EMPLOYMENT TRIBUNALS

Claimant: Miss Georgia Sylvester

Respondent 1: Notley Abbey Ltd

Respondent 2: John Holmes

Heard at: Bury St Edmunds (via CVP)

On: 29, 30 & 31 May, 6 September 2024
9 September, 1 & 4 November 2024 (in chambers)

Before: Employment Judge Graham

Members: Mrs J Hancock
Mr D Wharton

Representation
Claimant: Miss S Bewley, Counsel
Respondent: Mr J Munro, Solicitor

RESERVED JUDGMENT

It is the unanimous decision of the Employment Tribunal that:

1. The complaint of direct race discrimination succeeds.
2. The complaint of harassment related to race succeeds.
3. The complaint of victimisation succeeds in part.
4. The claim for unauthorised deductions is dismissed upon withdrawal.
5. The matter will now proceed to a remedy hearing.

REASONS

Introduction and procedural history

1. By ET1 claim form dated 20 July 2023 the Claimant brought complaints of direct race discrimination, harassment related to race, victimisation, unfair dismissal and other payments. The claim was brought against seven Respondents. An ET3 Response was lodged denying the claims.

Following a private preliminary hearing for case management on 16 January 2024 the complaint of unfair dismissal and the claims against five of the Respondents were dismissed upon withdrawal. The claim proceeded against the First Respondent as the Claimant's employer and the owner of the Harper Hotel in Norfolk where the Claimant worked, and against Mr John Holmes who is a manager at that establishment. ACAS Early Conciliation took place between 13 June and 11 July 2023.

2. The legal issues for determination were clarified at that preliminary hearing, however they required some minor refinement at the start of this hearing as the Claimant inserted that she had been constructively dismissed as a result of discrimination which had been incorrectly left out of the agreed list of issues. It was confirmed that the Claimant was saying that the acts of discrimination relied upon were breaches of the implied duty of mutual trust and confidence, and as such her constructive dismissal was also an act of direct discrimination, harassment and victimisation. Mr Munro for the Respondent agreed the issues. The Claimant withdrew her complaint about other payments.

3. At the start of the hearing we received a hearing bundle of 386 pages, an opening submission from Ms Bewley, and witness statements were received from the following people for the Claimant:

    i. Two from the Claimant
    ii. Matt Woodburn (current Maintenance Manager)
    iii. Dan Herbert (current Head Chef)
    iv. Jacob Perkins (former Food and Beverage Manager)
    v. Yasmeen Salahudeen Hashim-Caldwell (former Restaurant Manager, now Wedding and Event Coordinator)

4. For the Respondent we received witness statements from:

    i. Sam Cutmore-Scott (Managing Director)
    ii. Joanne Cutmore-Scott (Owner)
    iii. John Holmes (Duty Manager)
    iv. Yasmeen Salahudeen Hashim-Caldwell (former Restaurant Manager, now Wedding and Event Coordinator) [provided on 6 September 2024]

5. The hearing had been listed for four days from 28 to 31 May 2024, however we started on 29 May due to lack of judicial resource. The Respondent applied at the start of the hearing for it to be postponed so that it would not go part heard, however we refused the Respondent's application. The hearing started on 29 May 2024 and all of the witnesses gave evidence during the allocated time save for Ms Hashim-Caldwell who was unwell, and Mr Holmes as we ran out of time.

6. The hearing was relisted for 6 September 2024 where we heard evidence from Mr Holmes and also closing submissions. In the interim the Respondent produced a witness statement from Ms Hashim-Caldwell. We asked the parties how they wished to proceed given that the witness had provided a statement for both sides, however having read them there was no contradiction between the two. Both parties informed us that the

evidence could be taken as agreed and there was no need to declare Ms Hashim-Caldwell a hostile witness, nor to examine her.

7. A witness order was produced for Mr Perkins as he now works for a new employer.

8. The hearing was conducted via CVP and there were no issues with the connection although Mr Holmes experienced problems accessing the documents on the laptop as no-one had prepared a second screen or printed materials for him in advance. Several breaks were given in order for Mr Cutmore-Scott to set up a second screen for Mr Holmes and then to make the documents available for him. Mr Holmes gave part of his evidence from one of the hotel bedrooms and we had to break as the hotel wanted to give the room to a guest. Another room was found during that final break and his evidence was completed swiftly.

9. Closing submissions were delivered orally late on the afternoon of 9 September, and we received written and oral submissions from Ms Bewley. The written submissions from Mr Munro comprised of the list of issues and he then delivered oral submissions.

10. We did not hear witness evidence from four people referred to in the issues. The first was Jordan (surname unknown) who was the former Bar Manager and who had left the hotel at some point in 2021. Caroline Wilson (Assistant Manager) was not called although she remains employed and was available. Jules Keirle (former General Manager) was not called although he has recently left the hotel but remained contactable. Amy Wilmott (former Operations Manager) was not called and we understand she has left the hotel.

11. We enquired as to the reasons why these people had not been called and we asked whether we were to be asked to draw any inferences, and if so, what they were. As to the reasons for not calling them, Mr Munro explained it had not been thought necessary although the Tribunal could call Ms Wilson and Mr Keirle if we wished. We explained that it is not for the Tribunal to direct who the Respondent should call and we declined to call them. Ms Bewley said that the Claimant would invite us to draw a negative inference with respect to Ms Wilson and Mr Keirle, both of whom were contactable, and she invited us to infer that they were not called as the Respondent formed the view that their evidence would not have been helpful.

12. We will indicate in the judgment below where we have drawn an inference and we will explain why. We make it clear that, following the guidance of the Supreme Court in ***Efobi v Royal Mail Group Ltd*** **[2019] ICR 750** we have not drawn a negative inference at the first stage as the Respondents' explanation is to be ignored at that stage. We have looked to see whether a *prima facie* case has been established with each issue first before going on to decide whether or not to draw a negative inference.

List of Issues

13. The agreed list of issues we had to determine are set out below. We have struck through the allegation which was not pursued which concerned an alleged comment made by the Second Respondent.

1. Time Limits

   1.1 Were the complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide the following.

   1.2 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which one or more of the complaints relates? The 30 March 2023 incident is within the prima facie time limit.

   1.3 To the extent that one or more of the acts were on their own not brought within three months, was there conduct extending over a period?

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

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

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

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

2. Direct Race Discrimination (Equality Act 2010 s13)

   2.1 The claimant is of mixed heritage. Her mother is white British and Father is Black Caribbean.

   2.2 With regard to all complaints other than the complaint as to being passed up for promotion, the Claimant's comparator is a hypothetical white individual who had performed their workplace duties in a comparable way to the Claimant. The Claimant's comparator with regard to the complaint as to being passed up for promotion is Polly Mills or alternatively a hypothetical white individual who had performed their workplace duties in a comparable way to the Claimant.

   2.3 Are one or more of the following allegations proved?

      2.3.1 In November 2021, did Jordan [surname unknown] state, "I want every fucking foreigner out of my Country"?

      2.3.2 In Summer 2022, did the Second Respondent state, "the blacks need serving outside" and "I don't know what they are meant to be called nowadays"?

      2.3.3 In July 2022, did the Second Respondent whilst discussing drug addicts state, "all you lot are" and "all you black people"?

      ~~2.3.4 In 2022 did the Second Respondent state, "Oh trust me, I'm just playing a game when it comes to you."?~~

2.3.5 In July 2022, did the First Respondent fail to offer the Claimant promotion (a) when Polly Mills resigned and/or (b) during the period when Polly Mills' role as Reception Manager remained unfilled and/or (c) when Polly Mills was brought back on a "temporary" basis in circumstances where an appropriate comparator would have been offered promotion?

2.3.6 On 30 March 2023, did the Second Respondent state, "well, that's just a nigger in a woodpile"?

2.3.7 The Claimant was constructively dismissed on 24 April 2023.

2.4 Was that less favourable treatment?

2.5 The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

2.6 If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else (an appropriate comparator) would have been treated.

2.7 If so, was it because of the Claimant's Race?

3. Harassment related to Race - (Equality Act 2010 section 26)

3.1 Are one or more of the following allegations proved?

3.1.1 In November 2021, did Jordan [surname unknown] state, "I want every fucking foreigner out of my Country"?

3.1.2 In Summer 2022, did the Second Respondent state, "the blacks need serving outside" and "I don't know what they are meant to be called nowadays"?

3.1.3 In July 2022, did the Second Respondent whilst discussing drug addicts state, "all you lot are" and "all you black people"?

~~3.1.4 In 2022 did the Second Respondent state, "Oh trust me, I'm just playing a game when it comes to you"?~~

3.1.5 On 30th March 2023, did the Second Respondent state, "well, that's just a nigger in a woodpile"?

3.1.6 The Claimant was constructively dismissed on 24 April 2023

3.2 If so, was that unwanted conduct?

3.3 Did it relate to Race?

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

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

4. Victimisation (Equality Act 2010 section 27)

4.1 Did the Claimant do a protected act as follows:

4.1.1 in November 2021, raise a verbal grievance; and/or

4.1.2 in July 2022, raise a verbal grievance; and/or

4.1.3 on 31 March 2023, raise a grievance in writing against the Second Respondent; and/or

4.1.4 on 10 April 2023, appeal the grievance.

4.2 Did the First Respondent believe that the Claimant had done or might do a protected act as above.

4.3 Did the First Respondent do the following things:

4.3.1 failed to investigate or redress the grievances

4.3.2 failed to prevent the Claimant from being harassed by properly investigating and/or taking any or any appropriate disciplinary action and/or arranging for the Second Respondent to undertake equality training and/or apologising to the Claimant and/or removing the Second Respondent from the Claimant's areas of work and/or implementing procedures for improving race relations within the workplace and/or taking any steps whatsoever;

4.3.3 by Caroline Wilson stated "that's not good is it" following the grievance in November 2021, rather than taking any, or any proper, action in relation to the allegation;

4.3.4 by Amy Wilmot stated: "I don't know why you are getting upset, you are not dark enough" following the Claimant raising a grievance;

4.3.5 by Ms Wilson stated, "it was just a generational thing" and "just a joke" following the Claimant raising a grievance;

4.3.6 by Caroline Wilson and others informed the Claimant's former colleagues whilst the Respondent was carrying out the investigation in March 2023, that there was no truth in the Claimant's allegations, before concluding any real investigation into such truthfulness.

4.3.7 Constructively dismiss the Claimant on 24 April 2023

4.4 By doing so, did it subject the Claimant to detriment?

4.5 If so, was it because the Claimant did a protected act?

4.6 Was it because the First Respondent believed the Claimant had done, or might do, a protected act?

5. Remedy

5.1 What financial losses has the discrimination caused the Claimant?

5.2 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

Findings of fact

14. From the information and evidence before the Tribunal it made the following findings of fact. We made our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgment all the evidence which we heard but only our principal findings of fact, those necessary to enable us to reach conclusions on the issues to be decided.

15. Where it was necessary to resolve conflicting factual accounts, we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against any contemporaneous documents. We have not referred to every document we read or were directed or taken to in the findings below, but that does not mean they were not considered.

16. The Claimant was employed by the First Respondent as a Reception Supervisor based at the Harper Hotel in Langham, Norfolk. The Claimant's employment commenced on 14 June 2021, and it ended on 24 April 2023.

17. The First Respondent is a business owned by Joanne Cutmore-Scott and her husband and they purchased the Harper Hotel in 2017 but it did not open for business until 2021. Sam Cutmore-Scott is the son of the owners and he is a Managing Director of the First Respondent.

18. It is fair to say that the allegations of race discrimination directed at the First Respondent have upset Mr Cutmore-Scott and Mrs Cutmore-Scott, as they informed us that the family had previously been involved in setting up a non-profit offshoot from the family's headhunting business to focus on increasing the representation of women and ethnic minorities on boards. Some of this upset is readily apparent in some of the things which Mr Cutmore-Scott says about the Claimant in his witness statement which will be addressed later in this judgment. Nevertheless, as is clear from the list of issues, none of the allegations in this claim are against either of them personally, although as the senior managers and owners of the First Respondent they are ultimately responsible as Mrs Cutmore-Scott noted in her witness statement.

19. It was clear from the written and oral evidence of the witnesses who worked at the hotel, including the Claimant, that they enjoyed their roles and had

many good things to say about working there. It was also apparent to us that the Claimant and Mrs Cutmore-Scott were fond of each other. The message we continually heard from the Claimant's witnesses was that they were upset that complaints about discrimination or harassment were not acted upon.

20. At the time of the facts giving rise to this claim, the Claimant was a single parent, and she had suffered from recurrent anxiety and depression for a number of years for which she has obtained medical treatment. The Claimant is of mixed heritage as her mother is white English and her father is black Caribbean. The Claimant gave evidence to the Tribunal about her grandparents who came to live in the United Kingdom from Saint Lucia some years ago. It is clear that the Claimant was an ambitious member of the First Respondent's staff and she was well respected by many of her former colleagues, some of whom have attended this Tribunal hearing to give evidence in support of her claim even though she left over a year earlier. A number of these witnesses remain employed by the First Respondent in managerial roles.

21. The First Respondent had in place a personal harassment policy and procedure, and also an equality, inclusion and diversity policy which applied to staff at the hotel. This was a company wide policy. The harassment policy provides that harassment and victimisation are unacceptable and will not be tolerated, and it sets out the legal definition and provides examples of unwanted conduct. The policy goes on to state that staff who wish to complain about their treatment can utilise the grievance policy or they may raise the matter informally with a senior colleague as a confidential helper. The policy goes on to set out how a formal complaint will be dealt with including separating the complainant and alleged harasser and transferring the latter or suspending them on contractual pay pending an investigation.

22. The equality, inclusion and diversity policy sets out that discrimination is unacceptable, and it states that staff will be treated with dignity and respect, and that breaches of the policy will lead to disciplinary proceedings and possibly disciplinary action and dismissal. The policy states that senior staff will receive training on the policy and that promotion will be in line with the policy.

23. Contrary to the policy, no equality or diversity and inclusion training was provided for staff at the hotel (irrespective of grade) until it was introduced after April 2023 following the outcome of the Claimant's grievance by which time her employment had ended. Mr Cutmore-Scott told us that the training had not been provided as the family were present on site and the managers shared their values.

24. The Second Respondent is employed by the First Respondent as a Duty Manager at the Harper Hotel, and his employment commenced in June 2022.

25. The management situation within the hotel was in a state of flux after opening which meant that the Claimant reported to a number of people including Mr Jules Keirle the General Manager.

26. At the time of her arrival the Claimant had a lot of experience in the industry gained from a previous role and she was clearly hoping to progress her career at the hotel. The Claimant's role was based on the reception front desk which operated as a central hub at the hotel where both customers and staff would gather throughout the day. The Reception Manager was Polly Mills.

November 2021 - comments about foreigners

27. During November 2021 the Claimant was having a conversation at work with a colleague named Jordan who was the then Bar Manager. Jordan's surname has not been confirmed in these proceedings and he will therefore be referred to by his first name. The Claimant says that during the conversation Jordan said words to the effect that *"I want every fucking foreigner out of the country."* The Claimant says that she immediately challenged him on this and explained that her family came from abroad and she asked him not to say it again in her presence.

28. The Claimant says that on a second occasion around that time Jordan attended the reception to collect an iPad and he made a comment about a colleague from Poland who worked in housekeeping whom he referred to as a foreigner. At that time the Claimant was with Ms Hashim-Caldwell who she says challenged Jordan on his use of language to which he replied words to the effect that *"watch me, I'll call them whatever the fuck I want."*

29. The Respondent concedes in its Response that the comments were made as does Mr Cutmore-Scott in his witness statement.

30. The Claimant and Ms Hashim-Caldwell were concerned by Jordan's comments and made complaints about him to senior managers. The Claimant complained to Caroline Wilson (Assistant Manager) who said replied *"that's not good is it"* and said that she would speak to Mr Keirle (General Manager). The Claimant says that as Mr Keirle did not discuss the matter with her she then raised the issue with Amy Willmott (Operations Manager) who said that Jordan had been spoken to but it was a *"he said she said"* so there was nothing that could be done.

31. Ms Hashim-Caldwell also complained to Ms Wilson and Mr Keirle, however neither of them conducted an interview or investigation with her about the matter either.

32. We did not have the benefit of Ms Wilson, Ms Wilmott, or Mr Keirle as witnesses. We do not at this stage draw a negative inference from that. We however accept the Claimant's version of events as to what was said by Ms Wilson and Ms Wilmott as the Claimant has been consistent not only in her evidence to this tribunal, but also as set out in the contemporaneous documents in the hearing bundle. The Claimant's version of events has not changed, and as will be indicated below, she has been honest and open about things she could not be 100% sure about. The Claimant has not, in our view, presented as someone who is prone to exaggeration or invention.

33. Mr Cutmore-Scott in his witness statement said that *"I understand that Jordan did indeed utter the phrase that Georgia mentions that the team immediately undertook a formal grievance process and that this resulted in*

him receiving a formal warning. He was not a well-liked member of the team and has not been with us for a long time now. This utterance does not reflect any overall company position and was dealt with promptly and properly."

34. In his oral evidence Mr Cutmore-Scott explained that Jordan had been spoken to and was issued with a warning about the incident however he was unable to provide any disclosure of this because he said that the Respondent had subsequently changed HR systems and only carried across the data about existing staff and there was no way to access the historic data.

35. We do not accept Mr Cutmore-Scott's version of events. We find it hard to believe that there is no accessible record of this matter, moreover we note that the Respondent has failed to provide other relevant disclosure in this matter, specifically Ms Hashim-Caldwell's emailed complaint to Mr Keirle, as well as a copy of the Second Respondent's alleged witness statement produced after the Claimant's grievance (addressed below).

36. In addition Ms Hashim-Caldwell said in her first statement that she understood that Jordan left of his own accord, not because he was subjected to any kind of disciplinary procedure. The Respondent chose to agree her evidence.

37. As such, given the consistency of the Claimant's witness evidence, and the unchallenged corroboration from Ms Hashim-Caldwell, we prefer the Claimant's evidence and we find that no investigation was conducted into those complaints, Jordan was not disciplined, and that he left the Respondent of his own choice with no action having been taken against him having made those offensive remarks about foreigners.

Not dark enough to be offended comment

38. The Claimant says that when she complained to Ms Willmott in November 2021 about Jordan's comment she told her that *"she was not dark enough to be offended."*

39. The Claimant complained about the comments from Ms Wilmott in her written grievance of 29 March 2023. The notes of the interview with Mr Keirle record the Claimant having raised it in her interview with him. The outcome letter of 4 April 2023 dismissing the grievance in full makes no mention of the complaint. The Claimant raised the matter again in her written grievance appeal and again in her appeal interview with Anna Lisa DeVoil on 3 April 2023. The appeal outcome letter of 2 May 2023 which dismissed the appeal (save for one procedural matter) made no reference to this complaint. This matter was one of the issues to be decided yet no witness was called by the Respondent to address it.

40. We find that Ms Wilmott did say to the Claimant in November 2021 that she was not dark enough to be offended by Jordan's comments. The Claimant has been clear and consistent on this matter and repeatedly raised this with the First Respondent which failed to address it.

June 2022 – shouting and swearing incident

41. On 5 June 2022 Mr Keirle issued the Second Respondent with a verbal warning for misconduct following an incident the day before whereby he had sworn at a receptionist named Katherine and the Claimant. The misconduct had been admitted by the Second Respondent. In brief, the Second Respondent had shouted *"you are taking the piss, you need to be in there working"* towards Katherine and the Claimant after seeing them having a discussion with Ms Wilmott in the staff area at around 3:45pm that day. Katherine was on shift however Ms Wilmott and the Claimant had finished their shifts at around 3pm that day. The Second Respondent had been frustrated and annoyed because a guest had asked him to order a taxi but he had been unable to do so and he required help.

42. The incident was witnessed by hotel guests who informed Matt Woodburn the Maintenance Manager who was also informed about it by the Claimant. Mr Woodburn remains employed by the Respondent but attended the hearing to give evidence in support of the Claimant. The Claimant and Katherine also informed Mr Woodburn of what happened, and he then emailed Mr Keirle to make him aware.

43. The Second Respondent issued an apology to both Katherine and the Claimant and in his witness statement he confirms that at the time he was exasperated and angry as he had expected Katherine back from her break, however he recognised that the comment was offensive, and he felt embarrassed and ashamed by what had happened which he said was out of character.

44. We note that in his evidence, notwithstanding his apology to the Claimant, the Second Respondent says it was the Claimant who had immediately contacted other staff to give them her opinion on the incident, and that Mr Woodburn's email was sent on hearsay from *"a member of staff who resented me ever being made duty manager, and who was passive aggressive in making my time with her on reception, as problematic at times as she could"* and further that the complaint *"was spearheaded by the clique that had developed in the team, not by Katherine who had also accepted my apology."*

45. The Tribunal found those sentences in the Second Respondent's statement to be particularly revealing as he appears to hold resentment towards the Claimant over this matter notwithstanding his earlier apology and admission that he had been in the wrong.

46. The Second Respondent's oral evidence to the Tribunal about this matter was confused and contradictory. On the one hand the Second Respondent admitted the incident and expressed remorse but then went on to accuse the Claimant by suggesting that the incident had not been witnessed by customers (contrary to Mr Woodburn's evidence) and that it was the Claimant who had gone around telling people about it. The Second Respondent denied that there was a clique (involving or led by the Claimant) contrary to his own witness statement, he suggested it was more of a team, before then going back to say that there was a clique.

47. As will be indicated below, we had serious concerns about the reliability of the Second Respondent's evidence throughout this hearing as it was for the most part contradictory and equivocal and at times implausible. On the one

hand, in his evidence (and in the grievance appeal process) the Second Respondent suggested he liked the Claimant, their relationship was wonderful and he got on well with her, and on the other hand his witness statement before us alleged that she was part of a clique, she was passive aggressive towards him, resented him, and sought to make his time at work as problematic as she could.

48. We have preferred the evidence of Mr Woodburn over that of the Second Respondent about this incident. Mr Woodburn remains employed by the First Respondent as a manager, his evidence has been clear, consistent and measured throughout, he has no obvious reason to provide us with inaccurate evidence, and we found him to a very reliable witness of fact. Conversely the evidence of the Second Respondent was generally unsatisfactory as we have indicated.

49. In any event it is clear that there was an incident where the Second Respondent had shouted and used offensive language at work and that he had been disciplined for it. It is accurate that this was an example of the First Respondent dealing with a complaint which had been lodged against a member of management, although we note that there was no element of discrimination alleged.

Failure to promote

50. Ms Mills (Reception Manager) left the First Respondent on around 14 June 2022 and soon after started her own business. Ms Mills was not replaced and her functions were distributed amongst staff, particularly to the Claimant. It appeared that the Claimant had picked up the bigger share of Ms Mills' role as she took on duties such as marketing, planning events and other functions, work for the spa and other venues as well. Mr Cutmore-Scott who gave evidence in these proceedings disputed that the Claimant provided training, although as he conceded that he had shown a new starter how to use a booking system, we find that the Claimant was to some degree involved in training.

51. Following the departure of Ms Mills, the Claimant had hoped to be appointed into her role as she felt that she had taken on much of her responsibilities and believed that she was performing the role well.

52. We heard unchallenged evidence that the Claimant was working additional hours and had even changed her hours and re-arranged childcare in order to accommodate the needs of the hotel. The Claimant was frustrated that she was not promoted into that role, and whilst she did not raise this directly with the owners at the material time, she says that she spoke about it regularly with Mr Keirle and one occasion she said that she would be content just for her job title to be changed rather than having a pay rise. The Claimant says that Mr Keirle informed the Claimant that the First Respondent was not looking for anyone to replace Ms Mills.

53. This did not occur and whilst the Claimant remained open minded and confused at first, over time and following discussions with friends and her father, she began to consider whether it was her mixed-race heritage which was the cause as she struggled to find another reason why she had not been promoted. The Claimant did not raise the issue of her race being a

reason for her non-promotion at the time. Even when the Claimant subsequently made complaints about comments made to her by the Second Respondent she did not directly raise the issue of promotion in her original written grievance. The Claimant's evidence on this failure to raise the matter was that it was not an easy thing to raise at the time.

54. The Claimant went off sick from work following an incident on reception with the Second Respondent on 30 March 2023 addressed below. In her absence the First Respondent brought back Ms Mills. The Claimant says that Ms Mills was brought back as Reception Manager, as does Ms Hashim-Caldwell. We have been provided with emails from Miss Mills upon her return which show her job title as reception manager and also a screenshot from WhatsApp which shows the title manager under her name. We were referred to some work rotas which showed the same.

55. Mr Cutmore-Scott's evidence was that he had made the decision in conversation with Mr Keirle that the role of Reception Manager was not needed when Ms Mills left. It was put to him that in the grievance interview Ms Wilson had said that the role was not needed but the First Respondent had decided that the Claimant would not have been suitable in any event, however Mr Cutmore-Scott maintained that the latter may have been Ms Wilson's opinion, it was his decision (with Mr Keirle) that the role was no longer needed.

56. Mr Keirle did not attend this hearing but the notes of his grievance appeal interview appear in the hearing bundle. In those notes he concurs that there was no longer such a role as he did not feel the need for the position. However Mr Keirle said that whilst Ms Mills was not in the role of Reception Manager she had the ability to be a duty manager if needed as she had been a manager there before. Whilst stating that Ms Mills might do a duty manager shift she was not on the management rota. This appeared to be a rather confusing and fluid arrangement and does not address why Ms Mills' job title on correspondence and internal communications was manager, nor why other staff recognised that she was a manager.

57. Mr Cutmore-Scott in his oral evidence to us was unable to adequately explain, if as he says the role was no longer needed, why Ms Mills was showing her role on emails, work schedules and WhatsApp as a manager. Mr Cutmore-Scott said that Ms Mills was paid an hourly rate and not a salary, and that she was engaged to cover the Claimant's absence, and that the job title of Reception Manager was automatically generated from Microsoft Outlook when Ms Mills' email account was reactivated. The Claimant disputes this and says that the First Respondent had new IT systems in place when Ms Mills returned and that the job title would have had to have been entered manually by someone when Ms Mills returned.

58. The evidence of Ms Hashim-Caldwell for the Claimant was that Ms Mills came back in with the job title of Reception Manager and she stated:

"13. I understand that individuals at The Harper have denied that she was re-hired as a "Reception Manager", but that is the job title that was stated on the work schedules, and that is the job title that was stated on her email signatures. Every customer that would email The Harper would receive a response from 'Polly Mills, Reception Manager'."

59. Ms Hashim-Caldwell's evidence was agreed by the Respondent, it did not seek to challenge her on it. Mr Herbert (Head Chef) also said in his evidence that Ms Mills was brought back as Reception Manager.

60. It is our finding that Ms Mills was brought back to work as Reception Manager as this is how her role was recorded in multiple sources and not least because the Respondent did not challenge Ms Hashim-Caldwell on her evidence. This was the role performed by Ms Mills before she left the Respondent the first time, and it was the same role she performed upon her return. Moreover we have found the explanations from Mr Cutmore-Scott in his evidence, and the notes of the interview with Mr Keirle, to be implausible given that Ms Mills was using the job title, other staff recognised her as such, Mr Keirle said she could be used as duty manager, and the Respondent did not challenge Mrs Hashim-Caldwell's evidence on the matter.

61. The Claimant had suggested that the First Respondent did not appoint her to that role as it did not want anyone mixed race in that role. It was the witness evidence of Jacob Perkins (former Food and Beverage Manager) that the First Respondent would not want anyone in the management role who looked different, for example if they had tattoos or piercings and he gave evidence that on one occasion on an unspecified date he was discussing recruitment with Ms Wilmott and the Second Respondent as Ms Wilmott was considering appointing someone from East Europe, to which the Second Respondent allegedly said that he did not think that the owners of the hotel would want anyone non-English speaking or with an accent working as front of house as they would prefer it to be a very traditional British service. Mr Perkins said that he did not know if the owners actually had those views, it was simply what he alleged the Second Respondent had said.

62. However, we heard evidence from Mr Cutmore-Scott that the First Respondent's female managers did not all look alike or were all British. We were referred to Ms Hashim-Caldwell who was the Restaurant Manager and has recently been promoted to Wedding and Event Coordinator. In her statement for the Respondent Ms Hashim-Caldwell states:

    "4. I am of mixed ethnicity and would describe myself as Arab or White Arab. My skin colour is olive, my father is full Arab and my mother is English, Caucasian. During my time at The Harper my ethnicity has been of no relevance and has not affected my career or growth within the business."

63. We have also been provided with evidence as to the Claimant's performance. The Claimant says that she received positive feedback about her performance from other staff including Mr Keirle. Mr Keirle did not attend to give evidence, however as we have indicated we have found the Claimant to be an honest and reliable witness and not one prone to exaggeration. In his grievance appeal interview notes Mr Keirle said very little about the Claimant's performance save that *"…in all honesty, she is not showing the correct or not correct is not the right word. But hadn't shown the development or the progression."* This did not appear to make a great deal of sense although we understood it to mean that Mr Keirle did not think that the Claimant would have been suitable for the role of Reception

Manager. We note that Mr Keirle said that the Claimant suffers from stress and was reliant on medication, that she had gone sick once when she switched medication, and the First Respondent had tailored the rota to give her every other weekend off so she had the ability to plan her childcare.

64. Ms Wilson in her grievance appeal interview said that the Claimant *"does a good job on reception. She's you know, she gets things done she's OK. We did speak about promotion, but don't think its suitable for her only because I don't think she's mature enough for the role. She I don't know if she's competent either. She takes a lot of time off sick. She wants to leave early a lot. She doesn't step up to the role in any way. I did say to her that day if she wants to progress, she would have to step up and show us that she's capable show us that she's serious. But since then, very little has been done about that you know, she hasn't progressed herself in any way, in fact it's probably gone the other way, if anything."*

65. The Second Respondent informed us in oral evidence that the Claimant was good at her role, that she had been helpful to him, and he agreed that she had taken on some of Ms Mills' duties when she left such including work for the spa.

66. In her witness statement for the Claimant Ms Hashim-Caldwell gave evidence that the Claimant was the best person at reception, when Ms Mills went on maternity leave they found many mistakes on the system but it was rare to find any from the Claimant, and she felt that the hotel should have promoted the Clamant to Reception Manager and had she worked somewhere different she would have been promoted.

67. Similar evidence was given by the Claimant's other witnesses. Mr Woodburn stated that the Claimant was as good as other managers there, the Claimant was a bit better at her role than Ms Mills, he had seen Ms Mills crying on reception after receiving any kind of complaint, whereas the Claimant was more robust, was better at giving information than Ms Mills and he had others commenting positively on her work, including Tracey Manning (Food and Beverage Manager). Mr Woodburn said that in his view Ms Mills represented a personal preference as to what the owners and senior managers thought the company wanted to present and *"Although I would not say that I believed they wanted a white manager. But more of a class of person or a more demure manager."* As we have indicated, Mr Woodburn remains employed by the Respondent as Maintenance Manager.

68. The evidence of Mr Perkins was that the Claimant was extremely capable with very good attention to detail, she was very hard-working and very passionate about what he did whereas in his view Ms Wilson and Ms Mills would overbook the restaurant massively and just say that it was fine to do so. Mr Perkins said he trained the Claimant to use the EPOS system which she learned to right away and she completed it really well. Mr Perkins said that the First Respondent did not seem to be afraid to promote and that there were a lot of senior members of staff and they were not afraid to give promotion and pay rises to people with relatively little merit but the attitude did not extend to the Claimant. We have taken into consideration that Mr Perkins had previously been dismissed by the Respondent on grounds of capability however his evidence was that he could also say good things

about having worked for the First Respondent. We therefore found his evidence to be reliable.

69. Mr Herbert said he believed that the Claimant was passed over for promotion and that she was more than capable of doing her job and that in his opinion she was more capable than Ms Mills whose work ethic was severely lacking when she returned to work at the hotel. Mr Herbert said if he ever need anything done, it was always done by the Claimant, whereas if he asked Ms Mills for something he was never going to get it. We have of course taken into consideration that Mr Herbert is the Claimant's partner and the father of her child. We have therefore viewed Mr Herbert's evidence that context, whilst noting that he remains employed by the First Respondent as Head Chef.

70. Within the hearing bundle there is a record of the grievance appeal interview with Scott Taylor, the Executive Head Chef of the hotel. Mr Taylor did not attend as a witness in this hearing however he was interviewed as he was present following a later incident which will be discussed below. During his interview Mr Taylor said of the Claimant *"She's an amazing team member a really helpful and really caring about her position and her role. Very much so"* and that she had the experience to move forward, she had been managing other properties and spas and not just the reception, and *"she's been a great worker. Fantastic you know, we do work closely together because she's the keeper of all the facts and figures that I need out of the system you know. I've never had a problem with either of them to be fair. She works damn hard and cares about the company a lot…".* We understand that the other person being referred to whom Mr Taylor had not had a problem with was the Second Respondent.

71. Mr Cutmore-Scott addresses the Claimant's performance within his witness statement and said that the Claimant was a managerial challenge, she was unstable and needed constant emotional support, she had complicated romantic entanglements with team members, her childcare impacted her ability to do her job, her mental health made her difficult to rely upon, she was erratic and unpredictable and was only just able to do her job when Mr Keirle or Ms Wilmott were present, and he also said that he believed that she was suffering from a paranoid delusion disorder.

72. These were very serious criticisms of the Claimant and Mr Cutmore-Scott was challenged about his evidence in the hearing and was asked to explain his comments about the Claimant's alleged unreliability. The response we received was that there was one occasion where the Claimant had been unwell for two days on 13 and 14 October 2022 due to switching medication for her mental health, and there had been another occasion where she had asked to rearrange a shift due to childcare. We were provided with no further evidence to substantiate these remarks. We note that Mr Keirle did not make such serious criticisms of the Claimant in his grievance appeal interview even though he was her line manager and should have been in a position to know first-hand how the Claimant performed at work. At most Keirle mentioned that she gets stressed, that she had past mental health difficulties, and he had tailored the rota for her childcare. In her grievance interview Ms Wilson had made reference to the Claimant having had time off sick and wanting to leave early a lot, however no details were provided and she did not attend the Tribunal either to give evidence.

73. We noted that Mr Perkins had been dismissed by the Respondent on capability grounds, and as such it appeared to us that this was not an employer which was afraid to tackle underperformance. We were provided with no documentary evidence of these performance or behavioural concerns ever having been raised with the Claimant. We would have expected, had it been true that the Claimant behaved as alleged, that the Respondent would have raised this with her initially informally and then more formally, including by way of some form of performance management. Nothing like this was put before us and there was no oral evidence given which suggested that this had ever occurred or even been considered.

74. Ms Bewley for the Claimant has argued that the Respondent has engaged in character assassination of the Claimant. The Tribunal agrees. We have found the allegations made against the Claimant to be extraordinarily hostile and based upon the most scant evidence, namely that the Claimant had gone sick for two days due to her mental health on 13 and 14 October 2022, and had asked to rearrange shifts for her childcare as a single parent. These were hardly examples of unreliability or erratic and unstable behaviour as alleged by the First Respondent.

75. We found there to be no truth whatsoever in the attacks on the Claimant's performance and character. We were unable to accept that the First Respondent would have retained a member of staff so long in a front of house position on reception if they were barely able to do their job and then only able to do so when the general manager was present. We reject the evidence of Mr Cutmore-Scott as to the Claimant's performance and we prefer the evidence of the Claimant, Mr Perkins, Mr Herbert and Mr Woodburn, as well as that of Ms Hashim-Caldwell who appeared for both the Claimant and the Respondents. We have found their evidence to be far more balanced and as such more plausible, and we have believed them. It will be noted that three of those witnesses remain employed by the First Respondent, two of whom are managers themselves and one is the head chef.

76. Towards the end of his oral witness evidence Mr Cutmore-Scott withdrew the allegation about the Claimant having a paranoid delusion disorder. We understand that Mr Cutmore-Scott says he made the comment because of comments he says that the Claimant had made about why the First Respondent was supporting the Second Respondent. In any event the comment was withdrawn albeit very late in proceedings. The level of hostility shown towards the Claimant did cause us to question the true motivation for not promoting her.

The drugs comment – July 2022

77. At some point during July of 2022, there was an incident at the hotel where some guests had been found taking drugs. This was not a common event and inevitably staff discussed the matter afterwards. The Claimant's evidence was that she was discussing the incident with Mr Perkins and the Second Respondent and during the conversation the Second Respondent told the Claimant (in front of Mr Perkins) that obviously she takes drugs. The Claimant says she denied this and said she was not a drugs user, to

which the Second Respondent replied *"of course you are"* and *"all you lot are"* and following a pause he said *"all you blacks are."*

78. A similar version of events was provided by Mr Perkins who recalls the Second Respondent saying *"your kind you all do it, you blacks."* Mr Perkins says that he looked at the Claimant in surprise and then felt that he should walk away. Mr Perkins said that he did not report it as he felt that it would not be dealt with anyway as other issues he had raised, including sexual harassment by a female colleague towards him had not been addressed, nor had other matters he raised.

79. The Second Respondent does not deal with the allegation in his witness statement save for a bare denial.

80. In his grievance appeal interview the Second Respondent was asked about the conversation and he agreed that there had been a conversation about drugs and that he had said that *"everybody's had a little go at it"* and he referred to his own experience from the 90s. During that interview the Second Respondent repeatedly denied using the phrase *"your sort"* and he appeared to deny using the phrase *"your lot"* although it was not clear what specific words the Second Respondent was admitting that he had said save that he was intending to refer to that in his view everyone had tried recreational drugs, and that he never saw the Claimant as anything other than Georgia. We also note that in the same part of the interview the Second Respondent said that the Claimant was the same skin tone as he was as he had just come back from Tenerife.

81. In his oral evidence the Second Respondent's expanded on his version of events to say that he was intending to refer to young people. This is of course a generalisation on the part of the Second Respondent about a group in society. Whereas the Second Respondent's oral evidence was that he had not used the words *"your sort"* he admitted to using the words *"your lot"* however he said that he was intending to refer to young people and that he had most definitely not used the words *"blacks."* As will be set out below, we have found that the Second Respondent had on another occasion referred to a family of guests at the hotel as "the blacks." When asked by Ms Bewley if he had said "*your lot, black people"* the Second Respondent replied *"I never called her black, not to her face."* It was put to the Second Respondent that this matter had been raised with Ms Wilson and he was asked if she had ever raised it with him, however he said that she may have done but he could not remember.

82. Whereas Mr Perkins no longer works for the First Respondent after he was dismissed we heard from Mr Perkins that there were a lot of good things that he could say about the hotel and a lot of bad things he could say too, and he was attending to tell us what he had witnessed. We found Mr Perkins to be a candid and a reliable witness, and the fact that he still said that he could mention positive things about the hotel and the Second Respondent was not suggestive of someone intent on seeking revenge for their dismissal. Rather it appeared to us that Mr Perkins' evidence was measured and reliable.

83. In his oral evidence to us the Second Respondent admitted that he would say inappropriate comments at work for a laugh, and as will be set out below

he admitted to asking whether the diversity and inclusion trainer would be half and half, although he now suggests he may have meant half woman and half man not half black and half white.

84. We have considered whether the comment was made in connection with the Claimant's age. At the time of this incident the Claimant was aged around 32 and was the mother of a child and she was of course younger than the Second Respondent.

85. We have taken into account the submissions from Mr Munro for the Respondents that the Claimant's witnesses are unreliable as they have a grudge against the Respondents. We did not accept that submission not least because all of them indicated or gave the impression that they enjoyed their roles with the First Respondent, and moreover three of the Claimant's witnesses remain employed by the First Respondent in management or senior roles, and one of them even gave evidence on its behalf and was recently promoted (Ms Hashim-Caldwell). One witness who could have such a motive was Mr Perkins who had been dismissed on capability grounds, however he was clear that he could say many positive things about working for the Respondent and he said his frustration was that complaints he raised (about harassment of him) had not been acted upon. Mr Perkins gave no impression whatsoever of being unreliable or untruthful. Mr Perkins' evidence was limited to corroborating this one comment the Claimant says that the Second Respondent made, and we believed Mr Perkins' account.

86. We have taken into account the consistency and corroboration between the evidence of the Claimant and Mr Perkins, and we have also taken into account the inconsistency in the evidence of the Second Respondent with respect to the other legal issues in this case, including his admission (addressed below) that part of his witness statement was made up. We are therefore satisfied to the level that we need to be, which is on the balance of probabilities, that the Second Respondent did say to the Claimant that she had taken drugs, and further *"all your sort do, you blacks."*

87. We also find, based upon the grievance appeal interviews, that the Claimant reported this comment to Ms Wilson at that time and that she sought to excuse the Second Respondent's behaviour by saying that he was older and makes comments about younger people and that it is was a difference in their generations. We note that Ms Wilson took no action in response to the oral complaint to her by the Claimant.

"The Blacks" comment – Summer 2022

88. The date of this incident has not been provided by either party, although it is agreed that it occurred a short time after the Second Respondent's warning on 5 June 2022.

89. The Claimant says that she was busy on the reception, Mr Woodburn was present as was the Second Respondent. A waitress named Jasmine came by and the Second Respondent allegedly told her that some guests needed serving in the courtyard, to which Jasmine asked which ones, and the Second Respondent allegedly replied "the Blacks." Jasmine allegedly told the Second Respondent that he should not be calling people "the Blacks"

and Mr Woodburn interjected to say that the Second Respondent would not have used the phrase "the Whites" to which it is alleged the Second Respondent replied *"I don't bloody know what they are meant to be called nowadays."*

90. A similar version of events is provided by Mr Woodburn, although we did not hear evidence from Jasmine. Mr Woodburn says that the Second Respondent made further excuses that "*he did not keep up with these sort of things"* and further that he is *"an old man."* It is also alleged by Mr Woodburn that when Jasmine told the Second Respondent that he ought to have used the table number instead he said that he had forgotten what it was.

91. The Claimant did not make a formal complaint about this matter at the time and she has been candid in her oral evidence that she thinks that she made Mr Keirle aware of it at some point but she cannot be "100%" sure that she did so.

92. Mr Woodburn says that he made Ms Wilson aware of the incident verbally but not in writing.

93. The Second Respondent denies the allegation. We note that during the grievance investigation on 24 April 2023 it is recorded that the Second Respondent told the grievance investigator Anna Lisa DeVoil that he did not remember saying it, and that if he did he apologised, and he asked if it was wrong to have said it.

94. Conversely, in his witness statement the Second Respondent now recalls the incident and wrote that what he actually said was *"The Black family in the yard need service"* and this was because he could not remember their table number or their name. Both the Claimant and Mr Woodburn say that it was unbelievable that the Second Respondent would not have remembered the table number.

95. However, during his oral witness evidence to the Tribunal the Second Respondent gave another account. The Second Respondent was asked why he had been able to remember this incident whereas he could not do so during the grievance appeal, to which he replied he could not recall and he had been asked to write down what had happened. The Second Respondent was asked if he was trying to add on words to an allegation which had been made to which he replied *"Yes, I probably was trying to add on."* I asked the Second Respondent if his oral evidence was that paragraph 15 of his witness statement was wrong, to which he replied yes.

96. After a break the questions resumed and the Second Respondent was again asked if he had used the words *"The Blacks"* to which he replied he could not recall but he would have said "the black family" and *"if I said it I never meant it derogatory."* When asked if he would agree that this could cause offence, the Second Respondent said that it would depend upon the tone. The Second Respondent was also asked if he recalled being challenged by the Claimant or Mr Woodburn to which he replied no. The Second Respondent was then asked if he recalled using the words that he did not know what to call people these days and that he referred to new

fangled ways of what people wanted to be called. The Second Respondent replied that parts of this were familiar.

97. The Second Respondent said that he did recall a conversation about a table in the back and that he recalled a black family being there. The Second Respondent was asked if he was saying that the only challenge to him was in connection with not knowing what to call the family, to which he replied *"Of course I know. I had D&I training at hospital. Sometimes use inappropriate comments like dear or sweets but not about skin."* The Second Respondent added that he may have said "they're blacks" and that he apologises if he did. During this exchange the Second Respondent confirmed that he was very aware of the Claimant's race and that she was proud of her black heritage, that *"Georgia is Georgia"* and he had been proud to share experiences of St Lucia with her.

98. The Second Respondent indicated that had he known that the Claimant was upset he would have apologised to which he was asked *"are you saying you may or may not have said it?"* to which he replied *"yes."* It was put to the Second Respondent that Mr Woodburn had complained about it to Ms Wilson, and he was asked if she spoke to him about it, to which he replied that he could not remember.

99. Based upon the consistent accounts of the Claimant and Mr Woodburn, not just before this Tribunal in their written and oral evidence, but also based upon what they informed the First Respondent during the grievance appeal process, we find that that the Second Respondent did make the comments attributed to him – that he did say that *"the Blacks outside need serving"* and further when he challenged he said *"I don't know what you call them these days."* We have found the evidence of the Second Respondent to be inconsistent having been provided with three different accounts of was said as set out in the grievance appeal interview, his witness statement before us which included a statement of truth, and his oral evidence to the Tribunal. The Second Respondent conceded that his witness statement was inaccurate, that he had just added in words to the allegation, and that he may or may not have said the comments and apologises if he did so. We have found the account of the Second Respondent to be unreliable and equivocal and we did question the veracity of his evidence given that he appeared able to remember some parts of the incident and not others. We also queried why, if nothing had been raised with him by Jasmine or Mr Woodburn at the time, the Second Respondent would remember the guests being referred to. This did not appear to make any sense to us. We prefer the evidence of the Claimant and Mr Woodburn for the reasons we have just given.

100. We also find, following on from what we have heard, that Mr Woodburn was concerned about what the Second Respondent had said, he then raised it with Ms Wilson who again took no action.

29 July 2022 interaction

101. On 29 July 2022 the Claimant's line manager Mr Keirle was away and she was working on her computer at reception and she says that she was not feeling well and the Second Respondent was seated near her and stared at her and said words to the effect *"look at you, it's just who you are*

isn't it" and further *"with that look on your face."* The Claimant says she replied *"what do you want from me John"* but he did not respond. The Claimant gave evidence that she felt that the Second Respondent was "chipping away" at her following other comments he had made about "blacks." The Second Respondent does not deal with this issue in his witness statement.

102. The Claimant says that she spoke to Caroline Wilson about this incident and previous comments which had been made to her, however she says that Ms Wilson replied *"oh well that would have been a joke, it's John's sense of humour. It's his generation. That man doesn't have a bad bone in his body."* The Claimant says that Ms Wilson shut the whole thing down and told the Claimant that she must have had a *"very sheltered life."* The Claimant gave evidence that she found this response to be very patronising and suggestive that she needed to put up with racist abuse. The Claimant also refers us to Ms Wilson's notes in the grievance interview where she says that the Claimant told her that the Second Respondent's comments about drugs related to young people as opposed to back people, and the Claimant strongly refutes this and says that she told Ms Wilson that the comment had been made about black people.

103. The Claimant was not advised by Ms Wilson to put her complaint in writing and she says that the staff handbook in force at that time states that complaints may be submitted orally or in writing.

104. It was at this time that the Claimant started to consider resigning, and she had produced a resignation letter which Ms Wilson persuaded her not to send until Mr Keirle was back from leave. Mr Keirle subsequently returned from three weeks' annual leave and upon his return the Claimant informed him what had happened, however she did not resign at that time.

The "woodpile" comment – 30 March 2023

105. On Thursday 30 March 2023 Mr Keirle was away. The Claimant says that she was working at the reception desk reviewing emails when one she had not dealt with was identified. The email involved something to do with children staying in a room and being over capacity. The Claimant says she explained that she needed to speak to management about a customer request in the email. The Second Respondent told us that this part of the exchange *"rings a bell."*

106. The Claimant says that the Second Respondent replied *"I suppose so"* and "*that makes things more complicated"* before he then looked at the Claimant and said *"well that's just a nigger in a woodpile, isn't it?"* It was agreed in the hearing the phrase (leaving aside the racial aspects to it for the moment) has previously been used to describe a hidden problem lurking about to come out.

107. The Claimant says in her witness statement:

"I should be clear that I did not know what the phrase "nigger in a woodpile" meant at the time. However, I have always understood the word "nigger" to be an extremely offensive slur, which almost nobody uses these days because of how offensive it is. The fact that John looked me in the eye and

used that word to me felt like he was specifically directing offense towards me."

And further:

"It is the one word that I would have expected everyone to know you can use that is going to cause havoc. No-one in their right mind would use that one word against the only black person in the building unless they specifically wanted to cause offense."

108. The Claimant says that she had to look up the meaning of the phrase on the internet whereupon it produced an image of a black man, painted in a stereotypical and offensive way, behind a pile of wood that appeared cage-like, and she says that seeing that hurt even more and she added in her witness statement:

"In this day and age, I do not want to have to be reminded of the era of slavery or of systematic discrimination."

109. Whereas the Second Respondent vehemently denies using those words, it is agreed that at some point he left the reception to go check on hotel rooms.

110. The Claimant says that she felt extremely overwhelmed and anxious about the comment so she sent a message to Scott Taylor (Executive Head Chef), asking to speak with him, followed by a second message to Tracey Manning (Food and Beverage Manager) asking to have a meeting with her the same day. As there was no immediate response the Claimant says that she went upstairs to speak to them and found Mr Taylor, Ms Manning and Ms Wilson in a meeting with Mr Gough the Chief Operating Officer. The Claimant spoke with Mr Taylor in private and explained what she says the Second Respondent had said to her and that she started to hyperventilate and have a panic attack. The Claimant finished explaining what she said had happened, gathered her things and went to her car where she was approached by Ms Manning. In her subsequent grievance appeal interview Ms Manning confirmed observing that the Claimant was upset.

111. Mr Keirle was on leave at this time but upon his return a day or two later he was informed that there had been an incident and he sought HR advice which we understand came from Peninsula who advised him to take statements from the Claimant and the Second Respondent. The Claimant provided hers on 31 March 2023 in which she made explicit reference to the woodpile comment and the drugs comment from the Second Respondent, and also the comment from Ms Wilmott about not being dark enough to be offended. The Claimant said she had repeatedly raised concerns about her treatment which had not been dealt with and that Ms Wilson had made excuses for the Second Respondent and she said that the drugs comment would have been a joke and his sense of humour.

112. On 2 April 2023 the Claimant emailed Mr Keirle to ask him to also consider the comments from the Second Respondent about "the blacks" needed serving and *"I don't know why they are meant to be called nowadays."* Mr Keirle met with the Claimant to discuss her grievance on 3 April, Ms Manning attended as a notetaker. During the meeting the

Claimant again repeated the woodpile comments, the drugs comments, the comments from Jordan about foreigners, and also the comments from Ms Wilmott about not being dark enough to be offended. The Claimant said that she had raised complaints before and nothing had been done. The Claimant said in her statement that Mr Keirle informed her that the previous complaints had technically not been a complaint as it had not been put in writing. This did not appear in the notes of the interview, and we do not have the benefit of Mr Keirle nor Ms Manning as witnesses, nevertheless we find that the comments were said as we have found the Claimant to be a truthful witness, moreover Mr Woodburn gave evidence that similar comments had been made to him at work that complaints had to be put in writing and these were incorrect as the First Respondent's policy provides for oral complaints.

113. At the end of the meeting Mr Keirle informed the Claimant that he would speak to the Second Respondent and provide her with an outcome. We were not provided with a copy of the statement from the Second Respondent which Mr Keirle informed Peninsula he had obtained, nor have we been provided with any notes of an interview between them. The Second Respondent's evidence on this was again unclear, he denied that he had given a statement, he then said he had, he then said that Mr Keirle had produced one. The alleged investigation from Mr Keirle is not referenced in the Second Respondent's witness statement and his oral evidence was muddled on this and made no sense.

114. The following day on 4 April 2023 at 12:47pm Mr Keirle messaged the Claimant to say that he would be interviewing the Second Respondent later that day. In his message Mr Keirle said *"Whilst we strive to find a resolution to your complaint, I do not see the need for you to remain absent from work. I appreciate that you are away on annual leave from Thursday so I will expect you at work tomorrow. Jules."*

115. Later that day Mr Keirle sent the Claimant an outcome letter dated 4 April 2024 in which he said that he had conducted an investigation into the woodpile comment, the historic racist comments which the Claimant said management had not acted upon, as well as historic nasty comments from the Second Respondent. Mr Keirle said that he had taken a statement from the Second Respondent and interviewed him (with Ms Manning present), he took a statement from Mr Taylor (Executive Head Chef), and also spoke to Ms Wilson about historical incidents not being actioned.

116. Mr Keirle informed the Claimant that there were no witnesses to the woodpile comment which the Second Respondent denied saying, and that there had been no historical complaints of racism made against him either from the Claimant or anyone else. The Claimant was informed that Mr Keirle could not find sufficient grounds to substantiate her grievance, she was notified of her right to appeal, and she was further informed that the First Respondent would be introducing equality and diversity training into the company induction.

117. The Tribunal found this grievance investigation to be wholly inadequate, it was rushed, there was a lack of any attempt at a proper investigation, the Claimant's complaints were simply dismissed out of hand on the basis of a denial by the Second Respondent and because the alleged

woodpile comment had not been witnessed by anyone else. A number of the Claimant's complaints were simply not addressed which leads us to the conclusion that they were not investigated at all. It appeared to the Tribunal that the process adopted by Mr Keirle was a sham and that he had no intention of uncovering what had really happened. We are able to draw that conclusion because the First Respondent's policy provides that staff may be separated during such a grievance investigation, whereas Mr Keirle ordered the Claimant return to work before he had even interviewed the Second Respondent. We found the process adopted by Mr Keirle to have been deeply unsatisfactory and akin to having adopted a closed mind. This was all the more troubling given the serious nature of the complaints which the Claimant was making about race discrimination by a number of staff over a prolonged period and the failure to act on her previous complaints.

118. We were referred to a copy of the Claimant's GP notes from 4 April 2023 which record that the Claimant had been seen and had reported racial abuse at work, unsupportive management that made her feel that she was the problem, that she was told they were just joking and that she isn't dark enough to be offended, and that the N Word was also used by a staff member and this had caused a big dip in her mental health, she was feeling very low with panic attacks and finding it difficult to function, experiencing poor sleep but no suicidal thoughts.

119. The Claimant was signed off from work from 5 April 2022 due to stress, and she filed her grievance appeal on the same date. The Claimant again set out in detail her version of events about the drug comments which she said was witnessed by Mr Perkins, the blacks comments which she said was witnessed by Mr Woodburn and Jasmine, and also the woodpile comment where she said that Mr Taylor had witnessed how upset she was. The Claimant referenced a lack of action by Ms Wilson, a lack of thorough investigation into the grievance by Mr Keirle, and she repeated her earlier complaint about Ms Wilmott saying that she was not dark enough to be offended. The Claimant suggested that there was institutionalised racism, and she explained in detail the negative impact upon her health of those comments and the failure to take them seriously. In conclusion the Claimant said:

"… I ask you to put yourself in my position and think about how it could feel to be the only person in the company, affected my [by] *racial comments towards black people, be made to feel like you're creating an unnecessary fuss when you report it, to be treated in a very cold manner, have your complaint rejected and then be expected to return to work alongside someone who has such vile views against your race and makes comments that attack what makes you you, not to mention your family members."*

120. On 14 April 2023 the Claimant was made aware that Ms Mills had returned to work as reception manager during her sickness absence.

121. The grievance appeal was allocated to Peninsula Face2Face to conduct. This body is separate from the First Respondent. The investigator was Anna-Lisa DeVoil, and whereas Ms DeVoil did not attend the hearing to give evidence, we did have the benefit of the case report (methodology), the findings, notes of interviews, and the appeal outcome.

122. At first sight this appeared to be a comprehensive investigation. We were referred to the twenty page notes of interview conducted with the Clamant and we observe that the Claimant was asked about her complaint and she was able to speak uninterrupted about what she was seeking to complain about and how she had been made to feel and the impact upon her. The Claimant spoke about the woodpile comment, the drugs comment, not being promoted to reception manager, the comments about foreigners by Jordan, the comments that "the blacks" needed serving, the comment about not being dark enough to be offended, and the failure of Ms Wilson and the First Respondent generally to take action in response to complaints.

123. Interviews were also conducted with Mr Taylor, Ms Wilson, Mr Keirle, Ms Manning, Mr Woodburn and the Second Respondent. We do not intend to repeat verbatim the contents of those interviews as much of them have been included elsewhere in this judgment. During his interview Mr Taylor confirmed that on 30 March 2023 (the woodpile incident) the Claimant displayed shock and anger and was struggling to breath, they had to control her breathing and that she was starting to hyperventilate. Mr Taylor said that afterwards he had been asked by the director of the company who was at his meeting what happened (this we believe to be Mr Gough) and he told him what the Claimant had been said. Mr Taylor said that the Second Respondent had become angry when he asked him why he had told Mr Gough and that he should have pulled him aside privately. Mr Taylor said that the Second Respondent denied making the woodpile comment and that he was so angry that he could be heard shouting from downstairs.

124. Ms Wilson's interview notes record that on 30 March the Claimant had come to the meeting room and asked to speak to Mr Taylor who then some minutes later informed her what the Claimant alleged the Second Respondent had said to her (the woodpile comment). Ms Wilson said she spoke to the Second Respondent who was absolutely incredulous and that he did not believe it.

125. We noted that Ms Wilson also said "*he was really upset that anybody would think that he would say that. He was incredulous that the accusation was made and he was worried as well. You know this is probably the last job he'll ever have. He's new retirement and you know to end it in such a horrible way it would be awful. So, he was really upset about that and really quite worried. The question of him ever having said that, didn't really come up because you know his reaction on the day was enough for me to believe that he hadn't said that."* The Tribunal found that comment to be particularly revealing as Ms Wilson had immediately formed the view that the Second Respondent had not made the woodpile comment without even having spoken to him about it. This tended to fit in with the Claimant's arguments of Ms Wilson not taking seriously her complaints and not acting upon them and automatically taking the side of the Second Respondent.

126. Ms Wilson is also recorded as having said that she saw the Claimant on the way out and she was agitated but not angry and did not seem upset. Ms Wilson said that the Claimant had said she had enough of talking and had spoken to people in the past and nothing had happened. Ms Wilson said that the Claimant had spoken to her before about her mental health but had not mentioned anything about race before.

127. We noted that in his interview Mr Keirle is recorded as having said that he had never been made aware of any complaint against the Second Respondent before, and he then went on to mention the shouting incident referenced above in this judgment. Mr Keirle is then recorded as having said *"but never heard anything regarding racist comments previously from John or anyone else for that matter."* This would appear to be at odds with Mr Cutmore-Scott's evidence (which we have already rejected) that Jordan had been disciplined for the comments he had made about foreigners.

128. We also noted the contents of the interview with Ms Manning who said that on 30 March 2023 she saw the Claimant ask to speak to Mr Taylor during their meeting, and afterwards he told her *"it's not good"* and so she went to speak to the Claimant and followed her to her car where she said *"I cannot do this anymore, its gone too far"* following which she told her about the woodpile comment and that it was not the first time something had happened. Ms Manning said that the Claimant was upset and she was crying and she told her she was not in a fit state. We noted that this is a very different description than that given by Ms Wilson but it is consistent with that of Mr Taylor and also how the Claimant described herself. Ms Manning said she told the Claimant to take the weekend and that she would speak to Mr Keirle who was due to return on the Monday and they would take it from there. Ms Manning recalled the Claimant telling her about the previous comment from Ms Wilmott which was the first time she had heard of it and that she expressed shock as Ms Wilmott had been the Claimant's friend. Ms Manning said that the Second Respondent was in shock for the rest of the day.

129. We have already made reference to the interview with Mr Woodburn above. In addition we have noted that he said he could not recall the Second Respondent directly saying anything racist to the Claimant but he could think of several sexist comments he had made to several people and he had heard him say things that he thought were probably not acceptable in terms of race.

130. Mr Woodburn confirmed he had heard the Second Respondent referring to the guests as "the blacks" following which Jasmine had challenged him to which he had replied *"I don't know what to call them"* and *"you know I don't know what people call themselves these days."* Mr Woodburn said he challenged the Second Respondent by saying *"you wouldn't call them white if they were white"* to which the Second Respondent replied words to the effect that *"I don't know what these newfangled ways of people want something."* Mr Woodburn said he raised it with Ms Wilson and further *"she was like oh well, as long as he didn't call the guests it or something like that."* Mr Woodburn said that he was aware of the comments from Jordan although he admitted he was not privy to it and did not witness it himself.

131. Mr Woodburn also indicated in his interview that the Second Respondent would often make comments which others might be offended by, although not to do with race, and that the Second Respondent would think that he was funny. Mr Woodburn also said that the Second Respondent would lie and he gave an example of a time where someone had opened the door to the pellet room and spilled small wooden pellets

over the floor. The Second Respondent had denied that it was him, whereas Mr Woodburn checked the CCTV and saw that it was the Second Respondent. Mr Woodburn also referenced that the Second Respondent had previously made negative comments about him in front of customers.

132. We have considered the contents of the Second Respondent's interview with Ms DeVoil. In his interview the Second Respondent denies making the woodpile comment, and as we have referenced above he also said *"I thought that the working relationship was wonderful, no problems at all. I'd absolutely no issues with Georgia whatsoever. She was personable, she was funny, friendly which hence the shock. But no, I've never considered there to be any issues whatsoever. I've never been made aware that there were any issues."* We have already indicated above that this was at odds with the contents of the Second Respondent's witness statement before this Tribunal where he had accused the Claimant of being passive aggressive in making his time with her on reception as problematic at times as she could, that she was part of a clique and had spearheaded a complaint against him, that the relationship was always professional but sometimes challenging and they had very little in common.

133. As regards the day in question the Second Respondent said that the Claimant was at reception and everything was fine whereas the Claimant could be vocal if things were not going her way but *"It was never been directed at me. It's directed generally, she's that type of person…."* and "*she was just being what I call general likeable Georgia, you know."* This description of the Claimant was also at odds with the evidence which the Second Respondent gave us in his witness statement which we have just referred to.

134. We also noted in his interview the Second Respondent was asked about the alleged email the Claimant was reading on 30 March 2023 to which the Second Respondent replied *"… because believe me, Georgia is far more qualified on that computer and in the reception role then I'll ever be you know. I'm just a bystander there really. When she's on duty because she's so good at it."* This appeared to be odds with the description of the Claimant's performance provided by Mr Cutmore-Scott in his witness statement that the Claimant was just about able to do her role when a manager was present.

135. In his oral interview the Second Respondent denied making the woodpile comment and he denied that he would use the words, he said he was confused where the allegation had come from, and he was sure that if he had offended the Claimant then she would have told him about it. The Second Respondent said that he had no inkling at all that the Claimant was upset or would have a panic attack. Within his witness statement the Second Respondent states:

"I make it perfectly clear that I have never ever in any conversation mentioned Georgia's skin colour or anyone else's colour at any time during my time here. I am not a racist." And further *"As to the 'Woodpile' quote, I stated when the allegation was first made and I say it now, I did not and have never said such a thing."*

136. The Second Respondent was repeatedly questioned on this matter during his oral evidence and his response remained the same that he denied saying the comment and that he would not use the language, although we understood from his evidence that he was familiar with the phrase, save that he did not use it.

137. We noted that the Second Respondent had said in his witness statement that the Claimant was *"passive aggressive in making my time with her on reception, as problematic at times as she could"* however in his oral evidence he appeared to resile from that and he said that he did not see anyone as problematic as he had put in his witness statement.

138. We have been left with two different versions of events about what happened on the reception on 30 March 2023. The Claimant has referred us to a number of other matters and invites us to draw an inference. We will address these below.

Hoodies comment

139. Mr Herbert has given evidence that some months ago, and after the Claimant's resignation, he was telling the Second Respondent his weekend plans which would involve parking at Westfield in London to which the Second Respondent replied *"why would you park in Westfield, it's full of black people wearing hoodies."* This comment does not form part of the Issues to be decided in this case but has been included as alleged evidence of the Second Respondent's behaviour. The Second Respondent he has denied using those words and instead said words to the effect that "*London was full of people in black hoodies"* or words to that effect and this was after having visited London for the ABBA experience and having seen the Police chasing people in black hoodies. The Second Respondent says that he only mentioned the clothing and not the colour of peoples' skin.

140. In our view it would have been an unusual thing for someone to have mentioned the colour of the clothing of the people being referred to, although it is entirely possible that someone may make that type of remark. Nevertheless we consider that it is more likely that what was being referred to was black people in hoodies rather than people in black hoodies. We draw this inference on the basis of other comments we have found the Second Respondent to have made, even though he disputed making them, such as *"the blacks"* needed serving and the comments about drugs. We also note that much of the Second Respondent's witness evidence has been changeable with passages of his witness statement being incorrect by his own admission.

Text message from Scott Taylor

141. Mr Herbert also gave evidence that following the Claimant's departure Ms Wilson stated on an unspecified date that the Second Respondent *"isn't that type of person"* and we were provided with a copy of a text message sent to Mr Herbert from Scott Taylor (Executive Head Chef) where he states *"we all know John is racist but we can't prove it."* Mr Taylor was not called by either side to appear as a witness therefore we have been unable to hear what he has to say about the message although we note that the Respondents have not suggested that the message is a forgery. We

have placed very little weight on the text message from Mr Taylor given that he did not attend to be questioned on the message thread.

142. Mr Herbert also gave evidence that he had heard the Respondent referred to by other staff as "racist uncle john" however this was not expanded upon. We discount that evidence as it is no more than hearsay and without any substance.

143. We should point out that Mr Herbert is the partner of the Claimant, they have been in a relationship for many months and are expecting their first child together. Neither Mr Herbert nor the Claimant informed the Tribunal of this fact in their witness statements, and it was only made clear when Mr Herbert was questioned by Mr Munro. We have taken into account whether this impacts the reliability of Mr Herbert's evidence and we have determined that it does not. Whereas it may have been helpful had Mr Herbert mentioned this relationship of his own volition, we found his evidence to be reliable and consistent with evidence we have heard from the other witnesses who appeared on behalf of the Claimant.

Comments about diversity training event

144. Mr Woodburn also gave evidence that following the Claimant's departure the First Respondent arranged diversity training for staff. Mr Woodburn said that the trainer was running late and the Second Respondent asked him if the trainer would be "half and half" or "half black/half white half man/half woman." Mr Woodburn said that he and others who heard the comment were left feeling uncomfortable. In addition Mr Woodburn said that the Second Respondent introduced himself to the trainer and said that he mostly works with men so does not understand the ways of talking to people.

145. The Second Respondent was questioned about this during his evidence and he said he made a comment but it was not that. The Second Respondent was asked again and he said he could not recall saying it but if he had said it he had only done so to gain a laugh but it would not have been about race. When asked if he had said half man half woman the Second Respondent said he could not recall. Whereas this is not one of the issues for us to decide, we find that the Second Respondent did make a comment about wondering whether the trainer would be "half and half" and whilst we are not satisfied that he mentioned race, we do find that the Second Respondent had sought to make inappropriate comments about diversity in order to gain a laugh as he says.

Sayings generally

146. Mr Woodburn said that more recently he had been in conversation with Ms Manning and the Second Respondent and the phrase "in a bind" had been mentioned to which the Second Respondent had said that he could not use sayings anymore because it is racist. Mr Woodburn says he took to be an admission of guilt with respect to other comments he made, including the "nigger in a woodpile" comment. Again these do not form part of the Issues to be decided in this case but have been provided to the Tribunal as alleged evidence of the Second Respondent's approach towards diversity and equality generally.

147. We have discounted this evidence as we did not draw the same inference as Mr Woodburn that it followed that the Second Respondent was admitting to making the woodpile comment. We note that the Second Respondent denied saying these words to Mr Woodburn in any event.

Football comment

148. We were referred to a text message between the Claimant and a colleague named Amy and we understand that her partner Yvan had attended a football match with the Second Respondent where he is alleged to have made comments about too many foreigners in English football or words of an equivalent meaning. The Second Respondent says that he was referring to an influx of foreign players and that he did not say anything derogatory about race. We do not draw any negative inference from this exchange simply because we are not persuaded that any negative comments about race were made by the Second Respondent on that occasion.

Remarks about marriage in South Africa

149. We were also referred to Mr Woodburn's grievance appeal interview where he said that there was a conversation at work where a colleague named Alan was discussing his sister's marriage in South Africa and some sort of problem between or within white and black communities over there. Mr Woodburn was recorded as having said in his interview *"and I heard John say something about how well they shouldn't allow them to marry or something like that."* This did not feature in Mr Woodburn's witness statement and the Second Respondent denied saying it. The comment was rather general and it did not appear that Mr Woodburn at that time of the interview could recall with clarity what had been said. We therefore discount this evidence.

Comments to Ms Hashim-Caldwell

150. We have already indicated that Ms Hashim-Caldwell provided a statement for both parties and her evidence was agreed and unchallenged. In her witness statement for the Respondent Ms Hashim-Caldwell denies ever hearing the Second Respondent making any offensive comments about race, although she is not alleged by the Claimant to have witnessed any either.

151. Ms Hashim-Caldwell said:

"John has made multiple comments to myself that I have deemed inappropriate due to my body shape and size, these have not been in relation to my ethnicity."

And

"Ever since John's appointment to Duty Manager I have had a personality clash with him due to the derogatory and unprofessional comments he's made about my figure."

152. The Second Respondent denies making such comments although he admits to commenting on or complimenting Ms Hashim-Caldwell on her clothing and her style in a jolly way and admits to saying *"you look fantastic"* by reference to her style. Not only was this statement produced on behalf of the Respondents, but it was agreed and unchallenged evidence. We therefore accept the evidence of Ms Hashim-Caldwell in full and we find that the Second Respondent would on occasion make inappropriate comments about her appearance, her body shape and her size which she found to be derogatory and unprofessional. We also find that is a reasonable inference to draw from what the Second Respondent admits he has said to Ms Hashim-Caldwell. We note that Ms Hashim-Caldwell states that she never witnessed the Second Respondent making inappropriate comments about race, however it has never been alleged that she was present when they were said. The fact that Ms Hashim-Caldwell did not witness them does not mean that they were not said.

Conclusion – woodpile comment

153. There were no witnesses beyond the Claimant and the Second Respondent as to what happened on the reception on the morning of 30 March 2023. This is a case of one word against another. The Claimant is adamant that the Second Respondent said *"Well that's just a nigger in a woodpile"* whereas he vehemently denies saying it. This is a dispute of fact which we must resolve.

154. We have had to look at all the evidence before and after this alleged incident to enable us to make a finding on the balance of probabilities as to what happened. This is the civil standard and not to be confused with the criminal standard which is beyond all reasonable doubt.

155. On the one hand we have the evidence of the Claimant whom we have found to be an honest and credible witness who has given a consistent account in her evidence as to the other matters we have addressed. The Claimant's witnesses, and Ms Hashim-Caldwell who gives evidence for both sides, have also given consistent evidence and corroborate much of what else has been alleged in this matter. All of those witnesses give a similar account of the Second Respondent making inappropriate comments related to protected characteristics, much of it related to race, but not exclusively so. We have made findings that the Second Respondent said "the Blacks" comment about hotel guests, that he also said *"I don't know what they are called these days"* or words to that effect. We have also made a finding that he made the drugs comment, and that he also made the comment about black people in hoodies.

156. On the other hand we have the evidence of the Second Respondent. Much of his evidence was contradictory and changeable, although on this allegation it has been consistent – in his own words he says he denied saying it at the time and he denies saying it now. The Second Respondent, by his own admission, included parts of his witness statement which were inaccurate, even though it included a statement of truth. The Second Respondent appeared unable to recall the incident about "the Blacks" before then appearing to remember it in detail in his witness statement, before then telling us he didn't and had just added words in. The

Second Respondent has indicated that if had said "the Blacks" he did not see what was wrong with it but would apologise if he had done so. As to the woodpile incident, whereas the Second Respondent denied saying it and denied that the Claimant was upset, he says he would have apologised had he known that she was upset. This caused us to query what it was the Second Respondent would be apologising for.

157. The Second Respondent admits making inappropriate comments to gain a laugh, including at a diversity and inclusion training session which had been arranged after the Claimant's grievance. The Second Respondent admits wondering if that trainer would be half and half, and whilst he says he does not recall half what, he denied it was due to race but implied it could have been half male and half female. The Second Respondent admits making comments about Ms Hashim-Caldwell's appearance, he denies he commented about her figure, but having read her version of events and having listened to the Second Respondent admit he told her that she looked "fantastic" we found it more likely that some of the comments were about her figure or her body. We also took into consideration the Second Respondent's evidence that he did not see any difference between himself and the Claimant as he had just come back from Tenerife. We felt that was a particularly revealing comment and that it displayed a degree of ignorance about differences in race which inevitably go well beyond skin colour.

158. We also recalled the Second Respondent informing us that he was very aware of the Claimant's race. Finally, we took into account the stark difference in accounts between the description the Second Respondent gave to Ms DeVoil about his working relationship with the Claimant and the contents of his witness statement before us – these accounts were diametrically opposed. In the interview the Second Respondent described their relationship as wonderful and no problems at all. Within his witness statement the Second Respondent described the Claimant as passive aggressive, determined to make his role as problematic as possible, and that she was part of a clique.

159. Taking all of the above into account we are satisfied to the level that we need to be, which is on the balance of probabilities, that the Second Respondent did say to the Claimant on 30 March 2023 *"well that's just a nigger in a woodpile."* We are also satisfied to the same level that the Second Respondent knew at the time of saying it that it would be offensive to the Claimant as he has told us that he was very aware of her race. We further find that this caused the Claimant to appear visibly distressed and further that she suffered a panic attack causing her to hyperventilate.

Claimant's resignation

160. On 24 April 2023 the Claimant messaged Mr Cutmore-Scott in order to resign. This was four days after the appeal interview meeting with Ms DeVoil. Within her resignation message the Claimant said that this was due to the response from her grievance and past reported issues not having been dealt with, and being brushed off as though she was creating unnecessary problems in reporting the incidents. The Claimant said she could not return due to fears it would make her mental health decline further.

161. Mr Cutmore-Scott replied to say that he was saddened at the decision and that the Claimant's grievance was being taken seriously and being fully investigated. We noted that the Claimant was not asked to reflect or to reconsider her decision nor to await the outcome of the grievance appeal.

162. The Claimant has said that she resigned in response to a series of acts of discrimination which breached the implied term of mutual trust and confidence, culminating in a final straw. The alleged final straw is said by the Claimant to have been committed by Ms Wilson who had informed staff, in advance of the grievance appeal outcome, that there was nothing in the allegations and that they were untrue. We will address the appeal outcome below, however we have noted that these comments from Ms Wilson did not appear in the Claimant's witness statements and were not explicitly referred to in her resignation email. None of the Claimant's witnesses address this in their statements although Mr Herbert recorded in his statement that after the Claimant left Ms Wilson stated *"John isn't that type of person."*

163. In her oral evidence the Claimant was repeatedly asked why she had chosen to resign that day and not wait until the outcome of her appeal. The Claimant was asked what had happened that day to cause her to resign. The Claimant's evidence was that Ms Wilson had been heard saying things, suggesting that the Claimant was a liar and that the Second Respondent was like a grandfather to everyone, and that she did not particularly remember that day itself, the comments had been heard around then give or take day, and that there had been a build up of issues, witnesses had not been approached (such as Katherine or Mr Perkins) and that previous complaints had not been acted upon and she did not feel that she could return there.

164. We did not have sufficient evidence before us to find that Ms Wilson had made the comments alleged, although they did fit in with the contents of her interview with Ms DeVoil about not believing that the Second Respondent would act as alleged and her general failure to act. We were not told when Ms Wilson is alleged to have made the comments and nor where we told who the Claimant says heard them and passed them to her. We noted that the Claimant said that not all of the relevant people were spoken to, however it appeared to us unlikely that the Claimant would definitely have known that at the time as the grievance appeal outcome had yet to be released. We note that the Claimant was off sick at that time and her mental health was not good due to alleged work related stress. We found it understandable that the Claimant may have been confused about what she knew and when, and she was candid in her oral evidence that she did not particularly remember what had happened that day (24 April 2023) and that it was a buildup of things.

165. The First Respondent has sought to argue in these proceedings that the Claimant was intending to leave anyway and to set up her own hair dressing business some distance away in Essex. Having heard the Claimant's answers to those questions we are not satisfied that was the Claimant's intention at that time. The Claimant had a young son in primary school which would have involved disruption, and whilst she had considered moving closer to her family where she would have their support, this was no

more than an option for consideration and she would not have had any hair dressing clientele had she moved. We are satisfied that the Claimant's hope was to remain employed by the First Respondent and to gain promotion to any suitable managerial role, not specifically to the role of Reception Manager.

166. The Claimant's employment ended on 24 April 2023.

Grievance appeal outcome

167. Whereas the investigation was conducted by Peninsula Face2Face, together with a report setting out the findings of those investigations, the final decision on the grievance outcome rested with the First Respondent. The outcome report indicated that where no evidence existed the conclusions would be reached on the balance of probabilities.

168. By letter dated 2 May 2023 from Mr Cutmore-Scott the Claimant was informed that Ms DeVoil had concluded her investigation and that the decision was to dismiss the Claimant's appeal and to uphold the earlier decision of Mr Keirle. The only matter which was upheld in part was that Mr Keirle had failed to address the contents of the Claimant's message of 2 April 2023 to him, however it was recorded that those complaints had also been investigated and were not upheld.

169. We have already indicated that at first sight this was a comprehensive investigation into the Claimant's appeal. It is a far more detailed investigation than that conducted by Mr Keirle and it gave the impression of being more of a re-hearing rather than simply reviewing the process adopted by Mr Keirle. As we have also indicated, a number of relevant witnesses were interviewed, they were asked appropriate probing questions, and the Claimant was permitted to speak at length about her version of events and the matters she sought to complain about.

170. However, we have identified a number of areas of concern about the manner in which the appeal was conducted, which together with the eventual outcome, give us serious concern about the fairness of the appeal process. We do not intend to provide a detailed assessment of the grievance appeal report but will refer to the areas which gave us the most concern.

171. With respect to the woodpile comment, Ms DeVoil said that there was no evidence to substantiate the comment and whilst she did not believe the Claimant's concern to be disingenuous there was not enough evidence to substantiate it. Whereas Ms DeVoil took into consideration the evidence of the Claimant, the Second Respondent, Mr Keirle, Ms Manning, and Mr Taylor, there was no reference to the evidence from Mr Woodburn about previous issues which may have been relevant for her to have taken into consideration. The evidence of Mr Taylor that the Claimant had been visibly upset and shaken was referenced but it does not appear that sufficient weight was attached to it by Ms DeVoil. Ms Manning also provided evidence of the Claimant's distress but this was not referenced. It appeared us that whereas Ms DeVoil correctly made reference to the balance of probabilities in her methodology, she did not in fact approach her task in that way but instead required a far higher standard of proof, and moreover she failed to

place sufficient weight on some evidence, and failed to take into account relevant considerations at the same time, specifically the evidence of Mr Woodburn. The Tribunal found it hard to reconcile the conclusions of Ms DeVoil with the evidence she had been presented with and it appeared as though she was unprepared to look further as to why the Claimant was upset or to take into consideration the other things which Mr Woodburn had witnessed the Second Respondent as having said.

172. We also noted Ms DeVoil's approach to the comments about "the Blacks" needed serving. Ms DeVoil approached this from the point of view of whether it was direct or indirect discrimination and then from the point of view of an employee or the customer. This made no sense to us. This was quite clearly an allegation of either direct discrimination or harassment related to race brought by the Claimant and there was no consideration of her feelings.

173. Ms DeVoil recorded that *"referring to someone as black or a group of people as blacks is more likely than not to be considered an acceptable term"* and she went on to find that *"on the balance of probabilities it is unlikely to be considered a discriminatory term to refer to a group of people as "black". The term itself is not considered derogatory in the black community, nor is there any relevant caseload that would set a precedent in this is regard."* The difficulty which we have with this reasoning is because the allegation was far more nuanced than that.

174. The Claimant's allegation was that the Second Respondent referred to the only table of guests in the courtyard as "the Blacks" rather than referring to them by the table number (which he ought to have known) or even perhaps referring to them as being black. Ms DeVoil approached this allegation at a very basic level by asking herself the question in very simple terms whether it is appropriate to refer to customers by their colour. The allegation was not that the Second Respondent referred to the customers as black, the allegation was that he referred to them as *"the Blacks."* Ms DeVoil did not take into consideration the precise words which were used, nor did she take into account the evidence of Mr Woodburn that the Second Respondent had said *"I don't know what people call them these days."* It appeared to the Tribunal that Ms DeVoil was content to find that the use of the word to describe a customer as black was acceptable and she failed to go on to look at the precise words used and what conclusion she might draw from that or how it had made the Claimant feel.

175. We also find that a number of the matters which the Claimant sought to complain about were not addressed, by way of example the allegation that Ms Wilmott had told the Claimant that she was not dark enough to be offended. We remind ourselves that the Claimant complained about this in writing to Mr Keirle and repeated it in the interview with him, yet it was not addressed. The Claimant included it in her grievance appeal letter, and again raised it orally in her appeal interview, and yet again it was not explicitly addressed by Ms DeVoil. No matter how many times the Claimant raised the complaint it remained unaddressed.

176. We were also concerned that Ms DeVoil adopted a very restrictive approach to the issue of the Claimant's previous complaints not being dealt with. Ms DeVoil's conclusion was that they had not been raised

formally before and as such she did not find that there had been failures by the First Respondent. We of course note that Ms DeVoil did find that Mr Keirle had failed to deal with the Claimant's email of 2 April 2023, however that did not appear to have triggered any serious consideration by Ms DeVoil into whether oral complaints might also have been ignored. The approach of Ms DeVoil appeared to be that only formal complaints needed to be addressed even though, and as she quoted, the Respondent's policy provides for oral or informal complaints to be raised.

177. The above is a summary of some of the concerns we have identified in the outcome of the appeal. As such we find that the appeal process was unfair, a burden of proof in excess of the balance of probabilities was applied by Ms DeVoil, key evidence was either ignored or too little weight was attached to it, there was an inexplicable reference to indirect discrimination rather than harassment, and the Respondents' explanations were accepted at face value to the detriment of the Claimant. Whereas the process appeared more thorough than that adopted by Mr Keirle, the outcome remained the same for the Claimant as her complaints of discrimination were not fairly investigated.

178. We note that the Clamant was signed off work due to work related stress from the beginning of April 2023 and she continued to received medical treatment for the next few months and she has told us that she considered self harm during this period which she describes as a dark place. The Claimant has returned to hair dressing which she says provides her with a small income far less than she earned with the First Respondent.

179. The First Respondent has since implemented the equality and diversity training and Mr Hebert gave evidence that a new person has been appointed from HR whom he spoke positively about.

Submissions

180. This is already a long judgment and we mean no disrespect to the parties by not repeating their oral submissions and the written submissions of Ms Bewley here. We have addressed the relevant submissions in our findings of fact and in the conclusions and analysis section below. We have taken all of those submissions into account when reaching our decisions on the findings of fact and the issues to be decided. We have included all of the authorities to which we were referred in the law section below.

The law

Direct Discrimination and victimisation

181. Section 13(1) Equality Act 2010, together with section 9 of that Act, provide that direct discrimination takes place where an employer treats an employee less favourably because of race than it treats (or would treat) others. Race includes national and ethnic origins. Under s. 23(1), when a comparison is made there must be no material difference between the circumstances relating to each case. A comparison may be made with an actual comparator, or with how a hypothetical comparator would have been treated.

182. Given that a tribunal may take into account a wide range of factors including circumstantial evidence, there may be cases where there is someone who, whilst materially different to a claimant, may be of assistance as an evidential comparator. They may, depending upon the circumstances and in conjunction with other material, justify a tribunal drawing an inference that a claimant was treated less favourably than he or she would have been treated.

183. Section 39 of that Act provides that an employer must not discriminate against its employee by dismissing them or subjecting them to any other detriment.

184. Section 39 of that Act also provides that an employer must not victimise the employee by dismissing them or subjecting them to any other detriment.

185. Section 27 provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. A protected act is defined as either bringing proceedings under the Equality Act 2010; giving evidence or information in connection with proceedings under that Act; doing any other thing for the purposes of or in connection with that Act; or making an allegation (whether or not express) that A or another person has contravened that Act.

186. It is often appropriate to first consider whether a claimant has in fact received less favourable treatment than an appropriate comparator, and then consider whether this less favourable treatment was because of the protected characteristic, in this case that is race. In some cases, particularly if there is only a hypothetical comparator relied upon, it may be appropriate to first consider the reason why the claimant was treated as they were – ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** **[2003] IRLR 285** (paragraph 8).

187. The reason for decisions or treatment can often be for more than one reason. Provided that the protected characteristic (here race), or the protected act, had a significant influence on the outcome, then discrimination will be made out – per Lord Nicholls in ***Nagarajan v London Regional Transport*** **[1999] IRLR 572**. The Tribunal may need to consider the mental processes of the alleged discriminator, and whereas this is often referred to as motivation, it is not to be confused with motive as this is not a relevant consideration. It is possible for an employer to discriminate unlawfully even with a benign motive – ***Amnesty International v Ahmed*** **UKEAT/0447/08**.

188. Very little discrimination today is overt or deliberate, and those accused of discrimination are usually unlikely to accept that they have done so, and possibly will be unlikely to recognise it in themselves. In cases of direct discrimination or victimisation, an examination of the "reason why" someone was treated as they were should not be reduced to a simple "but for" question. It is therefore not appropriate to ask but for the protected characteristic (here it is race) would the Claimant have been treated better? Rather we must conduct a more rigorous inquiry into the mental processes

of the Respondent to establish the underlying core reason for the treatment. This might be easier in cases where there is an overt or obvious reason for the treatment, however in other cases are more detailed analysis of the facts will be necessary. As per Sedley LJ in ***Anya v University of Oxford and another*** **[2001] ICR 847**:

"Very little direct discrimination is today overt or even deliberate. What King and Qureshi tell tribunals and courts to look for, in order to give effect to the legislation, are indicators from a time before or after the particular decision which may demonstrate that an ostensibly fair−minded decision was, or equally was not, affected by racial bias." (paragraph 11).

189. In ***Earl Shilton Town Council v Miller*** **[2023] IRLR 532** the court provided guidance on the approach to the reason why analysis in discrimination claims. Here HHJ Tayler noted that when considering whether treatment was due to a protected characteristic the tribunal spends much of its time considering the mental processes of the alleged discriminator in order to ascertain the reason why someone was treated as they were. However, the court held that there are at least two types of cases where it is unnecessary to consider the mental processes of the alleged discriminator, the first is where the reason was obvious, and the second is where a criterion is used which corresponds exactly with the protected characteristic. The court also concluded that a "good" motive will not prevent discrimination from having occurred.

190. In ***Chattopadhyay v Headmaster of Holloway School*** **[1981] IRLR 487** the court noted the special nature of discrimination proceedings and that the person complaining of discrimination may face great difficulties when it comes to proof. The court held that where it may be appropriate to take into account evidence of hostility before and after the event (or act complained of) where it is logically probative of a relevant fact.

191. The term "detriment" should be given its broad ordinary meaning, and a detriment will exist if a 'a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment – per Brightman LJ in ***Ministry of Defence v Jeremiah*** **[1980] QB 87**.

Harassment

192. Section 40 provides that an employer must not harass an employee. Section 26 provides that a person (A) harasses another (B) if it engages in unwanted conduct related to a relevant protected characteristic, and 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. In deciding whether conduct has the effect referred to into account must be taken of the perception of B; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect. This analysis is not required where the conduct had the purpose of violating B's dignity or creating the proscribed environment.

193. In ***Weeks v Newham College of Further Education*** **UKEAT/0630/11** it was held that a tribunal must be sensitive to all the circumstances; the fact

that unwanted conduct was not itself directed at the Claimant is a relevant consideration but it does not prevent that conduct being harassment.

194. As to whether the conduct had the requisite effect, there are both subjective considerations – the Claimant's perception of the impact on them – but also objective considerations including whether it was reasonable for it to have the effect on the particular claimant, the purpose of the remark, and all the surrounding context - ***Richmond Pharmacology Ltd v Dhaliwal*** **[2009] ICR 724**. Conduct which is trivial or transitory is unlikely to be sufficient.

195. In ***HM Land Registry v Grant*** **[2011] EWCA Civ 769** it was held:

"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment." (paragraph 47)

196. Section 212 of the Act provides that a detriment does not include harassment. Accordingly it is not possible for impugned treatment to amount to both direct discrimination (or victimisation) and harassment at the same time.

Liability for discrimination

197. Section 109 of the Act provides that anything done by a person (A) in the course of A's employment must be treated as also done by the employer. In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment, it is a defence for B to show that B took all reasonable steps to prevent A from doing that thing, or from doing anything of that description.

Burden of proof

198. Section 136 of the Equality Act 2010 provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However this does not apply if A shows that A did not contravene the provision.

199. The burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another - ***Hewage v Grampian Health Board*** **[2012] IRLR 870**.

200. Guidance on the application of the burden of proof in discrimination complaints was provided in ***Igen Ltd v Wong*** **[2005] IRLR 258**:

"*(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of* [the protected characteristic], *since no discrimination whatsoever is compatible with the Burden of Proof Directive.*

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that [the protected characteristic] *was not a ground for the treatment in question.*

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof...."

201. ***Igen v Wong*** refers to the law under the previous Sex Discrimination Act 1975 prior to the Equality Act 2010, however the decision of the Court of Appeal in ***Efobi v Royal Mail Group Ltd*** **[2019] ICR 750** confirms this guidance also applies under the Equality Act 2010.

202. It is not sufficient for a claimant to merely to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. Rather a claimant must establish a prima facie case of discrimination. As was held in ***Madarassy v Nomura International Plc*** **[2007] ICR 867**:

"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination." (paragraph 56)

203. The court in ***Madarassy*** indicated that at the first stage the tribunal would need to consider all the evidence relevant to the discrimination complaint such as evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like; and available evidence of the reasons for the differential treatment. The absence of an adequate explanation for differential treatment of the complainant is not relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant.

204. At the first stage the tribunal should take into account all of the relevant evidence from both sides and usually disregard any explanation provided the respondent. The consideration of the tribunal then moves to the second stage whereby the burden is on the Respondent to prove that it has not committed an act of unlawful discrimination. The Respondent may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If it does not, the tribunal must uphold the discrimination claim.

205. As regards the "something more" needed to shift the burden of proof onto a respondent, this will depend upon the facts of each case but it may include evidence of stereotyping, statistical evidence, lack of transparency or inadequate disclosure, or inconsistent explanations. However, mere unreasonable treatment by an employer "casts no light whatsoever" as to the question of whether an employee has been treated unfavourably -

Strathclyde Regional Council v Zafar **[1998] IRLR 36**. This has also been followed by the Employment Appeal Tribunal in ***Law Society and others v Bahl*** **[2003] IRLR 640** where it was held that mere unreasonableness is not enough as it tells us nothing about the grounds for acting in that way.

206. In ***Laing v Manchester City Council and others*** **[2006] IRLR 748** the EAT provided helpful guidance on the application of the burden of proof, and in particular the potential for a tribunal to move direct to the second stage where the evidence suggests that the employer had discriminated against the claimant:

"75. The focus of the tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race".

76. Whilst, as we have emphasised, it will usually be desirable for a tribunal to go through the two stages suggested in Igen, it is not necessarily an error of law to fail to do so. There is no purpose in compelling tribunals in every case to go through each stage. They are not answering an examination question, and nor should the purpose of the law be to set hurdles designed to trip them up. The reason for the two-stage approach is that there may be circumstances where it would be to the detriment of the employee if there were a prima facie case and no burden was placed on the employer, because they may be imposing a burden on the employee which he cannot fairly be expected to have discharged and which should evidentially have shifted to the employer. But where the tribunal has effectively acted at least on the assumption that the burden may have shifted, and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever.

77. Indeed, it is important to emphasise that it is not the employee who will be disadvantaged if the tribunal focuses only on the second stage. Rather the risk is to an employer who may be found not to have discharged a burden which the tribunal ought not to have placed on him in the first place. That is something which tribunals will have to bear in mind if they miss out the first stage. Moreover, if the employer's evidence strongly suggests that he was in fact discriminating on grounds of race, that evidence could surely be relied on by the tribunal to reach a finding of discrimination even if the prima facie case had not been established. The tribunal cannot ignore damning evidence from the employer as to the explanation for his conduct simply because the employee has not raised a sufficiently strong case at the first stage. That would be to let form rule over substance."

Drawing inferences

207. The Supreme Court in ***Efobi*** considered the question whether an adverse inference may be drawn from the absence of a witness. It was held that at the first stage of considering a discrimination claim, no adverse

inference could be drawn from the fact that the employer had not provided an explanation for the claimant's treatment, because the employer's explanation had to be ignored at this stage, however this does not mean that no adverse inference of any kind could ever be drawn at the first stage from the fact that the employer had failed to call the actual decision makers. The Court held:

"there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so" (paragraph 41).

208. It will be for the tribunal to consider the witness availability, what relevant evidence the witness could have given, what other relevant there was on that point in issue, and the overall significance of those points. The court also held that "*Where it is said that an adverse inference ought to have been drawn from a particular matter - here the absence of evidence from the decision- makers - the first step must be to identify the precise inference(s) which allegedly should have been drawn"* (paragraph 43).

Constructive dismissal / discriminatory dismissals

209. The applicable law is found in section 95(1)(c) of the Employment Rights Act 1996 which provides that "*for the purpose of this Part an employee is dismissed by his employer if .....the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".*

210. The leading case on constructive dismissal is ***Western Excavating (ECC) Ltd v Sharp 1978*** **ICR 221, CA**. The employer's conduct must give rise to a repudiatory breach of contract. In that case Lord Denning said "*If the employer is guilty of conduct which is a significant breach going to the root of the contract, then the employee is entitled to treat himself as discharged from further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."*

211. There will be a breach of the implied term of trust and confidence where, looking "*at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and. sensibly, is such that the employee cannot be expected to put-up' with it*" - ***Woods v WM Car Services (Peterborough) Ltd*** **[1981] ICR 666**.

212. In order for there to have been a repudiatory breach of the implied term of trust and confidence, there must have been no "*reasonable and proper cause*" for the employer's actions: ***Hilton v Shiner*** **[2001] IRLR 727**.

213. In ***Malik v Bank of Credit and Commerce International SA*** **1997 IRLR 462** the House of Lords affirmed the implied term of trust and confidence 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".

214. In ***Baldwin v Brighton and Hove City Council 2007*** **IRLR 232** the EAT had to consider whether for there to be a breach, the actions of the employer had to be calculated and likely to destroy the relationship of confidence and trust, or whether only one or other of these requirements needed to be satisfied. The view of the EAT was that the use of the word *"and"* by Lord Steyn in the passage quoted above from ***Malik***, was an error of transcription and that the relevant test is satisfied if either of the requirements is met, so that it should be "*calculated or likely".*

215. In ***Kaur v Leeds Teaching Hospitals NHS Trust 2018*** **IRLR 833** the Court of Appeal listed five questions that should be sufficient for the Tribunal to ask itself to determine whether an employee was constructively dismissed:

a. What was the most recent act (or omission) on the part of the employer the employee says caused, or triggered, their resignation?

b. Has the employee affirmed the contract since that act?

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

d. If not, was it nevertheless a part (applying the approach explained in ***Waltham Forest v Omilaju [2004]*** **EWCA Civ 1493**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign).

e. Did the employee resign in response (or partly in response) to that breach?

216. In ***Meikle v Nottinghamshire County Council*** **[2004] EWCA Civ 859** the Court of Appeal held that a constructive dismissal could amount to an act of discrimination even though it is the employee who terminates the contract by accepting the employer's repudiatory breach. Per Keene LJ (at paragraph 48):

"... the courts should avoid attaching too much significance to form instead of substance. Whether there is a dismissal cannot depend on whether an employer says to an employee "get out" or alternatively drives him out. In the Derby case [2001] ICR 8332, after dealing with the arguments based on the history of the various statutes, the appeal tribunal said, at p840:

> *"16...Whether the employer deliberately dismisses the employee on racial grounds or he so acts as to repudiate the contract by racially discriminatory conduct, which repudiation the employee accepts, the end result is the same, namely the loss of employment by the employee. Why should Parliament be taken to have distinguished between these two situations?""*

217. It is important to note that in ***Amnesty International v Ahmed*** **UKEAT/0447/08** the EAT noted that it does not automatically follow that unlawful discrimination is a breach of trust and confidence as the two tests are distinct.

218. In ***Williams v Governing Body of Alderman Davies Church in Wales Primary School*** **[2020] IRLR 589**, by reference to ***Meikle*** (above) the EAT held that a constructive dismissal should be held to be discriminatory *"if it is found that discriminatory conduct materially influenced the conduct that amounted to a repudiatory breach"* (paragraph 89).

219. In ***De Lacey v Wechseln Limited*** **[2021] IRLR 547** the EAT held:

"..there can be cases in which the constructive dismissal is, overall, discriminatory, even though the last straw was not. The very essence of the "last straw" doctrine is that the last straw need not be something of major significance in itself. It need not even amount to a breach of contract, when looked at on its own. It need not have the same character as the other incidents that preceded it.." (paragraph 71).

220. The Court added that the significance of the last straw is that it tips things over the edge so that the entirety of the treatment suffered by the employee amounts to a repudiatory breach of contract, and that in a discriminatory constructive dismissal, time runs for the claim from the date of the acceptance of the repudiatory breach, not from the date or dates of the discriminatory events. Accordingly a discrimination claim arising out of a constructive dismissal may be in time even if the discriminatory events that render the dismissal discriminatory are themselves out of time (paragraph 72).

221. In ***Driscoll v V & P Global Limited and others*** **[2021] IRLR 891** the EAT confirmed that a where an employee resigns in response to a repudiatory conduct which constitutes or includes unlawful harassment, his or her constructive dismissal is itself capable of constituting "unwanted conduct" and hence an act of harassment contrary to ss 26 and 40 of the Equality Act 2010.

Time limits

222. Section 123 Equality Act 2010 provides that proceedings on a complaint may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Section 123(3) provides that conduct extending over a period is to be treated as done at the end of the period.

223. The normal time limit must be adjusted to take into account the early conciliation process and any extensions provided for in section 140B.

224. In ***Hendricks v Metropolitan Police Commissioner*** **[2002] EWCA Civ 1686**, the Court of Appeal stated that the test to determine whether a complaint was part of an act extending over a period was whether there was an ongoing situation or a continuing state of affairs in which the claimant

was treated less favourably. In ***Hale v Brighton and Sussex University Hospitals NHS Trust*** **UKEAT/0342/17** it was found that the respondent's decision to instigate disciplinary proceedings against the claimant created a state of affairs that continued until the conclusion of the disciplinary process.

225. When determining if there was a continuing state of affairs the tribunal will consider what the acts were, the context and who was involved. A tribunal may decide that some acts form part of a continuing act, while others remain unconnected - ***Lyfar v Brighton and Sussex University Hospitals Trust*** **[2006] EWCA Civ 1548**.

226. It is for the claimant to show that it would be just and equitable to extend time - ***Bexley Community Centre (t/a Leisure Link) v Robertson*** **[2003] EWCA Civ 576**.

227. The court in ***British Coal Corporation v Keeble*** **[1997] IRLR 36** provided guidance to tribunals when considering whether to exercise its discretion to extend time on this just and equitable basis. This will include consideration of the length of and reasons for the delay, but might include the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued had co-operated with any requests for information; the promptness with which the claimant acted once they knew of the possibility of taking action; and the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

228. The court in ***Adedeji v University Hospitals Birmingham NHS Foundation Trust*** **[2021] EWCA Civ 23** has confirmed that the correct approach is for the tribunal to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. The court advised against using a mechanistic approach and using the examples in ***Keeble*** as some sort of checklist.

229. In ***Jones v The Secretary of State for Health and Social Care*** **[2024] IRLR 275** the Employment Appeal Tribunal reiterated the long established principle that time limits in an employment law context are relatively short and should be complied with, however the tribunal has a wide discretion to extend time on just and equitable grounds.

Conclusions and analysis

230. The Claimant contacted ACAS on 13 June 2023, therefore anything occurring before 14 March 2023 is potentially out of time under s. 123 Equality Act 2010 unless it was brought within some other period that the Tribunal considers to be reasonable. As set out under s. 123(3), conduct extending over a period is to be treated as done at the end of that period. It is accepted that the complaint about the woodpile comment which occurred on 30 March 2023 has been brought within time.

231. Given the operation of s. 212 Equality Act 2010 which provides that detriment does not include conduct that amounts harassment, we will deal with each allegation in turn (where it is appropriate to do so) rather than as they have been set out under the list of issues.

Comments from Jordan in November 2021, that "I want every fucking foreigner out of my Country"?

232. The complaint has on the face of it been brought out of time. The comment was made in November 2021 and the ET1 was lodged on 20 July 2023, some eighteen months later. However, we find that there was conduct extending over a period ending with the "woodpile" comment on 30 March 2023 which was within time. We find that that there was a continuing state of affairs whereby offensive comments relating to race had made been at the Harper Hotel by staff in management roles which other managers failed to address. There was an inexplicable failure by senior management to provide training to all staff on equality and diversity at the hotel until after the Claimant resigned in April 2023. Moreover complaints about offensive comments were ignored and brushed aside by managers such as Mr Keirle and Ms Wilson, and as such we find that there was a continuing state of affairs leading up to the date the Claimant's employment ended. We note that the complaint about shouting and swearing by the Second Respondent had been addressed, however that matter is distinguishable as it did not relate to discrimination.

233. Even if we are wrong on the continuing state of affairs, we would in any event have exercised our discretion on a just and equitable basis given that the complaint had merit, the Respondent agreed that the comment was made, and as such there was no prejudice to the Respondent given that the allegation was admitted. This is not a case whereby memories of events might be impaired as the First Respondent accepted in its Response that the comment had been made, and Mr Cutmore-Scott was honest and candid about it in his witness statement. We further note that the Claimant had been attempting to progress her job and her career with the First Respondent, she had sought to raise issues at the time however these were ignored or brushed off, and when she ultimately raised her formal grievance she was directed to return to work with no resolution or any measures put in place for her. The Claimant's mental health deteriorated and she became unwell following the woodpile comment, and she raised her claim in a reasonable period after the final incident relied upon concerning the handling of her grievance. Consequently we would have extended time on a just and equitable basis had it been necessary and we therefore had jurisdiction to hear this complaint.

234. The First Respondent has agreed that the comment was made. The words used quite clearly related to race. It has not been argued that this was not unwanted conduct, and for the avoidance of doubt we find that it was unwanted. The unwanted conduct clearly related to nationality or national origins which falls within the definition of race under the Equality Act 2010. We were not satisfied from what we have heard that the purpose of making that comment was to creating the proscribed environment, but we are satisfied that it did have the effect of causing the Claimant to feel harassed within the definition under s. 27 Equality Act 2010. We note that the comment was not directed at the Claimant but was said in her presence but we find that it caused the Claimant to feel that her dignity had been violated and also that it was humiliating and offensive to her. The Claimant, and Ms Hashim-Caldwell, both complained about this at the time. The comment had clearly caused offence to the Claimant. We also find that it

was reasonable for it to have had that effect upon her in particular given her mixed race heritage whereby her grandparents came to this country from abroad.

235. This complaint of harassment related to race succeeds as against the First Respondent. We do not therefore need to go on to consider whether it was also an act of less favourable treatment.

Comments from the Second Respondent in Summer 2022 that *"the blacks need serving outside"* and *"I don't know what they are meant to be called nowadays"?*

236. Again this complaint has been prima face brought outside of the time limit, however for the reasons we have given above, we find that there was a continuing course of conduct which comprised of making offensive comments as to race compounded by the failure of management to take action by way of equality and diversity training and to deal with staff complaints about discrimination.

237. Had it been necessary instead for us to consider whether to exercise our discretion on a just and equitable basis, we would have done so for the reasons we have already given. The Tribunal has a wide discretion whether to extend time, there was no obvious prejudice to the Respondents as they were able to address the allegations, and there is a public interest in allegations of discrimination being heard and not simply dismissed on grounds of time where it is still possible to have a fair hearing. In this case the Claimant had been complaining about race discrimination on a number of occasions and these complaints were often ignored or mishandled, the claim had been brought in a reasonable period of time following the last act complained of, and it would therefore be just and equitable for the Tribunal to extend time to allow all of these matters to be considered. We therefore have jurisdiction to consider the complaint.

238. We have found that the Second Respondent made these comments and that the Claimant heard them. The words used quite clearly related to race. We find that this was unwanted conduct, and we also find that it had the proscribed purpose under s. 27 Equality Act 2010 as it was clearly, in our view, intended to demean people on account of the colour of their skin. The Second Respondent could have referred to them as the guests or the family, he could also have referred to them as their table number, but he chose not to.

239. Whereas we of course do not find that describing someone as black would of itself have the purpose of causing the proscribed effect, the words used was "the blacks" not the "the black family" or "the black guests." This is borne out by the Second Respondent's subsequent sentence *"I don't know what they are meant to be called nowadays"* which, in our view, was a clear intention to demean them further by reducing those guests not only to their colour, but also the suggestion that he did not know what to call them which we find was expressed in a negative and a belittling manner.

240. We remind ourselves that the evidence of the Second Respondent was that he was "very aware" of the Claimant's race although we recognise that the comments were not directed at her specifically they were made in her

presence. Given the words used it clearly related to colour which falls within the definition of race under s.9 Equality Act 2010.

241. Even if we are wrong as to the purpose, we find that the comments had the proscribed effect on the Claimant and that it was reasonable, not least because of her mixed race ethnicity, for it to have had that effect upon her. The Claimant was clearly offended and humiliated by the remarks and it was reasonable for it to have had that effect upon her. We are also mindful that the Second Respondent was in a managerial and superior position to the Claimant and we find that this was a particularly aggravating feature of the conduct.

242. We note that the First Respondent does not seek to rely on the statutory defence under s. 109 Equality Act 2010. This complaint of harassment related to race succeeds as against the First and Second Respondents. We do not therefore need to go on to consider whether it was also an act of less favourable treatment.

Comments in July 2022 by the Second Respondent whilst discussing drug addicts state, *"all you lot are"* and *"all you black people"?*

243. Again this is a matter which has been brought outside of the primary time limit, however for the reasons we have already given above, we find that there was a continuing course of conduct by virtue of the continuing pattern of making offensive comments about race compounded by the continuing failure of the First Respondent to address it either by training or by acting on complaints which had been raised. We of course note that this was the second offensive comment made by the Second Respondent in the presence of the Claimant. Similarly even if we are wrong about the continuing course of conduct we would have exercised our discretion to extend time for the same reasons we have give above. We therefore had jurisdiction to consider this complaint.

244. We have already found that these comments were made by the Second Respondent. The words used quite clearly related to race. Whereas this was a conversation about drug taking at the hotel which those present were happy to discuss, we find that the comments about black people was unwanted conduct as it was the Second Respondent and not the Claimant who brought race into the conversation.

245. We also find that this had the purpose of the proscribed effect as the Second Respondent has said he was very aware of the Claimant's race, it was directed at the Claimant and those who share her race, and he would therefore have known how offensive it would have been for to her to hear him suggest *"all your lot"* take drugs thereby stereotyping her.

246. Even if we are wrong as to the purpose, we find that it would have been reasonable for the comments to have had the effect of humiliating and of causing offensive to the Claimant, and that it would have been reasonable for it to have done so given her mixed race ethnicity. The fact that it was said by a manager at the hotel in a position of power or authority over the Claimant is again an aggravating feature.

247. This complaint of harassment related to race succeeds as against the First and Second Respondents. We do not therefore need to go on to consider whether it was also an act of less favourable treatment.

Failure to promote the Claimant in July 2022 following the departure of Ms Mills or upon her return on a temporary basis

248. As regards the issue of time, again we note that the complaint appears to have been brought outside of the time limit, however we observe that the failure to promote the Claimant continued up until her resignation and as such we find that this amounted to a continuing state of affairs. In the event that we are wrong on that, and we note that those responsible for not promoting the Claimant are not the same people who we have found to have harassed her, we would in any event exercised our wide discretion to extend time on a just and equitable basis for the reasons we have already given above and which are not repeated here, noting that the extension of time (if required) would be minimal given that this failure to promote the Claimant endured for the rest of her employment. We therefore had jurisdiction to consider this complaint.

249. The Tribunal considers that this complaint is more naturally one of direct race discrimination – the Claimant allegedly having been treated less favourably than Ms Mills (who is white) or a hypothetical comparator. The failure to promote someone can amount to a detriment. We have found Ms Mills to be a valid comparator for this complaint.

250. It has not been disputed that the Claimant was not promoted. The dispute between the parties is the reason why. The Claimant says that it was on grounds of race, the First Respondent says that there was no need for the role. It is for the Tribunal to determine the reason why the Claimant was not promoted.

251. We have applied the statutory burden of proof to this allegation. The first question we considered was whether the Claimant has proved facts from which the Tribunal could decide, in the absence of any other explanation, that the failure to promote her was due to race. In our view the answer to that question is yes, and we will explain our reasons below.

252. We find that the Claimant has established a prima facie case of direct discrimination because Ms Mills, who is white, was performing the role of Reception Manager until her departure in June 2022, the Claimant was not offered that role upon her departure but was tasked with undertaking much of her role, and upon Ms Mills' return she was appointed as Reception Manager. The role of Reception Manager continued to exist, it was clear from the correspondence being sent by Ms Mills and that contained on the work rota that is the role she was performing on her return, and this was also the unchallenged evidence of Ms Hashim-Caldwell. Had the First Respondent sought to challenge the evidence of Ms Hashim-Caldwell it could have done so but instead treated her evidence as agreed.

253. The Claimant and her witnesses have given us consistent and corroborative evidence that the Claimant was good in her role and that she was seeking promotion. The Second Respondent told us that she was good in her role and praised her performance in his interview with Ms DeVoil. Ms

Hashim-Caldwell who provided evidence for both parties said that the Claimant performed better than anyone on reception, including Ms Mills, and had she worked elsewhere she would have been promoted. This evidence was provided for the Claimant but was unchallenged by the First Respondent. We noted the interview notes of Mr Taylor who praised the Claimant's performance. Accordingly we find that the Claimant has established a prima facie case of less favourable treatment.

254. The burden has shifted to the First Respondent to provide a non discriminatory explanation for the treatment. We have found the First Respondent's explanation to be implausible and we also took into account the level of hostility in Mr Cutmore-Scott's witness statement directed the Claimant with respect to her performance at work which we found to be exaggerated and unreliable.

255. The explanation from the First Respondent is simply that the role was no longer required and it had ceased to exist and Ms Mills was brought in urgently but not as Reception Manager. Quite clearly that was not the case as we have already found. Ms Mills returned to work at the Harper Hotel in the same role she performed as before.

256. Whereas the First Respondent did not bring Ms Wilson as a witness to these proceedings, we note that in her interview with Ms DeVoil she agrees that the role was no longer needed, but further she says that the Claimant would not have been suitable in any event, and she suggested the Claimant lacked maturity and had not stepped up.

257. The description of the Claimant's performance as provided by Mr Cutmore-Scott amounted to an attempt at character assassination as Ms Bewley has argued. By way of reminder, Mr Cutmore-Scott described the Claimant as presenting managerial challenges, being quite unstable, needing consistent emotional support, having complicated romantic entanglements with staff members, having childcare challenges impacting her ability to do the job, having ongoing mental health challenges that made her difficult to rely on, that she was just about able to do her job when Mr Keirle or Ms Wilmott were there, that she was erratic and unpredictable and would often leave work early. Mr Cutmore-Scott also described the Claimant as suffering from some sort of paranoid delusion disorder. Not only were these descriptions untrue based upon what we have heard about the Claimant's performance from the other witnesses (including the Second Respondent and Ms Hashim-Caldwell as set out in her witness statement), and what we have read in the bundle of documents before us, they appeared incredibly hostile. The explanation provided by the First Respondent was unreliable and inconsistent.

258. Accordingly, the burden of proof having shifted to the First Respondent, it has failed to persuade us that the Claimant's race played no part whatsoever in the treatment complained of. For that reason we uphold the complaint of direct race discrimination as against the First Respondent. It is unnecessary therefore for us to go on to consider whether this complaint was an act of harassment.

<u>On 30 March 2023, did the Second Respondent state, "well, that's just a nigger in a woodpile."</u>

259. This complaint was brought within the time limit under s. 123 Equality Act 2010. The words used quite clearly related to race.

260. We have already found that the Second Respondent made this comment notwithstanding his vehement denials that he did not. It is trite that very few people would admit to making a comment like that. The conduct was unwanted as the Claimant was simply discussing a hotel reservation. The Second Respondent is an intelligent man and most sensible or rational people would or should realise how offensive a comment like that would be to others in general, particularly so in a place of work. The Second Respondent has told us that he was very aware of the Claimant's race, and as such we find that the purpose was to cause the proscribed effect.

261. Even if we are wrong as to the purpose, the comment clearly violated the Claimant's dignity and also created an intimidating a hostile, a degrading, a humiliating, and an offensive environment for her. It is unnecessary for the conduct to do all of those things to amount to harassment, however we find that it did. The comment caused the Claimant to become so highly distressed that she suffered a panic attack at work, she struggled to breathe and hyperventilated, and she subsequently went off work sick and never returned. The effects upon the Claimant were observed by Mr Taylor and Ms Manning, neither of whom were called to give evidence but recorded it in their interview notes. We also find that it was reasonable for the conduct to have had this effect upon the Claimant as most people would find the phrase offensive, and the Claimant has persuaded us why it was particularly offensive to her due to her family background. We of course note that the comment was made by someone who was a manager and in a position of power or seniority to the Claimant.

262. The complaint of harassment related to race succeeds as against the First and Second Respondents. We do not therefore need to consider whether it amounted to less favourable treatment.

Protected acts

263. We find that the Claimant's complaint in November 2021 to Ms Wilson was a protected act as she was complaining of race discrimination (comments about foreigners) by Jordan.

264. We also find that the Claimant's oral complaint in July 2022 to Ms Wilson about the Second Respondent's comments about black people and drugs was a protected act as she was clearly complaining about race discrimination.

265. We find that the Claimant's written grievance of 31 March 2023 was a protected act. It has not been argued by the Respondent that this was not a protected act, and in any event we find that it was as she was clearly complaining of race discrimination. Similarly, and for the same reason we also find that the Claimant's appeal of 10 April 2023 was also a protected act as she was clearly complaining of race discrimination and the Respondent has not sought to argue otherwise.

266. For the avoidance of doubt we find that the Claimant's oral and written grievances and appeal amounted to protected acts within the meaning of s. 27(2)(d) Equality Act 2010.

267. We find that the First Respondent was aware that the Claimant had carried out these protected acts as it was abundantly clear that the Claimant was complaining about race discrimination.

Victimisation

Failure to investigate or redress the grievances

268. Whereas the failures on the part of Ms Wilson would be prima facie out of time, we find that there was a continuing state of affairs whereby staff complaints about discrimination (rather than complaints generally) were not dealt with. The complaint about the written grievance and appeal were in time. We therefore have jurisdiction to consider this complaint.

269. We find that Ms Wilson despite being informed of the comments from Jordan about foreigners and the comments from the Second Respondent about drugs, failed to take any action in response but simply ignored them and brushed them aside, minimising what had been said and making excuses for the Second Respondent's behaviour.

270. We also find that Mr Keirle's purported grievance investigation was no more than a sham and there was no attempt to properly investigate the Claimant's complaints of race discrimination.

271. In addition we find that the appeal investigation conducted by Ms DeVoil, whilst undoubtedly more thorough than that of Mr Keirle, was still poorly conducted. There was a baffling reference to indirect discrimination rather than harassment, there was an assessment from the point of view of the guests rather than the Claimant, the comment about "the Blacks" focussed wrongly on whether the word black was offensive as opposed to the term "the Blacks", relevant evidence was either ignored or too little weight (if any) was attached to it, the First Respondent's evidence was taken at face value whereas Ms DeVoil applied a far higher standard of proof on the Claimant despite acknowledging it should have been on the balance of probabilities. In addition many of the allegations, such as the "not dark enough to be offended" comment remained yet again unaddressed, and contrary to the Respondent's own policy Ms DeVoil said that the Claimant had failed to raise these matters formally even though the policy provides for oral complaints to be raised. We found it hard to believe that an external professional firm specialising in this type of investigation could have made the errors we identified.

272. We have found that all of the above amounted to unreasonable failures to properly investigate or to provide redress as to the Claimant's grievances and further this amounted to an unreasonable failure to comply with the ACAS Code of Practice. All of the above amounted to a detriment to the Claimant for having carried out a protected act.

273. The complaint of victimisation therefore succeeds as against the First Respondent.

Failure to prevent the Claimant from being harassed by properly investigating and/or taking any or any appropriate disciplinary action and/or arranging for the Second Respondent to undertake equality training and/or apologising to the Claimant and/or removing the Second Respondent from the Claimant's areas of work and/or implementing procedures for improving race relations within the workplace and/or taking any steps whatsoever;

274. We find that this complaint is within time as it part of a continuing state of affairs which extended up to the termination of the Claimant's employment on 24 April 2023.

275. We have found that the Claimant was subjected to repeated acts of harassment related to race and despite complaining about them at the time to various managers, no meaningful steps were taken to deal with those complaints or to protect the Claimant from further such acts. No action was taken with respect to Jordan who we find left of his own volition, no steps were taken by Ms Wilson who simply refused to believe that the Second Respondent could act as alleged, and whereas the First Respondent's policy provided for equality and diversity training for managers, no one attempted to implement it. Mr Cutmore-Scott proceeded on the basis that if he or his family were on site then that was sufficient. Clearly that proved not to be the case.

276. The policy also provided that alleged perpetrators of discrimination could be moved or separated during an investigation, however that was not done and contrary to the First Respondent's policy Mr Keirle demanded that the Claimant return to work alongside the Second Respondent whom she had just accused of making the "nigger in a woodpile" comment – this was on the basis that he saw no reason for her to remain off work. It appeared to the Tribunal that the First Respondent viewed the Claimant as the problem as Mr Cutmore-Scott's description of her was that she was unstable erratic and had a paranoid delusion disorder.

277. The only measure which the First Respondent implemented was to arrange diversity and inclusion training, and whereas it was a sensible course of action, this came very late and only after the Claimant had been repeatedly subjected to harassment related to race and had gone off sick. Had the training been implemented earlier it is possible that the matters giving rise to this claim may not have happened or would have at least been handled differently.

278. We find that the above also amounted to a detriment to the Claimant beyond simply the failure to investigate her grievances or to provide her with redress.

279. We uphold this complaint of victimisation as against the First Respondent.

Caroline Wilson stated "that's not good is it" following the grievance in November 2021, rather than taking any, or any proper, action in relation to the allegation;

280. This complaint appears to be a repetition of the first complaint of victimisation above, nevertheless we make it clear that we have found that Ms Wilson made the comment alleged and that she failed to take any action in connection with the Claimant's oral complaints to her, that she routinely ignored and dismissed the Claimant's complaints and automatically sided with the Second Respondent, and that this amounted to a detriment, and therefore this complaint of victimisation succeeds as against the First Respondent.

281. We have already addressed the issue of time above and we repeat that the Tribunal had jurisdiction to consider this complaint.

Amy Wilmot stated: "I don't know why you are getting upset, you are not dark enough" following the Claimant raising a grievance

282. Whereas this complaint is prima facie out of time, we have already indicated repeatedly in this judgment that there was a continuing state of affairs at the hotel whereby managers failed to address complaints about discrimination, and this state of affairs endured until the Claimant's resignation on 24 April 2023.

283. We have found that Ms Wilmot made the comment in response to the Claimant having raised an oral complaint about race discrimination with her. We find that by telling the Claimant that she did not know why she was getting upset, and further telling her that she was not dark enough to be offended, this was clearly a detriment to the Claimant as it suggested she was overreacting. Moreover, the suggestion that the level of offence that might reasonably be caused is commensurate with one's skin colour was a particularly offensive comment to have made. The Claimant was obviously offended by the remark as she raised it four times with the First Respondent yet no one listened to her.

284. We therefore uphold this complaint of victimisation as against the First Respondent.

Ms Wilson stated, "it was just a generational thing" and "just a joke" following the Claimant raising a grievance

285. This complaint also appears to be a repetition of the first complaint of victimisation above, nevertheless we make it clear that we have found that Ms Wilson made the comment alleged and that she failed to take any action in connection with the Claimant's oral complaints to her, that this amounted to a detriment, and therefore the complaint of victimisation succeeds as against the First Respondent.

286. We have already addressed the issue of time above and we repeat that the Tribunal had jurisdiction to consider this complaint.

Caroline Wilson and others informed the Claimant's former colleagues whilst the Respondent was carrying out the investigation in March 2023, that there was no truth in the Claimant's allegations, before concluding any real investigation into such truthfulness.

287. We were not satisfied to the level that we needed to be that Ms Wilson made the comments alleged of her. Whilst the comments were of a similar nature to comments she had made in the grievance appeal interview, we were not provided with sufficient evidence that the comments had been said by her, or when or whom they were said to. Accordingly this complaint of victimisation does not succeed as the factual premise of the complaint has not been made out.

288. It was unnecessary for us to consider the issue of time as this complaint was dismissed.

The Claimant was constructively dismissed on 24 April 2023

289. We have found that the Claimant was repeatedly subjected to acts of harassment related to race during the course of her employment with the First Respondent, that the First Respondent directly discriminated against her on grounds of race by not promoting her, and that she was victimised on a number of occasions for having made oral and written complaints about the treatment she was subjected to. These acts were carried out by those in managerial positions within the First Respondent.

290. All of these acts are capable of amounting to a breach of the duty of mutual trust and confidence implied into the employment contract. They may amount to a breach individually or cumulatively and culminating in a final straw.

291. We have not found the Claimant to have affirmed any of the breaches by continuing to remain in employment as long as she did. When the acts took place the Claimant complained about them to management, save for *"the blacks need serving*" comment where she could not be sure if she had complained to Mr Keirle. The Claimant exercised her right to complain about them and remained in her role in the hope that by complaining her treatment would improve. We do not find that by utilising the grievance process as she did, the Claimant had in some way affirmed all of those earlier breaches.

292. We have looked closely at the last straw relied upon, which is alleged to be the comments from Ms Wilson to the Claimant's colleagues that there was no truth in her allegations. We did not find that this occurred on the balance of probabilities. We have therefore gone to the preceding act relied upon, which is the rejection of the Claimant's grievance by Mr Keirle on 4 April 2023. We note that complaint was within time.

293. We have already found that this was process was a sham and that the grievance was not properly investigated and that it amounted to a detriment and an act of victimisation. We find that this act was a breach of the implied duty of mutual trust and confidence and that it was capable of doing so in its own right. Every breach of the implied term is repudiatory and in this case we find that this was such a breach as an employee is entitled to expect that its employer will conduct an investigation into complaints of discrimination in a reasonably fair manner. That did not happen in this case for the reasons we have already given and which are not repeated here. The fact that the grievance was about some matters which were prima facie out of time in their own respect does not alter our finding. The Claimant's

grievance included a complaint that the Second Respondent said "nigger in a woodpile" on 30 March 2023, and that was in time in any event.

294. We have paid attention to the length of time between that grievance outcome on 4 April 2023 and the Claimant's eventual resignation on 24 April 2023. We do not find that the Claimant unreasonably delayed her resignation so as to amount to a waiver or an affirmation of the breach. We remind ourselves that this is a Claimant who suffered with her mental health and who was currently signed off from work for stress having some weeks earlier been exposed to an act of harassment at work by a manager, and having raised a grievance it was rejected and not properly investigated. The Claimant had recently been told to return to work and would inevitably have been exposed to the person she had complained about. These were clearly matters which had been preoccupying the Claimant as it was reflected in her GP notes, and having reflected upon the situation she found herself in, she decided that she could not return to work thereby accepting the breach. We do not find that there was any waiver or affirmation of the breach by waiting the 20 days before she resigned.

295. Accordingly we find that the Claimant was constructively dismissed by the First Respondent. We further find that this was the last straw and that it was an act of victimisation as we have already found that the failure to investigate the Claimant's grievance fairly by Mr Keirle amounted to victimisation. Having found that the constructive dismissal was an act of victimisation we do not need to go on to consider whether they also amounted to acts of harassment or direct discrimination.

296. This complaint of victimisation therefore succeeds as against the First Respondent.

Remedy

297. The Claimant has succeeded in her complaints of direct race discrimination, harassment related to race, and victimisation. The matter will now proceed to a private preliminary hearing for case management to agree directions for a remedy hearing.

298. In the meantime the Tribunal expects the parties to at least attempt to resolve the matter of remedy between them in order to limit further time and legal costs if possible. This would be in furtherance of the Overriding Objective.

299. We are grateful to Ms Bewley and Mr Munro for their assistance to the Tribunal.

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Employment Judge Graham

_____

Date 4 November 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

5 November 2024

FOR EMPLOYMENT TRIBUNALS

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