Case Number: 1403724/2023

EMPLOYMENT TRIBUNALS

Claimant	v	Respondent
Mr Andre Merrick		Royal Mail Group Limited

Mr Andre Merrick **Royal Mail Group**

Heard at: **Southampton Employment Tribunal**

On: **23, 23,25 and 26 September 2024**

Before: **Employment Judge Rayner**
Mrs C Earwaker
Mr K Sleeth

Appearances
For the Claimant: **In person with Miss B Parsons**
For the Respondent: **Miss Kendrick, solicitor**

JUDGMENT

1. The Claimant's claim that he was constructively and unfairly dismissed by the Respondent is well founded and succeeds.

2. The Claimant's claim that he was discriminated against on grounds of his race by the Respondent contrary to section 13 Equality Act 2010 , in respect of issue 2.1.1; issue 2.1.2.; 2.1.2.1 and 2.1.2.2 and issue 2.1.4 in the list of issues only, is well founded and succeeds.

3. The Claimant's claim that he was discriminated against on grounds of his race by the Respondent contrary to section 13 Equality Act 2010, in respect of the issues at 2.1.3;2.1.5, 2.1.6; 2.1.7 and 2.1.8 , in the list of issues are not well founded and are dismissed.

4. The Claimant's claims that he was discriminated against by the Respondent for reasons related to his race contrary to section 26 of the Equality Act 2010 are not well founded and are dismissed.

5. The matter will now be listed for a remedy hearing, with a date to be notified to the parties in due course.

Reasons

6. Oral judgment having been given to the parties at the end of the hearing , and the sort form judgment having been sent to the parties on 8 October 2024, and written reasons having been requested by the claimant on the 20 October 2024, the following reasons are now provided to the parties.

7. The claimant resigned from his employment on 17 February 2023.

8. He approached ACAS on the 11 April 2023 and received his ACAS certificate on the 23 May 2023.

9. He filed a claim to the employment tribunal on 12 June 2023. The claimant alleged constructive unfair dismissal and race discrimination.

10. Following a case management hearing before Employment Judge Cadney on 6 December 2023, the parties agreed the issues in the case, as set out in the bundle of documents provided to the purposes of this hearing at pages 60 to 63.

The issues agreed are as follows:

11. The claimant alleges that
    a. that Robert Fredenburg and Steve Grout made the claimant feel uncomfortable and targeted in February 2022;
    b. that in September 2022 the claimant was moved and or demoted on his return from sick leave and refers to the terms of the letter of 29 July 2022;

c. the claimant also refers to contact from managers during a period of sick leave in late 2022 in which his manager, Steve Grout, contacted him
d. the claimant relies on the delay in arranging an interview in respect of grievances he had raised as well as the delay in providing a grievance outcome, which had not been received by the date of the claimant's resignation.
e. The claimant relies on his pay being stopped on the 31 December 2022.
f. The claimant relies upon the breach of the implied term of mutual trust and confidence.

12. The claimant's allegations of race discrimination are put as allegations of direct discrimination and race related harassment.

13. The claimant alleges that in April 2021 David Cooper asked the claimant about his immigration status and discussed this with someone called Carlos.

14. In February 2022 after the claimant had confided with David Cooper about an ongoing issue he was having with Nigel, David Cooper was alleged to say
    a. I know you're finding it difficult because you are different to other people in the office
    b. you know how you are with your gold teeth
    c. In February 2022 did Steven Grout and Robert Fredenberg sit together in the canteen and keep looking at the claimant, talking to one another and looking back at the claimant
    d. in February 2022 did David Cooper change the claimant's break time from 3:00 PM to 3:20 PM
    e. in April 2022 did David Cooper request the claimant to attend a meeting regarding his attendance
    f. in August 2022 when the claimant arrived to work 2 minutes late David Cooper was waiting at the entrance for the claimant to arrive and started questioning him about his attendance
    g. in September 2022 Steven Grout informed the claimant that his duties would be changed and he would no longer be required to work in the SD locker NB is this an allegation of direct race discrimination

h. in December 2022 when the claimant has been signed off work sick, Robert Fredenburg attended the claimant's home to hand deliver a letter and questioned why he was not at work

15. The claimant also puts those matters set out above as acts of harassment related to race.

16. The respondent accepts that these are the relevant issues in the case although pointed out that time limits had not been included and that time limits were an issue particularly in respect of race discrimination.

17. The respondent filed an ET3 to the employment tribunal on the 19 July 2023 and denies all the allegations.

18. The respondent says that the claimant first made reference to race discrimination in a complaint he raised on the 7 October 2022 and that in that complaint he referred to allegations of race discrimination taking place in 2020 and 2021. The respondent asserts and we agree that the tribunal may not have jurisdiction to hear claims of race discrimination insofar as they relate to acts that occurred prior to the 12 of January 2023, unless they are found to be part of a continuing act of discrimination.

19. We remind ourselves as we reminded the parties of the discretion the tribunal has to extend time in circumstances where it is just and equitable to do so.

The hearing and the documents

20. Prior to the hearing the tribunal was provided with an agreed bundle of documents comprising 388 pages. We were provided with witness statements from David Cooper, Robert Fredenburg, Joe Miranda and Steven Grout on behalf of the respondent and from the claimant on his own behalf.

21. Mr. Cooper was the claimant's line manager from October 2018 until August 2022.

22. We were told at the start of the hearing that David Cooper would not be attending, although no reason was given, and the tribunal was asked to take his statement as read. The employment judge explained to the parties that the tribunal would read the statement, but that it would not carry as much weight as evidence which had been heard under oath and for which the parties had had the opportunity to cross examine on issues in dispute.

Chronology of events and findings of fact

23. The claimant started work for the post office as an operational postal grade based at Dorset Mail Centre on the 24 October 2016.

24. When he started work, the claimant was a part time employee, but at some point he transferred to his present place of work and at some point he also became a full time employee.

25. We have seen a number of employment contracts within the bundle, the most recent of which is for a long term contract for operational postal grade starting on the 16 July 2018 .

26. The claimant's job title is postman/postwoman and at paragraph six of the terms and conditions it states that details of his duties will be provided by Royal Mail and then says *you will also be required to undertake such other duties as may be required from time to time which Royal Mail considers you capable and competent to perform* .

27. There is a mobility clause in the contract at paragraph 7 which states *your initial place of work will be Southampton mail Centre* but goes on to say that he may be required to work at any other location of Royal Mail group limited.

28. It is a condition of the claimant’s employment that he has the right to work in the UK and paragraph 25 states that he must comply with immigration legislation.

29. The respondent asserts that the claimant was employed as a leave reserve and assigned to the special delivery SD locker, after he moved from a part time to a full-time position.

30. On the 13 April 2021 the claimant was sent a letter headed *Variation to Contract Of Employment.* This letter stated that with effect from the 12 April 2021 his terms and conditions of employment would be varied due to a temporary change in his part time hours.

31. The letter states that he remains as a postman, substantive OPG grade; that his weekly pay would be £453.50 per week gross and that his hours of attendance would be 35. His work location was now Dorset mail Centre.

32. We understand this to be the point at which the claimant became a full time worker rather than a part time worker.

33. In addition to this letter, the claimant received a further letter from the respondent dated the 29 July 2022, at page 229 of the bundle

34. This letter was headed *Potential Requirement For Reserves To Work Alternative Shift Patterns*. It stated that the Way Forward Agreement between Royal Mail and the Communication Workers Union allowed for the deployment of reserves on any shift, according to demand, with due notice and appropriate training. The letter then said, *as a current reserve duty holder I am writing to notify you that as of 8 August 2022 you may be a asked to work on any shift (early's late nights).*

35. The letter says *if required to work on a different shift to the one you currently work on you will be given a minimum of one weeks notice.*

36. All parties accept that this was sent to the claimant, although the claimant asserts that this was the first time anybody had suggested to him that he was a reserved worker.

37. Mr Grout gave evidence that the claimant became a reserve worker when he moved from a part time to a full time post. He said the reason for this was that the only full-time posts available were those identified as being reserved posts, meaning that they were appointed specifically to provide cover when other members of staff were absent on leave or absent for sickness reasons or other reasons.

38. Mr Merrick told us, and we accept, that he had applied for and obtained a specific opportunity to work in the SD locker when another member of staff left. He said that this was a job that he did from his appointment as a full time worker until his job was changed by Mr. Cooper and Mr Grout in September 2022.

39. We set out our findings of fact in respect of the events of September 2022 later in the chronology.

40. However, from the contractual documents we have been referred to and from the letters we have seen there is no indication whatsoever that the claimant is being employed upon any particular contract and in particular there is no identification anywhere of him as a reserve worker.

41. Further we find as fact that Mr Merrick did not work to cover other people's leave or absences, but worked to fill a post which was left vacant upon another member of staff leaving.

42. We also find that the letter sent to him in July 2022 was not suggesting that the *work* he did might be changed but was rather suggesting that the *shift* on which he did the work might be changed.

43. The claimant was originally from Trinidad and Tobago. He has indefinite leave to remain, but needs to renew this leave every 2 ½ years.

44. He says that in April 2021 David Cooper approached him in the office to question him about his immigration status.

45. In further and better particulars sent to the tribunal, the claimant says that he told Mr. Cooper that his rights remained the same and that he, Mr. Cooper could use the employer checking service to look this up. He asserts that Mr Cooper did not do this, but instead went and spoke to another colleague called Carlos about the claimant's immigration status.

46. In the statement provided on behalf of Mr Cooper, he says that he received an e-mail from human resources about a Home Office check that was required and that Stephen Grout had asked him to contact the claimant and action it to ensure that the claimant renewed his visa application. He says that this was in or about July 2020 and he understood there to be a deadline of early September 2020. He accepts that he initially approached the claimant to see if he was aware of the process.

47. We find that an e-mail was sent to Mr Grout on the 3 September 2020 from Visa monitoring. A signed Home Office consent form for Mr Merrick had been sent in and the request had been made by the Home Office to check Mr Merrick's continued right to work in the UK. Mr Grout was told that the check should be back in four to six days, and that he could continue to work for the Royal Mail.

48. On the 10 September Mr Grout received a further e-mail stating that the Home Office check had been completed; that they had received his positive verification notice, confirming the claimant's continued right to work in the UK. This check was valid until the 7 March 2021. It said, when the claimant received a new biometric residence permit Mr Grout should make a copy of the permit in duplicate and date the copies and send the copies on.

49. Mr Grout then contacted Mr. Cooper on the 15 September 2020 forwarding the emails and stating *please chase this daily if not weekly*.

50. At this stage it appears that the process had been completed and that what was being chased was the provision of a biometric residence permit.

51. There is a disagreement between the parties as to when the conversation took place. We accept that there was an exchange between the respondent officers in the autumn of 2020 and that at that point Mr. Cooper would have spoken to the claimant about the biometrics visa. However, at that stage the claimant had completed all the documentation and had therefore received confirmation of his right to remain and continue working until the following spring.

52. In his witness statement the claimant refers to the complaints that he raised when he raised his bullying and harassment complaint. He refers to what he said to Mr Miranda on the 10 November 2022, when Mr Miranda carried out an investigation.

53. One of the claimants complaints was that Mr Cooper had spoken to him about his work visa and then that he had then discussed it with a man called Carlos.

54. The claimant told Mr Miranda that he had received a letter from head office asking for a new bio card, which meant he had to get a letter from the Royal Mail saying that he had applied and was waiting for it to come through.

55. He says that he told David (Mr Cooper) this too as he, Mr Cooper was starting to get concerned and said he, the claimant, was just waiting for the Home Office. He said that later on when he went to the canteen Carlos had stopped him and said that David Cooper had told him that he, the claimant was having immigration problems.

56. The tribunal had no evidence from Carlos, and the claimant told the tribunal that Carlos had passed away two years ago.

57. Mr Cooper has written in his unsworn statement, that he did speak to Mr Carlos but that he did not mention the claimant. He says *I laid out everything that was required of the claimant but he was not cooperating*.

58. He suggested that in August 2020 the claimant was still not cooperating with the required process and that he then spoke to another member of his team, Carlos, who was from Argentina. In the witness statement he says he did not mention the claimant specifically, but asked Carlos whether he ever had to complete a visa or right to work renewal. He said that he , Mr Cooper later found out that Carlos had approached the claimant. He says *I can only assume that he took inference from something I had said and assumed that this related to the claimant*.

59. He accepts the claimant approached him about Carlos mentioning it to him and was frustrated. The witness statement states that Mr Cooper had apologised to the claimant.

60. The claimant told us, and we find that he had had a go at Mr. Cooper about this and that Mr Cooper had apologised. The claimant did not accept the apology and spoke to the union. We find as fact that the union had then spoken to the claimant and Mr. Cooper, and that Mr Cooper had accepted that he had done wrong, in that he should not have mentioned the matter to Carlos.

61. Mr Miranda decided not to interview Mr. Cooper, because he decided the events had taken place too long ago. This means he did not have this or any evidence about what had been said or when, except the claimants evidence .

62. There is a dispute between the parties therefore as to when this conversation took place, but also whether or not Mr. Cooper told Carlos about the claimants immigration issue or whether he asked him a general question about immigration issues.

63. We prefer the sworn evidence of the claimant. It is not denied that a conversation took place between Carlos and the claimant and we accept the claimant's recollection that Carlos specifically said to him, that he had been told by David that he, the claimant was having immigration problems. We also accept that the claimant raised the matter both with Mr. Cooper, who apologised, and with the union who also got involved. We find on balance of probabilities it is more likely that Mr Cooper did have that conversation and that that was the reason why he subsequently apologised for it.

64. We also find that it is more probable that the conversation took place sometime in late 2020 than early in 2021.

65. We all agree that the conversation was about the claimant's immigration status and that that is inextricably linked to his race and his status as a black man from Trinidad and Tobago. We also consider that the claimant was treated differently to the way another hypothetical white person in the same situation would have been spoken about by Mr. Cooper, in that he spoke to another employee about the claimant's personal employment status and issues.

66. We have no evidence that he would have behaved in that way to anybody else who had immigration issues. We find this because we find that Mr Cooper himself accepted that his behaviour was wrong and inappropriate and apologised for it, but also because we find that the union at the time also considered that his behaviour was wrong and inappropriate. We find therefore that the claimant was treated differently and less favourably than a hypothetical other person would have been treated by Mr. Cooper.

67. We accept that employers need to ensure that the people working for them have the relevant immigration checks in place and that they have the right to work in the United Kingdom. Asking questions about those matters is unlikely of itself to amount to discrimination.

68. However, we accept the claimant's evidence that he had already given Mr. Cooper assurances that the matter was being dealt with and we are troubled by the e-mail we have seen from Mr Grout suggesting that Mr Cooper should question the claimant about this on a weekly if not daily basis.

69. Further, asking another employee, who we find was the only other employee who was visibly of a different race or nationality, was a breach of the claimant's privacy rights, and wholly unreasonable. Mr. Cooper has not given evidence and we do not accept the evidence in his unsworn witness statement where it conflicts with the evidence of the Claimant.

70. From the facts we have found we consider that we could conclude, in the absence of an explanation that this was direct discrimination. We do not accept the explanation provided by Mr. Cooper in his witness evidence as truthful in respect of the conversation with Carlos. Whilst making inquiries about immigration status and the steps taken may be an explanation which is nothing to do with race, we have no explanation given by Mr. Cooper under oath that we are prepared to accept.

71. Either way as a standalone allegation in respect of race discrimination, we accept that it would be out of time. We have therefore considered later on in our judgement whether or not the actions are part of any continuing course of conduct, and if not whether it would be just and equitable to extend time.

72. The next allegation chronologically is that in February 2022 the claimant had confided in David Cooper about ongoing issues he was having with somebody called Nigel Harding. He alleges that Mr Cooper said *I know you are finding it difficult because you are different to other people in the office you know, how you are, with your gold teeth.*

73. The claimant puts this as an allegation of direct race discrimination and as an allegation of harassment related to race.

74. Mr Cooper denies the comment was made and in his unsworn statement he says *if there was any discussion had about difference it would have been that I compared the claimant with Nigel Harding on a personality basis and their differing work styles due to their ongoing issues.*

75. In the absence of sworn evidence and cross examination of Mr. Cooper we prefer the claimants evidence, and find that these comments were made to him and that they were made in or about February 2022.

76. We find that the claimant was the only black person working in his sections and that the comments made by Mr. Cooper were a direct reference to that fact.

77. Mr Merrick told Mr Miranda that Mr. Cooper made the comment in the context of the claimant raising concerns about Nigel Harding.

78. The claimant said that he had numerous issues with Mr Harding, who was older than he was, and who insisted on telling him what to do. He complained that he treated him unfairly and didn't want the claimant working there.

79. We accept that there had been attempts to improve the working relationship between the claimant and Mr Harding and that at one point both men had been referred to mediation. We find that there had been some apparent improvement for a short period of time before matters had deteriorated again.

80. The claimant told Mr Miranda that when Mr. Cooper made the comment, he the claimant had laughed and then he said *I slightly thought something of it but not in a bad way*. That is all Mr Merrick said and Mr Miranda asked him no further questions about it.

81. We find that the claimant did not *agree that this would not have been said in a negative way* as stated by Mr Miranda in his witness statement.

82. When the claimant was asked to explain the comment during the course of giving his evidence to the employment tribunal, he explained that he did not take it in a bad way.

83. In any event, he said that whilst he was not upset at the time, when other things happened later on, he thought that it had been said as something about his race.

84. Mr Miranda said that he concluded that if it had been said, it was said in a supportive way. He reached this conclusion without any evidence from Mr Cooper. Mr Miranda said the inference of what was meant as being different was not clear, but even if it was in relation to appearance, it did not, in his mind mean that it was racist or an example of bullying or harassment.

85. The claimant now puts this as a claim of direct discrimination as well as harassment.

86. We agree with the respondent that the remark, which we find was made, did not at the time or later have the effect of creating an intimidating hostile or otherwise offensive environment for the claimant.

87. However, we find that it was different treatment of the claimant and that it was something to do with the claimant's race. We conclude that the comment was made, albeit subconsciously, on grounds of the claimant's race.

88. The claimant was raising a concern about how he was treated by a fellow worker and instead of taking steps to resolve the issue, his manager drew attention to his difference and implicitly to his race. We do not accept the explanation provided by Mr Cooper that, if a comment was made, it was because he was comparing the way that claimant and Mr Harding worked.

89. We also remind ourselves that even if Mr Miranda was right and that the comment would not have been said in a negative way, that direct discrimination cannot be justified and that the intention of a person when making the comment does not provide a defense.

90. We conclude that this was an act of direct race discrimination, and we conclude that it took place in February 2022. The claimant did not raise it as a concern until October 2022 and did not make a complaint to the employment tribunal until April 2023.

91. The complaint in respect of this matter is therefore out of time unless we find that it was part of a continuing course of conduct. We remind ourselves that if it is out of time then we can consider whether or not it would be just and equitable to extend time.

92. We have therefore considered the reasons why the claimant did not complain about this matter at an earlier stage.

93. In respect of his reasons for not raising some matters with the respondent prior to his grievance in October 2021, we accept the claimants evidence that he did not make an issue at the time because *he did not want to be somebody who, because he is black, insinuated that a person was treating him in a particular way because of his colour*. He said that he had raised the issues as a grievance, because it had led to other things happening.

94. He said *it just hit me this is that it's been happening consistently for some time.* He said he didn't want to be someone who *comes to work and complains about their manager everyday*. He said this specifically in relation to the earlier allegations he had made during the course of the grievance hearing, but he has repeated this by way of explanation for delay in making any of his complaints, when giving his evidence to the employment tribunal.

Making the claimant feel uncomfortable in the canteen

95. The claimant alleges that in February 2022, following him raising some concerns with Mr Fredenburg that he saw Mr Fredenburg and Mr Grout having a discussion. We accept that this is true.

96. He also says that at one point he noticed Mr Grout peering round and apparently looking right at the claimant. We accept that Mr Grout may well have looked around and may well have appeared to have been looking at the claimant. The claimant says that he assumed that Mr Grout and Mr Fredenburg were talking about him and that the reason they were talking about him was because of the matters the claimant had been discussing with Mr Fredenburg.

97. Mr Grout denies that he would have been talking about the claimant or indeed any work matters whilst in the canteen. He accepts that he often took his lunch with Mr Fredenburg as they got on well, but says that they simply did not discuss work matters because it would not be appropriate.

98. The matter was not raised by the claimant at the time and Mr Grout was not asked any questions about this matter when he was asked questions by the claimant. The claimant was assisted by Miss Parsons, who is not legally qualified, but who asked questions about a range of matters and challenged the evidence of the respondent in many other respects.

99. We have no evidence before us other than the claimant's suspicions that the conversation in the canteen was anything to do with the claimant at all, and we find that the claimant has not proved that it was.

100. The claimant relies upon this as unreasonable conduct for the purposes of his constructive unfair dismissal claim.

101. We find that this was not unreasonable conduct. We have no basis to find that the conversation was anything to do with the claimant and find that of itself it is not capable of being a breach of contract and nor is it capable of contributing to any fundamental breach of an implied term.

The changes to the claimants break times

102. The claimant alleges that in February 2022 David Cooper changed the claimants break time from 3:00 PM until 3:20 PM. In support of this allegation the claimant produced some videos which he said he had taken whilst he was on his break, on his own. The tribunal agreed that these were relevant and admitted them as evidence.

103. We find that Mr. Cooper did make a decision to change the claimant's break times from 3:00 to 3:20 .

104. Mr Grout gave evidence that there was a need to cover the work of other areas on occasions and that employees could be asked to cover a section, whilst others took a break.

105. The respondent accepts that the breaks were changed but says this was not always the case and that it was not permanent.

106. We have been shown videos of the claimant working in an area where there are no other people, and we find that on a number of occasions he was the only person asked to cover breaks of other workers, the result being that he was taking his break at a different time from all other members of the teams within which he was working or covering.

107. The respondent accepts that the videos we have seen show the areas the claimant was working in. The respondent accepts it was his work areas (see subs of Respondent at 59)

108. We have no evidence from the respondent, to counter the claimant's assertion that he was singled out to take his breaks on his own. We accept that there may have been other people working in other areas taking their breaks at 3:20, but we understand the claimant's complaint to be that he was treated differently to other members of the team within which he was working. We find that he is right about that.

109. We accept the principle that an individual may be required, on occasions, to cover the break of other workers but that does not explain why the claimant was the only person required to take his break at a later time, out of the particular teams affected.

110. The explanation from Mr Grout , was that there was a need to cover others breaks. He gave no explanation why it was only the claimant asked to do this. The respondent but does not say when it was changed, and we find no one else was asked to do this

111. We find that the claimant was the only black person working in his areas and that he was the only person who was asked to cover the breaks of others on a regular basis. This was his evidence to the employment tribunal, and he was not challenged on that part of his evidence. We have no evidence from the respondents that anyone else was ever treated in the same way.

112. For example, there is no suggestion from the respondents that there was a Rota or that the requirement to take the late break was shared among the relevant workers, and we find that it was not.

113. Mr. Cooper states that he does not remember changing the claimant's break time from 3:00 until 3:20 but says that as he was a leave reserve changes are made from time to time and this would have been reasonable.

114. Again, in the absence of a sworn statement and any cross examination, we prefer the evidence of the claimant and note the evidence from the respondent that the claimant's break times were different.

115. From the findings of fact we have made about this matter and about Mr. Cooper, we all agree that there has been a difference in treatment and a difference in race, and that the facts we have found, including the way the claimant was treated by Mr Cooper on other occasions, facts are ones from which we could conclude, in the absence of an explanation that this was an act of race discrimination by Mr. Cooper, so that the burden of proving that it was not , passes to the respondent.

116. We find that the respondent has not satisfied us that the reason for this treatment was nothing to do with race and we conclude that it was an act of direct race discrimination.

117. We have considered whether or not this is capable of being harassment and we accept that it did create an intimidating or hostile environment for the claimant. However, in this case we have no evidence that it was related to race although we do have evidence that the claimant was treated differently to others. We therefore dismiss the allocation of harassment and conclude that this was direct discrimination.

Requirements to attend a meeting with Mr Cooper regarding time keeping.

118. The respondent had a policy in respect of time keeping that made it clear to all workers that they must not be more than 5 minutes late on any three occasions, within any particular period of time.

119. There is no dispute between the claimant and the respondent that the claimant was late for work on a number of occasions.

120. Although the details off the occasions of lateness include a number of occasions when the claimant was less than 5 minutes late, we find that there

were sufficient occasions when he was more than 5 minutes late, within the relevant period, for the respondent to raise the matter with him.

121. We find that Mr Cooper did ask the claimant to attend at a meeting to discuss his time keeping and that he did so in line with the employer's policy.

122. Whilst the claimant may have had some issues, such as travel difficulties, which affected his time keeping, we find that he was treated no differently to the way any other employee would have been treated, if they too had been late for work as often as the claimant had been.

123. The claimant has not proved a difference in treatment and the burden of proof does not shift.

124. In any event, we find that there was a genuine reason for the treatment which has nothing to do with the claimants race. We therefore dismiss his claim of direct race discrimination in this respect.

125. We accept that the claimant may not have wanted to be called to a meeting, but for the purposes of harassment we find that the treatment did not have the purpose or effect of creating an adverse environment for him and that in any event it was not related to his race. We therefore dismiss his allegation of racial harassment in respect of this matter.

Mr. Cooper waiting at the entrance when the claimant was late for work

126. The claimant alleges that he was singled out by Mr. Cooper when Mr. Cooper waited at the works entrance on one occasion, when the claimant arrived late for work. He objected to Mr. Cooper picking on him, because the claimant said he arrived with another worker who was white, who was also late, but who was not pulled up for his lateness. He accepted that he worked in a different section and was not therefore managed by Mr. Cooper.

127. The claimant asserted that no one else was ever treated in the same way, and it was not suggested by the respondent that it was common practice to deal with lateness in this way.

128. However, there was a long list of the claimant's lateness and the claimant has the burden of proving that he has been treated differently. Whilst it may be considered heavy-handed for Mr. Cooper to wait for the claimant to see whether he is late, the claimant has not provided any evidence that Mr Cooper would not have behaved the same way to another employee of a different race, with similar levels of lateness.

129. The respondent told us and we find as fact that the worker who the claimant arrived with, who was white was not managed by Mr. Cooper and therefore he was not an appropriate comparator.

130. In his statement Mr. Cooper refers to having a number of conversations with the claimant and taking advice about the claimant's persistent lateness.

131. We accept that he did not take a formal route with the claimant in respect of his lateness.

132. We all agree that whilst the claimant may have found it intimidating to have his manager waiting for him, to see whether he was late, that it was not an act of direct discrimination, because the claimant has not proved that it was different treatment.

133. We also all agree that we have no evidence from which we could find that the treatment was related to the claimant's race and we find it was not. We find the treatment was related to the claimant's lateness and Mr Cooper's genuine wish for the claimant to improve his time keeping.

134. We therefore dismiss the allegations of direct discrimination and harassment related to race in respect of this matter.

The claimant's move out of the SD locker

135. In August 2022 the claimant had a period of sickness absence. He was signed off work with stress. Part of the reason for his absence, which was known to the respondent, was that he had had a family emergency.

136. The respondent told us, and we accept, that industrial action in the post office, combined with the reduction in certain types of work, led managers to consider that they needed to change the way that the SD locker, where the claimant worked with Mr Harding, was staffed. The respondent says that due to falling volumes and in consultation with the claimant's union, the claimant and another individual were asked to work elsewhere in the mail centre.

137. We find that a decision was taken by Mr Grout and Mr Cooper to move both the claimant and Mr Harding out of the SD locker and allocate them to different areas of work.

138. We observe that both individuals could have their work area changed because of their contract.

139. The claimant was informed of this on his return to work from period of sickness absence.

140. There is no dispute that after an initial refusal to work in a different place, the claimant did agree to do so, but after a few hours stated he was not well and reported sick.

141. The respondent suggests that because the claimant was a reserve worker he could be moved around. We are not satisfied that the claimant was a reserve worker and the information we have seen does not suggest that simply because he was a reserve worker he could be moved in a different way to any

other employee anyway. However, we do accept that the business could allocate any worker to a different task, if necessary for business reasons.

142. Moving workers away from an area where they are used to working and where they like working, must however be done without discrimination and without breaching the implied term of mutual trust and confidence.

143. From the evidence we have heard, we find that the reason why the claimant and Mr Harding were moved out of the SD locker was firstly because there was a reduction in the volume of work and there was an associated need to save costs.

144. Secondly, we find that the managers were influenced by the continuing poor relationship between the claimant and Mr Harding. We find that this was one of the primary reasons why the claimant and Mr Harding were moved out of the section, rather than being retained in the section where there was still work to be done. Management saw an opportunity to separate the two of them, and took it.

145. We find that Mr Harding was dissatisfied with the decision to move him and that he retired shortly after.

146. We also find that Mr Grout at least, considered that the claimant was a reserve worker and formed the belief that this meant that the claimant could be reallocated. Whether this was right or not, we accept that this was the belief that Mr Grout held.

147. We also find that Mr Grout and Mr. Cooper both considered that they could move any worker because of the mobility clause in the contract.

148. We think that the issue raised by both parties about whether or not the claimant was a reserve worker was a red herring.

149. We do find that Mr Grout knew the claimant had been on sick leave and knew the reasons for his sickness absence. We find that the claimant was told that he would be moving jobs on the day he returned from work following an absence for stress.

150. We find that Mr Grout did not explain matters particularly well to the claimant and did not help the situation by referring to the claimant status as a reserve worker.

151. Whilst we find the respondent was entitled to move the claimant, the manner in which the claimant was informed of the matter, on return to work from sick leave for stress and anxiety due to a family emergency and with no previous notice, was insensitive and thoughtless.

152. We find that the claimant was genuinely upset by the treatment, not just because he was moved out, but also because it was obvious that other workers had been brought in to do the work. The work was still there to be done but he was not being allowed to do it.

153. We find that the claimant and Mr Harding, who was a white man were treated in exactly the same way, and were in the same material circumstances. They were both workers who their managers recognised did not get along with each other. Both were moved, both were treated in the same way. We find there was no difference in treatment and that the treatment was nothing to do with the claimant's race.

154. Similarly, whilst we accept that the claimant was genuinely upset and that he may have found the environment he then worked in to be hostile or otherwise adverse to him, the treatment was not related to his race.

155. We also find that the respondent had a reasonable cause for taking the steps that it took. The decision to move the claimant was not an act which breached the claimant's contract of employment.

156. However, the manner of the change and the timing of it, and the lack of notice given to the claimant was unnecessary and has not been explained to us, accept in terms that the claimant having been absent, was told as soon as he returned to work.

157. We all agree that from the claimant's perspective this had an effect of damaging the trust he had in his employer, and we find that he was genuinely upset by his treatment and that he formed a genuine belief that this was unfair unreasonable and something to do with his race.

158. This is evidenced, we find, both by the fact that the claimant spoke to his union the same day and absented himself from the workplace and was signed off sick with stress the following day, and secondly by the fact that the claimant told the respondent the following day that he wanted to raise a grievance.

159. The claimant remained absent on sick leave and submitted sick notes citing work related stress, until he resigned in February 2023.

160. There is no suggestion by the respondent that he was not unwell, or that he was not suffering from work related stress.

161. The claimant attended two occupational health appointments prior to his resignation, both of which referred to work related stress and identified a need to deal with the cause of that stress in order for him to be able to return to work.

162. The claimant sent an e-mail to Mr Grout on the 29 September advising him that he would not be in work. He said on returning to work the anxiety and stress came straight back. He said he was due to speak to his doctor after 2:00

PM and would update them. He then said *due to the treatment I have received whilst working for Royal Mail Poole branch, has had a huge effect on my mental and emotional health and I'm not satisfied with how this had been dealt with and I would like details of how I can raise a formal grievance*.

163. He asked Mr Grout to send him details of the grievance procedure when he sent his first sick note in on the 29 September 2022. He reminded Mr Grout that he wished to raise a grievance and asked how to do it and Mr Grout told him to contact human resources and gave him a phone number.

164. Mr Grout was therefore aware of the claimant's intention to raise grievance, and the reason why he was raising the grievance.

165. On the 3 October 2022, the claimant sent e-mail to Steven Grout, David Cooper and David Jones. We understand that David Jones was the trade union representative.

166. The claimant referred to a missed call from work and was not sure if it was Mr Grout or Mr. Cooper. He said *if anyone needs to contact me please do so by e-mail as I would like a log of any conversation. I know you have previously said you prefer to speak on the phone, but I am not in the right frame mind frame to talk. I still haven't received the formal grievance procedure which I requested on the 29th of September. you will receive my sick note by e-mail today*

167. On the 3 October Mr Grout wrote backed the claimant stating that he had called him on the Friday and saying he was happy to correspond via e-mail for a couple of weeks. He then said *however telephone contact on a weekly basis is the preferred method of contact as stated in the absence notification and maintaining contact policy as stated below.* He then set out the contact plan which states *where the absence is longer term it is recommended that contact should be made on at least a weekly basis and that the manager and employee*

agree a contact plan that should be maintained throughout the period of absence. It is advisable to ensure that this plan is as detailed as possible with agreed method and times of contact etc so that both parties are prepared for these discussions. For example it may be decided that telephone contact will be made twice a week as well as after any key events EG medical appointments. Employees should inform their manager of the dates of any medical appointments Contact should be made by telephone or in person where practical to support ongoing discussions.

168. We note in particular the requirement for an agreement between the employer and employee and that the suggestion for telephone contact is specifically referred to as *where practical*.

169. We all agree that the sickness absence policy and the contact policy are drafted in terms clearly intended to allow flexibility. In this case the claimant was absent from work with stress and had stated that he was not in the frame of mind to deal with telephone calls and that he wanted a log of conversations. He had specifically requested contact by e-mail and had given a clear reason for it.

170. Mr Grout told us that he needed to have regular telephone conversations with the claimant because he wanted to support him and assist him to get back to work. He was not able to explain to the satisfaction of the tribunal why it was not possible to have contact by e-mail in order to do this. Whilst we accept that Mr Grout would have preferred telephone contact and whilst we accept that he genuinely considered that this was more appropriate, we find that it was not reasonable for him to insist on telephone contact given the claimant's clear statements and reasons for preferring e-mail contact.

171. The claimant was not refusing contact with the respondent but rather was explaining his preferred method of contact.

172. The claimant did raise a grievance on the 7 October 2022.

173. In his grievance he referred to unprofessional behaviour; discrimination and ongoing victimisation since he moved from Southampton to the Poole branch. He said the behaviour was coming from two managers in the workplace as well as an employee.

174. On the initial complaint call form, it notes that he would prefer to receive communications via e-mail and then sets out a summary of his concerns. He complains about an instance of Steve coming into the locker in front of everyone and raising a concern about him having food out of his break time. He referred to an issue in the canteen; He referred to comments made by Dave Cooper; he referred to Steve and David changing his breaks so that he was alone; he had referred to the visa renewal problem and he referred to the removal of him from the SD locker and stated *agency workers were now in his old position*.

175. He also stated that when he talks, he is told to calm down, even though he is calm and feels he is treated unfairly.

176. The respondent appointed Mr Joe Miranda to investigate the claimant's allegations. On advice from human resources the claimant had agreed that they would be dealt with under the bullying and harassment at work policies. On the 10 October 2022, the claimant received an e-mail from Mr Miranda inviting him to a teams meeting on the 19 October 2022.

177. On the 14 October Mr Grout contacted the claimant by e-mail saying he had tried to call him but had not had a response. He was chasing the sick note which had expired the day before and asking for consent to refer the claimant to occupational health. The claimant replied later that evening stating that he had not been in the best mental state and that his next appointment with his GP wasn't until the Monday, but that his GP had advised that he would backdate any sick note. He said *I would appreciate you passing my details across for the*

referral and said that he would e-mail Mr Grout the following Monday . On the 18 October the claimant sent an e-mail to Mr Grout and Sue Allder with his attached sick note signing him off work until the 18 October.

178. The claimant contacted Mr Miranda before his meeting, asking if he could have his own witness as he wasn't able to get anyone from work. Mr Miranda rearranged the meeting to Monday 24 October in order to allow him additional time to arrange someone to accompany him.

179. That meeting did not go ahead because Mr Miranda suffered a bereavement.

180. He contacted the claimant on the 4 November apologising for the late reply and asking if he was available to meet on Thursday 10 November. The claimant confirmed that he was, and the meeting took place.

181. In the meantime on 20 October, Mr Grout had contacted the claimant with a referral to occupational health and a telephone appointment for 25 October 2022. A report was provided dated 25 October 2022.

182. The occupational health report recorded that the claimant had been off work with perceived work-related issues and that he had been suffering from headaches, disturbing sleep pattern, that he was supported by his GP, and was not requiring medication, although he had agreed to NHS counselling, which he believed would be hugely beneficial.

183. The report said he was unfit for work , being symptomatic with stress and work related issues were identified. There was recommendation that management should review these factors and take whatever measures practical to try and reduce them. The occupational health practitioner suggested another referral in two to four weeks and stated that a stress reduction plan needed to be implemented before the claimant returned to work. It also stated that Royal

Mail should maintain contact with the claimant and support his need to attend counselling.

184. Mr Grant contacted the claimant by e-mail on 28 October stating that he was expecting the occupational health report and was hoping that they would have a chat either when his sick note ran out on 1 November or, if he had not returned stating that he would call to discuss the report to see what support could be offered the claimant submitted a further sickness note.

185. Mr Grout returned to work on the 10 November, the same day that the claimant had his grievance meeting with Mr Miranda. He contacted the claimant by e-mail again and stated he would call at some point in the week to discuss the occupational health report.

186. At the point of the grievance meeting there had been a delay because the claimant wanted to find a companion and a second delay and rearrangement because of Mr Miranda's circumstances. We find as fact that these were the only two delays of which we have evidence and reject the suggestion from Mr Miranda that there were further delays caused by the claimant.

187. The meeting took place by video, Mr Miranda took a note of the meeting. The claimant was accompanied by Bradley Warren.

188. At the beginning of the meeting Mr Miranda told the claimant that he must be as open and honest as he could be and that a copy of the complaint form would be sent to the respondents. This was Mr Grout and Mr. Cooper. In fact, we find that Mr Miranda never did send either Mr. Cooper or Mr Grout a copy of the claimant's complaint form.

189. He also told the claimant that when he had gathered sufficient evidence, he would provide a copy of the evidence to the claimant, which would include those of the respondents and witness interviews and that he would have five

days to provide any further comments he wished to make having considered the evidence.

190. We find that Mr Miranda did interview Mr Grout, but not until January 2023, and that he did not provide the claimant with a copy of those meeting notes at any point. We find that therefore the claimant did not have the opportunity to comment on that evidence.

191. Mr Miranda said he would produce a report, and then said if the complaints are upheld or found not to have been brought in good faith this may lead to matters being progressed under the code of conduct for the people deemed responsible.

192. The claimant confirmed that he agreed that the bullying and harassment procedure was the appropriate one to use. Mr Miranda repeated that he must remind him if the complaints were not brought in good faith this may lead to matters being progressed under the code of conduct.

193. Mr Miranda asked a number of questions about the various incidents, starting with a matter in the autumn of 2021 when the claimant said he had ordered some food which arrived late, and then being called out by Steve Grout. He said that Steve had asked why he had ordered food when he wasn't on a break and then Mr Merrick stated that the Rep had come out and spoken to Steve and said he should have spoken to David and that David as the claimants line manager should have spoken to him. Mr Merrick also said that the Rep felt the manner in which Steve had spoken to him was not appropriate.

194. Mr Miranda asked why it was inappropriate and the claimant said *it was the way he was cutting me off pointing at me and telling me to calm down I felt like he was treating me like a kid and belittling me* . When asked why he had to ask the claimant to calm down, Mr Merrick said *I think he thought I was going to*

shout the Rep was there and can vouch for me that I didn't. The claimant said it had ended when Mr Grout talked to the Rep as the claimant walked off.

195. When asked why he had waited for over a year before he raised the matter, the claimant said *I am not that type of person but at the time I didn't think any more of it but looking back it has led to other stuff because I am black I don't like to insinuate that this person is like this way to me because of my colour. I even winced as you read out the complaint* .

196. He said he raised it now because *it has led to other stuff it just hit me that has been happening consistently for some time, I didn't want to be someone who comes to work and complains about their manager every day.*

197. This was the summary of the evidence he gave to the tribunal and Mr Miranda accepted, when asked by the Judge, that this was broadly what he had understood from the claimant's evidence at the investigation meeting.

198. He knew that the claimant had raised his claim of race discrimination after a number of matters had led him to question whether or not he was being treated less favourably on grounds of his race.

199. Mr Miranda told us that he had received training in investigating bullying and harassment matters in the 1990s. Since then his training had been comprised of team meetings and discussions with others.

200. We find that he had some understanding of discrimination but he could not explain to us how he would decide whether or not discrimination had taken place.

201. The claimant was then asked about an allegation that his manager had been giving him dirty looks in the canteen. The claimant said he had an issue with Mr Fredenburg and had a word with him, then later on he had seen Mr

Fredenburg talking to Steve Grout in the canteen and said at one point he saw Steve bend round the table sideways and look at him, trying to intimidate him.

202. The claimant said he had not said anything because he was strong and he was from Trinidad and Tobago. He said I thought it must be to do with the conversation I had with Mr Fredenburg. He said this happened earlier in the year in January or February and that there were no witnesses.

203. He also told Mr Miranda that his Direct Line manager David had made a comment to him *I know you're finding it hard because you were different to other people in the office* and that this comment had been made in January or February of that year. That is early in 2022.

204. He said that he had confided in David about the general behaviour of Steve and Nigel.

205. The claimant said he had had previous issues with Mr Harding and involved the union. He complained about Mr Harding telling the claimant what to do, him being the favorite , and the claimant being treated unfairly. The clamant said that he had been excluded from meetings on occasions, until the union rectified things.

206. He explained that it was after this that he went to David and that was when David made the comment about him being different to others. Mr Miranda asked *what did you say* and the claimant said *I laughed I slightly thought something of it but not in a bad way.*

207. From the notes we find that this is the only comment that the claimant made at that point about the comments made by David Cooper.

208. From the notes and from the claimant's own evidence we find that what he meant by that comment was that he did think something about the

comments that had been made to him but at the time he didn't think about them having been bad comments.

209. However, he did not say as Mr Miranda has suggested in his evidence that he accepted that the comments had been made.

210. We found Mr Miranda did not ask any further questions about what was said by Mr. Cooper at that stage.

211. The 4th complaint is that the claimant was sent on his break alone at 3:20 and that everybody else took their breaks at 3:00.

212. The claimant says everybody that he worked with on the DSA goes on break at 3:00 and that he used to have his break at 3:00 but it was changed.

213. He thought it was changed earlier in the year January or February by David. He said he thought it was an adjustment and everyone who works here goes at a certain time he said he had spoken to a Rep who'd agreed that the time should not have been changed.

214. Mr Miranda decided that he would not speak to Mr. Cooper about any of the allegations the claimant had made against him because he considered that they were all out of time. He did not inform the claimant that this was his view at any time prior to the claimant resigning.

215. He did ask Mr Grout about these issues when he interviewed him subsequently and Mr Grout disagreed that the claimant was taking his breaks on his own.

216. However from the evidence we have heard under cross examination and from the evidence of the claimant we find that in fact the claimant was required to cover the breaks of other workers and that the effect of this was that he

would often be taking a break later than other members of his team and on his own. We find that it happened on a regular basis.

217. Mr Grout has suggested to us that this was because of the need to cover but we find that there was no sharing of this task and that it was only the claimant who was asked to cover.

218. It is suggested that the reason for this was that he was a reserve worker but the claimant has suggested that Mr Harding was also a reserve worker and we can find no reason why it was only the claimant who was asked to do this.

219. We find that the claimant was the only black person working in his area although Mr Grout suggested that there might have been an Asian person working in the section as well.

220. We find that the claimant in this respect was treated differently to the way other workers of a different race were treated.

221. As set out above, Mr Cooper was also subject of a complaint the claimant made about comments and queries in respect of his immigration renewal. We set out our findings above.

222. Mr Miranda decided that because the issues that the claimant was raising about Mr. Cooper had happened some months previously it was not appropriate for him to investigate them. He decided not to interview Mr. Cooper.

223. Given that Mr Merrick was raising a concern about race discrimination, we find that this was not reasonable and not a proper way to conduct the investigation.

224. The claimant had explained why he had not raised matters earlier, not thinking at the time that they were discriminatory, but that he had started to

think there might be an issue as things progressed. We can see nothing in the policy that suggest that an investigator can decide not to investigate matters because they happened some months ago, although we do note that the policy provides that matters should be raised immediately or as soon as possible in most cases where practicable.

225. We understand that determining race discrimination allegations is not an easy task. However, it is not unusual for somebody who considers they have been a victim of discrimination to come to that view over a period of time. It is not unusual for person not to consider that a first or even a second adverse event is anything to do with race, but to start to consider it might be, if there are further adverse events, as the claimant was suggesting here.

226. The claimant said there had been a number of instances which he considered were less favourable treatment of him and which he said did not seem to happen to other people.

227. In addition there was evidence available from others, that could have assisted Mr Miranda to find out if the claimant's version of events was correct.

228. We find that Mr Merrick's version of events was correct and we also find that had Mr Miranda spoken to Mr. Cooper he would have been provided with information which would have required him to ask, as part of any fair process, whether the reason for the comments or the questions was anything to do with the claimant's race.

229. Instead Mr Miranda did not make these inquiries dismissed the claimants allegations and then determined that the claimant had made the claims in bad faith. We found that there was no proper basis on which he could determine this. We come back to this later on in our judgment.

230. At no time during the investigation did Mr Miranda ask the claimant whether he had been treated differently to people different races and he confirmed that he did not take any steps to find out whether or not other people had been treated in the way the claimant was treated.

231. He did not at any time ask the claimant why the claimant considered and to be anything to do with his race.

232. He told us that he did not think the claimant was being untruthful, but that he believed that the only reason the claimant was complaining about the matters in a grievance at this point in the autumn of 2022 was because he had been moved from his job in the SD locker and this was retaliation against his managers. We find that this was the basis on which he considered the claimant to be acting in bad faith.

233. He did not suggest this to the claimant at any point.

234. We find that Mr Miranda failed to properly investigate the allegations the claimant was making of race discrimination, because he considered they were out of time, and we therefore do not understand how is was able to conclude that the claim that made the allegations in bad faith. We conclude, in so far as it matters for our conclusion on constructive dismissal, that Mr Miranda failed to carry out proper investigations, and drew his conclusions without any evidence of bad faith before him. This was unreasonable behavior without proper cause, and was we conclude likely to seriously damage the relationship of trust. In fact the claimant did not receive the outcome before he decided to resign.

235. Shortly after the meeting Mr Miranda sent a copy of the notes of his investigation meeting to the claimant inviting him to write back if he had any comments.

236. The claimant received the notes and had no comments and therefore made no response.

237. We find that from that point until January 2023 Mr Miranda did nothing at all in respect of the investigation.

238. He did not take any steps whatsoever to contact Mr Grout or Mr. Cooper to inform them that he was carrying out an investigation and he did not send either man a copy of the claimant's grievance as he had told the claimant he would do.

239. Nor did he take any steps to contact Mr Grout to interview him.

240. It is unclear when he decided that he was not going to interview Mr. Cooper or when he decided that the claims were out of time, but he certainly made no contact with the claimant or anyone else to suggest that he had reached that decision on part of the claimant’s grievance.

241. The respondent's own bullying and harassment procedure sets out clear and detailed timeframes within which steps must be taken . Mr Miranda should have been familiar with the process and the claimant was entitled to expect that to the respondent would comply with the timeframes within it.

242. The policy also provides that in the event of delays the manager should contact the complainant and the people being complained about to explain the delay.

243. Mr Miranda did not contact the claimant at all and when asked why, he said it was because he was waiting for the claimant to contact him about the notes of the meeting. He suggested that the claimant was responsible for the delay. We find that this was not a valid reason for the delay, but also find that it was not the real reason for the delay. We do not accept Mr Miranda’s evidence in this respect.

244. It was not for the claimant to chase Mr Miranda. It was his responsibility as the manager in charge of the investigation to ensure that he complied with time limits and if there were reasons why he could not do so, that he informed all of those involved. We find that Mr Miranda knew this.

245. Mr Miranda has suggested that there were a number of reasons why he was unable to comply with time limits, including pressure of other work, a busy Christmas period and the fact that he took annual leave at Christmas and travelled to Portugal to sort out his father's affairs.

246. We accept that there may well have been factors including personal factors which impacted on Mr Miranda during this period of time, but we do not accept that they are a full or reasonable explanation for the failure to take any steps whatsoever in respect of the claimant's grievance. Mr Miranda did not prioritise the claimant's grievance, and was prepared to lay blame at his door, for thigs which he himself should have done. Further, we know that at some point, he drew unfounded adverse conclusions about the claimant's motivation.

247. Mr Miranda's failure to act in a timely manner, had a particular impact on the claimant, because neither Mr Grout or Mr. Cooper were formally made aware either that the claimant's bullying and harassment complaint was being investigated or that the complaints being made were specifically about things that they were alleged to have said or done.

248. This was important to the claimant, because he considered that it was inappropriate for Mr Grout himself to continue to contact him, when Mr Grout was the subject of the claimant's bullying and harassment allegations.

249. This was also important to the respondent because the claimant was off signed of sick with work related stress and the occupational health report had specifically stated that the matters needed to be addressed in order to assist the claimant to return to work.

250. There was a further impact on the claimant because he was entitled to full pay for a stated period, and then his pay reduced to half pay. The delay by Mr Miranda meant that the claimant's pay was reduced to half pay at the end of 2021. Had the matter been resolved earlier, it is possible that the claimant would have been able to return to work and therefore would not have suffered the reduction in pay.

251. However, in respect of the issue raised by the respondent and relied on by the claimant around the amount and nature of contact from the respondent, we find that Mr Grout unaware of this aspect, and therefore continued to try to contact the claimant, and to require contact by telephone. The claimant considered this to be unreasonable because of his ongoing investigation.

252. It was not the claimant's responsibility to tell his managers about the investigation, it was Mr Miranda's responsibility and he failed to do it.

253. The claimant complains about the level of contact and the respondent defends its actions essentially relying upon the policy and Mr Grouts belief that it was appropriate to insist on telephone contact.

254. The policy does require an employee to keep in contact and that the contact is reasonable but we find that the policy and good practice also requires an employer to take into account all the circumstances of any particular case.

255. Whilst we consider that Mr Grout's insistence on weekly telephone calls instead of emails was excessive and did not take into account all the circumstances, because of the failures by Mr Miranda to inform the relevant people of what was happening and by his failure to progress the investigation. We also accept that Mr Grout was at a disadvantage.

256. We find that during the period up to December, that the contact between the claimant and the respondent generally and Mr Grout, that the claimant was keeping in touch with the respondent. He sent in his sick notes on a regular basis and he also cooperated with occupational health and he responded by e-mail on a number of occasions. We find that the amount of contact required by Mr Grout was unreasonable in those circumstances.

The home visit and stopping the claimants pay

257. The respondent's absence notification policy provides at page 360, that if an employee who is on long term sickness absence who fails to maintain contact or fails to provide a further medical certificate, the manager should again make all reasonable efforts to make contact.

258. This would include sending contact letters by special delivery and 1st class post and ensuring that a record is kept of all the attempts to make contact.

259. The policy states that if the employee does not make contact or fails to provide a further medical certificate, that following written notification giving the employee two days' notice, any sick pay they may be entitled to from Royal Mail group may be stopped.

260. By mid-November 2022 the claimant had attended an investigation meeting with Mr Miranda and had also attended an occupational health meeting.

261. He remained absent on sick leave and we find that he continued to provide sick notes covering his absence on a regular basis. On 25 November Mr Grout wrote to the claimant reminding the claimant of absence procedures.

262. He said that the claimant needed to follow the above procedures to ensure that he continued to meet the criteria to receive sick pay. He did not suggest in that letter that the claimant had failed to maintain contact and we find

that at that point there would have been no grounds for doing so, because the claimant had maintained contact as required.

263. Mr Grout then said *I would therefore like to invite you to an interview on the 29 November 2022 at the Dorset mail centre or a phone call to discuss your absence and confirm a contract strategy*.

264. He noted that the claimant's absence was stress related and said he would like to go through the stress risk assessment with him, and said it was not a formal meeting but said the claimant might bring a workplace representative with him .

265. Whilst it was not unreasonable for Mr Grout to send this letter at this point, given what he knew, he was still not aware of the ongoing investigation. The claimant sent a further sick note in, covering him for early December and also sent an e-mail to Miss Allder on the 6th of December, stating that he had tried to contact on Friday and Monday by phone with no answer but stating that he had been signed off for a further 2 weeks.

266. On 13 December Mr Grout sent the claimant a further letter referring to his letters of the 10 November, the 25November. He said the claimant had made no contact with him and he had not been able to offer support to discuss the absence he then said *I appreciate that your medical condition may make it difficult for you to make contact ,however I feel sure I can offer you support.*

267. He said, *I would therefore like to give you one final opportunity to contact me so that we can discuss how I can best support you and for you to send certificates to cover your absences. I must advise that if you do not contact me this may result in your pay being withheld from the 15 December.*

268. This letter was hand delivered by Mr Fredenburg to the claimant at his home address at the request of Mr Grout.

269. There is no specific provision within the policy we have been referred to which suggests that an unannounced home visit would be an appropriate step to take. Although we do accept that hand delivery of a letter may be considered appropriate, we find that it would have been better to comply with the express terms of the policy, and send the letter by special delivery for example.

270. Mr Fredenburg accepted that an unannounced home visit to somebody off work with work related stress may well be seen as unwanted conduct and could be seen as intimidating.

271. We find that the claimant was upset by Mr Fredenburg knocking on his door unannounced and asking him questions about his sickness absence.

272. This was the first time that it had been suggested to the claimant that his pay might be withheld.

273. On the 13 December, the claimant wrote to Mr Miranda asking, do *my managers know they are being investigated* and asking Mr Miranda to contact him. He enclosed his phone number.

274. Mr Miranda did not respond and did not contact the claimant at all. From the evidence we have heard we find that even at this point Mr Miranda did not inform the claimant's managers about the investigation.

275. The claimant then wrote the respondent on the 14 December referring to the letter sent by Mr Grout.

276. In his letter the claimant confirmed his continuing sickness absence was work related. He then referred to the e-mail of the 3 October to himself and Dave requesting contact by e-mail. He said he was signed off and had provided the right documents to support it and he was unsure why he had to make continuing contact *because my mental health is already suffering being signed*

off with work related stress I don't understand why you would expect me to make contact I was informed by the investigation officer that you would be aware that you are under an investigation for bullying and harassment it is for this reason I don't feel comfortable talking to you I have also been advised by my counsellor not to answer the phone to you.

277. He also said that it was the second time that another Royal Mail worker been sent to his door and said *you have not stopped to think how this may impact your employee who is signed off work with work related stress having colleagues turn up unannounced to my home to discuss my personal circumstances have caused a huge amount of anxiety and stress.* We find that the claimant was telling the truth about how the visit impacted upon him.

278. He also said it was becoming increasingly distressing and referred to the threatening letter telling him that his pay would be stopped if he didn't contact within two days. He said *you told me I need to send in my certificates of absence which I have sent in as per the procedure.*

279. He set out when he had sent the notes he asked him not to send a colleague to his door and said *if I am required to keep in communication with work please assign a different manager to do this and have the communication agreed properly so I do not continue to suffer with my health.*

280. We find that this was a reasonable letter for the claimant to send; that it was sent within two days of the letter having been delivered by hand containing the threat that his pay would be stopped and that it clearly set out the reasons why the claimant did not want to be in contact with Mr Grout.

281. We find that Mr Grout then asked Mr Fredenburg to make contact with the claimant again and that Mr Fredenburg did so. We find that Mr Fredenburg reported to Mr Grout and to the plant manager, that he had made contact with Mr Merrick but that Mr Merrick was refusing a face to face meeting.

282. He also said that the claimant had refused permission to read the occupational health report, until he had attained obtained advice from his CWU Rep and said the only contact that the claimant would agree to, was once a week through phone call or e-mail. He also referred to the complaint made by the claimant about Mr Fredenburg delivering the letter.

283. At this point the claimant was agreeing to contact with the respondent by phone.

284. Despite this Mr Grout , who the claimant had specifically asked not to make contact with him and who at this stage did know that there was an ongoing investigation against him because the claimant had told him, wrote a further letter to the claimant making reference to the dates on which he had contacted the claimant. He said the claimant was refusing to attend a face to face appointment or complete a stress risk assessment. He also said, *I note that you have not replied and not taken up the offer to contact me to discuss your absence from work.* This was not true, the claimant had replied on the 14 December.

285. In this letter Mr Grout said *I would therefore like to give you a further opportunity to contact me so that we can discuss how I can best support you I must advise you if you do not contact me this will result in your pay being withheld on the 16 December.*

286. We find that claimant had responded to Mr Grouts letter and that Mr Grout knew that Mr Fredenburg had been in contact with the claimant and that the claimant had agreed to have regular telephone contact with Mr Fredenburg.

287. The claimant was absent from work with stress and anxiety and any manager looking at the claimant's investigation at this point would have realised that no steps whatsoever had been taken in respect of the investigation. Further the respondent knew that occupational health had advised that dealing with the

matters alleged to be causing the work related stress were the first step to recovery.

288. Instead of the respondent managers taking steps to ensure that the investigation was progressed and instead of recognising that their treatment of him was placing him under even greater stress and anxiety, Mr Grout, the manager who the claimant had specifically asked not to contact him, continued to make threats to his pay.

289. We conclude that there was no reasonable cause for this employer to threaten to stop the claimants pay at this stage.

290. The claimant did respond to Mr Grout and Sue Allder on the 20 December. He referred again to the open investigation and said it was unreasonable to ask him to discuss matters further, when there was a formal investigation.

291. He took issue with a number of assertions, pointing out it was incorrect to say he had not been in contact because he had in fact sent a letter. He also said he had asked numerous times for Mr Grout not to contact him during the time of the investigation as he did not feel safe or comfortable to speak with him.

292. He reiterated that if contact was needed, it could be arranged with another manager at preset and agreed dates and times. He then said *please accept this e-mail as contact yourself and I ask that you respect my request and do not withhold my pay as I have provided all sicknotes from my doctor. I'm currently waiting for my doctor to issue with me a follow on sick note from when I spoke with my last my GP last week but this is still not ready to collect. this is only making my stress and anxiety levels increase and I ask that you are consistent with my requests.*

293. Despite this letter Mr Grout made the decision to stop the claimant's pay having spoken to Mr Saint, the Plant manager.

294. Mr Grout was not able to explain to us the process he went through in making the decision or the day on which he made the decision, or the basis on which he made the decision to stop the claimants pay.

295. There is no evidence in documentary form whatsoever within the bundle that shows the date that the claimant's pay was stopped; the reason for the pay being stopped; or the date that his pay was reinstated. Mr Grout has said that the claimants pay was reinstated, but was unable to explain to us how that occurred; who made the decision or indeed when the decision was made.

296. Stopping an employees pay is capable of being a fundamental breach of contract if there is no reasonable cause for doing so.

297. In this case the respondents and Mr Grout were aware of the claimant's reason for his sickness absence. The respondent knew that he had raised a bullying and harassment complaint that Mr Miranda should have been investigating and had anybody made inquiries would have realised that the investigation was still outstanding and that Mr Miranda had failed to carry out any steps other than interviewing the claimant. Nonetheless the respondent and Mr Grout himself were aware that the claimant had made complaints against Mr Grout of bullying and harassment and were aware that there were good reasons for the claimant not wishing to engage with Mr Grout himself or to engage with face to face contact with him.

298. In those circumstances we find that there was no reasonable cause for stopping the claimants pay just before Christmas, and further we find that the action was likely to and did damage the implied term of trust and confidence, in part because it had the effect of causing significant distress to the claimant.

299. We conclude that this act was a fundamental breach of his contract.

300. The claimant remained on sick leave but we find that he did not accept the breach of contract.

301. He did however receive a further letter this time from Mr Fredenburg on the 21 December, again reiterating what he must do when he was on sick leave. He was invited to an interview on the 30 December at midday to discuss his absence.

302. The claimant was informed on the 30 December that his occupational sick pay would be reducing to half.

303. The claimant prepared a statement in advance of his meeting with Mr Fredenburg dated the 30 December 2022. This is a page 305 onwards of the bundle. He provided a copy of his evidence and made reference to his sick certificates his contact with the office as well as confirming that he had remained in his residence; that the post office was his only source of income; that he had consented to occupational health and that he would tell his line manager when he intended to return to work, once the open investigation had been concluded and a resolution provided to him.

304. He said he had done everything possible to maintain as much contact and then said *my pay has now been stopped which happened 2 days before Christmas I have a mortgage to pay a daughter and a pregnant fiancée and this has caused further stress and has now started to impact my family I find it unreasonable that my sick pay has been stopped as I have complied with all the above points and provided evidence of this and I request for my pay to be reinstated and backdated* he then said *until I have further resolution from my investigation I have nothing further to say at this meeting*.

305. On 30 December Mr Fredenburg contacted Sue Allder and Steve Grout to report that he had had a face to face meeting with Mr Merrick; that he had completed a workplace stress risk assessment; he had he would go through the occupational health which Mr Merrick had given him consent to see and that

they had agreed a strategy whereby he would speak to Mr Merrick every Friday. He said Mr Merrick felt disappointed and let down by Royal Mail and believes his managers don't care.

306. Mr Fredenburg contacted Ms Allder and Steven Grout on the 6 January reporting that he had called Mr Merrick who was feeling better that they had discussed the stress risk assessment and that he was continuing to receive counselling

307. Following this on the 17 January 2023, Mr Stevens Saint, who we are told was the plant manager, but from whom we have not heard evidence, contacted Mr Miranda. In his e-mail he said that he saw on the system that he was the investigating manager for bullying and harassment complaint *that one of my employees has made against I can only assume is one of my managers*. He asked for an update on *where you are with the case* stating *the individual is on long term sick and refusing to return to work until the case has been resolved any support would be appreciated*.

308. Mr Miranda replied on the same day stating that there had been a delay for a number of reasons, including him needing to seek advice on the case, but also due to personal family emergency. He then said almost all of the claimants complaints were significantly out of date some going back as far as two years, and that having sought advice it is likely that his complaint will not be upheld. He said he needed to understand the circumstances around his transfer out of the back room and that he would contact Mr Grout, either that day or the next.

309. He then said *I do understand the case needs to be resolved as quickly as Andre continues to be off sick I will do what I can to conclude it as soon as possible.*

310. Mr Saint then forwarded the e-mail to Mr Grout and said *looks like he has no case and once you confirm the move out of the den was not malicious in any way then should be resolved very quickly*.

311. We find that Mr Miranda acted inappropriately in discussing his thoughts on the case prior to interviewing Steve Grout and that Mr Saint acted inappropriately in suggesting to Mr Grout what he ought to be saying in order to progress the case.

312. We have been referred to a note of a meeting he then held with Mr Grout in which Mr Grout was asked about the allegations that the claimant had made. On the 26 January 2023 Mr Miranda contacted Steven Grout with a summary of the conversation that he had had with him.

313. Mr Grout returned the notes on the 31January 2023. As stated previously, they were not provided to the claimant and the claimant had no opportunity to comment on them.

314. Mr Merrick made no further contact with the claimant at all and on the 17 February 2023 the claimant resigned from his employment.

315. In his resignation letter (page 341) he says he was resigning due to serious breach of contract and considered himself constructively dismissed. He referred to having raised a grievance in September with concerns in the workplace and referred to his mental health having deteriorated because of ongoing bullying discrimination; victimisation; harassment and emotion since his move from Southampton to Poole. He said *I believe you have seriously breached my contract as you have not upheld my grievance and I now consider that my working conditions at Royal Mail are intolerable and this has left me no option to resign*.

316. He said *I do not take my resignation lightly I'm a homeowner with pregnant fiancée and daughter I also have my leave to remain renewal approaching in May and leaving my position could have a serious impact on all the above, but I'm no longer able to cope with the stress. I have been in regular contact with my GP and you can see from my occupational health report current*

capacity for work and how significantly this has and continues to impact my psychological health. you are aware I've been off sick since August 2022 we are now in February 2023, and nothing has been resolved. I have chased, waited and complied and I simply do not have the mental capacity to continue with this anymore.

317. Mr Miranda has provided a copy of a bullying and harassment case report which he had produced, and which is dated the 13 February but he could not explain why that had not been sent to the claimant. The respondent asserts that it did write to the claimant on the 16 March 2022 stating that the investigation had been completed and the complaint not upheld. The claimant says and we find as fact that he did not receive that letter or the attached report at that stage.

Applicable legal principles

318. A resignation by the employee may amount to a constructive dismissal if it is in response to a fundamental breach of contract by the employer – Ss.95(1)(c) and 136(1)(c) Employment Rights Act 1996 (ERA). However, to succeed with a claim for constructive dismissal, there must be a causal link proved between the employer's breach and the employee's resignation – i.e. the employee must have resigned because of the employer's breach and not for some other reason, such as the offer of another job. It is a question of fact for the employment tribunal to determine what the real reason for the resignation was.

319. In ***Western Excavating (ECC) Ltd v Sharp*** 1978 ICR 221, CA, the Court of Appeal ruled that the employer's conduct which gives rise to a constructive dismissal must involve a repudiatory breach of contract. :'If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then

he terminates the contract by reason of the employer's conduct. He is constructively dismissed.' Lord Denning M

320. In ***Malik v Bank of Credit and Commerce International SA (in compulsory liquidation)*** 1997 ICR 606, HL, Lord Steyn emphasised that there is a breach of the term only where there is '"no reasonable and proper cause" for the employer's conduct, and then only if the conduct is calculated and likely to destroy or seriously damage the relationship of trust and confidence'

321. Therefore in order to succeed in a claim of constructive dismissal, the employee must establish that:

- there was a fundamental breach of contract on the part of the employer
- the employer's breach caused the employee to resign; and
- the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

322. Once a breach is established, it is a question of fact and degree whether or not the breach is fundamental. A key factor will be the impact of the breach on the employee. We reminded ourselves that any breach of the implied term of mutual trust and confidence is inevitably fundamental. see M*orrow v Safeway stores plc 2002 IRLR 9 EAT.*

323. The employers motive for the treatment is irrelevant but an employee is not justified in leaving employment simply because an employer behaves unreasonably. What is required is a breach of contract. We have reminded ourselves that where we have found conduct to be unreasonable, what we must consider, is whether that is evidence of a breach of the implied term, so as to amount to a fundamental breach. We have reminded ourselves that unreasonable treatment may well be evidence of a breach of the implied term but equally it may not be.

324. In *Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA*, the Court of Appeal explained that the act constituting the last straw does

not have to be of the same character as the earlier acts, and nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective. And while it is not a prerequisite of a last straw case that the employer's act should be unreasonable, it will be an unusual case where conduct that is perfectly reasonable and justifiable satisfies the last straw test.

Affirmation

325. In the words of Lord Denning MR in *Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA*, the employee 'must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged'.

326. Notwithstanding these words, it is important to remember that the issue of affirmation is essentially one of conduct, not simply passage of time. Giving judgment in *Chindove v William Morrison Supermarkets plc EAT 0201/13*, Mr Justice Langstaff, then President of the EAT, warned against looking at the mere passage of time in isolation when determining whether an employee has lost the right to resign and claim constructive dismissal. What matters is whether, in all the circumstances, the employee's conduct has shown an intention to continue in employment rather than resign. The employee's own situation, Langstaff P continued, should be considered as part of the circumstances. As Lord Justice Jacob observed in *Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA*, resigning from a job is a serious matter with potentially significant consequences for the employee. The more serious the consequences, the longer the employee may take to make such a decision

Direct discrimination

327. S. 13 of the Equality Act 2010 provides that a person is subject to direct discrimination if :

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

328. There are thus two elements in direct discrimination that a claimant must prove to suceed: (1) the less favourable treatment, and (2) the reason for that treatment. In *Glasgow City Council v Zafar [1998] IRLR 36*, *[1998] ICR 120 at 123*, Lord Browne-Wilkinson put the matter this way:

"Although at the end of the day, s 1(1) of the Act of 1976 requires an answer to be given to a single question (viz has the complainant been treated less favourably than others on [the ground of that protected characteristic]?) … it is convenient for the purposes of analysis to split that question into two parts—(a) less favourable treatment; and (b) [on grounds of that protected characteristic]."

329. The comparison must be made between the treatment of the Claimant and another person, actual or hypothetical. When making that comparison, section 23(1) states

"On a comparison of cases for the purposes of sections 13, 14 or 19, there must be no material difference between the circumstances relating to each case."

330. It is for the claimant to show that the hypothetical comparator would have been treated more favourably. In so doing the claimant may invite the tribunal to draw inferences from all relevant circumstances, but it is still a matter for the claimant to ensure that the tribunal is given the primary evidence from which the necessary inferences may be drawn. In this case, we bear in mind that if we

find there is prime facie evidence of discrimination, we should consider how a hypothetical comparator would have been treated, even if the claimant has identified real comparators. In this case the claim has been put, primarily, as a hypothetical comparator case.

331. We have reminded ourselves of the legal principles relevant to the task of deciding how a hypothetical comparator would be treated.

332. We remind ourselves that the evidence of how real individuals were actually treated by the respondent, is likely to be crucial for our determinations, and that the closer the circumstances of those individuals are to those of the complainant, the greater the weight we are likely to attribute to the significance of any difference between their treatment, and the treatment of either of the claimants.

333. Key to a direct discrimination claim will thus be the determination of the reason for the conduct in issue, which needs to be the prohibited ground in issue, although it might not always be expressly identified as such. As Lady Hale observed in the joined appeals in *Essop v Home Office (UK Border Agency)* and *Naeem v Secretary of State for Justice [2017] UKSC 27*, *[2017] IRLR 558* (largely concerned with the approach to the determination of claims of indirect discrimination) 'even if the protected characteristic is not the overt criterion, there will still be direct discrimination if the criterion used … exactly corresponds with a protected characteristic … and is thus a proxy for it.'

334. When considering whether or not direct discrimination had taken place in this case, we considered and applied Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

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

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

335. In applying the test and before the reverse burden of proof is triggered, we must consider whether the facts we have found could lead to a conclusion that the prohibited factor, in this case the Claimants race, may have or could have been the reason for any of the treatment we have found to have occurred.

336. We approached the case by applying the test in *Igen v Wong* [2005] EWCA Civ 142, and took into account that in order to shift the burden of proof to the respondent, requiring a full explanation for any detriment or adverse treatment, the Claimant must prove more than a difference in treatment between himself and any comparator, actual or hypothetical, and a difference in protected characteristic. Before the burden of proof will shift, we must make some additional factual finding from which we may draw an inference that race was causative of that treatment in some way. Unreasonable treatment alone may not be enough, unless it is connected to the protected characteristic.

337. We reminded ourselves that a successful direct discrimination claim depends on a tribunal being satisfied that the Claimant was treated less favourably than a comparator because of a protected characteristic. The Claimant bears the burden of proving both less favourable treatment and facts from which the tribunal could conclude in the absence of an explanation that the grounds for that treatment was something to do with the Claimant's race.

338. The question of whether the treatment complained of is less favourable, is a question or fact for the tribunal.

339. We reminded myself when considering whether the treatment the Claimant relied upon was as a matter of fact less favourable treatment that the legislative test is an objective one.

340. The fact that a Claimant believes that he has been treated less favourably does not of itself establish that there has been less favourable treatmenW. e had in mind the judgments of the **EAT in *Burrett v West Birmingham Health Authority 1994 IRLR 7, EAT*.**

341. We also bore in mind however that the Claimant's perception about his treatment and its effect on him will often have a significant influence on the Tribunals conclusions. In ***Chief Constable of West Yorkshire Police v Khan* 2001 ICR 1065, HL** (a victimisation case), the House of Lords determined that the Claimant was treated less favourably when the employer refused, for allegedly discriminatory reasons, to provide him with a reference. It was almost certain that, had he been given a reference, it would have been very unfavourable, and their Lordships took into account that from an objective point of view, he was better off without one. Nonetheless, he was held to have been treated less favourably than a comparator. There is, according to Lord Hoffmann,

'a distinction between the question of whether treatment is less favourable and the question of whether it has damaging consequences'.

342. On the other hand, it is not enough simply to show that the complainant has been treated differently. As Lord Scott said,

'*there must also be a quality in the treatment that enables the complainant reasonably to complain about it. I do not think, however, that it is appropriate to pursue the treatment and its consequences down to an end result in order to try and demonstrate that the complainant is, in the end, better off, or at least no worse off, than he would have been if he had not been treated differently. I think it suffices if the complainant can reasonably say that he would have preferred not to have been treated differently.'* Here, the Claimant wanted a reference to be given, even though he knew that it would be likely to contain adverse remarks about him, and withholding it meant that he had suffered less favourable treatment.

Harassment

343. A standalone claim of harassment under S.26 EqA, does not require a comparative approach. It is not necessary for the worker to show that another person was, or would have been, treated more favourably. Instead, it is simply necessary to establish a link between the harassment and a relevant protected characteristic.

344. There are three essential elements of a harassment claim under S.26(1) EqA:

- unwanted conduct
- that has the proscribed purpose or effect, and
- which relates to a relevant protected characteristic

345. We remind ourselves of the dicta of Mr Justice Underhill, then President of the EAT, that it would be a 'healthy discipline' for a tribunal in any claim alleging unlawful harassment specifically to address in its reasons each of these three elements. see *Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT*

346. We have also taken into account the dicta of Mr Justice Underhill also in *Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT*, that 'Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended'. Mr Justice Langstaff, then President of the EAT, affirmed this view in *Betsi Cadwaladr University Health Board v Hughes and ors EAT 0179/13*.

347. The Equality and Human Rights Commission's Code of Practice on Employment (2011) ('the EHRC Employment Code') makes the point that 'a serious one-off incident can also amount to harassment' — para 7.8. The question whether an act is sufficiently 'serious' to support a harassment claim is

essentially a question of fact and degree — see *Insitu Cleaning Co Ltd v Heads 1995 IRLR 4, EAT*.

348. In deciding whether the conduct has the effect referred to in S.26(1)(b) EqA (i.e. of violating a person's (B) dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B), each of the following must be taken into account:

- the perception of B
- the other circumstances of the case,
- and whether it is reasonable for the conduct to have that effect — S.26(4)

349. The test therefore has both subjective and objective elements to it. The subjective part involves the tribunal looking at the effect that the conduct of the alleged harasser (A) has on the complainant (B) (see 'Subjective element' below). The objective part requires the tribunal to ask itself whether it was reasonable for B to claim that A's conduct had that effect.

350. When considering whether or not the claimant has proved a claim of harassment contrary to section 26, not only did the conduct have to have been 'unwanted', but it also had to have been 'related to' a protected characteristic, which was a broader test than the 'because of' or the 'on the grounds of' tests in other parts of the Act (*Bakkali-v-Greater Manchester Buses* [2018] UKEAT/0176/17).

351. As to causation, we reminded ourselves of the test set out most recently in the case of *Pemberton-v-Inwood* [2018] EWCA Civ 564. In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the prescribed effects under sub-paragraph (1) (b), a tribunal must consider both whether the victim perceived the conduct as having had the relevant effect (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as[3] having that effect (the objective question). A tribunal also had to take into account all of the other circumstances

(s. 26 (4)(b)). The relevance of the subjective question was that, if the Claimant had not perceived ***his/her*** the conduct to have had the relevant effect, then the conduct should not be found to have had that effect. The relevance of the objective question was that, if it was not reasonable for the conduct to have been regarded as having had that effect, then it should not be found to have done so.

352. We remind ourselves that the words in the statute imported treatment of a particularly bad nature; it was said in *Grant-v-HM Land Registry* [2011] IRLR 748, CA that "*Tribunals must not cheapen the significance of these words. They are important to prevent less trivial acts causing minor upset being caught by the concept of harassment.*" See, also, similar dicta from the EAT in *Betsi Cadwaladr Health Board-v-Hughes* UKEAT/0179/13/JOJ.

Conclusions on constructive unfair dismissal

353. In ***Malik v Bank of Credit and Commerce International SA (in compulsory liquidation)*** 1997 ICR 606, HL, Lord Steyn emphasised that there is a breach of the term only where there is '"no reasonable and proper cause" for the employer's conduct, and then only if the conduct is calculated and likely to destroy or seriously damage the relationship of trust and confidence'

354. Therefore, in order to succeed in a claim of constructive dismissal, the employee must establish that:

- there was a fundamental breach of contract on the part of the employer
- the employer's breach caused the employee to resign; and
- the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

355. We find that the respondent failed to deal with the claimants bullying and harassment investigation within any reasonable time, or in a reasonable way. They failed to comply with their own internal time limits and Mr Miranda failed to keep in contact with the claimant or to take the most basic steps necessary to pursue the investigation. This had serious consequences for the claimant in

terms of the constant contact from managers, and the decision to stop his pay, and the impact on his health.

356. We conclude that the unreasonable actions of Mr Miranda, were without reasonable cause and were likely to damage the term of mutual trust and confidence, and that they did in fact do so. Here we conclude that unreasonable actions were evidence of a fundamental breach of the implied term of the contract.

357. We find that the respondent behaved unreasonably, and without reasonable cause, in all the circumstances in stopping the claimant's pay and conclude that this also was likely to and in fact did, seriously damage the implied term of mutual trust and confidence. We conclude that this amounted to fundamental breach of the claimant's contract, and was part and parcel of the difficulties that the claimant relied on when he resigned.

358. The acts and omissions breached the implied term of mutual trust and confidence and we conclude that the failures amount to a fundamental breach of the claimants' contract of employment, entitling the claimant to resign in response.

359. We find in this case that the reason for the claimant's resignation was the breaches set out above and described in his resignation letter.

360. We find that the claimant did not affirm any breach at any time. He remained on sick leave and never returned to work, and he continued to press for some form of contact and resolution in respect of his claim throughout his sick leave.

361. We conclude that the claimant was constructively dismissed. There was no fair reason for termination of his contract, and we conclude that it was an unfair constructive dismissal.

Conclusions in respect of Race discrimination and time.

362. We have set out our findings and conclusion in respect of race discrimination in the paragraphs above.

363. We find that Mr. Cooper discriminated against the claimant on grounds of race. Whilst we have decided that the actions of Mr Grout and Mr. Cooper in respect of other allegations are not discriminatory, we do find that a number of their actions were capable of breaching the implied term of mutual trust and confidence as set out above. In particular, the manner in which the claimant was informed about the move from the SD locker, although not the move itself and the changing of the claimant's breaks were matters which were capable of breaching the implied term of mutual trust and confidence and were matters that the claimant raised and objected to. However, these were not acts of discrimination, and not the primary reason for the claimant's dismissal. It was the failure to conclude the investigation and the consequences of that failure, which caused his resignation, we find.

364. We conclude therefore that there was no continuing course of discriminatory conduct, although there were linked acts of discrimination. The matters raised in respect to Mr. Cooper were standalone matters.

365. We find that the claims of discrimination were brought out of time , because they were not brought within three months of the last act complained of.

366. We have therefore considered whether it would be just under equitable to extend time in this case, in respect of the matters of discrimination we have found.

367. We all agree with that the remarks made by Mr. Cooper were clumsy but hurtful to the claimant in retrospect. We all agree that the claimant acted reasonably in not initially identifying them as matters of race discrimination

about which he intended to raise a complaint. We accept that he did raise them at a point where he considered that there had been a course of conduct of which they were a part. Whilst we find that he was wrong about that, we reject the suggestion by Mr Miranda made in a report after the event that the claimant was acting in bad faith. We find that he was acting in good faith, all be it that we find his later complaints and allegations of race discrimination to be unfounded.

368. We find that the claimant wanted to have his matters resolved through an internal process and was reasonable to try to do so. The fact that he was off sick with work related stress explains in part why he did not take action at an earlier stage. The fact that Mr Miranda did not conclude the investigation in a timely manner also contributes to the delay in the claimant bringing a claim to the ET. Theses two factors are linked.

369. We find that having come to the conclusion that there would be no resolution and having made the decision to resign he acted in a timely manner to make his claim to the employment tribunal.

370. Whilst his race discrimination claims were out of time at the point that he raised them, they were claims with some merit which the claimant only thought about when other negative things happened to him. We find that there was good reason for him not having raised them earlier and that in all the circumstances of this case, that his understandable reluctance to raise complaints or to recognise them as possible issues of race discrimination was entirely understandable. That, combined with the delay of the respondent when he did raise them, and the fact that when he did raise matters, he was ill and the fact that we find his claims have merit, lead us to conclude that in this case it is just and equitable for us to extend time.

371. We therefore extend time in respect of those allegations we have found to be acts of race discrimination.

372. We therefore conclude that the claimant succeeds in those allegations of race discrimination.

373. The matter will now be listed for a remedies hearing.

Employment Judge Rayner
Dated: 25 November 2024

Sent to the parties on:
11 December 2024
By Mr J McCormick
For the Tribunal

Note: Reasons for the decision having been given orally at the hearing, written reasons will not be provided unless a written request is received from either party within 14 days of the sending of this record of the decision.