



EMPLOYMENT TRIBUNALS

Claimant: Mr O Hamouda

Respondent: Southern Water Services Ltd

Heard at: Bristol (by CVP)

On: 18 – 22 May 2026

Before: Employment Judge Gray-Jones
Mr D Jenkins
Ms L Fellows

Representation

Claimant: In person

Respondent: Mr C Adjei, Counsel

RESERVED JUDGMENT

1. The Respondent subjected the Claimant to harassment related to the protected characteristic of race under s.26 Equality Act 2010 by:
 - 1) Giving the Claimant an unwarranted warning for travelling abroad on 31 March 2023;
 - 2) Providing false feedback on the Claimant which led to a decision to initiate a Performance Improvement Plan (PIP) on 07 August 2023;
 - 3) Subjecting the Claimant to an unjustified PIP;
 - 4) Issuing a written warning under the PIP on 05 October 2023.
2. The Respondent subjected the Claimant to direct race discrimination under s.13 Equality Act 2010 by:
 - 1) Initially seeking to dismiss the Claimant for travelling abroad for a funeral in Africa when the Claimant was intending to work remotely;
 - 2) Constructively dismissing the Claimant.
3. The other complaints pursued in the claim are dismissed.
4. The case will now be listed for a hearing to determine remedy.

REASONS

Introduction

1. This is the unanimous reserved judgment and reasons of the Tribunal.
2. In a claim presented on 05 June 2024 the Claimant brought complaints of race discrimination against the Respondent. The Claimant was employed by the Respondent from 01 August 2022 until 08 January 2024 as a Carbon Data Analyst.
3. The original claim form included complaints of unfair constructive dismissal and detriment on the ground of protected disclosure but following discussion at the Preliminary Hearing conducted by Employment Judge Halliday on 18 February 2025 it was confirmed that these complaints were no longer pursued. Accordingly, the only complaints before the Tribunal at the final hearing were direct race discrimination and harassment related to the protected characteristic of race under ss.13 and 26 Equality Act 2010 ("the EqA").

The Issues

4. The allegations made by the complaint covered a period of time from 2022 which concluded with the Claimant's resignation with effect from 08 January 2024. The Claimant alleged that he resigned because of the Respondent's discriminatory conduct and that his resignation was therefore a constructive dismissal under s.39 EqA. The Respondent denied that the Claimant had been subjected to any discrimination.
5. The issues in the claim were discussed and agreed at the Preliminary Hearing on 18 February 2025 and were as follows (in relation to allegation 2.2.1 the original list of issues stated the warning was for 2 years but it was in fact for 12 months):

1. Time Limits

- 1.1 The claim form was presented on 05 June 2024. The Claimant commenced the Early Conciliation process with ACAS on 03 April 2024 (Day A). The Early Conciliation Certificate was issued on 08 May 2024 (Day B). Accordingly, any act or omission which took place before 04 January 2024 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

- 1.2 Were the discrimination and harassment complaints 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 3 months (plus early conciliation extension) of the act or omission 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 (EqA s.13)

- 2.1 The Claimant describes himself as black.
- 2.2 Did the Respondent to the following things:
 - 2.2.1 Initially seek to dismiss the claimant and then issue an unwarranted 12 month written warning in March 2023 for travelling abroad for a funeral in Africa when the Claimant was intending to work remotely?
 - 2.2.2 Ms Ana Maria Noguera the Claimant's line manager excluded the claimant from key stakeholder meetings? Specifically:
 - 2.2.2.1 Performance Review 2023 (PR23) Committee meetings (February to April 2023);
 - 2.2.2.2 Asset management Period 8 (AMP8) committee meetings between December 2022 and April 2023;
 - 2.2.2.3 Science based Target initiative (SBTi) consultation meetings with ERM consultancy during 2022/2023 financial year;
 - 2.2.2.4 Net zero plan meetings with Stantec and KPMG during 2022/2023 financial year;
 - 2.2.2.5 A meeting with the board of directors that was open to all staff in circa April 2023.
 - 2.2.3 Negatively impact the Claimant's ability to perform his duties by excluding him from these meetings

particularly as Process Owner for the Ofwat Compliance Framework (OCF361) and the carbon emissions framework?

- 2.2.4 Assign work related to the discussions and decisions made in these meetings despite the Claimant being excluded from attending them?
- 2.2.5 Ms Anna Maia Noguera submitted untruthful and misleading feed-back about the Claimant to HR which resulted in a Performance Improvement Plan (PIP)?
- 2.2.6 Subject the Claimant to an unjust PIP from August to October 2023 based on erroneous/falsified information and which resulted in an unwarranted written warning. Specifically:
 - 2.2.6.1 Was the PIP unjustified and discriminatory;
 - 2.2.6.2 Was the PIP changed from informal to formal retrospectively;
 - 2.2.6.3 The Claimant having refused to sign, his signature was inserted on form HR475 in August 2023;
 - 2.2.6.4 Did the Respondent issue the Claimant an unwarranted written warning at the conclusion of the PIP on the 4th of October 2023, despite having initially assured the Claimant that it was an informal process?
- 2.2.7 In or around [April 2023 tbc] Ms Noguera refused to pay for the Claimant to obtain his NEBOSH environmental qualification.
- 2.2.8 Allocate work inequitably to the Claimant and then hold him liable for work related issues without assuming management responsibility. Specifically:
 - 2.2.8.1 Between February and June 2023, did the Respondent (Ms Ana Maria Noguera) subject the Claimant to an unjustified and excessive workload by making him solely responsible for the carbon emissions calculations for the 2022/23 financial year and historical emissions data, while also requiring him to complete managerial responsibilities?

- 2.2.8.2 Throughout 2022/23, was the Claimant unfairly denied recognition and support for his significant contributions, while his manager, Ms. Ana Maria Noguera, took credit for his work and unfairly attributed mistakes solely to him as was detailed in the Claimant's grievance in August 2023?
- 2.2.9 Did the Claimant's manager (Ana Maria Noguera), apply company policies inconsistently by refusing to accommodate the Claimant's request for an online meeting on the 4th of August 2023 but granting the same request when made by the manager herself?
- 2.2.10 Throughout 2022 and 2023 did the Respondent (Ms Ana Maria Noguera) unfairly and unreasonably deny the Claimant's requests for annual leave, resulting in the loss of annual leave entitlement and volunteering days?
- 2.2.11 In November and December 2023, and January 2024, fail to organise a farewell card and gift collection for the Claimant upon his resignation, despite similar arrangements being made for comparable roles?
- 2.2.12 Constructively dismiss the Claimant by discriminating against him on grounds of the protected characteristic of race and thereby breach the implied duty of trust and confidence?
- 2.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.
- 2.4 The Claimant says he was treated worse than the following comparators for each of the alleged acts of discrimination relied:
- 2.4.1 Re 2.2.1: A white employee Iris Solar who travelled to work from Spain between approx. October and December 2022;
- 2.4.2 Re 2.2.2, 2.2.3, 2.2.4, 2.2.5, 2.2.6, 2.2.8, 2.2.9, and 2.2.10: A white employee Gareth Winslade in a similar role who was not excluded from key stakeholder meetings, subjected to unfair feedback; put on a PIP; subjected to inequitable distribution of work; refused on-line meetings or not allowed to take holiday.

2.4.3 Re 2.2.11: Adam Glenister who had a farewell organised for him and received a gift.

2.5 In relation to 2.2.9, (training) the Claimant has not named anyone in particular who he says was treated better than he was and therefore relies upon a hypothetical comparator.

2.6 If so, was it because of race?

2.7 Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to race?

3. Harassment related to race (EqA s.26)

3.1.1 Did the Respondent do the following things.

3.1.1.1 Give an unwarranted warning for travelling abroad as set out in para 2.2.1 as an act of direct discrimination;

3.1.1.2 Exclude the Claimant from key meetings as set out in par. 2.2.2 (and identified in sub-clauses 2.2.2.1 - 2.2.2.5) as an act of direct discrimination;

3.1.1.3 Provide false feedback as set out in par. 2.2.5 as an act of direct discrimination;

3.1.1.4 Subject the Claimant to an unjust PIP as set out in para 2.2.6 as an act of direct discrimination;

3.1.1.5 Fail to arrange a farewell gift as set out in par 2.2.11 as an act of direct discrimination;

3.1.1.6 In August 2023 provide the Claimant with contradictory instructions by reprimanding him for not contacting Ofwat in one instance while criticising him for contacting another company (Engie Impact) in a similar situation? (Gaslighting)?

3.2 If so, was that unwanted conduct?

3.3 Did it relate to the Claimant's protected characteristic, namely race?

4. Duplication of Harassment and Direct Discrimination

4.1 The claimant's complaints relating to race are presented as both harassment and/or direct discrimination. The tribunal will determine these allegations in the following manner.

- 4.2 In the first place the allegations will be considered as allegations of harassment. If any specific factual allegation is not proven, then it will be dismissed as an allegation of both harassment and direct discrimination.
- 4.3 If the factual allegation is proven, then the tribunal will apply the statutory test for harassment under s. 26 Equality Act. If that allegation of harassment is made out, then it will be dismissed as an allegation of direct discrimination because under s. 212 (1) Equality Act the definition of detriment does not include conduct which amounts to harassment.
- 4.4 If the factual allegation is proven, but the statutory test for harassment is not made out, the tribunal will then consider whether that allegation amounts to direct discrimination under the relevant statutory test.

The Hearing

6. The hearing was conducted remotely by Cloud Video Platform. The Claimant represented himself and the Respondent was represented by Mr Adjei of Counsel. In accordance with the Case Management Orders made on 18 February 2025 the final hearing was to consider liability only, with remedy to be dealt with at a subsequent hearing if this was required.
7. There was an agreed bundle of documents running to 681 pages. A few additional documents were added in the course of the hearing. The Claimant gave evidence and for the Respondent the witnesses were Ana Maria Noguera, Carbon and Climate Change Manager and the Claimant's line manager; Ashley Marshman who is no longer employed by the Respondent but when he left held the position of Head of Customer Service; Kelly Young, Litigation; and Claims Manager; and Andrew Beeby, OAM Programme Design Lead. All witnesses gave evidence under oath and were cross-examined.
8. There had been two Preliminary Hearings before the Final Hearing. The first, on 18 February 2025 was before EJ Halliday and the second, on 16 October 2025, was before EJ Volkmer, which dealt with various applications made by the parties.

Findings of Fact

The Witness Evidence

9. The Tribunal did not find all of the witness evidence wholly reliable. On balance we concluded that the Claimant was an honest witness but that did not mean that we accepted every part of his evidence. Of the Respondent's witnesses we had concerns about the reliability of evidence given by Ana Maria Noguera and Ashley Marshman in relation to essential matters and the points on which we had concern and the reasons for this

are dealt with in detail in the Tribunal's findings of fact and conclusions. The evidence of Kelly Young and Andrew Beeby was really only relevant to the factual background of the case.

Background

10. The Claimant commenced employment with the Respondent on 01 August 2022. He was interviewed by Iris Soler and Ana Maria Noguera, who are both Spanish. It was put to the Claimant in cross-examination that Ms Noguera was involved in the decision to appoint him as she interviewed him with Ms Soler and that as his race must have been clear to her this negated any possibility of racial prejudice. However, Ana Maria Noguera gave no evidence concerning her role in the interview and what her view of the Claimant was when she interviewed him and so the Tribunal is not in a position to make any findings in relation to this. The Claimant's opinion was that it was Iris Soler, Ana Maria Noguera's line manager, who made the decision to appoint him.
11. However, we note that in September 2022 a discussion via Teams took place between Ms Noguera and Ms Soler concerning the Claimant. The Tribunal note from this that Ms Noguera stated, *"Good morning Iris, I wanted to let you know that I spoke with Osama, but unfortunately, our conversation only confirms that he's not the right person for this position. I'd like to proceed with Human Resources."*

The First Written Warning

12. On 09 January 2023 the Claimant travelled to South Sudan, arriving on 10 January 2023. He travelled there because of a bereavement, namely his brother, to attend the funeral. He did not inform the Respondent that he was travelling to South Sudan or the purpose of his trip. The Claimant's evidence was that he intended to work remotely from South Sudan.
13. On 10 January 2023 the Respondent's IT department picked up that the Claimant's laptop was logging in at a location near Khartoum and issued an alert. A message was sent to Ms Noguera. The laptop was shown logging in at 8.36am.
14. There was then a discussion via Teams chat between the Claimant and Ms Noguera which has what in retrospect is a bizarre element, namely that the Claimant doesn't tell Ms Noguera he is in South Sudan and she doesn't mention that she knows he is in South Sudan or ask what he is doing there.
15. At 10.12 the Respondent's IT department disabled the Claimant's account, despite being aware that the laptop was still in Mr Hamouda's possession. The Claimant then contacted Ana Maria Noguera to inform her of the need to travel to Sudan for a family bereavement (this information being sent in a text from his work phone on Tuesday 10 January 2023 at 11:23 and an email from personal email account at 12.29 on the same day), advising that he left after the 10:00-10:30 meeting had finished. However, the IT Security showed he was already in Sudan at that time.

16. The account was disabled, as far as we can tell, because Sudan was considered a potential high risk location and the Claimant did not have permission to travel. The email from Rob Condrey of the Respondent's IT department states:

"The account was disabled as a precaution, this was due to the Security Operations team receiving a security alert of a successful login from a potential high risk location (Sudan). On investigation and after an email exchange with Ana Maria, there was no prior agreement for Osama to work from Sudan or as far as I am aware any communication stating he would be working from there until after the account was disabled."

17. On 13 January 2023 Ms Noguera spoke with the Claimant and told him that the absence would be treated as unauthorised absence.

18. The Claimant returned to work on 31 January 2023. Ana Maria Noguera said she was concerned about his absence and the security risk. She said that it was decided by the Respondent's HR department that an investigation would be conducted into the Claimant's unauthorised absence.

19. On 06 February 2023 an email was sent by Kate Rice, Natural Strategy Capital Manager to Katia Sparks, Louisa Gumbrell and Ana Maria Noguera [p.232]. The subject of the email was, *"Investigation – misconduct"*. The email stated, *"Hi Katia – I've spoken with Ana Maria and with Lou about this and we've agreed that Lou will lead the interview supported by Ana Maria as note taker. Ana Maria will collate all information/evidence needed. We'll get the letter out today and are all meeting on Wednesday to get ready for the interview. Hope that's ok, Best wishes Kate."*

20. The letter sent to the Claimant informing him of the investigation stated that it would be conducted by Louisa Gumbrell [p.235]. It is clear from the exchanges of emails between Katia Sparks and Ana Maria Noguera on 06 February 2023 [pp.233 – 234] that Ana Maria Noguera was also involved in it.

21. The Claimant was asked to attend an investigatory meeting which took place on 15 Feb 2023. He confirmed that he intended to work from South Sudan and took his laptop with him when he travelled there. He did not notify his line manager about this until he was in South Sudan. The Claimant was not asked about any relevant policies or his knowledge or awareness of them in the investigatory meeting.

22. The investigation report which was produced following the investigation is dated 22 February 2023 [p.245]. It records that the only person interviewed was the Claimant. The report was produced by Louise Gumbrell. The report makes no reference to any relevant policies, in particular the Respondent's absence policy, bereavement policy and remote working policy. The report states that in the Conclusion section, *"Formal action required as this unauthorised absence is Gross*

Misconduct.” Louise Gumbrell was not called to give evidence and so the only information available to explain how this conclusion was reached was the contents of the report itself and the other documents which we have referred to above.

23. On 15 March 2023 the Claimant was invited to a disciplinary meeting. The invitation letter was from Ashley Marshman and stated, *“The purpose of the hearing will be to discuss your alleged gross misconduct and that your actions alone [sic] consisted of or resulted in: Gross misconduct – Unauthorised Absence.”*
24. The Tribunal noted that unauthorised absence was not categorised as gross misconduct in the Respondent’s disciplinary policy, although the policy states that the examples stated in it are not exhaustive.
25. The letter stated the misconduct alleged was travelling abroad without permission. The wording used was:

“Namely a period of unauthorised absence between 10th to 30th January 2023 in which you left the country to go to Sudan, Northeast Africa. Management were not consulted about your plans to travel abroad and the absence was therefore not authorised.”
26. The Tribunal were not shown any contractual documentation or policies which indicated that the Claimant needed the Respondent’s permission to travel abroad. The case, as put at the hearing, was that he needed permission to work from abroad (but not permission to work remotely). As far as the Tribunal could see the Claimant spent nearly all of his working time for the Respondent working remotely.
27. The disciplinary meeting took place on 24 March 2023. It was conducted by Ashley Marshman. Also present was David Hardy, People Co-Ordinator, who is recorded in the notes of the meeting as being a note taker.
28. In the meeting the Claimant made the point that travelling abroad was not prohibited. Ashley Marshman stated that permission would have been given to the Claimant if he had asked.
29. The meeting note [pp. 252 – 260] records that at one point the meeting was adjourned and the Claimant left. The note states, *“AM and DH discussed some of the issues around the policies and whether it is stated about working outside of UK requiring approval – could not find anything to support this in Remote Working Policy or IT Security Policy, but confirmed that bereavement leave should be requested and agreed with LM “as soon as practically possible”, and ideally in advance (Special Leave policy, under ‘compassionate leave’).*
30. On 31 March 2023 the Claimant was issued with a first written warning. The letter issuing the warning states that it is being given for breach of the Respondent’s bereavement leave policy. The Claimant had not requested bereavement leave, or indeed any leave.

31. It is not clear in the letter and was not clear from Ashley Marshman's evidence in what way the Claimant had breached the bereavement leave policy. The Respondent's Special Leave Policy [pp.518 – 530] states that an employee should contact their line manager to request compassionate leave in the event of the death of a member of their immediate family. However, clearly an employee is not obliged to request leave of absence from work in the event of a bereavement. The Claimant was not seeking to take leave: he had gone to South Sudan with the intention of working remotely. He had logged on for work on his arrival. The reason he didn't carry out work after 10 January 2023 was because his remote access to the Respondent's system had been disabled by the Respondent.
32. The First Written Warning was not appealed by the Claimant.
33. The evidence of Mr Marshman, in response to questions in cross-examination, was that the Respondent had a policy that employees required permission if they wished to work remotely outside the UK. There was no written policy as such, but it was something that employees would be informed about by their line manager. He said in his evidence that he had worked remotely for the Respondent from Italy, having obtained permission from his line manager to do so, and that Iris Soler had worked remotely from Spain because she had been given permission to do so. Ana Maria Noguera said in her evidence in cross-examination that the Claimant was informed verbally about the policy by Iris Soler, although there was no reference to this in her witness statement, and it was not of course something that was put to the Claimant in cross-examination. The Claimant said he had never been informed about this policy.
34. We prefer the Claimant's evidence that he did not know about the policy and was not told by Iris Soler, Ana Maria Noguera or anyone else at the Respondent. We find it likely that if something of such significance had happened it would not only have been in the Respondent's evidence but would have been raised in the disciplinary proceedings, which as we have found, Ana Maria Noguera was involved in.

Exclusion from Meetings

35. The Tribunal then considered whether the Claimant was excluded from meetings. It seems that there was no explicit refusal to allow the Claimant to attend a meeting that he wished to attend but rather he was not informed or invited to meetings attended by Ana Maria Noguera.
36. Ana Maria Noguera says that he was invited to all meetings relevant to his role. She accepted he was not invited to meetings which were not relevant. The Claimant and Ms Noguera were the only members of the Carbon team.
37. Anna Maria Noguera stated that there were no meetings of PR23 in that period relevant to the claim and also no asset management committee meetings in that period. The Claimant in cross-examination says he wasn't sure when the meetings were.

38. Claimant says he only attended a few of these meetings. It was not clear from his evidence what meeting he says he was excluded from.
39. There were three Capital Emissions meetings with Mott McDonald. The Claimant said he went to one. The dates of these meetings were unclear. Anna Maria Noguera said that these meetings were just to specify the job Mott McDonald needed to do and attendance wasn't necessary.
40. The Claimant's case was that Gareth Winslade, a white employee of the Respondent, attended meetings from which the Claimant was excluded. The Tribunal finds that Gareth Winslade held the role of Technical Energy Lead. This was a different role to the Claimant. Furthermore, he was in a different team with a different manager. The Tribunal didn't accept Gareth Winslade was a valid actual comparator.
41. In the Tribunal's view the issues at paras 2.2.3 and 2.2.4 are the alleged consequences of the Claimant being excluded from meetings rather than separate complaints.

The PIP

42. It is clear that from September 2022 Ana Maria Noguera had a negative view of the Claimant, as is shown in her exchange with Iris Soler referred to earlier in the judgment. It is also clear that she was involved in the disciplinary proceedings which led to the issue of the first written warning.
43. Ms Noguera's own statement states that she started to become concerned about the Claimant's performance at an early stage. Her statement refers to incomplete work containing errors and a failure to follow instructions. However, there are no specific examples given.
44. It is clear from emails from Ana Maria Noguera that felt that there was a significant problem with the Claimant's attitude.
45. In an email from Ana Maria Noguera sent on 05 June 2023 at 15:34 to Michael Shanks, the Head of Environment she states, *"Hi Michael, I just wanted to let you know that I had a meeting with Osama, and he was absolutely rude and aggressive with me because of a comment in the below email (I can give you the details when we have a chat). Unfortunately, this is not something that I can keep tolerating, and I would need to take further actions as this is affecting my mental health and wellbeing at work. Regards, Anamaria"* [p.264].
46. There is a further email from Ana Maria Noguera sent on 07 June 2023 to Katia Sparks re: *"Behaviour Concern"* which states, *"Hi Katia, I am contacting you to let you know that I keep having problems with Osama's behaviour. I reported this before the disciplinary investigation, and now I am reporting it after that process."*

"He has a confrontational attitude with me, being disrespectful and rude. He keeps making mistakes in his work, but usually he does not accept

them, and if I tell him about them, he gets rude and just try to blame me. Unfortunately, I have been left alone with this problem at Southern Water, and I can't believe the lack of support that a non- English women received at this company. Recently, I have sent an email to my new manager about an unpleasant meeting with Osama (please see email below), and I have not received any answer so far, or at least a call or message to see if I am ok. So, I have not received any guidance or support on this. As I mentioned in the below email, I have been struggling with my mental health and wellbeing, not just at work but this is affecting my personal life as well.

"If possible I would like to book a meeting with you next week, maybe Tuesday or Friday, to discuss this further."

47. It is clear that Ana Maria Noguera felt very strongly that the Claimant was rude and disrespectful to her, to the point where she claimed it was affecting her own health. It was put to the Claimant in cross-examination, in relation to specific emails in the bundle, that the emails to Ana Maria Noguera were rude. The Claimant denied this. The Tribunal did not consider that the emails in question, when viewed fairly and objectively, could be seen as rude or disrespectful. It was not explained in Ana Maria Noguera's evidence why she considered the emails were rude and disrespectful. There was no evidence presented of any other employees of the Respondent who interacted with the Claimant taking the view that he was rude and disrespectful and no evidence of anyone witnessing the Claimant being rude or disrespectful to Ana Maria Noguera.
48. The Tribunal concludes that Ana Maria had a hostile view of the Claimant, based on her view of his performance and her view of his attitude. It is likely that there were some performance issues but it appears to us clear from the contemporary documentation that the real complaint being raised by Ana Maria Noguera was that the Claimant was perceived by her as being hostile and rude. These concerns about performance and attitude may have been genuinely held by Ms Noguera, but there is no evidence before the Tribunal that they were critically evaluated and confirmed by anyone else at the Respondent. We have not heard evidence from any other managers with experience of working with and managing the Claimant, in particular Michael Shanks. It appears that Michael Shanks took the view that the relationship between the Claimant and Ana Maria Noguera had broken down and the Tribunal was surprised that no attempt were made by the Respondent to mediate between them in order to resolve matters.
49. On 13 July 2023 Ana Maria Noguera wrote to the Claimant to inform him that due to performance concerns he was being asked to attend an informal meeting under the Respondent's Performance Improvement Policy [p.280]. The decision to initiate the PIP was taken by Ana Maria Noguera, having taken advice from HR.
50. The informal meeting eventually took place on 03 August 2023. The PIP document which was produced following that meeting is in the format

which is common in this type of process, setting out targets, concerns, expectations, actions and support in a series of columns [pp.294 – 296].

51. The PIP did not make reference to any behaviour concerns but dealt purely with alleged performance. Ana Maria Noguera said she had been told by HR that the PIP could not address the alleged behaviour concerns and these would be dealt with separately. However, there is no evidence that any steps were taken or were planned to address the attitude and behaviour issue perceived by Ana Maria Noguera, which in our view was the real reason for her negative view of the Claimant.
52. The perception of the Claimant's performance which led to the PIP appears to have been derived entirely from Ana Maria Noguera's perception of his performance. There is no evidence of reviews taking place during the PIP. Ana Maria Noguera said that there were weekly meetings but there is no evidence of these or what was discussed in them. There is also no evidence of support or training being discussed or offered at any point.
53. The Claimant alleges that his signature was forged on the PIP document produced following the meeting on 03 August 2023. He said that he had never signed the document and would not have signed it as he did not agree with it. His name is typed into the section for the employee's signature. Ana Maria Noguera said in her evidence that the PIP was signed by the Claimant and that she sent it to him by email so he could add his signature as it was a remote meeting. The email was not in the hearing bundle and the Respondent was ordered to disclose it. The email was not disclosed and the explanation given was that it could not be located. The Tribunal is satisfied that there was no email and that the PIP was not sent to the Claimant for him to review and approve, which is the only way that it could have been signed by him if the meeting was conducted remotely. The Tribunal concludes that the Claimant's electronic signature was added by Ana Maria Noguera or somebody in the Respondent's HR department. That this happened gives cause for concern about the credibility of Ana Maria Noguera's evidence and the evidence of the Respondent generally.
54. For these reasons the Tribunal is satisfied that the PIP was not being undertaken in good faith. In other words, there was no intention for it to be a collaborative and supportive process.
55. The informal PIP document stated it would last until 03 October 2023. On 28 September 2023 Ms Noguera sent an email to the Claimant with a letter attached [pp.448 – 449]. The letter (which is erroneously dated 28 October 2023) stated:

"I made it clear that further action would be taken if the required improvement was not made and it was explained to you that your performance would be kept under review and, should the required improvement not be forthcoming and maintained, we would commence the formal stage of the Performance Improvement Policy and Procedure. I am writing to you because I believe that your performance remains

unsatisfactory. The reasons for this are that you have not achieved expected standards required in the performance improvement plan such as submit completed/updated documents and outputs accordingly to what it was required, comply deadlines with an accurate output, read documents, and instructions carefully and make sure you understand and meet them, follow procedures, and being accountable for your work.

"You are therefore invited to attend a stage 1 performance review hearing of the performance improvement policy (a copy of which is available on the intranet). The meeting will take place at 10:30 am on 5 October 2023 at Durrington office and I will conduct the meeting."

56. The covering email stated:

"Hi Osama,

I have been calling you both by Teams and by phone, but I could not reach you.

"This email is with regard to your performance improvement plan (PIP), and with the PIP period coming to the end I believe that you are still not achieving the objectives I have set in the performance improvement plan. Therefore, I am inviting you to a formal Stage 1 hearing. Please find attached the invite with all the details.

"This meeting would be in person, and would take place on 5 October 2023, at 10:30 in Durrington office.

"If you have any question, please let me know.

Regards,"

57. There was then a Stage 1 formal meeting on 05 October 2023 attended by the Claimant and Ana Maria Noguera which resulted in a first written warning.

58. The Claimant argued that he should not have been given a Stage One Warning on 05 October 2023 as until that point he had been at the informal stage of the PIP procedure. The Respondent argued that in fact the formal procedure had started 28 September 2023, with the sending of the email and letter to the Claimant by Ana Maria Noguera inviting him to the meeting on 05 October 2023.

59. The Respondent's Performance Improvement Policy and Procedure [pp.159 – 169] states at section 16, *"Where the informal procedure and PIP does not lead to a satisfactory performance improvement, the formal procedure will commence."* The Tribunal considers that before any decision to move the PIP to the formal stage was taken there should have been a review of the informal stage of the PIP with the Claimant. It was not consistent with the purpose and spirit of the policy to simply move the PIP to the formal stage and issue a warning at that point. It was not reasonable

to issue a warning either at the very start of the formal stage of the PIP or after a formal review period of 3 working days, which is what the Respondent argued had happened. This does not in itself of course mean that the issue of the warning was discriminatory.

The NEBOSH Qualification

60. The Claimant alleged that in April 2023 the Respondent refused to pay for the Claimant to obtain his NEBOSH environmental qualification (NEBOSH is National Examination Board in Occupational Safety and Health).
61. On 13 December 2022 the Claimant sent Ana Maria Noguera a message via Teams chat [p.225]. He asked whether the Respondent would be prepared to pay for his NEBOSH exam that he wanted to sit. Ana Maria Noguera replied stating that she was not sure how it worked at the Respondent but the exam was for health and safety and that it should be something that the Claimant could justify should be paid for by the Respondent.
62. The Claimant responded that it was for NEBOSH environmental management which had a lot to do with emissions. Ana Maria Noguera replied that the Claimant should find out what the policy was at the Respondent and that it may be the case that there was other training that was more focused on the role he was carrying out. The Claimant responded with a thumbs up emoji.
63. In the Tribunal's view there was no agreement that the training identified would be paid for by the Respondent but nor was there an explicit refusal. The matter was effectively left in Claimant's hands and there is no evidence that he pursued it further.
64. We don't find that the Claimant has shown that the NEBOSH examination was directly relevant to his role at the Respondent or that Ms Noguera unequivocally refused to agree to pay for the exam. Had the Claimant renewed the request with more information and it had been refused the position might be different but that is not what happened.

Work Allocation

65. The Claimant's evidence was that he didn't have managerial responsibilities. He mentioned co-ordinating a team in India but not having direct management responsibilities.
66. The Claimant was the only other person in the team. We don't consider that the Claimant's evidence shows that he was being instructed to do tasks that were outside his job role, which appears to be the basis of the allegation at para 2.2.8.1.

Denial of Recognition

67. This allegation (para 2.2.8.2) appears to be based on Ana Maria Noguera passing on information provided to her by the Claimant to other persons in

the Respondent without explicitly acknowledging or stating that the information or research had been supplied or carried out by the Claimant. The Tribunal considered that this happened on occasions but didn't consider that it was unusual in a workplace of the type in which Ms Noguera and the Claimant worked. As acknowledged in the grievance outcome it might have helped improve relations between them both if Ana Maria Nogeurea had taken more active steps to acknowledge the work carried out by the Claimant when this was the basis for information being passed on to others.

Request for an Online Meeting

68. It was accepted that a proposed face to face meeting on 04 August 2023 was changed to a remote online meeting when Ana Maria Noguera learnt that there was a train strike that day which would make travel to the proposed venue for the meeting difficult.
69. There is no evidence that in deciding to change the meeting to a remote meeting Ana Maria Noguera was failing to comply with a policy of the Respondent. It was initially proposed as a face-to-face meeting but was changed to a remote meeting by Ana Maria Noguera when she realised that a train strike on the day of the meeting would make travel to the meeting venue difficult. The Claimant had originally proposed a remote meeting. There was no evidence that a policy was not being followed when the meeting was converted to a remote meeting. The explanation for the change in format of the meetings was clearly because Ms Noguera perceived it as being more convenient given the train strike.

Annual Leave

70. It appears that the Claimant tried to book annual leave in August 2022 but was unable to do so. This was explained by the fact that he could not take annual leave in August as he had only just joined the Respondent. This appears to have been something that happened as result of the restrictions on Workday, the app used by staff of the Respondent for booking and approving leave, rather than a decision. The Claimant had not requested the annual leave at his interview for the role.
71. On 01 August 2023 the Claimant emailed Ana Maria Noguera stating that he had requested some annual leave days [p.212]. She was instructed by the Respondent's HR department not to approve it until the Claimant had confirmed that he would be attending the proposed meeting to discuss the PIP.
72. On 03 August 2023 Ana Maria Noguera messaged the Claimant on Teams stating that the PIP would be extended by a week so he can take his holiday.
73. The Claimant alleged that the Respondent's holiday records are inaccurate but there is no claim for holiday pay and nor has the Claimant given evidence showing that he did not receive his annual leave

entitlement during his employment or a payment in respect of any annual leave accrued and unused at termination of employment.

Failure to Give the Claimant a Farewell Gift and Card

74. The Claimant was not given a farewell gift and card when he left the Respondent following his resignation. There is no evidence that there was a formal policy that the Respondent would organise farewell cards and gifts for departing employees.

75. A farewell gift and card, if these things were given to a departing employee, would have been arranged by their colleagues. We were troubled by the Respondent's explanation that the reason nothing was arranged for the Claimant was that the Claimant's colleagues may have felt uncomfortable about arranging something because the Claimant was under a PIP when he left the Respondent. Information relating to the PIP should have been kept confidential. However, there was no evidence that any particular person at the Respondent had responsibility for organising farewell cards and gifts and no evidence that Ms Noguera or the Respondent's HR department or anyone else at the Respondent made a decision not to arrange a farewell card and gift for the Claimant.

Contradictory Instructions

76. The Claimant contacted a supplier to obtain further information in relation to EE Benchmarking Tools and EF. It is not clear whether he was simply contacting them or arranging a meeting. When he contacted Ana Maria Noguera by email to provide an update she stated said that he had not asked to arrange a meeting [p.302]. The Tribunal doesn't consider that this statement can reasonably be construed as a reprimand. The Claimant says this was "gaslighting" as he had been told to arrange a meeting with Ofwat. However, Ofwat was a regulator of the Respondent, not a supplier, and we accept that the circumstances were different and that the instruction to contact Ofwat was given in materially different circumstances. We don't see anything rude or dismissive in Mrs Noguera's response.

Resignation

77. The Claimant resigned his employment in November 2023. The Respondent acknowledged receipt of it on 24 November 2023 [p.458]. The Tribunal is satisfied that the Claimant's resignation was influenced, at least in part, by the PIP process and the decision to issue him with a written warning on 05 October 2023. The Claimant appealed this decision on 17 October 2023. The appeal was heard by Andy Beebee and was unsuccessful, the outcome being issued on 11 December 2023. The Claimant's last day of employment was 08 January 2024.

The Relevant Law

78. The Claimant alleges that he was less favourably treated because of the protected characteristic of race under s.13 EqA and subjected to harassment related to the protected characteristic of race under s.26 EqA.

79. Section 13 EqA provides, so far as is material,

(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.

80. Section 26 EqA provides, so far as is material,

(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.

(5) The relevant protected characteristics are—

...Race.

81. Section 39(2) and (7) EqA provide,

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment...

(7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

(a) by the expiry of a period (including a period expiring by reference to an event or circumstance);

(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

82. The burden of proof provisions set out in s.136 EqA apply to the complaints pursued in this claim. Accordingly, it is for the Claimant to prove facts which show a prima facie case that he has been subjected to the detriments alleged and/or dismissed because of the protected characteristics of sex.
83. If the Claimant can prove such facts it is for the Respondent to prove that the treatment complained of was in no sense whatsoever influenced by the relevant protected characteristic: **Igen v Wong [2005] IRLR 258**.
84. A prima facie case is not made out simply by the Claimant showing a difference in treatment and a difference in status: **Madarassy v Nomura International Plc [2007] ICR 867**. “Something more” is required to shift burden of proof.
85. Although unreasonable treatment does not in itself amount to material from which an inference of discrimination can be drawn, the same may not apply where there is unexplained unreasonable treatment: **Law Society v Bahl [2003] IRLR 640**, approving the judgment of Elias J in the EAT in **Law Society v Bahl [2003] IRLR 640**, where it is stated at [99] – [101]:

“99. That is not to say that the fact that an employer has acted unreasonably is of no relevance whatsoever. The fundamental question is why the alleged discriminator acted as he did. If what he does is reasonable, then the reason is likely to be non-discriminatory. In general, a person has good non-discriminatory reasons for doing what is reasonable. This is not inevitably so since sometimes there is a choice between a range of reasonable conduct, and it is of course logically possible the discriminator might take the less favourable option for someone who is, say, black or a female and the more favourable for someone who is white or male. But the tribunal would need to have very cogent evidence before inferring that someone who has acted in a reasonable way is guilty of unlawful discrimination.

*“100. By contrast, where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations. But again, there should be proper evidence from which such an inference can be drawn. It cannot be enough merely that the victim is a member of a minority group. This would be to commit the error identified above in connection with the **Zafar** case: the inference of discrimination would be based on no more than the fact that others sometimes discriminate unlawfully against minority groups.*

“101. The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given than it would if the treatment were reasonable...”

86. In **Bennett v MiTAC Europe Ltd [2022] IRLR 25** the EAT stated that it was important that tribunals were mindful of the following points in cases where the burden of proof has shifted to the Respondent to establish that discrimination has not occurred:

- 1) The standard of proof necessary to discharge the burden is the balance of probabilities;
- 2) The protected characteristic need only have been a material cause of the treatment;
- 3) The general requirement for 'cogent evidence' to discharge the burden does not apply a standard of proof beyond that of the balance of probabilities. Nonetheless, it is an important point. It is the respondent that generally can provide evidence about the reason for the claimant's treatment. The shifting burden of proof was designed to assist claimants in discrimination claims because such claims generally require an analysis of the reasoning process of an employee, or employees of the respondent. The respondent will be able to choose what evidence to call about the decision-making process and it is likely to be the key evidence in deciding whether discrimination has occurred;
- 4) Whilst documentary evidence is likely to be important, because express evidence of discrimination is rarely available, much is likely to turn on the evidence of the decision maker(s). An important consequence of s.136 is that if the respondent chooses not to call the relevant decision maker it puts itself at considerable risk of an adverse finding, should there be sufficient evidence to shift the burden of proof, because it will face substantial difficulty in discharging the burden;
- 5) The requirement for 'cogent' evidence to discharge the burden should not be disregarded. It is guidance from the Court of Appeal, approved by the Supreme Court;
- 6) The fact that a decision maker is not called to give evidence does not necessarily mean that the required cogent evidence cannot be provided. There may be compelling documentary evidence, or others might be able to give convincing evidence that they know the reason why the decision was taken. However, there should be a reasoned analysis of such evidence;
- 7) It will usually be necessary to consider why a decision maker was not called to give evidence. There may well be a compelling reason – a witness could be unwell or have died. Distance should not be assumed to be an unsurmountable barrier to a witness giving evidence because an application can be made for a witness to give evidence by video and could be made before the Coronavirus pandemic made it a common occurrence. Where no reason or an unconvincing reason is given for the absence of the decision maker, particularly careful analysis is required of the evidence to determine whether, on balance of probabilities, it is sufficiently cogent to prove that the protected characteristic was not a material factor in the decision taken;
- 8) On occasions parties choose not to call a witness because, if the witness was called, it is likely that their evidence would be damaging. That possibility should be borne in mind, particularly

where the respondent is reticent to explain why a decision maker is not giving evidence;

- 9) As the protected characteristic need only be a material factor in the making of the impugned decision, the fact that there is evidence that some other factor was the primary reason for the treatment complained of does not exclude the possibility that the protected characteristic was a factor in the treatment.

87. A detriment may be shown if a reasonable employee would feel disadvantaged in the circumstances in which they had to work by the treatment complained of: **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337**. It is not necessary to establish any physical or economic consequence for a detriment to be established, and the test is not wholly objective. It is sufficient that a reasonable worker might take a view that they had been disadvantaged in the circumstances in which they had to work. As such the threshold for establishing detriment is low: **Warburton v Chief Constable of Northamptonshire Police [2022] EAT 42** at [51].

88. An employee is entitled to rely on either an actual or a hypothetical comparator for the purposes of the comparison required in a direct discrimination complaint. The circumstances of the comparator must be the same or not materially different (s.23 EqA 2010). However, this does not mean that the situation of the employee and their comparator have to be precisely the same: **Hewage v Grampian Health Board [2012] ICR 1054**.

89. In **Kalu v Brighton and Sussex University Hospitals NHS Trust UKEAT/0609/12** the EAT (Langstaff J) suggested that employment tribunals may be assisted in deciding the circumstances which are relevant for the comparative exercise in a particular case by first identifying the purpose of the comparison in that case.

90. The existence of a different decision-maker in the comparator's case need not prevent the comparison being a valid one: **Olalekan v Serco Ltd [2019] IRLR 314**.

91. Even where there is a material difference between an employee and a chosen comparator, so that the comparator does not qualify as a statutory comparator, the treatment of that comparator may be evidence from which a tribunal may infer how a hypothetical comparator would be treated: **Shamoon** at [109] and [143].

92. A constructive dismissal may amount to unlawful discrimination if some of the matters relied on are acts of discrimination. In **Williams v Governing Body of Alderman Davies Church in Wales Primary School [2020] IRLR 589** HHJ Auerbach stated at [89] that a constructive dismissal should be held to be discriminatory "*if it is found that discriminatory conduct materially influenced the conduct that amounted to a repudiatory breach.*" At [90] HHJ Auerbach stated that the test was whether "*the discrimination thus far found sufficiently influenced the overall repudiatory*

breach, such that the constructive dismissal should be found to be discriminatory.”

93. This approach was approved by Cavanagh J in the subsequent EAT judgment in **De Lacey v Wechsels Limited t/a The Andrew Hill Salon** **UKEAT/0038/20** i

Conclusions

Para 2.2.1

94. The first complaint is at para 2.2.1 of the list of issues. The allegation is that the Respondent sought to dismiss the claimant and then issued an unwarranted 12 month written warning in March 2023 for travelling abroad for a funeral in Africa when the Claimant was intending to work remotely.
95. We find that the factual allegation is proven. The investigation report prepared by Louisa Gumbrell dated 22 February 2023 [pp.245 – 249] states in its conclusion: *“Formal action required as this unauthorized absence is gross misconduct”*. As such we are satisfied that in the investigation report the Respondent was seeking to dismiss the Claimant, as the report stated that his absence was unauthorized and was gross misconduct (it did not even state potential gross misconduct). It is not disputed that the Claimant was given a 12-month written warning at the conclusion of the subsequent disciplinary hearing. We deal below with whether the warning was unwarranted.
96. The Claimant relied on Ashley Marshman and Iris Soler as actual comparators. Iris Soler was identified as a comparator in the list of issues. Ashley Marshman was identified as a comparator when in the course of his evidence in cross-examination he admitted that he had worked remotely from Italy for a period having obtained permission from his line manager. The Tribunal found it surprising that this obviously relevant fact was not included in his witness statement.
97. Both Iris Soler and Ashley Marshman are white employees of the Respondent who worked remotely from abroad. The Respondent said that they had both obtained permission to work abroad. On that basis they are not actual comparators as the Claimant had not obtained permission to work remotely from abroad when he travelled to South Sudan. The Tribunal accepted this argument. However, although there was no actual comparator identified the Tribunal found the following matters relevant to the question of whether a prima facie case of race discrimination had been made out:
- a) The investigation report made what was essentially a finding of gross misconduct without the specific policy or rule which is alleged to have been breached being specified. The Tribunal does not consider that the conduct in question was of the nature that there was no need to specify

breach of a specific policy or rule, as may be the case with conduct such as theft or physical violence in the workplace.

- b) The investigation report reached the conclusion set out above in relation to black employee who had travelled to a country which was clearly associated with his ethnicity.
- c) The recommendation in the investigation report does not appear to comply with the Respondent's own policy, which states that the investigation report should simply recommend whether a disciplinary hearing is required [pp.149 – 150].
- d) Unauthorised absence is not itself identified as an example of gross misconduct in the policy (although list is not exhaustive).
- e) The decision to treat the absence as misconduct appears to have been taken before the investigation took place, as shown in the emails between Ana Maria Noguera and employees in the HR department.
- f) The Tribunal draws an adverse inference from the fact that Louisa Gumbrell was not called to give evidence. No explanation was put forward for her absence.

98. The Respondent's case was that the Claimant needed prior authorisation to work remotely from abroad, but this was not set out in a written policy and there is no evidence that this unwritten rule was brought to the Claimant's attention. We don't accept Ana Maria Noguera's evidence in cross-examination that Iris Soler had informed the Claimant about the policy (and of course, this was not something that was put to the Claimant in cross-examination).

99. The Tribunal was concerned that there was a general lack of transparency on the part of the Respondent about the circumstances in which employees were permitted to work remotely from abroad, as shown by the absence of any written policy, the fact that Ashley Marshman only admitted that he had worked remotely from abroad in cross-examination and that there has been no disclosure of any relevant documentary evidence relating to the permissions given to Iris Soler and Ashley Marshman to work remotely from abroad. However, accepting the Respondent's evidence that two white employees worked abroad with permission, having been made aware of the unwritten policy, we still consider that questions need to be answered about why the Claimant was viewed as having committed gross misconduct for breaching an unwritten policy that he had not been informed of.

100. It was suggested by Mr Adjei that the Claimant should have known that he needed permission to work abroad because his location was specified in his contract of employment as the Respondent's premises at Otterbourne, but the Tribunal doesn't consider that this contractual provision can reasonably be interpreted as meaning that permission must be required in order to work remotely from abroad. In any event, there is no evidence that this provision of the contract of employment was in the minds of any of the employees of the Respondent at the time of the events complained of.

101. The Tribunal concludes that the investigatory report is unreasonable in multiple unexplained ways and that for the reasons set

out in the paragraphs above the Claimant has shown a prima facie case that the Respondent sought to dismiss him because of protected characteristic of race. Accordingly, the burden shifts to the Respondent to show a non-discriminatory reason for the treatment.

102. The author of the report was Louise Gumbrell. Neither she nor anyone else from the Respondent's HR department were called to give evidence. In her evidence Ana Maria Noguera stated that her role in the investigation was as a note taker in the meeting between Louise Gumbrell and the Claimant and that the report was prepared by Louise Gumbrell. In her witness statement she said that she was initially concerned that the Claimant had not been truthful about his absence and had put the Respondent's IT systems at risk by logging on to the system from South Sudan, but there was no finding in the investigation report that the Claimant had been dishonest and there is no information in it about any actual or apparent risk to the IT systems, or indeed any other witness evidence about such a risk.
103. Accordingly, the Tribunal finds that the Respondent has not provided the cogent explanation required under s.136 EqA and find that the Respondent subjected the Claimant to direct discrimination because of the protected characteristic of race by seeking to dismiss him.
104. The Tribunal then considered whether the issue of the written warning following the disciplinary hearing was discriminatory. This was complaint was alleged to be both an act of harassment related to race and direct race discrimination.
105. The written warning was given, according to Ashley Marshman, because the Claimant breached the Bereavement Policy. However, the Tribunal finds that the Claimant didn't breach the policy. He didn't ask for special leave but that was not in itself a breach of the policy. He did appear to breach the unwritten rule that permission was needed to work remotely from abroad but there was no evidence, and no evidence before Ashley Marshman, that he had been informed of the rule.
106. We found it surprising that Ashley Marshman admitted in evidence that he had worked remotely from Italy but there was no reference to this in his witness statement and nor was it referred to in the disciplinary hearing. We find it inexplicable that Ashley Marshman would not raise in the disciplinary or in his witness statement that he himself had worked remotely from abroad and in the disciplinary explored with the Claimant why the Claimant's circumstances were different and why the Claimant had breached the Respondent's unwritten policy. If the Claimant had breached the policy then his knowledge and understanding of the policy was essential if there was to be reasonable conclusion that he had committed misconduct.
107. Ashley Marshman decided to give the Claimant a written warning even though there was no breach of the policy relied on and no basis for a finding that the Claimant had been aware of the Respondent's unwritten policy. Mr Marshman did not seek to argue that he may have made an

error and he confirmed that he was an experienced manager who had previously conducted disciplinary hearings. It is clear that he had advice and support from HR. As such this was a deliberate decision to issue a disciplinary penalty when there were no grounds to do so. As noted above, the Claimant was a black employee who was seeking to work remotely from a country which was closely associated with his ethnicity.

108. The Tribunal is satisfied that the issue of the written warning to the Claimant was unwanted conduct which created an intimidating, hostile, humiliating or offensive environment for the Claimant.

109. Therefore, the Claimant has shown a prima facie case that he was subjected to harassment related to race by the issue of the first written warning dated 31 March 2023 and the Respondent has not provided the cogent evidence required to prove that it did not subject the Claimant to harassment related to race. Accordingly, this complaint is upheld.

110. As the harassment complaint in relation to the written warning has been upheld there is no need to consider whether it amounted to direct race discrimination.

Paras 2.2.2 – 2.2.4

111. The complaint at para 2.2.2 is that Ana Maria Noguera excluded the Claimant from key stakeholder meetings. This is also alleged to be an act of harassment related to race (para 3.1.1.2). We don't find that the Claimant has shown a prima facie case that he was subjected to race discrimination in the way alleged.

112. It is not clear from the Claimant's evidence which specific meetings he was excluded from, or that they were key stakeholder meetings that he should have been invited to. Even if the Claimant was not invited to certain meetings we don't find that there is sufficient evidence to show a prima facie case that this was harassment related to race. As such the harassment complaint is dismissed.

113. The Tribunal does not find that Gareth Winslade is a valid actual comparator for the Claimant. He held a different role and was in a different team. Furthermore, there is insufficient evidence to show a prima facie case that a hypothetical comparator of a different race would have been treated differently to the Claimant. As such this complaint is dismissed.

114. The complaints at paras 2.2.3 – 2.2.4 are allegations relating to the alleged consequences of the complaint at para 2.2.2. rather than separate complaints and as such these are also dismissed.

Para 2.2.5

115. This is an allegation that Ana Maria Noguera submitted untruthful and misleading feedback about the Claimant to HR which resulted in a PIP. It is raised both as a complaint of direct race discrimination and harassment related to race (para 3.1.1.3).

116. We are satisfied that Ana Maria Noguera had a very negative view of the Claimant. This appears to have arisen largely because of her perception that he was being rude and aggressive towards her. However, there were not really any specific examples of this provided in her evidence or even in the contemporaneous documentation. The Tribunal did not find that the emails which were alleged to be rude when the Claimant was cross-examined justified that description on a fair and objective basis. There was no evidence of anybody else considering the Claimant to be rude and aggressive.
117. Ana Maria Noguera's evidence was that she was also concerned about other performance issues but her witness statement only described these in generic terms and there is little detail given in the contemporaneous documentation. On the balance of probabilities we don't find that the Claimant was being rude and offensive. As such we find that the material being supplied to HR was not truthful and was misleading. If Ana Maria Noguera believed that the Claimant had behaved rudely and aggressively to her then we would expect her to be able to provide specific evidence about when this had occurred and the circumstances in which it took place.
118. Accordingly, we find that the burden of proof has shifted as apart from the Claimant's race there doesn't appear to be any reasonable explanation for the false and misleading information given to HR by Ana Maria Noguera. We are satisfied that the reports led to the decision to commence the PIP process and so was unwanted conduct which created an intimidating, hostile, humiliating or offensive environment for the Claimant.
119. We don't find that the Respondent has shown that the Claimant was not subjected to harassment related to race and so this complaint is upheld. As the harassment complaint has been upheld there is no need to consider the direct race discrimination complaint.

Para 2.2.6

120. This complaint relates to the PIP and is also alleged to be an act of harassment related to race.
121. For the reasons set out above in relation to complaints 2.2.5 and 3.1.1.3 we find that the decision to implement the PIP was an act of harassment related to race.
122. In relation to the specific complaints at paras 2.2.6.1 to 2.2.6.4 the Tribunal's conclusions are as follows:

2.2.6.1: The Tribunal has concluded that the PIP was unjustified and discriminatory. It was not undertaken in good faith and the decision to implement it was influenced by the Claimant's race.

2.2.6.2: The allegation in the list of issues is that the PIP was changed from an informal to formal process retrospectively. The

Tribunal is satisfied that the decision to convert the PIP to a formal process was effectively a breach of the PIP procedure. It was clearly unreasonable to convert the PIP to a formal process without having a review meeting and to issue a warning based on a formal review period of three working days. So the Tribunal is satisfied that in effect the PIP was converted from a formal to an informal process retrospectively, as most of the period taken into account when the warning was issued was when the PIP was at the informal stage.

2.2.6.3: The Tribunal finds that the Claimant's signature was inserted into the form HR475 without the Claimant's agreement, so that the document was falsely presented as a document which he had signed.

2.2.6.4: The Respondent did issue the Claimant with a written warning at the conclusion of the first stage of the PIP on 04 October 2023. The Tribunal is satisfied that the warning was unwarranted because the Tribunal finds that it was based on a review of performance when the PIP was, apart from three working days, at an informal stage. Moreover, the reason for Ana Maria Noguera deciding to issue the warning was in our view due to hostility towards him rather than genuinely held performance concerns.

123. The Tribunal concludes that the decision to implement the PIP was tainted by discriminatory motives and that moreover there was seriously unreasonable unexplained conduct in relation to the way that it was carried out, as set out in our findings on paras 2.2.6.1 – 2.2.6.4. The Tribunal is satisfied that this was unwanted conduct which created a hostile, intimidating, offensive, humiliating or degrading environment for the Claimant.

124. The Tribunal is satisfied that the Claimant has shown a prima facie case that he was subjected to harassment related to race and that the Respondent has not shown that the harassment did not occur. Accordingly, this complaint is upheld. There is no need to consider whether the conduct alleged also amounted to direct race discrimination.

Para 2.2.7

125. This complaint relates to the alleged refusal to pay for the NEBOSH environmental qualification. The Tribunal has not satisfied that the Claimant has shown that there was a refusal to pay for the qualification. The relevance of the qualification was questioned and the Claimant was asked to provide further information, which he appears to have understood, and after that he did not pursue the matter further. Accordingly, the Claimant has not proven the factual basis of the complaint and it is dismissed.

Para 2.2.8

126. These complaints relate to allegedly unfair allocation of work and Ana Maria Noguera unfairly denying the Claimant recognition and attributing mistakes solely to him.

127. In relation to the first part of this complaint the Tribunal does not find that the Claimant has shown a prima facie case that he was being unfairly allocated work and in particular was being required to do tasks which were not part of his job role, taking into account that he was the only person in the team apart from Ana Maria Noguera. As the factual basis of this complaint is not proven it is dismissed.
128. In relation to Ana Maria Noguera unfairly denying the Claimant recognition and support for significant contributions and having mistakes unfairly attributed to him the Tribunal is satisfied that Ana Maria Noguera on occasion used information provided by the Claimant in work communications without giving him credit. The Tribunal is not satisfied that the Claimant has shown a prima facie case of racial harassment and not has he shown a prima facie case that Ana Maria Noguera would not have done this with an employee of a different race.
129. In relation to the second part of this allegation the only example given in the Claimant's witness evidence of having mistakes unfairly attributed to him relates to the drafting of the emissions section of the Respondent's annual report and the Claimant being blamed for inaccuracies and formatting issues, despite having inadequate support and authority over the final content. It appeared from the Claimant's evidence that he was accepting that there were inaccuracies and formatting issues. The Tribunal does not consider that the Claimant has shown a prima facie case that any criticisms of him in relation to this amounted to harassment related to race or that an employee of a different race would have been treated differently. Accordingly, the complaint is dismissed.

Para 2.2.9

130. This complaint relates to Ana Maria Noguera deciding to convert a proposed in person meeting to a remote meeting when she found out that a rail strike on the day of the meeting would make travel to the proposed location of the meeting difficult.
131. There does not appear to any dispute that this happened but the Tribunal does not consider that the Claimant has shown that he was subjected to a detriment. He seemed to have wanted the meeting to be conducted remotely in any event.
132. Even if the Claimant can show that he was subjected to a detriment the Claimant cannot show a prima facie case of either racial harassment or race discrimination. Even if Ana Maria Noguera made the change in arrangements for her own convenience, which appears to be what is alleged by the Claimant, the Claimant cannot rely on Ana Maria Noguera treating herself more favourably than the Claimant in order to show less favourable treatment because of race. Accordingly, the complaint is dismissed.

Para 2.2.10

133. The Claimant was apparently denied an annual leave request in August 2022 but this was because he had only just started work for the Respondent and had nothing to do with race. There is no evidence a new employee of a different race would have been treated differently. The Claimant has not shown that he was denied annual leave on any other occasions and accordingly this complaint is dismissed.

Para 2.2.11 and 3.1.1.5

134. This relates to the admitted fact that the Claimant was not provided with a farewell card and gift when he left the Respondent.
135. The Claimant has not shown a prima facie case of harassment related to race or direct race discrimination in relation to this complaint. There is no evidence that any decision was made by an identified individual not to provide the Claimant with a farewell gift and card. This complaint is dismissed.

Para 3.1.1.6

136. This complaint relates to alleged gaslighting by providing the Claimant with contradictory instructions. For the reasons set out in the Tribunal's conclusions the Tribunal does not consider that the Claimant has shown either the factual basis of the complaint or, if this did happen, that it was related to or because of race. Accordingly, the complaint is dismissed.

Para 2.2.12

137. The final allegation is that the Claimant was constructively dismissed. It was not disputed by the Respondent that an act of direct race discrimination or harassment will amount to a breach of the implied duty of trust and confidence.
138. The Claimant resigned his employment, at least in part, because of the PIP process he was subjected to from August – October 2023 and the issue of the written warning under this process on 05 October 2023. The Tribunal has found that the PIP process and the written warning were acts of race discrimination.
139. The Tribunal is satisfied that the Claimant did not affirm the contract before resigning, either through delay or any other act consistent with affirmation. The Claimant appealed the written warning on 17 October 2023 and as such at the date of his resignation the Tribunal does not consider that he had affirmed the contract.
140. As the Claimant was constructively dismissed and a discriminatory act of the Respondent was a material cause of that resignation the discriminatory constructive dismissal claim is upheld.

Time Limits

141. The discriminatory constructive dismissal claim is in time, as the Claimant's employment terminated on 08 January 2024. See **Lupetti v Wrens Old House Ltd [1984] ICR 348**.
142. The Tribunal is satisfied that the complaints relating to the PIP and the imposition of the written warning amount to conduct extending over a period, which culminated in the Claimant's constructive dismissal. Accordingly, these complaints are in time.
143. The complaint relating to the investigation report and written warning for unauthorised absence are prima facie out of time as they relate to acts of discrimination which took place in February and March 2023.
144. Although they do not relate directly to the PIP the Tribunal considers that Ana Maria Noguera was involved in the investigation that led to the decision to hold a disciplinary hearing and that the Respondent's HR department was involved in the investigation, the issue of the written warning and the PIP. The Tribunal does not consider that the period between the issue of the warning in March and the decision to commence the PIP is particularly excessive. On balance the Tribunal concludes that the investigation and the warning formed part of a discriminatory course of conduct which commenced with the investigation, encompassed the written warning, the PIP and the written warning issued on 05 October 2023 and culminated in the Claimant's resignation. Accordingly, all the complaints which have been upheld are in time.

Approved by Employment Judge D Gray-Jones
Date 20 August 2026

JUDGMENT & REASONS SENT TO THE PARTIES ON
03 September 2026

FOR THE TRIBUNAL OFFICE