EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms H Brimah	**v**	**HBOS PLC**

Heard at: London Central
On: 26 April 2017 – 5 May 17

Before: Employment Judge Hodgson
Ms J Cameron
Mr D Eggmore

Representation
For the Claimant: Ms K Moss, counsel
For the Respondents: Mr A Smith, counsel

JUDGMENT

1. **The claim of unfair dismissal fails and is dismissed.**
2. **The claim of direct discrimination fails and is dismissed.**
3. **The claim of breach of contract is dismissed on withdrawal.**

REASONS

Introduction

1.1 By a claim presented to the London Central Employment Tribunal on 11 November 2016 the claimant brought claims of direct discrimination, breach of contract, and unfair dismissal.

The Issues

2.1 At the commencement of the hearing the issues to be considered were identified.

2.2 The breach of contract claim, for alleged non-payment of bonus, was withdrawn and dismissed.

2.3 The claimant alleged direct race discrimination. The claimant relied on one allegation of race discrimination and that was the decision that the

claimant could not apply for a grade F appointment during a restructure known as 'Project Archway.'

2.4 The claimant relied on one comparator, Ms Moberly. It was the claimant's case that her comparator had been allowed to apply for a grade F role, despite not being on secondment for 12 months, as her secondment came to an end when she went on maternity leave in October 2015.

2.5 It was less clear the way in which the case was put. Initially the claimant stated that there was no policy, rule, or procedure prohibiting individuals from applying for posts at their own level unless they had been in an acting up role or secondment role at a higher grade for at least 12 months. It was the claimant's case that this alleged practice had been invented in order to justify the different treatment of Ms Moberly.

2.6 The claimant alleged that the explanation of the respondent, that Ms Moberly was treated as having 12 months in secondment as acting otherwise could be maternity discrimination, was untrue and an invention.

2.7 It was less clear who the claimant stated was responsible for the alleged discriminatory decisions and practice. It was the respondent's case that the two individuals involved in the decision were Ms Frew and Ms Carver. However, Ms Moss declined to clarify who the claimant alleged had discriminated.

2.8 Nevertheless, Ms Moss identified that the claimant's primary case was one of direct, deliberate, and conscious discrimination because the claimant was a black person.

2.9 Mr Smith indicated that it had never been suggested this was a case of subconscious bias.

2.10 Ms Moss declined to accept this was not a case of subconscious bias. We therefore considered this in detail. We sought to understand the basis on which any claim of subconscious discrimination could be pursued. We specifically enquired whether this was an allegation of an "innocent" decision giving effect to some previous discriminatory act. It was specifically conceded that the case was not advanced in that manner. Therefore, to the extent there was any allegation of subconscious discrimination, it was the mental processes of the individuals who decided that the claimant could not proceed with any application for appointment at a higher grade, during the restructuring. This did nothing to identify the specific individuals and it remained the position that Ms Moss declined to identify against whom the allegations were brought.

2.11 It follows that there was one allegation of discrimination identified, which revolved around the decision that the claimant could not apply for a grade F role because she was a grade E employee who had not been seconded as a grade F employee for the requisite period.

2.12 Finally, there was an allegation of constructive dismissal advanced both as unfair dismissal and direct discrimination. The claimant relied on the single alleged act of discrimination as constituting the breach of the implied term of mutual trust and confidence. It was said to be a discriminatory dismissal because she accepted the discriminatory act as a fundamental breach of contract.

Evidence

3.1 For the claimant we heard from the claimant, C4; Ms Lesley Wan, C5; Mr Amapal Takk, C6; and Ms Lorraine Campbell, C7.

3.2 For the respondent we heard from Ms Sarah Frew, R5; Ms Joanna Carver, R6 ; Mr Greg McEneny, R7;and Ms Mei Yen Chan, R8.

3.3 In addition we received statements (but the witness was not called) from Mr Stephan Hall for he claimant. It was said he had mental health issues and was not able to attend. No medical report was produced, although we did get a fit note.

3.4 We received a bundle, R1.

3.5 On the first day of the hearing, the respondent filed a skeleton argument in support of its application to exclude evidence, R2; opening submissions, R3; and a list of amended liability issues, R4. The claimant filed a skeleton argument concerning preliminary matters, C1 and a draft list of issues, C2.

3.6 On day two of the hearing, we received an application from the claimant, C3.

3.7 We received written submissions from both parties.

Concessions/Applications

4.1 At the commencement of the hearing, we considered the issues. It was initially stated that there was only one allegation of discrimination: the constructive dismissal. It was clarified that the breach of contract relied on was the failure to allow the claimant to apply for a grade F post.

4.2 We explored the nature of the claimant’s allegation. The tribunal referred specifically to the case of **CLFIS v Reynolds 2015** EWCA Civ 439.

4.3 It was the claimant’s case that two individuals, Ms Sarah Frew and Ms Joanna Carver, had consciously decided to refuse to allow the claimant to apply because of her race.

4.4 As the conversation developed, Ms Moss suggested that the alleged conscious discrimination was her primary case, but indicated there was a

claim of subconscious discrimination. Mr Smith stated there was no basis in the claim form, or the claimant's witness statement, for any case of subconscious discrimination. He said no such claim was intimated or pleaded.

4.5 We sought to ascertain the nature of any claim of subconscious discrimination. We specifically enquired whether there was any suggestion that Ms Frew and Ms Carver had been influenced by some previous discriminatory act such that they were unwitting conduits and 'innocent' employees. If that was the case it may be necessary to amend the pleadings, as a claim may lie against some other individual. It was specifically confirmed that there was no such allegation and that no such allegation would be pursued.

4.6 We then sought to understand the nature of any secondary allegation of discrimination, which appeared to be based on some form of subconscious discrimination. Ms Moss was unable to point to any part of the claim form, or the claimant's witness statement, which assisted. We noted that claims of subconscious discrimination often proceed on the basis of an allegation that an individual had unrecognised discriminatory assumptions. These cases often rely on assumptions such as an individual would not fit in. However, that did not appear to be the nature of the allegation of subconscious discrimination.

4.7 It was the claimant's primary case that the alleged policy – that only those who had been seconded to a higher grade for a year could apply for a similar job above their substantive grade – did not exist. It was therefore the claimant's case that the policy had been invented, deliberately, so as to expressly to exclude the claimant from applying.

4.8 The claimant ran a second argument. If the policy did exist, there was discrimination against the claimant because Ms Jo Moberly was permitted to apply, despite the fact that [she] had not completed 12 months' secondment in October 2015, when she left for her maternity leave. It was accepted that, by the time the redeployment process was announced, Jo Moberly would have been on secondment for 12 months but for the maternity leave. It was the claimant's case that the secondment came to an end when her maternity leave started. It was her case that it was not permissible to add on the period of maternity leave and that the period of maternity leave was added for the purpose of deliberately allowing Jo Moberly to apply as a white person whilst consciously excluding the claimant as a black person.

4.9 The claimant also suggested that there was a general discretion to allow individuals on secondment to apply for roles at a higher grade during reorganisation. The basis for this was not set out at all. It was the claimant's case that there was no policy which was capable of variation at all. It therefore appeared to be an assertion of general discretion, but the basis for that was not specified.

4.10 In that context, we sought to understand what was the basis for subconscious discrimination. We suggested one way it may be advanced was a failure to exercise a discretion because some form of unrecognised racial assumption. This would include general concepts such as the claimant would not fit in. However, whilst we suggested that was one way it might be pursued, it was not adopted by the claimant.

4.11 It may be possible to argue that some form of subconscious discrimination influences the decision to treat Jo Moberly as employed on secondment for a full year. However, that was not specifically accepted or adopted by the claimant either.

4.12 The basis on which any allegation of subconscious discrimination was pursued, therefore, remained obscure.

4.13 In the circumstances, we asked Ms Moss to consider her position and revert to us the following day, once we had read the witness statements. She should either clarify the nature of the subconscious discrimination claim as it appeared in the claim form, confirm that no such claim is pursued, or set out the basis for it in any relevant amendment.

4.14 Mr Smith then sought clarification as to whether there was any further allegation of discrimination. Ms Moss referred to an allegation which was not identified adequately. There was some suggestion that the failure to continue the claimant at pay grade F level was an act of discrimination. We ascertained there had been, prior to the hearing, an application for an amendment, and it appeared that the claimant assumed it had been allowed. However, Ms Moss was unable to identify any specific order of any employment judge. We considered the amended paragraph. Whilst it made some reference to the failure to continue to pay the claimant a grade F, the detail was obscure. The proposed amendment failed to set out the basic details including: the basis on which she was entitled to that pay, the person who made any contrary decision, and the date of any decision. It was also far from clear that it was put as an allegation of discrimination. As Ms Moss was unclear about the status of the application and whether there had been any decision, we asked her to consider the position and address us further the following day.

4.15 We noted that it appeared any allegation that failure to pay was an act of discrimination was essentially a new cause of action based on entirely new facts. We indicated it would be necessary to provide clear written particulars of the allegation, as it currently appeared to be unclear, before we could consider it.

4.16 On the first day Ms Moss clarified that the claim for bonus, the breach of contract claim, was withdrawn and we dismissed it.

4.17 On the first day, Mr Smith indicated that he intended to object to the claimant calling a number of witnesses. He had produced two skeleton arguments. One concerned his application to exclude witnesses. The

second document was a set of opening submissions. Ms Moss confirmed she had no objection to our reading them. The claimant had produced a skeleton argument on preliminary matters and we said we would read that also.

4.18 We refused to hear any application to exclude evidence on the first day, as we would wish to read the statements first. We noted that the basic principle we would apply is whether the evidence was sufficiently relevant. We noted the fact that there was other litigation involving the witnesses which was not relevant to our decision.

4.19 We agreed that the hearing would be limited to liability only.

4.20 On day two of the hearing, the claimant submitted an application to amend the application to amend; insofar as it is material, it read as follows:

> **<u>The amendment included in the Particulars of Claim at [39C to I]</u>**
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> **1. The Claimant submitted an application to the ET by email on 15th February 2017 asking for permission to amend the Particulars of Claim ("POC") in the form at [39C-39I, 39A-B]. There had been a Preliminary Hearing that day but there had been insufficient time to deal with the application. On the 21st February the Respondent requested further and better particulars and the Claimant responded on the 3rd March 2017 [39J]. On the 8th March the Respondent wrote to the ET saying they did not object to the Claimant's application and they applied for permission to amend their Grounds of Resistance ("GOR"), but no draft amendment has been sent to the Claimant.**
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> **2. It would appear that the matter was not canvassed again by either party and so there has been no formal permission given by the Tribunal for the amendments proposed at pp.39C-I (pertinently, 39G which is the only page which includes amendments). In these circumstances, the Claimant applies for permission to amend the Particulars of Claim in the form of the draft submitted on the 15th February 2017. The Respondent presumably has no objection, as it did not previously, has known about the proposed amendment since February, included the amended POC in the Bundle, drafted a List of Issues which included the amended claim, and the Respondent's witnesses deal with this claim in their evidence.**
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> **3. If the Respondent does have an objection, *Selkent* applies, the balance of prejudice clearly lies in favour of the Claimant. There is simply no prejudice to the Respondent, since they are prepared to deal with this claim as part of these proceedings. There would be great prejudice to the Claimant if she was prevented from pursuing this part of her direct race discrimination claim, and denied a remedy.**
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> **4. The Further Information contained in the Claimant's solicitors' letter on [39J] provides the detail of who and when. (The Claimant's salary was not in fact reduced; she was told that it would be when her secondment came to an end). The Claimant was told by Mei Yen Chan on 29th July 2015 that her salary would be reduced at the end of her secondment, rather than being maintained at the Grade F level. The Respondent maintained this position until the end of the Claimant's employment. This decision contributed to the Claimant's constructive unfair dismissal and was discriminatory.**

4.21 The application, it follows, made no attempt to set out the specific detail we had referred to on day one. The fact that the claimant refers to detail contained in an extra letter simply served to confirm that our concerns about the lack of detail and clarity were legitimate and correct. It is for the claimant to set out the detail of the allegation in the pleadings. The detail should be set out because the tribunal must be able to determine what the allegation is. This involves a finding of fact. If the factual circumstances as relied on are not made out, the allegation will fail at that point. The respondent should know the specific allegation so that it can produce an explanation and identify the relevant cogent evidence. It is not appropriate for the claimant to refer generally, and loosely, to documentation; this simply invites misunderstanding and confusion which can, and should, be avoided by a careful and appropriate amendment.

4.22 The application to amend also deals with the issue of subconscious bias. It read as follows:

> **Conscious and/or sub-conscious bias**
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> **5. The Claimant has pleaded her discrimination claims as direct race discrimination (under section 13 Equality Act 2010) – paragraphs 23, 25, 28, 30, 32 [39G-H]. It is unnecessary for the Claimant to specify in a pleading whether she wishes to pursue a claim involving conscious or subconscious bias. There is no other provision under the EqA 2010 to be relied upon. It is unnecessary for the Claimant to prove a conscious motive to succeed in a direct race discrimination claim – *Nagarajan v London Regional Transport* [1999] IRLR 572, *Ahmed v Amnesty International* [2009] IRLR 884. There is no authority that suggests that a Claimant needs to plead expressly conscious and/or sub-conscious bias in order to pursue a direct race discrimination claim on either or both of those grounds.**
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> **6. Her primary claim is that there was a conscious discriminatory motive which caused her being prevented from applying for the role of Grade F Senior Lawyer, and which caused her being told she would revert to the salary from her substantive role at the end of her secondment. If the tribunal are not satisfied of that, the tribunal are asked to consider whether there was a sub-conscious bias on the part of the Respondent's decision-makers.**
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> **7. If the Tribunal is against me on this submission, the Claimant applies for permission to amend the POC to include the following passage after the sentence at paragraph 30 of the POC [39H]:**
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> **"*The Claimant contends that the less favourable treatment was as a result of conscious and/or sub-conscious racial bias against nonwhite employees on the part of the Respondent".***
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> **8. Given that the Respondent has known that the claims were brought under s.13 EqA 2010, and therefore it is unnecessary for the Claimant to prove conscious motivation to succeed in her direct discrimination claim, and there is no change to the Respondent's evidence which is necessary, again, the balance of prejudice lies very firmly in favour of the Claimant.**

4.23 We note that the proposed amendment does nothing to say who was subject to subconscious discrimination, how it operated, or in relation to what decision. It failed to clarify any of the difficulties we raised on day one, and it failed to explain the nature of the subconscious discrimination

claim. It also appears to seek to amend the basis on which the constructive dismissal claim is brought. Whilst there are some tangential references to the constructive dismissal claim, the basis for this and the way in which it modifies the claim as it had hitherto been pursued was not explained. If there was some form of express term, that term is not identified. If there was an implied term, that term is not identified. If there was some behaviour which was said to be breach of the term of mutual trust and confidence, the basis for that is not set out.

4.24 On day two of the hearing, Ms Moss proceeded with her application to amend the claim form.

4.25 Mr Smith proceeded with his application to exclude witness evidence and to interpose witnesses.

4.26 We allowed the claim form to be amended to include a bare allegation of subconscious discrimination, as set out in paragraph 7 of the amendment. We rejected the remainder of the application to amend the claim form. We reserved the reasons.

4.27 We rejected the respondent's application to exclude the claimant's witnesses. We rejected the respondent's application to interpose witnesses. We reserved the reasons.

4.28 The parties agreed to allow further documents to be introduced into evidence and we allowed the order by consent.

4.29 We can deal briefly with the reasons for our decisions.

4.30 The application to amend was made initially on 15 February 2016. It sought to make the following amendment[1]:

> **24. The claimant was informed that upon being returned to a grade E post her salary would be dropped to that level. This was despite this being contrary to the normal practice of the respondent, which was to maintain the pay of staff in the unusual situation of them being returned to the lower substantive grade at the end of secondment.**
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> **25. Owing to the respondent's decision to block her application for the grade F role, and reduce her pay, and to do so in a perverse, discriminatory and true manner, the claimant considered that the respondent had, without good reason, undermined all trust and confidence she had previously had in her employer.**
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> **26. As a result, on 1 April 2016, after receiving the outcome of the restructuring which placed her back at a grade E post and being informed of the reduction of her pay the claimant resigned.**

[1] The proposed amendments to the original claim are shown as underlined.

4.31 On the first day of the hearing, we discussed the lack of clarity. It was unclear whether it purported to raise a fresh allegation of discrimination, and if so what was the allegation. The amendment as drafted referred, vaguely, to the manner of the treatment. It failed to set out any clear allegation or factual basis setting out the nature of any specific contractual or other obligation. It failed to say who made any inappropriate decision or when that decision was made. We indicated that if the application was to be pursued the specific allegation must be identified, as must the factual matters in support. We stressed the need for clarity.

4.32 The claimant failed to address any of these matters. The application made no attempt at all to clarify matters. Moreover, Ms Moss accepted that the basis of the allegation was not set out in the amended the claim form and she referred, vaguely, to a letter sent in support by her solicitors, which she described as "further and better particulars." Ms Moss offered no reason for why there had been a failure to include all the relevant particulars in the application to amend.

4.33 Mr Smith's main argument was that the respondent should not be required to deal with unclear allegations. He submitted that natural justice demanded that the amendment should be certain and clear.

4.34 We find Mr Smith's submission is correct. The claimant chose to rely on an amendment she knew was unclear. Had we allowed the amendment, it was inevitable we would then have had to seek further and better particulars as to the nature of the allegation. Such particularisation may also have required further amendment. This would have led to delay. It would have been unclear whether the respondent would need to obtain further evidence. It is likely that either because of delay or because of the need to obtain further evidence that the hearing would have been adjourned or abandoned.

4.35 Amendments should be clear for two reasons. First, the tribunal must be able to determine whether the factual circumstances that are said to be the treatment in fact occurred. If there is a lack of clarity, the tribunal does not know what factual allegations it must decide. Second, if the burden of proof shifts, the respondent is required to produce an explanation. There is an expectation that the explanation must be supported by cogent evidence. If the initial allegation is unclear, there is a serious risk that the respondent will be unable to identify all of the specific factual allegations put in support, and will be denied the opportunity, first, to dispute the factual allegations and second, to produce the relevant cogent evidence needed to rebut the allegations. It is fundamentally unfair to a respondent to allow by amendment a vague and unparticularised allegation because there is severe risk of prejudice to the respondent, as it may be denied the opportunity to establish an explanation.

4.36 The claimant offered no reason for the lack of clarity. We considered the balance of hardship. The claimant could proceed with her primary claim, which concerned dismissal. There was little hardship for the claimant, but considerable hardship for the respondent. When announcing our decision

we did confirm that a key point was the fundamental lack of clarity. We noted that the claimant may apply at any time during the hearing to include a clear allegation, even when the application to amend was initially refused.

4.37 As regards the second allegation, this is a bare assertion that the less favourable treatment was as a result of conscious or subconscious racial bias. There is nothing in this amendment which expands on the initial claim. It cites no new allegation of discrimination. It identifies no new facts. It identifies no new argument. It is not necessary when pleading a case to specify whether the discrimination occurs because of conscious or subconscious for processes. The purpose of our discussion on day one was to understand the basis on which the claim was pursued. The tribunal did not suggest that there is a specific need to plead the concept of subconscious discrimination. However, it is appropriate to consider whether the way the case is pursued is relying on conscious or subconscious motivations.

4.38 On the first day we suggested that there were a number of ways in which it may be possible to argue subconscious discrimination. We explored those possibilities in order to seek to understand the nature of the claimant's case. Ms Moss was unable to identify any basis for proceeding with a claim of subconscious discrimination and hence why we asked her to consider the matter and to set out the factual basis of any claim of subconscious discrimination. The application as made did nothing at all to clarify the claim of subconscious discrimination. However, given that this was a bare assertion, which simply reflected the general right to argue subconscious discrimination, there was no reason to disallow it. It was, essentially, an irrelevant and unnecessary application.

4.39 We considered the respondent's application to exclude witness evidence.

4.40 We referred to the case of **HSBC Asia v Gillespie** EAT 417/10. It is not unusual for witnesses to give irrelevant evidence. It does not necessarily follow that a decision should be made either at an interlocutory stage or during the course of the hearing. It is frequently better to hear any potentially irrelevant evidence and then, having regard to the submissions made concerning it, consider whether it is in fact relevant.

4.41 Mr Smith made a number of points in his submissions we deal with them briefly. The argument as to relevance could safely be determined at the conclusion of the case. There was in our view no risk of the essential issues being obscured. We did not consider that their admission would substantially increase the length of the hearing. We did not consider their inclusion to be oppressive or prejudicial. There was no risk of our determining the claims of other individuals and therefore no risk of circumventing a previous tribunal ruling of 15 February 2017.

4.42 Mr Smith suggested that if we allowed the irrelevant evidence to proceed, he would be compelled to cross-examine on it in order to protect the respondent's position. We consider that submission to be unrealistic. We

noted that much of the evidence consisted of bare allegations of discrimination. It was not for the tribunal to determine allegations of discrimination not pleaded by the claimant. We could see no basis on which Mr Smith would need to cross-examine those witnesses as to their assertions of discrimination. It appeared to be the claimant's case that, in some manner, the other witnesses' assertions of discrimination were relevant to her case. We considered it better to hear the evidence, receive full submissions, and then decide the point. We therefore rejected the application to exclude the witnesses.

4.43 As to interposing his own witnesses, it appears that two of the witnesses, Miss Carver and Ms Frew, had booked foreign holidays. We made it clear on day one that, before exercising any discretion, we would need full disclosure as to the nature of the holidays, when they were booked, and why the application had not be made earlier. No such information was given. Instead Mr Smith relied on the assertion that those witnesses would find it convenient. That was not a good enough reason to disturb the normal pattern of evidence. Ms Moss thought that the claimant may be disadvantaged. Whilst that assertion was not developed, the mere fact that the respondent's witnesses may find it convenient to be heard earlier was not enough to disturb the normal order of evidence. There is good reason for asking the claimant and her witnesses to give their evidence first. The whole of the claimant's case is then put and the scope of the cross-examination is clear. That should only be disturbed when there is good reason to do so. There was no good reason in this case.

4.44 On day three of the hearing, and whilst the claimant was giving evidence, Ms Moss made a further application to amend. Insofar as it is material it reads as follows:

> **1. As the learned judge yesterday indicated that the reason for the amendment application being rejected was due to lack of clarity of the proposed amendment. The Claimant now applies for permission to amend the Particulars of Claim in the following way, to be inserted between paragraphs 23 and 24 of the original Particulars of Claim:**
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> > **"24. The Claimant was informed verbally by Mei Yen Chan on 29th July 2015 that her salary would reduce to her previous salary level upon her being returned to her substantive role. This was confirmed by email on 29th July 2015 for Mei Yen Chan to the Claimant. Joanna Carver and Mei Yen Chan knew that it was normal practice not to reduce base pay when employees move from a secondment to their substantive role. The Claimant contends that the decision to reduce the Claimant's salary at the end of her secondment was an act of direct race discrimination under s.13 Equality Act 2010 (as a result of conscious or sub-conscious racial bias). She relies upon a hypothetical comparator and/or Jo Moberly who was in a materially similar position to the Claimant at the end of her secondment in October 2015 but the Respondent decided not to reduce her pay to the level of her substantive role."**
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> **2. The Respondent did not have an objection previously in February when a less clear amendment about the same facts and claim was applied for. The Respondent has also been provided with Further Information from the Claimant at the beginning of March 2017, on request. The Respondent**

included the previously proposed amended POC in the Bundle, drafted a List of Issues which included the previously proposed amended claim, and the Respondent's witnesses deal with this claim in their evidence.

3. The Selkent principles apply, the balance of prejudice clearly lies in favour of the Claimant. There is simply no prejudice to the Respondent, since they are prepared to deal with this claim as part of these proceedings. There would be great prejudice to the Claimant if she was prevented from pursuing this part of her direct race discrimination claim, and denied a remedy.

4.45 The application was made whilst the claimant was giving her evidence. We noted that the application to amend must have been drafted without seeking the claimant's specific instructions, as she was giving evidence at the time. Ms Moss initially indicated that it was unnecessary to take the claimant's instructions, as her instructions were already sufficiently clear. We did not hear the application until the claimant's evidence had concluded and Ms Moss had been given an opportunity to take the claimant's instructions.

4.46 The application to amend was, essentially, a renewal and expansion of the previous application.

4.47 The application still lacked clarity and we sought further information as to the way the claim was put. It was confirmed to be a stand-alone race discrimination claim which had no relevance to the constructive dismissal claim. There was an assertion that the normal practice was that individuals would not return to their pre-secondment salary when reverting to their substantive post. The basis for this was not set out. Ms Moss accepted that there was no allegation that secondment changed the substantive contract. She confirmed that there was no allegation of any implied term. The basis on which it was said to be a normal practice remained obscure.

4.48 It was agreed the claimant did not, in fact, ever return to her pre-secondment pay. The only potential loss was an enhancement to the claim for injury to feelings. The total claim for injury to feelings was already put at £20,000 and the value of the claim already before the tribunal as pleaded was in the region of £1.4 million. It was accepted that the increase in injury to feelings could possibly increase the value of the claim by £1–2,000. This was about a 0.1% of the value of the claim.

4.49 Mr Smith noted that the application failed to make the allegation clear. It was not clear against whom it was brought. In oral evidence the claimant had disavowed any suggestion that Ms Chan had discriminated. It was unclear against whom the allegation was proceeding: was it Ms Chan or Ms Carver or someone else? He noted that the oral evidence of the claimant was diametrically opposed to any potential claim against Ms Chan.

4.50 We considered the balance of hardship and had regard to **Selkent**. We concluded that this was a new claim based on new factual allegations. It related to events dating back to July 2015 we were now in April 2017 and

the claim was significantly out of time. It is clear that the application could have been made earlier. A less particularised application was made in February 2017 and had already been pursued before the tribunal. No explanation was given as to why even the level of detail contained in this application could not have been included in the original application. There was therefore no good reason for any delay. Allowing the application would necessitate further clarification and potentially the recall of witnesses. There was a serious risk that the hearing would have to be adjourned or abandoned because it would be necessary for the respondent to be given an opportunity to produce the relevant cogent evidence. This would include producing evidence of how others were treated. There was force in the respondent's arguments that the allegation appear to be contrary to the claimant's own witness evidence. Further, the failure of the claimant to set out the basis for the alleged normal practice suggested the merits of the allegation were weak. When considering the balance of hardship, it is clear the claimant could pursue her primary claim. This was a stand-alone race discrimination claim. The effect on the overall value of the claim was de minimis. Balanced against this was the real risk that the hearing would be adjourned or would go part heard. There could be considerable delay. It would be necessary for the respondent to incur further and potentially disproportionate costs in dealing with this matter. The balance of hardship was against allowing the application.

4.51 On day four of the hearing at 13:02, we received a written application from the claimant for disclosure of documents. On the morning of day four, Ms Moss had made the application orally. It appeared that the application for disclosure had already been considered by Employment Judge Lewzey in March 2017. We enquired whether there had been any appeal or further application, but no explanation was given. We indicated that if the application for disclosure was to be pursued Ms Moss should provide the following: a draft order; an explanation as to what application been made previously; the outcome of the previous applications; the reasons for any refusal of a previous application; details of what, if anything had now changed; and the reason why it would be in the interest of justice to allow any application for disclosure of documents that had been previously refused.

4.52 By email of 2 May 2017 13:02, the claimant's solicitors provided an application as follows:

> **We act for the Claimant in the above case and write to renew our application for specific disclosure of copies of all correspondence to Jo Moberly in or around September 2015 and any correspondence relating to the ending of her secondment and continuation of her higher pay rate for the duration of her maternity.**
>
> **The Respondent rely entirely on their position that Ms Moberly would have been seconded for a period of one year whereas the Claimant had not been as their defence to allowing Ms Moberly to apply for the Grade F role and not the Claimant. The Respondent has disclosed emails indicating that Ms Moberly's secondment in fact ended prior to it lasting for a period of one year, but that her pay was maintained. Should this be the case this would**

evidence that the Respondent's entire position regarding them allowing Ms Moberly to apply for the post and not the Claimant is fundamentally flawed,

It is therefore contended that disclosure of evidence detailing the end of Ms Moberly's secondment and the protection of her pay is vital to the Claimant's case and highly relevant, and that these important documents should be easily located on Ms Moberly's personnel file/record.

This application was previously declined on the 29th March 2017 on the basis that it was disproportionate, however it is understood that the Tribunal has given permission for this application to be renewed.

We have copied the Respondent's representative into this application, who should respond to the tribunal copying us in should they wish to oppose our application.

4.53 That application failed to deal with the matters that we had identified. Moreover, it inaccurately suggested that permission had been given for the application. We asked that Ms Moss should consider whether to renew the application before us, and if so, she should seek to comply with the directions given. We indicated we would not hear the application until the respondent had seen it in writing, and therefore it could not proceed until the morning of day five.

4.54 In accordance with the timetable agreed, all evidence was finished by the end of day four ready for submissions on day five.

4.55 On the morning of day five, we received a further application from Ms Moss. This application was for disclosure and was as follows:

1. The Claimant renews her application for specific disclosure of:

The Respondent's correspondence, including any note of telephone calls, to Ms Moberly, between September 2015 – November 2015 relating to her application to the permanent role of Grade F Senior Lawyer in London, the change of recruitment from a permanent to an interim role, the maintenance of her salary during her maternity leave, and what her position / job title / Grade was whilst she was undertaking her maternity leave.

2. This evidence is relevant because the Respondent relies on their position, that Ms Moberly would have been seconded for a period of one year whereas the Claimant had not been, as their explanation for allowing Ms Moberly to apply for the Grade F role and not the Claimant. The Respondent has disclosed emails [214-215A] indicating that Ms Moberly's secondment in fact ended in or around October 2015, but that her pay level was maintained during her maternity leave. The Respondent must have corresponded with Ms Moberly to have informed her of the outcome of the recruitment process, her salary and her position during maternity leave. The Respondent's case is that Ms Moberly's position in a Grade F secondment continued throughout her maternity leave. The Claimant's case is that her secondment came to an end in October 2015, and although her Grade F level pay was maintained, her position was Grade E throughout her maternity leave. If there is any evidence which demonstrates what Ms Moberly was told at the time about her position during her maternity leave, that is clearly relevant evidence and is disclosable. These documents should be easily located on Ms Moberly's personnel file/record and are not

anticipated to amount more than a handful of letters / emails (given that two of the three months are within Ms Moberly's maternity leave).

3. This application (made with a number of other requests for specific disclosure) was previously declined on the 29th March 2017 by EJ Lewzey on the basis that it was disproportionate, however it is now hoped that the Tribunal, having heard the evidence of the parties, can appreciate the relevance of the limited documents requested and the proportionate nature of the application.

4. The Respondent's representative has been copied into this application.

4.56 The current application for disclosure was similar to, or identical to, part of the previous application which had been considered, and rejected, by Employment Judge Lewzey.

4.57 As to what consideration was given to the original application, and the reasons for its refusal, no explanation was given. Ms Moss said she was not in attendance and could offer no assistance. Her primary submission was that the relevance of the documents and the need for those documents had been clear during the entirety of the case. In any event, to the extent that it may be argued that the relevant documents could not be identified prior to disclosure, there was no argument that they could not be identified shortly after disclosure. The original application had been made in February 2017.

4.58 No explanation was offered as to why the decision of Employment Judge Lewzey was not appealed, or why the application and not been renewed prior to the hearing. No explanation was offered as to why the application could not have been made at the beginning of the hearing. We sought to understand what evidence, if any, presented during the hearing had led to any further line of enquiry or had changed the potential relevance of potential documents. No adequate explanation was given. Ms Moss suggested, generally, that this tribunal was now in a better position to understand matters as it had heard the evidence.

4.59 To the extent that there was relevant evidence, we noted we had heard no evidence to suggest that there was any specific document created which had not been disclosed. The evidence of Ms Chan did not suggest that there was any formal documentation concerning the interim position and the treatment of Ms Moberly.

4.60 The claimant's request was, essentially, a fishing expedition. There was some general assertion, without any specific evidence, that documentation must exist, and this despite the fact that the same process which led to claimant's appointment to the interim role was not supported by documentation from the respondent to the claimant. It follows there was evidence that little or no documentation had been created by the process. The suggestion that some documentation been sent to Ms Moberly was pure speculation.

4.61 Granting the application would have led to delay and further costs. There was no basis for believing that there was any failure to disclose documentation. There was a risk that there would be applications to recall witnesses, or to produce new witness evidence. This would have led to the hearing being adjourned and considerable delay.

4.62 Nevertheless, if there was sufficient reason to believe that there was documentation which was sufficiently relevant, it may still have been appropriate to order disclosure. It was the claimant's case that there was already sufficient evidence before the tribunal to turn the burden in relation to the relevant decision. Should the burden shift, it is for the respondent to produce the relevant cogent evidence in support of any explanation. If there were any basis for arguing that there was withholding of documentation, that may in itself be enough to defeat the explanation. Against that, there was no basis to believe there was any undisclosed documentation, or that it would be sufficiently probative to potentially defeat the explanation.

4.63 There must be certainty and finality in litigation. A tribunal should exercise caution before granting an application for specific disclosure which appears to be a fishing expedition, at any time. A tribunal should be even more cautious when the application is made extremely late without good reason or excuse. It was open to the claimant to appeal the original order. It was open to the claimant to make an application in good time prior to the hearing. It must be assumed that the claimant made a litigation choice. In this case there was no sufficient evidence to suggest that there was any documentation which was sufficiently relevant that had been withheld. There was no explanation for the delay. The potential disruption to the hearing was clear and manifest. We therefore refused the application.

<u>The Facts</u>

5.1 The respondent bank maintains an in-house legal department. At all material times, the claimant was a lawyer within that department. The lawyers occupy positions which are graded. These include lawyers graded as D, E, F and G (G being the highest).

5.2 On 11 May 2006, the claimant commenced work with the Halifax Bank of Scotland as a solicitor in the derivatives team. In September 2007, she was admitted to the roll of solicitors in England and Wales, having already qualified as a New York attorney.

5.3 The claimant describes her ethnicity as black British.

5.4 In 2009, the respondent merged with Lloyds Banking Group. The claimant states that the environment and culture in Lloyds was different and that "the institutional racism became apparent."

5.5 In her evidence the claimant is critical of Mr McEneny who she states sought to intervene in her ratings and "was quick to side with other employees who were happy to act on micro-inequities to put [her] down."

5.6 At all material times the claimant occupied a substantive role at grade E. In 2014, the claimant secured a secondment, also at grade E. She alleges that Mr McEneny attempted to push forward a white colleague, Mr Brian Kearns; the claimant was specifically asked to undertake the role by the products team manager, Ms Chan.

5.7 Shortly thereafter, a further opportunity arose as a senior lawyer (grade F). The claimant recognised that she had little exposure to the wider commercial banking projects and business. She discussed it with Ms Chan and with Mr McEneny. She states that neither was encouraging and she decided not to apply

5.8 In her evidence, the claimant suggests that Mr McEneny deliberately sought to hold her back whilst ensuring that an inadequately qualified individual was able to apply for the role. Her reason is unclear. The claimant could have applied for the role had she chosen to.

5.9 Another grade E solicitor, Ms Moberly, applied for the job and was appointed to undertake the secondment. Ms Moberly is white British. She had two years' post qualification experience whereas the claimant had seven.

5.10 Ms Moberly started that post, which was based in London, on or around 26 January 2015. The secondment was in Ms Chan's team and covered the grade F role of Alexandra Zambas who had taken a secondment elsewhere.

5.11 A further secondment opportunity for a grade F senior lawyer arose later in the year. This role was based in Bristol. The claimant applied for the role and was appointed on 8 March 2015, but did not start in the role until July 2015. A white male applied for the role, but was unsuccessful.

5.12 There were three grade F posts in the relevant team. They were based in Bristol, London and Edinburgh.

5.13 In the summer of 2015, Ms Zambas secured a new permanent role and so the London role ceased to be occupied by an incumbent employee. Ms Chan sought approval to recruit a permanent replacement. She identified that Ms Moberly would be on maternity leave from the end of September

5.14 Three employees: the claimant, Ms Moberly, and a white man, Mr Cassar, applied for the London grade F senior lawyer role. The claimant was shortlisted.

5.15 At this time, there was an ongoing process of reorganisation. Mr McEneny had been acting as general counsel for commercial banking. That position was filled full-time by Ms Joanna Carver from July 2015. Ms Carver took over responsibility for the team of ninety or so lawyers supporting the commercial banking division. One of her tasks was to address the structure of CB legal and establish how it may be altered to better serve

the needs of the bank. She decided that a new structure should be introduced. She considered a target operating model and arranged for an off-site meeting with her direct reports to take place in September 2015.

5.16 As part of this process, Ms Carver, on or about 1 September 2015, discussed with Ms Chan the grade F senior lawyers' role. Ms Carver took the decision that it would be inappropriate to proceed with a permanent appointment when it was unclear whether that role would, or would not, continue post the restructure. Ms Carver decided to preserve the position by continuing that role on an interim basis.

5.17 The effect of Ms Carver's decision was that the process of appointing a permanent lawyer for the grade F position ceased.

5.18 Ms Chan sought practical advice as to what she should now do. The job application had been opened on the respondent's human resources system and it needed to be coded as closed in some manner. It became referred to as an interim post. The exact mechanism is unclear. Mr McEneny suggested in his evidence that the term "interim" had no specific meaning and was just a convenient label.

5.19 It is clear there was no formal process of appointment for the interim role. Ms Zambas had secured a new role. This led to the proposed competitive process to fill the London role. That process was brought to an end by Ms Carver's unilateral decision to remove the permanent position pending completion of the restructure process.

5.20 After Ms Carver had made her decision, Ms Chan dealt with the practicalities as recorded in the email of 2 September 2015. She recorded that Ms Carver had made the decision to make the London role an interim role pending, possibly, opening it up post the September meeting to consider the new structure. She recorded that of the three candidates who had applied, Mr Cassar was not interested in the interim role, but would consider applying for the permanent role, if and when it was advertised. Ms Moberly was about to go on maternity leave. The email states, "She won't be in a position to apply for the interim as she will be starting maternity leave as of 9 October …" She recorded the claimant was still interested in the interim role and happy to cover Bristol alongside Gavin Simpson. She then said "So my proposal is for Haja to cover London when Jo starts her maternity leave on 9 October and for both Haja and Gavin to cover Bristol until our TOM is agreed." She then asked a number of questions about the practicality of achieving this.

5.21 Ms Chan in the same email specifically asked about Ms Moberly's position. She addressed the question to HR . She stated "The proposal is that we keep Jo's salary at her current acting up role while she goes on maternity leave. This is because by making the role an interim role, she will not be able to apply for this role and it is only right that we ensure she is not financially worse off as a result of us making this role interim for now… Jo can then apply for the new role then."

5.22 Ms Chan then went on to ask a number of questions in particular as to what the process was for ensuring that Ms Moberly's pay remained the same whilst on maternity leave. It was also envisaged that Ms Moberly may apply for the job if advertised, as it may be necessary to obtain maternity cover for her should she be successful.

5.23 There was then a phone call between Ms Chan and Naomi Tountas from HR during which the outstanding issues were addressed. It was said there was no need to readvertise the role. This appears to be a reference to the interim role. It is stated the claimant had already gone through high risk vetting again. There is reference to her secondment to the end of January 31 and a statement there was no need to do anything. There's a reference to Ms Moberly's application being withdrawn and the other candidate having already withdrawn. There is reference to confirmation being necessary that the permanent role is no longer available due to reorganisation. It then states in relation to ATR (authority to recruit) that it would just go through the cost board as planned. Ms Chan explained in evidence that this was essentially an internal process to facilitate the decision that had already been made with regard to Ms Moberly continuing up to her maternity leave and the claimant taking over thereafter.

5.24 The remaining cover for that role, which it is clear was assumed would remain in place pending the resolution of the restructure, was thereafter referred to as an interim position.

5.25 Ms Chan resolved the matter in a practical way. She discussed the position with all three applicants. Ms Moberly withdrew her application. Mr Cassar withdrew his application. She proposed the way forward: to leave Ms Moberly in place and then for the claimant to take over. All agreed and arrangements were made

5.26 Miss Moberly took some annual leave from 9 October 2015 and formally started her maternity leave on 26 October 2015. There were handover discussions involving the claimant. The claimant worked in the interim role, as from 9 October 2015. The claimant did not take over all of Ms Moberly's work. The claimant continued to cover Ms Ashleigh Harding's secondment, the position that she had started to cover in July 2015, alongside Mr Gavin Simpson.

5.27 The restructure then proceeded. During September 2015, Ms Carver discussed the restructure in an off-site meeting, with her direct reports, in France. There has been some suggestion that a number of BAME individuals who should have attended were not asked to attend. There is no credible evidence in support of this. The people who attended were Ms Carver's direct reports, albeit one of the individuals had secured a new job and was in the process of moving.

5.28 The restructure, known as Project Archway, proceeded. The detail was worked out by Ms Carver and Mr McEneny. Ms Carver was ultimately responsible for the decision-making process.

5.29 The start of the restructure process was announced on 3 February 2016. A briefing packet was produced and sent to all relevant affected individuals. Part of that briefing pack included FAQs (frequently asked questions). The FAQs were drafted by Ms Frew who had experienced a number of restructures. She adapted the procedures from previous restructures. Within the FAQs she included the following (R1/434):

> **"Can I preference for roles at a higher grade?**
>
> **You can only preference for roles at your permanent grade. We are committed to working through a selection process that is fair and transparent for all colleagues and the standard Group selection process will be adopted for these changes. This ensures that colleagues undertaking roles at the permanent grade are considered for available roles at that grade in the first instance. There is one exception to this – if you have been on secondment to a higher grade for more than 12 months, you can preference for one role at the higher grade and 2 roles at your existing grade."**

5.30 During the hearing, the respondent produced further previous FAQs which demonstrated that this policy pre-existed.

5.31 The claimant's argument that this policy was invented purely to prevent her from applying for the grade F role and was not a policy that existed prior to September 2015 was abandoned during the course of the hearing. We find that the policy existed at all material times. We can refer to this generally as the one year rule.

5.32 We also find that there is no formal policy concerning whether individuals who take maternity leave during a secondment will be treated as on maternity leave from their substantive position or from their seconded position.

5.33 On 3 February 2016, the restructure was announced. Length of service in a secondment position was determined as at the date of the announcement. This was consistent with previous arrangements.

5.34 Within the restructure, a number of roles were created which, essentially, were the same as existing roles. The incumbents of those roles had the right to transfer directly to the new roles. This was known as 'mapping.' Twenty two people were mapped; only one was a BAME employee. Only one employee was treated as employed in a higher seconded position for one year: Ms Moberly. She could apply for a job one grade above her substantive position. The claimant did not have the 12 month qualifying period and so did not qualify for the exception. No other employee qualified for the exception.

5.35 No grade E lawyer was entitled to apply for a grade F role, other than Ms Moberly. Ms Chan specifically told the claimant that she could not apply for the grade F role. The claimant asked for a copy of the relevant policy (R1/383 – 384). When she did not receive what she considered to be an adequate explanation, she formed the view that the policy had just been made up as a way of "giving Jo Moberly the post" instead of her. The

claimant formed the view that she was deliberately targeted. However, the claimant raised no grievance about race discrimination. The claimant formed the view that it was certain she would have been appointed over Ms Moberly because she was better qualified and had more experience. The claimant believed she was expressly targeted. The claimant's evidence does nothing to explain what view she reached, if any, in relation to Mr Cassar.

5.36 The claimant was asked to participate in the redeployment exercise. She indicated on her application form a preference for voluntary redundancy, but also applied for three separate positions. The claimant was successful in securing her first preferred position.

5.37 It is the claimant's evidence that she delayed her resignation because she had hoped to receive a redundancy payment, having expressed an interest in voluntary redundancy.

5.38 At paragraph 25 of her statement the claimant says the following:

> **25. I did not resign straightaway because I thought that as this was clearly a demotion Lloyds would do the fairer and sensible thing and give me redundancy. I ticked voluntary redundancy on my preference in form and thought that I would get it because of the situation that I had been put in… I made my position clear to all my grade G colleagues that I spoke to and in particular I recall a conversation with Lorrane Campbell and Lucy Purkiss where I stated how aggrieved I was and the fact that I thought that the only sensible option was to be made redundant…**

5.39 The claimant’s explanation as to why it would be "fair and sensible" to make her redundant is that the circumstances were a clear demotion. What is meant by the clear demotion is not explained. It appears to be her contention that the possibility of reverting to her substantive role was a demotion. At that time she had made no complaint about race discrimination and had specifically applied for three separate posts.

5.40 There can be no doubt that the claimant was unhappy at the time and had a number of discussions. However, those discussions fell short of alleging race discrimination.

5.41 At paragraph 30 of her statement the claimant says the following:

> **30. … I was constantly being asked by my peers why I was not permitted to apply for the role whilst it was clearly marked out for Jo Moberly who was less qualified and whether I thought it had anything to do with my race. I had to deal with people asking me whether they were just trying to get rid of me along with the ethnic minority colleagues who had been made redundant. It was a very unsettling environment. The racism surrounding the process was so noticeable, people talked of little else. Common language among staff included likening it to the Oscars, when no non-white actors were nominated and “ethnic cleansing.” People even joked about buying a blonde wig to fully fit the stereotype. Unfortunately, Lloyds appeared to be mirroring the populist feeling highlighted by Brexit and the US elections. I had to sensitively manage ethnic minority colleagues who**

> **fought that my mistreatment was a clear sign that they did not have a future at Lloyds.**

5.42 There was some evidence from Ms Chan that there was some discussion about possible discrimination. However, we find that the claimant's allegation that people talked of "little else" is clear exaggeration.

5.43 The claimant received the outcome of the selection process on 31 March 2017. She resigned on 1 April 2016 (R1/365).

5.44 The senior management, including Mr McEneny and Ms Carver sought to persuade the claimant to change her position. It was pointed out that the claimant would continue in the current grade F role pending return of Ms Moberly. She was to return in the third quarter of 2016. In the meantime, it was explained that a number of other grade F roles may become free and the claimant would be in a good position to apply.

<u>The law</u>

6.1 Section 95(1)(c) of the Employment Rights Act 1996 states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances in which he or she is entitled to terminate it, with or without notice, by reason of the employer's conduct.

6.2 The leading authority is **Western Excavating ECC Ltd -v- Sharp** [1978] ICR 221. The employer's conduct which gives rise to constructive dismissal must involve a repudiatory breach of contract Lord Denning stated:

> **If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further performance. If he does then that terminates the contract by reason of the employer's conduct. He is constructively dismissed.**

6.3 In summary three matters must be established: first that there was a fundamental breach on the part of the employer; second, the employer's breach caused the employee to resign; and third, the employee did not affirm the contract as evidenced by delaying or expressly.

6.4 In so called last straw dismissals there can be a situation where individual actions by the employer, which do not in themselves constitute a breach of contract, may have the cumulative effect of undermining the implied term of mutual trust and confidence. One or more of the actions may be a fundamental breach of contract, but this is not necessary. It is the course of conduct which constitutes the breach. The final incident itself is simply the last straw even if in itself it does not constitute a repudiatory breach. The last straw should at the least contribute, however slightly, to the breach of the implied term of trust and confidence.

6.5 The question of waiver has to be considered. A clear waiver, or simple passage of time, may demonstrate that the employee has affirmed the contract at any particular moment. However, it may be that a final incident would be sufficient to revive any previous incidents for the purpose of showing a breach of the implied term.

6.6 We must consider causation, the employee must show that she has accepted the breach, the resignation must have been caused by the breach and if there is a different reason causing the employee to resign in any event irrespective of the employer's conduct there can be no constructive dismissal.

6.7 We note that where there are mixed motives the tribunal must consider whether the employee has accepted the repudiatory breach by treating the contract of employment as at an end. Acceptance of the repudiatory breach need not be the only, or even, the principal reason for the resignation, but it must be part of it and the breach must be accepted. The tribunal notes the case of **Logan – v Celyn House** UKEAT/069/12 and in particular paragraphs 11 and 12.

6.8 We note the case of **Bournemouth University v Buckland** 2010 IRLR 445 CA. the head note reads:

> **(1) In constructive dismissal cases, the question of whether the employer has committed a fundamental breach of the contract of employment is not to be judged by a range of reasonable responses test. The test is objective: a breach occurs when the proscribed conduct takes place.**
>
> **The following stages apply to the analysis of a constructive dismissal claim: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished *Malik* test applied; (ii) if acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) it is open to the employer to show that such dismissal was for a potentially fair reason; and (iv) if he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally, fell within the range of reasonable responses and was fair…**

6.9 In **Malik v Bank of Credit and Commerce International SA** 1997 IRLR 462. The House of Lords confirmed that there is an implied duty of mutual trust and confidence as follows:

> **the employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.**

6.10 We would note that it is generally accepted that it is not necessary that the employer's actions should be calculated *and* likely to destroy the relationship of confidence and trust, either requirement is sufficient.

6.11 Direct discrimination is defined by section 13 Equality Act 2010.

Section 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.**
> **…**

6.12 The burden of proof is found at section 136 Equality Act 2010

Section 136 Equality Act 2010 - Burden of proof

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**
>
> **(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.**
>
> **(5) This section does not apply to proceedings for an offence under this Act.**
>
> **(6) A reference to the court includes a reference to--**
>
> **(a) an employment tribunal;**
> **(b) …**

6.13 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd** [2003] IRLR 323 which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong** [2005] IRLR 258**.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc** [2007] IRLR 246**.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board** 2012 UKSC 37

> **Annex**
> **(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.**
>
> **(2) If the claimant does not prove such facts he or she will fail.**
>
> **(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.**

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

Conclusions

7.1 The claimant's submissions identify less favourable treatment as follows: the respondent bank “did not to allow her to apply for a Grade F Senior Lawyer position as part of the Project Archway restructure.”

7.2 The claimant fails to set out who it is alleged made the decision and when.

7.3 It is the claimant's case that she was told on 3 February 2016 that one grade E lawyer (Ms Moberly) could apply for a grade F role. The rationale was explained to her. The claimant does not identify who she considers to be the person who treated the claimant less favourably. The claimant does identify the individual she believed to be a comparator: Ms Moberly.

7.4 The treatment is established. The claimant was not allowed to apply for a grade F role during the restructure.

7.5 It is the claimant's case that the reason she was not allowed to apply was because at least one individual, possibly a number of individuals, deliberately acted in a way to manipulate the process in order to favour Ms Moberly, a white woman, and to exclude the claimant, a black woman.

7.6 The claimant's initial case was based on the positive allegation that the 12 month rule did not exist, and reference to that rule was a deliberate invention and falsification of policy with the express intention of excluding the claimant. This act, on the claimant's case, was part of a course of conduct by one or more of the respondent's employees undertaken with the express intention of ensuring that Ms Moberly was able to apply for the grade F position; thus smoothing the path for Ms Moberly. On the claimant's case this was done with the express intention of excluding the claimant: it was conscious and deliberate race discrimination.

7.7 It is clear the claimant has not been able to maintain her initial position, not least because it is now conceded that the 12 month policy existed. Instead, the allegations have morphed into an assertion that when the respondent's employees treated Ms Moberly's maternity leave as continuous with her occupation of the original secondment role, this was a deliberate act to improperly bring Ms Moberly within the exception of the 12 month rule.

7.8 The claimant now accepts that if an individual had been acting up as a grade F employee for a year when the restructure was announced, that individual qualified to apply for a grade F role. The claimant accepts that she did not qualify by that route.

7.9 During the course of her evidence the claimant suggested that an exception should have been made for her, but the basis for that was never clarified, other than some general assertion about unreasonableness. When asked to explain, she suggested that all grade E employees should be entitled to apply for a grade F role, although how this fitted into her general claim of less favourable treatment remains unexplained.

7.10 There is no doubt that Ms Moberly was the only grade E employee whom the respondent found to have 12 months' service. The claimant's case comes down to a narrow issue which revolves around the reason why Ms Moberly was allowed to apply for the grade F role, but the claimant was not.

7.11 It is the respondent's case that Ms Moberly was on secondment to a grade F position. That position became an open vacancy when the incumbent

employee obtained a new position in August 2015. It was advertised. Three people applied. The restructure was then contemplated. The permanent appointment was withdrawn. The role was then described as interim at the beginning of September 2015. Ms Moberly continued in post after it had become an interim role and then went on maternity leave. At that point the claimant took over.

7.12 It is the respondent's case that Ms Moberly remained in the grade F role and it was that role from which she started her maternity leave. It is the respondent's position that it would have been exposed to a claim of maternity discrimination had it not elected to treat the grade F secondment as continuing during maternity leave. It is for that reason that Ms Moberly was deemed to have 12 months' service and therefore qualified automatically to apply for the grade F role.

7.13 It is the claimant's case that Ms Moberly was in some manner removed from the interim position, returned to her original substantive role, and then wrongly treated as having 12 months' employment in the seconded grade F role. It is the claimant's case that the decision to treat Ms Moberly as satisfying the 12 month exception was because there was a deliberate policy to permit Ms Moberly to apply for the job and to exclude the claimant. Underlying all this was a deliberate policy to exclude the claimant because of her race.

7.14 The claimant dismisses the possibility that failing to treat Ms Moberly's maternity leave as leave from the grade F secondment role could have been any form of maternity discrimination. No rational basis for this is set out at any point. In so far as Ms Moss's submissions address the matter at all, they say the following:

> **16. Both Ms Carver and Mr McEneny, in their evidence, stated that the reason they decided to allow Ms Moberly to apply was to avoid maternity discrimination. As a matter of fact, Ms Moberly's secondment ended in October 2015. If the Bank had simply applied the acting up rule to her, which prevented her from applying for Grade F roles, the reason for that treatment would be just that – the application of the acting up rule. It would not be unfavourable treatment on the grounds of her maternity leave.**

7.15 We now go on to consider our conclusions.

7.16 Ms Moberly never returned to her original substantive grade E post. She remained in the grade F post until she commenced her maternity leave. There was never a formal competition for the interim post. The matter was dealt with pragmatically. Ms Moberly remained in the interim position until she started her maternity leave. The third individual no longer wished to be considered for the role at all. This left only the claimant. Asking the claimant then to take over cover was a logical step. This is not a situation where there was some competitive interview whereby the claimant was successful and displaced Ms Moberly. It was not necessary. It did not occur. Cover was needed for a position which would be absorbed as part of the restructure and would be filled as a result of that process.

7.17 Had the respondent not allowed Ms Moberly to treat her maternity absence as an absence from the grade F role, Ms Moberly could have legitimately complained. She would have received lower maternity pay. She could have complained that treating maternity absence as absence from her substantive position was a provision criterion or practice which discriminated against those taking maternity leave. The provision criterion or practice would have been the requirement to be at work physically. Pregnant woman taking maternity leave would be at a clear disadvantage. A prima facie case of indirect discrimination would result. It is such an obvious indirect discrimination claim that any reasonably competent lawyer, with a moment's reflection, should be able to see the force of the argument.

7.18 Moreover, the same claim could, potentially, be brought as a direct discrimination claim. But for the maternity leave, the individual would have continued, or at least had the right to continue, in the secondment post.

7.19 It is fair to say the respondent could have chosen to have a competitive interview for the interim position, but it did not. It would have been possible, once the application for a permanent position was abandoned in September 2015, to simply continue with the status quo pending restructure. Creating this ill-defined interim position did not, by reference to any policy, necessitate a competitive process. It was open to the respondent to simply terminate all of the applications and , essentially, that happened: the claimant's application simply terminated along with Ms Moberly's and the third applicant, a white man. Following informal discussions, the position became clear. The third applicant withdrew altogether. Ms Moberly was going on maternity leave. That left only the claimant interested and a position vacant when Ms Moberly left. There was no formal process. There was no competitive interview. A pragmatic solution was found, agreed by all, and implemented. As to whether there would have been a competitive interview if Ms Moberly was not going on maternity leave, that is speculation, and it is irrelevant.

7.20 We find that it is beyond doubt that failing to treat Ms Moberly as having 12 months' service carried a significant and real risk of a claim of maternity discrimination. The claimant's suggestion that there was no possibility of any discrimination claim from Ms Moberly, and that the respondent employees should have realised that, is without merit.

7.21 The claimant's suggestion that the possible maternity discrimination would not have been obvious to experienced lawyers because either they were not employment lawyers or because they had not asked the opinion of a HR partner with no specific legal qualification is without merit.

7.22 During submissions, Ms Moss accepted that the claimant's case revolved around the assertion that the reason advanced for treating Ms Moberly as having 12 months' relevant service, namely the potential for a discrimination claim if she was not so treated, was a post-facto rationalization by the respondent: it was not part of the reason at the material time. Further, she confirmed that if we did not accept that

submission, it was still open to us to find that race discrimination formed part of the reason. It appeared to be her case that we can simultaneously accept the respondent's explanation – that there was concern to avoid a maternity discrimination claim – and find a substantive second reason which was discriminatory.

7.23 It may be possible to argue unconscious discrimination of some form, but the basis for that was not set out. We have considered whether the claimant's submissions clarify her position in relation to subconscious or unconscious discrimination. There is no reference to subconscious bias and only one reference to unconscious bias, which is dealt with briefly in paragraph 6 and 7 of the submissions as follows:

> **6. This decision was made in the context of a wider restructure which had the effect that BAME employees were 12.5 times more likely than white colleagues to be made redundant, according to the Bank's figures ([515] 71 employees in selection process + 22 employees mapped; [518] 14.6% of those, in total, not white; 10 redundancies in total, of whom 7 were not white). If you were not white you had a 50% chance of being made redundant as part of Project Archway. If you were white, you had about a 4% chance of being made redundant. These figures do not include Ms Brimah, who was not made redundant by the process. Neither Mr McEneny nor Ms Carver carried out the Best Practice Guides included in the Inclusion and Diversity Policies for the purpose of recruitment [562, 625]. There was no explanation for why they drew the distinction between recruitment and restructure, given that, obviously the same conscious or unconscious bias can affect whether a person is appointed to a role.**
>
> **7. The tribunal could infer race discrimination from these facts, and so the burden of proof should shift to the Bank. It is then for the Bank to prove on the balance of probabilities that the treatment, in no sense whatsoever, was on the grounds of race.**

7.24 Whilst the possibility of some form of unconscious bias is raised, the mechanism for its operation in the context of the claimant's case is not addressed at all. There is no attempt to demonstrate how such an assertion would defeat the explanation advanced by the respondent.

7.25 This is a claim of direct discrimination. As the claimant was prevented from applying for a Grade F role, we must ask if the burden shifts. The claimant's submissions do identify a number of matter said to turn the burden; we consider each of those.

7.26 There is a general assertion that the claimant's career did not progress and that white candidates have been pushed forward in preference, particularly by Mr McEneny. The evidence for this is extremely poor. There is no evidence of the claimant applying for roles for which she was unreasonably refused. There is good evidence that she applied for secondment positions and was successful. She was well thought of and received good feedback. She did receive some potentially negative feedback about confidence, and we accept Mr McEneny suggested at one point that she was perceived as lacking gravitas. Nevertheless, there is no evidence at all that Mr McEneny deliberately sought to exclude the claimant and advance other candidates.

7.27 The claimant has identified at least one candidate who was informed of a potential post by Mr McEneny. That candidate had 25 years' experience. That explains why the candidate was advanced. There is no reason why Mr McEneny should not have advanced him. The same post was brought to the attention the claimant by her line manager. That was the proper process. There is no reason to criticise Mr McEneny.

7.28 There is no doubt that the claimant has taken a very negative view of Mr McEneny. We do not doubt her perception now is that she was disadvantaged and discriminated against. However, we do have reason to doubt the accuracy of the claimant's perception and we also have reason to doubt the factual accuracy of her account.

7.29 The claimant has alleged institutional racism. There has been no attempt to pursue this allegation. Those allegations were not put to any witness. The basis remains unclear. The claimant has essentially abandoned those allegations by failing to refer to or explain them in her submissions. Moreover, the claimant's reference to individuals talking about little else other than race discrimination, which on the claimant's case was virtually daily and continued for months, is in our view unsustainable. There is no evidence in support. It is a clear example of serious exaggeration. Whilst there is some evidence that there was some discussion, and this is perhaps not surprising given the number of individuals who later went on to make discrimination claims, the suggestion that it was the main topic of conversation for months, is not sustainable on the evidence presented.

7.30 We do not need to consider all of the matters raised by the respondent that are said to undermine the claimant's credibility; however, we will deal with one point. During the course of oral evidence, and for the first time, she alleged that during the exit interview she had specifically stated to her line manager, Ms Chan, that she had been racially discriminated against. In oral evidence Ms Chan denied this. The relevant contemporaneous evidence consists of an exit interview form which does not mention race discrimination. Ms Chan's evidence was that the words recorded were specifically read to the claimant and agreed. There was a subsequent email from the claimant to the effect that she had forgotten to mention diversity in terms of ethnicity as "something that needed to be improved." In our view, if the claimant had specifically alleged direct discrimination against herself, she would either have mentioned it in the email, or the email saying she had forgotten to mention diversity would have been entirely unnecessary. In order to accept the claimant's account, we would have to reach the conclusion that Ms Chan had lied on a number of occasions. First, that she had deliberately falsified an exit document in some manner. Second, she had lied to us in tribunal. We explored with the claimant whether, on her case, there was any possibility of a misunderstanding, or any other reason why Ms Chan may not have recorded the allegation of race discrimination. The claimant asserted the possibility could not arise. We have concluded that the claimant's evidence on this matter is untrue. It follows that when considering direct conflicting evidence, we have clear reason to doubt the claimant's

credibility. First, there is evidence of exaggeration. Second, there is evidence of invention.

7.31 We consider the remainder of the matters said to turn the burden.

7.32 It is asserted the claimant was more qualified than Ms Moberly, but Ms Moberly was allowed to apply for the grade F role. This simply begs the question of why Ms Moberly was allowed to apply. The mere fact Ms Moberly was allowed to apply could not shift the burden, as it is no more than a difference in race and difference in treatment.

7.33 There is reference to the wider context of restructure. The actual result of the restructure is striking and it does raise questions about the process. It is common ground that there were 71 employees in the selection process. Of the 22 employees mapped into positions, only two were BAME employees. There were 10 redundancies, only 3 of whom were white. The result was that BAME employees were 12.5 times more likely to be made redundant. There is no doubt that the process proportionately displaced and affected employees who were not white. The figures are striking. At grade G, 3 out of the 7 employees displaced were BAME. The respondent accepts that 50% of the BAME employees were affected by redundancy, whereas only 4% of the white employees were so affected. There can be little doubt that these startling statistics would turn the burden in relation to a claim brought by one of the affected BAME employees made redundant. The claimant was not made redundant. It may be that these statistics do not turn the burden in relation to the specific allegation we are dealing with. We do not have to finally decide that point for the reasons we will come to.

7.34 During the course of the restructure, the respondent employees, including Ms Carver and Mr McEneny did not specifically consider the best practice guides included in the inclusion and diversity policies for recruitment. The explanation given to us was clear: the restructure was not a recruitment. Failure to consider these policies is not in our view sufficient to turn the burden in this case. There is a general argument that failing to have in place some form of monitoring system and some form of diversity impact analysis could shift the burden. However, this has not been pursued in evidence.

7.35 The process by which the interim role was filled has been poorly set out and defined by both sides. This failure to set out, in the written evidence, the process adopted may be enough to turn the burden.

7.36 During the course of her oral evidence, Ms Carver, when describing a BAME person referred to that individual as "coloured." The use of this term is surprising. It is well recognised, in this country, that the term is considered offensive and many would find it extremely offensive. When a person uses such a term, it does raise questions about that individual’s conscious or subconscious thought processes. At the very least, it indicates that the individual has not understood the importance of using neutral and inoffensive terminology, and may be seriously lacking in

diversity awareness. It is rare to be presented with such clear evidence of potentially unrecognised discriminatory thought processes. The use of such offensive language by an alleged discriminator may be enough to turn the burden, and it does so in this case.

7.37 Following the decision in February 2016 to not allow the claimant to apply for a grade F role, the claimant did question the basis for that decision. On 2 June 2016, Mr McEneny suggested there was a normal practice in relation to the treatment of individuals on maternity leave and their rights. We have not received any adequate evidence that there was a normal or general practice. Instead the evidence shows an isolated decision concerning the circumstances of one individual. There is a clear argument that Mr McEneny overstated the case and by doing so misled the claimant in relation to the circumstances surrounding the treatment of Ms Moberly. When an employer misleads an employee as to the reason for a particular decision, that can raise legitimate questions from which discrimination could be inferred. In our view this turns the burden.

7.38 There has been criticism of Mr McEneny for describing the claimant as lacking in gravitas. It is suggested that this may indicate stereotyped views based on race. This is an argument that can be advanced when any subjective judgment is expressed. We find that the mere use of a subjective term is not enough, without more, to find it is used because of a protected characteristic. The mere possibility is not enough. In this case the use of the word gravitas does not turn the burden.

7.39 Having decided the burden shifts. We must now consider the explanation.

7.40 In order to consider whether the respondent has established a reason, it is necessary to consider the claimant's main arguments advanced in opposition.

7.41 The first part of the argument is that the 12 month rule did not exist. It was the claimant's initial position that the requirement to have been seconded for 12 months, before applying for a higher grade during a restructure, was a policy that did not exist, but was invented to aid Ms Moberly and prevents the claimant from applying for a higher position. That argument is without merit and has now been conceded.

7.42 The second part of the argument is that Ms Moberly was not on maternity leave from the grade F position. This is based on some assertion that the claimant was appointed to the interim role and in some manner that displaced Ms Moberly, who then reverted to her original substantive position. We have considered the circumstances carefully. It is entirely wrong to suggest that the claimant was appointed to the interim position in a manner which displaced Ms Moberly. That was not the reality of the situation. There was no competitive process, and the claimant was aware of that. There was no formal appointment. Despite the lack of documentation sent to the claimant, for reasons which remain unclear, she has asserted there must have been some other documentation sent to Ms Moberly. That is mere speculation which is entirely inconsistent with the way the claimant was treated. The reality is clear, and should have been

clear to all at the relevant time. Ms Moberly stayed in position after the role was deemed interim. It was recognised by all that this would be a temporary arrangement as she was due to take maternity leave in October 2015. The claimant was put in place to cover at least part of Ms Moberly's seconded role. The claimant understood this and participated in the handover. As to what would happen ultimately, it was clear to all that the role would be subsumed and dealt with during the restructure.

7.43 We have been referred to and an organogram which shows Ms Moberly as being in her original substantive position. In our view that is not evidence of having returned to her substantive role prior to her maternity leave. Mr McEneny confirmed that it was necessary to identify the substantive roles of all individuals in order to facilitate the restructure process. It is not evidence that Ms Moberly ceased to be seconded to a grade F role prior to her maternity

7.44 The assertion that Ms Moberly was somehow displaced from the grade F position, such that she started maternity leave from her substantive position is unsustainable.

7.45 The third part of the argument is that treating Ms Moberly as taking maternity leave from her less well-paid substantive role could not have been seen as an act of maternity discrimination. For the reasons already described, that argument lacks any merit.

7.46 The fourth part of the argument is that because there is one email asking how to ensure Ms Moberly continued to be paid at the grade F rate during maternity leave, that is clear evidence that she had returned to a substantive post. It is alleged that this shows treating her as continuing in her seconded role was some form of discretion exercised in her favour. That argument is not sustainable. Ms Moberly continued to be paid as a grade F right up to and including her maternity leave. The fact that advice was sought as to how to ensure she continued to receive the pay at grade F level tells us something about the practicalities of the respondent's payroll system, but nothing about the underlying agreements and relationships.

7.47 This leaves the respondent's case. Ms Carver decided to withdraw the permanent appointment. The claimant's argument is that this was conscious discrimination designed to prevent the claimant from applying for a role, as it was clear to Ms Carver that the claimant would succeed in the competition with Ms Moberly. The claimant says nothing at all about the fact that there was a third person, a white man, who applied. It may be that the claimant assumes that Ms Carver was content for the third person, Mr Cassar, to be disadvantaged, as it was some form of acceptable collateral damage justified by the conscious discrimination. The claimant's assertions in relation to this matter cannot survive the weight of the evidence. The impetus for the restructure had nothing to do with the claimant. Ms Carver was relatively new and had no specific reason to dislike the claimant. Withdrawing the permanent post is entirely rational

and understandable. There is a clear non-discriminatory reason for that decision.

7.48 The subsequent treatment of that decision and the relabeling of the role as “interim” had little if anything to do with Ms Carver. It is clear from the evidence that the process was considered by Ms Chan who suggested the solution which was ultimately accepted by all. The claimant has made it clear that she does not allege discrimination against Ms Chan. In any event Ms Chan’s explanation for her action is clear. It was necessary to cover the role pending the restructure. She discussed the matter with all and took a pragmatic decision which all supported. There is no suggestion here of any discrimination.

7.49 It was Ms Carver's decision to treat Ms Moberly as continuing in the grade F role during the course of her maternity leave. There were clear, rational reasons for doing so. Treating Ms Moberly as continuing in a grade E role would have illustrated a degree of irrationality and would have, for the reasons we have explored, exposed the respondent to allegations of maternity discrimination with little, if any, chance of defence.

7.50 Ms Moberly was allowed to proceed to apply for a grade F role because she satisfied the condition of the 12 month rule. She, at the time the restructure was announced, had been in an acting- up role at grade F for over a year. The pre-existing policy was applied appropriately and rationally. The claimant had not been acting up for a year. She was excluded by the pre-existing policy, as were all other Grade E employees. Failure to allow Ms Moberly to apply would, in all likelihood, have been a further act of discrimination. It follows that the respondent has established its explanation.

7.51 The claimant sought to compare herself to Ms Moberly. That comparison is unsustainable. Their material circumstances were not the same. The key difference was that Ms Moberly had been acting up in a grade F role for 12 months at the time the restructure was announced. Further, Ms Moberly had during that time taken maternity leave whilst acting up in a grade F role. The circumstances did not apply to the claimant. It was those circumstances which were determinative of the way Ms Moberly was treated. The treatment of the claimant and the treatment of Ms Moberly were entirely unrelated. They were both treated individually in accordance with the relevant policies and having regard to rational and appropriate decisions concerning Ms Moberly's maternity leave.

7.52 The relevant comparator was an individual at grade E who had not been acting up for at least a year. The fact the claimant had been acting up for part of the year was entirely irrelevant. That did not trigger the exception to the 12 month rule. The claimant was therefore treated in exactly the same way as the true comparators, namely the other grade E lawyers.

7.53 We now consider the allegation of constructive dismissal.

7.54 It is the claimant's case that she resigned because of the refusal to allow her to apply for a grade F role was an act of discrimination. For the

reasons we have given, there was no act of discrimination. It follows that there was no act of discrimination which could have founded a breach of the implied term of mutual trust and confidence.

7.55 The claimant has sought, in her submissions, to advance a supplementary argument. It is said that if we find that the act was not discriminatory, it was nevertheless "so unreasonable as to undermine all trust and confidence for the respondent to allow Ms Moberly to apply for the grade F role, but not the claimant." How this allegation is put independently of the alleged act of discrimination is unclear.

7.56 The claimant has sought to persuade us in her evidence that there was some form of unreasonableness, and the claimant should have been allowed to apply for grade F roles. The argument that the claimant should have been singled out is, when properly analysed, a request for more favourable treatment. The claimant argues that the failure to treat her more favorably than her colleagues was a breach of contract.

7.57 There was a clear policy which prevented application for higher roles unless the individual had been acting up for a year. That policy predated this restructure. The policy was set out in the FAQs. It was not challenged by the claimant. It was not challenged by any union. It was not challenged by any employee. The policy was clear. There were rational reasons for it. It is unfortunate that the claimant could not bring herself within the exception, but she could not. It is difficult to see how the application of this policy could be seen as a breach of the implied term of mutual trust and confidence.

7.58 Further, when the claimant expressed her disappointment, the respondent engaged. When the claimant resigned, attempts were made to dissuade her. The potential for appointment to a grade F role was spelt out. The claimant continued in a grade F role. How any of this is said to be the respondent acting in the way which was either designed to or likely to fundamentally destroy the mutual trust and confidence is not explained.

7.59 We find that there was no breach of the implied term of mutual trust and confidence. As there was no breach of the term, it was not open to the claimant to accept the breach. It follows that she was not dismissed.

7.60 The respondent also says the claimant affirmed her contract. There can be no doubt that the claimant deliberately decided not to resign. She did not state that she was continuing in protest, as she believed there was some form of race discrimination. Instead, the claimant continued on the basis that she hoped to obtain a redundancy payment. We do not need to decide whether this was a clear affirmation of the contract, but the possibility arises. We do not need to resolve, either, the exact reason for the resignation. There appears to be at least two aspects. One concerns the claimant's disappointment at not being made redundant. The second concerns the view that the respondent had discriminated against. We accept that the belief she had been discriminated against by the respondent was at least part of her reason. However, the unfair dismissal claim must fail because there was no breach of contract to accept.

7.61 We note that we heard from a number of witnesses, all of whom allege discrimination by the respondent. We are not in a position to resolve their complaints. We have considered, carefully, whether the claimant has sought to rely on any evidence advanced by those witnesses in support of her claim. If it is still alleged that those witnesses are relevant, such relevance is not addressed in either the claimant's written, or oral closing submissions. In the circumstances, we can find that those witnesses believe there has been discrimination of various forms at various times. Beyond that bare finding, there are no factual matters that we can find which are relevant to this case. It follows that we do not need to consider their statements, or the credibility of those witnesses, further.

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Employment Judge Hodgson
10 July 2017