EMPLOYMENT TRIBUNALS

Claimant: **Mrs A Jenkins-Hurrell**

Respondents: **(1) The Campion School**
(2) Mr Christopher Conner
(3) Mr Keith Williams

Heard at: **East London Hearing Centre**

On: **23, 24 & 25 October 2019 and (in chambers) 21 November 2019**

Before: **Employment Judge G Tobin**

Members: **Mrs R A Forest**
Mrs B K Saund

Representation
Claimant: In person
Respondent: Ms E Walker (Counsel)

JUDGMENT

The unanimous Judgment of the Tribunal is that:-

1. **The third respondent, Mr Keith Williams, is dismissed from proceedings.**

2. **The claimant complaint of harassment against Mr Paul Day is out of time, pursuant to s123(1) Equality Act 2010, and the Tribunal does not consider it just and equitable for this complaint to proceed.**

3. **The claimant's remaining 2 allegations of harassment, under s26 Equality Act 2010, against the second respondent and the first respondent (by virtue of s109(1) Equality Act 2010) do not succeed and are accordingly dismissed.**

4. **The claimant did not act unreasonably in pursuing her complaints of harassment. Accordingly, the deposit paid by the claimant will be refunded.**

5. **The claimant was constructively unfairly dismissed, pursuant to s94 Employment Rights Act 1996.**

6. The case will be listed for a remedy hearing and the tribunal will make case management orders accordingly.

REASONS

Proceedings

1 The claimant issued proceedings on 15 January 2019. The claimant was employed by the first respondent, a secondary school, as a cleaner for almost 5 years and was employed to work 15 hours per week. The second respondent is the first respondent's Site Manager and the third respondent is the first respondent's Headmaster. The claimant originally complained of unfair constructive dismissal, race discrimination, bullying, harassment, victimisation, whistleblowing, holiday pay unlawful deduction of wages and other payments. Responses was filed by all three respondents on 11 March 2019 together with a single detailed grounds of resistance submitted on behalf of all 3 respondents which denied all allegations.

2 At a Preliminary Hearing on 15 April 2019, the Tribunal dismissed the claimant's claims in respect of her holiday pay, unlawful deduction from wages, other payments and her complaint that she was subject to a detriment as a result of having made a public interest disclosure. The case was listed for a further hearing and was heard at a Preliminary Hearing (Open) on 14 August 2019. The claimant's complaint of direct race discrimination was struck out as it was not presented in time and the claimant's complaint of indirect race discrimination and victimisation were struck out as having no reasonable prospects of success. Employment Judge Barraclough ordered a deposit order of £100 in respect of the claimant's allegations or arguments that the respondent[s] harassed her. The reason for the deposit order were given as:

> The allegations of harassment were not pleaded or set out in the claimant's [Claim Form] and were only raised for the first time the Preliminary Hearing on 15 April 2019.

3 The claimant provided Further Particulars of the details of complaint on 21 August 2019 and the respondents provided an amended response on 11 September 2090.

4 The Claims remaining for determination were the unfair dismissal and the harassment on the grounds of the claimant's race.

List of issues

5 At the outset of this hearing the Employment Judge conducted a case management hearing and identified the claims to be determined. The details of these claims were initially set out in the Case Management Summary of Regional Employment Judge Taylor for the Preliminary Hearing of 15 April 2019 [Hearing Bundle, page 62]. The claims that required determination at this hearing were as follows:

Harassment

5.1 The claimant alleges that during her employment she was called names by other employees, including Mr Paul Day (Caretaker) and Ms Corren Howard (Cleaner). Mr Day, at various times (unspecified) said she performed voodoo or called her "voodoo" and both Mr Day and Ms Howard said to her "you scare me".

5.2 On 10 April 2018 the claimant started work at 7.30am but the second respondent wrongly claimed that she should have been attending work at 6.00am and that she had arrived at work late. Two cleaners who were white, attended work at 8.00am and 9.00am although they were schedule to attend work at 6.00am and they were not subject to any adverse comment by The second respondent.

5.3 On 11 April 2018 The second respondent told the claimant that the building contractors had been looking for her and Mr Vaughan had wanted to speak to her but could not find her. In saying this The second respondent was falsely alleging that the claimant had arrived late for work. The claimant believed she had been "singled out" for this treatment (being accused of attending work late) and returned home. (The claimant did not return to work after that date).

Unfair (constructive) dismissal

5.4 The claimant explained she had resigned and claimed constructive dismissal because she believed that the respondent(s) had breached the implied terms of trust and confidence for several reasons. These reasons included:

5.4.1 that the respondent(s) had subjected her to harassment;

5.4.2 did not pay her for all her overtime worked;

5.4.3 had wrongly accused her of searching the school offices; and

5.4.4 had accused her of attending work late on 11 April 2018.

5.4.5 Then Mr Williams on 15 May 2018 at the first grievance hearing was hostile and intimidating towards her, and also her friend, who had attended the grievance meeting to support her.

5.4.6 The respondents unreasonably failed to uphold her grievances.

Preliminary determination

6 Prior to the commencement of the hearing, the respondent's representative had raised the issue of the third respondent – Mr Keith Williams (Headmaster) – being removed from proceedings as a named respondent. Mr Williams also repeated this request at the beginning of his witness statement. The Employment Judge asked the claimant to identify the claims of discrimination made against Mr Williams and she could

not identify any allegations made directly against Mr Williams. Following initial discussion, the claimant did not object to Mr Williams being dismissed as a party to these proceedings and the Tribunal ordered that Mr Williams be removed as a named respondent.

7 For the rest of this determination, we shall refer to Mr Williams in name only and not as the third respondent.

The Law

8 Under section 4 Equality Act 2010 ("EqA"), a protected characteristic includes a person's race, which includes: (a) colour; (b) nationality; (c) ethnic or national origin.

9 The test for harassment is set out in s26 EqA:

> (1) A person (A) harasses another (B) if –
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of –
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (4) In deciding whether contact has the effect referred to in subsection (1)(b), each of the following must be taken into account –
>
> (a) the perception of B;
>
> (b) the other circumstances of the case; and
>
> (c) whether it is reasonable for the conduct to have that effect.

10 S136 EqA implements the European Union Burden of Proof Directive. This requires the claimant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination, and it is then for the employer to prove otherwise.

11 For allegations of harassment, there is no necessity to look for a comparator. As described in *Rayment v MoD [2010] EWHC 218 (QB), [2010] IRLR* the standard for harassment is conduct that is "oppressive and unacceptable". The definition approaches the matter from the claimant's perspective. Therefore, if a victim had made it clear that she found the conduct unwelcome, the continuation of such conduct will constitute harassment. Only if it would be unreasonable to regard the conduct as harassment at all will there be a defence here, but the test for connections between the conduct and the effect have been loosened so that unwanted conduct no longer has to be *on the ground of* the victims protected characteristic to fall within the definition, but only *related* to the claimant's protected characteristic.

12 Section 95(1) ERA provides that an employee is dismissed by her employer for the purposes of claiming unfair dismissal if:

> (c) 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.

13 An employee may only terminate her contract of employment without notice if the

employer has committed a fundamental breach of contract. According to Lord Denning MR:

> If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. *Western Excavating (ECC) Ltd v Sharp [1978] ICR 221.*

14 In *Courtaulds Northern Textile Ltd v Andrew [1979] IRLR 84* the Employment Appeal Tribunal ("EAT") held that a term is to be implied into all contracts of employment stating that employers will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

15 Brown-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 (EAT)* described how a breach of this implied term might arise:

> To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

16 *Western Excavating* established that a *serious* breach is required. *In Brown v Merchant Ferries [1998] IRLR 682*, the Court of Appeal accepted that if the employer's conduct is seriously unreasonable, this may provide evidence that there has been a repudiatory breach of contract, but, on the facts, held that the conduct in question fell far short of a repudiatory breach by the employer. Mere unreasonable behaviour is not enough.

17 In *Hilton v Shiner [2001] IRLR 727* the EAT confirmed that the employer's conduct must be without reasonable and proper cause. *WA Goold (Pearmak) Ltd v McConnell and another [1995] IRLR 516* held that an employer's obligation to address an employee's grievance may amount to an implied contractual term existing in all contracts of employment. In *Malik and another v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606* the House of Lords held that a failure to respond to an employee's grievance can amount to a breach of the implied term of mutual trust and confidence. Thus, a failure by an employer to address an employee's grievance could itself amount to a breach of contract and entitled the employee to resign and claim constructive dismissal. According to *Morrow v Safeway Stores [2002] IRLR 9* if a breach of mutual trust has been found, this implied term is so fundamental to the workings of the contract that its breach automatically constitutes a repudiation – a Tribunal cannot conclude that there was such a breach but, on the facts, hold that it was not serious.

18 *Claridge v Daler Rowney Ltd [2008] IRLR 672* held that for an employer's mishandling of a grievance to amount to a breach of trust and confidence, it was necessary for the employee to show that the conduct complained of was calculated or likely to destroy or seriously damage the employment relationship.

19 If an employee contends that a particular matter amounted to a "last straw" entitling him to resign, the "last straw" must not be entirely innocuous. It need not be in itself a breach of contract, but it must contribute to the series of events alleged to amount

to a breach of the mutual trust and confidence term: *Waltham Forest London Borough v Omilaju [2005] ICR 418.*

20 We should consider whether the claimant has established, in the respects alleged by her, a breach of the implied term of mutual trust and confidence. We will need to analyse not only the alleged failure to respond to each individual grievance but also the cumulative effect of a failure to respond to the 6 complaints identified under paragraph 5.4 above.

21 The employee must accept or rely upon the breach within a reasonable period following the fundamental breach of contract to avoid being taken as having affirmed the contract and waived the breach. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract, but if it is prolonged, it may be evidence of an implied affirmation. In *Fereday v South Staffordshire NHS PCT UKEAT/0513/10* the claimant invoked the grievance procedure, which resulted in a decision adverse to her on 13 February 2009, nevertheless she resigned, by letter dated 24 March 2009. The EAT upheld the Employment Tribunal's decision that the respondent had repudiated contract of employment, but that the claimant had affirmed the contract by her delay. A prolonged delay of nearly 6 weeks between the last breach of contract (the grievance decision) and the claimant's resignation was an implied affirmation, bearing in mind that the claimant was expecting or requiring the respondent (the employer) to perform its part of the contract of employment by paying her sick pay.

22 ACAS has published a Code of Practice on Disciplinary and Grievance Procedures. The ACAS Code is not legally binding. It sets out the basic requirements for dealing with grievances and disciplinary matters and the Code should be considered by a Tribunal. If an employer fails to comply with the Code, that will be taken into account by the Tribunal. The Code has particular force in deciding unfairness in respect of disciplinary processes. However, unfairness is not the appropriate test for constructive dismissal and the Code in relation to Grievances has limited relevance.

Witnesses

23 The claimant gave evidence in which she confirmed her witness statement dated 18 October 2019 and she adduced a witness, Ms Aleksandrina Yarkova. Ms Yarkova was the claimant's son's partner and she accompanied the claimant to the claimant's informal grievance meeting of 15 May 2018.

24 The Respondents adduced the following witnesses:

24.1 The second respondent (i.e. Mr Chris Connor), the Claimant's line manager, whose statement was dated 14 October 2019;

24.2 Mr Keith Williams, statement dated 14 October 2019 (the Headmaster);

24.3 Ms Georgina Peters (who investigated the Claimant's grievance), statement dated 14 October 2019; and

24.4 Mr Nicholas Williamson (chair of the grievance appeal panel), statement

dated 16 October 2019.

25 All of the above parties and witnesses were subjected to cross-examination. The Tribunal asked some questions for clarification. The witnesses were then re-examined.

Findings of fact

26 We (the Tribunal) made the following findings of fact. We did not determine all of the facts in dispute between the claimant and the respondents, merely those facts that we decided were relevant to the complaints as identified above. In determining appropriate facts, we placed particular weight on the contemporaneous or near contemporaneous correspondence or meeting notes etc. Witness statements were, of course, central. However, the witness statements were written after the events in question and through the prism of either advancing or defending the appropriate claims.

27 The claimant commenced work with the first respondent on 6 January 2014. She was employed as a cleaner. The claimant initially worked 15 hours per week although she did work some overtime.

28 The claimant commenced work late on 9 January 2018, which was a training day. The claimant was due to commence work at 6.00am on 10 and 11 April 2018. These start times were organised by the second respondent and the claimant. The claimant commenced work at 7.30am on both 10 and 11 April 2018. During the course of the hearing, the claimant accepted that she was late on these 3 days.

29 Later, on 11 April 2018, the second respondent and Mr Vaughan met with the claimant to discuss her apparent lateness for work that morning. Some contractors had arrived at the building where the claimant was supposed to have been, only to find the place in darkness and having not been able to gain access. The meeting was effectively an investigation meeting, following which the claimant left work and was then on a period of sick leave. She did not return to work again.

30 In her email of 16 April 2018 [HB p128] the claimant informed Mrs Christine Noddings (who was the Headmaster's personal assistant) that she would be off from work due to stress until further notice and that this had been brought on by the previous week's meetings, which she said was the last straw after feeling victimised for some time. It was in this correspondence that the claimant complained for the first time about the language used towards her. The claimant had arrived at work late on 10 April 2018 and she took exception to the way Darren, the caretaker, had monitored her time; the claimant felt that she was being watched. In addition to 2 incidents on 10 and 11 April 2018 and the involvement of Darren, the second respondent and Chris Vaughan (Director of Finance and Resource), the claimant complained about being singled out, but she was not clear in this email who she contended had singled her out. She stated:

> I have been disrespect, even told by I can go and work my vudu even sometimes people would say how Annmarie you frighten me am i a ghost. and I never made any complaint I just carry on with my work apart from when spoke to you about the job that come available and I respect its decision and put it behind me …."

31 The claimant then wrote to Mr Williams with a formal grievance against the second respondent on 1 May 2018 [HB p144]. She complained about not being paid correctly and

that the second respondent had accused her of bullying staff, which she contended was unwarranted. The claimant complained that the second respondent felt that it was acceptable to speak to her in a demeaning manner and referred to an incident where he shouted "Ann Marie I want a word with you, come with me" in a room full of staff. He then showed her a small piece gum on the carpet in one of the offices. The claimant said that she felt humiliated by this. The claimant said that the second respondent constantly belittled her for some time and that she challenged this behaviour in October 2017, and he apologised. The claimant contended that the second respondent gave extra shifts to other staff members but not to her and that she was the only black female and she felt she had to constantly defend herself against his attitude.

32 Mr Williams acknowledged the claimant's "formal grievance" on 9 May 2018 and arranged for a meeting. The claimant thought that this meeting was a formal meeting and she brought Ms Yarkova with her to support her. Mr Williams contended that this was an informal grievance meeting; notwithstanding, the claimant had raised a formal grievance and the meeting was conducted for a large part of the hearing in a formal business-like manner. Towards the end of the meeting, Ms Yarkova requested repeatedly a very short break (2 minutes) to discuss issues that Mr Williams had raised. The claimant had made complaints about the way she was treated by the second respondent and had clarified during the course of the meeting that she felt the second respondent had treated her differently. The claimant's grievance centred on this being bullying and harassment, and that this was because of her race, i.e. that she was the only black female employee in the workplace. This complaint was difficult for the claimant to raise. The claimant was a hard-working and respectable older female employee. The claimant was not assertive, and she was employed in a domestic occupation. She was respectful of authority generally, and the Headmaster in particular. Ms Yarkova felt that Mr Williams was brow-beating the claimant in respect of her contention that she had been treated less favourably because of her race. We have listened to the tape recording provided by the claimant (the first respondent had apparently lost its recording) and Ms Yarkova's concerns seemed reasonable. The claimant was getting upset at this point, particularly as Mr Williams had raised the temperature by asserting that racist abuse was a big issue in this Catholic school and then telling the claimant (without investigating the matter) that he did not believe it was the case in her instance. Ms Yarkova asked the claimant if she wanted to think about Mr Williams's response to her allegation of racial harassment and Mr Williams took exception to this. Ms Yarkova repeatedly asked politely for a 2-minute break and Mr Williams refused, raising his voice and becoming angry. Ms Yarkova continued to ask for a short break and Mr Williams repeatedly refused to allow this. When Ms Yarkova told the claimant to take her time, Mr Williams said she could not. When Ms Yarkova objected to Mr Williams putting the claimant under pressure, Mr Williams told Ms Yarkova forcefully that she was an observer and challenged her about the previous meetings she had attended. The meeting then broke up and, according to the recording, Ms Yarkova then made the point that the claimant had not been offered a glass of water. The meeting came to an end abruptly because of the intemperate and, in the circumstances, unreasonable behaviour of Mr Williams.

33 The claimant wrote to Mr Williams on 22 May 2018, saying:

> The meeting that was held on Tuesday 15th of May was hostile in my opinion exemplified by your insistence that when my friend requested a minute and a glass of water from me, you said NO I CAN'T HAVE A MINUTE LEANING INTO MY FRIEND AS YOU SAID IT.

34 The claimant wrote a "Formal letter" of complaint to Mr P Davis and Mr C Miles of the Board of Governors on 3 June 2018 [HB p164]. She complained about the second respondent's treatment of her and Mr Williams's conduct at the meeting of 15 May 2018. The claimant did not receive a response to this letter from the governors.

35 On 5 July 2018 Mrs Noddings invited the claimant to a formal grievance hearing, with Mr P Tisi, the Assistant Head Teacher, i.e. Mr Williams's subordinate. The claimant responded on 9 July 2018, requesting that the meeting be conducted by a senior human resources consultant and the Chair of the Board of Governors. The claimant requested a copy of all of the evidence so far gathered. Mrs Noddings replied that the meeting set for 13 July 2018 would proceed as "the investigation meeting".

36 On 13 July 2018 the claimant met Ms Georgina Peters, together with Mr E Parsons (HR adviser) and Mrs Noddings who took notes. Ms Peters was a teacher in the science department and had recently been promoted to an Assistant Head Teacher at school. Ms Peters was a former police officer, so she contended that she had some experience in investigations and conducting interviews and handling source information. At the conclusion of the meeting, Ms Peters said that she would investigate, amongst other things, the claimant's complaints of bullying, harassment and Mr Williams' conduct at the previous grievance meeting. The claimant again asked if she could see the evidence when this was available, including the audio recording of the previous meeting (which she previously requested). Ms Peters agreed to provide this information.

37 On 20 July 2018 Ms Peters sent the claimant her outcome letter [HB p187], together with a report of her investigations [HB p189-196]. The vast bulk of the allegations were "not upheld". The 2 allegations (of 21) that were "partially upheld" do not relate to matters under scrutiny by this Tribunal. At the end of the report, Ms Peters offered the claimant the right of appeal. She said that the claimant should write to the Chair of Governors within 5 working days of receipt of the letter setting out the basis of her appeal. Ms Peters went on to say, the appeal "will not be a reinvestigation into these allegations. It will however be an opportunity for you to present any areas where you feel the investigation officer (Georgina Peters) did not carry out a full investigation".

38 The claimant appealed against the outcome of the investigation on 25 July 2018 [HB p164]. She said that she did not agree with the findings of the investigation. The claimant complained (for at least the third time in writing) that she had not been given all the evidence that the school had stated it had collected. The claimant said she should have received witness statements from all the people who had been questioned and she complained she still had not received a copy of the taped record of the meeting of 13 July 2018, which she said had previously been referred to in the outcome letter. The claimant said that she felt that she was being discriminated against due to her race.

39 On 7 August 2018 Mr Davis (Chair of Governors) wrote to the claimant confirming that he had received the appeal in time. Mr Davis said that he did not consider there to be a genuine basis of appeal because the claimant said that she "did not agree with the investigations of her original grievance". He also said that the claimant appeared to raise issues that were not contained in her original grievance and that this was not appropriate. He therefore instructed the claimant to "confirm the basis of your appeal in writing based on the **conclusions of the letter** sent to you on 20th July 2018".

40 The claimant clarified that the reason she was appealing the outcome of her grievance was because her grievance was not properly handled and that all matters were not fully investigated. The claimant asked that Mr Davis investigate this matter further and ensure that she was provided with the statements from every individual that had been spoken to in regard to this matter. The claimant said that she was told statements had been taken although she had never been shown a copy of those statements. The claimant also requested a copy of the audio recording for the meeting with the headteacher on 13 March 2018. The claimant informed Mr Davis that the situation was taking a toll on her mental health.

41 Mr Davis wrote to the claimant on 24 August 2018 [HB p199]. He said that he had reviewed the outcome letter sent to the claimant and said he believed there has been a comprehensive investigation into the claimant's grievance and that she had been supplied with an appropriate outcome. He said that it was the claimant's responsibility to provide information where the [employer's] investigation was incomplete, and he said that the claimant had not done this. Mr Davis referred to the ACAS guidelines and said that once a date had been set for the appellant's appeal "all parties involved in the appeal hearing will be furnished with all documents that are relevant to the grievance investigation, including notes of meetings etc".

42 Mr Davis wrote to the claimant on 1 October 2018 [HB p200] and set the grievance appeal for 6 November 2018. He said the claimant would have the opportunity to make verbal representations, that this was not a re-investigation into the claimant's original claims but her opportunity to present any evidence that she felt was not taken into account in the previous investigation. Significantly, Mr Davis did not provide the claimant with the late documentation that he promised to provide in his earlier correspondence.

43 On 19 October 2018 Mrs Noddings provided the claimant with "all necessary paperwork" for her grievance appeal. This comprised a further, short report from Ms Peters. So, prior to the appeal hearing, and despite the claimant's repeated requests, she had not seen, nor been able to comment upon, the evidence and information taken into account by Ms Peters in coming to the decision to dismiss the vast bulk of the claimant's appeal.

44 The claimant's grievance appeal was heard by 3 school governors – Mr Nick Williamson, Mr Duncan Bartlett and Ms Maureen Lynch – on 6 November 2018. The appeal panel was supported by a senior human resources consultant. In his outcome letter [HB p217-218], Mr Williamson said that the appeal was not upheld because the appellant did not present any new evidence to the panel to support that the investigation was incomplete.

45 The claimant resigned on 14 November 2018. In her resignation letter [HB p220] she said:

> I am writing to formally submit my resignation. I feel that this is the only option following the outcome of my grievance and the ongoing stress the school has put me under.

Determination

Harassment

46 The claimant was the only 1 of 11 cleaners who was black. All the other cleaners were white employees. In respect of the first harassment allegation, the claimant did not refer to evidence that she was called names other than the voodoo allegation and an allegation against the second respondent in respect of the gum on the carpet. The allegation against Ms Howard was not pursued at the hearing.

47 The gum on the carpet matter occurred in September 2017. The claimant said that this was at a cheese and wine party at the school and the respondent's contended that this was an open day for parents. Little turns on the nature of the function other than the claimant contends that the second respondent raised his voice and reprimanded her in a public place. As this claim was not one that was identified for determination at the previous Preliminary Hearings we did not make any findings of fact in this regard. However, following this incident, the conversation between the claimant and the second respondent led on to other matters which included washing the claimant's cleaning cloths. The second respondent had arranged for another member of staff to wash all cloths (for which she would be paid extra) the claimant said that she normally undertook this herself and queried the additional pay arrangements. The claimant then said that she expected her cloths to be washed and clean for the Monday morning and she contended that Mr Paul Day said "oh so if you're not going to get clean cloths by Monday what are you going to do, work your voodoo".

48 Notwithstanding that this was minuted incorrectly by the respondent (which we accept was a genuine error) we find that the claimant was consistent in alleging that Mr Day had made the voodoo comment. The claimant was consistent in the broad nature of her allegation in respect of the voodoo comment and she was also consistent that this had originated from Mr Day. She could not be precise when this had happened. The claimant was able to pinpoint the voodoo comment to September/October 2017. We have not heard from Mr Day in respect of his response and Mr William the Headmaster confirmed that Mr Day was still employed at the school. No clear reason was proffered as to why Mr Day did not attend this hearing.

49 The second respondent who was there said that he did not hear this comment, so his evidence is inconclusive. The claimant identified Sheena as being present, but the Tribunal has not heard any evidence from her. The respondent's representative contends that we should take into account Ms Peters investigation which found that these comments were not made. We have not seen the statements or evidence compiled by Ms Peters, which is very surprising in the circumstances of the first respondent being professionally represented. Ms Peters investigation had little, possibly no, regard for principles of natural justice; so, Ms Peters' opinion on whether or not the voodoo comment (or any other name-calling) was made is not going to assist us.

50 We are troubled that the claimant has left it so long to report such a matter. Nevertheless, there is sufficient evidence to shift the burden of proof. However, Mr Day was still employed by the first respondent, and we were not presented with any evidence or information as to why he could not attend the hearing and given his version of events. The inexplicable absence of the person who allegedly said the comment, in circumstances

where he could and should have attended the hearing was a significant factor in us determining this complaint. Under the circumstances, on the balance of probabilities, we accept that such a comment was made and directed towards the claimant. Given that the burden of proof has shifted to the first respondent, the first respondent has not been able to persuade us that such a comment was not said. Referring to an elderly black woman of West Indian origin working her voodoo is an unwanted racially offensive comment. The comment had both the purpose and the effect of violating the claimant's dignity and was both degrading and offensive.

51 In making this finding, we do not extrapolate that other comments were said or that this was a regular feature. We make this finding as a single incident because the claimant has gone back some period in her recollections and other allegations appeared to be unconnected with the claimant's race and also lacked detail. The other name-calling referred to by the claimant were at most generalised assertions for which it was met with generalised denials from the first respondent (there being no allegation made against the second respondent, Mr Williams nor any other witness present at the hearing). Under the circumstances of the absence of clarity about what was said, when it was said, by whom and whether anyone else was present, we were unable to take these allegations further.

52 We note that the allegation in respect of Mr Day is out of time by around 12 months, pursuant to section 123(1)(a) EqA. This is a substantial delay. The claimant was not able to provide sufficient explanation as to why she could not issue proceedings within the 3-month time limit and the discrimination that we have found relates to a single incident. We have taken into account that any remedy, in respect of injury to feelings, would be relatively modest because the delay in raising this matter, as well as the claimant's uncertainty about when the incident occurred, indicates that the upset caused may not have been excessively distressing. We note that there is a strong public policy consideration that discrimination should be recognised; however, our starting point should be that time limits should be observed in all but exceptional cases. Under the circumstances, we determine that there is no basis upon which it is just and equitable to extend time. So, other than making the finding that Mr Day discriminated against the claimant by reason of her race, we determine that this allegation is out of time and there is no basis for the Tribunal to extend time under s123(1)(b) EqA.

53 The harassment in respect of the second allegation is that the claimant was accused of being late when she said that she was not. We found, as a matter of fact, that she was late. The claimant accepted this in evidence. Accordingly, this allegation does not succeed. So on 10 April 2018 the claimant started work late. The day before the second respondent organised 4 cleaners to start work at 6.00am. The claimant in fact started work at 7.30am. The other (white) cleaners who started at 6.00am were Sheila, Angela and Jo. We accept the second respondent's evidence that he wanted the shifts coordinated to minimise staff working on their own so far as possible. The claimant came in late. The 2 other cleaners who started work later were Corrine and Kim. This was by arrangement with the second respondent and they were scheduled to work later but would also work in proximity to their colleagues. Corinne and Kim were not subject to any adverse comment by the second respondent because they came to work on time. Accordingly, this allegation of harassment is rejected.

54 On 11 April 2018 the claimant was late again. This was the third day in a row that the claimant had been late for work. The claimant was due to attend work again at

6.00am. It being school holiday, the first Respondent had organised some contractors to undertake some work. A contractor had arrived and had been unable to gain access to part of the premises. He reported to the second respondent that the building had been in darkness and that there was no one around. The second respondent asked the claimant if she had turned up for work on time and the claimant contended that she had. The second respondent met the claimant later that day as he was concerned whether or not the claimant had attended work on time. He said that the claimant had signed in, but the rooms were in darkness and that none of the rooms were open. In effect, the contractors were looking for the claimant, she was nowhere to be found and when the second respondent subsequently checked, he found that she had signed in. At the end of this meeting the second respondent said that he would speak to the other cleaners and he would investigate this matter further. The claimant said that she was feeling stressed, that she was feeling picked on and that she was going to go off sick in her email of 16 April 2018. The second respondent did not falsely allege that the claimant had arrived late for work. There were reasonable grounds to investigate whether or not the claimant was late and the fact that she signed in for 6am made the matter more serious. There was no evidence to suggest that this was a common occurrence so we do not accept that the claimant had been "singled out". The second respondent said that he wanted to take matters further, but the claimant went sick. This was not harassment.

Constructive dismissal

55 The claimant contended that the first respondent had breached the implied term of trust and confidence so she resigned and claimed constructive dismissal. the alleged breaches of contract (both individual and cumulative) are identified in paragraph 5.4 above.

56 We find that Mr Day had subjected the claimant to harassment. This harassment was on the grounds of the claimant's race and as such represented a fundamental breach of contract. However, this was a single incident that occurred around 14 months before her resignation. If this was the only breach of contract that the claimant was relying upon, then she affirmed such a breach. However, the claimant did not rely upon this harassment as the only element of the respondent's repudiation of her contract of employment. We note that this complaint formed a significant part of the claimant's grievance.

57 So far as the claimant's wages are concerned, this aspect of her claim was difficult to discern; however, we understood this to be as follows. The claimant said in her grievance that she was owed 4 weeks of work which the second respondent did not pay her [HB p128]. In her grievance letter [HB p144] the claimant said that she was not paid for 4 weeks work in 2016. The claimant said in evidence that she put in a timesheet in September 2017 to Mrs Noddings but never heard back. It took to mean the timesheet for 2016 and that this was an additional time sheet. On 15 May 2018 during the grievance meeting the claimant said that the second respondent gave the claimant 1 hour per week overtime but at the end of the month he only paid 4 hours which should have been 5 hours for some months. In the claimant's appeal letter [HB p170] the claimant said that she was given 1 hour per week overtime but that her work sometimes took longer and at the end of the month she was told she would only be paid 4 hours overtime even when she had worked the additional time on 5 Wednesdays.

58 At the appeal meeting the claimant said that she was asked to work 2 shifts alternating with another cleaner and that she could be paid overtime for any time after 7pm. She worked through to 7pm on overtime then an extra 9 minutes and that this was every other week throughout December 2016 and January 2017. So, the claimant wanted to be paid for 20 shifts of 3 hours each. The claimant also contended there was another 23 hours overtime worked and that she was only paid for 19 hours. On the timesheets [HB p263 and p263] the claimant claimed additional hours but not overtime which compares with page 276 where overtime is claimed. In the claim form the claimant said that she worked an additional 1 hour per week and was told that she could only claim 4 hours instead of 5 and also that she did an extra shift of 15 hours per week with no pay on or before 2017. In the claimant's statement she said that in December 2017 she worked 20 hours and was paid 20½ hours and in January 2018 she worked 23 hours and was paid for 19 hours. We note that the complaint in respect of wages has been dismissed and that this is not a claim before the Tribunal.

59 At the time that the claimant left work she had not claimed specific amounts and her assertions were of a general nature. So, in recap the claimant when she treated herself as constructively dismissed claimed that she put in a timesheet, that the timesheet had gone missing and that she had not been paid and was consequently owed outstanding money. In fact, the timesheet had been submitted and the claimant did not claim the money that she contended that she claimed. Consequently, we dismissed this aspect of her constructive dismissal claim.

60 The claimant said that she had been wrongly accused of searching the school offices by Mr Vaughan. The claimant was approached by Mr Vaughan on 6 February 2018 and asked whether she was in the school offices on 31 January 2018. The claimant said she was, and Mr Vaughan said he had been told that someone had photographed some timesheets and that someone had gone through the cabinet files. The claimant said that she was accused with another cleaner, Joanna Stokes (who was a white female). The claimant denied this and said there were 4 people in the room and that it was another cleaner, Michael Crighton, who went through some folders. Mr Vaughan then told the claimant to forget about it. The claimant was left feeling disgruntled. Nevertheless, the allegation (if there was one), was not pursued. This matter was one of a whole series of disputes between the claimant and some of her colleagues and, we determine, the incident was relatively trivial. There was no disciplinary action arising out of this. Mr Vaughan made some enquiries from the claimant and she pointed to someone else. This was accepted. There was no detriment to the claimant.

61 One aspect of the claimant's constructive dismissal was the accusation that the claimant attended work late on 11 April 2018. We determine above that the claimant did, in fact, attend work late on this date. Therefore, this individual allegation could not sustain, or contribute, towards the claimant's contention that the respondent had fundamentally breached her contract.

62 We have dealt with Mr Williams's behaviour at the meeting of 15 May 2018 above. The first respondent chose to go down an informal route when the claimant clearly put a formal grievance. So, it is not clear what purpose Mr Williams was trying to achieve in this meeting. Nevertheless, Mr William's conduct prior to the exchange at the end of the meeting was not oppressive or overbearing; he was business-like and formal. The claimant's supporter, Ms Yarkova felt that Mr Williams was not addressing the claimant's

points, that he was overbearing and that he was attempting to browbeat the claimant in respect of her race discrimination complaint. Ms Yarkova asked for some time to talk to the claimant. Mr Williams refused. He then launched a verbal attack on the claimant's supporter. Having heard the transcript, we regard this attack as untoward. The claimant's supporter was acting entirely appropriately in asking for a break. This was her role as envisaged by the ACAS guidelines. Mr Williams's behaviour at this point and towards the claimant's supporter was unacceptable. The claimant saw this as being hostile and intimidating towards her and we accept that this is a reasonable and appropriate interpretation. It was an attack upon the claimant's supporter, in front of the claimant for requesting a short break – which we determine was reasonable. Ms Yarkova was doing exactly what she ought to have done in such circumstances in asking for a short pause so that the claimant could collect her thoughts, particularly as Mr Williams's behaviour was raising the temperature in the room. Mr Williams's behaviour towards Ms Yarkova was hostile and intimidating towards the claimant. Mr Williams should not have got frustrated or angry about Ms Yarkova's intervention, which was entirely appropriate.

63 In her resignation letter, the claimant contended that the school would not take her grievance seriously. The claimant said that she was very disappointed that her grievance was not upheld and that all the evidence she put forward was not investigated properly and the school did not value her as an employee. She said the school did not have a conversation with her over her mental health stress, that this whole situation had caused. The claimant expressed dissatisfaction with Mr Williams's manner towards her during this process and she contended that she had been racially discriminated against, bullied and victimised and that the school had unlawfully deducted from her wages.

64 The final aspect of the claimant's constructive dismissal was the first respondent's unreasonable failure to uphold the claimant's grievance. So far as the first respondent's procedure is concerned, the first respondent appointed Ms Peters to be the investigating officer after the meeting with Mr Williams. Ms Peters met with the claimant on 13 July 2018. Ms Peters then met 15 other witnesses; her witness statement referred to questioning every member of the cleaning staff and caretaking staff. Her witness statement does not say when she met these employees and she said in evidence she could not remember when this was. Ms Peters said that she was able to identify all of the witnesses that she met, by drawing up a schedule shortly before the Tribunal hearing, but that she did not list any witness interviewed either for her investigation report or at all during the period of the investigation. Indeed, Ms Peters said that she had asked the first respondent's human resources adviser for assistance and that the HR representative told her not to take any notes of these meetings. This is in breach of the Acas guidance. This is in breach of any proper investigative process. This advice is so bad that we doubt that this was given. If it was given then Ms Peters should not have followed it, or at least she should have questioned why she was told not to make any record of her investigation. As a former police officer, we cannot believe that Ms Peters conducted an investigation on this basis. We note that the claimant regularly requested copies of witness statements and other investigatory material. Ms Peters said she had heard of the Acas guidance in evidence, but she did not refer to this. She said that the HR practitioner had not mentioned anything about the Acas Code of Practice on investigating grievance matters.

65 Ms Peters said that she anonymised all reference to what she said to her because a number of staff members (she could not be sure how many) said that they were concerned about the claimant knowing what they said in case of "come back". When we

asked Ms Peters what this meant, she said that she did not enquire further. When she was asked whether there was an allegation or contention that the claimant might be violent or even awkward towards these members of staff Ms Peters said that there was no implication of violence and that she was told to anonymise this information so that the witnesses could speak freely. Yet, Ms Peters said she did not make a record of these responses.

66 We went through the report with Ms Peters. She came to various conclusions without setting out the basis for such a conclusion. When we asked in detail about how she came to the conclusion not to uphold many aspects of the claimant's grievance, Ms Peters could not explain in detail how she came to these conclusions. At the hearing she accepted that she had taken matters into account that the claimant did not know about or that the claimant could not possibly know about and that the claimant was not given an opportunity to challenge or comment upon this evidence. This is fundamentally unfair. It is a wholly inappropriate way to conduct any investigatory process and renders any decision that Ms Peters made as unsound.

67 However, Ms Peters's unfairness in dealing with the claimant's grievance went further; she said at the hearing that unless there was evidence to corroborate the claimant's version of events, she found that it did not take place. So Ms Peters's starting point was one of disbelieving anything the claimant said that was not independently corroborated. There was no basis for adopting such a disbelieving approach to the claimant's account. This is not just fundamentally unfair, it is a perverse way to investigate a complaint.

68 Ms Peters's findings confirmed the right of the claimant to appeal. However, Ms Peters restricted the claimant's right of appeal by refusing any possibility of re-investigating her investigation. Again, this was fundamentally unfair because the claimant did not know what investigations Ms Peters carried out nor was she in a position to guess what investigations had ensued. This limitation on the claimant's right of appeal is all the more inexplicable in the context of the claimant's repeated request for copies of all of the evidence and information taken into account in determining her grievance.

69 The appeal was eventually heard by Mr Williamson, Mrs Leach and Mr Bartlett on 6 November 2018. Mr Williamson confirmed in evidence that he undertook no investigation himself. He confirmed that he had read Ms Peters report, but he had not read, or seen, any of the evidence Ms Peters purported to rely upon in coming to her conclusion. The claimant had complained about the behaviour of Mr Williams at the meeting of 15 May 2018 and Mr Williamson said that neither he nor his colleagues had even listen to the tape. He said that the human resources adviser listened to it for the appeal panel and told them what to make of it. There were no transcripts of this meeting available for the grievance appeal panel.

70 In evidence, Mr Williamson said that he and his colleagues had every faith in the investigation, although they did not scrutinise this in any critical way. When the Tribunal raised the question about whether or not that faith could have been misplaced, Mr Williamson said he had no reason to believe that it had been misplaced. So, the appeal panel also commenced their role as accepting the outcome of Ms Peters's investigation and expecting the claimant to provide evidence that this was wrong. This stance was biased towards Ms Peters at the outset. However, given that the claimant had no access

or knowledge of the information that Ms Peters relied upon, this accepting and uncritical approach of the appeal panel was an abrogation of their responsibilities. This was a wholly unfair appeal process.

71 The claimant had been subject to harassment by Mr Day some 14 months before her resignation, although this was a significant part of her grievance. Mr Williams's behaviour at the "informal" grievance hearing had been hostile and intimidating towards the claimant's friend and supporter. Under the circumstances, the first respondent's handling of the claimant's grievance amounted to a fundamental breach of contract as this went way beyond mere unreasonable behaviour. The conduct of Ms Peters and Mr Williamson, Mrs Leach and Mr Bartlett through the formal stages of the claimant's grievance process was such that the claimant was entitled to resign and treat herself is constructively dismissed, which she did so reasonably promptly.

The deposit order and remedies hearing

72 The unanimous view of the Tribunal is that the claimant's allegations in respect of harassment on the grounds of race by Mr Day were meritorious, although the claimant has not convinced us that we should exercise our discretion so as to allow this out-of-time complaint to proceed to remedy. The Tribunal is satisfied that the claimant has shown that she did not act unreasonably in pursuing her other complaints of harassment. Accordingly, the claimant's deposit will now be refunded.

73 The case will now be listed for a remedy hearing. The Employment Judge will issue further case preparation orders in due course.

Employment Judge Tobin
Date: 23 January 2020