EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr V Edwards	**v**	**Hertfordshire County Council**

Heard at: Watford

On: 2 to 6 August and 25 September 2017
26 September 2017 in chambers

Before: Employment Judge R Lewis
Members: Mrs C Baggs
Ms S Johnstone

Appearances

For the Claimant: Ms B Maistry, Solicitor
For the Respondent: Ms A Rao, Counsel

RESERVED JUDGMENT

1. The claimant's complaint of direct racial discrimination which arises out of imitation of his accent is upheld.

2. All other claims of racial discrimination, howsoever formulated, fail and are dismissed.

3. The claimant's claims of victimisation are dismissed on withdrawal.

4. The claimant's claim of constructive unfair dismissal fails and is dismissed.

5. The claimant's claim of discrimination by constructive dismissal fails and is dismissed.

6. The claimant has conducted the proceedings unreasonably and is ordered to pay to the respondent costs of £750.00.

ORDERS

1. There will be a remedy hearing for 1 day only on **Monday 5 February 2018** at 10am.

2. The claimant is to send to the respondent a witness statement dealing with remedy only no later than **18 December 2017.**

3. The respondent may, if so advised, send to the claimant any witness statement which it proposes to call at the remedy hearing, no later than **22 January 2018.**

4. The parties are reminded of their continuing disclosure obligations.

5. It is the duty of the parties in reasonable co-operation to present the documents required at the remedy hearing in a manner which will facilitate the interests of justice.

6. Of the tribunal's own initiative, the claimant's date to pay the above costs award is extended to **5 March 2018** in accordance with Rule 66 of the Tribunal Rules of Procedure.

REASONS

Procedural history

1. This was the hearing of a claim presented on 29 January 2016, by Messrs ABM Solicitors, who continued to represent the claimant throughout this hearing. Before the start of this hearing, there had been a number of attempts at case management, as well as delay caused by error within the tribunal system. A preliminary hearing (Employment Judge Smail) took place on 3 May 2016. That was adjourned to enable the parties to finalise a list of issues. It was re-listed to be heard in June, but postponed until 2 September, (Employment Judge Smail) when management orders were made and a 5 day hearing listed to start in February 2017.

2. Shortly before the listed hearing, and through administrative error, the claim was struck out for non-payment of fees. It was re-instated shortly afterwards, but the listing had been lost, and on 14 March 2017 the claim was listed for the 5 days starting 2 August 2017. On 27 and 28 July 2017 there were exchanges of correspondence about preparation.

3. The position at the start of this hearing was the following:

4. There was a bundle of over 600 pages, which appeared to have been prepared by the two sides separately, so that it was not chronological or coherent;

5. There were two chronologies, which had not been agreed, and of which we work from the respondent's, because it was expressed in neutral language, and helpfully cross referred to the bundle.

6. It was not clear that the case was ready to proceed to a remedy hearing if required, and the tribunal proposed and parties agreed that this hearing should be limited to liability only.

7. The list of issues was not fully and finally agreed. The tribunal worked from Ms Rao's composite list, pages 115j-115m. Ms Maistry withdrew any claims

brought under s.27 of the Equality Act (victimisation), and confirmed that the claims under the Act are brought exclusively under s.13 (direct discrimination).

8. The claimant had served a witness statement, along with a short witness statement from a former colleague, Mr Gary Clarke, and a statement from his partner, Ms Alison Powell, which dealt almost exclusively with remedy issues.

9. After submission from Ms Rao, the claimant withdrew from his statement allegations which were new and had not previously been pleaded.

10. In the course of the second day of hearing, the claimant produced bound books which he said were diaries maintained at the relevant times. Apart from a single page, these had not been disclosed. The respondent applied for disclosure, and in the event, almost all of the fourth day of hearing was set aside to enable the claimant to prepare a supplemental witness statement dealing with the disclosed diaries, and annexing copies of the relevant pages. (The originals were made available to the respondent for inspection). The claimant was recalled to be cross examined about the diaries, and the respondent's witnesses were heard out of order in order to accommodate this. Largely in consequence, the allocated 5 days were all required to deal with evidence, and the hearing was adjourned for several weeks for submissions on 25 September. The parties both provided written submissions and spoke to their submissions. A case management order sent out by the tribunal on 28 August regrettably had not reached the respondent.

11. The respondent's witnesses were Ms Sarah Evans, Head of Hertfordshire Equipment Service; Mr Andrew Mawbey, previously Customer Services Manager and Customer Service Team Leader; Ms Gill Card, Senior HR Officer, who had supported Ms Brinkley in her investigation of the claimant's grievance; Mr Patrick Stiles, at the time Head of Fleet and Contract Management Services, who had been the commissioning officer of Ms Brinkley's investigation; and Mr Stuart Bannerman-Campbell, Assistant Director, who had rejected the claimant's appeal against the grievance outcome.

12. All witnesses adopted their statements on oath and were cross examined. The claimant was offered adjustments which might be necessary to address any health issue in relation to his evidence, but made no request other than short breaks.

General observations

13. We preface this judgment with a number of general points.

14. As is common in the work of the tribunal, we heard evidence about a wide range of matters, and some of it in depth. Where we make no finding about a matter of which we heard, or where we make a finding but not to the depth to which the parties went, that should not be taken as oversight or omission,

but as a reflection of the extent to which we found the issue truly of assistance.

Executive summary

15. We open with an executive summary, which we trust will make this judgment easier to follow, as we have found it appropriate to depart from strict chronology in giving this judgment, and we have given our conclusions on each discrete matter as we proceed.

16. The claimant worked for the respondent for some three and a half years as an Engineer servicing wheelchairs. He was initially an agency worker, then became an employee. He is of Caribbean origin and speaks English with an accent. His claims that colleagues mimicked his accent, and thereby discriminated against him, are upheld. No other part of his claim succeeds.

17. The claimant had a long and difficult journey to work, and his timekeeping was poor. We reject his assertion that the respondent made a special arrangement or contractual term to allow him to attend work late. The claimant was in a group of workers who were undermanaged. When Ms Evans and Mr Mawbey became responsible for the group, they introduced higher standards of management than the group were used to. In particular in the summer of 2014 Mr Mawbey introduced rigorous timekeeping requirements, which the claimant failed to meet. Mr Mawbey monitored the position, and early in 2015 the claimant was advised that his timekeeping would give rise to a disciplinary enquiry. On being notified of that, the claimant went off sick and remained off sick for eight months until his resignation.

18. While he was off sick, the claimant submitted a grievance, covering a wide range of issues, of which one was racial discrimination. Mr Stiles commissioned Ms Brinkley to investigate, in which Ms Brinkley was supported by Ms Card. We have attached considerable weight to Ms Brinkley's interview with Mr Durrant, and the records of his replies, and of Ms Brinkley's analysis of them. Ms Brinkley rejected the grievance, and the claimant appealed. Shortly before his appeal was due to be heard, he resigned with immediate effect. He nevertheless attended the grievance appeal meeting with Mr Campbell. We have rejected the claim of constructive dismissal, and we have rejected the claim of discrimination in constructive dismissal.

19. The claimant complained that his management by Mr Mawbey and Ms Evans was tainted by race, and that individual management decisions made by each of them were acts of discrimination, each constituting a detriment on racial grounds. We reject all of those allegations without reservation. We find that Mr Mawbey and Ms Evans may be considered wholly vindicated in the eyes of this tribunal of such allegations.

The legal framework

20. The claim of discrimination proceeded as a claim of race discrimination only. It was brought only as a claim of direct discrimination, and therefore under the provisions of s.13 of the Equality Act 2010 (EqA).

21. Section 13 of the Act defines direct discrimination as occurring where "A discriminates against B if because of a protected characteristic, A treats B less favourably than A treats or would treat others".

22. Section 23 provides that "On a comparison of cases for the purposes of section 13, 14 or 19, there must be no material difference between the circumstances relating to each case."

23. For the sake of completeness, we set out Section 26, which defines harassment, which for these purposes, occurs if "A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating, or offensive environment for B".

24. Section 123 provides that the time limit is "The period of 3 months starting with the date of the act to which the complaint relates, or … such other period as the employment tribunal thinks just and equitable".

25. Day A was 15 December 2015. On the face of it, all acts occurring on or before 16 September 2010 were matters which the tribunal did not have jurisdiction to consider, unless we found it just and equitable to extend time. However if we were to find a continuing state of affairs or series of events, spreading across that date, we would be entitled to accept jurisdiction to consider that sequence of events. Even if we were not to accept jurisdiction in relation to events occurring on or before that date, we would be entitled to have regard to their evidential weight as forming part of the relevant background to the matters which we do have to consider. If we hear such evidence, it would in any event be in the interests of justice to give a determination on them.

26. Section 136 sets out the burden of proof provisions. Section 136(2) provides: "If there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred." That provision "does not apply if A shows that A did not contravene the provision."

The claimant's evidence

27. We preface our findings further with an observation about the claimant's evidence. We understand something of the difficulties experienced by a member of the public who approaches an employment tribunal for the first time. We appreciate that the process is unfamiliar, stressful and daunting. We understand that the claimant had been off sick for about a year before he brought these claims, and we were told that he has not worked since. We understand fully that the allegations brought by the claimant were emotive (and that the strength of feeling in this case was experienced on both sides). We understand that our procedures are artificial, and that stress has been exacerbated by a six month delay occasioned by administrative error within the tribunal system, for which this tribunal can only tender apologies.

28. Making all such allowances, our overarching finding is that the claimant was an unconvincing narrator, and that our general approach has been that where allegations rest on his bare word only, we approach them with considerable scepticism.

29. The claimant was an unreliable narrator in a number of respects. His complaints were often insufficiently specific to be capable of fair trial. The allegations were presented inconsistently, so that narratives of a particular event differed. The allegations were presented almost wholly without analysis, and then incrementally. Thus the allegation of racist language appears for the first time in the claimant's grievance of March 2015 (251); there is the some additional material when the claimant is interviewed the following month (294); there is then what appears to be a thoughtful addition the following month (622); the claimant makes no specific additional allegations through the further grievance or appeal process; and then for the first time introduces a most striking allegation the following January in his claim form. He continued to amplify allegations beyond the pleadings in his first and second witness statements, and in his oral evidence.

30. We do not criticise the claimant for the general unclarity of his written material. However, when we came to consider the late disclosed diary, we found it of almost no assistance, and we do not accept that it was a record of events taking place on or about the dates of the diary entries.

31. The claimant repeatedly made assertions based on assumption and speculation, without evidential support. He took for granted the foundations of the case which he needed in fact to prove; and then built his case on foundations which had not been established. In doing so, he failed to analyse each step in the process, or to consider any evidence which ran counter to his underlying assumption. Throughout these events and at this hearing, the claimant appeared for example to remain in denial that he was persistently late, and that persistent lateness was objectively a matter which might lead to a legitimate management response.

32. In particular, he advanced assertions that his work group contained members who were related to each other and friendly with each other; and then went on to assert that those relationships and friendships tainted their professional interaction. In closing, Ms Maistry gave a striking example: Having heard that Ms Evans had previously worked with Mr Mawbey, and had encouraged Mr Mawbey to work with her again, she asserted that they were "good friends" were likely to support each other in management. There was no evidence, nor could Ms Maistry be in a position to adduce evidence, to the effect that the friendship between Ms Evans and Mr Mawbey was anything other than professional; nor did it follow that friends and colleagues might always agree with each other.

33. The claimant asserted that in relation to each matter about which he felt strongly, a hypothetical white person would have been treated differently, because there was no other explanation for the claimant's treatment. Ms Maistry strongly reiterated the point in closing. We appreciate that that formulation was inevitable, given the absence of actual comparators. One

problem with that approach was that it expressed a frequent, basic error in discrimination cases, which was to assume that the presence of protected characteristic plus detriment proves the causation between the two. Another was that it adopted a simplistic model of management, and disregarded the objective evidence about the information available to management, which stood free of race.

34. The foundation of the submission was lacking: in the absence of evidence of discrimination on the part of Mr Mawbey, the claimant's case was repeatedly that he was managed as he was managed because of his race, and he failed to bring any analysis to the events which we had to consider. He showed little insight into the balancing exercises required by management decision-making.

The claimant's time-keeping

35. The first and in our view main strand of this case relates to the claimant's attendance pattern at work, and we set out our findings of fact on that matter first.

36. The claimant, who was born in 1973, and at all relevant times lived in West Drayton, started working for the respondent as an agency worker in early 2012. We heard almost no evidence about his previous employment record.

37. The claimant was employed in Welwyn Garden City as a member of the Wheelchair Repair Service. The task of the service was to maintain and repair wheelchairs for members of the community, and this might be done either by the wheelchair being brought to the premises at Welwyn Garden City for repair, or by an engineer going out to carry out a repair in the field, such as at the user's home or work place. The skills required to carry out the repair might differ, depending on whether the wheelchair was power assisted or manual. The claimant's workplace was both a warehouse and an engineering shop.

38. As stated, the claimant joined as an agency worker, from which we take it that he was paid by the hour for time attended, that any risk of lateness or poor attendance fell on him, and that there was no issue of parity of terms between him and other members of the team.

39. The claimant became an employee of the respondent in March 2013. We accept that his terms and conditions of service were set out at pages 116-127, although no copy was signed by the claimant. The claimant asserted that he was unhappy with the pay and/or hours terms. We find that in every respect he worked in accordance with these terms and conditions for over two years, and that they applied to him.

40. The claimant's line managers and colleagues for his first two years included Mr Tierney, Mr Burke and Mr Walker. We accept the evidence of Ms Evans and Mr Mawbey that the claimant and his colleagues were undermanaged at that time. We mean by this that the line managers to whom the claimant reported failed to apply the respondent's procedures; failed to set the standards of work and conduct required in the workplace; failed to address

management issues when they arose; and failed to maintain appropriate records.

41. In the claimant's case, the particular issue which was not addressed was timekeeping. The claimant had a long and uncomfortable drive between West Drayton and Welwyn Garden City twice a day. He was frequently late. We find that none of the above three managers sought to address the issue with the claimant, either informally or formally. We accept that this may in part have been the result of the fact that the claimant started as agency staff.

42. We find that throughout the period of under-management there was a clocking in procedure available but it was ignored.

43. The claimant asserted that there was an unwritten agreement, with management, after he became an employee, that he could continue with a personal timekeeping arrangement, which was to the effect that he would do his best to be punctual but could come in late if circumstances required, and make up time in the lunch break or in the afternoon so as to complete his hours.

44. In closing submissions, Ms Maistry asserted that this was a variation of the written terms and conditions of employment (which the claimant had never signed).

45. Inquiries by the respondent produced no evidence that such an agreement was entered in to. We find that there was no such agreement to vary the claimant's terms. We accept also that if Mr Mawbey had found that there was an informal arrangement, he would have taken steps to rescind it. We do not accept that any manager on behalf of the respondent agreed on the respondent's behalf to such a variation in the claimant's terms and conditions; at its very highest, underperforming managers may have failed to address the issue.

46. In May 2013 Ms Evans was tasked with improving the management of Hertfordshire Equipment Services, and later that year, with Ms Evans' support, Mr Mawbey was appointed Customer Service Team Leader, with overall management responsibility for the Wheelchair Repair Service. Mr Mawbey's appointment coincided with the departure from the respondent of Mr Tierney and Mr Burke. Mr Mawbey set about improving the management of the service in which the claimant worked.

47. We found Mr Mawbey a serious and impressive manager, of whose commitment to standard setting there could be no doubt. We find that he identified timekeeping as an issue which had to be addressed. This issue was not confined to the claimant.

48. Mr Mawbey reinstituted the clocking procedure. It was to be instituted with effect from 1 May 2014, and we attach very considerable weight indeed to a letter addressed to all staff dated 25 June 2014 with attachment (393-394). The documents should be read in full. They reiterate that clocking in and out is a mandatory procedure, as follows:

> "As from 1 May 2014 clocking in and out has been checked and recorded. Staff adherence with the requirements is being tracked and now forms an integral, measureable part of every PMDS and will contribute to each individual performance rating. Failure to clock in/out continually will be raised as a disciplinary matter and addressed accordingly."

49. It is striking that the document is signed personally by four managers: Ms Evans and Mr Mawbey, and the other team leader, Mr Fearon and Mr Walker, Operations Manager. The bundle contained a further document headed "This is to confirm that I understand the basic requirements for clocking in and out" (394). The claimant signed on 1 July 2014, along with eight other colleagues who signed that day. We do not accept the claimant's assertion that he signed 394 without knowing about 393: we are confident that where nine individuals signed the same document on the same day, they knew the meaning and effect of what they were signing.

50. Mr Mawbey was conscious, as a good manager, of the balance between creating a general rule, and making allowances for individual circumstances. He was aware that the claimant had a journey around the M25 twice a day. We find no fault whatsoever with his having asked the claimant from time to time whether he really wanted to commute so far to work, and thereby suggested to him that he might be happier working closer to home. Those questions were no more than common sense, and we do not see in them a sinister attempt to get rid of the claimant.

51. We accept that at an early stage of his enquiry in to the claimant's time keeping, Mr Mawbey had an informal meeting with the claimant to discuss the matter. The claimant advanced his point that he had been given management permission to come in late, and named Mr Walker as the source of this. Mr Mawbey promptly asked Mr Walker to join the meeting, which he did. We accept that Mr Walker told Mr Mawbey in the claimant's presence that he had on one occasion authorised lateness by the claimant, but that there was no question of his having given general permission or altered the claimant's working hours. Ms Maistry's criticism of this meeting, that Mr Mawbey should have created a formal documented record of it, was well made in theory, but seemed to us to miss the point. Mr Mawbey was under no such obligation, and in any event we have no reason to believe that had that been done, Mr Walker's response would have been any different. We also accept Mr Mawbey's comment that if he had found that a previous and underperforming manager had authorised the claimant's lateness, he, Mr Mawbey, would have revoked the permission and required the claimant to work his contracted hours.

52. Mr Spooner, who was a Field Engineer covering the west of Hertfordshire, was off sick in the summer of 2014, and Mr Mawbey offered the claimant the opportunity to cover his role, understanding that it might assist the claimant to organise his working day more effectively. Mr Mawbey gave evidence that he thought the claimant might "tilt" his working day so that he would come to the premises at Welwyn Garden City during the day rather than first thing, but it seems that no one formally made this suggestion to the claimant.

53. In the event the claimant returned to work at Welwyn Garden City in autumn 2014, and his timekeeping continued poor. Mr Mawbey was aware of this, and monitored formally in December 2014 and January 2015. The results of the monitoring were in our bundle: page 128 shows that in the December/January two month period, the claimant was late for work 32 days out of 34. Pages 472(a) to (f) show that in a random selection of dates in the period July to November 2014, the claimant was late on 31 days out of 38. We could also not see in them evidence (for which the claimant argued) of systematic working late to make up for late arrival times.

54. Mr Mawbey formed the view that this level of lateness could not be sustained. We agree that he had legitimate objective evidence to support this view, gathered over a reasonable period of time. We accept that it was inherently undesirable, contrary to procedure, and created a strain on other members of the team, who could see a peer and colleague working shorter hours than they did for the same pay. Mr Mawbey was aware of this issue by late 2014, and we accept his evidence that he did not want to address such a potentially fraught issue with the claimant in the run up to Christmas.

55. Allowing for Christmas and the subsequent holiday period, Mr Mawbey reported the matter to Ms Evans, and on 21 January 2015 the claimant received two letters of that day, one from Ms Evans and one from Mr Mawbey (235-4 respectively). Ms Evans' letter told him that Mr Mawbey had been appointed by her to investigate his persistent lateness; Mr Mawbey's letter invited the claimant to an investigation meeting on 30 January to discuss the matter. Both letters had the appearance of templates from an HR support function. They were both given to the claimant by hand. At the time it appeared that the claimant saw an impropriety in both letters being in the same envelope. We can see nothing in that point. Both letters contained the following sentence:

> "If the allegation is founded at the disciplinary hearing the possible consequences could be a verbal warning or first written warning."

56. Accordingly, the claimant was properly notified that this first stage enquiry was a matter of standard setting, at which there was no question of his employment being at risk through dismissal.

57. Following receipt of these letters, the claimant began the period of sick leave from which he never returned. He resigned while still off sick.

58. The claimant's absence was certificated, although the respondent found it necessary from time to time to remind the claimant to produce certificates. The claim form contained a complaint that Mr Mawbey had harassed the claimant, (effectively, discriminated against him) by sending him texts while he was on leave. The texts in question were at pages 231 to 233 of the bundle, and ran from 26 January 2015 until 27 March 2015. The claimant texted Mr Mawbey a number of times to report on his health, and Mr Mawbey's replies dealt with channels of communication, medical certification, and occupational health referrals. Mr Mawbey also dealt with

legitimate workplace concerns, for example he asked for a key for a tool box to be returned.

59. On 16 March, in reply to the claimant being signed off, Mr Mawbey texted (233):

> "Thanks for letting me know. As stated in our last letter the hearing will continue without you today. Can you also let me know a convenient time over the next week when John and I can visit you. Thanks".

60. The meeting in question was the postponed investigation meeting to discuss the allegation of persistent lateness. We take the reference to the visits to be a welfare visit.

61. The bundle shows that in the period between 26 January and 27 March Mr Mawbey sent the claimant 11 texts, an average of about one every five days across the whole period. They were all work related, and the great majority were in reply to the claimant, rather than initiated by Mr Mawbey. It is impossible to see anything in any of them (or all cumulatively) which amounts to any improper use of management authority, or which could be criticised. We accept, that as pleaded, "communications relating to his investigation" "added to the claimant's stress" and add that that is a finding about the subjective consequence of Mr Mawbey's actions.

62. While the claimant was off sick, Mr Mawbey wrote to him on 4 February to postpone the lateness investigation interview to 2 March; and on 9 March asked for written submissions (236 and 237). He also wrote about occupational health and routine matters.

63. Our conclusion on this strand is that the claimant's timekeeping was habitually poor. We find that the consistency over time of his poor timekeeping showed that he made no realistic sustained effort to improve the position. We accept the accuracy of the time keeping records which are before us. We find that the claimant's time keeping was not addressed by any manager before Mr Mawbey. We find that by 1 July 2014 at the very latest (although probably much earlier) the claimant could be in no doubt that the respondent's expectations of his attendance had changed. We have no criticism of Mr Mawbey's approach to the claimant's timekeeping, either as a matter of management, or as a discrimination issue.

<u>The claimant's grievance</u>

64. We now turn to the second strand. It relates to the claimant's grievance.

65. As stated, the claimant was off sick from 21 January 2015. He was in touch with Mr Mawbey, and it is clear that issues relating to his health and to the pending investigation into his timekeeping were a source of concern. His diary contained a draft of a grievance, which was not a document that greatly assisted us. On 16 March 2015 he submitted a detailed grievance to the Head of HR (246-251). In style and presentation it is a very different document from what the claimant put in his diary, which leads us not to

accept his evidence that he alone drafted the grievance (a matter on which we do not criticise him).

66. The grievance is a long document, which should be read in full. Taking an overview of that which it conveys, we note the following. The claimant asserted that all was well until Mr Mawbey became responsible for his area of work, after which, he said (246), Mr Mawbey began a "campaign of harassment against me."

67. He asserted that Mr Mawbey had picked on him; he raised a number of the issues with which this tribunal was concerned: lateness, lack of training, incidents which we deal with below, events on a cold day, or concerning his stool, cleaning his bicycle and some cleaning materials. Although heavily focussed on Mr Mawbey (who is named more than 40 times in the document), the grievance also named Ms Evans as a person responsible for harassing him.

68. On the sixth page of the letter, the claimant wrote this (bold in original, 251):

> "**I also have to put up with certain colleagues mocking my accent (they do this in front of Mr Mawbey) and Mr Mawbey did nothing about it other than to laugh and smirk** at staff making racial comments. This in my eyes shows me that he Mr Mawbey is condoning these types of racist attitudes. They also make Hitler signs, also making jokes about how Hitler wasted the gas on the Jews and on occasions talking nastily about different races. There have also been discussions within the building about joining the National Front and other right wing parties. I find these comments made directly to me and about other races deeply upsetting and disturbing."

69. We note that the quoted words were the only portion of the six page grievance which raised the issue of race or racial language; that the allegations were expressed entirely in non-specific terms; and that the claimant named none of those responsible for racial language, but presented the complaint as a complaint of condonation by Mr Mawbey.

70. The respondent's HR team acknowledged the grievance on receipt (253c) following which Mr Stiles was appointed commissioning officer of the grievance, and he in turn appointed Ms Brinkley as the investigating officer. We were told that Ms Brinkley was too ill to attend the tribunal.

71. A meeting took place on 20 April which was an initial informal meeting to discuss the grievance process. The claimant attended accompanied by Mr Clarke, and the respondent was represented by Mr Stiles and Ms Brinkley. It is a matter for criticism that it appears that no note or record was made of the meeting. We accept that the claimant was asked to suggest who should be interviewed as a witness for the purposes of the grievance, and he put forward names. We also accept that it was agreed by the claimant that his grievance was against Mr Mawbey and Ms Evans and no other individual. That proved to be an important point. It gave rise to a curiosity which pervaded much of what followed (including this hearing). It was that the formal grievance was not against those who the claimant said were responsible for racial abuse, but against the managers who were said to have condoned it by their failure to intervene.

72. Ms Brinkley, assisted by Ms Card from HR, then began the interview and meeting process which formed her investigation.

73. The claimant was interviewed, supported by Mr Clarke, on 30 April. The claimant gave startling evidence to the tribunal that although Ms Brinkley knew that he is type 2 diabetic, he told Ms Brinkley and Ms Card at the start of their meeting that he had not eaten that day, and that he was then not permitted to eat or to take a break throughout a three hour meeting. We find that assertion literally incredible and reject it. We had no reason to believe that Ms Brinkley and Ms Card would behave in a manner which was both callous and potentially dangerous. We are sure that if they had, the claimant would have recorded a complaint about it at the time. It was not mentioned in Mr Clarke's witness statement. If the claimant intended to imply that as a result, he could not do himself justice at the meeting, we reject that suggestion.

74. The bundle contained a record of the interview prepared by the respondent (293). The claimant made one material change at page 295, and added a number of annotations, concluding, "I am signing this inaccurate document under duress" (307) and referred to a number of points of detail (311). We do not find that the claimant was under duress in the true sense, ie such that his freedom of expression or will were overborne.

75. A material part of the record from our perspective is at questions 1-10 (294-5) at which Ms Brinkley questioned the claimant about the allegation of (in his word) 'mockery' of his accent and related matters. The grievance is formulated as "Racism allowed to take place in the workshop unchallenged by the manager" and therefore focused not on the perpetrators or speakers, but on the subject of the grievance, which was Mr Mawbey's response.

76. In his answers, the claimant named one perpetrator only, Mr Durrant. He attributed to Mr Durrant a number of matters: criticism of the claimant's speech, imitating his accent, telling him to "speak English", remarks of a pro-Nazi bent, and discussion of attending a racist political event, and the remark, allegedly made the previous January, "Hitler wasted his gas on the Jews." (294-295). When asked, the claimant said that he was "Not sure" if Mr Mawbey took part in imitating his accent, but that his response to the Hitler remarks was "Smirking, grins. Does nothing." The claimant agreed that he never reported his feelings to Mr Mawbey. In answer to the final question, "What prompted you to raise this matter now?" he said, "All that has been happening – I got a letter from Sarah Evans and Andy Mawbey regarding a disciplinary investigation into lateness, both on 21st January 2015 by hand and by post. This has made me feel stressed, picked on and victimised." (295). We found that a significant answer, because it showed that the claimant did not accept the legitimacy of the concern about his lateness, and attributed Mr Mawbey's attempt to address his time keeping to other, extraneous factors. We note below that Mr Mawbey gave an almost identical answer when asked the parallel question (paragraph 86).

77. Subsequently, Ms Brinkley wrote to the other parties to the grievance, as well as to Mr Durrant and Mr Crush to arrange interviews. On 13 May she

interviewed Mr Durrant, and we find the note of that interview one of the most significant documents before us (314-315).

78. The first four questions were around "that Mr Edwards has to put up with certain colleagues mocking his accent." Mr Durrant's replies were recorded as the following:

> (1) "Everyone has a bit of fun, no one definite.
> (2) I'm not sure, I can't remember any occasions. It's just banter, it happens rarely, in a happy way.
> (3) I honestly can't remember when or where exactly.
> (4) Once or twice, I don't know."

79. Ms Brinkley then put this;

> "Vernon also mentions jokes and unkind remarks about different races, and racial comments or jokes such as how "Hitler wasted gas on the Jews" tell me about that."

80. Mr Durrant's replies were:

> "(6) I can't think of any, not definite, it would be jokey. Not to harm others.
> (7) I don't know, I can't be sure.
> (9) I've never spoken to [the claimant] and he has never spoken to me about it. I don't think there's been anything serious enough to complain about. I've never known anything to be directed at Vernon, not when I've been there".

81. When asked the question "Does Mr Mawbey take part in this and if so how?" Mr Durrant said "No". When asked how Mr Mawbey reacted to the Hitler remarks Mr Durant said, "I don't know, nothing's ever been said, no complaints or anything".

82. We interpret the record as indicating that without being able to particularise a particular phrase, date, time or speaker, Mr Durrant accepted the broad general thrust of the allegation of a workplace where banter on occasion crossed a boundary into what was not acceptable. Mr Durrant did not answer any of these questions with anything suggesting shock or denial. That seemed to us a significant absence. In closing remarks, Mr Durrant is recorded as saying (317):

> "Vernon is a nice guy and we got on well. He's never said anything about racist remarks. The only problem with him is lateness. He has been late every day for the last 3 years. He did come in early one day, the day before he went off. He had been told to attend a meeting about his lateness and he was really worried. I was going to go in with him but we decided that wasn't right, I'm too close."

83. After further discussion of the claimant's lateness, Mr Durrant was recorded as concluding:

> "He doesn't share our sense of humour and easily offended. You have to think about what you say. His relationship with his colleagues and management is no different to anyone elses."

84. We found two significant points in those answers. The first was that Mr Durrant's first spontaneous comment about the claimant was about his time keeping (and that he pitched his comment very high). The second was that when faced with the seriousness of the disciplinary investigation into lateness, the claimant turned to Mr Durrant as his potential companion, despite having identified Mr Durrant as the perpetrator and speaker of ugly racist sentiments. It also seemed to us significant that Mr Durrant did not take up the suggestion, because "I'm too close". We interpret that, in context, as a clear statement that Mr Durrant's personal view was that the claimant's lateness was indeed problematical.

85. Ms Evans was interviewed, and gave a lengthy statement about the claimant's work history and timekeeping (320-322).

86. Mr Mawbey was interviewed on 19 May 2015 (327). He gave a brief outline of how he had managed the claimant's timekeeping. He robustly denied having heard imitation of the claimant's accent, or any other racist language, or having taken part in it, or knowing anything about it. Asked why he thought the claimant had raised the issue, his immediate response was the mirror image of that given by the claimant to the parallel question (paragraph 76 above) (330),

> "I think it's because he has got away with his timekeeping issue for a long time, and now he's being pulled up on it."

87. After later commenting on the notes of his interview, Mr Mawbey wrote a lengthy letter addressed "To whomever it may concern" (342-350) in which he set out a detailed denial of each allegation against him.

88. When he came to deal with the issue of racist language, Mr Mawbey wrote (349) an impassioned section of his letter, in which he asserted his commitment to diversity in both his personal and professional life. The contents of that section of his letter (349-350) should in our view be read in full. They were corroborated by the evidence which Mr Mawbey gave, and the claimant made no attempt to challenge any of the points made by Mr Mawbey either in oral evidence or cross examination. We accept that Mr Mawbey submitted to the respondent compelling evidence of the diversity of his personal and private life and family circumstances, and invited the respondent to pursue the claimant's allegation of racism with eight named individuals with whom he worked at the time, and whom he described generally as, "from an ethnic minority background".

89. On 28 May, four weeks after being interviewed, and <u>after</u> Ms Brinkley had completed her report, the claimant wrote to Ms Brinkley (622). The first two paragraphs of the email said:

> "It has been hard for me to do this but I have come now to the decision to tell you about the other things you asked me about at the last meeting we had. You are already aware of many different types of comments made about other races and how they targeted me specifically to mock my accent in a nasty way, which is a very personal and direct attack on me. I would like to let you know that there have been other people involved in the racist talks in the workshop. The other people are John Lucas an office staff who comes to the workshop and talks about

> his pro-Nazi racist views also the engineer next to my bench, John Sollis, made racists comments about "Chinks" referring to people of oriental origins in January 2015. When I objected and said "this is a racist remark", Dave Durant said "here we go again", like I was making a big deal of this and being a nuisance."

90. The email then went on to raise an allegation of a threat of violence against colleagues, including an allegation that Mr Mawbey had brushed aside the claimant's report of the matter. This email would have been the appropriate occasion to explain that the claimant had not spoken of these matters on 30 April because of his diabetes and being denied the opportunity to eat: neither of those points was made.

91. This email was the first occasion on which the claimant had complained of physical threats, and the first on which he had named Mr Lucas and Mr Sollis as perpetrators, and the first occasion on which in each case he had attributed to them the quoted language. In evidence, he was unable to explain why he had failed to raise these allegations any earlier. Ms Brinkley, as stated, had completed her report, and did not re-open her inquiry in response to this.

92. Ms Brinkley completed her report at the end of May (262). The document should be read in full.

93. Ms Brinkley set out a detailed analysis of the procedure followed, of the evidence in support of each allegation, and her rejection of each allegation. We attached considerable weight to her conclusion on the racist language allegation (268):

> "I conclude that there is no evidence to substantiate the claim that [Mr Mawbey] allows racist remarks and behaviour to occur. On the balance of probability this does not happen. I believe that it is likely that such jokes and remarks do occur and although the complaint is not directed at peers, management need to tackle this. This part of the complaint is unsubstantiated."

94. At the end of the report Ms Brinkley wrote (279):

> "I can find no evidence to support claims that either Mr Mawbey or Ms Evans have behaved in a manner that would constitute Harassment and Bullying…. I do recognise however that there have been instances of misunderstanding and poor communication and therefore, I suggest that the following actions are taken to resolve matters ...
>
> (iv) Develop staff awareness if unacceptable behaviour and language under HCC Equality and Diversity policy. Remind staff of HCCs Values and Behaviour."

95. A lot of time at this hearing focussed on that part of Ms Brinkley's findings. In the absence of Ms Brinkley, Ms Card's evidence was that Ms Brinkley was sure that no discrimination had taken place. That answer seemed to us to open up three points.

96. First, Ms Brinkley was tasked with finding whether Mr Mawbey and / or Ms Evans had permitted racist behaviour and language and failed to challenge or manage it. She rejected that allegation. Ms Brinkley was secondly not

tasked in the grievance procedure with deciding whether any of the claimant's peers had used racist language. She could not uphold a complaint or grievance to that effect. She nevertheless concluded that, "Racist jokes and remarks do occur" which she rightly saw as a matter to be addressed, hence the recommendation quoted above. The third point was whether unlawful discrimination had taken place. That was not the question which Ms Brinkley had to answer. We take Ms Card's evidence as indicating however that Ms Brinkley tried to do so, and may have fallen into the error of concluding that unlawful discrimination had not taken place because the language in question was not intended to be offensive and was not directed at the claimant personally or as an individual.

97. Ms Brinkley's report was sent to Mr Stiles as Commissioning Officer of the complaint. Mr Stiles invited the claimant to a debrief meeting, which the claimant declined to attend (as was his right) and instead Mr Stiles wrote an outcome letter (396) in which he set out his reasons for rejecting the grievance. We quote only the decision on the first matter. After rejecting the allegation against Mr Mawbey, Mr Stiles wrote: "Your colleague does not recall any inappropriate comments directed at you". (Emphasis added). While that may have been a finding of fact which was open to Mr Stiles, it indicates that he may have fallen into an error similar to that of Ms Brinkley.

98. The claimant put in a detailed appeal, notable mainly for the first reference to his diary (405, 29 June 2015), the document that was disclosed in the course of this hearing. Mr Campbell was appointed to hear the appeal by late July, and on 12 August, he wrote to the claimant to invite him to attend the appeal hearing on 24 August (407). The claimant stated that date was not available to his companion (408) and the meeting was rearranged to take place on 23 September (letter of 27 August, 410). The claimant was sent a management pack of some 250 or more pages.

99. It will be recalled that the claimant had been signed off sick since late January. On 15 September, and returning to the strand of the claimant's absence, Ms Evans wrote to the claimant (429B) to suggest a meeting to discuss his health, to be held at 3pm, 23 September at County Hall (the grievance appeal was to be at 10am on the same day at the same venue). Her letter alerted the claimant to outcomes, including the possibility of a first written warning. That alert also indicated that there was no risk of the claimant's dismissal at the meeting.

100. On 16 September the claimant wrote to resign with immediate effect (430). The letter stated:

> "I feel I have been left with no option but to leave because of a fundamental breach of contract, the reasons listed below:"

101. The claimant then listed eight reasons, as follows:

> "Work related stress: Bullying and harassment; Discrimination; Unreasonable amount of delegated work; Arbitrary and capricious; Breach of trust and confidence; Last straw doctrine; Breach of health and safety"

102. Despite having resigned, the claimant attended the appeal before Mr Campbell on 23 September and Mr Campbell's letter recorded (457), "You responded that you might reconsider your resignation dependent on the outcome of the appeal." The claimant denied knowledge of the health meeting of the same afternoon. The respondent's records showed that the letter of invitation had been signed for on 19 September.

103. The outcome was a lengthy letter which should be read in full (457). The outcome on racist language stated (467), "I have not seen any evidence that you have been the recipient of racist remarks by either Ms Evans or Mr Mawbey." That was not the claimant's allegation, and an indication of, at least, inattention to the issues. Mr Campbell then went on to deal with the allegation of condonation, which he rejected due to the absence of evidence.

104. Our conclusions on this strand are that while aspects of the respondent's process could be criticised, there was overall a fair and proper process by which the grievance was analysed, investigated and rejected. The case which we heard was not the case which the claimant put forward in the grievance. He did not help his case by focusing his fire so heavily on Mr Mawbey, and by refusing to accept the legitimacy of any management interaction which he did not like. We have found above that if the grievance hearers went on to consider discrimination law (which they did not have to), they misunderstood it.

Limitation

105. We deal below with our findings as to the claimant's reasons for resigning, and we now turn to the other discrete issues which he raised as complaints of discrimination. Although the claimant gave no evidence in support of extension of time, and despite Ms his disregard of the disciplines of pleading and case management, and despite the unilateral extensions of the list of issues undertaken by both the claimant and Ms Maistry, we have thought it right to make findings on each of the issues of which we heard. It seemed to us in the interests of justice that having given evidence on these matters, the parties should understand the tribunal's determination of them.

Isolation / ostracism

106. Ms Maistry asserted that on taking up employment, the claimant was isolated from his group of colleagues, of which he was the only non-Caucasian member. She asserted that he was isolated on grounds of race. She agreed that this is not a pleaded issue, and is not to be found in the claim form or in the list of issues. It is not made such by the mere assertion of a representative, and we proceed to our conclusion on it, as a matter of potential evidential relevance and no more.

107. The claimant asserted first that his colleagues formed a close-knit group, bound together by ties of friendship and family. We do not accept that that was proved. The evidence before us was that the group of engineers was not a particularly stable group, and we had no evidence as to how long they had worked together. We heard the names of a number of employees who

had come and gone over the three years with which we were concerned. The arrival of a new member of the group was not unusual.

108. There was evidence that Mr Mawbey and Mr Durrant shared an interest in music and had played together. That was the only bond or interest of which we heard which existed outside work. There was no evidence that it influenced Mr Mawbey's management of Mr Durrant. The claimant asserted that there was a bond between the smokers who congregated to smoke. We do not accept that huddling together to smoke constitutes evidence of friendship. Ms Evans gave evidence that she encouraged Mr Mawbey to apply for his post, and we find that the reason was that she respected his professional abilities and thought that he had much to contribute to the respondent. We accept her evidence that there was no friendship between her and Mr Mawbey outside work.

109. When the issue of family relationships was raised, witnesses on both sides had a general awareness that somebody appeared to be somebody else's uncle or in-law, but no cogent evidence was given. There was no clear or cogent evidence of what the family ties were and between whom. The name of Mr Weswick, an agency worker who left in 2013, and was apparently related to one of the group, was mentioned, but no one was sure in evidence what the relationship was or with whom, and as he left in 2013 his role in these matters was plainly limited. There was no evidence (outside the claimant's assertions) that any relationship based on friendship, family or marriage, or shared interests, spilled over into work relationships.

110. At the second step the claimant asserted that as a close-knit group, his colleagues excluded the claimant, and did so on grounds of race. There was no evidence beyond the claimant's perception to support the former point. There was some evidence on the contrary to suggest that to the extent that the workshop was an undermanaged place where people behaved in a naughty fashion, the claimant had joined in (the stool incident was the strongest example before us).

111. In closing, Ms Maistry developed the assertion that as the work group was all Caucasian, they isolated or ostracised the claimant. That was a simplistic submission, unsupported by evidence. Its weakness is starkly illustrated by Mr Mawbey's impassioned response to the allegation of discrimination against him. His description of a hugely diverse extended family was not known to the claimant when he first made his allegations against him.

112. We note also two matters of contemporaneous evidence originating with the claimant, which were at odds with his evidence. When interviewed on 4 April 2013 about an unrelated matter, the claimant was asked "How are your day-to-day relations with other engineers?" and replied (emphasis added, 601), "<u>At first they were difficult as everyone was new</u> and Mr Durrant had been on sick leave. There are several related persons and if one is upset then the others can take sides. Mr Edwards states that things are much better now and hopes that they stay that way." That nuanced reply reflected the claimant's perception at the time.

113. In focusing his grievance on Mr Mawbey, the claimant implied that there had been good working relationships before he came. The claimant wrote at paragraph 5 “Since Mr Mawbey became my line manager I have noticed a change in attitude between both Mr Mawbey and Ms Evans.” (248) That reflects one general theme of the grievance, which was that his position began to deteriorate with the arrival of Mr Mawbey. It also reflects the degree to which he personalised his issues with his employer as grievances against Mr Mawbey as an individual. Another instance is at paragraph 10: “I have now worked for 3 years for the council and it is only now they are finding fault with my timekeeping.” (249). We find that while the claimant’s unpunctuality was a recurrent issue, the respondent had failed to address it until the arrival of Mr Mawbey.

114. We do not accept that the claimant’s colleagues isolated or ostracised him, or that they did so on grounds of race. Where there were day-to-day events and tensions of the type that arise in any workplace, we had no evidence to suggest that they were related to a protected characteristic. We had no evidence to suggest that any management decision was tainted by a sense that the claimant was in some way an outsider.

Work allocation and workload

115. The claimant had a recurrent complaint that he was overworked. The complaint was not that the service had been cut so that it was insufficiently resourced to serve the public. The complaint was found in the ET1, and was said to be that the claimant had to do more on the road jobs than colleagues;

116. The work undertaken in the workshop was reactive, ie repairs of damaged or broken items. It might also be urgent, if damage to a wheelchair left a user immobilised.

117. Field work had the particular difficulty that it involved both travel to an external location, and attempting to carry out a repair at the location, of an unpredicted duration.

118. That being so, we accept that the numbers of tasks allocated, or the time spent on them, or the location, even taken together are incomplete measures of workload.

119. We had no general evidence to support the proposition that the claimant’s workload was in any way excessive, disproportionate, or tainted by the protected characteristic of race. While the claimant attempted to rely on individual episodes, his evidence on them was no more than anecdotal, and could not help us to determine that objectively, and taken over a representative period, the claimant’s workload in fact exceeded that of any comparator.

120. We do not fault Mr Mawbey for encouraging the claimant to act as field engineer in the summer of 2014 during Mr Spooner’s absence on sick leave, because that arrangement could work around the claimant’s personal travel. Our criticism is that there seems to have been no formal exploration of Mr

Mawbey's suggestion that the claimant's working routine be tilted, so that he would come to the workshop in the middle of each day rather than at the start of each day. That however is a point of detail about organisation or practice, and was very far indeed from the issues before us.

121. Our finding is that it has not been shown that the claimant was in any way disadvantaged in arrangements around work allocation. That being so, we do not need to consider whether race was a factor in his treatment. If we had had to consider that point, we would have rejected it.

The stool incident

122. We heard a great deal about this matter. There was first some dispute about whether the claimant and Mr Mawbey were involved in one or two material incidents about a stool. We accept Mr Mawbey's evidence. We find that there was a single stool incident.

123. We find that on a day in summer 2014 the claimant and Mr Sollis were the only engineers at work. Mr Durrant was out on a call.

124. At some point during the day, Mr Mawbey came in to the workshop to see if Mr Durrant had returned and discovered that Mr Durrant's stool had been bolted to his bench. This was probably meant as a prank, which it would have taken somebody a bit of time and work equipment and material to do, and which Mr Durrant would have had to undo in order to use his stool.

125. Mr Mawbey gave evidence that he did a number of things. He asked the claimant who was responsible and in his witness statement wrote "Mr Edwards went red." Later, when he asked Mr Sollis, Mr Sollis said "Let me put it this way, there was only two of us here and it wasn't me." Mr Mawbey believed Mr Sollis. He was angry. What he saw was not a harmless prank, but a waste of time, material and resource, all of which belonged to the public. He photographed the item, and then moved the claimant's stool away from his workplace, returning it later in the day.

126. Mr Mawbey's account was materially corroborated in plain common sense language by Mr Durrant, when he was interviewed by Ms Brinkley (316),

> "..[T]his is about, the day the stool was removed. I left my station for a short time and when I came back my stool had been bolted to my workbench, a joke I suppose. There was only Vernon and John there and John is just not that type of person so it's likely Vernon did it. It didn't bother me. Andy Mawbey came up and saw it and was a bit annoyed, it must have wasted quite a bit of company time, I think he took a photo of it. I think Andy took the stool away bit it was bought back within about 20 minutes. VE initially accused me of removing the tool but I told him it wasn't me. Andy wasn't being nasty, it seemed like it was done as a joke."

127. So that there is no doubt about it, we find as follows: First, that that was the only material incident relating to the stool; secondly, that Mr Mawbey did not carry out a formal enquiry in to who had bolted Mr Durrant's stool; thirdly, that on the evidence before him, and based on his knowledge of the two individuals, he was entitled to form a reasonable belief that the claimant

was responsible; fourthly, that while he might have dealt with the matter informally or formally through a disciplinary process, he chose to deal with the matter by removing the claimant's stool, either as mere retaliation, or to put the claimant into the embarrassing position of having to come and ask for his stool or where it was. It follows fifthly that we do not accept that as pleaded the claimant's stool was not returned to him for four months.

128. This was a trivial everyday incident. If anyone comes badly out of it, it is the person who bolted Mr Durrant's stool in the first place. We do not follow Ms Maistry in making an unrealistic criticism of Mr Mawbey's management of the situation. It is fanciful , in our judgment, to regard this incident as related to race. Ms Maistry's submission that Mr Mawbey automatically decided that the claimant rather than a white comparator, Mr Sollis, was at fault is one which we reject. He formed that there were only two possible culprits. He spoke to each of them. He reached his view on the basis of what he perceived as the claimant's embarrassment when asked about the matter. He was reasonably entitled to accept Mr Sollis' denial. He was under no obligation to conduct any further or formal process.

The cleaning materials

129. The claimant complained as an act of discrimination that he was unjustly accused of stealing cleaning materials. When this allegation was tested, the claimant agreed that such accusation, if it were made, was made by Mr Mawbey in the form of a look or a gesture and not in words. We find as follows.

130. On the day in question, in 2014, the claimant was seen by Mr Mawbey to be taking cleaning materials from the workplace to his car. There was nothing wrong with this, as the claimant had paid for the materials in accordance with an established procedure. However, when Mr Mawbey saw the claimant, the claimant was leaving the building using a fire door, at a time when there had been express repeated instructions that the fire door was not to be used other than in a fire emergency. Mr Mawbey agreed that he gave the claimant a quizzical look, or some sort of gesture, but did not speak. The claimant, in response to the look or gesture, showed Mr Mawbey a receipt for the goods, or offered to do so.

131. We struggle to place the claimant's allegation of discrimination by quizzical gesture or look in to the framework of the Equality Act. We find that Mr Mawbey treated the claimant in the same way that he would at that time have treated any other person whom he had seen coming through the fire door in a non-emergency. He did not make an allegation of theft. There was no element of race or detriment in this matter.

132. The claimant asserted that a colleague had told him that Mr Mawbey had behind his back accused him (the claimant) of theft. The claimant agreed that he had no other evidence that Mr Mawbey had done so. We are confident that if Mr Mawbey ever formed a suspicion to that effect, he would have acted on it professionally. We accept that he did not say anything to that effect. It is possible that the colleague who said that he did was teasing the claimant.

PAT training

133. The claimant complained that he had not received PAT training. He asserted that all his colleagues had had the training, and he had been denied it on grounds of race.

134. We accept Ms Evans' evidence (WS41 and 42):

> "As it was my role to ensure that all staff had the appropriate training… it was not a requirement of all of the engineers to have PAT testing and I cannot think of any other staff members who received this training. I am aware however that some of the staff that were TUPEd over to HCC had received this training with their previous employer, but not all HCC staff were trained and were not required to be PAT trained. PAT testing is not a major requirement of the role that was being undertaken by the claimant… there were also other engineers available who could PAT test should the need arise."

135. Our finding is that the respondent did not provide PAT testing to anyone, irrespective of race, within the relevant group, and relied, for PAT related matters, on the training received by their employees in previous employment. There is no point of comparison to be made. We find that the claimant, along with white colleagues, did not receive PAT training, for the reasons stated by Ms Evans. Race formed no part of this.

Personal development meetings

136. The claimant complained that he had not had the Personal Development one-to-ones to which he was entitled, and which his white colleagues had had. The factual basis of the claim is partly correct. One aspect of the shortcomings in the claimant's line management before Mr Mawbey's appointment was a failure to carry out PMDS reviews. On taking up management of the group of engineers, Mr Mawbey was aware that this was a matter to be addressed, and he candidly admitted that due to work pressures, he had omitted to do so. He named the claimant and a white colleague, Mr Spooner, (who had been off sick for part of the relevant period) as those who had not received PMDS reviews.

137. We accept that the reason why the claimant did not have PMDS was first under-management by the departed managers, and then oversight and omission on the part of Mr Mawbey. We accept Mr Mawbey's evidence that he committed the same oversight and omission in relation to a white peer, Mr Spooner. The claim fails on the basis that no difference in treatment has been shown, and that a white comparator experienced the same treatment. If we need go further, we add that we accept that the reason why the claimant and Mr Spooner missed PMDS was poor management before Mr Mawbey, and omission by Mr Mawbey.

Bicycle works

138. The claimant complained about a bicycle incident. One day he brought his bicycle to work in his vehicle, and while at work, had used work equipment to clean the bicycle. Whether by accident or design, he did this on a day

when Mr Mawbey was absent from work, and Mr Mawbey found out about it on his return.

139. Mr Mawbey's evidence (WS69 to 70) was that two of the claimant's colleagues had reported to him that they had been delayed in their work by the claimant's use of the cleaning equipment on his bicycle. That was an indication that the claimant's actions were regarded as untoward and disruptive. Mr Mawbey asked if the claimant had undertaken the cleaning during the lunch break and was told that he had not.

140. Mr Mawbey dealt with the matter informally, as he was entitled to. Mr Mawbey spoke to the claimant informally about the matter and told him that he needed permission to use the equipment for himself. He was entitled to remind the claimant that if he wanted the perk of using office equipment for personal use, he should do so with permission and in his own time (such as the lunch break). There was nothing inherently untoward about the conversation. It was an everyday management interaction.

141. The claimant relied on a white colleague, Mr Lucas, as comparator, on the basis that Mr Lucas had been allowed to use workshop facilities to repair his bike. Mr Mawbey's evidence, which we accept, was that Mr Lucas was not a true comparator in all the circumstances. First, Mr Lucas used the bike to commute to work from Stevenage; secondly, he had therefore not specifically brought the bike to work for repair, but had had a puncture or the need for some other repair on the way to work; thirdly, he had asked permission and been permitted to undertake the repair which, fourthly, was in his lunch break, so that fifthly no colleague complained of his work being delayed in consequence. The comparison shows the claimant in a poor light when seen with Mr Lucas. The two situations are not materially comparable, and if they were, the difference in treatment is fully explained by Mr Mawbey. We find that any difference in treatment was wholly unrelated to race.

Contact while off sick

142. The claimant complained of discrimination in contacting him while he was off sick. Ms Maistry confirmed that the complaint related only to Mr Mawbey's texts, and we have dealt above with our findings on the texts. We repeat that we can see nothing to criticise in Mr Mawbey's texts to the claimant, whether in number, timing, or content, and no indication whatsoever of a claim of race discrimination.

143. A correspondence of eleven texts in two months cannot by any standard be called harassment or suggestive of discrimination on any ground. The language of all of the texts is professional. The great majority were sent not proactively, but in reply to communication from the claimant. The great majority reminded the claimant of the respondent's needs and procedures. The claimant had the option of asking not to be sent texts, which he did not take up. It is fanciful to attach to this part of the case any label related to a protected characteristic.

The cold day

144. We heard a considerable amount of evidence about an event in December 2014. We find as follows. The weather was cold. In common with others in public service buildings, those returning to work found that the heating had not been on during the Christmas break, and therefore the working conditions were cold. The claimant spoke to Mr Mawbey about the cold in the workshop; it is possible that his diabetes rendered him more susceptible to cold than others. Mr Mawbey arranged for an official temperature test to be undertaken, which showed that although it felt cold, the temperature was within permissible limits.

145. In a second conversation the same day, Mr Mawbey asked the claimant what he wanted to do about the cold, and the claimant said that he wanted to go home. Mr Mawbey said that if the claimant did go home, it was not with his permission. He then said words to the effect that if the claimant chose to go home without permission, then he, Mr Mawbey, might take the opportunity to look at the claimant's lateness record.

146. Ms Maistry attached a great deal of weight to this exchange. In particular, it led her to the submission that the letters of 21 January 2015, alerting the claimant to an investigation in to his timekeeping, were not sent for good reason, or for the reasons appearing on their face, but as a form of bad faith retaliation against the claimant for having raised the issue of the working temperature (this was not pleaded as a public interest disclosure point). It was not explained why a complaint about cold would attract retaliation, or what this had to do with race.

147. The flaw in Ms Maistry's submission was that there was clear evidence that the claimant's timekeeping had been a matter with which Mr Mawbey had been engaged (with cause) for at least the previous six months. Mr Mawbey had sought to reset standards of timekeeping from, at the very latest, 1 July 2014; he had offered the claimant the facility of field work; and he had deferred addressing the matter in autumn because of the Christmas period. However, the informal monitoring that was under way showed that the claimant's timekeeping record remained dismal, as indicated above. His remark may have been unguarded – its meaning was no more than to say to the claimant that if he, the claimant, was going to be difficult, then Mr Mawbey could be difficult too – but it was no more than that, and there was certainly nothing whatsoever to link it to race.

<u>Racist language: fact find</u>

148. We now turn to the issue of racist language.

149. The claimant described a work setting which was all white; all male; and in which general workplace banter (by which we mean the OED definition of 'friendly playful teasing') included racist language about other groups and races. On occasion, on his account, it was directed at him. He (and briefly his partner) spoke of its effect on him. Our assessment of this evidence is that when we find the claimant's allegations to be corroborated by other

evidence, we accept it. We do not accept the claimant's uncorroborated evidence. We first set out our general approach.

150. In assessing this evidence, we must focus on substance and not form. We should not let the poor quality of the claimant's presentation of his case of itself distract us from the merits. That comment is however subject to the demands of offering the parties a fair hearing. Fairness demands that each side has sufficient information about the case which it has to meet. Many of the claimant's allegations were so generalised as to be incapable of fair trial.

151. We bear in mind also that we heard the names of a number of the claimant's colleagues and peers bandied about, and that the claimant made serious allegations against many of them as individuals. We have not heard evidence from any of them, and we must be cautious to avoid applying blame to the broad backs of the absent. Ms Maistry criticised the respondent for not calling Mr Durrant. We accept that Mr Durrant left the employment of the respondent in October 2015 as a result of a TUPE transfer. Ms Maistry commented that his presence would have assisted the tribunal. It was open to either side to arrange his attendance by use of the witness order procedure. It is a matter of speculation as to whether oral evidence would have added to Ms Brinkley's record of his interview.

152. We have commented earlier that we find the claimant's evidence generally unreliable. We repeat that finding, and the reasons stated. In this part of the case, we were struck by the near-total lack of specificity or detail about most allegations. We have commented separately that the claimant's diary gave us little assistance, and certainly no reliable corroboration of any one allegation. What appeared to be possible corroboration, ie the timing of the 'gas' remark in the diary, was challenged by the fact that the relevant entry was recorded to a day after the claimant went off sick.

153. We attach considerable weight to the point that the racist remarks form part of the claimant's case against Mr Mawbey, both at the grievance stage, and in this tribunal. We have commented above that Mr Mawbey was named over 40 times in the claimant's initial grievance; and having heard the evidence in full, we find that the claimant appears fixated both on Mr Mawbey as an individual, and on his attempts to manage the claimant's poor time-keeping.

154. We reject any allegation that Mr Mawbey was passive, indifferent or acquiescent in the presence of racist language. We find that he gave powerful evidence of a number of respects in which he has demonstrated a commitment to equality which renders the allegations unsustainable. We attach weight both to his assertion that his wife and her family identify as black, and to the list which he gave the respondent of eight non-white colleagues and direct reports within their employment, and with whom he had perfectly normal working relationships (349).

155. We attach weight, against the claimant, to the piecemeal manner in which allegations of racist language were made. In doing so, we do not expect of the claimant a lawyer's objective analysis and description of experience. We do bring to bear a number of reasonable, common sense expectations: that he could reflect and prepare what he put in writing, or in advance of

meetings; that he was able to identify the most serious and / or the most recent events; that he could make some reasonable attempt to describe who said what, when, and in what context; and that having (in March 2015) made a first report of racist language, he would understand the importance of presenting a single, coherent case. We find that the failure to meet these expectations undermined the claimant's credibility, and created the impression of a case which was a process of embellishment (which continued to, and included, Ms Maistry's closing submissions).

156. We remind ourselves that the claimant began working at the respondent in 2012. He entered into an employment relationship in place of an agency worker relationship. At all times he had the challenge of a long awkward journey to and from work. When specifically asked in 2013 about working relationships (601) he mentioned past difficulties, without reference to race, but said that things were now better.

157. We set out a summary of our findings in support of paragraph 155 above. In doing so, we note the number of iterations presented to us. In chronological order, they included: his diary; first written grievance; grievance interview; follow up letter (622); grievance appeal letter; grievance appeal meeting; claim form with particulars; witness statement; second witness statement; oral evidence; submissions.

158. The first allegation in relation to racial language was made on 16 March 2015 (251) and as commented above, in the sixth page of his grievance, to which, reading the document as a whole, it was something of an afterthought. The allegation named no perpetrator ('certain colleagues') and was squarely an allegation that "Mr Mawbey did nothing about it other than to laugh and smirk at staff making racial comments." The instances quoted were 'mocking my accent,' as well as Hitler signs, the gas remark, and discussions about extreme right wing organisations.

159. On 30 April the claimant was interviewed by Ms Brinkley and Ms Card in the presence of Mr Clark. We have rejected the allegation that the claimant was not well enough to do justice to his case at the interview on 30 April. The claimant named only one perpetrator, Mr Durrant. He quoted Mr Durrant in a "funny accent" saying to him "Speak English" and quoted as racial remarks, "Heil Hitler" and "Hitler wasted his gas on the Jews". He said that there was discussion of joining a racist rally. He repeated the assertion that Mr Mawbey smirked and grinned and did nothing to intervene.

160. On 28 May the claimant wrote to Ms Brinkley to supplement his allegations of racial remarks (622). We have quoted the passage above. On that occasion and for the first time he named two more perpetrators, Mr Lucas and Mr Sollis, and added one more express quotation in the phrase, "John Sollis made racist comments about 'Chinks'" on an occasion in January 2015". He said that when he objected, Mr Durrant answered, 'Here we go again.'

161. The claimant gave no more specifics in his appeal letter of 29 June (404), writing (bold in original), "**Racism comments take place** on a daily/weekly basis by more than one member of staff."

162. Notes of the grievance appeal hearing on 24 September record the claimant having referred to (437),

> "Jewish racist
> Making monkey noises when I'm working in front of cage
> Immigration people should drown."

163. The latter two comments here appeared for the first time, and were later clarified further.

164. In his Particulars attached to the ET1 of January 2016 the claimant through his solicitors wrote,

> " (16) [C]olleagues mocked his accents and made racist jokes in the presence of management. No caution was given by … Andy Mawbey ..
>
> (30) On or around 2014 .. several racist comments were directed to him, such as reference to him travelling to London on a banana boat were made in the presence of managers.
>
> (31) On or around January 2015 .. several colleagues made comments such as 'Hitler wasted gas on the Jews' in the presence of managers .. the manager, Andy Mawbey smirked giving and indication that he agreed with the comments made ..
>
> (33) .. his accent was often mocked whilst working."

165. This was the first occasion on which the 'banana boat' allegation was made, over a year after the claimant had last been in the work place. He had not associated it with the 'monkey noise' allegation raised at the September appeal, although both refer to the same racist trope; nor was the monkey noise allegation incorporated in the ET1. When interviewed the previous April, the claimant had named Mr Durrant as the speaker of the 'gas' remark, and had not spoken of several colleagues.

166. In his witness statement for these proceedings the claimant asserted that Mr Durrant and Mr Weswick mocked his accent from February 2012 onwards in the presence of staff and management. He asserted that Mr Weswick spoke about joining the EDL, "would make Hitler signs and recite the verses (Heil Hitler) in my presence." (WS5)

167. At paragraph 10 of his witness statement he wrote "Mr Dave Durrant would often say to the other staff in the workshop that I came over to England on a banana boat and would begin to laugh at me and mock my accent, he would also say he would teach me to speak like a cockney and would burst out laughing. " He continued, "Mr Dave Durrant would sometimes shake the wire fence and make monkey noises if I was working on the other side of the fence and again would just laugh." (WS11). He continued, "Several times… between the end of 2012 to the end of 2014 Mr Dave Durrant would say to me… that all illegal immigrants should be taken on a boat to the middle of the ocean and sink the boat…" (WS12).

168. At WS13, the claimant asserted that Mr Durrant "made a comment "Hitler wasted gas on the Jews"… after coming back from the canteen in the

morning and we had just got back into the workshop, the TV was on the news channel, there was a WW2 Remembrance Day special events on the TV that day" (WS13). At WS18 the claimant wrote "The duo repeatedly made comments about me and how I must have travelled to England on a 'Banana Boat' in the presence of managers .. namely Mr Mawbey" (the duo in context refers to Mr Walker and an agency worker named Paul).

169. We note: in September no perpetrator of the monkey noises was named. The allegation, despite its seemingly clear and offensive nature, was not pleaded. In the witness statement Mr Durrant was named as perpetrator. The 'drowning' allegation was made at the grievance appeal, and no perpetrator is recorded; in the witness statement, it is said that Mr Durrant made the remark repeatedly. It is not pleaded. While the January particulars of claim plead (as first mention) the banana boat allegation, three perpetrators were identified for the first time in the witness statement.

170. In her closing submissions, the claimant asserted that "The Caucasian workers" were (emphasis added) "all racially prejudicial to ethnic minorities." The claimant named Mr Durrant, Mr Weswick, Mr Luca (*sic*), (presumably Mr Lucas), Mr Burke and Mr Hobson, all of whom were identified as perpetrators in the submission. The claimant had not, in any of about ten pervious iterations, asserted racial prejudice against all his colleagues. The submission continued "throughout his employment his accent was mocked, at times daily and at times monthly."

171. We attach caution to any consideration of the claimant's diary. While written on a chronological diary, it was not kept as a diary in the sense of a chronicle of events recorded on named dates. We find that the claimant made handwritten notes, but we make no finding of their accuracy or when they were made. We note in the diary that on the page for 22 September 2014 the claimant recorded that Mr Durrant had made a comment about sinking a boat of immigrants in the ocean. On 17 November 2014 he recorded "Dave mocking my accent for the hundredth time! Getting fed up of this!!." We saw no other reference to either the drowning allegation or the accent.

172. On the forward planner for 27 January 2017 the claimant wrote "Hitler wasted gas on Jews D Durrant." This was the only event on which the claimant identified simultaneously the event, the date, the perpetrator, a diary entry and linked his recollection to a verifiable, external matter. As Ms Rao pointed out, 27 January was marked as Holocaust Memorial Day, and there may well have been television historical footage, or news coverage of commemorative events. However, we find that the claimant was not at work that day, as he had gone off sick on 21 January.

173. Our stated conclusion on these allegations has been that where they rest on the claimant's uncorroborated word, we do not accept them. That includes our finding that the claimant's diary is not corroboration of his oral evidence.

174. In corroboration, we rely on the record of Mr Durrant's interview on 13 May 2015 (314-315) and Ms Brinkley's analysis of it (268). We find taking those matters together, that what is striking is Mr Durrant's failure to deny any

allegation except the one against Mr Mawbey, notwithstanding their gravity, or how bizarre they might seem on paper. We interpret the record of Mr Durrant's questioning to mean that Mr Durrant accepted that there had been remarks around the claimant's accent, and that the remark "Hitler wasted gas" was made. We interpret Ms Brinkley's conclusion as a finding that the allegation against Mr Mawbey and Ms Evans was rejected; that there had not been any allegation against Mr Durrant or the claimant's peers which she was require to determine; and that while Ms Brinkley thought that there had not been a breach of the Equality Act; "banter" had taken place which required to be addressed through diversity and respect training.

175. We were troubled in deliberation by the issue of whether or not the use of racial language which we have found took place correctly leads us to uphold a freestanding claim. We have no difficulty in stating the principle that a workplace should be free of any actual or reasonably perceived negative event related to a protected characteristic. If the claim had been pleaded as a claim under 26 (harassment) we would have had less difficulty. It has however been pleaded exclusively as a claim of direct discrimination under s.13, and we must therefore consider whether there has been less favourable treatment than a hypothetical comparator.

176. These claims were pleaded and conducted as claims of direct discrimination only. We must therefore find that the claimant has been treated less favourably than a hypothetical comparator, or than any other member of the white group of engineer colleagues. We uphold only one complaint as to the use of racist language, which is that Mr Durrant, and probably others, repeatedly over time imitated the claimant's accent, both in conversation among themselves in the claimant's hearing, and in conversation with the claimant. We find that the detriment (imitation of the Caribbean accent) took place; and that Mr Durrant (and others) did not imitate the accent of any other person who was not of the claimant's race.

177. In our judgment, the only complaint upon which we can find that the claimant was treated less favourably than a hypothetical comparator not of Caribbean origin, and which we have found on balance of probabilities to have been corroborated and upheld, relates to the imitation of the claimant's accent. That claim succeeds and on that claim alone matters proceed to a remedy hearing.

178. We find that on a date in January 2015, but on or before 21 January, Mr Durrant used the words "Hitler wasted gas on the Jews." We find that that was said in general conversation. If we had been called upon to consider it as an element in a claim under s.26 (harassment) we might reach a different conclusion. We reject a claim based on this remark because we can see no element of less favourable treatment of the claimant, or the construction of any comparator.

179. We reject all other pleaded allegations which arise out of allegedly racist language, because the pleaded allegation has not been proved to us on balance of probabilities.

<u>Constructive dismissal</u>

180. We turn now to the claim of constructive dismissal.

181. The claim of constructive dismissal is brought under s.95(1)(c) of the Employment Rights Act 1996. That section provides that an employee is dismissed:

> "If the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

182. The correct approach is that the claimant must show that the respondent without proper cause conducted itself in a manner calculated or likely to destroy the relationship of trust and confidence which exists between employer and employee. The conduct of the employer must be considered objectively, not from the perspective of the feelings of the employee. It is important not to lose sight of the requirement that such conduct be "without proper cause" as there may be occasions when legitimate management decisions otherwise meet the statutory language. The conduct must be the operative cause of the resignation, and the resignation must follow reasonably promptly. It is for the claimant to prove the claim. A claim of constructive dismissal may also be brought under the discrimination in dismissal provisions of the Equality Act.

183. The claimant relied as the repudiatory events on a sequence of management events and interventions, culminating in the letters of 21 January 2015, and thereafter on the grievance process. We find that in relation to each such event, the respondent acted reasonably, and for proper cause, and within the respondent's own procedures and standards. Whether we take these incidents separately or cumulatively, we find that there has been no repudiatory conduct, and where there was management action which the claimant wished to challenge (most specifically in relation to his lateness) the respondent acted for reasonable cause. Where we have expressed criticism or reservations about management's action, those are counsel of perfection and no more. It follows that the claimant's claim of constructive dismissal must fail.

184. It follows also that while we do not necessarily need to make a finding as to why the claimant resigned, we think it in the interests of justice that we do so, as we have heard evidence and reached conclusions. In our judgment, the claimant resigned his employment because he wished to avoid the management assessment of his lateness which he knew was inevitable. We do not underestimate the strain on the claimant of a vehicle commute between West Drayton and Welwyn Garden City. The claimant must have seen that he was persistently late, and by July 2014 at the very latest (but we think much earlier) he must have known that there was a new, pro active style of manager, and that the respondent's forbearance of his timekeeping was at an end. He may have foreseen that his employment was becoming unviable, either through his own decision or through, ultimately, dismissal for bad timekeeping.

185. We have found that racial language was used at the workplace, and we have asked whether we consider that that was an event which contributed to the claimant's resignation and, not without misgivings, we find on balance that it was not. In particular, without in the slightest or in any respect appearing to defend the language about which we heard, the position was that the first occasion upon which the claimant complained of such language was, on his account, 38 months after it began, and then, as we have said a number of times, in the context of a grievance about the management of his timekeeping, framed as a grievance against Mr Mawbey as an individual.

The list of issues

186. We here cross refer our findings and conclusions to the list of issues (115j-m).

187. Issue 3(a) is upheld in part: we find that the respondent, through Mr Durrant, directly discriminated against the claimant by imitating his accent on a number of occasions throughout his employment.

188. Issue 3(b) fails: it has not been proved that the 'banana boat' remark was made. We find that no such remark was made in the presence of Mr Mawbey or Ms Evans.

189. Issues 3(c) and 3(e) fail: we find that there was a single stool incident as set out above and wholly unrelated to race.

190. Issue 3(d) fails: we find that the claimant was not accused of stealing. The look or gesture of which the claimant gave evidence was wholly unrelated to race.

191. Issue 3(f) fails: we find that the claimant did not receive PMDS for reasons stated. He was not 'excluded,' and the reason was wholly unrelated to race.

192. Issue 3(g) fails: we accept in full Mr Mawbey's evidence about the bike incident. His informal management of the claimant's conduct was wholly unrelated to race, and not comparable with the comparator.

193. Issue 3(h) fails: we accept that the claimant complained of the temperature. We repeat our finding as to Mr Mawbey's reply. We find that Mr Mawbey's response was wholly unrelated to race.

194. Issues 3(i) and 3(j) fail: we reject the claimant's uncorroborated assertions on which these allegations are based.

195. Issue 12 fails.

Costs

196. Ms Rao made a concise application for costs. She sought an order in relation to all or part of her brief fee for the hearing on 25 September, which, she submitted, was necessitated entirely because of the loss of time which arose from late disclosure of the claimant's diary. The diary was referred to in the claimant's appeal letter, so that even before he was legally

represented, the claimant had been aware of its potential materiality to these matters. Ms Maistry replied that the claimant had not intended to mislead the tribunal, but had misunderstood the position. She reminded us (correctly) that the costs jurisdiction is not punitive, and that as the claimant had been out of work for some time, a costs award would be overly harsh.

197. We approach the matter through three steps. We ask first if the claimant has conducted the proceedings unreasonably (that form of words includes the conduct of the claimant's representative), and we find that he has. A disclosure order was made on 2 September 2016. The claimant failed to give disclosure of a clearly material document. The respondent's failure to ask for it was, in the case of a represented claimant, not a material consideration or explanation.

198. We then ask if a costs order is in the interests of justice, and we find, in all the circumstances of this case, that it is. We can see no interest of justice which requires a public authority to incur an additional day's costs in consequence of a clear breach of case management discipline over a period of time by a represented claimant.

199. We then ask how much an award should be. We had no formal information about the claimant's means. However, by the time we reached this stage in our deliberations, we were aware that the claimant would have the ability to pay by way of set off from the award to be made on that part of the claim which succeeded. It seemed to us right to award a proportion of Ms Rao's brief fee, to set the figure of £750.00, and then, of our own initiative, to postpone liability to pay to a date after the remedy hearing in the expectation of a set-off.

_____
Employment Judge R Lewis

Date: …2 November 2017……..

Sent to the parties on: .....

.....
For the Tribunal Office