EMPLOYMENT TRIBUNALS

Claimant: Miss Sonia Mitchell

Respondent: North of England Commissioning Support Unit

Heard at: Watford Employment Tribunal **On:**19-23 May 2025

Before: Employment Judge Young
Non Legal Members: Mr C Surrey
Mr A Scott

Representation
Claimant: Litigant in person
Respondent: Ms Helena Ifeka (Counsel)

JUDGMENT

The Employment Tribunal's unanimous decision is:

1. The Claimant's complaint of constructive unfair dismissal is not well founded and dismissed.

2. The Claimant's complaints of harassment related to race are not well founded and are dismissed.

3. The Claimant's complaints direct race discrimination are not well founded and are dismissed.

REASONS

Introduction

1. The Claimant was employed by the Respondent, the North of England Commissioning Support Unit (NECS) as an Engagement and Interventions Manager with the Cervical Screening Administration Service ('CSAS') from 1 August 2019, having TUPE transferred to the service from Capita with continuous service from 4 January 2016 until her resignation on 6 December 2021. The Claimant resigned with notice to expire on 11 December 2021 and the Claimant's termination date was 11 December 2021. The Claimant contacted ACAS on 17 January 2022. The ACAS

early conciliation certificate was issued on 19 January 2022. The Claimant presented her claim for constructive unfair dismissal, race discrimination and harassment related to race on 17 February 2022.

The Claims and Issues

2. The Claimant's claims are constructive unfair dismissal, direct race discrimination and harassment related to race.

3. The issues in the case are as follows:

1.Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 18 October 2021 may not have been brought in time.

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

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

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

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

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

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

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

2. Unfair dismissal

2.1 Was the Claimant dismissed?

2.1.1 Did the Respondent do the things referred to at paragraphs 4.2 and 5.1 below? The Claimant relies on all of the alleged acts, separately and cumulatively, as repudiation.

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

2.1.2.1 whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and

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

2.1.3 Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

2.1.4 Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.

3. Remedy for unfair dismissal

3.1 Does the Claimant wish to be reinstated to their previous employment?

3.2 Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?

3.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

3.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

3.5 What should the terms of the re-engagement order be?

3.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.6.1 What financial losses has the dismissal caused the Claimant?

3.6.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

3.6.3 If not, for what period of loss should the Claimant be compensated?

3.6.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

3.6.5 If so, should the Claimant's compensation be reduced? By how much?

3.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.6.7 Did the Respondent or the Claimant unreasonably fail to comply with it?

3.6.8 If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

3.6.9 If the Claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?

3.6.10 If so, would it be just and equitable to reduce the Claimant's

compensatory award? By what proportion?

3.6.11 Does the statutory cap of fifty-two weeks' pay apply?

3.7 What basic award is payable to the Claimant, if any?

3.8 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

4. Direct Race discrimination (Equality Act 2010 section 13)

4.1 The Claimant defines her race for the purposes of this claim by reference to colour, and she defines herself as black.

4.2 Did the Respondent do the following things:

4.2.1 Angela Lydon-Burgan in about October/November 2019 allocated to the Claimant more CSPB meetings than the Claimant's white colleagues, namely Sean, Angela Pownall.

4.2.2 Required (by virtue of the omission of Angela Lydon-Burgan) to work without a laptop for 6 months between February 2020 to July 2020. The Claimant compares herself to Angela Pownall, Diane Thornton, Louise Hennesey.

4.2.3 Being called the wrong first name twice in the same CSPB Teams meeting, by Karen Burgess, in October 2021 (the Claimant says that this was the only CSPB meeting which she attended with Karen Burgess that month). The Claimant does not know the name that Karen Burgess used but says that another person in the meeting said, "that's not her name". The Claimant compares herself to those present at the meeting whose names the Claimant says Karen Burgess got right.

4.2.4 Attending a team meeting in Preston on 2 November 2020 and, during a discussion about unpaid wages, a colleague had to stop herself from laughing at the Claimant.

4.2.5 On an unspecified date in 2020 one of three female colleagues standing on the ramp of the Respondent's Leeds office as the Claimant was leaving and saying to the Claimant 'thanks for popping in' in a sarcastic tone; all three stared at the Claimant.

4.2.6 At a CSPB meeting on an unspecified date in 2019 being told to 'go' and when the Claimant turned to look at him saying 'no, go', in an aggressive and rude manner (sharp, harsh, angry in tone) by Jamie Scott.

4.2.7 Underpaying the Claimant by £483.05 on 27 October 2020. The Claimant does not know who was responsible for the underpayment. The Claimant compares herself to all of her other colleagues who, she says, did not suffer a deduction. The Claimant notes that one colleague, who is white, was the subject of a much smaller deduction.

4.2.8 Not receiving an extra screen or printer on 9 March 2020 when other colleagues were provided with this extra equipment.

5. Harassment related to race (Equality Act 2010 section 26- subject to the provision at section 212(1) Equality Act 2010)

5.1 Did the Respondent do the following things:

5.1.1 Being laughed at by Diane Thornton on 02 November 2020 when the Claimant said she needed to get a lawyer over a mistake in her pay

5.2.2 On an unspecified date in 2020 one of three female colleagues standing on the ramp of the Respondent's Leeds office as the Claimant was leaving and saying to the Claimant 'thanks for popping in' in a sarcastic tone; all three stared at the Claimant.

5.1.3 At a CSPB meeting on an unspecified date in 2019 being told to 'go' and when the Claimant turned to look at him saying 'no, go', in an aggressive and rude manner (sharp, harsh, angry in tone) by Jamie Scott.

5.1.4 Being called the wrong first name twice in the same CSPB Teams meeting, by Karen Burgess, in October 2021 (the Claimant says that this was the only CSPB meeting which she attended with Karen Burgess that month). The Claimant does not know the name that Karen Burgess used but says that another person in the meeting said, "that's not her name". The Claimant compares herself to those present at the meeting whose names the Claimant says Karen Burgess got right.

5.1.5 On an unspecified date in 2021, on a MS Teams call during a fortnightly catch-up meeting when the Claimant was on sickness absence, Jonathan Gore turned his face away from the Claimant when she told him that she believed her colleagues wanted to physically hurt her.

5.1.6 On an unspecified date in 2021, on a different MS Teams call during a fortnightly catch-up meeting when the Claimant was on sickness absence, Jonathan Gore said that the alleged bullying against the Claimant was 'not racial'.

5.1.7 On an unspecified date in 2021, on a different MS Teams call during a fortnightly catch-up meeting when the Claimant was on sickness absence, Jonathan Gore asked the Claimant why the bullying at the Respondent was any different from the bullying at PCSE.

Post employment harassment (section 108, EQA)

5.1.8 Receiving a text message from Louise Hennessey on 4 April 2023 which asked the Claimant how she was.

The Hearing and Evidence

4. The hearing was in person over a period of 5 days. We received an agreed bundle of 720 pages. Pages 713-720 were provided on the first day of the

hearing from the Respondent with the agreement of the Claimant. The pages contained a summary of pages already contained in the agreed bundle and up to date figures of the number of meetings that the Claimant and her colleagues attended within a relevant period. We also received a Supplemental bundle of 57 pages from the Respondent on the first day of the hearing which the Claimant agreed to. We received witness statements from the Claimant and 7 Respondent witnesses. We had an agreed cast list, agreed chronology and an agreed list of key documents.

5. We also heard evidence from the Claimant and 5 of those Respondent witnesses which included Ms Angela Lydon Burgan (formerly National Engagement Lead for CSAS and the Claimant's line manager, now currently Operations Manager), Ms Diane Thornton (Engagement and Intervention Manager), Ms Lousie Hennessy (Engagement and Intervention Manager), Mr Ian Davidson (formerly Business Information Services Director, currently interim Deputy Managing Director) and Mr Jonathan Gore (Engagement Lead and formerly the Claimant's line manager,). Although the other 2 witnesses Mr Khalid Azam (Account Director and Head of Clinical Services) and Ms Sherryll Davison (formerly Senior HR Manager, currently People Lead) were sworn in and available to give evidence the Claimant and Employment Tribunal did not have any questions for either of those witnesses.

6. On the first day, Ms Ifeka counsel for the Respondent provided an opening note setting out the outstanding issues regarding the status of a possible victimisation claim arising out of a second claim form sent to the Respondent and Employment Tribunal and a third claim form that the Claimant had sent to the Respondent. The Employment Tribunal had no record of a third claim form having been received. The Claimant was unable to tell the Employment Tribunal when it was sent. The second claim form was contained in the bundle [65-79]. However the copy in the bundle was not complete, there were missing sentences. The parties were asked to provide the evidence of the third claim form having been sent to the Employment Tribunal and a full copy of the second claim form. The Respondent provided an email from the Claimant of the second ET1 sent to the Employment Tribunal on 9 June 2023 [63]. It was clear that the second claim form was before Employment Judge Freshwater at a previous preliminary hearing on 28 June 2023 **[95-103]** as Employment Judge Freshwater refers to the further ET1 in paragraph 5 **[96]** of her case management order dated 22 September 2023. The Claimant provided an email dated 16 November 2023 sent to the Respondent's solicitors asking for their view of her further amended claim form (aka the third claim form). There was no email of the third claim form having been sent to the Employment Tribunal. Ms Ifeka's opening note pointed out there were additional matters in the third claim form and that they required an amendment and that Respondent objected to the addition of these matters contained in the third claim form. The Claimant confirmed that she was not pursuing the additional matters in the third claim form as the third claim form was her attempt to clarify the amendments agreed by Employment Judge Freshwater contained in both her second claim form and further and better particulars. It was pointed out to the Claimant that she was raising for the first time that she suffered a detriment as a result of her raising a grievance. The Claimant confirmed that she was not pursuing a Victimisation complaint and did not seek an amendment of any additional matters.

7. On the same day, the Claimant indicated initially that she did not have any questions for any of the Respondent witnesses. It was explained to her that if she did not challenge the evidence of the Respondent witnesses where she disagreed with them, then there was a significantly increased probability that the Employment Tribunal would accept the evidence of the Respondent witnesses. The Claimant then agreed that she would have some questions for the Respondent witnesses. The Employment Tribunal agreed to the Respondent's application that the hearing be a liability only hearing to ensure that there was no risk of the hearing going part heard. The Claimant subsequently did have a small number of questions for some of the Respondent witnesses although not all and it was agreed that the Claimant would have 1 ½ hour of time to cross examine the Respondent witnesses which the Claimant agreed to.

8. The start of the proceedings were delayed because the Respondent did not provide copies of the Supplemental bundle until after 14:45pm. Ms Ifeka apologised for the delay.

9. There were occasions during the hearing the Claimant became teary, the Claimant was asked if she wanted a break. The Claimant said on every occasion that she was ok to continue.

Findings of fact

10. We approached witness statements with a degree of caution. Witness statements are, of course, central; they are important to explaining the surrounding context of the contemporaneous documents. However, the witness statements were written many year after the events in question and they were written through the prism of either advancing or defending the claims or allegations. We reminded ourselves that it is often the case that where evidence is contradictory. It does not necessarily mean that one party has lied, as this can arise from an incorrect recollection of events or interpreting events through a particular perception.

11. We found the Claimant to be inconsistent in her evidence and largely inaccurate when compared to contemporaneous documentation. The fact that the Claimant could not remember dates or events accurately was unsurprising and understandable what was surprising is that in the face of clear documentation the Claimant had a tendency to deny the documentation. We found the Respondent witnesses to be large witnesses of truth.

12. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence and considered relevant.

13. Reference to numbers in bold square brackets are a reference to the agreed bundle unless the number has an 'S' preceding it and then it is a reference to the Supplemental bundle.

14. The following findings of fact are made on a balance of probabilities.

15. The Claimant has continuous service from 4 January 2016 when she worked for Capita who carried out NHS services. However, on 1 August 2019 the Claimant was TUPE transferred to Respondent commonly referred to as NECS in to the Cervical Screening Administration Service ("**CSAS**"). The CSAS service was delivered from the Respondent's Leeds and Preston sites. The Respondent moved its Leeds office in around July 2020. The Respondent shared the site with Capita in Leeds.

16. The Claimant was employed under contract of employment with the NHS Business Services Authority. Between 1 August 2019 until 31 March 2020, Angela Lydon-Burgan, National Engagement Lead was the Claimant's direct line manager. Angela Lydon-Burgan covered the role until 1 October 2020 when Jonathan Gore was recruited. When Angela Lydon-Burgan was the Claimant's line manager, the Claimant, Sean Glanfield and Angela Pownall were Engagement Managers, Louise Hennessy was the Interventions Manager and Diane Thornton the Co-ordinator. However in April 2020 all 4 members of the team's job titles were changed to 'Engagement and Intervention Manager'.

17. From 1 October 2020 Jonathan Gore was the Claimant's line manager. When Jonathan Gore was the Claimant's line manager the Claimant's team was the same. All members of the Claimant's team at all times including her line managers were white. The Claimant was the only black member of her team.

18. Angela Lydon-Burgan gave evidence that the broader team of 100 staff were 8-9 black members of staff. The organisation was multiculture with a large number of people with diverse backgrounds, including a high number of south Asian staff and various staff of varying European backgrounds and we accept her evidence on this point.

Allocation of CSPB meetings

19. In October 2019 the Claimant was required to attend Cervical Screening Programme Board ("**CSPB**") meetings. The CSPB meetings were held quarterly. During the pandemic these meetings converted from in-person to Teams. In October 2019, only the Claimant, Angela Pownall, Sean Glanfield as engagement managers were required to carry out CSPB meetings. The meetings held all over the country, the Claimant covered the South, Sean Glanfield covered Midlands and South West and Angela Pownall covered the North. At that time the allocation of meetings was determined by the Screening and Immunisation Team, Angela Lydon-Burgan was not part of that team. The Claimant accepted in evidence that this was who determined when the meetings took place. However, in October and November 2019 the meetings had already been scheduled from when the Claimant was employed by Capita and so there was no

input from Angela Lydon-Burgan or the Respondent in respect of how many meetings the Claimant was required to undertake at that time. We find that the Claimant did have more CSPB meetings than her colleagues in October 2019 but not more CSPB meetings than any of her colleagues in November 2019 [713-720]. However, Angela Lydon-Burgan did not allocate more CSPB meetings to the Claimant than the Claimant's colleagues Angela Pownall or Sean Glanfield because she was not responsible for how many CSPB meetings the Claimant had in October or November 2019. It was the Claimant's former employer as a result of the Screening and Immunisation Team's scheduling of those meetings that was responsible.

Jamie Scott comment

20. In 2019 the Claimant attended a CSPB meeting at the Leeds office with Jamie Scott who was employed by NHS England as a Screening and Immunisation lead. The Claimant did not mention the matter in her witness statement but in cross examination the Claimant said she did not know when the incident happened, but that he said 'no' to her and spoke to way in a manner that made her feel uncomfortable and sound and tone of his voice was not nice. The Claimant said that she told her manager but she could say when or who she told. She said that it was not Jonathan Gore as he was not her manager at the time it happened, but then she said that it could have been HR she reported it to, and when she spoke to them they told her that it could not be investigated because Mr Scott was not employed by the Respondent.

21. Jonathan Gore gave evidence that he asked Leanne Mann (Screening & Immunisation Co-ordinator) who attended the same meetings as Mr Scott and who explained that the Claimant's part of the meeting would be moved to the beginning of the meeting so that the Claimant who had a long way to travel could leave but she was more than welcome to stay. **[280]** We find that if Mr Scott did say to the Claimant 'go' it was because Mr Scott was letting the Claimant know that she could leave the meeting early if she wanted to. We do not accept that Mr Scott was rude to the Claimant in saying that or in his tone because the Claimant did not mention this in witness statement, and her original complaint was different from the words alleged in list of issues, the Claimant alleged that Mr Scott said go in her further and better particulars [49] and the investigation she said that Mr Scott said 'now go', but the list of issues says that Mr Scott allegedly said 'go' and then 'no, go'. The Claimant's evidence was not consistent with her previous statements. She said in the investigation meeting that she had not reported the incident before [343], but in cross examination she said she had, she never stated when the incident happened in the investigation which was nearer in time to 2019 but later at preliminary hearing said that it was 2019. We do not accept the Claimant's version of events and so find that this incident did not happen.

Computer Equipment provided on 9 March 2020

22. On 21 November 2019, Lorrae Rose, Operational Delivery Manager for the Respondent sent an email to Angela Lydon-Burgan requesting what

equipment was needed for her team and for her team's home address for the equipment to be delivered. **[269]** Angela Lydon-Burgan explains in her email response to Ms Rae that she did not have access to the team's home addresses **[268]** and that she would have to ask her team for their addresses. It was as a result of Ms Rae's request that Angela Lydon-Burgan requested that the Claimant send her an email with her home address. The Claimant said in evidence that she did not want to give the Angela Lydon-Burgan her home address.

23. On 9 March 2020 there was an in person meeting in the Leeds office to receive the IT equipment. The equipment included new laptops, mouse, keyboard and docking station with a built in screen. The Claimant had attended the meeting travelling by train. The Claimant's colleagues attended travelling by car. The Claimant and her colleagues were given all the equipment, however because the Claimant was travelling by train she could not take the docking station/screen with her, whilst her colleagues could because they had cars. The Claimant did take her laptop on 9 March 2020 but not the screen. The Claimant accepted in evidence that she had not sent Angela Lydon-Burgan or anyone her home address by email by 9 March 2020. Angela Lydon-Burgan's evidence was that she discussed with the Claimant sending the equipment by courier on 9 March 2020 but the Claimant said no that she wanted her equipment to be dropped off at headquarters in London. Angela Lydon-Burgan' evidence was that after this it was the Claimant's personal responsibility to arrange and we accept Angela Lydon-Burgan's evidence on this point which was not challenged by the Claimant. On 14 March 2020 the Respondent's IT department wrote to Angela Lydon-Burgan, that printers were now available at Appleton House **[274]**. The email indicated that IT would arrange for any missing kit and printer to be sent. Angela Lydon-Burgan never received a printer. The Claimant said that she did not receive a screen or printer. We accept Angela Lydon-Burgan evidence on this point. We find that the Claimant did receive her screen on 9 March 2020 and no one was provided with a printer on 9 March 2020. The Claimant was not treated any differently to her other colleagues. It was the Claimant's responsibility to arrange her screen and printer to be sent to her after 9 March 2020 or to pick it up from one of the Respondent's offices.

Working Laptop

24. Following the Claimant's transfer with colleagues from Capita. There was a transition period where transferred employees continued to use Capita laptops and equipment until March 2020 when the Respondent began providing transferred employees IT equipment. From March 2020 the Claimant and her colleagues had two laptops: a Capita laptop and a NECS laptop. The Capita laptop didn't have to be returned until 21 August 2020 **[276].**

25. During the period of February- July 2020 the Claimant said that she had issues with her laptop. However, the Claimant also gave evidence that the 6 month period included 3 months when she was employed by Capita. The Claimant then said in cross examination that in the 3 month period where she was employed by the Respondent and her laptop was not

working, her laptop had issues but she could not remember what they were. When it was put to her in cross examination that she had suggested in an email to herself in July 2020 that her laptop was slow [S33], and so it was not that her laptop was not working but that it was slow, the Claimant denied this and said that it was not working as it should be or as she was used to. When it was put to her in cross examination that she had a working laptop from Capita and a slow laptop from NECS, the Claimant denied this and said that she did not have a laptop that worked sufficiently. However, in re-examination the Claimant said the NECS laptop did work for a little while, she said she had her other laptop and was able to use that laptop for the teams meeting and her phone so it wasn't an issue. The Claimant said that she contacted IT and spoke to a Michael and the issues were eventually fixed. In 2019 after the transfer the Claimant and her colleagues had IT issues with their laptop **[695]**.

26. However, we find that in February-July 2020 there was no evidence that the Claimant told Angela Lydon-Burgan that she had laptop issues, in fact the emails that the Claimant sent to herself in this period of time about meetings with Angela Lydon-Burgan do not mention that she spoke to Angela Lydon-Burgan about her IT issues which we would expect to see if the Claimant wanted Angela Lydon-Burgan to do anything about it. Angela Lydon-Burgan's evidence was that the Claimant did not raise it with her and we prefer her evidence. The Claimant accepted that she did not mention having any IT issues in her email to herself in May 2020 about a meeting with Angela Lydon-Burgan in the relevant period [S2]. We find that the Claimant's evidence on this point entirely inconsistent and we do not accept any of it. We find that the Claimant did have a working laptop which she did use. It wasn't an issue that is why she did not raise it with Angela Lydon-Burgan. The Claimant contacted IT to resolve it and they did. There was no omission by Angela Lydon-Burgan because she did not know about the Claimant's IT laptop issues in the relevant period and the Claimant was not required to work without a laptop for 6 months or any other period of time.

Underpayment & 2 November 2020 team meeting incident

27. On or about 27 October 2020, the Claimant received her monthly payment of salary and realised that the sum of £483.05 was missing from her pay. The Claimant contacted HR who told her that she should email payroll. On 30 October 2020 14:56 the Claimant emailed payroll to ask about the deduction from her car allowance **[282]**. Payroll responded to the Claimant's email on the same day 15:07 that *"This allowance doesn't pay correctly when sickness is entered and tries to take the payment from you. I have amended this now so shouldn't happen again and the shortfall due will be on the November payslip."* **[281]** . Following the Respondent's explanation on 30 October 2020, the Claimant emailed payroll at 15:10 to say that *"Thank you for getting back so quickly and explaining what has happened."* **[281].** On 24 November 2020 Becky Johnson (Assistant HR Manager) wrote to the Claimant and explained *"that the pay issue from October has been rectified and is due to be paid in November for you*" [**292**]. On 3 December 2020 Becky Johnson confirmed the correction to the Claimant's pay had been made in the November payroll **[296]** and the Claimant was paid as was reflected in the Claimant's November payslip

[558]. We find that the Respondent was not entitled to make the deduction in the Claimant's October pay. But we also find that Claimant was paid the shortfall in her November 2020 pay and the Claimant accepted that she would be paid in her November pay and did not ask to be paid any sooner.

28. The Claimant's evidence was that she was told by payroll that there was a glitch in the system and this issue would be rectified in the next pay. The Claimant interpreted the use of the word "glitch" to mean an IT issue. However, we find that the word "glitch" was not used by the Respondent to explain the reason for the deduction of the Claimant's salary. The Claimant accepted the explanation provided by the Respondent in her response.

29. We therefore do not accept that the Respondent was required to send out an email to everyone in the organisation if there were any issues with internet access, systems not working properly, or phones not working which the Claimant said was the Respondent's policy because the Respondent did not say there was a glitch and therefore the alleged policy would not have applied. We accept the Respondent's explanation for why the Claimant was not paid sum of £483.05 as did the Claimant.

30. At the same time the Claimant experienced a shortfall in her car allowance the Claimant's colleague, Louise Hennesey also experienced a deduction from her car allowance for the same reason of approximately £30-40. Louise Hennessy is white. When the Claimant was challenged in cross examination as to the reason why she suffered an underpayment if it was because of her race it wouldn't have happened to Louise Hennessy. The Claimant's response was they had to do it me, it had to happen to someone else so it wouldn't stand out, that is what she believed now. Sherryll Davison who was senior HR manager at the time of the Claimant's employment explained in her written evidence that the reason why the Claimant suffered a deduction was because it was due to a technical fault but also an error when populating information, payroll should have input into a separate box that the car allowance should continue if the employee goes off sick. The Claimant did not challenge Ms Davison's evidence and we accept her evidence on this point as it more credible than the Claimant's incredible explanation to the reason why the Claimant suffered an underpayment. We find that both the Claimant and Louise Hennessy were not paid because a box to continue payments when off sick was not ticked due to an omission on the transfer of their employment. We find that the Respondent did not make the deduction on purpose but it was an administrative error.

31. At a team meeting on 2 November 2020 the Claimant and Louise Hennessy had a conversation about the fact that they had both suffered deductions. Louise Hennessy's evidence was that she and the Claimant asked other team members to check their payslip and realised that the reason for the deduction was due to the Claimant and her sickness absence and expressed this to the Claimant. The Claimant's evidence was that at this meeting one of her colleagues mentioned that it had taken 5 months to get money back when they had suffered a deduction. The Claimant responded that if that was the case, she would get a lawyer to

speak on her behalf. The Claimant said that Diane Thornton sitting across from her started laughing and would not stop laughing and put her hand over her mouth to stop herself laughing out loud. The Claimant said that she felt ridiculed and embarrassed by what she considered to be Diane Thornton's derision. Louise Hennessy's evidence on this point was that she did not recall anyone laughing at the Claimant or putting their hand or arm over their mouth to cover up laughing and that on the same evening of the team meeting on 2 November 2020, the Claimant called her on the phone but ask her about Louise Hennessy own deduction but did not mention anything about Diane Thornton allegedly laughing at her. When Louise Hennessy was interviewed as a witness for the investigation of the Claimant's grievance she stated that she did not recall any inappropriate behaviour by Diane Thornton. Diane Thornton's evidence was that she did not recall laughing at the Claimant and said that she would not laugh at anyone in that situation as it was not in her nature to laugh at anyone's misfortune. We find Diane Thornton did not laugh at the Claimant. We accept both Louise Hennessy and Diane Thornton's version of events as their evidence is more consistent and credible and the Claimant did not challenge either of their version of events in cross examination. We do not accept the evidence of the Claimant whose recollection of this particular event was inconsistent and patchy. The Claimant said in her written evidence that she said she would get a lawyer to speak on her behalf. But at the investigation meeting on 16 March 2021 the Claimant said, "I told a colleague about being underpaid and she put her hand over her face and started laughing and said, "in that case get a lawyer to fight your case". The two versions of the Claimant are inconsistent with each other. The Claimant's version of events was not supported by Louise Hennessy who we understand to have been friendly with the Claimant and would have no reason to dispute the Claimant's version of events if indeed they had happened as the Claimant indicated.

Incident on the ramp

32. The Claimant attended meetings at the Leeds office. On the first floor of the office there is security card entry. The first floor has 400-500 staff who work there in an open plan office. Some of those working there are NECS employees, some are Capita and consultants and some are NHS England employees. There is a lift of outside access doors which have a ramp leading to it within the office. The Claimant's evidence was that on some unspecified date in 2020 she had attended a meeting and was leaving the office when 3 female colleagues stood on the downward ramp walkway and one of them who said her "thanks for popping in". However, in the grievance appeal meeting the Claimant said that "*Three colleagues said "thanks for popping in" in a manner which made SM feel uncomfortable. They had been aggressive and rude in their manner"* [572]. But in oral evidence when the Claimant was cross examined about referring to another incident that was not part of the Claimant's grievance appeal where she said that *"3 colleagues just stared at her in a corridor but she had not raised this as part of her grievance",* the Claimant's response was, it the same incident. Angela Lydon-Burgan accepted in evidence that the Claimant told her about an incident, on 19 February 2020 **[272]** when the Claimant complained that 3 staff members made her feel uncomfortable when one of them commented "thanks for popping in" what she believed

was a sarcastic manner. Angela Lydon-Burgan's evidence was at the time the Claimant could not identify the individuals by name or provide a description of them or the date of the meeting when it was alleged to have happened. Angela Lydon-Burgan spoke with Paul Roberts and Natalie Andrews who were operations managers at the time but they could not take the matter any further because there was no identifying information from the Claimant. It is only at a meeting with Jackie Parkes on 16 February 2021, that the Claimant said one of the girls was short haired and said thanks for popping in. We find that the Claimant version of events in respect of the incident are inconsistent we do not accept her version of events as having happened as she said it happened. Notwithstanding, the Claimant never mention the race of the person who said thanks for popping in any of her version of events.

Claimant's grievance

33. On 6 November 2020 the Claimant raised concerns about bullying and harassment with Anne Greenley (Freedom to Speak Up Guardian) who was responsible for the Respondent's whistleblowing process.**[272; 288-290]**. The Claimant stated in her complaint in summary that:

    a. "*I believe this has now moved into my personal life and I am concerned for the safety of myself and my family*" **[288]**;

    b. At Capita she had worked for 3 months without a laptop;

    c. 3 colleagues had "*waited in the corridor*" and said "*thanks for popping in in a manner which made me feel uncomfortable*";

    d. Emails were answered with a question and, when responded to, ignored;

    e. The Claimant had attended CSPB*s* and been told to "go";

    f. On 27 October 2020 the Claimant had had difficulties joining a Teams meeting;

    g. Her October pay had been short £483.05;

    h. The Claimant had been contacted about an external name which was similar to a family member's bank details;

    i. On 2 November 2020 at the Preston office when discussing the October pay shortfall a colleague had laughed at her and had ignored her while she was talking about two CSPB meetings; the Claimant had previously found the same colleague's behaviour unsettling.

34. The Claimant concluded her email complaint by stating that she had taken "*a long time to make contact*" but was raising this now because she

believed there was an organised conspiracy - "*this is a well organised group of people who may well have people in strategic places both internal and external to the organisation*" **[290]**. The Claimant wrote a draft of her concerns (although we note that the Claimant did not know about her underpayment at that stage) on 22 October 2020 that she sent to herself **[S36]**. In that draft email the Claimant mentioned "racism" in the first line, but in the list of concerns sent to the Respondent on 6 November 2020 which became the basis of the Claimant's grievance the Claimant did not mention racism or race at all.

35. On the same day as the Claimant's complaint, on Friday 6 November 2020, Anne Greenley emailed that the Claimant to ask her to speak with her on Monday in a telephone call **[287]** Following the Claimant being informed that her complaint would be treated as a grievance under the dignity at work policy, Khalid Azam (Account Director and Head of Clinical Services) was appointed as Commissioning Manager for the Dignity at Work complaint and Corrine Wilson was appointed as Investigating Officer. Investigation meetings took place on 11 December 2020 with the Claimant **[308-313]**; on 8 January 2020 with Diane Thornton **[329-331; 337]** and with Louise Hennessy **[323-333; 337]**; on 12 January 2021 with Angela Lydon-Burgan **[323-326; 337]**. The report was finalised on 22 January 2021 **[334-344]**.

36. The Claimant was off work sick from 9 November 2020 – 31 January 2021 and returned to work on 1 February 2021 **[345-346]**. On 2 February 2021 the Claimant received the outcome of the investigation and was invited to discuss the findings **[604]**. On 4 February 2021 Mr Azam met with the Claimant to explain the grievance outcome **[565; 350-351; 604]**. The Claimant's grievance was not upheld, but Mr Azam made recommendations to ensure regular supervision and a review of service culture to maintain professional boundaries. The Claimant was told that if she felt uncomfortable attending external meetings she should discuss this with her line manager initially **[350]**. The grievance outcome was confirmed in writing by letter dated 5 February 2021.**[350-351]** On 18 February 2021 the Claimant appealed **[365]**. The Claimant's grounds of appeal were that (i) the investigation was not thorough (ii) evidence had not been taken into account (iii) the allegations of bullying at external meetings were not investigated (iv) "*there were delays to the whole process due to holidays and annual leave*" and (v) as reflected in the title of her appeal letter, "*the decision in the outcome letter should change*" [**365**]. The Claimant did not mention race discrimination in her appeal.

37. The Claimant was invited to an appeal hearing **[366]** by Ian Davison for 16 March 2021 **[568-577]** and on 19 March 2021 by letter the Claimant was informed her appeal was not successful **[368-371]**. In summary, Mr Davison found (i) "*a reasonable and appropriate investigation has taken place*" in which the investigating officer "*took into account details of witnesses provided by you*" (ii) "*the information provided by you was reviewed and considered by the investigating officer*" (iii) the Respondent was "*unable to investigate allegations made about external parties… in respect of someone who is not our employee… the meeting in which the alleged inappropriate behaviour took place was some time ago and a precise date was not presented*" (iv) "*taking out the 3 week delay due to*

Christmas and New Year, the formal HR process took approximately 6 weeks to conclude" (v) there was no evidence of bullying or harassment **[370-371]**.

38. On 25 March 2021, the Claimant went off sick because of anxiety and stress **[387]**. On 22 September 2021, the Claimant had a long term sickness meeting with Becky Johnson, the Claimant said in that meeting that she did not want to come back and that it would not be good for her mental and physical health **[430]**. The Claimant also said that she did not want to have contact with the individuals that she believes have done her wrong **[430]**. She said she thinks that it would be unrealistic for her to return to work. The Claimant said that she had been looking at jobs and she had questions regarding references and base salary and "*whether she could hand in her notice while on sickness leave"* **[430]**.

39. On 19 October 2021 Becky Johnson emailed the Claimant to ask whether she was interested in redeployment **[441]**. The Claimant responded on 19 October 2021 stating *"…redeployment does not seem feasible and for my wellbeing a position outside of the company is probably best."* **[441]** On 21 October 2021 the Claimant sent an email to Becky Johnson stating, "*I have an NHS Jobs account and have been applying for new positions"*. **[441]**

Karen Burgess allegedly calls the Claimant by the wrong name

40. The Claimant gave no written evidence on whether she was called by the wrong name by Karen Burgess in October 2021. The Claimant accepted in oral evidence that Karen Burgess, the screening and immunisation manager for Kent was not an employee of the Respondent and that she was on sick leave in October 2021. She also accepted that Karen Burgess did not call her by the wrong name in October 2021. However, her evidence was that even though she did not know the date of the meeting, it allegedly happened and even though she did not what the name was that Karen Burgess allegedly used and gave no evidence on the name of the person who told her that she had been named wrongly, the Claimant insisted it did happen. We find that Karen Burgess did not call her the wrong name twice in October 2021 because the Claimant couldn't recall any information about when it happened or where it happened what was actually said and she was not even working in October 2021.

41. On 3 November 2021 the Claimant attended a long term sickness meeting with Becky Johnson and Jonathan Gore. At the meeting the Claimant's response when asked about when she might return to work was "*No, don't see herself coming back, there's no point. Don't see coming back at all. Think about herself and way she's been treated. Lost all faith and trust, no point coming back because would have to work with same people and wouldn't be good for her*." **[453]** At the same meeting the Claimant said *"looked at contract briefly, said had to give 2 months' notice, something that could be* looked at **[454]**. Becky Johnson explained in the meeting that following the expiry of the Claimant's fit notes at the end of November, the Respondent must follow the process to an attendance review/incapacity review meeting to determine the Claimant's continued

employment because all options had been explored. The Claimant said later in the meeting *"Regardless will come to a point whether find job or not, looks like will have to hand in notice. Can't go on forever. Just want to get right job, not be in same position. By December 14 or 15 will have to make a decision or at least resign. Thought less about the process and more about herself."* [454] Becky Johnson asked the Claimant what does she mean make a decision by 14 December and the Claimant responded when sick pay finishes.

Comments by Jonathan Gore

42. When Jonathan Gore became the Claimant's line manager it was during the pandemic, so he had very little face to face contact with the Claimant. However once the pandemic restrictions were lifted Jonathan Gore would have in addition to team meetings with the Claimant and the rest of the immediate team fortnightly on Microsoft Teams and once a month face to face meeting in Leeds or Preston. Furthermore, Jonathan Gore would have regular one2ones with the Claimant via Microsoft Teams for a 1 hour or so as well as monthly one2ones. Jonathan Gore recorded notes of his conversations with the Claimant from April-November 2021.

43. The Claimant's evidence was that on more than one occasion Jonathan Gore dismissed her reports of bullying and harassment. However, the Claimant was unable to say when it was that Jonathan Gore was alleged to have said that the bullying that she was receiving was not racially motivated and that he further stated why was the bullying at NECS different from the bullying that she experienced at PCSE. Jonathan Gore's evidence was he did not say to the Claimant that bullying suffered by the Claimant was not racial or that why was the bullying at NECS different from the bullying that she experienced at PCSE. These things did not occur. Jonathan Gore gave evidence that he had recorded notes of his calls with the Claimant from April – November 2021 which do not refer to these things **[578-579, 587-593].** What Jonathan Gore had a record of was of mentioning at a meeting on 28 May 2021 in response to the Claimant saying that she did not want to attend CSPB meetings **[591]** that she'd been to tougher meetings such as Practice Managers meetings when working at PCSE. We accept Jonathan Gore's evidence. We do not accept the Claimant's evidence as she was unable to identify when Jonathan Gore said that the bullying that she was receiving was not racially motivated and that he further stated why was the bullying at NECS different from the bullying that she experienced at PCSE. We do not accept that these comments were made by Jonathan Gore as there was no note in Jonathan Gore notes of the comments.

44. The Claimant's evidence was that at a meeting where the Claimant said that her colleagues were trying to hurt her, Jonathan Gore turned his head away. The Claimant did not state in her claim form or further and better particulars when this event allegedly happened. The only reference to a date was in paragraph 29 of the Claimant's witness statement, where the Claimant said that it happened at a meeting on 3 November 2021. The Claimant's written evidence was that Angela Lo was the note taker at this meeting with Jonathan Gore and Becky Johnson present. Jonathan

Gore's evidence is that he cannot recollect the Claimant saying that her colleagues were trying to hurt her and he turned his head away. He said that if it did happen, it would not have been in any way related to the Claimant's race or done in a deliberate and/or negative manner. Jonathan Gore explained that when he is working from home, he may have inadvertently looked away from his screen if, for example, if he heard a noise. He also explained that he has multiple screens and therefore may have moved his head to look at another screen in front of him. In his written evidence he said that given the passage of time he cannot specifically recall if he had a discussion with the Claimant where she alleged that colleagues wanted to physically hurt her, but there was nothing about in any of his notes. Jonathan Gore's evidence was that he did not believe that this conversation took place, not least because he thinks it is the kind of thing that would stick out in his memory. We agree with Mr Gore. We do not accept the Claimant's evidence on this point.

45. We find that it was not at a meeting on 3 November 2021 that Jonathan Gore turned his head in response to the Claimant saying that her colleagues were trying to hurt her. We accept Jonathan Gore's evidence on this point as being more credible and that the Claimant did not say it. We find that even if Jonathan Gore had turned his head in response to anything the Claimant said there would have been nothing untoward with this as it was likely it was because he was looking at more than one screen not because of anything the Claimant said.

Resignation

46. The Claimant resigned by email dated 6 December **[470]** setting out in a letter attached that she wanted her resignation to take effect on Saturday 11 December 2021 **[471]**. However in that letter the Claimant did not say anything about the reason for why she was resigning. In fact in the letter the Claimant said *"Thank you for the support during my time at NECS/CSAS. Please let me know if there's anything you need from me before I leave*." **[471]**. When this was put to the Claimant in cross examination, the Claimant said it was appropriate to say those words about receiving support, even though she did not mean it, it was polite and she accepted that not everything was bad and not everyone treated her badly. However, in the Claimant's written evidence she said that she had no choice but to resign, considering the ongoing racial discrimination, harassment, not having the same equipment as my colleagues to do the same job was detrimental to my performance and my emotional and mental health and wellbeing. [paragraph 33 of Claimant's witness statement].

47. Following the Claimant's resignation, in an email dated 8 December 2021, Becky Johnson (Assistant HR Manager) offered the Claimant to chance to Claimant arrange a time to speak with her about her resignation. The Claimant accepted the offer the same day. **[476]** On 13 December 2021 the Claimant spoke to Becky Johnson. Following conversation on 13 December, the Claimant stated in an email of the same date *"weird question can I rescind my resignation*". **[480]** On 14 December 2021, Becky Johnson sent the Claimant an email saying that Paul Roberts who

was head of service of CSAS would want to first have a discussion with the Claimant if she wanted to rescind her resignation. The Claimant's father's funeral took place on 17 December 2021, the Claimant therefore did not reply until 20 December 2021 **[479]** where she asked first to have a conversation with Becky Johnson before the discussion with Paul Roberts. On 21 December 2021, the Claimant wrote to Becky Johnson saying that she no longer wanted to rescind her resignation **[481]**. We find that the reason the Claimant resigned was not because she believed she had been harassed or discriminated against. The Claimant never mentioned race discrimination at all throughout her grievance. The Claimant did not state that the reason for her deduction was because of race discrimination during the grievance process and did not mention it in her resignation letter at all. The Claimant's constant refrain whilst off sick was that she wanted to find another job was looking for another job. Yet Claimant gave evidence that she did not have a job when she resigned in any event. The Claimant repeatedly stated that she wasn't coming back to work and she didn't want to come back to work because she did didn't want contact with people she previously worked with, yet the alleged harassment took place more than a year before the Claimant resigned and approximately 8 months after knowing the final outcome of her grievance appeal. The Claimant did not mention harassment or any of the things she now relies upon as the reason why she resigned in her resignation letter. We do not accept the Claimant's evidence that the reason why thanked the Respondent for their support in her resignation letter was she was being polite. We find that the Claimant was at the time she resigned grateful for the Respondent's support and the reason she resigned was because she had run out of sick pay.

Time

48. Following the Claimant's resignation, the Claimant contacted ACAS on 17 January 2022. The ACAS early conciliation certificate was issued on 19 January 2022 and the Claimant presented her claim form 17 February 2022. The Claimant admitted in evidence that she possibly could have brought her claim sooner. The Claimant accepted that she had access to a union representative from 12 November 2020 **[S40]** and was represented by Kevin during the grievance process. The Claimant's evidence was that her union representative Kevin was very unhelpful. However, we find that the reason why the Claimant found her union representative unhelpful was because he was not telling her what she wanted to hear, as that is what she told Jonathan Gore on 14 May 2021 **[579]**. We find that the reason for the Claimant's delay in presenting her claim was not because of her ill health and that there was nothing preventing the Claimant from bringing an Employment Tribunal claim before she presented her claim. Furthermore, we find that the Claimant was in receipt of advice from her union representative in relation to her grievance complaints which form the basis of her tribunal claim.

Text message from Louise Hennesy

49. On 4 April 2023 at 00:09 Louise Hennessy sent the Claimant a text message "Hey Sonia hope you're well. How are you doing" **[483]**. The

Claimant does not mention this text message in her witness statement. The Claimant's oral evidence is that she had friendly text messages with Louise Hennessy before but the text message on 4 April 2023 upset her and made her feel uncomfortable because she said she was in the middle of the preliminary hearing. She accepted that Louise Hennessy had her personal mobile number for contact generally that was not about work.

50. Louise Hennessy's evidence was that when she sent the text she was unaware that the Claimant had brought an Employment Tribunal claim and only send the text because she was wondering how the Claimant was doing generally. She said that the Claimant and her had good working relationship for a very long time. They exchanged numbers to discuss things outside of work, games they liked, type of Christmas tree that year, she sent her a photo of a tree the Claimant sent her messages about her dogs on New Years Eve because of the fireworks and general friendly chit chat. We find that that there is nothing upsetting about the text. The Claimant did not challenge Louise Hennessy evidence that she did not know about the Claimant's Employment Tribunal claim and we accept Louise Hennessy's evidence on this point. We find that the text message was friendly and there had been a history of text messages not related to work that meant that the text message was an expression of genuine interest in the Claimant's wellbeing.

Law

Time limits

51. Section 123 EqA contains the provision on time limits applicable to discrimination claims, it states:

"(1) [Subject to [[section 140B]]] proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable [……]

(3) For the purposes of this section—

(c) conduct extending over a period is to be treated as done at the end of the period;

(d) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(e) when P does an act inconsistent with doing it, or

(f) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

52. When exercising their discretion to allow out-of-time claims to proceed, Tribunals may also have regard to the checklist contained in Section 33 of the Limitation Act 1980 (as adapted by the Employment Appeal Tribunal ('EAT') in British Coal Corporation v Keeble and ors [1997] IRLR 336.

53. Keeble takes the Section 33 factors listed as: considering the prejudice that each party would suffer if the claim were allowed or not, and to have regard to all the circumstances of the case — in particular, (a). the length of, and reasons for, the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued as cooperated with any requests for information; (d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the Claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

Continuing Acts

54. Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA: Tribunals should not get caught up on discerning whether there is a policy, regime, practice, rule, practice etc. In determining whether there is a continuing act, Tribunals should look at the substance of the allegations and where there are a series of connected acts that may suggest a continuing state of affairs, that continuing state of affairs may amount to a continuing act.

55. Aziz v FDA [2010] EWCA Civ 304, CA: In deciding whether separate incidents constitute part of a continuous act, "one has regard to whether the same individuals or different individuals were involved. This a relevant factor but not conclusive" [see paragraph 43, per Jackson LJ]

Harassment

Section 26, EQA 2010 sets out the legislative framework for harassment:

56. *"(1) A person (A) harasses another (B) if—*

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
violating B's dignity, or
creating an intimidating, hostile, degrading, humiliating or offensive environment for B […..]

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(c) the perception of B;

(d) the other circumstances of the case;

(e) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are— belief;"

57. In Richmond Pharmacology v Dhaliwal [2009] ICR 724 the EAT stressed that the Tribunal should identify the three elements that must be satisfied to find an employer liable for harassment: (a) Did the employer engage in unwanted conduct, (b) Did the conduct in question have the purpose or effect of violating the employee's dignity or creating an adverse environment for him/her, (c) Was that conduct on the grounds of the employee's protected characteristic?

58. In a case of harassment, a decision of fact must be sensitive to all the circumstances. Context is all-important. The fact the conduct is not directed at the Claimant herself is a relevant consideration, although this does not necessarily prevent conduct amounting to harassment and will not do so in many cases.

59. Richmond Pharmacology v Dhaliwal confirmed that not every comment that is slanted towards a person's protected characteristic constitutes violation of a person's dignity etc. Tribunals must not encourage a culture of hypersensitivity by imposing liability on every unfortunate phrase.

60. Tribunals must not devalue the significance of the meaning of the words used in the statute (i.e., intimidating, hostile, degrading etc.). They are an important control to prevent trivial acts causing minor upset being caught in the concept of harassment. Being upset is far from attracting the epithets required to constitute harassment. It is not enough for an individual to feel uncomfortable to be said to have had their dignity violated or the necessary environment created. (Grant v Land Registry [2011] IRLR 748).

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

62. Section 212(1) EqA says "*detriment does not, subject to subsection (5) include conduct which amounts to harassment."*

63. Section 212(5) EqA says "*Where this Act disapplies a prohibition on harassment in relation to a specified protected characteristic, the disapplication does not prevent conduct relating to that characteristic from amounting to a detriment for the purposes of discrimination within section 13 because of that characteristic."*

64. Section 212 EqA means that an action that is complained of must be either direct discrimination or harassment, but it cannot be both. Equally such an action cannot be both harassment and victimisation. It must be one or the other. This is because the definition of detriment excludes conduct which amounts to harassment.

Burden of Proof provisions

65. Section 136 of the Equality Act 2010 states:

"(1) This Section applies to any proceedings relating to a contravention of this Act.

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

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

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to – (a) An Employment Tribunal."

66. Pre- Equality Act 2010 House of Lords decision of Igen v Wong [2005] IRLR 258 set out a two stage test tribunals must apply when deciding discrimination claims. This two stage approach was discussed in the Court of Appeal decision of Madarassy v Normura International plc [2007] EWCA 33, with guidance being provided by Mummery LJ. Since the Equality Act 2010 (although the burden of proof provisions differs in wording to the test set out in Igen), the Appellant Courts and EAT have repeatedly approved the application of the guidance set out by Mummery LJ in Madrassy. In summary the first stage is where the burden of proof first lies with the Claimant who must prove on a balance of probabilities facts from which a Tribunal could conclude, in the absence of any other (non discriminatory) explanation that the Respondent had discriminated against him. If the Claimant meets the burden and establishes a prima facie case (which will require the Tribunal to hear evidence from the Claimant and the Respondent, to see what proper inferences may be drawn), then the burden shifts and the Respondent must prove that it did not commit the act disproving the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The Respondent will have to show a non-discriminatory reason for the difference in treatment.

67. Tribunals must be careful, and the burden of proof provisions should not be applied in an overly mechanistic manner: see Khan v The Home Office [2008] EWCA Civ 578 (per Maurice Kay LJ at paragraph 12).

68. The approach laid down by section136 EqA requires careful attention where there is room for doubt as to the facts necessary to establish discrimination, but where the Tribunal is able to make positive findings on

the evidence one way or another, the provisions of section136 does not come into the equation: see Martin v Devonshires Solicitors [2011] ICR 352 (per Underhill J at paragraph 39), approved by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 (per Lord Hope at paragraph 32).

69. It is, however, not necessary in every case for the Tribunal to specifically identify a two-stage process. There is nothing wrong in principle in the Tribunal focusing on the issue of the reason why. As the Employment Appeal Tribunal ("EAT") pointed out in Laing v Manchester City Council [2006] IRLR 748 "*If the tribunal acts on the principle that the burden of proof may have shifted and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever*".

Direct discrimination

70. Section 13 EQA 2010 sets out the statutory position in respect of claims for direct discrimination because of philosophical belief.

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

Section 39 (2) applies to employers and states:

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

When determining questions of direct discrimination there are, in essence, three questions that a Tribunal must consider: (a) Was there less favourable treatment? (b) The comparator question; and (c) Was the treatment 'because of' a protected characteristic?

71. The test for unfavourable treatment was formulated in the case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11 in that case the House of Lords as it was then, said that unfavourable treatment arises where a reasonable worker would or might take the view that they had, as a result of the treatment complained of, been disadvantaged in the circumstances in which they had to work.

72. Lord Hope's judgment in Shamoon clarifies that a sense of grievance which is not justified will not be sufficient to constitute a detriment.

73. Section 23 EQA 2010 deals with comparators and states that:

"There must be no material difference between the circumstances relating to each case."

74. Shamoon held that the relevant circumstances must not be materially different between the Claimant and the comparators, so the comparator must be in the same position as the Claimant save in relation to the protected characteristic.

Third party harassment

75. Employers can only be liable for acts of harassment under the Equality Act 2010 if the employer has in some way failed to take action to ensure the well-being of the employee that would fall within the definition of harassment in of itself. (see Conteh v Parking Partners Ltd [2011] I.C.R. 34 EAT)

Post employment discrimination (section 108 Equality Act 2010)

76. Section 108 states that

"*(1) A person (A) must not discriminate against another (B) if—*

(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and

(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.

(2) A person (A) must not harass another (B) if—

(c) the harassment arises out of and is closely connected to a relationship which used to exist between them, and

(d) conduct of a description constituting the harassment would, if it occurred during the relationship, contravene this Act.

(3) It does not matter whether the relationship ends before or after the commencement of this section…..

(6) For the purposes of Part 9 (enforcement), a contravention of this section relates to the Part of this Act that would have been contravened if the relationship had not ended.

Constructive unfair dismissal- section 94 Employment Rights Act 1996 (ERA)

77. Section 95 ERA states: *"(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if) –(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

78. Section 95(1) (c) ERA is colloquially referred to as constructive unfair dismissal or constructive dismissal. Lord Denning in the authoritative Court of Appeal decision of Western Excavation Limited v Sharp [1978] IRLR 27 best summarises the test for constructive dismissal as *"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." (See paragraph 15). Thus the question is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment.

79. The House of Lords in the case of Malik v Bank of Credit and Commerce International [1998] AC 20 established that it is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: (See Malik at paragraphs 34h -35d and 45c-46e).

80. At paragraph 35c of Malik, Lord Nicolls sets out that the test of whether there has been a breach of the implied term of trust and confidence is objective) The conduct relied on as constituting the breach must impinge on the relationship that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence that the employee is reasonably entitled to have in its employer. A breach occurs when the proscribed conduct takes place.

81. Nottinghamshire County Council v Meikle [2004] IRLR 703: In that case the Court of Appeal held that what was necessary was that the employee resigned in response, *at least in part*, to the fundamental breach by the employer; as Keene LJ put it: *"The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by the employer."*

82. Building on Meikle, Elias P in *Abbeycars (West Horndon) Ltd v Ford UKEAT/0472/07 (23 May 2008, unreported)* said that the true question is whether the breach 'played a part in the dismissal' and this means that if the employee resigns in response to several complaints about the conduct of the employer (some of which were not contractual breaches) it will *not* be necessary for the Tribunal to consider which was the principal reason for leaving.

83. Langstaff J sitting in the Scottish division of EAT in Wright v North Ayrshire Council [2014] ICR 77 provides further clarity on the Meikle point, where he says *"Where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause"* (see paragraph 20)

84. In considering whether the passage of time means that the employee has affirmed the repudiatory breach or breaches, Chindove v William Morrison Supermarkets Ltd UKEAT/0201/13 (26 June 2014, unreported) Lanstaff P

in the EAT suggests that time in of itself is not the only matter to consider. *"The principle is whether the employee has demonstrated that his made the choice"* that is between accepting the breach e.g. continuing to work or whether he acts to as to demonstrate to the employer he regards himself as being discharged from his obligations under the contract of employment. (See paragraph 25). Lanstaff P goes on to say an employee *"may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time"* (See paragraph 26).

Submissions

85. We received written submissions from both parties and heard oral submissions from both parties of approximately 15 minutes each. We considered the submissions of both parties in coming to our conclusions.

Analysis/ Conclusions

Burden of Proof

86. The Claimant relied upon being the only black person in the team as the reason why she interpreted incidents that she complained of as happening to her because she was the only black person in her team. Whilst it was the case that the Claimant was the only black person in the team, there were matters she complained of in relation to the incident for example the thanks for popping in comment, the allegation against Jamie Scott and Karen Burgess where the membership of her team was not relevant. We accepted Angela Lydon-Burgan's evidence that the wider team and organisation was multicultural with a large number of people from south Asian backgrounds and various European backgrounds.

Issue 4.2.1 Angela Lydon-Burgan in about October/November 2019 allocated to the Claimant more CSPB meetings than the Claimant's white colleagues, namely Sean, Angela Pownall.

87. We found that Angela Lydon-Burgan did not allocate the Claimant more meetings as it was not her responsibility. In those circumstances there can be no direct race discrimination and the complaint is not well founded and is dismissed.

Issue 4.2.2 Required (by virtue of the omission of Angela Lydon-Burgan) to work without a laptop for 6 months between February 2020 to July 2020. The Claimant compares herself to Angela Pownall, Diane Thornton, Louise Hennesey.

88. We found that the Claimant was not required to work without a laptop for 6 months as firstly 3 of those months were when the Claimant was working for Capita and secondly the Claimant accepted that she had a working laptop to work with and that it was not an issue. In those circumstances there was no race discrimination and the complaint is not well founded and is dismissed.

Issues 4.2.3 & 5.1.4 Being called the wrong first name twice in the same CSPB Teams meeting, by Karen Burgess, in October 2021 (the Claimant says that this was the only CSPB meeting which she attended with Karen Burgess that month). The Claimant does not know the name that Karen Burgess used but says that another person in the meeting said, "that's not her name". The Claimant compares herself to those present at the meeting whose names the Claimant says Karen Burgess got right.

89. We found that it did not happen that Karen Burgess called the Claimant the wrong name twice. In those circumstances the complaints of direct race discrimination and harassment related to race are not well founded and are dismissed.

Issue 4.2.4 Attending a team meeting in Preston on 2 November 2020 and, during a discussion about unpaid wages, a colleague had to stop herself from laughing at the Claimant & Issue 5.1.1 being laughed at Diane Thornton on 2 November 2020 when the Claimant said that she needed to get a lawyer over a mistake in her pay.

90. We found that there was no discussion where the colleague named as Diane Thornton laughed at the Claimant on 2 November 2020. In those circumstances the complaints of direct race discrimination and harassment related to race are not well founded and are dismissed.

Issues 4.2.5 & 5.2.2 On an unspecified date in 2020 one of three female colleagues standing on the ramp of the Respondent's Leeds office as the Claimant was leaving and saying to the Claimant 'thanks for popping in' in a sarcastic tone; all three stared at the Claimant.

91. We found that the Claimant's version of events was inconsistent and so do not accept that the events happened as the Claimant described. We therefore conclude that the Claimant was not subjected to direct race discrimination or harassment related to race. Even if we had found that the events happened as the Claimant described, the Claimant did not provide any facts upon which we could infer that the reason for the incident was the Claimant's race. Furthermore, the Claimant did not mention the race of any of the people present or who said the comments so in those circumstances we could not find that there was any racial connation to the comment. If the incident had happened we would have concluded that it was not unwanted conduct because there wasn't anything untoward about saying to the Claimant 'thanks for popping in'. It was the Claimant's subjective view that the comment was sarcastic and we would have concluded that there was nothing objective about the comment that could amount to harassment in either purpose or effect. In those circumstances the complaints of direct race discrimination and harassment related to race are not well founded and are dismissed.

Issues 4.2.6 & 5.1.3 At a CSPB meeting on an unspecified date in 2019 being told to 'go' and when the Claimant turned to look at him saying 'no, go', in an aggressive and rude manner (sharp, harsh, angry in tone) by Jamie Scott.

92. We found that this alleged incident did not happen as we did not accept the Claimant's version of events. We therefore conclude that the Claimant

was not subjected to direct race discrimination or harassment related to race. Even if we had found the event happened we would have found that as the allegation was against someone who was not an employee of the Respondent there could be no liability in relation to the matter. Notwithstanding the Claimant did not provide any facts from which we could infer that the reason for the alleged incident was the Claimant's race or in any way related to the Claimant's race. We would have concluded that the explanation provided by Jonathan Gore was more credible from Ms Mann and therefore not because of the Claimant's race. The Claimant's complaints are therefore not well founded and are dismissed.

Issue 4.2.7 Underpaying the Claimant by £483.05 on 27 October 2020. The Claimant does not know who was responsible for the underpayment. The Claimant compares herself to all of her other colleagues who, she says, did not suffer a deduction. The Claimant notes that one colleague, who is white, was the subject of a much smaller deduction.

93. We found that the Claimant was underpaid, however we accepted the Respondent's explanation for why the underpayment happened. The Claimant did not challenge the Respondent's explanation given by Sherryll Davison in any event. Furthermore we found the Claimant's explanation incredible as to why it happened to her because she was black and Louise Hennessy who was white. We consider that Louise Hennessy was a valid comparator as the Claimant's complaint was that she was the only one to suffer a deduction. Yet Louise Hennessy did suffer a deduction which the Claimant admitted and so we conclude the reason for the deduction could not be the Claimant's race. Furthermore we would have found that the reason for difference of the deduction was because of the amount of time the Claimant had off work was more than Louise Hennessy and not because of the Claimant's race, notwithstanding that was not the Claimant's complaint in any event. We therefore conclude that the Claimant was not subjected to direct race discrimination and therefore the complaint is not well founded and is dismissed.

Issue 4.2.8 Not receiving an extra screen or printer on 9 March 2020 when other colleagues were provided with this extra equipment.

94. We found that the Claimant did receive an extra screen on 9 March 2020 like her colleagues but she just could not take her screen home with her that day. We also found that the Claimant and none of her colleagues did receive a printer on 9 March 2020 and so the Claimant was not treated differently to her colleagues. Although it was not the basis of the Claimant's complaint the Claimant did argue that she never received her screen or printer at all but we found the reason why the Claimant did not receive her printer and screen was because having told Angela Lydon-Burgan that she did not want it sent to her, she did not arrange with IT to get them sent or pick them up. We therefore conclude that the Claimant was not subjected to direct race discrimination and so the complaint is not well founded and is dismissed.

Issue 5.1.5 On an unspecified date in 2021, on a MS Teams call during a fortnightly catch-up meeting when the Claimant was on sickness absence, Jonathan Gore turned his face away from the Claimant when she told him that she believed her colleagues wanted to physically hurt her.

95. We found that the Claimant did not say to Jonathan Gore that her colleagues wanted to hurt her and so Jonathan Gore did not turn his face away in response. In those circumstances we conclude that the Claimant was not subjected to harassment related to race and the complaint is not well founded and is dismissed.

    Issue 5.1.6 On an unspecified date in 2021, on a different MS Teams call during a fortnightly catch-up meeting when the Claimant was on sickness absence, Jonathan Gore said that the alleged bullying against the Claimant was 'not racial'.

96. We found that Jonathan Gore did not say to the Claimant that the bullying against her was not racial. In those circumstances we conclude that the Claimant was not subjected to harassment related to race and the complaint is not well founded and is dismissed.

    Issue 5.1.7 On an unspecified date in 2021, on a different MS Teams call during a fortnightly catch-up meeting when the Claimant was on sickness absence, Jonathan Gore asked the Claimant why the bullying at the Respondent was any different from the bullying at PCSE.

97. We found that Jonathan Gore did not ask the Claimant why bullying at the Respondent was any different from the bullying at PCSE. In those circumstances we conclude that the Claimant was not subjected to harassment related to race and the complaint is not well founded and is dismissed.

    Issue 5.1.8 Receiving a text message from Louise Hennessey on 4 April 2023 which asked the Claimant how she was.

98. We found that the Claimant did receive a text message from Louise Hennessy asking her how she was. We conclude that this was not unwanted conduct because we found that the Claimant had a friendly relationship with Louise Hennessy and so the enquiry would have been not unwarranted. Furthermore we found that the text its self was not intimidating we did not believe that the Claimant was upset by the text message, even if we had believed that the Claimant was upset by the text message we would have found that objectively the effect of the text was not upsetting, it would not have been reasonable for the Claimant to have been upset by the text message itself, particularly where Louise Hennessy did not know that the Claimant had brought an Employment Tribunal and the Claimant did not challenge Louise Hennessy on this point. Furthermore we would have found that as the text message was sent post-employment there would need to be a link to the Claimant's employment. The text message was in no way related to the Claimant's employment and so even if we had found that the text message was harassment related to race we would not have found that the complaint was well founded as it did not fulfil the legal criteria under section 108(2) EQA the harassment did not arises out of and was closely connected to a relationship which used to exist between the Claimant and Louise Hennessy.

Constructive Unfair dismissal

Issues 2.1 Was the Claimant dismissed and issue 2.1.1 Did the Respondent do the things referred to at issues 4.2 and 5.1? The Claimant relies on all of the alleged acts, separately and cumulatively, as repudiation.

99. We did not find that any of the behaviour that the Claimant relied upon amounted to harassment or discrimination. Of the matters that we found occurred we accepted the reason of the Respondent for the Claimant's underpayment in 2020. We found that the Respondent was not entitled to deduct the underpayment and so we conclude technically it was a breach of the Claimant's contract.

Issue 2.1.2 Did that breach the implied term of trust and confidence, did the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent

100. Whilst we have concluded that the Respondent's deduction from the Claimant's salary was a breach of the Claimant's contract of employment we consider that the Claimant did not accept the breach but affirmed it. The Claimant accepted the reason for the underpayment at the time, she did not ask for the payment to be made any sooner but accepted that the payment would be made the following month. Furthermore we conclude that it was not behaviour that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent. When the Claimant raised it, HR responded the same day and the Respondent dealt with the issues quickly providing an explanation to the Claimant of the reason for the deduction within 3 days, which the Claimant accepted at the time. Whilst the Claimant raised the issue in her grievance, her issue was more about being singled out (which factually was not singled out because Louise Hennessy also suffered a deduction and she knew this) rather than the deduction itself. Furthermore, the Respondent did not make the deduction on purpose, we found it arose as an administrative error.

101. Neither accumulative or individually did the Respondent do anything that could be deemed to have amounted to a repudiatory breach of the Claimant's contract of employment and we conclude that there was no repudiatory breach entitling the Claimant to resign her employment. There was therefore no breach of the implied term of trust and confidence. We conclude that the Claimant was not dismissed.

Issue 2.1.3 Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

102. We found that the reason the Claimant resigned was not because she believed she had been harassed or discriminated against. The Claimant never mentioned race discrimination at all throughout her grievance. The Claimant did not mention the underpayment as a reason for her resignation in resignation letter, her witness statement or oral evidence.

The alleged harassment took place more than a year before the Claimant resigned and approximately 8 months after knowing the final outcome of her grievance appeal. Even if we had found that the Claimant had been dismissed by reason of a repudiatory breach, we would have concluded that the Claimant did not resign in response to that breach because we found the reason the Claimant resigned was because her sick pay ran out.

Issue 2.1.4 Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.

103. The Claimant did not mention harassment or any of the things she now relies upon as the reason why she resigned in her resignation letter. We did not accept the Claimant's evidence that the reason why thanked the Respondent for their support in her resignation letter was she was being polite. We find that the Claimant was at the time she resigned grateful for the Respondent's support and the reason she resigned was because she had run out of sick pay. The Claimant asked about her notice and was discussing resigning a month before she actually resigned. The fact that the Claimant tried to rescind her resignation also indicates that the Claimant did not consider the alleged behaviour of the Respondent as amounting to a repudiatory breach otherwise she would not have considered coming back to work for the Respondent. The Claimant also waited over 1 year, a significant amount of time from the breach of contract in relation to underpayment in October 2020. The passage of time from the breach coupled with the Claimant's wish to rescind her resignation we conclude that the Claimant affirmed the breach.

Issue 1.2 Time

104. The Claimant gave evidence that the acts of discrimination and harassment were all a continuing act. We did not find that the Claimant was subjected to any direct race discrimination or harassment on related to her race so there could be no continuing act. The Claimant did not ask the Employment Tribunal to exercise our discretion to extend time allow her claims if there were not a continuing act. Even if she had we would not have exercised our discretion to extend time as most of the allegations took place at least 12 months before the Claimant presented her claim and were therefore months if not years out of time. Secondly the Claimant was in received of advice during the period when she alleged discrimination. Thirdly there was no good reason for her delay and the Claimant essentially accepted that when she said that she probably could have brought her claim earlier.

105. In those circumstances the Claimant's claim fails.

Approved by:

Employment Judge Young

Dated 23 May 2025

JUDGMENT & REASONS SENT TO THE PARTIES ON
24 June 2025
.....

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FOR THE TRIBUNAL OFFICE

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