Company v Harvey EAT 0171/18, as follows:

231. the objective justification test requires (at a minimum) a critical evaluation of whether the employer's reasons demonstrated a real need to take the action in question;

232. if there was such a need, there must be consideration of the seriousness of a disparate impact of the PCP on those sharing the relevant protected characteristic, including the complainant, and an evaluation of whether the former was sufficient to outweigh the latter;

233. in performing this balancing exercise, the tribunal must assess not only the needs of the employer but also the discriminatory effect on those who share the relevant protected characteristic. Proportionality requires the importance of the legitimate aim to be weighed against the discriminatory effect of the treatment. To be proportionate, a measure must be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so

234. the caveat imported by the word 'reasonably' in the phrase 'reasonably necessary' allows that an employer is not required to prove there was no other way of achieving its objectives. On the other hand, the test is something more than the 'range of reasonable responses' test that applies in unfair dismissal claims

235. when carrying out the requisite assessment, there is a distinction between justifying the application of the rule to a particular individual and justifying the rule in the particular circumstances of the business.

Analysis and Conclusions

236. The claimant asserts the following PCPs (see Issues paragraph 15):-

Promoting staff during their first or second year of employment with the Respondent (Issues 15.1);

237. The respondent's witness evidence, in particular from Mr Chaudhri and Mr Oxley was that there was no general or regular practice of promoting staff during their first or second year of employment. The documentary evidence before us was consistent with there being a structured approach to professional development. Mr Chaudhri explained that promotions from junior grades to Officer grades would be tested against external candidates by competitive interview. He acknowledged that promotion from Officer to Senior Officer status did occur internally on the basis of annual review by the Management Team. But this was a response to a recognised staff retention concern and promotion was responsive to organisational needs, funding availability and individual ability. Mr Chaudhri gave details of promotions of a number of individual staff members which the claimant had relied upon in support of this head of complaint. They indicate, in broad summary, promotions of junior grade staff within one of two years.

238. We find that there was a practice of promoting the most junior grades of staff within one or two years and that this was done as a response to concerns about junior staff retention.

239. However, the only practice which is proved on the facts relates to dealings with junior employees moving up levels to Senior Officer level. The claimant joined the respondent at Manager level. No such practice applied to the claimant and the claimant was not therefore put at a disadvantage by the practice which we have found existed.

Denying / failing to take seriously equal opportunities or diversity training for staff? (Issues 15.2);

240. We have made findings of fact in relation to the steps taken by the respondent in connection with EDI and race awareness training.

241. The claimant has not established in our judgment as a matter of fact that the respondent adopted a practice of either denying equal opportunities or diversity training to staff or of failing to take those things seriously.

Not investigating complaints of race, safeguarding and performance? (Issues 15.3)

242. In relation to not investigating complaints of safeguarding, we have made findings of fact in relation to the respondent's unsatisfactory dealings with the claimant's bullying complaint, which was made and treated as a safeguarding complaint. We have found, in summary, that while there was consideration of the safeguarding criteria, there was a systemic and line management failure to investigate the claimant's complaint of bullying.

243. On the evidence before us Ms Kirk's safeguarding complaint against the claimant In March 2021 appears to have been dealt with in a similar (unsatisfactory) way.

244. We have also taken into account the documents in the bundle relating to Mr Makau's complaint against Ms Kirk and another GTBC staff member [243]. This was a complaint made under the Safeguarding policy to Mr Chaudhri on 18 September 2019 relating to events occurring in August 2019. The claimant's supplementary statement said that this was also reported to Mr Nick Herbert MP. She submitted that this complaint about Ms Kirk's bullying was not investigated. Mr Makau makes a number of other allegations against Ms Kirk's behaviour before the end of his contract in December 2019, but it is not clear when these were made or to whom. Mr Makau's own statement could not be tested and therefore had only little weight. However, his statement does not make clear what he says was or was not done beyond the statement that Ms Kirk bypassed established protocols, engaged senior staff and neglected his right to a fair process. He makes reference in this context to paragraph 9.8.12 which we take to be a reference to the safeguarding policy. However, overall, we did not derive much assistance from the evidence concerning Mr Makau's circumstances which added little to (but did not detract from) the clearer examples of the claimant's and Ms Kirk's treatment.

245. We find that there was a practice of failing to investigate safeguarding complaints relating to bullying and we find also that that practice put the claimant at a substantial disadvantage.

246. However, we are not satisfied on the evidence that the practice (which arose from a defective understanding and application of the safeguarding policy and the role of line management in dealing with bullying) put or would have put individuals (other than the claimant) who identified as BAME at a substantial disadvantage. We find that this was a case in which the claimant was unfairly treated by inept processing of her complaint but this was not done because of her race.

247. In relation to not investigating complaints of performance, the claimant made reference to a Mr Rogers. She suggested that he had been the subject of a complaint about his performance which had not been investigated resulting in his later promotion. Mr Chaudhri said that the claimant's allegations of Mr Rogers' performance were unwarranted. The claimant accepted in cross-examination that she did not have all of the relevant details. There is insufficient evidence to support the claimant's contention.

248. The claimant also relied on an allegation that Ms Kirk had not investigated Mr Makau's performance properly before terminating his contract in December 2019. However, the contemporaneous documentation in the bundle leads us to conclude that his performance was the subject of consideration by Ms Kirk and found by her to be unsatisfactory. She gave a convincing explanation of why a document relied on by the claimant as showing that Mr Makau was performing well did not reflect the substance of his performance, and in the period shortly after the termination of his contract Mr Makau's expressed concerns focussed not on the propriety of the non-renewal of his contract but on matters of outstanding payment.

249. In the circumstances the claimant has failed on the evidence to satisfy the burden on her of proving a PCP of not investigating performance complaints.

250. In relation to the PCP of failure to investigate complaints of race, the claimant said that in August 2020 she brought up the issue of race with Kate Hargreaves, who said that she had had similar experiences to the claimant and that it probably related to sex not race. However, Ms Hargreaves' email of 29 May 2024 recorded that the claimant had spoken to her in August 2020 but that this had been expressly in confidence and that the claimant had not given her permission to discuss her concern with senior management. She says that she considered that there had been a personality clash with Ms Kirk and that, other than generic challenges of being a black woman and that the events arising from George Floyd's death had influenced her world view, there were no specific concerns expressed to her concerning race. In a conversation in December 2020 the claimant had discussed her ambitions elsewhere and been encouraged by Ms.Hargreaves, and had stated that the claimant was seeing everything through a racial lens.

251. An email sent to Ms Hargreaves on 7 August 2020 (the day following the conversation with the claimant) did not express any concerns about this aspect on the claimant's part.

252. The claimant's witness evidence was weak on this matter. She had, understandably given the passage of time, a somewhat uncertain recollection of the detail.

253. On balance we find that the contemporaneous evidence does not support that the claimant made a complaint about race at all that she asked to be investigated. In any event, a single conversation does not in our judgment establish the existence of a practice of not investigating such concerns.

254. We find therefore that this complaint of indirect discrimination on the ground of race is not well-founded.

Detriment Arising from Whistleblowing – substantive claims

255. We preface this section by stating that we have concluded below that the claimant's complaints of detriment arising from the making of a protected disclosure were brought out of time and are dismissed on that ground. We had nevertheless heard evidence and considered the claims and having had the benefit of evidence and detailed submissions, in case we are wrong on the question of time limits we set out our findings and conclusions.

Relevant Law – substantive claims

256. Section 47B of the Employment Rights Act 1996 provides that a worker has the right not to be subjected to any detriment by an employer, a colleague acting in the course of his/her employment or an agent acting in within the employer's authority, on the ground that the worker made a protected disclosure.

257. The burden is on the claimant to show that there was :

a) a protected disclosure;

b) he or she had suffered an identifiable detriment;

c) the respondent, worker or agent had subjected the claimant to that detriment by some act, or deliberate failure to act.

258. If the claimant establishes each of these elements the burden shifts to the respondent to prove that the worker was not subjected to the detriment on the ground that the worker had made the protected disclosure.

Protected disclosure:

259. In order for a disclosure to be a protected disclosure it must satisfy three conditions set out in Part IVA of the ERA: namely:

259.1 it must be a 'disclosure of information'

259.2 It must be a 'qualifying' disclosure — i.e. one that, in the reasonable belief of the worker making it, (i) tends to show that one or more of six 'relevant failures' has occurred or is likely to occur and ii) is made in the public interest; and

259.3 it must be made in accordance with one of six specified methods of disclosure.

260. The ordinary meaning of giving 'information' is conveying facts. There is a distinction between "information" and an "allegation" for the purposes of the Act: per Slade J in Cavendish Monroe Professional Risk Management v Geduld [2010] IRLR 38.

261. Section 43B ERA 1996 sets out the relevant failures that a claimant must prove he/she reasonably believed:

"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the

preceding paragraphs has been, or is likely to be deliberately concealed."

262. Any disclosure of information must further identify, albeit not in strict legal language, the breach of legal obligation relied on: Fincham v HM Prison Service EAT/0925/01 paragraphs 32-33.

263. In relation to whether a disclosure is in the "public interest or not", the Court of Appeal in Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979 provided the following guidance:

263.1 the tribunal has to determine:whether the worker subjectively believed at the time that the disclosure was in the public interest; and

263.2 if so, whether that belief was objectively reasonable.

263.3 There might be more than one reasonable view as to whether a particular disclosure was in the public interest, and the tribunal should not substitute its own view.

263.4 In assessing the reasonableness of the worker's belief, the tribunal is not restricted to the reasons that were in the mind of the worker at the time. The worker's reasons are not of the essence, although the lack of any credible reason might cast doubt on whether the belief was genuine. However, since reasonableness is judged objectively, it is open to a tribunal to find that a worker's belief was reasonable on grounds which the worker did not have in mind at the time.

263.5 Belief in the public interest need not be the predominant motive for making the disclosure, or even form part of the worker's motivation. The statute uses the phrase "in the belief…" which is not same as "motivated by the belief…".

263.6 There are no "absolute rules" about what it is reasonable to view as being in the public interest. Parliament had chosen not to define what "the public interest" means in the context of a qualifying disclosure, and it must therefore have intended employment tribunals to apply it "as a matter of educated impression".

264. In a whistleblowing case where the disclosure relates to a breach of the worker's own contract of employment or some other matter in which the worker has a personal interest, there may be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case. Underhill LJ warned tribunals to be cautious of offending the "broad intent" behind the public interest test, which was to prevent whistleblowing laws being prayed in aid over "private workplace disputes", Four factors were highlighted as "a useful tool":

264.1 The numbers in the group whose interests the disclosure served - the larger the number of persons whose interests are engaged by a breach of their contracts of employment, the more likely it is that there will be

other features of the situation which will engage the public interest.

264.2 The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed. Disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, or where the effect of the wrongdoing is marginal or indirect.

264.3 The nature of the alleged wrongdoing disclosed. Disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people.

264.4 The identity of the alleged wrongdoer. The larger or more prominent the wrongdoer (in terms of the size of its relevant community, that is, its staff, suppliers and clients), the more obviously a disclosure about its activities could engage the public interest, although this principle "should not be taken too far".

265. It is not necessary for the information itself to be actually true. It follows that a disclosure may nevertheless be a qualifying disclosure even if it subsequently transpires that the information disclosed was incorrect : Darnton v University of Surrey [2003] IRLR 133, EAT);

266. The statutory test is a subjective one. It follows that the individual characteristics of the worker need to be taken into account. The relevant test is not whether a hypothetical reasonable worker could have held such a reasonable belief, but whether the worker in question in fact did so: Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4, EAT.

267. The disclosure must be made in one of the ways prescribed in ERA ss 43C to H. A qualifying disclosure that is made to the worker's employer will be a protected disclosure: ERA s.43C(1)(a).

Claimant has suffered an Identifiable detriment

268. A detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment.' : see Shamoon v Chief Constable or the Royal Ulster Constabulary 2003 UCR, HL and Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA.

269. A claimant would normally have to show that he or she suffered a disadvantage (which need not be physical or financial) compared to other workers (hypothetical or real): Shamoon. Someone who is treated no differently to other workers will find it difficult to show that he/she has suffered a detriment; for example see Chattenton v City of Sunderland City Council ET case 6402938/99).

Respondent subjected the claimant to the detriment by an act or deliberate failure to act

270. A claimant may be subjected to a detriment in the form of an act or a deliberate failure to act. But only a deliberate failure to act counts – there must be a

conscious decision made. Whether there was a deliberate failure to act must be viewed in the context of the applicable contractual powers and duties as well as statutory regulation: Abertawe Bro Morgannwg University Health Board v Ferguson 2013 ICR 1108, EAT.

On the ground that the claimant had made the protected disclosure

271. The burden of proving on the balance of probabilities the ground on which the employer (co-worker or agent) (and that it was not therefore on the ground that the claimant had made a protected disclosure) falls on the respondent: ERA s 48(2).

272. The words 'on the ground that' require a causal nexus between the fact of making a protected disclosure and the decision of the employer to subject the worker to the detriment: Aspinall v MSI Mech Forge Ltd EAT 891/01 and London Borough of Harrow v Knight 2003 IRLR 140, EAT. A causal nexus requires something more than a mere connection or link with the protected disclosure. The protected disclosure has to be causative in the sense of being "the real reason, the core reason, the causa causans, the motive for the treatment complained of"'.

273. In Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA, Lord Justice Elias expressed the view (obiter) that although the test in Igen v Wong (applied in the context of discrimination claims i.e: detrimental treatment was 'in no sense whatsoever' on the ground of the proscribed conduct) was not directly applicable to whistleblowing complaints given that it was decided in the context of EU law, the principle which informed Igen, that 'unlawful discriminatory considerations should not be tolerated and ought not to have any influence on an employer's decisions', was 'equally applicable where the objective is to protect whistleblowers, particularly given the public interest in ensuring that they are not discouraged from coming forward to highlight potential wrongdoing'. The words 'on the ground that' therefore require consideration of whether the protected disclosure materially (in the sense of more than trivially) influences the employer's treatment of the whistleblower.

274. It does not matter for the purpose of a S.47B claim whether the employer intends to do the whistleblower harm, so long as the whistleblower has, as a matter of fact, been subjected to a detriment on the ground of the protected disclosure. It is not necessary as a matter of law that the detriment be maliciously motivated: Croydon Health Services NHS Trust v Beatt 2017 ICR 1240, CA.

275. Given the importance of establishing a sufficient causal link between the making of the protected disclosure and the detriment complained of, a tribunal may need to draw inferences as to the real reason for the employer's (or worker's or agent's) action on the basis of its principal findings of fact. The EAT summarised the proper approach to drawing inferences in a detriment claim in International Petroleum Ltd and ors v Osipov and ors EAT 0058/17:

276. the burden of proof lies on a claimant to show that a ground or reason (that is

more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure that he or she made;

277. by virtue of S.48(2), the employer (or worker or agent) must be prepared to show why the detrimental treatment was done. If it (or he or she) does not do so, inferences may be drawn against the employer (or worker or agent) — see London Borough of Harrow v Knight 2003 IRLR 140, EAT

278. however, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.

279. If an employment tribunal can find no evidence to indicate the ground on which a respondent subjected a claimant to a detriment, it does not follow that the claim succeeds by default. If it rejects the reason for dismissal advanced by the employer, a tribunal is not then bound to accept the reason advanced by the employee: it can conclude that the true reason for dismissal was one that was not advanced by either party: Ibekwe v Sussex Partnership NHS Foundation Trust EAT 0072/14.

Guidance

280. In the case of Blackbay Ventures Ltd (t/a Chemistree) v Gahir 2014 ICR 747, EAT Serota QC provided the following guidance to enable Tribunals to properly determine whistleblowing claims:

281. Each disclosure should be identified by reference to date and content.

282. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified.

283. The basis upon which the disclosure is said to be protected and qualifying should be addressed.

284. Each failure or likely failure should be separately identified.

285. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient for the Employment Tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the Employment Tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the Employment Tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a

result of any particular disclosure; it is of course proper for an Employment Tribunal to have regard to the cumulative effect of a number of complaints providing always they have been identified as protected disclosures.

286. The Employment Tribunal should then determine whether or not the Claimant had the reasonable belief referred to in S43B(1) that it was made in the public interest.

287. Where it is alleged that the Claimant has suffered a detriment short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the Claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the Respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.

288. The Employment Tribunal should then determine whether the disclosure was made in the public interest.

Analysis and conclusions

Disclosures

289. As identified in the List of Issues the claimant relies upon five disclosures of information as being protected disclosures:

289.1 Disclosure 1: In September, October and December 2020, the Claimant told Aaron Oxley, by telephone, that as Chief Executive, he and Results had failed to follow up her safeguarding incident. [Issues 19.2.1];

289.2 Disclosure 2: In August 2020, on a Zoom call with Hannah Nixon, the Claimant told her that she had failed to follow up on the Claimant's safeguarding incident and that she had failed to follow the Safeguarding policy. The Claimant told Hannah Nixon that, as the Safeguarding Officer, she had not carried out the role that she was appointed to do. [Issues 19.2.2];

289.3 Disclosure 3: In August 2020, by telephone, the Claimant informed Katie Hargreaves (Head of Finance Committee / member of the main Board of Trustees) that she had reported a safeguarding incident to Aaron Oxley (Claimant's Line Manager and CEO) and Hannah Nixon (Safeguarding Officer) and that they had failed to do anything about the safeguarding report. [Issues 19.2.3];

289.4 Disclosure 4: On 10 December 2020, by telephone, the Claimant verbally told Katie Hargreaves that Aaron Oxley had failed to investigate, and that Hannah Nixon had failed to follow up on her complaint. [Issues19.2.4];

289.5 Disclosure 5: On 5 or 6 March 2020, the Claimant verbally told Hannah Nixon (Safeguarding Officer) that Aaron Oxley had known about the problem with Sarah Kirk for a long time and promised to do something

but had not. The conversation took place in the afternoon, in the small meeting room at the Respondent's office (there are only two meeting rooms; a small and a large one). [Issues 19.2.5]

290. It is convenient to consider these in a different order:

291. We find that Disclosure 5 as articulated by the claimant does not constitute a disclosure of information relating to failures in respect of any of the prescribed in s 43B(1) and is insufficiently clear.

292. We find that the conversation with Ms Hargreaves referred to in Disclosure 3 took place, but we accept the (albeit untested) evidence from Ms Hargreaves that the claimant asked for confidentiality and for Ms Hargreaves not to report anything to the Board of Trustee, and Ms Hargreaves did not do so because of the request by the claimant. This is consistent with the email of 7 August 2020 immediately following the conversation in which the claimant refers to the conversation but not to the disclosure relied upon and to other occasions when the claimant has asked for confidentiality in connection with her complaint. In cross-examination it was put to the claimant that this disclosure did not have 'wider significance' and was only about herself and her complaint against/relationship with Ms Kirk. The claimant fairly accepted that that was the case. We are satisfied that the claimant did not have a subjective belief at the time that the disclosure of the failure to progress her complaint (as she understood the position) was being made in the public interest.

293. We find that the conversation relied upon by the claimant as Disclosure 4 took place. We do not accept Ms Hargreaves' evidence that the claimant asked her on that occasion to keep what she discussed confidential: that is unlikely given that the claimant was setting out in her exit letter her concerns about the operation of the safeguarding policy. We find that the claimant made a disclosure of information relating to a breach of duty (the operation of the Safeguarding Policy in relation to her complaint by Mr Oxley and Ms Nixon) on that occasion which, although not in fact accurate (because the safeguarding element of the policy had been operated) the claimant had reasonable grounds at the time to believe were true. In all the circumstances we find that, as the position had developed in her mind by that time, the claimant had a subjective belief that the disclosure she was making was in the public interest: she was expressing those sentiments in her approximately contemporaneous exit letter.

294. As regards Disclosure 2, the claimant called Ms Nixon on 27 August 2020 [419] but on that call we find that the claimant only asked for a copy of Ms Nixon's notes (which she provided). We find that the claimant did not disclose to Ms Nixon at that time any information that she (or anyone else) had not carried out the role they were appointed to under the Safeguarding Policy. In cross-examination the claimant rejected the suggestion that in referring to August 2020 she was referring to the wrong month but she later said she may have been uncertain about the sequence of events. We find that a conversation did take place with Ms Nixon on 14 October 2020 [420] and at that later meeting the claimant told Ms Nixon that that she was 'a bad safeguarding officer and that she should step down'. Taking it at its highest this was a disclosure of information that Ms Nixon had not carried out her duties as

a Safeguarding officer and we are satisfied that at that time the claimant had a genuine belief in the truth of this statement.

295. As regards Disclosure 1 – the three alleged disclosures to Mr Oxley in September, November and December 2020:-

296. September 2020: We have found that there was a telephone call between the claimant and Mr Oxley on or about 15 September 2020 [197] but she did not refer to her complaint in her resignation email at this time and there is no detail of what was said or that it amounted to a disclosure of information sufficient to constitute a protected disclosure. The claimant has not proved this conversation amounted to a disclosure.

297. November 2020: On 19 November [201] the WhatsApp records reference a phone call about the safeguarding report. We accept that the claimant told Mr Oxley that 'nothing happened' about her Safeguarding report. We consider that this is a disclosure of information concerning a breach of duty in which the claimant had a genuine and reasonably held belief at the time.

298. December 2020: On 8 December 2020 the claimant referred in her exit interview [372] and her exit letter [322] referred in detail to specific 'failings in the way a Safeguarding complaint was handled by management, the board and the SGO'. We find that this was a sufficiently clear disclosure of information relating to a breach of duty by the claimant. We find that the claimant had a genuine belief on reasonable grounds as to the truth of the information. Both documents also reference the claimant's then wider concerns about the failings identified in her case. We find that at that stage (December 2020) she had a genuine belief that she was making the disclosures in the public interest.

299. Having regard to the guidance and the tools in Nurmohammed, considering all of the circumstances in our educated impression, we are satisfied that the claimant reasonably believed that her disclosures to Mr Oxley (Disclosure 1 November and December only) and to Ms Hargreaves (Disclosure 4) were in the public interest because:

    299.1 The claimant was a person who in our judgment regarded compliance with rules as a matter of importance in its own right;

    299.2 The disclosures concerned the operation of a policy designated as a Safeguarding Policy. Although the operation of this policy in the context of workplace bullying complaints was confusing both to those operating it and those at whom it was directed, we consider that the claimant reasonably regarded compliance with it as more than a trivial matter;

    299.3 The persons involved in the failure to act (as the claimant understood the position) included senior people;

    299.4 As against this, the claimant accepted in cross-examination that disclosure 4 did not have 'wider significance' and only concerned herself. However, this is not determinative of the issue. In her Union Rep's letter

of 8 December 2020 she did make specific reference to wider considerations and concerns arising from what she understood to be the failure to operate the Safeguarding Policy correctly. So we consider that she had reasonable grounds for a belief that in disclosing the information to Ms Hargreaves she was making a disclosure in the public interest.

300. In summary, in relation to disclosures of information which might potentially amount to protected disclosures, we have found that disclosures which the claimant reasonably believed were in the public interest took place on 14 October 2020 (to Ms Nixon) - although the claimant does not plead this conversation, and made no application to amend to include it – 19 November 2020 and 8 December 2020 (to Mr Oxley).

Detriments

301. The claimant relies on eleven separate detriments [Reference numbers refer to the paragraphs in the List of Issues]:

21.1.1. Around March / April 2020, roughly when Martin Younan started in the Finance Department, that Hannah Nixon told the Claimant to stay at home to safeguard herself.

21.1.2. In about mid-2020, when Aaron Oxley decided to create the Head of Operations role, he no longer wished for the Claimant to report to him and so created a role to effectively demote her, in circumstances where the Claimant had been carrying out key aspects of the role of Head of Finance for some time.

21.1.3. By August 2020, Hannah changed the written account of that which the Claimant had told her on 6 March 2020 to a biased one in order to protect her friend, Sarah Kirk.

21.1.4. Hannah Nixon and Soha Sudtharalingam (Board Trustee Lead on Safeguarding) kept on referring the Claimant back to Aaron Oxley, despite knowing that that he had failed to investigate the Claimant's safeguarding complaint.

21.1.5. In September / October 2020, Aaron Oxley took Sarah Kirk's side in creating untrue excuses for her.

21.1.6. Aaron Oxley asserted that the Claimant lacked emotional intelligence and did not have the quality to be Head of Finance.

21.1.7. In August / September 2020, Aaron Oxley exited a staff meeting as soon as the Claimant started speaking and, on his return after Claimant had finished speaking, he sarcastically said: "did I miss much?"

21.1.8. On 10 September 2020, Aaron Oxley exited the online group during a Line Manager's training, when the Claimant started to speak.

21.1.9. Between 10 September 2020 – 10 December 2020, at a Line Managers' meeting, Aaron Oxley physically turned away from the camera and

failed to respond when the Claimant spoke directly to him.

21.1.10. In or around November – December 2020, Hannah Nixon (Safeguarding Officer) did not provide the Claimant with important information that she needed in order to complete work on a project to which the Claimant had been assigned.

21.1.11. In or around November – December 2020, Hannah Nixon, after having failed to provide the required information to the Claimant, sought to attack her work ethic and integrity by lying to her Line Manager, Lucy Drescher, who relayed the information to her Line Manager, Aaron Oxley, that the Claimant had said that she would not carry out the work before she left the Respondent's employment.

302. In light of our findings about Disclosures, the detriments in Issues numbered 21.1.1 to 21.1.3, 21.1.6, 21.1.7 21.1.8 21.1.9 cannot have been 'because of' a qualifying disclosure because they occurred before the first such disclosure took place. Therefore, even if it were assumed in her favour that they were detriments and were suffered by her, the claimant cannot succeed in proving that these detriments were in any way caused by a protected disclosure.

303. Regarding the detriment in Issue 21.1.5 (Mr Oxley taking Ms Kirk's side and creating untrue excuses for her), we understood the claimant's reference to 'untrue excuses' to refer to Mr Oxley accepting that Ms Kirk was travelling in February/March 2020 at the time of the payment dispute when she was not. We consider that the claimant misconstrued Ms Kirk's comment about the pub in this context and she has not proved that Mr Oxley made untrue excuses for Ms Kirk. In any event these events pre-dated the first potentially protected disclosure in October 2020. When cross-examined the claimant sought to rely on a second incident in December 2020 when Mr Oxley approved a payment request by Ms Kirk after the claimant had left employment and said she could not recall the incident in September/October. We find that the claimant has not proved that she suffered the alleged detriment.

304. The remaining detriments all concern or include alleged conduct by Ms Nixon.

305. As regards the detriment at 21.1.4 (Ms Nixon and Ms Sudtharalingam repeatedly referring the claimant to Mr Oxley). The evidence before us was that Ms Nixon referred the claimant's first safeguarding complaint to Ms Sudtharalingam on 6 March 2020. This was a first complaint, and Ms Sudtharalingam was involved only once in this complaint. She advised Ms Nixon that the complaint did not need a safeguarding response and should be referred to Mr Oxley for line management resolution. At that stage Mr Oxley had not been involved at all. It cannot logically be the case that Ms Sudtharalingam could have known at that stage that Mr Oxley had failed to investigate the claimant's complaint and there was no evidence of any subsequent involvement by Ms Sudtharalingam or of her referring complaints by the claimant to Mr Oxley. The alleged detrimental conduct by Ms Sudtharalingam is not proved. The conduct alleged in any event pre-dates the first proved disclosure.

306. As regards Ms Nixon, we find that she referred the claimant's complaint to Mr Oxley in March 2020 (predating the disclosure). She could not have known at that stage that Mr Oxley was failing to deal with the complaint. We find that when the claimant spoke to Ms Nixon by phone on 14 October 2020 [419/420]. she was angry and upset with Ms Nixon and informed her (we find) for the first time that Mr Oxley had not dealt with her complaint. However, there is no evidence at all that after that call Ms Nixon referred the claimant back to Mr Oxley. We find that she did not. Ms Nixon's recollection and note of that conversation shared with Mr Jones state that she asked the claimant if there was anything else she could do and that the claimant said that she did not want her to do anything or follow up, and the claimant did not respond to a follow up email. The claimant has not proved that she suffered this detriment.

307. Detriments 21.1.10 and 21.1.11. In her oral evidence the claimant clarified that she was not provided with information necessary to complete the year end invoice for STBP, an educational hosted organisation (with which as we understand Ms Nixon was connected) and she had said that if she did not complete the work that she would get her replacement as Finance Manager to do it in time. She also said that Ms Nixon had told Ms Drescher who in turn mentioned to Mr Oxley that the claimant would not carry out the work before leaving. In cross-examination, she said that Ms Nixon had never complained before and that she did it because the claimant had criticised her work as a safeguarding officer.

308. If the claimant was not in fact provided with information in time and her replacement would be expected to complete the necessary report, we find that the claimant would not and did not suffer any detriment in that respect.

309. We had no evidence directly from Ms Nixon or Ms Drescher on the matter of the alleged mis-statement by Ms Nixon. There is no documentary evidence of this statement being made. There is no reference in the WhatsApp messages with Mr Oxley to any difficulties or complaints against the claimant at this time. On the contrary Mr Oxley was praising the claimant's work ethic (eg: 23/11/2020: "You must be really proud of where you are leaving us": "Yep" [212]). The claimant did not say anything at the time to correct any mis-statement. The claimant's allegation against Ms Nixon – that she deliberately mis-stated that the claimant would not complete work on time because the claimant had made a protected disclosure by way of complaint about Ms Nixon – is a serious allegation. It is not supported by any contemporary material. We also find it implausible that Ms Nixon would have done nothing for a six-week period, then engineered a false criticism of the claimant at a time when the claimant's departure from the organisation was imminent. We find it more likely than not that at some point there was a misunderstanding or a miscommunication in discussions to ensure that a time critical report in which Ms Nixon had some involvement was to be completed on time given the claimant's scheduled departure. We find that the claimant has not proved that she was subjected to these detriments.

310. For the reasons set out the complaints of detriment arising from whistleblowing are not well founded and, if they had not been dismissed for being out of time, we would have dismissed them on the merits for the reasons above.

311. Although it is not necessary given our conclusions, we record that we were satisfied, having regard to the guidance and tools in Nurmohammed, considering all of the circumstances in our educated impression, that her disclosures to Mr Oxley (Disclosure 1 November and December only) and to Ms Hargreaves (Disclosure 4) were reasonably believed by the claimant to be in the public interest:

    311.1 The claimant was a person who in our judgment regarded compliance with rules as a matter of importance in its own right;

    311.2 The disclosures concerned the operation of a policy designated as a Safeguarding Policy. Although the operation of this policy in the context of workplace bullying complaints was confusing both to those operating it and those at whom it was directed, we consider that the claimant reasonably regarded compliance with it as more than a trivial matter;

    311.3 The persons involved in the failure to act (as the claimant understood the position) included senior people;

    311.4 As against this, the claimant accepted in cross-examination that disclosure 4 did not have 'wider significance' and only concerned herself. However, this is not determinative of the issue. In her contemporaneous exit letter she did make specific reference to wider considerations and concerns arising from what she understood to be the failure to operate the Safeguarding Policy correctly. We consider that she had reasonable grounds for a belief that in disclosing information to Ms Hargreaves she was making a disclosure in the public interest.

Time Limits

Applicable Law

312. Section 123 (1)(a) of the Equality Act provides that proceedings may not be brought after the end of a period of three months starting with the date of the act to which the complaint relates or within such other period as the tribunal thinks just and equitable. An act which extends over a period must be treated as done at the end of the period (EqA s 123(3).

313. Section 48 of the ERA provides for a time limit of three months for bringing a whistleblowing complaint from the date of the act or failure to act, unless it can be shown that the acts extended over a period (section 48(4)) or where the act or failure to act is part of a series of similar acts or failures, the last of them (ERA section 48(3)(a)). To establish that acts or failures to act were part of a series of similar acts, the claimant must show some relevant connection between the acts within and those before the three- month period, taking into account all the circumstances including connections between alleged perpetrators, whether actions were organised or concerted and their reasons for doing what was alleged: Arthur v London Eastern Railway Ltd [2006] EWCA Civ 1358 per Mummery LJ.

314. For the purposes of the statutory time limit ERA s48(4) provides that a

deliberate failure to act shall be treated as done when it was decided on and 'in the absence of evidence establishing the contrary, an employer… shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected do the failed act if it was to be done'.

315. When considering whether acts of discrimination (or detriments arising from whistleblowing) extend over a period, the correct focus for the tribunal is on whether the employer was responsible for an ongoing situation or continuing state of affairs in which the complainant or group were treated less favourably: Hendricks v Metropolitan Police Commissioner [2003] IRLR 96.

316. In considering whether to extend time for discrimination complaints brought out of time, the tribunal has a broad discretion. The factors referred to in the Limitation Act 1980 s33 can provide a useful starting point: i) the length of and reasons for the delay ii) effect of delay on the quality of the evidence iii) the conduct of the respondent after the cause of action arose iv) the duration of any difficulty the claimant was experiencing in commencing proceedings after the date of accrual of the cause of action and v) the steps taken by the claimant to get relevant medical, legal or other advice and the nature of the advice received.

317. The test for extending time for Whistleblowing complaints is a stricter test: the claimant must show that it was not reasonably practicable to lodge the claims in time, and that they were in fact presented within a reasonable time. The claimant bears the burden of proof.

318. If claims are brought out of time and time is not extended, the tribunal has no jurisdiction to hear them.

Analysis and Conclusions

Race Discrimination/Harassment complaints

319. The claimant commenced early conciliation on 8 March and completed on 19 April 2021. She presented her claim on 19 May 2021. Claims based on single acts of discrimination under the EqA 2010 which occurred before 9 December 2020 are therefore in principle out of time.

320. The Respondent submitted that:

320.1 Act 1 (failure to promote) occurred at the end of October 2020 and is two months out of time;

320.2 Act 2 (failure to promote training/race awareness) began from June 2018 and is therefore some years out of time;

320.3 Act 3 (failure to deal with the bullying complaint in March 2020) is nine months out of time;

320.4 Act 4 (Mr Oxley's conduct towards the claimant in meetings on 8-10

September 2020) was a one-off event and three months out of time.

321. The claimant submitted that the conduct consisted of continuous and not separate incidents and were "a continuation and materialisation of the treatment of her and black people as a whole within the organisation".

322. Assuming this in the claimant's favour, the final act of discrimination relied upon was nevertheless at least two months out of time.

323. The claimant therefore bears the burden of persuading us that it would be just and equitable to extend time.

324. This issue was not very fully addressed in the course of the hearing. The claimant had not addressed the matter in her witness evidence. We reminded her towards the end of the hearing that it was a matter which she needed to deal with. She provided some oral submissions and additional information in her post-hearing written submission.

325. In that submission she referred to a letter from Ms Blackaby in 2021 saying that the grievance decision was final and there was no further right of appeal as a final straw/trigger point. This was the letter of 30 June 2021 dealing with the outcome of the grievance investigation [442]). However, this cannot have been the trigger because the claimant had already commenced her claim by then.

326. She pointed out that 'fear can act as a paralyser, it can stop actions permanently or delay progress' and that she was led to questioning herself and her conclusions. She also stressed that she was suffering from anxiety, stress and lack of self-belief in her judgment and conclusions. She said that she had had five support sessions to combat her anxiety in August/September 2021. There are references in the bundle [eg 341; 378; 441] which support a conclusion that the claimant was emotional, distressed and found it difficult to articulate her complaints clearly. Also, as we have observed above, the claimant told us that during lockdown she had looked more deeply into materials about race and privilege, and reflected on comments made to her by other members of staff and that she had retrospectively come to see the matters which occurred during her employment in a different, and discriminatory, light.

327. In all the circumstances we consider that this would be a case in which it would be just and equitable to extend time to allow the claimant to bring the discrimination claims. Our reasons are as follows.

    327.1 there was sufficient connection between the events as alleged that they should be regarded as a continuing state of affairs. In particular there was a continuing connection through Mr Oxley;

    327.2 the final acts in this series occurred in late October 2020, only some two months out of time. This is a significant but not excessive period;

    327.3 Although unsupported by any medical evidence the claimant explained that she was affected by stress and anxiety and loss of self-confidence

leading her to question her conclusions about race discrimination, and that those conditions progressed to support sessions. This provides at least some explanation for hesitation and delay, although her explanation that she was triggered to act by Ms Blackaby's letter does not make chronological sense;

327.4 The claimant, with the respondent's knowledge and acquiescence, was continuing to provide support to her replacement until early March 2021;

327.5 She was given permission by the respondent to take some time to formulate concerns in an amended exit interview document. She completed this 4 March 2021 and commenced ACAS conciliation shortly after that on 8 March 2021. She also raised a grievance concerning discriminatory conduct on 14 April 2021. She was therefore pro-active in the process more widely.

327.6 In response to the grievance notice the respondent indicated that it would be conducting an independent inquiry. By that stage the respondent must have been on notice that a claim was likely and all potential witnesses and documents were available. The adverse impact on the quality of the respondent's evidence is limited for that reason.

327.7 The claimant appears to have received some assistance from her union, and she told us that she had a barrister who prepared a ten-page document to assist her which she provided to Mr Jones, the investigating barrister. But we have no further detail of the content or timing of that advice. This is a neutral factor.

328. However, for the reasons set out above we have concluded that the conduct relied upon by the claimant did not, or was not proved to constitute proscribed discriminatory conduct.

<u>Whistleblowing complaints</u>

329. Given the dates of conciliation and presentation of her complaints, to be within three months the whistleblowing detriment claims must relate to conduct occurring on or after 9 December 2020 unless the time is extended.

330. We consider that the disclosures relied upon were all linked to the claimant's belief that respondent was failing properly to operate the safeguarding policy. Although the failings were by different people and there was no evidence of collusion/co-ordination, the breach identified was the same one, and Mr Oxley was both a participant in the deficient process and the CEO. The disclosures and any detriments fall to be treated as part of a series of similar acts so that the relevant date is the date of the last of the alleged detriment. The times of the last detriments alleged were 'November/December'. No more precise date can be identified but the nature of the alleged detriments (that Ms Nixon said the claimant would not complete a report before leaving) must have occurred on a date before the claimant's last day in post on 9 December 2020.

331. These claims are therefore out of time unless the claimant can satisfy us that it was not reasonably practicable to bring the claims in time.

332. In light of the evidence and all the circumstances before us, we are not satisfied that it was not reasonably practicable for the claimant to bring the whistleblowing detriment claims in time. Our reasons are as follows.

333. In favour of extending time, the claimant continued to provide support to her successor until March 2021, made use of the grievance machinery and was notified that her complaints, including that her safeguarding complaint would be investigated. She was contacted by Mr Jones [354] and the respondent [356] in late April/early May 2021 advising her of the investigation. Both responses were silent as to the effect of the investigation on time limits, although by that time the claimant had already concluded conciliation as, we infer, a precursor to bringing a claim.

334. The claims are also only slightly out of time, a matter of weeks at most because the last conduct in the series took place at some uncertain point before her last day.

335. As against this the claimant did not adequately explain to us why it was not reasonably practicable for her to bring the proceedings in time. She made submissions about stress, anxiety and fear inhibiting her decision-making, and as we have said above, although not supported by medical evidence, there were corroborating statements made by others and she was specific about support counselling attendances, so we accept those statements at face value. However, these conditions are not sufficient to explain why the claimant was not able to commence proceedings within time. She had had the assistance of a union representative to draft a detailed letter about the failure to operate the safeguarding policy on 8 December 2020 [322], she had amended her exit interview in some detail to outline her concerns by 4 March 2021 [327]. She had commenced ACAS conciliation on 8 March 2021, She formulated a letter of grievance by 14 April 2021, and she was able to prepare a very detailed summary of her complaints for Mr Jones in early May 2021. Against that background we consider that she has not proven that it was not practically possible to issue proceedings due to any mental stress, condition or indisposition.

336. The claimant also submitted that she could not make claims when she did not understand what was happening to her, and did not understand the law. However, she was not specific about what she did not understand and when she sought advice about it. She is an educated person with a professional accounting qualification. She clearly had the assistance of her workplace union representative in December 2020. She had formulated a legally coherent and detailed letter of grievance on 14 April 2021. She told us also that she had had assistance from a barrister who had prepared a ten-page legal summary which she had provided to Mr Jones. It is not clear when this advice was sought or provided. Given that she had apparently sought and had access to advice, it is not clear why she could not have made inquiries about the time limits for bringing a tribunal claim and what grounds might be open to her. She did not state that she was wrongly advised about time limits or otherwise. She did not satisfy us that it had not been reasonably practicable to bring these claims in time because of ignorance of the law.

337. We find therefore that the complaints of detriment arising from whistleblowing are out of time and the tribunal lacks jurisdiction to determine them.

338. As stated above our consideration of the time-limits issue took place at the end of our deliberations. By that stage we had considered the merits of these claims in detail and we have recorded the reasons why we would have rejected the whistleblowing claims on their merits in case our conclusion in relation to time limits is wrong.

Employment Judge Cox

25th July 2024

Judgment sent to the parties on
30th July 2024

For the Tribunal Office

Public access to employment tribunal decisions

Judgments (apart from judgments under rule 52) and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.