EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss S Sutherland	**AND**	**Watkins Solicitors**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol **ON** **17 to 21 January 2021**

EMPLOYMENT JUDGE J Bax
MEMBERS **Mrs D England**
Mrs P Ray

Representation

For the Claimant: **Mr R Downey (counsel)**
For the Respondent: **Mrs B Watkins (solicitor)**

JUDGMENT

The judgment of the tribunal is that

1. The Respondent contravened section 39(2)(d) of the Equality Act 2010 and the Claimant succeeded in her claim of harassment in relation to the incident in February 2019.

2. The claims of constructive unfair dismissal, direct discrimination, victimisation and remaining claims of harassment are dismissed.

REMEDY

1. The Respondent is ordered to pay the Claimant the sum of £8,500 for injury to feelings in respect of her claim of harassment.

2. The Respondent is ordered to pay interest in the agreed sum of £991.50.

3. The total sum to be paid is £9,491.50.

REASONS

1. In this case the Claimant, Miss Sutherland, claimed that she was constructively unfairly dismissed and also that the Respondent sexually and racially discriminated against her. The Respondent contended that the claimant resigned because she was facing disciplinary proceedings, that there was no dismissal, and denied discrimination.

Background and the issues

2. The Claimant notified ACAS of the dispute on 5 September 2020 and the certificate was issued on 5 October 2020. She presented her claim to the Tribunal on 4 November 2020.

3. At a Telephone Case Management Preliminary Hearing before Employment Judge O'Rourke, the issues and claims being made were identified, namely that there were 7 allegations of breach of the implied term of trust and confidence in respect of the constructive dismissal claim, 4 allegations of direct race and sex discrimination, 4 allegations of harassment relating to race and 4 allegations of victimisation. The Respondent relied upon the reasonable steps defence in relation to one allegation of harassment. It was also necessary to consider time limits with respect to the Equality Act 2010 claims.

4. At the start of the hearing the issues were discussed and were confirmed as those identified by Employment Judge O'Rourke. The Claimant clarified that the allegations of direct discrimination and harassment were on the basis of both race and sex.

5. There were also discussions about the bundle. Until 14 January 2022, the Respondent had been represented. The Claimant had sent the Respondent's previous representatives documents to be included in the bundle, but they had not been included. Mrs Watkins was unaware of them. It was agreed that the Claimant would send her a copy and that the Respondent would provide copies for the Tribunal. It was also agreed that the Respondent would disclose the Claimant's contract of employment and its data protection policy. The Respondent paginated all of the documents, even if already in the bundle. The Claimant wanted to see the Respondent's disciplinary policy and it was ordered that it was disclosed. The disciplinary policy and other documents were provided to the Claimant by the Respondent and the Claimant agreed to include them in the bundle.

6. After the Judgment on liability discussion took place about whether the Claimant would give further evidence. The Respondent did not want to cross-examine her and Counsel for the Claimant did not seek to recall her. It was agreed that both parties made oral submissions. After the decision

on remedy was given the parties agreed the rate of interest to be applied at 4%.

The evidence

7. We heard from the Claimant and also Ms Warmington (HR for the Respondent) and Mr Williams (conveyancer) on her behalf. We also heard from Mrs Dunlop (partner), Mr Calwell (partner), Mrs Watkins (partner) and Ms Grohmann (practice manager) on behalf of the Respondent.

8. We were provided with a bundle of 279 pages. Any reference in square brackets within these reasons is a reference to a page in the bundle.

9. There was a degree of conflict on the evidence.

10. A surprising feature of the evidence was that the Respondent's witness statements were very short and did not appear to contain evidence in relation to all relevant facts. The Respondent had been represented until shortly before the final hearing. It also appeared that when the statements were taken by the solicitors that they passed through the hands of Mrs Watkins as the point of contact.

The facts

11. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

12. The Respondent is a firm of solicitors.

13. The Claimant describes herself as a black British woman. She commenced employment with the Respondent on 17 July 2018 as an administrative assistant in the conveyancing department. Ms Dunlop was the head of conveyancing. At that time the only other administrative assistant was Mr Northey and Mr Williams was the only qualified conveyancing paralegal.

14. Mr Northey, a white male, started working for the Respondent in 2013, initially within the family department as an administrative assistant, until the first part of 2018 when he moved to the conveyancing department. He was also particularly adept at dealing with technical issues involving the Respondent's computer system and scanning/copying equipment.

15. The Claimant's role included managing, opening, closing, storing and retrieving client files and sending out client packs. She was also required to provide general administrative support to the conveyancing department,

including: filing of post, copying and scanning, preparing correspondence and deeds, preparing mail and speaking to clients in person and on the telephone. Mr Northey's job description was similar. Mr Northey also was involved in first registration work, which involved significant amount of copying and it was time consuming; the Claimant generally did not do this work. The Claimant was involved in the payment of insurance premiums, which Mr Northey did not do.

16. The Claimant worked Wednesdays and Thursdays and when Mr Northey reduced his days to three, he worked Mondays, Tuesdays and Fridays. From late 2019, the Claimant occasionally worked some additional hours on Tuesdays and on those days she overlapped with Mr Northey.

17. The Respondent's grievance policy provided that after a raising a grievance a formal meeting would be held without unreasonable delay and usually no longer than 10 days after the statement had been received by the partner.

18. The Respondent's disciplinary gave an example of conduct which would normally be considered to be gross misconduct as sexual or racial misconduct or harassment. Mrs Dunlop accepted that employees were entitled to have allegations of discrimination to be taken seriously.

19. At the start of each employee's employment, Ms Warmington arranged for them to carry out online training courses, including equality and diversity. The equality and diversity training involved watching a DVD. Refresher training was then provided every 2 to 3 years. Ms Dunlop received equality training in January 2018, when she joined the firm.

20. In September 2018, Mr Bridge, a friend of Ms Dunlop's, joined the firm as a paralegal. No evidence was given as to when Mr Bridge received his training if at all. Until that time, the Claimant had a good working relationship with Mrs Dunlop.

21. Mr Bridge was 'chatty' in the office and had a tendency to be loud. We accepted that he often spoke to others and he also had, from the outset of his employment, a tendency to make inappropriate comments. Mrs Dunlop would sometimes intervene when she thought he might say something inappropriate.

22. We accepted that the Claimant also had a tendency to talk in the office and would respond to Mr Bridge when he was speaking to her. The Claimant and Mr Bridge would have disagreements, following which Mr Bridge would go into Ms Dunlop's room and speak behind a closed door, following which Mrs Dunlop appeared annoyed or frustrated. Mrs Dunlop suggested that the Claimant sometimes made mistakes when she was chatting. We accepted that the Claimant might have made the odd mistake, but she generally

corrected them herself. We did not accept that productivity issues were raised with the Claimant, and we accepted that she was hard working.

23. Mrs Dunlop gave the impression in her witness statement that it was the Claimant who would spend large amounts of time chatting and she needed to informally speak to her on occasions. However, in oral evidence she said it was the Claimant and Mr Bridge who would chat to each other and on occasions if she noticed a conversation had been going on for too long she would raise it with both of them, but it was not serious enough to merit performance management. We accepted the Claimant's evidence that Mr Bridge initiated many conversations.

24. The Claimant was friends with Ms Warmington, who was employed in an HR capacity. If Mr Bridge said anything inappropriate or offensive he would say 'I don't care, go tell HR'

25. The Claimant's evidence was that after Mr Bridge joined the firm her tasks became less varied, and she undertook fewer para legal tasks and more administrative tasks, and she was taken off conveyancing tasks to cover reception. She said that Mr Northey continued to carry out paralegal tasks and was only assigned administrative work if there was a build up. There were e-mails from Mrs Dunlop to the team [p92, 93 and 105] which were addressed to the Claimant and Mr Northey asking them to do tasks. The Claimant said that although the e-mails were addressed to both of them, she was left with most of the scanning, we rejected that evidence. The Claimant and Mr Northey generally worked on different days and Mr Northey was involved in first registrations requiring significant copying. We concluded that they were both were required to do and did significant amounts of copying and scanning. We did not accept that Mr Northey left scanning for the Claimant to do, or that her work became less varied.

26. There was an informal system in the team in which team members, including Mrs Dunlop, would receive a gold star for good work. We accepted that the Claimant was not issued with a star. Mrs Dunlop recommended that the Claimant received formal recognition for hard work, for which she then received an award of cash vouchers.

27. Between October 2018 and January 2019, there was an incident in which Mrs Dunlop had asked the Claimant to do a task. Very shortly afterwards Mr Williams asked the Claimant to do something for him. Mrs Dunlop thought that the Claimant had asked Mr Williams for the task. Mrs Dunlop shouted at the Claimant that 'when she gave her a task she must do it and the boys should not give her their work to do.' We accepted that Mrs Dunlop felt undermined at the time. Shortly after this Mr Williams explained to Mrs Dunlop that he had given the Claimant the task and it was not her fault. Mrs Dunlop did not apologise to the Claimant.

28. In February 2019 the Claimant mentioned her grandmother was of Chinese heritage. Mr Bridge responded by saying, 'does she own a chip shop, all Chinese own chip shops?' This made the Claimant feel embarrassed and upset and she found it offensive.

29. A few weeks later, the Claimant spoke to Ms Warmington about the incident, but begged her not to raise it with anyone else. Ms Warmington subsequently informally raised the issue with Mrs Watkins in May 2019.

30. On about 8 May 2019, the Claimant was covering reception and a client was distressed about the sale of her property. The Claimant was unable to answer the questions and saw Mr Bridge and asked him to help. Mr Bridge said hello to the client and continued walking. Ms Dunlop entered reception and was extremely wet due to rain. The client was crying, and the Claimant asked Ms Dunlop for help, which she provided. The Claimant later spoke to Ms Dunlop in her office to thank her. Ms Dunlop shouted at the Claimant not to do it again, that she had looked like a drowned rat and if she could not answer the question to take a message. The door was open and other staff could hear the Claimant being shouted at, although not the words. The Claimant accepted that she had apologised to Ms Dunlop, but we accepted that she was nervous around her and would generally apologise to her on starting a conversation

31. The Claimant's evidence was that Amanda, who also had been on reception and was white, had not been shouted at. She asserted that as a female she was lower on the team and there was a general problem of being a black female on the team.

32. On 12 May 2019, the Claimant had a conversation with Ms Dunlop, which was shortly followed by an e-mail from Mrs Dunlop. The Claimant disputed the accuracy of the e-mail. The first account by the Claimant was in her grievance in July 2020, about 14 months after the incident, and we were concerned with the accuracy of her recollection. We did not accept that the Claimant raised that she thought Mr Northey was not doing his fair share of scanning and post, however she did say that she wanted to do less scanning. Discussion took place about chatting and the Claimant accepted that there had been a lot of chatting. In oral evidence, Mrs Dunlop accepted that she had said it was not just the Claimant doing the chatting. The e-mail gave the impression that it only related to the Claimant and that the Claimant was seeking to minimise it. Mrs Dunlop said that the e-mail was incomplete and comments had been made about meetings she had with the other staff, however we were not provided with them because they had been removed. We were not satisfied that the e-mail recorded the whole picture, and what was provided gave a slightly skewed view of the Claimant.

33. The Claimant spoke to Ms Warmington about the incident with Ms Dunlop and said that she was not happy. Ms Warmington then told Ms Watkins that the Claimant was not happy and about the incident with Mr Bridge in February 2019, but that the Claimant did not want to make a formal complaint. We accepted that Mrs Watkins was horrified and said something had to be done, even though the Claimant had not wanted to formally raise a complaint.

34. Mrs Watkins spoke to Mrs Dunlop about Mr Bridge, however because the matter had been raised in confidence Mrs Watkins did not say who had made the complaint, but told her what had been said. She asked Mrs Dunlop to make it clear to Mr Bridge that what was said was unacceptable and if it happened again, it would be extremely serious. Mrs Dunlop later reported to her that she had spoken to Mr Bridge, and he understood it was serious and he had received an appropriate warning.

35. Mrs Watkins also confidentially spoke to Mr Calwell and explained what had happened. At Mrs Watkins' request, Mr Calwell spoke to all conveyancing staff, apart from Mr Bridge who he understood would be spoken to by Ms Dunlop, in order to ensure it did not happen again and it was clear such behaviour would not be tolerated. The staff were told they could raise any concerns with him.

36. We accepted that Mrs Dunlop spoke to Mr Bridge about what he had said. It was surprising that the discussion did not feature in Mrs Dunlop's witness statement. She said it was because she had been told the allegation was out of time and it was irrelevant. We did not consider that was a satisfactory explanation, the allegation having been raised in the particulars of claim and that time limits were included as part of the list of issues. Mrs Dunlop said that she told Mr Bridge that the comment was offensive, it was not appropriate to make such comments and if it happened again the disciplinary procedure would be followed. This had then been followed up by an e-mail to Ms Watkins. The e-mail had not been disclosed. We did not accept Mrs Dunlop's evidence. Mr Bridge was a friend of Mrs Dunlop. It was more likely, taking into account the reaction of Mr Bridge after the discussion, that he was simply told about the allegation and not to do it again, we did not accept that the seriousness nor the potential disciplinary consequences were impressed upon him.

37. On 14 May 2019 the Claimant e-mailed Mrs Watkins and asked if she could speak about being unhappy in the conveyancing team. She said after an incident the previous Wednesday she felt uncomfortable in her role and that there had been a few incidences of racial comments within the team and banter taken too far.

38. Ms Watkins spoke to the Claimant on 15 May 2019. The Claimant was not expecting to talk about the incident in February 2019. The Claimant explained that she was not happy with the way Ms Dunlop was treating her and set out some of the details. We accepted that Mrs Watkins only had a vague memory of this. Ms Watkins wanted to speak about the incident in February and was angry about the way Mr Bridge had behaved and disgusted by the comments and told the Claimant if it happened again, she should contact Mr Calwell. We accepted that Mrs Watkins wanted the Claimant to know it was not being ignored. We also accepted that the Claimant did not want to make a formal complaint about Mr Bridge.

39. Shortly afterwards Ms Dunlop spoke to the Claimant and asked what the problem was with Mr Bridge, and she had noticed they did not get on. She also said that she was not close friends with Mr Bridge outside of work and the Claimant could speak to her.

40. Within a short time of the conversations Mr Bridge announced to the Claimant and Mr Williams that someone had tried to get him into trouble, but it backfired and he did not even get a slap on the wrist. This comment was not reported by either the Claimant or Mr Williams. Mrs Dunlop and Mrs Watkins were unaware that Mr Bridge had said it.

41. Mr Bridge's employment with the Respondent ended in October 2019.

42. On 17 and 18 December 2019, the Claimant's 2 year old daughter was unwell. The Claimant sent Ms Dunlop a message at 0730 on 17 December 2019 advising that she could not attend work because of it. She also e-mailed Ms Warmington and called the office. Ms Dunlop and Ms Warmington were not at work on 17 December 2019. The Claimant initially thought that she would not be able to attend work on 18 December 2019 but was able to arrange childcare and so attended.

43. On 18 December 2019, some e-mails passed between Ms Warmington and Mrs Dunlop. Ms Dunlop commented "I thought her husband/partner worked nights? I never had to take any time off as my husband even though he worked full time nights has always handled the childcare." In evidence Mrs Dunlop explained this as an observation and that it was irrelevant because she was not challenging the Claimant. At the same time Mrs Dunlop raised issues with Ms Grohmann about the way absences were reported and sought to try and change the process, however this was rejected by Ms Grohmann.

44. On several occasions, in the weeks prior to the Claimant's absence, Ms Grohmann had asked Mrs Watkins to remind staff about the correct absence notification procedure. There had been a problem, particularly in the North Street office, where employees were sending her messages late

at night, or were sending messages to colleagues that they would be absent. We accepted that the Respondent considered that the Claimant had correctly followed the procedure.

45. On 18 December 2019, Mrs Watkins sent an e-mail, after being asked by Ms Grohmann to do so, reminding all staff in the firm of the correct absence procedure. The Claimant said that it was sent because she had been absent, even though she had followed the policy and that Ms Dunlop was trying to show things were wrong when they were not and she was being targeted, we rejected the assertion. We accepted Ms Grohmann's evidence that an e-mail needed to be sent to all staff generally about the policy for several weeks before the Claimant's absence and that the e-mails on 18 December 2019 might have reminded her to chase Mrs Watkins again.

46. Mr Bridge was allowed to take time off for dependents and the Claimant said the policy was not raised when he needed time off. The Claimant was also allowed to take time off and no issue was raised with her.

47. The Claimant also complained that when Sofia Rehman was absent Ms Dunlop sent an e-mail informing everyone of the absence, but this did not happen in respect of the Claimant on 17 December 2019. We accepted that if someone was absent, when Mrs Dunlop was in the office, she would send an e-mail informing everybody in the team, however Mrs Dunlop was on holiday on 17 December 2019.

48. On 8 January 2020, Mrs Dunlop was absent from work with a migraine and she sent an e-mail with tasks for the team. The Claimant was asked, with the words in brackets "(and anyone else who gets a chance)" to do undertake file closures. She wanted the Claimant to be specifically tasked to close the 10 files she had been given the day before and to do 20 to 30 more. There was also a comment, "If you are doing this only (which you should be) then there is no reason why you shouldn't be able to get through about 40 today." The instruction to the Claimant included that no documents needed scanning and that she was to check the notifications of closure had gone to the client, run the file closure form, check there was no ledger balance and add the file to the closure spreadsheet and then put it in a box for Mrs Dunlop to check. We accepted Mrs Dunlop's evidence that the task should generally take 5 to 10 minutes per file.

49. The e-mail was sent to everyone in the team who was at work that day, but similar comments were not made in relation to the other requests. The Claimant considered that the comment was negative towards her and was sarcastic and humiliating in front of her peers. She also considered it was an unrealistic target. The Claimant said it was connected to her race or sex because she was targeted and Mrs Dunlop's friend had been racist towards her and white and Asian people were not treated in the same way and Mr

Williams, who was black, was also not treated in that way because he was male.

50. Mrs Dunlop's evidence was that the email was worded as it was because she ideally wanted the Claimant to try and close 40 files due to an impending audit. She was unaware that the Claimant would be called on to cover reception. We accepted that Mrs Dunlop was feeling very unwell when she sent the e-mail and that the screen was hurting her eyes. She sent the e-mail to the employees who were due to be at work that day with the tasks that she needed doing and did so quickly before returning to bed. We accepted that earlier in the week Mr Northey had also been asked to close files. Mrs Dunlop did not have in mind how many files Mr Northey had closed when she sent the e-mail and she was basing the target on her experience of closing files without doing scanning. Mrs Dunlop's was focusing on what was important to be done that day. We accepted Ms Dunlop's evidence that Jagoda had only started working for the Respondent in the new year and that she would not have had a good idea how long it would take to close a file without scanning.

51. At 1709 that evening the Claimant sent an e-mail to Mrs Dunlop saying that she had closed 21 files and explained that she had been required to cover reception and send out letters. Mrs Dunlop accepted that the Claimant had been working properly, although she did not say so to the Claimant.

52. In February 2020, the Claimant started a course of anti-depressants.

53. In March 2020 all staff were working from home due to the Covid-19 pandemic. It had been agreed that because the Claimant was also home-schooling, she could complete her 16 hours per week at any time. On 26 March 2020 the Claimant was told by Ms Warmington that she would be furloughed.

54. The Claimant's evidence was that she was the first member of the team to be furloughed and said it was related to sex or race, because she was a working parent and they decided to keep Mr Northey on and not furlough him

55. We accepted Mrs Watkins evidence that in the first four days of the furlough scheme, 13 or 14 staff members were furloughed and that three were in the conveyancing team. Mrs Dunlop made it known to Mrs Watkins that she did not want any of her team furloughed. Mrs Watkins was concerned that work was grinding to a halt and about the financial security of the firm. Mrs Watkins considered who to furlough across the whole firm and did not seek input from Mrs Dunlop in relation to the conveyancing team. Mrs Watkins knew that conveyancing work was drying up due to the pandemic restrictions. We accepted Mrs Watkins' evidence that Mr Northey was the

only administration assistant in the firm who was not furloughed, and that it was because he had been with the firm since 2013, had experience of working across the conveyancing and family departments, he had technical expertise and could be called upon to cover virtually all tasks across the firm. We accepted that Mrs Watkins was looking at how she could keep the firm going. The staff who were furloughed were paid 80% of their normal pay.

56. After being told that she was furloughed, the Claimant sent a text message to Mrs Dunlop and asked to speak to her about what to do with her computer and work. During the telephone conversation which followed, the Claimant mentioned some things that she was going to do with her children. We rejected the Claimant's evidence that she was told that she had been furloughed so that she could concentrate on her children and family. The Claimant did not refer to Mrs Dunlop saying this in her grievance and nor in her claim form. There was a text message later that day in which Mrs Dunlop said "Enjoy family time and we will be back at work before we know it x" and we considered it more likely that the Claimant had inadvertently muddled the two and was mistaken.

57. On 5 June 2020, the Claimant was informed by text message by Ms Dunlop that things were getting busier and was asked if she wanted to come back to work and if so what hours and days. The Claimant replied and said she did and could 4 hours in the afternoons Wednesday and Thursdays and 8 hours on Fridays from home.

58. We accepted Ms Grohmann's evidence as to her involvement as furlough ended. Ms Grohmann was forwarded the Claimant's response and did not speak to Mrs Dunlop. Her intention when asking about hours was to gauge from staff, in relation to their contracted hours, which days and hours they would like to return to the office and not whether a change of contracted hours was sought. Ms Grohmann wanted to consider all of the responses so that she could manage returns and determine whether part furlough was sought by some staff. Ms Grohmann telephoned the Claimant and said that it had been raised that she might want to change her days and that she wanted to clarify that the enquiry was meant to be whether she wanted to return to work on all or part of her contracted hours.The Claimant suggested that this was a way that Mrs Dunlop could 'have a dig' and suggest there was a problem, however we accepted Mrs Grohmann's evidence as to Mrs Dunlop's involvement and rejected the Claimant's suggestion.

59. The Claimant returned to work on 17 June 2020.

60. On 18 June 2020, part of the Claimant's tasks was to open files. Four files had been left over from Mr Northey's two days and a further sale and purchase file needed to be opened. There was also outstanding information

from other files which had been received, which took the total up to 10. On her first day back, due to IT issues, she had only been able to open 2 files. On 18 June 2020, the Claimant dealt with the post and scanning and renamed documents and attached it to files, which due to the amount of post took until midday. At this point Jagoda came into the office and they spoke for some time because they had not seen each other due to lockdown. She then colour coded files. At 1530 an e-mail was received from a family solicitor asking for a hard copy document to be found and the Claimant was involved in the search. The Claimant therefore was only able to open 2 files on 18 June 2020. Mrs Dunlop was not in the office that day and did not know what had happened.

61. At 1631 the Claimant e-mailed Mrs Dunlop and said 5 files were still to be opened. Mrs Dunlop thanked her and asked which files had been opened. The Claimant replied that there had been quite a bit of post and DX which was all saved in the folder and had taken up her morning. Mrs Dunlop responded at 1642 by saying:

"*So to recap: -2 files opened yesterday plus scanning (I know there were computer issues for an hour and half yesterday) – 2 files opened today plus scanning and collecting post/DX. Was there an issue with filos as the scanning was uploaded by 1030 which meant it took 6 hours to open two files which does not add up? If there is a filos/computer issue I will need to speak to Graham about it*."

62. The Claimant's evidence was that she had opened two more files than Mr Northey in his two days. She accepted that Mrs Dunlop was entitled to ask the question, but said she was being sarcastic. She suggested that it was a dig and a way of shaming her and was micro-aggression and had been discriminated against for her whole employment and Mrs Dunlop was making out that her role was of no significance. Mrs Dunlop gave evidence, which we accepted, that Jagoda had said to her that the Claimant had been talking to her and she had been trying to get back on with her work. Mrs Dunlop was unaware of the extent of the time that the post and naming the files had taken, nor that the Claimant had been asked to undertake the search. On the basis of Mrs Dunlop's knowledge she did not understand why the Claimant had only been able to open 2 files. She sent the e-mail to check her understanding of the situation and to check whether there were further technical problems. We accepted that on this occasion Mrs Dunlop was concerned about the Claimant's productivity.

63. The Claimant was upset when she left work and that evening sent an e-mail to Ms Grohmann setting out what happened that day. She said she felt bullied and victimised and had done so for nearly 2 years and Mrs Dunlop's unfair treatment started when Mr Bridge joined the firm.

64. On 19 June 2020, the Claimant spoke to Ms Grohmann, the Claimant told Ms Grohmann about the things that had happened, including what Mr Bridge had said and he had shrugged it off. We did not accept that Ms Grohmann told the Claimant that it was serious enough to raise a grievance, but discussion took place as to whether the Claimant wanted to raise a grievance and she could make it formal. The Claimant said that she did not want to work in the conveyancing team anymore and asked if she could do something else in the firm and refused to work with Mrs Dunlop. Ms Grohmann then discussed the situation with Mrs Watkins and found the Claimant another role doing billing and closing family files, working from the North Street office.

65. A week later Ms Grohmann spoke to the Claimant again and in the discussion, she said that it was unlikely she would get an apology from Mrs Dunlop. The Claimant was asked to open some conveyancing files by Ms Grohmann, but she said that she did not feel comfortable doing so.

66. On Tuesday 14 July 2020 the Claimant raised a grievance. She had taken a photograph of the conveyancing file opening spreadsheet, sent it to her Hotmail account and then sent it with the grievance by the same Hotmail account. Ms Shufflebottom, partner, acknowledged receipt of the grievance the same day, and said she was on leave the following week and would investigate it on her return.

67. Mrs Watkins was made aware that the grievance contained the attachment of the file opening spreadsheet. The spreadsheet included client details. Mrs Watkins was concerned that the information had been sent via Hotmail, that the Claimant had downloaded the spreadsheet and there had been a data breach. Mrs Watkins contacted the Information Commissioner because she was concerned that they had to report a breach.

68. On 15 July 2020, Mrs Watkins and Ms Grohmann spoke to the Claimant. Ms Watkins said that she knew about the grievance and would not be discussing that, but wanted to discuss the attachment sent by the Claimant and asked for an explanation. Mrs Watkins said that she was concerned that the Claimant had breached GDPR and that the firm could get into trouble. We accepted that this had not been the Claimant's intention and she was trying to secure evidence for her grievance. Mrs Watkins asked her to delete the photograph and e-mail from her telephone and Hotmail account, which the Claimant did at the time. We accepted that the Claimant said that it had not been malicious and was apologetic. Mrs Watkins said that she needed to think about things and would discuss it again the next day.

69. On 16 July 2020, the Claimant was absent due to self-certified sick leave and on 28 July 2020 was signed off work by her GP for a further 4 weeks with work related stress.

70. On Friday 24 July 2020, the Claimant had not heard anything about her grievance and considered it was not being taken seriously, that there had been an unreasonable delay and resigned, citing bullying/harassment by Mrs Dunlop as the reason.

71. In August 2020, Mrs Watkins spoke to Ms Warmington about the grievance. There was a lengthy discussion about the various elements, during which Mrs Watkins referred to parts of it being nonsense and complete rubbish. There was also a reference to it being like and 8 year old had written it.

72. On 10 August 2020 Ms Shufflebottom e-mailed the Claimant about the grievance and asked the Claimant to attend a meeting on 21 August 2020, which she did. The Claimant was sent the grievance outcome on 10 September 2020. It was agreed that comments made by Mr Bridge were wholly inappropriate. It was concluded that she had not been treated unfairly in the tasks she had been allocated, she had not been bullied or harassed by Mrs Dunlop. Mrs Dunlop had not been responsible for the e-mail regarding sickness or furlough.

73. On 30 September 2020 the Claimant appealed against the grievance outcome. On 5 October 2020, Ms Watkins responded by saying that the appeal had not been sent to a partner and she had not appealed within the 14 period under the policy.

Time

74. The Claimant's evidence, which we accepted, was that she brought the claim when she did, because the grievance had not been carried out properly and she wanted the matter investigated. She had started a new job shortly after leaving the Respondent and at the end of August sought advice from solicitors. She was aware that she could bring claims in the Tribunal as soon as she left the Respondent, but was not aware of the time limits. She also said that whilst working for the Respondent she might not have been in the right frame of mind.

The law

75. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if she terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct.

76. If the claimant's resignation can be construed to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".

77. The claim also alleged discrimination because of the Claimant's race and sex under the provisions of the Equality Act 2010 ("the EqA"). The Claimant alleged there had been direct discrimination, harassment and victimisation.

78. As for the claim for direct disability discrimination, under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

79. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.

80. The definition of victimisation is set out in s. 27 EqA: (1) A person (A) victimises another person (B) if A subjects B to a detriment because— (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act. (2) Each of the following is a protected act— (a) bringing proceedings under this Act; (b) giving evidence or information in connection with proceedings under this Act; (c) doing any other thing for the purposes of or in connection with this Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act…

81. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

Constructive unfair dismissal

82. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating

(ECC) Limited v Sharp [1978] IRLR 27: "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 his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

83. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors Maurice Kay LJ endorsed the following legal test at paragraph 20: "… whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."

84. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence". 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".

85. This was reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied; (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) It is open to the employer to show that such dismissal was for a potentially fair reason; (iv) If he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair."

86. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney [2008] IRLR 672); and that if an employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (Lewis v Motorworld Garages Ltd [1985] IRLR 465). In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA).

87. The judgment of Dyson LJ in Omilaju was endorsed by Underhill LJ in Kaur v Leeds Teaching Hospital NHS Trust. Having reviewed the case law on the "last straw" doctrine, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation by the employee.

88. If the suggested last straw was entirely innocuous, further guidance was given in Williams v The Governing Body of Alderman Davies Church in Wales Primary School UKEAT/0108/19/LA at paragraph 33. "If the most recent conduct was not capable of contributing something to a breach of the Malik term, then the Tribunal may need to go on to consider whether the earlier conduct itself entailed a breach of the Malik term, has not since been affirmed, and contributed to the decision to resign."

89. In addition, it is clear from Leeds Dental Team v Rose that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed, and does not turn on the subjective view of the employee. In addition, it is also clear from Hilton v Shiner Ltd - Builders Merchants that even where there is conduct which objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties,

if there is reasonable and proper cause for the same then there is no fundamental breach of contract.

90. A claimant cannot rely upon a breach of contract which he/she has been taken to have affirmed. Affirmation can, of course, have been express, but it can also be implied by inaction and delay, although simple delay is rarely enough. In Chindove-v-Morrisons UKEAT/0201/13/BA, Langstaff J said this (paragraph 26);

"*He [the claimant] may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time….. It all depends upon the context and not upon any strict time test."*

91. Where the employee relies upon the discriminatory acts or conduct of the employer as the basis for constructive dismissal, the constructive dismissal itself is a discriminatory act (Meikle v Nottinghamshire County Council [2005] ICR 1.

Direct Discrimination

92. With regard to the claim for direct discrimination, the claim will fail unless the Claimant has been treated less favourably, on the ground of her race and/or sex, than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The Claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the Claimant.

93. We approached the case by applying the test in Igen v Wong [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

"*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

94. In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment alleged. More than a difference in treatment or status and a difference in protected characteristic needed to be shown before the burden would shift. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might

suffice. As to the treatment itself, we had to remember that the legislation did not protect against unfavourable treatment per se but less favourable treatment. Whether the treatment was less favourable was an objective question. Unreasonable treatment could not, of itself, found an inference of discrimination, but the worse the treatment, particularly if unexplained, the more possible it may have been for such an inference to have been drawn (Law Society-v-Bahl [2004] EWCA Civ 1070). It was observed in Kowalewska-Zietek v Lancashire Teaching Hosptials NHS Foundation Trust UKEAT/0269/15/JOJ that the 'unreasonable not discriminatory defence' might be less applicable when only one person was made miserable.

95. In Madarassy v Nomura International Plc [2007] EWCA Civ 33 Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The Supreme Court in Royal Mail Group Ltd v Efobi [2021] UKSC 33 confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remained binding authority.

96. In Denman v Commission for Equality and Human Rights and ors [2010] EWCA Civ 1279, CA, Lord Justice Sedley made the important point that the "more" which is needed to create a claim requiring an answer need not be a great deal.

97. The function of the Tribunal is to find the primary facts and then look at the totality of those facts to see if it is legitimate to infer that the acts or decisions were done/made on prohibited grounds (Qureshi v Victoria University of Manchester [2001] ICR 863). In terms of drawing inferences, we were referred to Efobi v Royal Mail Group Ltd [2021] ICR 1263 in which after referring to Wisniewski v Central Manchester Health Authority [1998] PIQR 324 it was commented that, "Tribunals should, as far as possible be free to draw, or decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books before doing so."

98. The relevant question is to look at the mental processes of the person said to be discriminating (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07). The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful

discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154).

99. "Could conclude" means that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint.

100. The test within s. 136 encouraged us to ignore the Respondent's explanation for any poor treatment until the second stage of the exercise. We were permitted to take into account its factual evidence at the first stage, but ignore explanations or evidence as to motive within it (see Madarassy-v-Nomura International plc and Osoba-v-Chief Constable of Hertfordshire [2013] EqLR 1072).

101. We needed to consider all the evidence relevant to the discrimination complaint, that is (i) whether the act complained of occurred at all; (ii) evidence as to the actual comparator(s) relied on by the claimant to prove less favourable treatment; (iii) evidence as to whether the comparisons being made by the claimant were of like with like; and (iv) available evidence of the reasons for the differential treatment.

102. Where the Claimant has proven facts from which conclusions may be drawn that the respondent has treated the Claimant less favourably on the ground of the protected characteristic then the burden of proof has moved to the Respondent. It is then for the Respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act. To discharge that burden, it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic. That requires the Tribunal to assess not merely whether the Respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question.

103. The circumstances of the comparator must be the same, or not materially different to the Claimant's circumstances. If there is any material difference between the circumstances of the Claimant and the circumstances of the comparator, the statutory definition of comparator is not being applied (Shamoon). It is for the Claimant to show that the hypothetical comparator in the same situation as the Claimant would have been treated more favourably. It is still a matter for the Claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn (Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288).

104. When dealing with a multitude of discrimination allegations, a tribunal was permitted to go beyond the first stage of the burden of proof test and step back to look at the issue holistically and look at 'the reasons why' something happened (see Fraser-v-Leicester University UKEAT/0155/13/DM).

Harassment

105. Not only did the conduct have to have been 'unwanted', but it also had to have been 'related to' a protected characteristic, which was a broader test than the 'because of' or the 'on the grounds of' tests in other parts of the Act (Bakkali-v-Greater Manchester Buses [2018] UKEAT/0176/17).

106. As to causation, we reminded ourselves of the test set out in the case of Pemberton-v-Inwood [2018] EWCA Civ 564. In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the prescribed effects under sub-paragraph (1) (b), a tribunal must consider both whether the victim perceived the conduct as having had the relevant effect (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). A tribunal also had to take into account all of the other circumstances (s. 26 (4)(b)). The relevance of the subjective question was that, if the Claimant had not perceived the conduct to have had the relevant effect, then the conduct should not be found to have had that effect. The relevance of the objective question was that, if it was not reasonable for the conduct to have been regarded as having had that effect, then it should not be found to have done so.

107. It was important to remember that the words in the statute imported treatment of a particularly bad nature; it was said in Grant-v-HM Land Registry [2011] IRLR 748, CA that "*Tribunals must not cheapen the significance of these words. They are important to prevent less trivial acts causing minor upset being caught by the concept of harassment.*" See, also, similar dicta from the EAT in *Betsi Cadwaladr Health Board-v-Hughes* UKEAT/0179/13/JOJ.

Victimisation

108. The test of causation under s. 27 was similar to that under s. 13 in that it required us to consider whether the Claimant has been victimised '*because*' she had done a protected act or that the Respondent believed she had done or may do a protected act, but we were not to apply the 'but for' test (Chief Constable of Greater Manchester Constabulary-v-Bailey [2017] EWCA Civ 425); the act had to have been an effective cause of the detriment, but it does not have to be the principal cause. However, it has to

have been the act itself that caused the treatment complained of, not issues surrounding it.

109. In Martin-v-Devonshire Solicitors [2011] ICR 352 the then President of the EAT, Underhill J, encouraged tribunals to concentrate upon the statutory language on causation (in the context of this case, the word '*because*') and he referred back to Lord Nicholls' test in Nagarajan-v-London Regional Transport [1999] ICR 877; "*whether the prescribed ground or protected act 'had a significant influence on the outcome'*" (paragraph 36).

110. In order to succeed under s. 27, a claimant needs to show two things; that she was subjected to a detriment and, secondly, that it was because of the protected act(s). We applied the 'shifting' burden of proof s. 136 to that test as well.

Defence of reasonable practicability s. 109 EqA

111. Section 109 (4) of the Act reads as follows;

"*In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A -*
(a) from doing that thing, or
(b) from doing anything of that description."

112. The burden of proof of establishing the defence is on the employer (Enterprise Glass Co Ltd v Miles [1990] ICR 787.

113. In considering that defence, we had to focus upon what the Respondent did *before* the acts complained of occurred, not how it reacted after it was aware.

114. We considered the EHRC's Code of Practice (2011) and, in particular, paragraphs 10.50-10.53. We also took into account the guidance from cases such as that of Canniffe-v-East Riding of Yorkshire Council [2000] IRLR 555 in which the Employment Appeal Tribunal stated that the proper approach to the defence was to consider whether the Respondent had taken any steps to prevent the employee from doing the act or acts complained of and, secondly, having considered what steps were taken, then considering whether they could have taken any further steps which were reasonably practicable. It was important to remember that an employer would not be exculpated if it had not taken reasonably practicable steps simply because, if it had taken those steps, they would not necessarily have prevented the thing from occurring.

115. Canniffe was considered by the EAT in Allay (UK) Ltd v Gehlen UKEAT/0031/20 in which it was suggested that there were 3 stages to consider: (1) identify any steps that have been taken, (2) consider whether they were reasonable, and (3) consider whether any other steps should reasonably have been taken. It was further said that Canniffe supports the proposition that if there is a further step that should reasonably have been taken by the employer to prevent harassment the defence will fail even if that step would not have prevented the harassment that occurred in the case under consideration. That does not mean that in deciding the anterior question of whether a further step was one that it would have been reasonable for the employer to have taken, the tribunal cannot consider the likelihood that it would have been effective.

Time

116. Under section 123 of the Equality Act 2010 a complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates (s. 123 (1)(a)). For the purposes of interpreting this section, conduct extending over a period is to be treated as done at the end of the period (s. 123 (3)(a)) and this provision covers the maintenance of a continuing policy or state of affairs, as well as a continuing course of discriminatory conduct.

117. The relevant law relating to early conciliation ("EC") and EC certificates, and the jurisdiction of the Employment Tribunals to hear relevant proceedings, is as follows. Section 18 of the Employment Tribunals Act 1996 (“the ETA”) defines “relevant proceedings” for these purposes. This includes in Subsection 18(1) the discrimination at work provisions under section 120 of the Equality Act 2010.

118. Section 140B of the EqA provides: (1) This section applies where a time limit is set by section 123(1)(a) … (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.. (4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) The power conferred on the employment tribunal by subsection (1)(b) of

section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section.

119. It is generally regarded that there are 3 types of claim that fall to be analysed through the prism of s. 123;
   a. Claims involving one off acts of discrimination, in which, even if there have been continuing effects, time starts to run at the date of the act itself;
   b. Claims involving a discriminatory rule or policy which cause certain decisions to be made from time to time. In such a case, there is generally a sufficient link between the decisions to enable them to be joined as a course of conduct (e.g. Barclays Bank-v-Kapur [1991] IRLR 136);
   c. A series of discriminatory acts. It is not always easy to discern the line between a continuing policy and a discriminatory act which caused continuing effects. In Hendricks-v-Metropolitan Police Commissioner [2002] EWCA Civ 1686, the Court of Appeal established that the correct test was whether the acts complained of were linked such that there was evidence of a continuing discriminatory state of affairs. One relevant feature was whether or not the acts were said to have been perpetrated by the same person (Aziz-v-FDA [2010] EWCA Civ 304 and CLFIS (UK) Ltd-v-Reynolds [2015] IRLR 562 (CA)).

120. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service IRLR 434 CA that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require exceptional circumstances: it requires that an extension of time should be just and equitable - Pathan v South London Islamic Centre EAT 0312/13.

121. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: “In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the

EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it."

122. In exercising its discretion, tribunals may have regard to the checklist contained in s. 33 of the Limitation Act 1980 (as modified by the EAT in British Coal Corporation v Keeble and ors [1997] IRLR 336, EAT). S. 33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case and lists some of the factors. In Department of Constitutional Affairs v Jones [2008] IRLR 128, CA, the Court of Appeal emphasised that these factors are a 'valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases, and tribunals do not need to consider all the factors in each and every case. In Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, the Court of Appeal did not regard it as healthy to use the checklist as a starting point and that rigid adherence to a checklist can lead to a mechanistic approach to what is meant to a very broad general discretion. The best approach is to assess all factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular the length of and reasons for the delay. If the Tribunal checks those factors against the list in Keeble, it is well and good, but it was not recommended as taking it as the framework for its thinking.

123. A tribunal considering whether it is just and equitable to extend time is liable to err if it focuses solely on whether the claimant ought to have submitted his or her claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other: Pathan v South London Islamic Centre EAT 0312/13 and also Szmidt v AC Produce Imports Ltd UKEAT 0291/14.

Conclusions

124. Due to the overlapping nature of the causes of action with the factual allegations we have a considered each allegation against the various tests. In relation to primary facts that tended to show that there had been less favourable treatment, harassment or victimisation the Claimant relied upon

that she was the only person treated in the ways alleged. There was no evidence that anyone, other than Mr Bridge, made a remark or comment that could be construed as derogatory as regards to racial backgrounds, nor that there were any specific comments that tended so suggest a derogatory approach to women. We therefore needed to consider the allegations, as a whole and determine whether an inference could be drawn that the allegations were because or related to sex or race, taking into account that unreasonable conduct per se is does not automatically equate to discrimination. There were four proven factual allegations during the Claimant's employment, and they were of isolated natures, rather than repetitive. The Claimant submitted that these incidents were sufficient to shift the primary burden of proof in respect of the various tests under the Equality Act, however in relation to Mrs Dunlop they were at most incidents of unreasonable behaviour and there was a lack of evidence from which we could infer that there was motivation because of or relating to sex and/or race.

<u>In February 2019, the Claimant was subjected to racial harassment by a colleague, David Bridges,</u>

125. It was accepted by the Respondent that Mr Bridges made the comment and that it was related to race. What he said was offensive to the Claimant, who had a relative of Chinese heritage and it was embarrassing for her. This was not disputed by the Respondent. Given that the Claimant had a Chinese relative it was reasonable for the comments to have had that effect. This was an act of harassment by Mr Bridge.

126. The Respondent defended the allegation on the basis of the statutory defence that it had taken all reasonable steps to prevent Mr Bridge from doing the act. The Respondent required all staff to undergo Equality and Diversity Training on induction and for refresher courses to take place. No evidence was adduced as to what the training involved. Although it was asserted in the grounds of response that Mr Bridge had received training, no evidence, either oral, documentary or in a witness statement was provided that he actually received it and therefore no conclusion was reached that he was. It was significant that Mr Bridge had a tendency to make inappropriate comments, this was known by Mrs Dunlop and she would intervene if she thought he was about to say something inappropriate. It should have been apparent to Mrs Dunlop that Mr Bridge had not taken on board any Equality and Diversity training that he had received and not appreciated the effects of the comments he was making. We concluded that these comments were being made from the start of his employment. Mrs Dunlop should have asked him to take or retake the equality and diversity training and have told him to stop making such remarks before the incident in February 2019. We were not satisfied that enforcing the equality and diversity policies was sufficiently robust, in relation to Mr Bridge, and it was

reasonably practicable for the Respondent to have asked him to do the training or to do it again and to have told him to stop making inappropriate comments before February 2019. The Respondent was not availed of the defence, and the claim succeeded, subject to determining the issue of time.

In May 2019, Angela Dunlop, the Claimant's manager, shouted aggressively at the Claimant, in front of colleagues

127. The Claimant referred to two incidents during her employment in which Mrs Dunlop had shouted at her. The first incident at some point between October 2018 and January 2019, when Mrs Dunlop thought that the Claimant had asked for a task from Mr Williams, shortly after been given a task by Mrs Dunlop.

128. The incident to which the allegation related concerned being shouted at after the Claimant asked Mrs Dunlop to see a client, when Mrs Dunlop had just walked into the office and was extremely wet. Mrs Dunlop was placed into a difficult situation in that her appearance would have been poor and she would have been uncomfortable.

129. This allegation was primarily brought as an allegation of harassment and a breach of the implied term of trust and confidence. We accepted that being shouted at was unwanted and it caused the Claimant to feel humiliated given that colleagues could hear and that it would have been reasonable for the incident to have had that effect. The Claimant relied upon her female colleague on reception, who was white, to demonstrate that the incident was because of or related to her race or sex on the basis that the colleague was not shouted at. However, it was the Claimant who asked Mrs Dunlop to speak to the Client in reception and not the colleague. The circumstances were very specific to that day. Taking into account that there was no evidence that Mrs Dunlop had ever made racist or sexist remarks and the facts in relation to the other proven allegations, the Claimant's assertion that it was related to her race or sex, was just an assertion. We were not satisfied that the Claimant had adduced primary facts which tended to show that the incident related to her race or sex. In any event we were satisfied that the incident was due to the embarrassment of Mrs Dunlop and it was wholly unrelated to the protected characteristics. The allegation of harassment was dismissed.

130. Further, for the same reasons as set out above, the Claimant failed to adduce primary facts, from which we could conclude, that a male or a person from a different racial background would have been treated more favourably and the claim of direct discrimination was dismissed.

131. In relation to victimisation the Claimant had not raised her informal complaint about Mr Bridge at this stage and therefore what happened could

not be because of a protected act and the allegation of victimisation was dismissed.

132. We accepted that Mrs Dunlop shouted at the Claimant and that as a manager more restraint should have been shown and the explanation given in a more measured tone. Mrs Dunlop was frustrated, but still needed to show restraint and we accepted that although she had reasonable and proper cause to address the issue, there was not reasonable cause to shout at the Claimant, however as an isolated incident we were not satisfied that on its own it was a fundamental breach of contract.

<u>The Respondent did not properly deal with Mr Bridge's behaviour, when reported to them</u>

133. This was primarily an allegation of harassment and direct discrimination in the alternative and a breach of the implied term. The Claimant informally raised Mr Bridge's behaviour and stressed to Ms Warmington that she did not want to raise it formally. The incident was brought to the attention of Mrs Watkins, who despite the Claimant not wanting the matter to be formally dealt with, decided that it needed to be addressed. Mr Bridge was spoken to; however, we were not satisfied that the severity of the situation was sufficiently stressed to him for which we were critical. We were not satisfied that it was unwanted for Mrs Dunlop to speak to Mr Bridge. We accepted that Mr Bridge's subsequent comment was unwanted.

134. The difficulty for the Claimant was that she did not want the matter to be dealt with formally and that left the Respondent in a position in which it needed to do something, whilst taking into account those wishes. In the circumstances the Respondent adopted an informal approach, which was tantamount to giving Mr Bridge an oral warning. We were not satisfied that the warning was sufficiently robust.

135. Mrs Dunlop did not know who had made the complaint. There was no evidence that Mrs Dunlop ever made any statements which could be construed as adversely relating to race or sex. In order to show that it was related to or because of sex and/or race, the Claimant relied upon a general assertion and that Mr Bridge did not consider that he had even received a slap on the wrist. It was also relevant that Mr Dunlop was friends with Mr Bridge. Other than the fact of the allegation, and that it appeared to have been unreasonably dealt with by Mrs Dunlop, the Claimant could not point towards other factors, save for the allegations generally, that tended to show that it was related to or because of a protected characteristic. After considering all of the evidence we were not satisfied that the Claimant had proved primary facts tending to show that what happened was related to sex or race and the claim of harassment was dismissed.

136. For the same reasons we were not satisfied that the Claimant had proven primary facts which tended to show that she had been treated less favourably than a male or a person from a different racial background and the claim of direct discrimination was dismissed.

137. For the same reasons, we also concluded that the Claimant had failed to prove primary facts that tended to show that the way the action was taken was because she had raised the concern. In any event we concluded that Mrs Dunlop was less robust due to her friendship with Mr Bridge and the complaint played no part in her thought process. The claim of victimisation was dismissed.

138. Mrs Dunlop should have impressed more strongly on Mr Bridge that his behaviour was unacceptable and the consequences of a repeat. The Respondent acted with reasonable and proper cause by dealing with the matter informally, however the way in which Mrs Dunlop dealt with it was insufficient and was unreasonable. There was no suggestion that Mr Bridge was aware of who had made the complaint about him, however it was something which could damage the trust and confidence the Claimant had in the Respondent. It was notable that there was no suggestion that a further incident had occurred after Mrs Dunlop spoke to Mr Bridge and the Claimant carried on working and speaking with him afterwards. The Respondent and Mrs Dunlop had approached the matter without making it formal, in accordance with the Claimant's wishes. Mrs Dunlop did not sufficiently impress on Mr Bridge the seriousness of the matter, however in the circumstances of the Claimant's wishes, it was more of an error of judgement by Mrs Dunlop, rather than a deliberate act. In the circumstances, we were not satisfied that what occurred destroyed or seriously damaged the trust and confidence the Claimant held in the Respondent and in isolation it was not a fundamental breach of contract.

<u>On 18 December 2019, Ms Dunlop challenged the Claimant's taking of emergency leave to deal with her sick daughter</u>

139. This was an allegation of direct discrimination and victimisation. This aspect of the Claimant's case appeared to change at the point of closing submissions. It had been apparent that the challenge to the Claimant had been on the basis that all staff had been sent an e-mail reminding them of the correct absence procedure. In closing submissions, it was put that the less favourable treatment was that Mrs Dunlop had queried why the Claimant needed time off when her partner worked nights and that her own partner worked nights and dealt with childcare.

140. In relation to the e-mail sent to all staff, Ms Grohmann had been asking Mrs Watkins to send the e-mail for several weeks before it was sent.

We accepted that the e-mails about the Claimant's absence might have prompted Ms Grohmann to remind her again. The Claimant compared herself to Mr Bridge who also had been granted dependents leave. It was relevant that the Claimant's leave was also granted. There was a perception by the Claimant that the e-mail was sent because she had taken dependents leave. It was asserted that this was because of her race or sex. We were not satisfied that the Claimant adduced primary facts that the e-mail was sent because of her race or sex, or that if a male or person of a different racial background had been absent on 17 December 2019 that the same e-mail would not have been sent. In any event we were satisfied that the Respondent sent the e-mail due to there being problems in the North Street office, in the way that absence was notified, and that Ms Grohmann had been seeking for it to be sent for some time. We were satisfied that the sending of the e-mail was wholly unrelated to the Claimant's race and/or sex.

141. In relation to the e-mail sent by Mrs Dunlop to Ms Warmington an appropriate comparator would be a male whose partner worked nights. There was no evidence that Mr Bridge had a partner who worked nights. Other than a general assertion and that the Claimant complained of unreasonable behaviour there was not a suggestion in the e-mail that the comment related to the Claimant's sex. We were not satisfied that the Claimant adduced primary facts that a similar email would not have been sent in relation to a male in similar circumstances. Accordingly, the claim of direct discrimination was dismissed.

142. For same reasons we concluded that the Claimant had not adduced primary facts to suggest that the e-mails were sent because the Claimant had raised her concern about Mr Bridge's racist comment and the claim of victimisation was dismissed.

143. The e-mail to all staff was sent because the Respondent had difficulties with some staff (not the Claimant) reporting absences correctly. As such it was acting with reasonable and proper cause, and it was not a breach of the Claimant's contract of employment. In relation to the e-mail by Mrs Dunlop, the Claimant was not aware of it until after her employment ended and therefore it could not have been causative of her resignation.

<u>On 8 January 2020, set excessively high targets and being routinely taken off tasks with no reasonable explanation</u>

144. This was an allegation of direct discrimination and victimisation. We were not satisfied that the Claimant was routinely taken off tasks without reasonable explanation, and Mrs Dunlop was not cross-examined on that basis. We accepted Mrs Dunlop's evidence that closing a file, without doing any scanning, would take 5 to 10 minutes and that if nothing else was done

that 40 files could be closed in a day. The e-mail asked the Claimant to do the 10 files from the previous day and 20 to 30 more. We therefore concluded that the target was 30 to 40 files. The Clamant was not being allocated any additional work and therefore we concluded that the task was not excessive. No other examples of excessive tasks were given.

145. In any event, the Claimant submitted that Mr Northey was not given a similar target. The Claimant was not at work on the days that Mr Northey had been in attendance that week. The Respondent was about to have an audit and files needed to be closed. The Claimant was relying on an assertion that Mr Northey did not have similar targets, rather than it being based on observation. We accepted that in that week he was also being asked to close files. It was also significant that the instruction also applied to anyone else who had time. It was also relevant that on 8 January 2020, Mrs Dunlop felt very ill and wanted to send what needed doing quickly and then return to bed. The Claimant failed to prove primary facts that Mr Northey would not have received a similar task on 8 January 2020, had he been working. Further we were not satisfied that the Claimant proved primary facts that a male or a person from a different racial background would have been treated differently. The claim of direct discrimination was dismissed.

146. For the same reasons the Claimant failed to prove facts which tended to suggest that the target was set because she had raised a concern about Mr Bridge and the claim of victimisation was dismissed.

147. We concluded that the target was a reasonable instruction and that Mrs Dunlop was acting with reasonable and proper cause, given the impending audit, and that it was not a breach of the Claimant's contract.

<u>On 8 January 2020, Ms Dunlop sent an email to the conveyancing team, including the Claimant, which was worded in a 'negative, shameful and harsh' tone towards her</u>

148. This was an allegation of harassment and direct discrimination in the alternative and an allegation of victimisation. The words in the e-mail to which the Claimant objected were "*if you are doing this only (which you should be) …"* None of the other instructions included such a reference and it appeared to be an unreasonable reference. We accepted that the Claimant considered that this sentence was unwanted, and it would be an unwanted remark which was also sent to colleagues.

149. The Claimant relied on the totality of the conduct alleged and that she had been targeted and it was because she complained about Mr Bridge. The Claimant was relying on an assertion. There was no evidence that Mrs Dunlop ever made improper comments about race or women. It was relevant that the e-mail was sent with a background of Mrs Dunlop feeling

very unwell and that files needed to be closed for the audit. We were not satisfied that the Claimant adduced primary facts tending to show that it was related to her race or sex. In any event we were satisfied that Mrs Dunlop wanted to impress on the Claimant the importance of closing the files and that this was the reason for the remark. The remark was wholly unrelated to the Claimant's race and/or sex and the claim of harassment was dismissed.

150. For the same reasons, the Claimant failed to prove primary facts that a white and/or male colleague in the same circumstances would have been treated differently and the claim of direct discrimination was dismissed.

151. Further the Claimant failed to prove primary facts that remark was made because she raised a concern about Mr Bridge. There was no evidence to support the assertion that she made. The claim of victimisation was dismissed.

152. We accepted that the Claimant found the remark upsetting and although we accept the intention behind it, it could have been better worded and was unreasonable. However, we did not accept that it was of a type which was likely to seriously damage or destroy trust and confidence held in the Respondent.

<u>On 27 March 2020, the Claimant was the first person in the Team to be furloughed and it being stated to her that she was chosen, so she could concentrate on her family and kids</u>

153. The Claimant was not told that she was being furloughed so she could concentrate on her family and children. Mrs Dunlop did not want any staff furloughed. We accepted that Mrs Watkins made her decision in a short space of time and in pressing and unusual circumstances and that she was looking to maintain the viability of the firm. The only administration assistant in the firm not furloughed was Mr Northey. The Claimant submitted that this was clear cut and that Mr Northey was doing a similar job and he was not furloughed. It was relevant that those on furlough received 80% of pay. We accepted that there was an apparent difference in treatment and the Claimant shifted the primary burden of proof.

154. We rejected the Claimant's submission that it was unlikely that Mrs Watkins made the decision on her own, without input from Mrs Dunlop. Mrs Watkins knew what was happening with the work in the conveyancing department and had in mind the situation across the whole firm and that cost savings needed to be made. We accepted she made the decision herself. We also accepted her evidence that Mr Northey was not furloughed because he had more experience in terms of time and that he had worked in the family department and had IT expertise. It therefore made logical sense not to furlough an administrative assistant who could work across

multiple departments, without training, and who could help with technical issues. We were satisfied that this was reason for the decision and that it was wholly unrelated to the Claimants sex and/or race. Therefore, the claim of direct discrimination was dismissed.

155. We were not satisfied that the Claimant proved primary facts that the decision was because of her complaint about Mr Bridge and in any event Mrs Watkins made the decision for the reasons as set out above. The claim of victimisation was dismissed.

156. We concluded, for the same reasons, that Mrs Watkins was acting with reasonable and proper cause when deciding to furlough the Claimant and that it was not a breach of contract.

<u>On 18 June 2020, Ms Dunlop sent a further email, also harshly-toned, questioning the work completed by the Claimant that day</u>

157. The Claimant interpreted the e-mail as being harshly toned. It was sent with a background, which appeared to Mrs Dunlop that the Claimant had dealt with post until 1030 and then spent the rest of the day opening two files. This was alleged to be harassment, direct discrimination or victimisation.

158. We accepted that it was unwanted for the Claimant to be questioned about what she had done that day. The Claimant relied upon that she had opened two more files than Mr Northey had in his two days work that week and the incidents generally to show that it was related to sex and/or race. Other than effectively a general assertion the Claimant was unable to point towards any evidence that it was related to her protected characteristics. We were not satisfied that the Claimant had proved primary facts that it was related to her sex or race and the claim of harassment was dismissed.

159. In any event we were satisfied that Mrs Dunlop was concerned that the Claimant had undertaken little work that day and wanted to check whether her understanding of the position was correct and ascertain whether there had been a problem. The e-mail was short and to the point, however we were satisfied it was solely related to her concerns and was wholly unrelated to sex and or race or that the Claimant raised concerns about Mr Bridge.

160. For the same reasons we were not satisfied that primary facts were proven in relation to the claims of direct discrimination and victimisation. In any event we were satisfied that the Respondent had proved a non-discriminatory reason for the content of the e-mail and those claims were dismissed.

161. For the same reasons we were satisfied that Mrs Dunlop had reasonable and proper cause to send the e-mail and it was not a breach of the Claimant's contract of employment.

On 21 August 2020, the procedure for hearing of a grievance she had brought was not followed properly, due to both delay in hearing it and there being no witness statements having been obtained from those mentioned.

162. The allegation related to the claim of constructive dismissal only. The Claimant did not cross examine the Respondent witnesses about the way the grievance hearing took place, and we reached no conclusions as to whether there was a failure in the investigation of it. In any event the grievance hearing took place after the Claimant gave notice of resignation.

163. The Claimant complained about the delay for her to have a hearing, however it was clear to the Clamant, the same day, that Ms Shufflebottom would investigate it on her return from leave. The Claimant raised the grievance on Tuesday 14 July 2020 and sent her resignation on Friday 24 July 2020, i.e. before Ms Shufflebottom returned from leave. The grievance policy required a meeting without unreasonable delay and normally within 10 days. In the circumstances the grievance officer was absent on leave, which the Claimant knew and she did not make any enquiry as to whether she had returned. We were not satisfied that the Claimant proved that the Respondent was acting without reasonable and proper cause by not arranging the hearing by 24 July 2020. In the circumstances of the Claimant's knowledge that Mrs Shufflebottom was on leave and would not return until the following week and that she had not objected to Mrs Shufflebottom investigating on her return, we were not satisfied that this added anything to the earlier proven incidents.

Constructive dismissal

164. We concluded that the Respondent did not have reasonable and proper cause when Mrs Dunlop shouted at the Claimant in May 2019. Mrs Dunlop unreasonably did not sufficiently impress on Mr Bridge the seriousness of what he had said, and unreasonably worded her e-mail on 8 January 2020. The discussion with Mr Bridge was not forceful enough, but was more an error of judgement, but there were no further incidents. The other breaches, although upsetting, were isolated incidents. Taking the conduct together they were not so serious that a reasonable person would consider that there had been a fundamental breach of contract. Considering whether those matters together were sufficient to amount to a fundamental breach of contract, we concluded that although damage had been done that it was not so serious as to amount to a fundamental breach.

165. We accepted that the Claimant resigned because she perceived that she had been unfairly treated by Ms Dunlop.

166. Even if we were wrong on whether there was a fundamental breach, the Claimant waited more than 6 months to resign after the e-mail in January 2020. This was a significant amount of time and the Claimant returned to work after furlough and we were satisfied that her return to work demonstrated that the Claimant intended to continue the contract and any breach was affirmed.

Time limits for the successful harassment claim

167. The claim of harassment against Mr Bridge was presented 21 months after the incident and was therefore outside of the primary time limit. The Claimant did not properly appreciate that she could bring a claim until after she left the employment of the Respondent, when she took legal advice in August 2020. We also accepted that she had been treated for depression whilst employed by the Respondent. We accepted that it can be difficult for an employee to bring a claim whilst still employed. It was relevant that the Respondent accepted that the incident had occurred and Mrs Watkins was horrified by it. It was suggested by the Respondent that it was prejudiced because Mr Bridge had left and they had destroyed his paperwork, however the incident was accepted to have happened and the Respondent was able to call witnesses in relation to how it was dealt with and Mrs Dunlop gave evidence as to what had happened within the team. We did not accept that there was significant prejudice to the Respondent, other than losing the limitation defence. The Claimant, if the application was refused, would have been prevented from bringing a claim in which the harassing event was admitted to have occurred. Although the claim had been presented a significant amount of time outside of the time limit, the circumstances of the case were unusual, in that most of the allegation was admitted. In the circumstances it was just and equitable to extend time and the claim of harassment in that regard succeeded.

Remedy

168. The remedies available to the tribunal are found in section 124 of the EqA. The tribunal may make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate; may order the respondent to pay compensation to the complainant (on a tortious measure, including injury to feelings); and make an appropriate recommendation. In addition, the tribunal may also award interest on any award pursuant to section 139 of the EqA.

169. The interest payable on discrimination awards is to be calculated in accordance with the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ("the Interest Regulations"). Under regulation 2 the tribunal shall consider whether to award interest, and if it

chooses to do so then under regulation 3 the interest is to be calculated as simple interest accruing from day to day. Under regulation 6 the interest on an award for injury to feelings is to be from the period beginning on the date of the act of discrimination complained of and ending on the day of calculation. All other sums are to be calculated for a period beginning with a mid-point date between the act of discrimination and ending on the day of calculation.

170. We had to assess the injury to the Claimant's feelings. We considered the original bands of awards set by the case of Vento-v-Chief Constable of West Yorkshire Police [2003] IRLR 102 CA, as uplifted by the case of Da'Bell-v-NSPCC [2010] IRLR 19 EAT and then the further case of Simmons-v-Castle [2013] 1 WLR 1239 (an uplift on all awards of general damages of 10% which has been held to have applied to Tribunal litigation (see for example De Souza-v-Vinci Construction (UK) Ltd EWCA Civ 879). Since then, in the Presidential Guidance issued on 27 March 2020, the following bands were said to applied in respect of claims issued on or after 6 April 2020; £900 to £9,000 in respect of less serious cases, £9,000 to £27,000 the cases which did not merit in awarding the upper band and £27,000 to £45,000 for the most serious cases, with the most exceptional cases capable of exceeding £45,000.

171. When reaching a figure for injury to feelings, we remained aware that the award had to be compensatory and just to both parties. It should have been neither too low nor too high, so as to avoid demeaning the respect for the policy underlying the anti-discriminatory legislation. We also tried to bear in mind the value in everyday life of the particular sum that we chose to award. We had an eye on the range of awards made in personal injury cases. We also took into account the guidance at paragraph 36 of the EAT's decision in Base Childrenswear Limited v Otshudi UKEAT/0267/18.

172. Aggravated damages can be awarded when there are aggravating features which have increased the impact on the Claimant. Such an award is compensatory and not punitive and it can be made where a Respondent fails to treat a complaint with requisite seriousness.

173. The Respondent did not want to further cross-examine the Claimant in relation to remedy and she was not recalled. We took into account the facts found above and the following matters raised in submissions.

174. From the start of Mr Bridge's employment, he had a tendency to make inappropriate comments. We accepted Ms Warmington's evidence that the Claimant had become unhappy after he had joined the team. The incident in February 2019 was upsetting to the Claimant and it made her feel embarrassed and she was offended by it and it was notable that it

related to her grandmother. The Claimant was upset enough about the comment to mention it to Ms Warmington a few weeks after incident.

175. The Claimant submitted that the only incident which had happened by May 2109 was the proven harassment, however the Claimant also raised the incident when she had been shouted at between October 18 and January 2019 and her witness statement was referring to micro-aggression from Mrs Dunlop during this period, although no evidence as to what that was.

176. The Claimant submitted that the only incident which could have been giving rise to her feelings by the time she e-mailed Mrs Watkins in May 2019 was the incident of harassment. We rejected that submission. We were not satisfied on the balance of probabilities that was the sole cause. The Claimant's schedule of loss explained the injury to feelings and it focussed on Mrs Dunlop's behaviour. The relationship between the Claimant and Mrs Dunlop and how the Claimant perceived she was being treated was a significant factor in the way in which the Claimant was feeling.

177. It was submitted on behalf of the Claimant that after Mr Bridge left that she saw her GP regarding work related stress and that there had been no other incident which could have caused it, however that attendance was at least a month after his departure. There was no medical evidence as to the causes for the work related stress and the Claimant did not give evidence as to the factors which had caused it. The Claimant rightly did not seek a separate award for personal injury, but referred to the effects set out in the GP letter dated 1 September 2021.

178. We accepted that the way in which Mr Bridge responded to being spoken to by Mrs Dunlop, would have been upsetting to the Claimant and that it would have reemphasised the distress she had suffered. We accepted that the effects would therefore have carried on after mid May 2019, however it was notable that no further incidents were alleged against Mr Bridge. It was also apparent that the Claimant continued to work with Mr Bridge and was still speaking to him and we did not accept the level of hurt contended for by Counsel for the Claimant.

179. The Claimant submitted that on the basis of Base Childrenswear Limited v Otshudi, the starting point should be the middle of the middle band on the basis that case had a 3 month depressive episode and taking into account the way in which the incident was dealt with, an appropriate award was about £20,000. The Respondent relied on various cases which suggested a one off incident should attract awards of £1500 to £3000 and put injury to feelings at £5000.

180. The Claimant succeeded in relation to a single allegation of harassment. We accepted that the Claimant found it upsetting, offensive and embarrassing and those initial effects lasted to such a significant extent for her to raise her concern with Ms Warmington a few weeks later. The remark was made following the Claimant referring to her grandmother being Chinese and that when the conduct was brought to Mr Bridge's attention he was dismissive of it and we accepted that further enhanced her feelings. However, during this period, the Claimant was also complaining about other treatment by Mrs Dunlop as referred to in her e-mail of 14 May 2019.

181. We took into account that the guidelines are guidelines and that we are not straightjacketed to make an award in a particular band. This was a case where there was a single incident of harassment, however the effects lasted several months and therefore this put the level of the award on the cusp of the lower and middle bands. There were other factors causing the Claimant's distress, in addition to Mr Bridge's comment. We took into account that the award must be compensatory and not punitive. Taking all of the factors into account the Claimant was awarded £8,500 for injury to feelings, in which account was taken of Mr Bridge's response after being spoken to which we considered was an aggravating feature which we assessed at £500 and was included in that award. Interest was awarded on the sum of £8,500 in the agreed amount of £991.50.

182. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 ("the Recoupment Regulations") do not apply in this case.

Employment Judge Bax
Dated: 31 January 2022

Judgment sent to parties: 1 February 2022

FOR THE TRIBUNAL OFFICE