EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr N Stephenson	**- V -**	Tuffin Ferraby Taylor (TFT) Ltd

Heard at: London Central (CVP) **On**: 9 – 13 June 2025

Before: Employment Judge Baty
Ms G Carpenter
Mr J Carroll

Representation:

For the Claimant: Representing himself
For the Respondent: Ms L Hatch (counsel)

RESERVED JUDGMENT

1. The claimant's complaint of constructive unfair dismissal and his complaints of direct race discrimination and harassment related to race set out at paragraph 2.2.11.1 of the agreed list of issues ("LOI") are dismissed upon withdrawal by the claimant.

2. The claimant's complaints of direct race discrimination and harassment related to race at paragraphs 2.2.1 – 2.2.10 inclusive and 2.2.11.2 of the LOI were presented out of time and it was not just and equitable to extend time. The tribunal does not therefore have jurisdiction to hear those complaints and they are struck out. Even if the tribunal had had jurisdiction to hear those complaints, they would all have failed.

3. The claimant's remaining complaints of direct race discrimination and harassment related to race all fail.

REASONS

The complaints

1. By a claim form presented to the employment tribunal on 15 April 2024, the claimant brought complaints of direct race discrimination and constructive unfair dismissal. The respondent defended the complaints.

2. It is common ground that the claimant was employed by the respondent from 31 October 2022 until 6 February 2024. He does not, therefore, have the two years' continuous employment required for the tribunal to have jurisdiction to hear a complaint of unfair dismissal brought by him against the respondent.

3. A preliminary hearing for case management purposes took place on 1 August 2024 before EJ Bunting. At that hearing, a list of the (in total 15) complaints of direct race discrimination was agreed between the judge and the parties. EJ Bunting noted the jurisdictional problem with the constructive unfair dismissal complaint and that the tribunal was considering striking that complaint out.

4. There was some discussion about amendments at that preliminary hearing. It was noted that the claimant was in the process of instructing lawyers. Orders were made providing that, if the claimant sought to amend his claim, he should do so by 30 August 2024 and, indeed, by the same date provide reasons why the constructive unfair dismissal complaint should not be struck out. The claimant duly served an application to amend his claim on 29 August 2024, which we return to below. However, no action was taken by the tribunal in relation to the constructive unfair dismissal complaint.

Amendment application

5. As noted, on 29 August 2024, the claimant made an application to amend. He sought to include harassment related to race complaints in relation to the allegations of direct discrimination already agreed with the tribunal and he sought to amend to include the constructive dismissal as an act of discrimination pursuant to both section 13 and section 26 of the Equality Act 2010 ("EQA"). The respondent subsequently indicated that it did not oppose these amendments.

6. However, the claimant also sought an amendment as follows:

"Amendment to include a claim for indirect sex discrimination pursuant to section 19A of the Equality Act 2010 on the basis that others and I were required to increase days at the office or project sites from 2 to 3 days and this put me at a disadvantage as I am a single father with 3 children to care for. In addition to four other children with shared caring responsibilities."

The respondent indicated that it opposed this amendment.

7. The amendment application had not been determined by the tribunal prior to this hearing. In the interim, the claimant had also submitted a further document on 21 January 2025 which set out further particulars and which, at the end of it,

made reference to *"direct sex discrimination pursuant to section 19A of the Equality Act 2010"*, *"Refusal of request to work part-time"* and *"Breach of the Flexible Working Request procedure"*.

8. At the start of this hearing, the tribunal considered the outstanding amendment applications. The judge noted that the applications to include a constructive discriminatory dismissal complaint and for the direct discrimination complaints to be brought in addition as harassment related to race complaints were unopposed. Ms Hatch confirmed this was the case. On this basis, the tribunal allowed these amendments. It then agreed with the parties adjustments to the list of issues to incorporate them.

9. The judge noted the other amendments sought by the claimant and asked whether, in addition to the indirect sex discrimination complaint under section 19A EQA, the claimant was seeking to make amendments in relation to "direct sex discrimination", part-time working and breach of the flexible working request procedure. The claimant said that he was not seeking any amendments in relation to these matters, but only the amendment to bring a complaint of indirect sex discrimination under section 19A EQA (which remained opposed by the respondent).

10. The judge explained, for the claimant's benefit, the legal principles in relation to determining applications to amend and in particular the principles in Selkent Bus Co Ltd v Moore [1996] ICR 836. In determining whether to grant an application to amend, an employment tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties in granting or refusing the amendments.

11. The tribunal then heard submissions from both parties on the amendment application. The tribunal adjourned briefly to consider its decision and, when the hearing reconvened, gave the parties its decision and the reasons for that decision orally.

12. The tribunal refused the application to amend.

13. The tribunal noted that the application had been made by the claimant in accordance with the orders made by EJ Bunting at the 1 August 2024 preliminary hearing; there was no criticism of the claimant, as a litigant in person, having failed to include this complaint in his original claim form, particularly before he had obtained legal advice.

14. The tribunal noted that the amendment was outside the three month tribunal time-limit (the date of presentation of such a complaint being deemed to be the date of the granting of the amendment).

15. However, most pertinently, although the PCP set out in the amendment was clear, the remainder of what, by nature, is a complex multifaceted tribunal complaint, was not clear. Ms Hatch submitted that the respondent was not clear what the complaint was that was being brought against it. Furthermore, normally

a significant element of such complaints is whether or not the respondent can establish the justification defence and no such justification defence had been pleaded (understandably, as the proposed amendment had not been part of the claim at any point up to now). For reasons set out below, the timetable for this hearing was very tight, and allowing this amendment would inevitably have resulted in a postponement of the hearing to enable proper clarification of that amendment and to enable the respondent to plead whatever justification defence it might seek to plead and for the parties to provide the relevant evidence in relation to such a complaint. There would, for these reasons, be significant prejudice (to both parties, but particularly to the respondent) in allowing the amendment, in terms of the considerable delay involved in relisting a hearing many months down the line and the associated financial costs.

16. Furthermore, the tribunal had had the chance to do some preliminary reading into the case; indeed, the judge had by that stage read all of the witness statements and all of the underlying contemporaneous documents referred to in those witness statements. Having done this, the tribunal noted that it appeared very unlikely that the claimant would be able to show that the PCP relied on in this proposed indirect sex discrimination complaint had in fact been applied by the respondent; in which case, the complaint would fail at the first hurdle. Therefore, allowing the amendment would simply allow in a complaint which was likely to fail anyway.

17. Furthermore, the claimant had numerous other extant complaints being heard under his claim (now 16 complaints of direct race discrimination and 16 complaints of harassment related to race), so there was less prejudice to the claimant in terms of this particular amendment not being granted.

18. The balance of prejudice was, therefore, clearly in favour of refusing the amendment. Therefore the tribunal refused the amendment.

Reconsideration application

19. The judge then went on to discuss the documents before the tribunal. However, during this, the claimant returned to the amendment application which the tribunal had refused. For the claimant's benefit, the judge reiterated the tribunal's reasoning for refusing that amendment.

20. However, the claimant continued to dispute the decision. The judge said that, if the claimant wished to do so, he could seek reconsideration of the tribunal's decision, albeit the judge reminded the claimant that there was a very tight timetable to get the evidence and submissions done within the hearing allocation, and questioned whether, given the risk of the hearing going part heard, this was a sensible approach.

21. However, the claimant continued to dispute and the tribunal heard further submissions from the claimant seeking reconsideration of the decision relating to the amendment application. However, the claimant's submissions amounted to a reiteration of his existing position and an assertion that he considered that the complaint in relation to which he sought the amendment was an important part of

his case that he had assumed would be allowed to proceed. There was, therefore, no proper basis for reconsidering the tribunal's original decision, the reasons for which are clearly set out above. The judge therefore informed the claimant that that decision would remain the same and would not be reconsidered.

22. The claimant nonetheless continued to dispute. The judge said that the decision had been taken and that he would like the claimant to move on. The judge said that, if the claimant remained unhappy with the decision, he could, if he thought that the tribunal had applied the law incorrectly, appeal against the decision on the amendment to the Employment Appeal Tribunal but that, for now, he wanted the claimant to move on. Eventually, the claimant did so.

The issues

23. As indicated above, the issues for the hearing were agreed between the tribunal and the parties at this hearing. They comprised the original agreed issues in the case management orders of EJ Bunting, amended by agreement between the tribunal and the parties to incorporate the matters which were allowed to proceed on amendment.

24. A copy of that agreed list of issues ("LOI") is annexed to these reasons.

25. The judge re-emphasised on a number of occasions during the hearing that the tribunal would only be determining the issues in the LOI. He did this particularly when the claimant appeared to be dealing with matters which would amount to an expansion of the issues or strayed into matters in evidence which were not relevant to the issues in the LOI.

Withdrawal and dismissal of certain complaints

26. As noted, the claimant did not have the requisite continuous employment with the respondent for the tribunal to have jurisdiction to hear his complaint of constructive unfair dismissal.

27. After the issues concerning the amendments to the claim had been determined, the claimant withdrew his complaint of constructive unfair dismissal and the tribunal dismissed that complaint.

28. During his evidence, the claimant withdrew his complaints of direct race discrimination and harassment related to race at 2.2.11.1 of the agreed list of issues and the tribunal dismissed those complaints.

The evidence

Witnesses

29. Witness evidence was heard from the following:

For the claimant:

The claimant himself.

For the respondent:

Ms Lorna Melton-Scott, the HR Director for the respondent;

Mr Dominic Thomas, the respondent's Director of Construction Design & Management ("CDM"), who was employed by the respondent with effect from 9 October 2023 and was, from that point, the claimant's line manager;

Mr Daniel Henn, a Senior Director at the respondent; and

Mr Gareth Barry, an Associate Director Principal Designer within the respondent's CDM services team.

Documents

30. An agreed bundle numbered pages 1-642 was produced to the tribunal. In addition, the respondent produced a cast list and a chronology (not agreed by the claimant). There was also produced a schedule of loss from the claimant and a set of 2023 accounts from a company called "CDM Matters Ltd" (which is owned by the claimant).

31. Finally, the claimant produced his own bundle, which ran to 128 pages. The judge noted that this was not paginated and would be difficult to manoeuvre around as a result (although in the end we were not taken to documents in that bundle by either party).

32. The judge asked the parties whether there were any other documents which they expected the tribunal to have but which were not included in the documents listed above. There were none.

33. Neither party objected to any of the documents listed above being before the tribunal.

Disclosure

34. However, the claimant then started to make remarks about what he said were documents which were missing in relation to CVs of other individuals and bonus payments made to individuals, in particular Mr Barry.

35. The judge had a discussion with the claimant to try and work out what relevance (if any) such documents might have to the agreed list of issues.

36. The claimant said that the CVs were relevant to the issues of comparators. The judge explained that, in terms of actual comparators, the important point was that their circumstances should be materially the same as those of the claimant, but that he did not see that it was likely to be relevant to

view their entire CVs in order to determine that. Furthermore, although the judge did not state this at the time, there seemed to have been a misunderstanding on the claimant's part as to how comparators operated in discrimination complaints, as was evident from the choice of some of his alleged actual comparators set out in the list of issues. The claimant asked, in any case, whether he could rely on hypothetical comparators, which the judge said that he could. The claimant did not then pursue this element further.

37. As regards the bonus payments, the judge said that, from his reading, the respondent's position was that no bonus payments had been made in the last year of the claimant's employment, either to the claimant or Mr Barry. The judge also noted that the issues in relation to commission and invoices (2.2.9 and 2.2.10 of the list of issues) were quite self-contained and questioned whether the documents would be needed anyway. However, the judge said that, if the claimant wished to pursue this matter, he could set out concisely in an email to the respondent's solicitors today exactly what documents he said were relevant and the respondent's solicitors could then respond to him (to the extent that any such documents existed). The judge indicated that he hoped that the parties could resolve this themselves but that, if they did need to revert to the tribunal, they should do so as soon as possible. The judge reiterated the issues about the tightness of the timetable for the hearing and whether or not time spent on this issue would be proportionate, particularly if it delayed matters.

38. Neither party subsequently reverted to the tribunal regarding this matter.

Reading

39. The tribunal read in advance the witness statements and any documents in the bundle to which they referred.

Timetable

40. This hearing had been listed by EJ Bunting to consider both liability and remedy. It had been listed for five days, starting on Monday, 9 June 2025. However, the tribunal was only able to sit for 3½ days of that allocation. This was because of the unavailability of the judge on the Wednesday afternoon and Thursday of the hearing. Before the hearing started, the individual members of the tribunal ascertained that they would, if necessary, all be available to sit on the Monday and Tuesday following the end of the listed hearing if that was practicable for the parties.

41. At the very start of the hearing, the judge explained this to the parties. Unfortunately, Ms Hatch was already booked for another hearing on the Monday and Tuesday following this hearing and so would not be available for those two days. We were, therefore, left with the 3½ remaining days of the existing hearing.

42. The judge said that, in light of the time available, it would not be possible to deal with matters of remedy at this hearing and it was likely that, if the hearing did proceed, the tribunal would need to reserve its judgment on liability; it may be

that the members of the tribunal could reconvene the following week to deliberate upon the decision and produce a written reserved judgment reasonably swiftly.

43. The judge explained the risks of going part heard on liability and the fact that, if it was not possible to complete the evidence and submissions on liability within the 3½ days, the matter would need to be relisted for a reconvened hearing, probably several months down the line. He said that there were considerable disadvantages in this happening. The judge was not keen to start a hearing which would go part heard on the evidence and submissions on liability. He said that, however, the tribunal would be prepared to start this hearing if a timetable could be agreed between the parties and the tribunal which enabled the evidence and submissions on liability to be completed within the 3½ days. He then explored timings for cross-examination and submissions with the parties, explaining for the claimant's benefit as a litigant in person what cross-examination was and what submissions were, so as to enable him to give as good an estimate as possible in the circumstances.

44. The tribunal agreed it would be able to start hearing the evidence at the start of the afternoon of the first day of the hearing. Ms Hatch said that she needed about ¾ of a day to cross-examine the claimant; the claimant said that he needed between 1½ - 2 days to cross-examine the four witnesses of the respondent. Each of them indicated that they would produce written submissions and needed no more than 15-30 minutes for any oral submissions.

45. In the light of that, the judge said that, if this timetable was adhered to, it should be possible to complete the evidence by the morning of the last day of the hearing (Friday) and hear submissions after that on the Friday, with a reserved judgment to follow. The timetable was agreed on this basis.

46. The tribunal also variously started early, sat late and took shortened lunch breaks in order to help ensure that the hearing was completed within the time allocation.

47. The timetable was largely adhered to, and it was possible to complete the evidence and submissions on liability within the hearing time.

Submissions

48. Both parties produced written submissions, which the tribunal read in advance of hearing their oral submissions.

49. The judge had made it clear on a number of occasions during the hearing that the tribunal would only be determining the issues in the LOI. The claimant's written submissions contained allegations which were not in the LOI and also contained assertions of fact which were new and did not come out of the evidence.

50. The judge explained to the claimant that the tribunal could not and would not take such matters into account when determining the claim; he stressed that

it would be unfair to shift the goalposts and expand the claim at this stage and that the tribunal would not permit it.

Reserved decision

51. The decision was reserved.

Management of the hearing

52. The hearing was not straightforward to manage and the judge had to interject on more occasions than would normally be the case.

53. The judge had to interject on a number of occasions whilst the claimant was giving his evidence. This was because the claimant frequently did not answer the questions which were put to him, even where those questions were very simple and straightforward. The claimant often went off on a tangent, telling the tribunal what he wanted to tell the tribunal, rather than answering the questions which were actually being put to him. This happened throughout his evidence. The judge's interjections involved telling the claimant to focus on listening properly to what the question was, to answer the question put to him, and not to go off on a tangent telling the tribunal things which he wanted to say but which were not in answer to the question.

54. In his cross-examination of the respondent's witnesses, the claimant frequently asked questions about areas which were not relevant to the issues which the tribunal had to determine. The judge gave a considerable amount of leeway in this respect, acknowledging to the claimant that cross-examining was a difficult thing to do as a litigant in person and that he did not want to put the claimant off his stride. However, where it became persistent, the judge on a number of occasions throughout the claimant's questioning explained that what the claimant was asking was not relevant to the issues in the LOI which the tribunal had to determine, directed him back to the LOI and asked him to move on. Very often, despite the judge's exhortations in this respect, the claimant persisted in pursuing the same line of questioning and the judge had to remind him again until he eventually moved on from the topic.

55. Furthermore, even in areas where the claimant's questioning was relevant, the claimant had a habit of asking the same or similar questions again and again, with the result that he simply got the same answers and the evidence was repeated. In some of these instances, the judge interjected to explain this and asked the claimant to move on to a different topic. One particular example was the claimant's repeated questioning of Mr Barry about the tone of the meeting of 1 December 2023.

56. The claimant was very unclear in the formulation of many of his questions. This is not a criticism; it is difficult as a litigant in person to conduct cross-examination in a tribunal. However, the judge did need to interject on numerous occasions to explain that he did not understand the question which was being put and to ask the claimant to reformulate it in a manner which the witness could properly understand.

57. On a number of occasions, the claimant suggested to witnesses that they were not answering the question which he asked them. Sometimes, any difficulty in answering the question was because of the poor formulation of the question itself. However, on several occasions, a witness did answer the question which was put and nonetheless the claimant suggested that they were not doing so. The judge was concerned that the witnesses should not be intimidated or given the impression that they were not seeking to answer the question (when they were). He therefore interjected on a number of occasions to state that the witness was in fact answering the question and that the claimant should not make suggestions that the witness was not answering the question. The judge was clear that, if there were issues of individuals not answering the question, he would (as he had done on a number of occasions during the claimant's evidence) interject to remind the witness concerned to answer the question.

58. The claimant also had a tendency to misrepresent evidence that had been given in his formulation of his questions to witnesses, suggesting for example that a witness had previously accepted something when that witness had not in fact done so. On several of these occasions the judge interjected to explain that that was not the evidence that had been given and that the clamant should take care not, whether advertently or inadvertently, to misrepresent the evidence.

59. At about 3:40 on the afternoon of the second day of the hearing, whilst the claimant was cross-examining Ms Melton-Scott, he said that he had lost the remaining questions which he had for Ms Melton-Scott and he asked that the hearing be adjourned until the next day. He explained that he only had a few more questions for Ms Melton-Scott in any case and that he would have no more than an hour of questions for each of the two remaining witnesses for the respondent. There was at this stage almost an hour of tribunal time remaining in that day.

60. The judge reiterated that, given the reduction in hearing time, there was a tight timetable to complete the evidence and submissions on liability. He reiterated that the tribunal was, of its own volition, starting early, finishing late and taking short lunch breaks in order to ensure that the evidence and submissions on liability were completed within the allocated hearing time. He said he was disinclined to adjourn and waste tribunal time at this point in the light of that. Furthermore, he said that, if the claimant did indeed have only a few questions left for Ms Melton-Scott, it would be preferable for her evidence to be completed today so that she did not remain on oath overnight (Ms Melton-Scott is the respondent's Director of HR and, if she remained on oath overnight, would not have been able to give instructions to Ms Hatch or the respondent's solicitors during that period).

61. The judge therefore suggested that, instead, the tribunal should take a break to enable the claimant to locate his remaining questions, and for him to complete Ms Melton-Scott's evidence that day. The claimant agreed to this and said that he only had about 15 minutes of cross-examination left for Ms Melton-Scott. The tribunal duly adjourned for 15 minutes and reconvened at 4 PM. The judge asked the claimant if he had found his questions. The claimant indicated

that he was okay to continue. He then completed his questions for Ms Melton-Scott and her evidence was completed that day.

62. After that was done, the judge explored timings for the rest of the hearing with the parties, particularly in light of the fact that the claimant had said that he only had about an hour's worth of questions for each of the two remaining witnesses for the respondent. The claimant then indicated at this point that he might have 1½ hours' worth of questions for each of them. The judge indicated that there should still be time to complete the evidence and submissions in the light of that indication. However, in the light of that indication, it was as well that the tribunal had taken the decision not to waste the time on the afternoon of the second day and to complete Ms Melton-Scott's evidence that day.

The law

Direct race discrimination and harassment

63. Under section 13(1) of the EQA, a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others (direct discrimination).

64. Under section 26(1) of the EQA, a person (A) harasses another person (B) if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

65. In deciding whether conduct has the effect referred to above (but not the purpose referred to above), 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.

66. Race is a protected characteristic in relation to both direct discrimination and harassment as referred to above.

67. For the purposes of the comparison required in relation to direct discrimination between B and an actual or hypothetical comparator, there must be no material difference between the circumstances relating to B and the comparator. By contrast, there is no requirement for such a comparison in establishing harassment.

68. Under sections 39(2) of the EQA, an employer must not discriminate against an employee of his on various grounds, including dismissing him or subjecting him to any other detriment. Under section 40(1) of the EQA, an employer must not harass an employee of his. Where conduct constitutes harassment, it cannot also constitute a detriment as defined in the EQA and therefore cannot be direct discrimination as well as harassment.

69. In Richmond Pharmacology v Dhaliwal 2009 ICR 724 EAT Mr Justice Underhill, then President of the EAT, said: *'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'. The EAT affirmed this view in Betsi Cadwaladr University Health Board v Hughes and ors EAT 0179/13. The EAT observed that 'the word *"violating"* is a strong word. Offending against dignity, hurting it, is insufficient. *"Violating"* may be a word the strength of which is sometimes overlooked. The same might be said of the words *"intimidating"* etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence'. Indeed, the Court of Appeal in HM Land Registry v Grant (Equality and Human Rights Commission intervening) 2011 ICR 1390 further stated in this context that *'tribunals must not cheapen the significance of these words since they are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment'*.

70. In respect of the above provisions, the burden of proof rests initially on the employee to prove on the balance of probabilities facts from which the tribunal could decide, in the absence of any other explanation, that the employer did contravene one of these provisions. To do so the employee must show more than merely that he was subjected to detrimental treatment by the employer and that the relevant protected characteristic applied; there must be *"something more"* to indicate a connection between the two (Madarassy v Nomura International plc [2007] IRLR 246). If the employee can establish this, the burden of proof shifts to the employer to show that on the balance of probabilities it did not contravene that provision. If the employer is unable to do so, we must hold that the provision was contravened and discrimination did occur.

71. However, if the tribunal can make clear positive findings as to an employer's motivation, then it need not revert to the burden of proof (Martin v Devonshires Solicitors [2001] ICR 352 (EAT)).

Time extensions and continuing acts

72. The EQA provides that a complaint under the EQA may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable. The time limit is extended in relation to time spent in ACAS early conciliation.

73. The EQA further provides that conduct extending over a period is to be treated as done at the end of the period and that a failure to do something is to be treated as occurring when the person in question decided on it.

74. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA, the Court of Appeal stated that, in determining whether there was *"an act extending over a period"*, as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs. The concepts of policy, rule, practice, scheme or

regime in the authorities were given as examples of when an act extends over a period. They should not be treated as the indicia of *"an act extending over a period"*. The burden is on the claimant to prove, either by direct evidence or by inference from primary facts, that alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of *"an act extending over a period"*.

75. As to whether it is just and equitable to extend time, it is for the claimant to persuade the tribunal that it is just and equitable to do so and the exercise of the discretion is thus the exception rather than the rule. There is no presumption that time will be extended, see Robertson v Bexley Community Centre [2003] IRLR 434 CA. The tribunal takes into account anything which it judges to be relevant. This is the exercise of a wide, general discretion.

Constructive dismissal

76. In order successfully to make a discrimination or harassment complaint based on an alleged dismissal, an employee must first prove on the balance of probabilities that he or she was dismissed by the employer. Section 95(1)(c) of the Employment Rights Act 1996 states that:

"there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct."

77. This form of dismissal is commonly referred to as constructive dismissal. In the leading case on the subject, 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. In order to claim constructive dismissal the employee must establish on the balance of probabilities that:

(i) There was a fundamental breach of contract on the part of the employer;

(ii) The employer's breach caused the employee to resign;

(iii) The employee did not delay too long before resigning, thereby affirming the contract and losing the right to claim constructive dismissal.

78. Individual actions by an employer that do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of, for example, undermining the trust and confidence inherent in every contract of employment. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a "last straw" incident, even though the "last straw" by itself does not amount to a breach of contract or even unreasonable conduct (although it would be rare for objectively reasonable conduct to constitute a "last straw"). It suffices if it contributes to the employer's earlier breaches (if any) and/or cumulatively undermines trust and confidence.

79. An employer must not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the

relationship of confidence and trust between employer and employee (Malik v Bank of Credit and Commerce International SA [1997] ICR 606.

80. If the employee can prove that he or she was dismissed, the tribunal must then consider, for the purposes of direct discrimination and harassment complaints, whether the dismissal was because of or related to race in accordance with the principles set out above.

Explanations of the law

81. On occasions during the hearing and for the claimant's benefit as a litigant in person, the judge reminded the claimant about various aspects of the law and in particular about what it was necessary to do in order to prove discrimination complaints.

Findings of fact

82. We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues.

83. We begin with an overview, before going on to make more detailed findings of fact below alongside our conclusions on the issues.

Overview

84. The respondent is the leading independent firm of Development, Built Asset and Engineering and Sustainability consultants. It advises investors, developers, occupiers and owners on maximising best property asset values across all commercial property sectors. It has offices throughout the UK, including London. At the time of the claimant's employment, it employed 190 employees.

85. The claimant was employed by the respondent from 31 October 2022 until 6 February 2024. He was at all times employed as Associate Director Principal Designer in the respondent's Construction Design & Management ("CDM") team, based in the respondent's London offices.

86. The claimant had applied for this role with the respondent. The role was an employed position and not a self-employed or subcontractor position. This was made very clear during the claimant's interview process. When he was offered the role, the claimant was issued with a contract of employment on 16 September 2022, which he signed to accept on 26 September 2022.

87. On 6 November 2023, the claimant submitted his resignation in writing, giving three months' notice in accordance with his contract.

88. On 7 December 2023 the claimant went on gardening leave and remained on gardening leave for the remainder of his notice period.

89. The claimant's employment with the respondent terminated with effect from 6 February 2024, on the expiry of his notice period.

90. When the claimant joined the CDM team, it had four members, who were, in descending order of seniority: a Director (Ms Hilary Gleghorn), who led the team; two Associate Director Principal Designers (the claimant and Mr Gareth Barry); and one Principal Designer, Ms Fatimah Abarshi.

91. The claimant describes himself as "Black Caribbean".

92. Mr Barry is Caucasian.

93. The CDM team for the most part remained the same throughout the claimant's employment with the respondent, save in the following respects.

94. On 4 May 2023, Ms Gleghorn submitted her resignation on three months' notice. She worked her notice and she left her employment with the respondent with effect from 4 August 2023. The respondent carried out a recruitment exercise for a replacement for Ms Gleghorn, which we will return to below.

95. However, in the interim, the respondent engaged a "sub-consultant", Mr Mark Chandler, (not an employee), as temporary head of the CDM team. He was in post between July and October 2023. He was engaged to provide his services in this respect for half a day a week only, from 8:30 AM to 12:30 PM on Fridays.

96. The respondent offered the permanent role of Director of CDM services to an external candidate, Mr Dominic Thomas. Again, we will return to this process below. Mr Thomas commenced his employment with the respondent with effect from 9 October 2023, and took over as the manager of the claimant and Mr Barry from that point.

97. Throughout his employment with the respondent, the claimant emailed from his work email address to his personal email address a significant quantity of information, including company confidential information. It was only from 25 October 2023 that the respondent began to become aware that the claimant had been saving company documents on his personal computer.

Respective reliability of evidence

98. Before going any further, we make certain findings in relation to the respective reliability of the evidence given by the claimant and by the witnesses for the respondent. This is of relevance in particular in relation to those areas where the facts are not evidenced by contemporaneous documents and it is a question of one individual's word against another's.

The claimant

99. We have considerable concerns about the reliability of the evidence given by the claimant.

100. The claimant is highly qualified, as is evident from his CV. He is clearly an intelligent and able individual. However, he was in his answers in cross-examination evasive in the extreme. He frequently did not answer questions put to him, even when they were very simple questions. He often paused in relation to questions which he did not want to answer and turned them back upon Ms Hatch, suggesting that he did not understand them. He obfuscated continually, merging details from various different allegations from his claim in his answers, where he was being asked quite clearly about one specific issue. He was not prepared to accept things, even where the truth of those things was evident on the face of the contemporaneous documents. The evidence which he gave was frequently completely at odds with the clear evidence provided by the contemporaneous documents, in particular the numerous email exchanges between the claimant and those at the respondent.

101. Given his intelligence and abilities, we do not consider that this amounted to an inability to answer questions on his part; rather, we consider that he was knowingly evasive. He was also confrontational in his nature in both answering questions and in his dealings with the employment tribunal more generally (his refusal to accept the tribunal's decision in relation to the amendment application is one such example).

102. Furthermore, it was striking that, although the 16 allegations spanned the entirety of the claimant's employment with the respondent, he had never raised a grievance about any of them prior to his commencing upon his claim, let alone suggested that any such complaints were related to his race. The claimant, as we saw at this hearing, is an assertive individual who is not shy of expressing his opinion when he wants to. We accept Ms Hatch's submission that it beggars belief that, if the claimant genuinely felt during his employment that he was the victim of 16 separate instances of race discrimination/racial harassment and felt compelled to resign as a result, that he would not have mentioned it to his employer.

103. For these reasons, we have serious concerns about the reliability of the claimant's evidence. It is therefore very difficult to place any reliance on any evidence given by the claimant, save where such evidence is corroborated by other evidence from contemporaneous documentation or other witnesses.

<u>The respondent's witnesses</u>

104. The respondent's witnesses were all clear and measured in their responses to questions. They sought to answer the questions which were put to them, even when, as was often the case, the questions put by the claimant were difficult to understand. However, they sought to answer them and assist the tribunal in this respect. They did not in any material respects deviate from their positions when questioned. They were consistent in all material respects, both with their own written witness statements, with the witness statements and evidence of other witnesses for the respondent, and with the considerable contemporaneous documentation.

105. The respondent's witnesses made honest and frank admissions about their behaviour and held themselves fully accountable where mistakes had been made, for example Mr Thomas in relation to swearing at the meeting on 1 December 2023, and Mr Henn in relation to mistakenly having believed that the CDM team came into the office for 3 days a week rather than 2. They clearly respected the claimant for his qualifications and experience. They also had empathy for his family situation. They had clearly tried to support the claimant during his employment, but found him obstructive and difficult to deal with. They were genuinely surprised and perplexed that the claimant had brought claims of race discrimination and harassment, having never raised any grievances about any behaviour, let alone anything related to his race.

106. Without exception, we had no concerns about the reliability of the evidence which the respondent's witnesses gave.

107. Therefore, where there is a conflict between the evidence given by the claimant and the respondent's witnesses, we are inclined to prefer the evidence of the respondent's witnesses.

More detailed findings of fact

108. As noted, the claim comprises a large number of allegations of direct discrimination/harassment ranging over the course of the claimant's employment with the respondent. Many of these are self-contained and, in terms of structure, it makes more sense to set out the facts relevant to the individual allegations in the same section where we draw our conclusions on the issues in relation to those allegations. That is the approach we adopt below.

Conclusions on the issues

109. We make the following conclusions, applying the law to the facts found in relation to the agreed issues.

110. We begin with the individual allegations of direct discrimination and harassment, before considering the jurisdictional (time limit) issues at the end.

Direct race discrimination and harassment related to race

2.2.1 Fail to offer the claimant a role as a contractor rather than as an employee (comparator – interim department leader at the time – name TBC).

111. This allegation was undated and, in relation to it, the claimant appeared to dwell on two separate instances: firstly, his original job offer from the respondent in September 2022; and, secondly, his not having been given the interim role of temporary head of the CDM team in July/August 2023 which was given to Mr Chandler. There is some overlap between the latter of these and the issue at 2.2.6. However, we consider both of these allegations at this point in this section.

Original offer (September 2022)

112. We start with the original job offer to the claimant.

113. The respondent as a business does use subcontractors (or "sub-consultants", as the respondent refers to them) to respond to specific business needs and pinch points, and when specialist knowledge is required. However, it does not contract self-employed consultants on a full-time basis, because this is not a good business model, nor does it comply with HMRC's requirements under IR35. Furthermore, it is not a viable option where, as the respondent wanted to, one wants to build or expand a team of permanent staff. Building and expanding a team of permanent staff was one reason why the respondent advertised for the role of Associate Director Principal Designer which the claimant accepted in September 2022.

114. This role was always advertised as a permanent employment position and that was the role for which the claimant applied. The claimant was interviewed for the role twice in August 2022. Mr Henn conducted the latter interview. The claimant had previously done a lot of work on a self-employed basis for other organisations. Mr Henn's evidence, which we have no reason to doubt and therefore accept, is that, in that interview, the claimant had specifically cited IR35 as a reason for leaving his previous work; in other words, he was looking for permanent work as an employee rather than as a consultant, because there were problems with the latter because of IR35. Furthermore, in his witness statement, the claimant confirmed that he was told at his second interview that subcontractor/contract work was not available. He later contradicted his own evidence in questions to Mr Henn where he tried to suggest that he was told the opposite. His suggestion in his own oral evidence that he could not remember whether he had been taken on by the respondent for an employed role (because he had applied for a lot of jobs) was, we accept, entirely incredible.

115. We therefore find that the role which the claimant applied for and which he commenced on 31 October 2022 was an employment role, had always been advertised as an employment role, and that the claimant knew full well that it was an employment role.

116. We also accept Ms Melton-Scott's unchallenged evidence that, once an employee has been taken on, the respondent does not approach them about becoming a subcontractor; that was not its normal business practice. There is no evidence that the respondent subsequently asked the claimant to become a sub-consultant (which would have been against its normal business practice anyway) and we therefore find that that did not happen.

117. The reference in the allegation in the LOI to *"comparator - interim department leader at the time - name TBC"* is a reference to Mr Chandler. However, he became interim department leader only in July/August 2023 and he was not offered nor had he applied for a role of Associate Director Principal Designer in the CDM team in or around September 2022 at all, whether on an employed or sub-consultant basis. He is not, therefore, an appropriate comparator in relation to this allegation as his circumstances are not materially (or even remotely) similar to those of the claimant.

118. In short, the claimant was not offered a role as a contractor in August 2022. However, that was because the role advertised was always an employment role and it was not the respondent's practice to offer full-time roles on a sub-consultant basis. It was nothing whatsoever to do with the claimant's race. For this reason, these complaints of direct race discrimination and harassment related to race therefore fail.

119. They also fail because not offering the role as a contractor cannot reasonably have been seen as a detriment; indeed, it is evident from the interview that not only did the claimant know that the job was offered on an employed basis but that that is what he wanted, because of the issues in relation to contractor work and IR35. Failing to offer the role as a contractor was not, therefore, a detriment for the purposes of the direct race discrimination complaint; nor was it "unwanted conduct" for the purposes of the harassment related to race complaint.

120. Finally, failing to offer the role as a contractor in the circumstances set out above cannot possibly amount to conduct amounting to or contributing to a breach of the implied term of trust and confidence. Furthermore, the claimant has in any event affirmed this alleged breach by accepting the offer to work as an employee and continuing to work as an employee until the start of his gardening leave in December 2023.

Interim head of CDM (July/August 2023)

121. As noted, Ms Gleghorn submitted her resignation as Director of the CDM services team on 4 May 2023 and worked a notice period which ended on 4 August 2023. When she resigned, Mr Henn and the management team did not consider either the claimant or Mr Barry (the two Associate Director Principal Designers in the CDM team) to be suitable for the manager role at the time. Therefore, Mr Henn, supported by the rest of the executive, made the decision to put it out to external candidates, which is what they did.

122. A formal offer of the CDM Director role was subsequently made to Mr Thomas on 28 June 2023, following a competitive interview process. However, because of Mr Thomas's notice period, he could not start until October 2023, so the respondent needed someone to cover managing the team in the meantime. Mr Henn knew a sub-consultant whom the respondent had used previously (Mr Chandler) whom he contacted to see if he was available and interested in temporarily leading the team until Mr Thomas joined. Neither Mr Barry nor the claimant were approached about this position. Mr Chandler was a director of his own business and had the experience to support managing a team. He accepted the offer and joined the team in July 2023, prior to Ms Gleghorn's departure. He did this on a temporary basis (until Mr Thomas joined in October 2023) and he did so on a sub-consultant basis. He provided services for half a day a week, from 8:30 to 12:30 on Fridays.

123. Mr Barry's view in his oral evidence was that Mr Chandler's appointment was an excellent appointment. Furthermore, we have seen more than enough

evidence in this hearing that the claimant's management skills were not suitable for a position managing that team; we therefore accept that Mr Henn's view that the claimant was not suitable for this role (or indeed the permanent Director role) was an entirely reasonable and genuinely held view.

124. The reasons why the claimant was not offered the interim position (on a contractor basis or otherwise) are set out above. They are entirely sound and reasonable. They are nothing whatsoever to do with race. The claimant's complaints of direct race discrimination and harassment related to race in relation to this allegation therefore fail.

125. Finally, failing to offer the claimant the interim Director role in the circumstances set out above cannot possibly amount to conduct amounting to or contributing to a breach of the implied term of trust and confidence. Furthermore, the claimant has in any event affirmed this alleged breach by continuing to work as an employee until the start of his gardening leave in December 2023.

2.2.2 When the claimant took agreed holiday from 6-11 December 2022 he was not paid and his probationary period was extended (comparator – Gareth Barry and Hillary Gleghorn).

Holiday

126. As noted, the claimant's employment with the respondent commenced on 31 October 2022. The respondent's holiday year runs on a calendar year basis (1 January - 31 December). The claimant's contract provides that, as a general rule, holiday cannot be carried over from one holiday year to another. This provision applies to other employees as well.

127. It is not disputed that, from the commencement of his employment until the end of the 2022 holiday year, the claimant had accrued five days' holiday.

128. However, the claimant in fact took eight days holiday during that period. This included five days for a holiday which he had booked prior to commencing his employment with the respondent and the firm's Christmas closure for three days in December (which applied to all employees).

129. The claimant was permitted to take all of this leave. However, the respondent's case is that it was agreed between the respondent and the claimant that he would take three of these eight days unpaid. The claimant disputes this.

130. First, the respondent gave examples of other employees who were in a similar position and who took their unaccrued leave unpaid in the circumstances. We have no reason to doubt that evidence and accept it.

131. Secondly, we have seen contemporaneous documentation in relation to this issue. On 5 December 2022, the claimant tried to book the time off using the respondent's holiday booking system but wasn't able to do so. He therefore emailed a senior HR officer at the respondent the same day, raising that difficulty. She then checked with the claimant's line manager, Ms Gleghorn and,

in one of her emails to Ms Gleghorn, confirmed that the claimant had *"agreed to take 3 days over his allowance as unpaid so I will deduct it from his pay"*. On 19 December 2022, the claimant contacted the senior HR officer again for assistance in accessing his payslips and responded the same day confirming that he had the necessary information to access his payslips (and was, therefore, able to see what was paid and what was deducted).

132. We have no reason to doubt the senior HR officer's contemporaneous email stating that the claimant had agreed to take three days unpaid. Furthermore, the claimant made no complaint about this at the time and indeed did not make any complaint until he brought his claim well over a year later. As we have noted, the claimant is not shy in coming forward to complain about something if he feels that he has something to complain about; we therefore consider that it is highly surprising that, if he had not agreed to this deduction or disputed it (and certainly if he thought that the deduction was because of his race) that he would not have raised the matter at the time. Furthermore, for the reasons set out above, we are very concerned about the reliability of the claimant's evidence. We therefore accept that he did agree to take three days unpaid at the time and that he knows that. We also accept that this practice is the respondent's practice in relation to all employees in such circumstances.

133. The comparators whom the claimant cites in relation to this allegation (Mr Barry and Ms Gleghorn) are irrelevant as neither of them took more annual leave than they had accrued. Their circumstances were not, therefore, materially (or even remotely) the same as the claimant's.

134. The allegation as set out in the LOI by the claimant is not therefore made out; it is not true that the claimant was not paid for the period 6-11 December 2022 (a period of five days). The allegation therefore fails at the first stage.

135. It is correct that the claimant was not paid for three out of the eight days leave which he took in 2022. However, the reasons for this are as set out above; in summary, it was the respondent's practice, applied to all employees, not to pay employees for holiday taken in excess of what they had accrued in a particular holiday year. These reasons are nothing whatsoever to do with race. These complaints of direct race discrimination and harassment related to race therefore fail.

136. Finally, not paying the claimant for these three days leave in the circumstances set out above cannot possibly amount to conduct amounting to or contributing to a breach of the implied term of trust and confidence; this is not least of all because the claimant agreed to it, as well as it being the respondent's policy and a reasonable and fair policy at that. Furthermore, the claimant has in any event affirmed this alleged breach by continuing to work as an employee until the start of his gardening leave in December 2023.

Probationary period

137. In common with other employees, the claimant's employment began with a probationary period. This was set out in the claimant's contract of employment.

The probationary period lasted 13 weeks but the respondent reserved the right to extend the probationary period for up to a further three months at its discretion.

138. The claimant's manager, Ms Gleghorn, felt that the claimant needed more time to deliver technical work and prove his capability, particularly as he had only joined the respondent on 31 October 2022 and had been away from the business for a lot of December 2022 with his annual leave as well as the respondent's Christmas closure. Although Ms Gleghorn was not at the tribunal to give evidence, we have no reason to doubt the evidence of this given by Ms Melton-Scott, who discussed it with Ms Gleghorn at the time.

139. Ms Gleghorn and Ms Melton-Scott therefore met the claimant on 16 January 2023 to discuss this and informed him of the decision to extend his probationary period (by four weeks). This was confirmed in writing. There was no response received from the claimant about this and no issue was raised about the extended probationary period, either at the time or at any other time during the claimant's employment. The claimant's probationary period duly came to an end at the end of the extended period.

140. During the hearing, we heard evidence, which we accept, of various other employees having had their probationary periods extended. Three of these were Caucasian and one was black.

141. The comparators whom the claimant cites in relation to this allegation (Mr Barry and Ms Gleghorn) are not appropriate. Ms Gleghorn was the claimant's manager, so her circumstances were not materially the same as the claimant's. Furthermore, although we understand that Mr Barry did not have his probationary period extended, we have no evidence to suggest that his probationary period straddled a period when he took leave and/or when the respondent's office was closed, and we therefore find that it did not; therefore, his circumstances are not materially similar to those of the claimant.

142. The reasons for the extension of the claimant's probationary period were, therefore, as we have found above. They were nothing whatsoever to do with race. These complaints of direct race discrimination and harassment related to race therefore fail.

143. Finally, extending the claimant's probationary period for four weeks in the circumstances set out above and for the reasons set out above cannot possibly amount to conduct amounting to or contributing to a breach of the implied term of trust and confidence. Furthermore, the claimant has in any event affirmed this alleged breach by continuing to work as an employee until the start of his gardening leave in December 2023.

2.2.3 From May or June 2023 require the claimant to come in to the office three days a week despite, and attend site meetings as required, when the agreement previously was he would only work two days a week away from home (comparator – Gareth Barry and Hillary Gleghorn).

144. The background to this allegation is connected to the Covid pandemic. The respondent's employment contracts, including the claimant's, state that the employee's normal place of work is the respondent's normal place of business (in other words, in the claimant's case, the respondent's London offices). However, during the pandemic, employees had had to work from home. After the pandemic was over, the arrangements changed again as employees began to spend more time in the office. Employees at the respondent as a whole were then required as a matter of policy to work at least three days in the office with no more than two days spent at home. However, the arrangement in the small CDM team was different (and, as we shall come to, was not known to Mr Henn).

145. On 19 January 2023, there was a face-to-face team meeting of the CDM team, at which both the claimant and Ms Melton-Scott were present. The team discussed and agreed their in office working days and team meeting days going forwards. It was discussed that everyone in the team needed to be in the office two days a week, and that it was more beneficial for the team if they were in the office on the same two days each week. It was therefore agreed that the CDM team's in office days would be Mondays and Thursdays, with a regular weekly team meeting on the Monday afternoon, to be held in person. It was also agreed that everyone in the team were to make this a priority. The arrangement for two days was different to the arrangement for the rest of the business and was a compromise for the CDM team. Ms Melton-Scott followed this up with an email to the whole team, including the claimant, confirming the agreement reached.

146. However, the claimant repeatedly failed to abide by this agreement to come into the office twice a week. It started when he failed to attend the office the very next working day after it was agreed that they would all do so (i.e. on Monday, 23 January 2023). Nor did the claimant inform his line manager, Ms Gleghorn, that he would not be coming into the office as expected. It was a recurring theme throughout his employment, both before and after the family issues which occurred relating to him in summer 2023 (when his children came from Spain to stay with him in the UK). It was addressed with him on numerous occasions (including at the February 2023 probationary review meeting following which his probation was passed) and on numerous occasions in writing, but all to little avail.

147. This is the background to an email exchange between the claimant and Mr Henn relating to this subject in August 2023, with Mr Henn asking the claimant why he had not been in the office.

148. In one email in this exchange, on 14 August 2023, Mr Henn stated *"… the working arrangements are not more than two days a week from home and you are hardly in the office. I know you have your children just moved over from Spain but what are your arrangements?"*.

149. The reason Mr Henn stated this was that he was unaware of the different arrangements for the CDM team; he assumed that the CDM team were subject to the same working arrangements as the rest of the business, which is reflected in his statement in his email.

150. The claimant replied suggesting that when he joined it was stated in his interview that the arrangement was two days in the office. Mr Henn subsequently replied to explain, amongst other things, that since then the policy (for the business as a whole) had changed to allow working from home not more than two days a week, but acknowledging that he had seen a note from Ms Melton-Scott about the claimant being in the office at least two days a week; however, he suggested that it was a goodwill arrangement in the light of his children joining him earlier that month. Again, this was an incorrect assumption because he did not realise that the 2 days in the office arrangement had been made back in January 2023 with the whole CDM team. However, the claimant then pointed out that it was an arrangement for the whole CDM team. Mr Henn accepted that.

151. The policy agreed with the CDM team in January 2023 to attend the office at least two days a week was never changed at any point throughout the remainder of the claimant's employment with the respondent.

152. We accept Ms Hatch's submission that, in bringing this complaint, the claimant has knowingly sought to exploit a simple mistake made by Mr Henn in this correspondence. Mr Henn did not impose a "requirement" on the claimant to attend the office three days a week. The claimant knows that.

153. The factual basis of this allegation has not therefore been established and these complaints of direct race discrimination and harassment related to race therefore fail at the first stage.

154. Furthermore, the interchange between the claimant and Mr Henn was as a result of a simple misunderstanding by Mr Henn. It was nothing whatsoever to do with race.

155. The comparators whom the claimant cites in relation to this allegation (Mr Barry and Ms Gleghorn) are not appropriate. Ms Gleghorn was the claimant's manager, so her circumstances were not materially the same as the claimant's. Furthermore, both of them were subject to the same requirement to come into the office two days a week. However, there was no issue with their attendance in the office, so there was no need for Mr Henn to raise their non-attendance with them. Their circumstances are not, therefore, materially similar to those of the claimant.

156. Finally, this interchange, based on a simple misunderstanding by Mr Henn, cannot possibly amount to conduct amounting to or contributing to a breach of the implied term of trust and confidence. Furthermore, the claimant has in any event affirmed this alleged breach by continuing to work as an employee until the start of his gardening leave in December 2023.

2.2.4 Following the claimant becoming a single parent in May 2023 refusing to permit him to come in at 10am, rather than 9am, due to childcare arrangements, when others in the office were granted flexibility (comparator – Gareth Barry).

157. The claimant has not adduced any evidence to suggest that he ever made a request to come in at 10 AM rather than 9 AM due to childcare

arrangements. Ms Melton-Scott gave evidence, which we accept, that she never received nor was made aware of any such request from the claimant. The claimant had full access to the respondent's flexible working policy prior to his employment and signed to confirm that he had read that policy on 26 September 2022; however, he never made a request under that policy. Ms Melton-Scott confirmed that, if the claimant had made a formal request to come in at 10 AM rather than 9 AM due to childcare arrangements, it would have been granted.

158. The issues regarding the claimant which we have seen in the bundle are about the respondent's concerns that the claimant, despite the agreement in January 2023, hardly came into the office at all; there is nothing in the bundle which suggests that the respondent would have had any difficulty in him coming in at 10 AM rather than 9 AM. Furthermore, we have seen a considerable amount of evidence indicating that the respondent was very flexible in its arrangements and was happy to make adjustments for childcare needs (including in relation to Mr Barry). Finally, we reiterate our concerns about the claimant's reliability as a witness.

159. We therefore accept that the claimant never made such a request. As there was no request, there could not have been any refusal and there was therefore no refusal. These allegations are not therefore made out on the facts and these complaints of direct race discrimination and harassment related to race fail at the first stage.

160. Finally, as there was no such refusal, this cannot possibly amount to conduct amounting to or contributing to a breach of the implied term of trust and confidence. Furthermore, the claimant has in any event affirmed this alleged breach by continuing to work as an employee until the start of his gardening leave in December 2023.

2.2.5 During an appraisal with Daniel Henn in May/June 2023 include an incorrect comment that the claimant was 'uncomfortable in corporate organisations' and did not respond to requests to amend this (no named comparator).

161. The claimant had an appraisal with Mr Henn on 1 September 2023 (not May/June 2023 as set out in the allegation).

162. The appraisal does not include the comment that the claimant was *"uncomfortable in corporate organisations"* and the claimant accepted that in cross-examination.

163. The actual words used were *"Nick likes the work but not used to management"*. Mr Henn's unchallenged evidence was that he made this comment as he understood that the claimant had mostly worked for himself in recent years and Mr Henn felt that he was unused to being under management or being managed. Mr Henn's understanding of the claimant working for himself was evidenced in the CV that the claimant submitted when applying for the job; this showed him as working for his limited company, immediately prior to joining the respondent.

164. Furthermore, that Mr Henn should draw this conclusion is entirely unsurprising. The evidence that we have seen over the course of this hearing that the claimant dislikes being managed is legion. The evidence clearly shows that the claimant's managers had continuously struggled to get him to attend the office twice a week with the rest of his team, and that the claimant refused to comply with these management requests. We do not need to reiterate all the instances here, but the respondent's witnesses' evidence, which we accept, suggests that the claimant felt he knew better than his colleagues. The evidence of his frankly insubordinate behaviour towards his managers towards the end of his employment, which we will come to, is particularly powerful (although, to be fair, that had not occurred at the point when Mr Henn wrote the comment in September 2023). However, even without that latter evidence, we have no doubt that Mr Henn's decision to use this expression reflected not only a genuinely held belief but one which was fully grounded in reality.

165. The claimant disagreed with Mr Henn's comment. When he did so, Mr Henn was sympathetic and amended his appraisal accordingly. There was, therefore, no detriment on his appraisal record.

166. However, as the comment alleged by the claimant to have been made was not in fact made, this allegation is not established on the facts and these complaints of direct race discrimination and harassment related to race therefore fail at the first stage.

167. In any event, even if the allegation was based on the comment which was actually made on the appraisal, the reasons for Mr Henn making that comment are set out above. They are nothing whatsoever to do with race and the complaints of direct race discrimination and harassment related to race would fail for this reason too.

168. The choice of Mr Barry as comparator is again inappropriate. There is no evidence that Mr Barry was not used to management or had difficulties with management or complying with managers' instructions. His circumstances are therefore not materially similar to the claimant's.

169. Finally, making an entirely appropriate comment in an appraisal and then removing it at the request of the employee cannot possibly amount to conduct amounting to or contributing to a breach of the implied term of trust and confidence. Furthermore, the claimant has in any event affirmed this alleged breach by continuing to work as an employee until the start of his gardening leave in December 2023.

2.2.6 Fail to consider the claimant for the role of Department Lead in July 2023 despite him being qualified and interest (no named comparator).

170. We have in part covered this allegation in our conclusions and fact findings on allegation 2.2.1 above. However, as set out in this allegation (2.2.6), the claimant appears to be alleging that he should have been considered for the permanent Department lead role (which was offered to Mr Thomas) in July 2023

(as opposed to the temporary sub-consultant role which Mr Chandler was given), and we address that here.

171. We have already covered why the respondent did not offer the permanent role internally to the claimant (or to Mr Barry) but chose to advertise for it externally. We refer to our findings of fact above in that respect; the respondent did not consider that either the claimant or Mr Barry had the required skills or experience at that time, particularly in managing a team; the reasons for that decision were therefore nothing whatsoever to do with race. Furthermore, the fact that the respondent did not offer the role to Mr Barry (Caucasian) or the claimant (Black Caribbean) is further indicative that the decision not to do so was not in any way related to race; they were treated equally in this respect.

172. Having advertised the role externally, a competitive interview process took place. Following this, Mr Thomas was offered the role on 28 June 2023.

173. The claimant then expressed an interest in the role in writing on 3 July 2023. The respondent did not consider this. However the reason that it did not consider this was because it had already offered the role to Mr Thomas. It was nothing whatsoever to do with race.

174. Therefore, at the early stage, the claimant (and Mr Barry) were considered for the permanent role, albeit briefly with the respondent concluding that neither were suitable for it. At the later stage, after the claimant expressed an interest, he was not considered for it, but this was because Mr Thomas had already been offered the role. The reasons for these decisions were nothing whatsoever to do with race and these complaints of direct race discrimination and harassment related to race fail.

175. Finally, making these reasonable decisions cannot possibly amount to conduct amounting to or contributing to a breach of the implied term of trust and confidence. Furthermore, the claimant has in any event affirmed this alleged breach by continuing to work as an employee until the start of his gardening leave in December 2023.

176. However, it should be noted that the decision to appoint Mr Thomas, whilst not discriminatory, did provoke an extreme reaction from the claimant. On 24 July 2023, there was a team meeting with Alan Pemberton, a senior director of the respondent, to discuss the plan for the team following the impending departure of Ms Gleghorn, and to inform them of Ms Gleghorn's replacement. At this meeting, the claimant became angry and disruptive, declaring to those present that he would not be *"directed"* by anyone else, because he felt he was one of the only people in the industry qualified to deliver the role.

177. This prompted an email of 17 July 2023 from Mr Pemberton to other managers, including Mr Henn and Ms Melton-Scott, as follows:

"…All in all the meetings were positive although these was some initial push back from Nick on the appointment of a new Director (Dominic Thomas) to replace Hilary as Nick does not feel he needs to be managed or lead, and certainly not in the short term by Marc Chandler. This attitude was very quickly and robustly dispelled and Nick calmed down but one to keep an eye on…."

2.2.7 Change the days and times of departmental meetings from August 2023 without warning or consultation when a new sub-contactor took over from Hilary Gleghorn (comparator – Gareth Barry).

178. As noted, Mr Chandler became temporary leader of the CDM team, providing his services for half a day a week on Friday mornings from mid-July 2023 onwards.

179. On 13 July 2023, Mr Chandler sent a calendar invitation to the whole team inviting them to a meeting every Friday effective from 21 July 2023 until 6 October 2023. Prior to that, it had been agreed that team members would attend the office on Mondays and Thursdays (albeit that the claimant frequently didn't). We do not know whether Mr Chandler knew about this arrangement at the point when he issued the meeting invitation but, as he had just joined and was only a temporary appointment working half a day a week, there is every likelihood that he didn't and, in the absence of any evidence to the contrary, we find that he was not aware of this arrangement. In any event, Mr Chandler only worked on Friday mornings.

180. The claimant rejected the meeting invitation, but without stating why to Mr Chandler. Entirely reasonably, Mr Chandler asked for an explanation. The claimant explained his particular childcare challenges to Mr Chandler. Mr Chandler abandoned the 8:30 AM meeting for the claimant and asked the claimant to confirm what time worked for him for the team meeting. In doing so, Mr Chandler was entirely sympathetic about the claimant's childcare commitments, stating that childcare was *"something which absolutely resonates with me!"*. However, the claimant did not respond, prompting Mr Chandler to have to send a chaser to the claimant. Again, this is further evidence of disrespectful behaviour by the claimant to a manager.

181. Mr Barry gave evidence, which we accept, that in fact Mr Chandler accommodated the claimant by dealing with the matters which he needed to deal with with the other team members earlier on Friday and, when the claimant was able to come in later on Friday, then dealing with the matters which he had to deal with with the claimant.

182. We do not, therefore, accept that Mr Chandler did without warning or consultation change the days and times of departmental meetings. His initial email was nothing more than an email invitation and, when the claimant said that this did not work for him, he abandoned the idea. There was correspondence between Mr Chandler and the claimant in relation to this and Mr Chandler accommodated what worked for the claimant. We do not, therefore, consider that the allegation as alleged is established on the facts and these complaints of direct race discrimination and harassment related to race therefore fail at the first stage.

183. In any event, the claimant did not suffer detrimental or unwanted treatment in this respect, because Mr Chandler, following their email interchange,

accommodated the claimant and met him later on Fridays than the other members of the team.

184. Furthermore, to the extent that it can be said that Mr Chandler unilaterally changed the day and times of meetings, this was nothing to do with race. Firstly, his meeting invitations were sent to the whole team and not just the claimant so there was no disparate treatment between members of the team. Secondly, the reason why he did so was because he only worked on Friday mornings; it was nothing whatsoever to do with the claimant's race. These complaints therefore also fail for these reasons.

185. The claimant cited Mr Barry as a comparator for the purposes of this allegation. Mr Barry is an appropriate comparator because the meeting invitations were sent by Mr Chandler to the whole CDM team, including the claimant and Mr Barry. There was, however, no disparity of treatment; the meeting invitations were sent to both of them.

186. Finally, Mr Chandler's decisions in this respect, particularly given that he was sympathetic to the claimant in relation to his childcare issues and accommodated him by agreeing to meet him later on Friday mornings when it suited him better, cannot possibly amount to conduct amounting to or contributing to a breach of the implied term of trust and confidence. Furthermore, the claimant has in any event affirmed this alleged breach by continuing to work as an employee until the start of his gardening leave in December 2023.

2.2.8 Advertise the claimant's role and position in October 2023, despite him still being in post (comparator – Gareth Barry).

187. The respondent advertised for an additional role within the CDM team in October 2023. This was by way of additional headcount, due to team growth. It was not to replace any existing staff members. The role advertised was not an "Associate Director" role (the role which both the claimant and Mr Barry held) but was an "Associate" position, which is more junior than the roles held by the claimant and Mr Barry. The successful candidate joined the respondent on 27 November 2023, at the more junior "Associate" role.

188. The respondent did not at any time prior to the claimant's resignation on 6 November 2023 advertise for an Associate Director Principal Designer. The advertisement is clear that the job being advertised was an "Associate" role. The claimant eventually suggested in evidence that he may have been mistaken about the advertisement and mistakenly thought that it was for his role. However, we do not believe him in this respect. It is inconceivable that, if he had at the time thought that his own role was being advertised, he would not have raised an issue about it; but he did not do so. Furthermore, the claimant is an intelligent man and the advertisement is clear. We therefore find that not only did the respondent not advertise the claimant's role but that the claimant knew full well at the time and knows full well today that it did not do so.

189. As the factual basis of this allegation has not been established, these complaints of direct race discrimination and harassment related to race fail at the first stage.

190. We would add that, even if the respondent had advertised for a position of Associate Director Principal Designer in October 2023, the comparator cited by the claimant, Mr Barry, would have been an appropriate comparator, as he, like the claimant, also held the position of Associate Director Principal Designer. However, if advertising such a position was detrimental treatment to the claimant, it would have been just as much detrimental treatment to Mr Barry; if there was no disparity of treatment, advertising that position at that point would not have been because of the claimant's race. Therefore, even if the respondent had advertised the position at that point, the allegation would have failed as a complaint of direct race discrimination and harassment related to race.

191. Finally, as the factual basis of the allegation has not been established, this cannot possibly amount to conduct amounting to or contributing to a breach of the implied term of trust and confidence. Furthermore, the claimant has in any event affirmed this alleged breach by continuing to work as an employee until the start of his gardening leave in December 2023.

2.2.9 From August to September 2023 pay Gareth Barry commission for sub-contractors working under him, but not paying the claimant, despite being in the same position (comparator – Gareth Barry).

192. We accept Mr Barry's clear and unequivocal evidence that he was not paid commission for subcontractors working under him from August to September 2023. Furthermore, he did not receive commission on fees from sub-consultants that went towards any fee, target or bonus paid to him. Mr Barry had used subcontractors on some of his projects due to a lack of resource within the team. As set out earlier, the respondent does sometimes use subcontractors to deal with pinch points and lack of resource, but on a temporary basis. However, as Mr Barry clearly explained and as we accept, using subcontractors actually has a detrimental effect on him achieving his annual fee target. If he had been able to carry out the subcontracted work himself, that would have counted towards his target; however the work carried out by subcontractors either did not count towards his target or represented a far smaller amount which contributed towards his target than would have been the case had he done the work himself. This meant that it was harder for him to achieve his annual fee target of three times base salary.

193. The bonus which an employee might receive for a given year is contingent upon the employee hitting their annual fee target for that year. In 2023, neither Mr Barry nor the claimant reached their annual fee target of three times base salary. Therefore, neither of them received a bonus for that year.

194. In short, Mr Barry was not paid commission for subcontractors working under him. Therefore, the factual basis of this allegation is not established and these complaints of direct race discrimination and harassment related to race fail at the first stage.

195. In any case, even in relation to the arrangements regarding subcontractors that there were, there was no disparity in treatment. The claimant could have used subcontractors as well had he wanted to do so. However, as noted above, using subcontractors is actually detrimental in terms of achieving annual fee targets, so there is no advantage to Mr Barry in terms of annual fee targets in Mr Barry having done so.

196. Finally, as the factual basis of the allegation has not been established, this cannot possibly amount to conduct amounting to or contributing to a breach of the implied term of trust and confidence. Furthermore, the claimant has in any event affirmed this alleged breach by continuing to work as an employee until the start of his gardening leave in December 2023.

2.2.10 Fail to issue invoices for work undertaken by the claimant (comparator – Gareth Barry).

197. Although this allegation in the LOI is very generally put, the claimant confirmed in cross-examination that the allegation related to his work on the so-called GreyGR projects. It appeared from the claimant's evidence and his cross-examination of Mr Barry that the claimant did not understand, or refused to accept, that the fee allocations and invoicing on the GreyGR projects were managed by a project manager in a different team, Mr RC. However, the respondent's evidence, including that of Mr Barry, is that they were managed by a project manager in a different team, and we accept that.

198. The invoices for the CDM team's work on the project were raised in July 2023 and again in November 2023. There were only invoices raised for Mr Barry in July 2023, because he worked on an earlier part of the project, whereas the claimant did not. The claimant was, therefore, not treated any differently to Mr Barry or other members of the CDM team in this respect.

199. As to the later invoices, they were issued in November 2023. There was no failure by the respondent to issue invoices for the work undertaken by the claimant; rather, they were issued at the same time as for the other members of his team. The claimant therefore suffered no detriment as a result.

200. In summary, therefore, the factual basis of this allegation is not established because there was no failure to issue invoices for work undertaken by the claimant. These complaints of direct race discrimination and harassment related to race therefore fail at the first stage.

201. Furthermore, there is absolutely no basis whatsoever for suggesting that the way any of these invoices were dealt with was because of the claimant's race, as the raising of invoices was done by a project manager in a different team and there was no disparate treatment as between the claimant and the other members of the CDM team in this respect; where there were invoices to be issued for work done by the claimant (as was the case in November 2023), these were issued, and they were issued at the same time as the invoices for work done by other members of the claimant's team.

202. Finally, as the factual basis of the allegation has not been established, this cannot possibly amount to conduct amounting to or contributing to a breach of the implied term of trust and confidence. Furthermore, the claimant has in any event affirmed this alleged breach by continuing to work as an employee until the start of his gardening leave in December 2023.

2.2.11 Mistreat the claimant, through Dominic Thomas (who took over as Line Manager in October 2023) in the following ways:

2.2.11.1 Arrange meetings at unreasonable times, and without notice

203. As already noted, this allegation was withdrawn by the claimant during the hearing and was dismissed by the tribunal.

2.2.11.2 In one meeting (mid-October 2023) was shouting and swearing at the claimant

204. The claimant's evidence about this allegation was very vague and it was quite hard to pin him down as to what exactly he was alleging. However, eventually, the claimant appeared to be suggesting that at a meeting at some point after Mr Thomas had become his manager on 9 October 2023 but prior to the claimant submitting his resignation on 6 November 2023, there was a meeting at which various members of the CDM team were present and at which there was some shouting and swearing from Mr Thomas although, even on the claimant's case, he said that it was not directed at him.

205. We have heard evidence from Mr Thomas and from Mr Barry (who is a member of the CDM team and would, therefore, be likely to have been at any such meeting). Their evidence is that, with the exception of the single instance of swearing in the handover meeting of 1 December 2023 (which we consider in the allegation below), there was no other meeting at which there was shouting and swearing from Mr Thomas.

206. In light of our findings on the respective reliability of the evidence of the claimant as compared to that of the respondent's witnesses and the extremely vague nature of this allegation as presented by the claimant, we prefer the evidence of the respondent's witnesses. Accordingly, we find that there was no shouting or swearing by Mr Thomas at the claimant (or at all) in any meeting during this period.

207. The factual basis of this allegation is not therefore established and these complaints of direct race discrimination and harassment related to race therefore fail at the first stage.

208. Finally, as the factual basis of the allegation has not been established, this cannot possibly amount to conduct amounting to or contributing to a breach of the implied term of trust and confidence. Furthermore, the claimant has in any event affirmed this alleged breach by continuing to work as an employee until the start of his gardening leave in December 2023.

2.2.11.3 In a second meeting (November 2023) shouting and swearing at the claimant

2.2.11.4 In a handover meeting (in late November 2023), arranging for Gareth Barry to attend, despite telling the claimant that it was a one to one meeting.

209. It makes sense to consider these two allegations together, as there is considerable overlap between them.

210. Although the claimant has referenced a meeting in November 2023, there is no doubt on the evidence that the meeting referred to in these two allegations is a meeting which took place on 1 December 2023, at which the claimant, Mr Thomas and Mr Barry were all present.

211. It is relevant to track the background which led up to this meeting, which details the disrespectful and insubordinate behaviour of the claimant over this period. Whilst there are numerous examples set out below, they are by no means a complete picture of the claimant's disrespect and insubordination shown to his managers over this period.

212. As noted, Mr Thomas joined the respondent as Director of the CDM team on 9 October 2023. From that point on he was the line manager of the claimant and Mr Barry.

213. Mr Thomas booked a meeting with the claimant for 12 October 2023, in the London office. The claimant accepted the meeting invite. However, he didn't turn up for the meeting in the London office and Mr Thomas had to call him and ask where he was. Only at that point did the claimant ask to change the meeting to a meeting by Microsoft Teams instead of a face-to-face meeting.

214. On 16 October 2024, Mr Thomas booked an in-person meeting with the claimant for 20 October 2023, for a detailed review of the projects he was working on (he undertook similar reviews with other members of the team, including Mr Barry). He did this in order to get an understanding of the respondent's clients and projects etc. The claimant attended the meeting, but turned up 20-30 minutes late.

215. On 25 October 2023, through an exchange of emails with the claimant, Mr Thomas discovered that the claimant had been storing some company documents on his personal laptop, rather than his work laptop. Mr Thomas found this extremely concerning for security reasons.

216. On 31 October 2023, Mr Pemberton got in touch with Mr Thomas to raise concerns about a lack of response from the claimant to requests for his input from the respondent's project managers on a report that was due to be issued. Mr Thomas tried to call the claimant on his mobile but the claimant did not answer. He eventually managed to speak to him. He asked him to respond on the matter which Mr Pemberton had raised with him. The claimant flatly refused saying that he had other projects to work on. His attitude on this call was

aggressive and extremely belligerent; almost immediately, he spoke to Mr Thomas with a raised voice, was defensive, aggressive and insubordinate, and dismissive of his request, and dismissive of the fact that Mr Pemberton, a senior director, had specifically requested the claimant to respond immediately. Although Mr Thomas had never experienced an attitude or response similar to the claimant's response in this call at any stage in his professional career, he remained calm throughout this exchange.

217. The claimant also continued to fail to attend the office as required.

218. As a result, it was decided that Mr Henn and Ms Melton-Scott would meet the claimant on Monday, 6 November 2023 to discuss the various issues which the respondent was having with him. Ms Melton-Scott therefore sent a meeting invite on 1 November 2023 for an in-person meeting with them.

219. On 2 November 2023, the claimant accepted this invitation.

220. However, at 8:31 AM on Monday, 6 November 2023, the claimant submitted his resignation to Mr Henn by email entitled *"notice to end employment contract"*. In his email, the claimant wrote:

"Hi Dan, I hope all is well.

In relation to my contract of employment and role at TFT. Please accept this email as formal written notification that I wish to end my employment with TFT.

Thank you for the time working at TFT and I understand that there is a 3 month notice period to be completed prior to leaving which I am happy to complete."

That is the extent of the email. There is no reference to any of the matters which now form the basis of this claim, let alone a suggestion that any of them amount to race discrimination.

221. Notably, the claimant did not even copy in his line manager on that email. That, we consider, is just another example of the lack of respect which the claimant showed Mr Thomas.

222. In the light of the claimant's resignation, on 16 November 2023, Mr Thomas requested a handover meeting with the claimant on the GreyGR projects. He invited both the claimant and Mr Barry, as Mr Barry had a good understanding of the overall GreyGR portfolio. He wanted the meeting to be on 17 November 2023 in the office. The claimant refused to attend, but didn't provide the explanation requested of him for why he couldn't attend the meeting which Mr Thomas had arranged, or propose an alternative date. Instead, he pushed back, questioning why it was necessary.

223. Mr Thomas made a second request on 17 November 2023 for a meeting on 20 November 2023. However, the claimant did not turn up at the meeting.

224. Mr Thomas then invited the claimant to attend the office on 22 November 2023, but the claimant cancelled the meeting without apology.

225. The claimant then refused to arrange another time that week.

226. Mr Thomas then invited the claimant to a meeting on 24 November 2023 and the claimant refused and suggested it was arranged for the following week.

227. Mr Thomas then repeated the invitation to attend on 24 November 2023; this time the claimant challenged whether it was "helpful and productive", which was tantamount to a refusal.

228. Mr Thomas then repeated the invitation once again.

229. Mr Henn then intervened to ask if the claimant was going to comply with Mr Thomas' reasonable requests. The claimant replied *"…I will meet on dates agreed in the office not by demand. No line manager has the right to talk or send demanding emails to me"*. That phenomenally arrogant and insubordinate email sums up the claimant's attitude to his managers.

230. Eventually, Ms Melton-Scott intervened on 27 November 2023 and informed the claimant that the respondent might be willing to consider putting him on garden leave for the remainder of his notice if he cooperated with Mr Thomas to provide a handover of his work.

231. This resulted in the meeting which eventually took place on 1 December 2023.

232. A meeting invite was sent out to the claimant for the meeting on 1 December 2023. Also included in the invite as a "required" attendee was Mr Barry. The claimant could therefore see from the invite that Mr Barry had also been invited to the meeting. The reason why Mr Thomas had invited Mr Barry to the meeting as well was because Mr Thomas had only been at the respondent for around two months at that point and he needed Mr Barry's support in terms of his understanding of the respondent's clients and projects, and Mr Barry could help explain any intricacies associated with them to Mr Thomas. That was a perfectly sensible reason to have Mr Barry there.

233. The claimant arrived at the meeting, typically, 15 minutes late. Mr Barry and Mr Thomas were already there. The claimant sat down and immediately challenged why Mr Barry was present. He was argumentative and belligerent in his attitude, suggesting that nothing had been mentioned to him about Mr Barry being present and he initially refused for the meeting to go ahead with Mr Barry present. The claimant maintains that he was not belligerent and argumentative; however for reasons of respective reliability of evidence, we prefer the evidence of Mr Thomas and Mr Barry in this respect and find that he was.

234. At this tribunal, the claimant has suggested that the meeting was actually a one-to-one meeting (rather than a handover meeting), which is why he thought Mr Barry should not have been there. However, that is plainly untrue.

235. We have heard the very powerful testimony of Mr Thomas and Mr Barry of what happened at the meeting. Mr Barry was clearly very uncomfortable at how aggressive the claimant was and thought that nobody should have to endure that type of meeting. He described the meeting as a *"horrible, horrible"* experience and one that he would never like to repeat. Mr Thomas similarly found the claimant belligerent, obstructive and disrespectful. Notably, the claimant did not advance any evidence at this tribunal as to what was allegedly said at the meeting.

236. However, Mr Thomas and Mr Barry frankly admitted that Mr Thomas, when faced with the behaviour outlined above, and against a background of obstructive behaviour over a lengthy period of time prior to the meeting, had stated *"I don't know why this has to be so fucking difficult"*. The statement was not directed at the claimant but did reflect Mr Thomas's frustration and exasperation at the situation that the claimant had himself created. Mr Thomas frankly admitted that he should not have used a profanity. At the meeting, he tried and succeeded in de-escalating the situation from that point on.

237. The allegation made by the claimant that Mr Thomas shouted at that meeting is not made out on the facts (indeed the only shouting came from the claimant himself). As to swearing, there was the one single instance of swearing as we have found above, which was not directed at the claimant, and was entirely understandable in the circumstances and caused by the claimant's own behaviour. The comment was not in any way whatsoever connected to the claimant's race; it was entirely due to the incredibly challenging situation which the claimant himself had created. These complaints of direct race discrimination and harassment related to race therefore fail.

238. As to Mr Barry's presence at the meeting, firstly the allegation is not established on the facts because the claimant was not told that it was a one-to-one meeting; it was clearly a handover meeting.

239. Furthermore, the fact that Mr Barry was there was for perfectly good reasons as set out above, because of Mr Thomas' lack of knowledge of the business at that stage and the fact that Mr Barry was well placed to assist; it was not in any way connected with the claimant's race. These complaints of direct race discrimination and harassment related to race therefore also fail.

240. Finally, in these circumstances these allegations cannot possibly amount to conduct amounting to or contributing to a breach of the implied term of trust and confidence. In any event, these events took place after the claimant had submitted his resignation; they could not, therefore, have formed any part of the reason why the claimant chose to resign.

2.2.12 During his notice unreasonably demand (with the threat of gross misconduct) the claimant return his laptop and phone, despite the fact that he was still working and required it for work (comparator – Hilary Gleghorn).

241. The claimant then went on gardening leave with effect from 7 December 2023. He was not working and did not require his laptop or phone after that point (and he confirmed this in his evidence).

242. The respondent, as it was entirely entitled to do, made several requests to the claimant to return his laptop and phone. The first request was in the gardening leave letter sent to him where Ms Melton-Scott asked the claimant to arrange a day with Mr Thomas to return his company phone and laptop.

243. Mr Thomas then spoke to the claimant and suggested that he return his laptop on Monday, 11 December 2023, which was a normal working day. The claimant replied that he *"could not do"* Monday.

244. Ms Melton-Scott then wrote to the claimant on 8 December 2023 asking him to return the laptop on 11 December 2023. The claimant responded on the same day stating that both he and his daughter had a medical appointment that day and he was unable to attend the office.

245. Ms Melton-Scott sent a further email on 8 December 2023 stating that the laptop could be returned that day, alternatively the following Tuesday. The claimant responded arguing that he should only be asked to come into the office on one of his *"office days"*.

246. Ms Melton-Scott wrote for a third time on 8 December 2023 asking whether the claimant would bring his laptop into the office that day or Monday. She suggested that he could work a visit to the office around his doctor's appointment. The claimant responded stating that he would not have his laptop with him when going to the doctors.

247. The respondent's requests were entirely reasonable but, once again, the claimant was obstructive and refused management requests. The claimant gave evidence at this tribunal that he never told the respondent that he would never give the laptop back as if this somehow mitigated his obstructive behaviour as outlined above; however, he was under a duty to return the laptop when the respondent requested and he repeatedly refused to comply with that duty.

248. Finally, on 20 December 2022, Ms Melton-Scott wrote to the claimant asking him to return the laptop by Friday, 22 December 2023. She stated:

"Following previous attempts to arrange for you to return your TFT laptop to the London office, I am writing to request this is done so before 1pm on Friday 22 December 2023. This must be returned in the condition it was issued to you, along with the charger. Please note that any damages may be chargeable in line with our TFT equipment care policy.

You are currently failing to comply with reasonable management instructions, which is tantamount to gross misconduct. Gardening leave means you are still an employee of TFT, and that we can request you attend the office at any time, on any day, due to your contract being office based, and you must be contactable at all times.

To ensure your gardening leave continues and your contract is not terminated, please return your laptop and charger to the London office by 1pm on Friday 23 December 2023."

249. Ms Melton-Scott's email was entirely reasonable in all the circumstances; the claimant had by this stage demonstrated a pattern of disrespectful behaviour towards his managers and this was yet another example; the claimant was breaching his employment contract by refusing to return the laptop and it was entirely reasonable to reference this in the letter. The reason for the letter was entirely due to the claimant's unreasonable refusal to return the laptop; it was not in any way connected to the claimant's race. These complaints of direct race discrimination and harassment related to race therefore also fail.

250. The claimant has cited Ms Gleghorn as a comparator in relation to this allegation. However, she is not an appropriate comparator because she was never on garden leave but rather worked her full notice period; there was, therefore, never any requirement upon her to return her laptop (which she still needed for work) prior to the termination of her employment itself.

251. Finally, in these circumstances these allegations cannot possibly amount to conduct amounting to or contributing to a breach of the implied term of trust and confidence. In any event, these events took place after the claimant had submitted his resignation; they could not, therefore, form any part of the reason why the claimant chose to resign.

2.2.13 The claimant's dismissal.

252. As we have found, none of the previous allegations amounted to conduct which could in any way breach the implied term of trust and confidence on an individual basis, nor could they do so on a cumulative basis. As there was no breach of the implied term of trust and confidence by the respondent, the claimant could not have been constructively dismissed.

253. Furthermore, we find that the reason for the claimant's resignation was not any of the allegations which form part of this claim and which were said to have taken place before the claimant submitted his resignation. In coming to this conclusion, it is noteworthy that the resignation email did not reference any of them and that no complaint about any of them was made until the claim itself was presented.

254. Furthermore, we accept Ms Hatch's submission that the claimant's resignation was for other reasons. By the time he offered his resignation, pressure was coming to bear upon him in several respects. There were concerns about his storage of confidential documents and the claimant was facing questions about this. It was subsequently discovered that on no less than 95 occasions, starting on his very first day of employment, the claimant had been forwarding company emails to his personal email account. We were taken to a schedule of these in evidence and we accept Mr Thomas' evidence that these included highly confidential client information. Furthermore, the claimant's obstructive behaviour had also been noted by Mr Pemberton, a senior director at the respondent, who expressed concern about the claimant's lack of response to his request for input on a particular report. The claimant was particularly belligerent in the call on 31 October 2023 with Mr Thomas in relation to this. Furthermore, it was obvious that the claimant resented Mr Thomas and

demonstrated a complete lack of respect for him. The claimant was the author of all of these situations. We find, on the balance of probabilities, that it was the cumulative effect of these actions which contributed to his decision to resign.

255. The reasons for his resignation were not therefore the alleged breaches of contract by the respondent. That is a second reason why the claimant cannot have been constructively dismissed.

256. Finally, as we have found in our findings above in relation to all of the alleged breaches pre-dating the claimant's resignation, the claimant affirmed those alleged breaches by carrying on working until December 2023. That is a third reason why the claimant cannot have been constructively dismissed.

257. As the claimant was not dismissed, the factual basis of this allegation is not made out and the complaints of direct race discrimination and harassment related to race in relation to the alleged dismissal fail.

Summary

258. In summary, therefore, all of the claimant's complaints fail on their substantive merits.

Time limits

259. We nonetheless need to consider the issue of whether we have jurisdiction to hear the complaints on the basis of whether those complaints were presented in time or not.

260. The claim was presented on 15 April 2024. ACAS early conciliation began on 3 February 2024 and concluded on 16 March 2024. It follows that any complaint where the alleged conduct is said to have taken place prior to 4 November 2023 is prima facie out of time. This means that the complaints of direct race discrimination and harassment related to race at paragraphs 2.2.1 – 2.2.10 inclusive and 2.2.11.2 of the LOI were presented prima facie out of time.

261. As there were no successful in time complaints, there are no complaints to which the earlier complaints can be linked as being part of conduct extending over a period such that they are deemed to be presented in time. Therefore, all of the complaints of direct race discrimination and harassment related to race at paragraphs 2.2.1 – 2.2.10 inclusive and 2.2.11.2 of the LOI were presented out of time.

262. We therefore need to go on to consider whether or not it would be just and equitable to extend time in relation to any of those complaints. The claimant has neither produced any evidence nor made any submissions as to why he did not present his claim earlier or why it would be just and equitable for us to extend time. We have considered the evidence available to us. There is nothing in that evidence which causes us to consider that it would be just and equitable to extend time. In particular, we consider that the main reason why the claimant did not put in his claim any earlier was because, at the time of the alleged events, he

did not consider that he was subject to race discrimination; the allegations of race discrimination appear to have stemmed from a decision on the part of the claimant much nearer to the time when he actually put in his claim. As Ms Hatch put it, the claimant has reverse-engineered a claim after the event.

263. We do not, therefore, consider that it is just and equitable to extend time.

264. The tribunal does not, therefore, have jurisdiction to hear the complaints of direct race discrimination and harassment related to race at paragraphs 2.2.1 – 2.2.10 inclusive and 2.2.11.2 of the LOI and they are struck out.

Indirect sex discrimination under section 19A EQA

265. As referenced towards the beginning of these reasons, the claimant had applied to amend his claim to bring a complaint of indirect sex discrimination under section 19A EQA. The tribunal refused to allow that amendment. One of the significant reasons why the tribunal refused to allow that amendment was that the tribunal considered that it was very unlikely that the claimant would be able to show that the PCP on which he relied was in fact implemented by the respondent; and, if that was the case, such a complaint would fail at the first hurdle.

266. The PCP relied on, as set out in the claimant's amendment application of 29 August 2024, was *"that others and I were required to increase days in the office or project sites from 2 to 3 days"*. Having heard all the evidence, we have, as set out above, made a finding for the purposes of determining the claimant's other complaints that the claimant was not required to increase days in the office from 2 to 3 days. The same applies to project sites. There was therefore no requirement to increase days in the office or project sites from 2 to 3 days. Therefore, even if we had allowed the amendment to include the complaint of indirect sex discrimination, that complaint would have failed at the first stage, because the claimant would not have established the PCP on which he relied.

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Employment Judge Baty

Dated: 2 July 2025

Judgment and Reasons sent to the parties on:

……..4 July 2025.....

…….....
For the Tribunal Office

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

ANNEX

AGREED LIST OF ISSUES

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 04 November 2023 may not have been brought in time.

1.2 Was the discrimination complaint 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. Direct race discrimination (Equality Act 2010 section 13)

2.1 The claimant describes himself as ‘Black Caribbean’ and they compare their treatment with people.

2.2 Did the respondent do the following things:

2.2.1 Fail to offer the claimant a role as a contractor rather than as an employee (comparator – interim department leader at the time – name TBC).

2.2.2 When the claimant took agreed holiday from 6-11 December 2022 he was not paid and his probationary period was extended (comparator – Gareth Barry and Hillary Gleghorn).

2.2.3 From May or June 2023 require the claimant to come in to the office three days a week despite, and attend site meetings as required, when the agreement previously was he would only work two days a week away from home (comparator – Gareth Barry and Hillary Gleghorn).

2.2.4 Following the claimant becoming a single parent in May 2023 refusing to permit him to come in at 10am, rather than 9am, due to childcare arrangements, when others in the office were granted flexibility (comparator – Gareth Barry).

2.2.5 During an appraisal with Daniel Henn in May/June 2023 include an incorrect comment that the claimant was 'uncomfortable in corporate organisations' and did not respond to requests to amend this (no named comparator).

2.2.6 Fail to consider the claimant for the role of Department Lead in July 2023 despite him being qualified and interest (no named comparator).

2.2.7 Change the days and times of departmental meetings from August 2023 without warning or consultation when a new sub-contactor took over from Hilary Gleghorn (comparator – Gareth Barry).

2.2.8 Advertise the claimant's role and position in October 2023, despite him still being in post (comparator – Gareth Barry).

2.2.9 From August to September 2023 pay Gareth Barry commission for sub-contractors working under him, but not paying the claimant, despite being in the same position (comparator – Gareth Barry).

2.2.10 Fail to issue invoices for work undertaken by the claimant (comparator – Gareth Barry).

2.2.11 Mistreat the claimant, through Dominic Thomas (who took over as Line Manager in October 2023) in the following ways:

2.2.11.1 Arrange meetings at unreasonable times, and without notice

2.2.11.2 In one meeting (mid-October 2023) was shouting and swearing at the claimant

2.2.11.3 In a second meeting (November 2023) shouting and swearing at the claimant

2.2.11.4 In a handover meeting (in late November 2023), arranging for Gareth Barry to attend, despite telling the claimant that it was a one to one meeting.

2.2.12 During his notice unreasonably demand (with the threat of gross misconduct) the claimant return his laptop and phone, despite the fact that he was still working and required it for work (comparator – Hilary Gleghorn).

2.2.13 The claimant's dismissal.

2.3 Was that less favourable treatment?

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

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

2.4 If so, was it because of race?

2.5 Did the respondent's treatment amount to a detriment?

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

3.1 Did the respondent engage in unwanted conduct. The examples of alleged unwanted conduct relied on by the claimant are all of those set out at paragraph 2.2 above.

3.2 Was the conduct related to the claimant's race?

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

4. Dismissal

4.1 for the purposes of the dismissal related harassment and discrimination complaints above, did the claimant resign in response to an act or omission or a series of acts or omissions by the respondent? The acts/omissions relied on by the claimant are those set out at paragraphs 2.2.1-2.2.12 above.

4.2 Did the acts/omissions amount to a fundamental breach by the respondent of the claimant's contract? The claimant relies on a breach of the implied term of trust and confidence; in other words, did the respondent without reasonable or proper course act in a way calculated or likely to damage or destroy the implied term of trust and confidence.

4.3 Has the claimant affirmed the breach of contract following the breach? If not, the claimant was constructively dismissed.