EMPLOYMENT TRIBUNALS

Claimant: Miss L Chivanga

Respondent: Allica Bank Limited

Heard at: Cambridge (by CVP) **On:** 9-11 December 2024, 31 January 2025, 11 April 2025, 23 May 2025 and 6 June 2025

Before: Employment Judge L Brown

Members Ms Davies

Mr Davie

Appearances

For the claimant: In person

For the respondent: Ms Arya - Counsel

JUDGMENT having been sent to the parties on the 14 July 2025 and reasons having been requested in accordance with Rule 60 of the Employment Tribunal Rules of Procedure 2024, the following reasons are provided:

Evidence and Procedure

1. At the outset of this hearing the Claimant had not filed a witness statement. Her ET1 form contained details of her complaint and also attached a grievance document.

2. The Claimant had been ordered to provide Further Information of her claim by Judge Tynan [P.45] and this was provided in a 20-page document [P.47-68].

3. At a subsequent Preliminary Hearing she agreed with Judge T Brown that much of this 20-page document was background information which expanded on her 7-page grievance attached to her statement of case, and he then defined the issues as set out in his Case Management Order [P.72-79].

4. The Claimant then failed to comply with directions and so a Preliminary Hearing took place before Judge Ord to consider the application to strike out the Claimants claim. Judge Ord declined to strike out her claim [P.91] and also made Unless Orders [P.98] which the Claimant fully complied with, in relation to disclosure.

5. Further disagreements then took place between the parties about compliance with directions. The Respondent nonetheless shared its witness statement with the Claimant on 21 November 2024 and provided a response to the Employment Tribunal in relation to the preparatory steps for the final hearing and the Claimant's strike out application.

6. It was noted that the matter of the Claimant's strike out application was not pursued any further by the Claimant at the final hearing. She did not raise it with us and did not state she was still applying to strike out, nor did Counsel for the Respondent point out that she had applied to strike out their Response and so we proceeded with the hearing.

7. In any event even had the Claimant pursued her strike out application it would have been refused by this Tribunal as the extensions of time sought by the Respondent for compliance with directions prior to the hearing were entirely reasonable, this being the basis of her strike out application, i.e. that the Respondent had delayed in complying with directions.

8. It was agreed with both the Claimant and the Respondent at the outset of this hearing that her ET1 form and the attached 7- page grievance would be treated as the Claimant's evidence in chief whereas the 20-page further information document would be treated as background evidence only.

9. The reasons for not filing her witness statement were that the Claimant appeared not to understand a separate witness statement repeating what was in her ET1 form was necessary and we accepted this misapprehension on the Claimants part.

10. There were issues with the Respondents main witness Carly Nutkin, in that she contacted the external solicitors for the Respondent while she was held on oath following the first hearing going part heard. Whilst this Tribunal was extremely

disappointed with her conduct, we did not conclude her evidence had been corrupted.

11. The Claimant applied at the second part-heard hearing for the Response to be struck out based on what she submitted was a breach of the order of this Tribunal not to discuss her evidence while under oath. However, we did not consider she had discussed her evidence with the internal solicitors, and thereby corrupted her evidence. Instead, she had complained about my conduct of the hearing as the Judge and asserted that I was interrupting her evidence excessively and that I was interrupting the cross-examination of the Claimant excessively thus lengthening the hearing length. We did not consider this complaint corrupted her evidence in any way. We therefore did not strike out the Response.

12. Unfortunately, at the second part-heard hearing of this claim Carly Nutkin then left the second listed hearing due to a prior appointment and the claim had to be relisted part heard once again. We accepted that the witness had had communication issues with the solicitors and that she was not showing deliberate disrespect to this Tribunal. When the part-heard hearing took place for the third time Carly Nutkin for the Respondent finally completed her evidence.

13. For the Respondent we had a witness statement from Carly Nutkin, and a supplementary statement explaining her departure from the second listed hearing, together with a statement in reply to that from the Claimant.

14. We had a bundle that ran to 445 pages, together with some extra disclosure emailed during the hearing.

15. After this Tribunal had delivered its oral Judgment, the Claimant applied for a preparation time order against the Respondent. We reserved our decision on this application as there was insufficient time to reach a determination on this application after oral Judgment had been delivered and the Reserved Judgement on this costs application will follow separately.

Findings of Fact

16. The Claimant was employed by the Respondent as a customer service advisor from the 22 November 2021 until she resigned due to what she described as a discriminatory constructive unfair dismissal of her on the grounds of her race.

17. On the 1st of February 2022 the Claimant's role changed from that of customer services advisor to lending support assistant [P.275 – P.293].

18. When the Claimant joined Carly Nutkins's team, this being the Credit Operations Team, in February 2022, [P.267-269-] having transferred from another team internally, Carly Nutkin gave evidence about the Claimant being concerned about how she may be perceived due to having had issues in the previous team [para [7] of WS].

19. We found that when the Claimant met Carly Nutkin, she explained the issues she had experienced in the previous team and that Carly Nutkin told her she wanted to effectively start with a "clean slate' [Paragraph 7] WS. Carly Nutkin was her Line Manager.

20. It was put to the Claimant in oral evidence, that Carly Nutkin was excited to have her in the team and to support her transition into the role [P. 267] and the Claimant accepted this during oral evidence and so we found that the initial relationship started on a positive footing.

21. On the 25 April 2022 the Claimant agreed one month's informal probation period in the new role [para 8a WS CN] and this was signed off as successfully completed by Carly Nutkin [P.323-329].

22. We found as per paragraph 10 of CN's witness statement that during her probation that, the Claimant had *to "to flex work with looking after her daughter when she was sick and could not attend nursery. That was fine with me; she was working well and had no issues with how Lynette balanced being a mum and performing her full-time role".*

23. Soon after the Claimant's probation/trial period ended [326, 353], the Claimant needed to take time off due to her surgery. She was signed off from work in May and was to be back in June [419] after eye surgery. When asked in evidence if she was back to work in June, C said that *"it appears so".*

24. From the 3 May 2022 to the end of May 2022 the Claimant was on sickness absence leave for eye surgery [P.419]. We found that due to financial pressure on the Claimant during this time she was off sick at home, she did not take her child into nursery in May instead caring for her herself at home. As a result, when her sick leave ended at the end of May 2022, and when she was due to return to work at the beginning of June 2022, we found that her child's nursery told her they would not allow her child to return to their nursery unless the June bill was paid in advance [P.223]. We also found that due to changes in her benefits and the way the Claimant was taxed that her net earnings went down and that she then had financial difficulties in paying for the outstanding childcare fees, and as a result she lost her child's nursery place and on no notice found herself without childcare for her child during her working hours in July 2022.

25. We found that the working from home arrangement for the Claimant in general terms was as set out in the Witness Statement of Carly Nutkin as follows: -

8.b - Place of Work – technically, Lynette was contracted to work in our Milton Keynes office five days per week [clause 5 – page 278]. However, the practice I encouraged across my team was to work in the office two days per week and three days at home for the first three weeks in the month. For the last week of the month, people could work full-time at home. Due to the nature of the role and lending completions being higher in the last week of the month, it was expected that workloads including particularly critical tasks, would increase. I took the decision to support the team where I could and this included allowing the whole team to work from home, if they wanted, to manage that increased intensity by working from home for the whole last week of the month. Lynette's previous role within the CSA team saw her in the office five days a week and in our first conversations before she joined my team, I remember that she told me that her preference was, in fact, to work in the office five days a week as she told me that her child was in nursery full-time and because she preferred being around people. She did say though that she was grateful for the flexibility I offered.

26. We also found that there was a culture among the team, many of whom were working parents, that working from home for a lot of the time was accepted by Carly Nutkin as evidence when she said [p 216] as follows on the 7 April 2022: -

'Work/life balance update for you -and to prove I really don't care when or how you work your hours as long as the job gets done. The job won't get done if you don't stay sane! Jack and I are just back from a 20-minute run. The road back to fitness is hard work but I've got to start somewhere…'

In a jokey manner Rachel Eckersley Lee Fallon replied:-

'I am wearing a tablecloth lol x.' [P.220].

27. The Claimants contract was silent on the issue of working from home and simply said as follows [P.193]: -

6. PLACE OF WORK
6.1 The Employee' s normal place of work will be First Floor, 100 Avebury Boulevard, Central Milton Keynes, MK9 1FH or such other place the Company may reasonably require for the proper performance and exercise of their duties, including any other of the Company's offices in the United Kingdom.

28. We therefore found that the arrangement for the Claimant working from home was that she could work at least three days a week work from home, and generally was expected to be in the office for two days a week but that this was not fixed and was subject to the demands of the Respondents business.

29. We also found that there was an unhelpful lack of written clarity over this issue in writing by the Respondent. We found that overall, the Claimant and others were expected to be able to go into the office, when necessary, each week when necessitated, and usually two days a week, unless it was the last week of the month when they could work at home all week, but that the Claimant and others, often at short notice, may need to go into the office if there was a need to, such as an IT issue, such that they were not able to work at home. It was this requirement to go into the office to work when required, often at short notice, that lay at the heart of this dispute.

30. Following the Claimant's sick leave in May 2022 Carly Nutkin contacted her on the 1 June 2022 [P.209]. She asked her how she was doing, and the Claimant stated she was healing but still had one more medical procedure. The Claimant explained to Carly Nutkin that she was due back that day but that she had spoken to Gemma Finlayson, the Team Leader, to explain everything, and who would fill her in. She then explained she had another medical procedure the following week [P.210].

31. Carly Nutkin said as follows [Para 13 WS] -:

I don't recall exactly what had been agreed with Gemma and Lynette in respect of her return to work, but I recall that it was agreed that Lynette could work from home as she needed. Gemma's role in my team was that of Team Leader. Whilst I was Lynette's formal line manager, Gemma assisted me in terms of being another point of contact for Lynette in the Credit Operations Team.

32. Carly Nutkin also said [Para 14 WS] :-

It was around this time that I think Gemma and I became concerned that Lynette was not in fact able to work from home properly as expected or as was needed. She reported having several IT issues with logging on remotely. When attending meetings remotely, she often would not have her camera on, and she was noticeably less engaged and less communicative during team meetings when I would try to spend a few minutes getting everyone to share what their plans for the evening/weekend might be. At this time, I was receiving reports from the team that they felt they were having to pick up the shortfall of Lynette not working to expected capacity.

33. We therefore found that from this time onwards from the beginning of June 2022 that Carly Nutkin did start to have concerns about the Claimants performance at work and had concerns that she was less engaged with her role than she had first been when starting her role in February 2022.

34. We also found that the Claimant worked fully from home from the 1 June 2022 and no evidence was before us that she went into the office during that month, and we find that Gemma Finlayson agreed this with the Claimant to help her while she recovered from eye surgery, and that they did what they could to support her.

35. Further messages ensued between Gemma Finlayson and Carly Nutkin about the Claimant on the 27 June 2022 as follows: -

    Gemma Finlayson [to Carly Nutkin] P.211:-

    'Did Lynette accept the meeting invite for today?

    'I can't see she's online and I checked messages'.

    A screenshot of the messages sent on the 21 June 2022 said as follows: -

    Good morning, Lynette I hope yesterday went well? Can I ask you to pick up the offer for Gain SPVKL as a priority please?

    A reply from the Claimant followed where she said:-

    Yes will do.

    Yesterday went very well thank you.

    Gemma Finlayson replied:

    Good news.

    The Claimant then replied:

    my eye is just a bit swollen, but I can see enough for work.

    going forward the doctor has said she just wants to check my eye next Monday after that it's less appointments.

    she also redid the sick note from the 30th of May so I can submit it to you

    Gemma Finlayson then said about this screenshot to Carly Nutkin:-

But she didn't say anything to me!

Carly Nutkin then replied to Gemma Finlayson at 8.23 am on the 27.6.22: -

What time is she back?

Gemma Finlayson replied:-

No idea. All I have is this message from a week ago, she's not online and Emma was asking if she's in (I'm doing the morning report as Ms outlook needs fixing). Lynette didn't say anything about today after that message, so I have no idea. Just another thing to add to the list…
also, Jason's not in today so we have to keep an eye on his (he won't have much) and tina's mailbox.

CN replied:

where is he?

GF replied: -

no idea got the day off as annual leave, I think!

36. Later that day on the 27th of June 2022 the Claimant asked Gemma Finlayson whether the Respondent offered childcare vouchers [P.214]. Gemma Finlayson replied that they did not, and the scheme was no longer available. Gemma Finlayson asked her if she would be logging on after her appointment that afternoon which we found was a reference to her medical appointment and the Claimant replied that she would not be to which Gemma Finlayson wished her luck at the hospital.

37. The Claimant then sent a further message to Gemma Finlayson asking whether or not, when the new Chief Operating Officer was introduced to the team in the preceding week, comments about childcare were aimed at her, and said a comment was made in front of the team about avoiding paying childcare to save money and went on to say, *'was that comment for me?'*

38. In a message from Gemma Finlayson to Carly Nutkin in relation to the above question from the Claimant Gemma Finlayson then asked Carly Nutkin whether she should tell the Claimant that the comments about childcare were for the whole team as the majority had children of varying ages, and that any points that are specific to any individual are brought up in one to ones. Carly Nutkin replied *'absolutely!'*

39. Carly Nutkin stated that she had a one to one with the Claimant around the end of June 2022 and we found that she did so following the above exchange of

messages between her and Gemma Finlayson. In particular in her witness statement [Para 15] Carly Nutkin said as follows:-

15. At some point at the end of June 2022, I recall having a 121 virtual call with Lynette during which Lynette had had her young daughter with her. I recall her daughter being about 3 years old then. Her daughter had been pulling at Lynette's face. I asked Lynette whether she needed more time and offered her to reconvene the meeting. Lynette then mentioned to me that she had her daughter on her own and that if it was ok, she would 'pop her on front of the tv and carry on'. During this call, it came to light that Lynette's daughter was no longer registered with a nursery. I asked Lynette to explain why she had taken this decision, and she advised me that she had cancelled her daughter's full-time place to save money in the month she was off sick in May 2022. Lynette had thought that she could manage looking after her child whilst off sick and then when she was working from home. I raised my concerns with Lynette at this point, as working from home with a young child, alone, would make her ability to undertake her full-time contracted role impossible. Feedback that had been received from the team was implying Lynnete was already struggling to fulfil the role. I became very concerned. **[our emphasis added]**

40. We found therefore that Carly Nutkins concerns about her performance at this point by the end of June 2022 were also inextricably bound up with the Claimant's childcare arrangements and the fact she was both caring for her child at home while also working.

41. At 3:51 pm on 4 July 2022, the Claimant informed Carly Nutkin that she would not be able to come into the office the next day as she was unable to put her daughter into nursery due to financial reasons and so she requested annual leave [223-228]. Messages then ensued between Carly Nutkin and the Claimant about the Claimant looking after her child from home 9:00 to 5:00 as well as carrying out her role for the Respondent. It was clear and we found that Carly Nutkin thought that the Claimant's daughter was in nursery again following the 1-1 at the end of June 2022 when she said to her: -

Hi Lynette, I thought she was in nursery last week?

The Claimant replied:

I had said that my daughter will be starting first week of June

Another message then followed that simply said: -

***July*

42. Carly Nutkin replied stating she was slightly confused because on the call in the previous week she said she would be in nursery full time and went on to say: - *'Although from what you're saying she wasn't in today or did they advise at lunchtime to come and collect her. I must admit I questioned this with you as I had to pay even when Finley didn't attend because you had to pay for space for the year.'*

43. The Claimant then clarified that her daughter had not been in nursery that day and she could no longer put her in the nursery full time and she was going to put her in three days two of which would be while she was in the office, and went on to clarify that this was changed after her one-on-one but she was still waiting Universal Credit but on her wage alone she couldn't afford the £854 that needed to be paid for full time nursery care as it was more than half her wage.

44. We therefore found that the Claimant's inability to pay for a full-time place for her daughter in nursery meant that up until this point on the 4th of July 2022 and since starting her sick leave from the beginning of May 2022 her daughter was at home with her being cared for by her while she was also carrying out her role for the Respondent throughout June when she had returned to work.

45. Further messages then ensued between Carly Nutkin and the Claimant [page 225]. Carly Nutkin, reasonably we found, asked whether she was exploring the option for full time care in another nursery. The Claimant then referred *to' I had set up the three days so at least I can definitely come to the office.'* We found from this at this point in time that on at least two days per week that the Claimant was working from home she was also looking after her child at the same time.

46. Carly Nutkin then responded at 4:31 PM on the 4th of July 2022 as follows:

'Lynette I am not calling you a liar. I have supported you throughout all of this. I am conscious you are paid for a full-time role and contracted for five days (should we require this) in the office but you are unable to fulfil this. Having the little one at home is a distraction you must remember your one to one? Your face was being pulled away constantly. I'm worried about the workload and how you might cope. I am a single parent and understand, I really do. Leave it with me. I will speak to HR. Thank you for letting me know. In the meantime, have a good evening.'

47. We found that whilst the Respondent did allow working from home three days per week informally with the requirement that at least two days a week the Claimant must be available to come into the office, that they could in fact require more attendance than this if business needs required it i.e. up to five days per week. We found the lack of any written arrangements about this unsatisfactory however and having regard to the size of the Respondent this Tribunal would

have expected to see the precise arrangements for home working agreed in writing. This lack of clarity led to the Claimant attempting to take care of her daughter at home when she had a childcare and financial crisis, and this was at the heart of this dispute where Carly Nutkin on behalf of the Respondent also had increasing concerns about her performance.

48. The Claimant then responded to this message in full accepting her daughter had distracted her due to her not being used to being around her while she was working but when she wasn't on the phone call her daughter is *'usually is playing at the side of me or away from me.'* She then went on to say *'I notice since then you've repeatedly made comments regarding my childcare decisions, and I've been answering all your questions. But I can only apologise if my daughter made you feel uncomfortable.'*

49. Carly Nutkin then replied further saying that she had mentioned childcare as she had a responsibility on behalf of the bank to ensure she was able to fulfil her role without distractions and the distractions could not only cause errors but could reduce productivity and that it appeared she was logging on in the evening to complete her tasks which she said '*...will reflect on our SLA'S.'* She referred to the Claimants previously being employed as a CSA and being expected to be in the office five days a week and her childcare was five days a week but now *'her situation had changed.'* [P.227]

50. Carly Nutkin then sought support from Human Resources [WS - CN/17 – P.229-233] later that day. The Claimant then attended a meeting the next day on the 5 July 2022 with Human Resources and Carly Nutkin to discuss her childcare arrangements [para 18 WS].

51. Carly Nutkin said of the meeting as follows: -

Lynette, Chonticha and I met at 9.30 am to discuss Lynette's childcare arrangements and her ability to work as contracted and as required. It was in this meeting I learned what had changed with respect to Lynette being able to afford full-time childcare. I was confused because the requirements of her having to work full-time/5 days per week and her salary had not changed since she joined the bank in November 2021.

What she explained was that due to the way her pay was taxed at the outset and then after her pay exceeded the nil rate band, the amount of money she had net each month reduced. We discussed how she was balancing work and childcare – she said that her daughter was with her at home whilst she was meant to be working.

This worried me as it was neither good for Lynette's daughter nor was it good to enable Lynette to perform her role as required. I explained to Lynette then

that I had received feedback that the level of Lynette's input was not the same and that others in the team felt that they were having to do more work to make up for what Lynette could not do.

52. We found that the Respondent did have valid concerns about the Claimant's performance in that some days she had IT issues, in that she had problems logging in, which made working from home difficult, and that others had told Carly Nutkin her input *'was not the same and that others felt that they were having to do more work to make up for what Lynette could not do.'*

53. At the meeting on the 5 July 2022, we found that it was agreed she could take the rest of the week as annual leave to assist her whilst she tried to sort out her childcare. In particular Carly Nutkin said as follows: -

I wanted to support Lynette in so far as we could, but it was critical that she arranged for her daughter to be looked after full-time to align with Lynette's contractual commitments to us. I said to her that the working from home arrangement my team had was subject to change. To help Lynette, we discussed a number of options, including her taking a period of unpaid leave or applying to work part-time. In the short term, we agreed Lynette would take the rest of the week as annual leave so that she could arrange care for her daughter [page 419]. Notes of this meeting are at pages 341 – 344. Lynette and I also exchanged emails after the meeting [pages 338 – 339].

54. On the 12 July 2025 the Claimant clarified that her mother was now also helping in looking after her daughter, and we found that her mother was helping to looking after her daughter for two days of her working week. [p348].

55. On the 12 July 2022 a further meeting then took place between the Claimant, Carly Nutkin and Conchita from HR [P.348-350] to discuss matters generally.

56. On the 12 September the Claimant then raised a grievance alleging race discrimination and harassment on the grounds of race [P.370 -376] and resigned alleging constructive dismissal, albeit this was put as a discriminatory constructive dismissal in the List of Issues as the Claimant lacked two years' service.

57. Grievance meetings then took place on the 20 September 2022 with the Claimant. [P.412-415]. The grievance was not upheld and was communicated to her on the 6 October 2022 – P.412 - 415. Key findings in the grievance outcome letter were as follows: -

48.1 I understand that you experienced a number of IT incidents which adversely affected your ability to carry out your role. It is not disputed that these

issues occurred, but it appears as though you experienced more IT difficulty than other members of the Credit Operations team. Some of these were caused by the way in which your IT profile was configured (e.g., your Sharefile profile) and others were caused by matters within your control (e.g., internet connectivity issues at home).

48.2 After discussing this with you during our meeting and subsequently speaking with other members of your team, the response taken by Carly Nutkins was not unreasonable and was not racially discriminatory, bullying, or harassment. Carly's suggestion that you work from the office was so that IT issues could be resolved by appropriate colleagues with minimal delay and little interruption to your work. The rationale behind Carly's proposal was driven by business efficacy requirements, and so I conclude that there has been no racial discrimination, bullying or harassment in respect of the response(s) to your IT issues.

48.3 Based on conversations with your colleagues, it appears as though there were a number of occasions where you were looking after your young child while trying to work. It was noted that your child could be heard crying continuously in the background on calls and that she would be pulling your face (and causing other distractions for you) during video calls. This was becoming a regular occurrence rather than a 'one-off' event. We are aware that you had ended your external childcare arrangements, and this now required you to look after your young child during working hours, which in turn was negatively impacting your ability to carry out your duties. This is why you were asked to consider your childcare arrangements. There was no racial discrimination, bullying or harassment in Carly asking you to ensure that your child was looked after appropriately during working hours.

48.4 I note that in light of your childcare situation, Carly offered you the option of working part-time. I do not accept your assertion that you were mistreated when this opportunity was made available to you. In fact, I believe Carly was trying to help you, by responding to your home situation and offering to vary your employment contract such that you would be able to look after your child and work on a part-time basis.

48.5 I have investigated the event of 27th July 2022, where Theresa Connelly's son sat with her on a Teams call. Whilst that was not correct of Theresa to do, I have been assured by senior members of your team that Theresa was spoken to after the incident and reminded that young children need suitable childcare arrangements. Therefore, I believe that this was a one-off incident which was dealt with appropriately.

48.6 I am satisfied that there was no racial discrimination (either direct or indirectly) in the matters referred to in your letter. I am also satisfied that there was no bullying or harassment.

Towards the end of our meeting, I asked you if there were any other situations where another member of staff had been racially abusive towards you (directly or indirectly). You told me there were no such other situations. The information you sent to me (via Richard Whorton) following our meeting does not show any evidence of racial discrimination, bullying and/or harassment. Further, during meetings with certain of your colleagues, I asked whether they were aware of any instance where you had been racially discriminated against, bullied, and/or harassed – they were not aware of any.

The decisions of people you complain about in your grievance letter are entirely consistent with the decisions they take vis-à-vis other people (regardless of any of their protected characteristics) and are entirely based on ensuring business efficacy within the Credit Operations function. It is vitally important to allow managers to 'manage', and I believe that is what Carly has done.

58. We took the submissions of both parties fully into account in reaching our decision despite the fact they are not quoted in full in this Judgment.

The Law

Direct Discrimination Claims

59. Section 13 of the Equality Act 2010 provides,

> 13. Direct Discrimination
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

60. In cases of alleged direct discrimination, the Tribunal is focused upon the 'reasons why' the Respondent acted (or failed to act) as it did. That is because, other than in cases of obvious discrimination (this is not such a case), the Tribunals will want to consider the mental processes of the alleged discriminator(s): Nagarajan v London Regional Transport [1999] ICR877.

61. In order to succeed in her claims under the Equality Act the Claimant must do more than simply establish that she has a protected characteristic and was treated unfavourably: Madarassy v Nomura International Plc [2007] IRLR246. There must be facts from which we could conclude, in the absence of an adequate explanation, that the Claimant was discriminated against. This reflects the statutory burden of proof in section 136 of the Equality Act 2010, but also long-established legal guidance, including by the Court of Appeal in Igen v Wong [2005] ICR931. It has been said that a Claimant must establish something "more", even if that something more need not be a great deal more: Sedley LJ in Deman v Commission for Equality and Human Rights [2010] EWCA Civ.1279**.** A Claimant is not required to adduce positive evidence that a difference in treatment was on the protected ground in order to establish a prima facie case.

62. It is for the Tribunal to objectively determine, having considered the evidence, whether treatment is "less favourable". Whilst the Claimant's perception is, strictly speaking, irrelevant, her subjective perception of his treatment can inform our conclusion as to whether, objectively, the treatment in question was less favourable.

63. The grounds of any treatment often must be deduced, or inferred, from the surrounding circumstances and in order to justify an inference one must first make findings of primary fact identifying 'something more' from which the inference could properly be drawn. This is generally done by a Claimant placing before the Tribunal evidential material from which an inference can be drawn that they were treated less favourably than they would have been treated if they had not had the relevant protected characteristic: Shamoon v RUC [2003] ICR337.

64. 'Comparators', provide evidential material. But ultimately, they are no more than tools which may or may not justify an inference of discrimination on the relevant protected ground, in this case disability. The usefulness of any comparator will, in any case, depend upon the extent to which the comparator's circumstances are the same as the Claimant's. The more significant the difference or differences the less cogent will be the case for drawing an inference.

65. In the absence of an actual comparator whose treatment can be contrasted with the Claimant's, the Tribunal can have regard to how the employer would have treated a hypothetical comparator. Otherwise, some other material must be identified that is capable of supporting the requisite inference of discrimination.

This may include a relevant statutory code of practice, or adverse and discriminatory comments made by the alleged discriminator about the Claimant might, in some cases, suffice.

66. Discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it.

67. It is only once a prima facie case is established that the burden of proof moves to the Respondent to prove that it has not committed any act of unlawful discrimination, so that the absence of an adequate explanation of the differential treatment becomes relevant: Madarassy v Nomura [2007] EWCA Civ.33.

68. There is a succinct summary of the law on the burden of proof more recently set out in the case of **Mr Kwabala Gad - Appellant - and – UK Power Networks (Operations) Ltd Respondent [2025] EAT 84** where His Honour Judge James Tayler said as follows: -

Analysis of Burden of Proof provisions:

27. The burden of proof may be of considerable importance in determining some claims, but not necessarily so. In ***Hewage v Grampian Health Board*** *[2012] UKSC 37 Lord Hope DPSC stated: … it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.*

28. It is important not to adopt a mechanistic approach to the burden of proof but to analyse the facts with care to consider whether it may be appropriate to draw an inference. This is a subtle business. There is still much to be gained by returning to some of the early authorities about drawing inferences that predate statutory provision for a shift in the burden of proof. Mr Korn, for the claimant, relied particularly on the wise words of Sedley LJ in ***Anya v University of Oxford and another [2001] EWCACiv 405, [2001] ICR:***

> 11. … Very little direct discrimination is today overt or even deliberate. What **King** and **Qureshi** tell tribunals and courts to look for, in order to give effect to the legislation, are indicators from a time before or after the particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by racial bias. … The choice between these two comparably

well qualified candidates depended entirely on how the panel viewed their personal and professional qualities. Such a judgment is notoriously capable of being influenced, often not consciously, by idiosyncratic factors, especially where proper equal opportunity procedures have not been followed. If these are to any significant extent racial factors, it will in general be only from the surrounding circumstances and the previous history, not from the act of discrimination itself, that they will emerge. This court and the Employment Appeal Tribunal have said so repeatedly and have required tribunals to inquire and reason accordingly. …

……..

25. To assert this is not to demand, as Mr Underhill sought to suggest it did, an infinite combing by the industrial tribunal through endless asserted facts or an over-nice appraisal of them. It is simply that it is the job of the tribunal of first instance not simply to set out the relevant evidential issues, as this industrial tribunal conscientiously and lucidly did, but to follow them through to a reasoned conclusion except to the extent that they become otiose; and if they do become otiose, the tribunal needs to say why….

…….

28 … The only proven act of potential racial discrimination is not the final allocation of the research post: it is, in Dr Anya's contention, that event in the context of of prior events which, as the appeal tribunal acknowledges, have been neither proven nor disproven. There is no difficulty in seeing what facts, if they were found, could make out the applicant's case. Experience of other cases indicates, speaking generally, that the allegations made by Dr Anya are not inherently improbable; nor, if his factual allegations are made out, are the reasons for them necessarily speculative. What were lacking were the industrial tribunal's conclusions on the factual issues essential to its conclusion and, in consequence, a proper and rounded determination of the single legal matter of complaint, the selection of Dr Lawrence in preference to the applicant.

Harassment related to race

69. 'Harassment' is defined in section 26, which includes, in subsection (1):

(1) "A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

……..

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

(a) the perception of B;

(b) the other circumstances of the case;

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

68. In **Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336,** Underhill J set out at paragraph 10 (A/122) the elements of a claim of harassment related to a protected characteristic:

"(1) …Did the respondent engage in unwanted conduct?

(2) …Did the conduct in question either:

(a) have the purpose or

(b) have the effect of either (i) violating the claimant's dignity or (ii) creating an adverse environment for her?

(3) Was that conduct [related to] the claimant's [relevant protected characteristic]?"

69. As for "purpose or effect", the requisite threshold is high – intending to or causing upset or offence is insufficient – the language used (e.g., "violating" and "degrading") points to purposes/effects which are serious and marked **(Betsi Cadwaladr University Health Board v Hughes EAT 0179/13 and Land Registry v Grant [2011] ICR 1390).**

70. The question of whether conduct "related to" a relevant characteristic is determined by the Tribunal, not by the claimant's perception **(Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495).**

71. The Code, at paragraph 7.9, observes that:

"Unwanted conduct 'related to' a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic".

72. It gives the following example:

"A female worker has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by continually criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker, but because of the suspected affair which is related to her sex. This could amount to harassment related to sex."

73. This less-than-causative meaning of "related to" has been considered in case law.

74. Whether conduct is "related to" a protected characteristic is an objective question, not determined by the respondent's knowledge or perception of the claimant's protected characteristic, or by their perception of whether the conduct "relates to" the claimant's protected characteristic **(Hartley v Foreign and Commonwealth Office Services [2016] ICR D17**

Finding of Facts on the Defined Issues and Applying the Law

75. The issues in this claim were set out and agreed at a case management hearing before Judge T Brown and it is those issues upon which we made findings of fact as set out above, and more specifically below, and on any background evidence relevant to those defined issues.

Race

(i) The Claimant describes her race, for the purposes of the claim, as Black African.

Direct race discrimination

(ii) Did any of the following amount to less favourable treatment because of race?

a. ***On 4 July 2022, Carly Nutkins told C that she was unable to work at home with her child. C compares herself with Theresa Connelly.***

76. We find that she was not told that she was unable to work at home but was instead told she needed to arrange fulltime childcare to enable her to carry out her duties when home working, and when in the office, and in fact we find it was made clear that it was not feasible for her to work at home as well as caring for her child during her working hours, as Carly Nutkin indicated to her during their various meetings and as set out above.

77. It was put to the Claimant during cross examination that she did not in fact know that Teresa Connelley was working from home regularly without childcare and presumably with her child present and she replied: -

'No, I was comparing the fact that both worked from home and both had children, I would not know her childcare circumstances.'

78. We therefore did not find that Theresa Connelly, her chosen comparator was in the same material circumstances as the Claimant as we did not find she was regularly working from home whilst also looking after her child, as we found the Claimant was throughout June and into the beginning of July 2022. We did not find that the chosen comparator therefore had the same material circumstances of the Claimant as she was not doing what the Claimant had been doing i.e. carrying out her role whilst also caring for her child at home and also that the comparator in any event was not considered to be underperforming in the way that the Claimant was considered to be underperforming i.e. the Respondent had concerns about her the Claimants performance but not that of the chosen comparator. Finally, we found that she had a different role to the Claimant in that her role was managerial and unlike the Claimant she did not need to send out as much customer data, information, or documentation that was time critical. In contrast we found that the Claimants role was more customer facing. In any event we did not find that Theresa Connelly had ever requested to work from home whilst caring for her child at home, and Theresa Connelly did not have the same material circumstances in order for her to be a valid comparator.

79. The Respondent stated in submissions that in evidence, the Claimant herself agreed that as her manager, Carly Nutkin was entitled to understand the Claimant's childcare arrangements, in order to see if she was able to perform her contracted role properly, including asking her questions about her ability to pay for childcare (a topic that we found that the Claimant had first raised – not Carly Nutkin). The Claimant had also accepted that it was up to the Respondent to decide whether she was required to come into the office, and that it could be up to 5 days a week. She agreed that there was nothing in the messages or otherwise in the bundle that indicated that Carly Nutkin's messages to her were made by reason of or were in relation to her race. We accepted these submissions.

80. We noted the evidence about Theresa Connelly's son being present on her screen [p.373] In particular we noted the evidence in the background document of the Claimant about this that said as follows: -

However, On the 27th of July, my other team member Theresa Connelly sat with her son in the morning team meeting, and this was received positively by the group. The next day on the 28th of July at 8.36am Carly Nutkins young son messaged into the Teams group greeting the team, the team responded positively as we know children can sometimes be unpredictable. Following this,

Theresa bragged to Carly that she had 'missed kailen joining our call yesterday'. Carly responded with a heart showing her approval.

81. We did not find the heart emoji in reaction to Theresa Connelly's son Kailen being present showed different treatment and that the Claimant was treated less favourably because of her race. We found that there is a difference between the Claimants daughter pulling at her face during a 1-1 with Carly Nutkins set against the background of no childcare and that of Theresa Connelly's son simply appearing on the screen. Whilst the ages were the same [the Claimant's daughter was 3 years old and Teresa Connelly's son was 5 years old – p.374] the circumstances of Theresa Connelly. were materially different to that of the Claimant in any event and so we found she was not a valid comparator.

82. This allegation therefore fails – we did not find that the Burden of Proof shifted to the Respondent to provide a non-discriminatory reason for the treatment of the Claimant on this issue as our primary findings of fact on this issue meant that there were not findings of fact from which we could infer direct discrimination on the grounds of race.

b. On 5 July 2022, Carly Nutkins withheld from C information about the option of working flexibly. C compares herself to a hypothetical comparator.

83. The Claimants case on this was never clear. It appeared she was saying that she was not specifically told by Carly Nutkin or Human Resources about her right to make a request for flexible working i.e. the right to work from home full time or at least two days per week presumably for the two days her daughter did not have a nursery place.

84. The Claimant accepted that she never made a request for flexible working, and we find that she was aware of her right to do so. In any event during cross examination when it was put to her that there was *'no basis for you to suggest that Carly Nutkins attempts to provide options to you were affected by or related to your race'* the Claimant replied, *'it would appear so.*'

85. Counsel in submissions on this issue made reference to the following:-

In cross examination, the Claimant was taken to the notes of the meeting on 5 July 2022 [341], where CN had told her that *"Even with part-time hours, that's something you can also think about. We've supported Zoe with her flexible working request due to childcare, and we would consider the same for you if it'll help" [343].*

86. We accepted these submissions and found that reference was in fact made to a right to formally request flexible working during the meeting on the 5 July 2022 in the context of part-time working if that would assist the Claimant. We did not

find there was information deliberately withheld from her about flexible working generally in the context of part-time working and the option of working flexibly at home.

87. On the issue of working flexibly by working flexibly wholly from home with her child present with her at least two days a week [i.e. she referred to having childcare in the form of firstly having a nursery place for three days a week and then also to her mother helping on certain days of the week] whilst the Claimant was never clear that this was how she put her case even if this was how she put her case we did not find that flexible working information was withheld from her for this possibility because of her race. There was simply no evidence to this effect for us to make such a finding.

88. We found in any event that following the meeting on the 5 July 2022 as submitted by the Respondents that: -

'It was put to C that the option of flexible working was put forward in this meeting which ended at 10:10 am, and that shortly thereafter, she reached out to HR at 10.39 am asking what she needed to do. In that exchange, C was also told by HR that she would "need to put in a flexible working request for the business to review her part time working requests" [331].

89. The Respondents submitted that:-

Even if it is assumed that the option of flexible working was withheld in the meeting (although it was clearly not), it could not have been less favourable treatment of C in any way, even when compared to a hypothetical comparator. C was at all times able to access the relevant policies on the company intranet and make an application for flexible working. In any event, there remains a fundamental difficulty with C's case – there is nothing in the facts to suggest that CN offered the flexible working option to C in the manner she did because of C's race.

90. We found that the option of flexible working was not withheld and the context in which it was raised in the context of part time working rather than in the context of home working with her child present for two days a week, when she had no nursery place or her mother was not looking after the child, was not because of her race. We did not find a hypothetical comparator i.e. a person who not black African would have been treated in any more of a favourable way. The burden of proof did not shift on this issue to the Respondent for them to have to provide non-discriminatory reasons for this treatment as our findings of fact meant that we could not infer discrimination because of race on the facts as we found them.

c. On 12 July 2022, Carly Nutkins told C that C needed to make more effort to speak up in Team meetings. C compares herself to Emma Peck and:

d. On 12 July 2022, Carly Nutkins told C that C was unapproachable. C compares herself to Emma Peck.

91. We find that telling the Claimant she needed to make more effort to speak up was said, as set out in Carly Nutkins Witness Statement [28.c] where she says as follows-

    I did relay feedback to Lynette on 12 July 2022 that she appeared less communicative in team meetings, and I encouraged her to speak up more as well as turning on her camera as it really helped create and maintain team morale in light of the hybrid and flexible structure I encouraged. This is noted on page 349. This had nothing to do with Lynette's race. I do not know why she is comparing herself to Emma Peck in this regard.

92. We did not find that this was said because of race but was said due to a partial breakdown in the relationship between Carly Nutkin and the Claimant, partly caused by Carly Nutkin's somewhat poor management skills, and that it was also caused by the lack of written clarity over the Claimant working from home, but that it was also due to the Claimant trying to look after her daughter while doing her job which we found did cause on Carly Nutkin's part anxiety about how it affected her performance.

93. We also found there was an anxiety on Carly Nutkins part that the Claimants engagement with her role and her team was being diminished by her problems with childcare and this then caused her to make the comment *'to speak up more.'* We did not find that this had anything to do with or was because of the Claimant's race. The burden of proof did not therefore shift on this issue to the Respondent.

94. Carly Nutkin denied specifically saying the Claimant was unapproachable. We find as set out in the notes of that meeting that CN said as follows: -

    CN You are quite closed off. I just wanted you and the other team members to be engaging with each other. I'm noting you're a bit distance and I have told you on this on numerous occasions.

95. Having found that something similar to the allegation that the Claimant was told she was unapproachable was said i.e. that Carly Nutkin said that she was closed off, we asked ourselves if she was treated differently to her chosen comparator Emma Peck.

96. During cross-examination the Claimant asked Carly Nutkin if Theresa Connelly or Emma Peck were given feedback to speak more or be an adult. In reply Carly Nutkin said:-

97. *'they had no conflict within the team, but there was communication with Emma.'*

98. On the balance of probabilities, we did not find she was treated differently to her chosen comparator. Her chosen comparator was Emma Peck, and we did not hear evidence about exactly what was said to her when Carly Nutkin referred to *'communication with Emma.'* In the absence of evidence on what this communication with Emma Peck was and what it amounted to there is no evidence of less favourable treatment of the Claimant compared to Emma Peck on which we could make primary findings of fact and from which we could infer less favourable treatment on the grounds of race.

99. Again we also found this comment made about *'being closed off'* arose out of Carly Nutkins growing frustration with the Claimant and Carly Nutkin's issues about finding the Claimant increasingly difficult to manage in view of her obvious lack of childcare, but we find this comment was not made because of her race, and there was no evidence before us of Emma Peck being treated more favourably than the Claimant because of race i.e. that she was not told to speak up more compared to the Claimant.

100. The context for making this comment about being closed off was said by Carly Nutkin to be because, *'I just wanted you and the other team members to be engaging with each other. I'm noting you're a bit distant, and I have told you on this on numerous occasions" [349].*

101. We also noted that Carly Nutkin explained that she encouraged the Claimant to speak more in meetings in light of the hybrid working structure and mentioned that this *"was because C's "demeanour, energy and engagement in team meetings reduced from the time before her probation completed."* [CN/28.d].

102. We accepted this evidence of Carly Nutkin and preferred it to the overall case put by the Claimant that this treatment was because of race, and we found that this treatment was not because of race.

103. We overall accepted that the Claimants circumstances were different to that of Emma Peck. Whilst Emma Peck did carry out the same role as the Claimant, i.e. a customer facing role, she did not have the same issues surrounding her performance of her role that the Claimant had in Carly Nutkins opinion.

104. There was also no evidence that Emma Peck was having IT issues which we found the Claimant had i.e. difficulties logging onto her device when working at home, and internet connectivity issues, nor did Emma Peck have any childcare difficulties. She was not a comparator that had no material differences to the Claimant and so she did not provide evidence of less favourable treatment of the Claimant.

105. We therefore found that the burden of proof did not therefore shift to the Respondent on this issue as we found no primary facts from which we could infer discrimination.

Race related harassment

(iii) Did any of the following amount to unwanted conduct related to race?

a. On 4 July 2022, Carly Nutkins told C outside of working hours (at 6.09pm), and at short notice of a meeting with HR. C does not complain about the fact of arranging a meeting with HR per se.

106. We found the meeting was arranged at short notice on the 4 July 2022 due to the urgent need to clarify how the Claimant could work going forward, and they were responding urgently to the Claimants childcare emergency, and we did not find that this related to her race, and we found that at most it related to her childcare responsibilities as a working mother, and also to their increasing concerns about her performance. There was no evidence before us whatsoever that it was in any way related to race. While we found it was very short notice and that it would have been fairer on the Claimant for the Respondents to at least offer to meet online the next day, instead of a physical meeting in the office, we did not find the extremely short notice of the meeting was in any way related to race.

b. On 7 July 2022, Carly Nutkins messaged C, which message C took to be an expression of disapproval at C contacting Carly Nutkins's manager.

107. A message was sent to the Claimant on the 7 July 2022 [p.19]:-

Hi Lynette it's Carly. I understand you have made contact with Emily regarding your childcare arrangements on training etc. I am disappointed you didn't feel you could come to me regarding this especially as it was left on Tuesday with HR you would update me. That aside I am pleased to hear you've managed to sort out full-time childcare. Please can I ask for you to come into the office on Monday (some of the team are in) so that we can ensure you have access to all the required systems and that we do not experience any issues going forward when accessing. Have a lovely weekend. Carly X.'

108. We found that this expression of disappointment by Carly Nutkin to the Claimant was not an expression of disapproval. We find it was understandable she felt disappointed as the manager of the Claimant that the Claimant had not come to her first.

109. We did not find that this message and expression of disappointment related to the Claimants race, and there was no evidence before us that it was related to race.

110. The Respondents submissions on this were as follows:-

When asked questions about the text message (which is included in a screenshot on page [19]), C agreed that in part of the text, CN was asking C to come into the office to resolve her IT issues. C agreed that CN was given the impression that she had sorted out full time childcare, and therefore was looking to ensure that ongoing IT issues were sorted by sending the message. She explained that **"Sometimes I would have to dig to get the full answer, and [C wasn't] transparent enough and things came out last minute".**

111. We accepted these submissions, and the concessions were made by the Claimant in cross examination in the way set out. She did accept that Carly Nutkin had been under the impression previously that she now had full time childcare. We found that the reason for asking her to come into the office did not relate to race but instead related to perfectly valid concerns that the Respondent had about how the Claimant could carry out her full-time role without childcare for her daughter and in wanting to resolve IT issues.

112. We also found that the Claimant had not been forthcoming about her childcare issues initially with Carly Nutkin and that Carly Nutkin had had to *'dig'* to get the information out of her. We find that this treatment was not in any way related to race.

iv) If so, was the purpose or effect of that conduct to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

113. As the treatment was not related to her race then this test falls away.

(v) If the conduct had that effect but not that purpose, the Tribunal must take into account the perception of the Claimant, the other circumstances of the case and whether it was reasonable for the conduct to have that effect.

114. This test falls away.

(vi) Did the matters about which the Claimant complains contribute to a repudiatory breach of contract entitling the Claimant to treat herself as dismissed? If so, were they sufficiently material for any such dismissal to be a contravention of the Equality Act 2010 in relation to race?

115. The breaches of contract are the alleged acts of direct race discrimination and the acts of harassment as alleged, and having found that none of those acts were because of or related to race then this claim of discriminatory constructive dismissal fails.

Claim No:3314463/2022

Approved by:

Employment Judge L Brown

24 June 2025

SENT TO THE PARTIES ON

14 July 2025

FOR THE TRIBUNAL OFFICE