EMPLOYMENT TRIBUNALS

Claimant: **Mr A I Malik**

Respondent: **Al-Mubarakia Limited**

Heard at: **East London Hearing Centre**

On: **13, 14, 15 and 16 September 2022**

Before: **Employment Judge Russell**
Members: **Mr J Webb**
Mr L O'Callaghan

Representation:
For the Claimant: **Mr J Horan (Counsel)**
For the Respondent: **Mr D Barnett (counsel)**

JUDGMENT

The Judgment of the Tribunal is as follows:

1. **The Claimant's application to strike out the Response is refused.**

2. **The employer's contract claim is withdrawn. It is not dismissed.**

3. **The claim of direct discrimination because of race succeeds.**

4. **The claim of harassment related to race succeeds.**

5. **The claim of unfair dismissal succeeds. The Respondent has not shown a potentially fair reason for dismissal, there is no Polkey deduction, there is no contributory fault deduction.**

6. **The claim for breach of contract in respect of holiday pay and/or time off in lieu succeeds.**

REASONS

1 By a claim form presented on 7 October 2020, the Claimant brings complaints of unfair dismissal on 21 July 2020 and of race discrimination. On 7 December 2020, the

Respondent resisted all claims and made an employer's contract claim. Case Management Orders were made by Employment Judge Barrowclough on 10 March 2021, these included exchange of witness statements by 21 February 2022 and the final hearing was listed for 27, 28, 29 April 2022 and 3 and 4 May 2022. At a further Preliminary Hearing on 24 January 2022, Employment Judge Barrett made orders for specific disclosure but did not amend the date for exchange of witness statements.

2 By letter dated 11 April 2022, the Respondent applied for a postponement of the final hearing as two of their witnesses would need to give evidence by video link from abroad:

- Professor Arifi had relocated to Saudi Arabia and would not be unable to attend in person due to professional commitments. He would not less than 8 weeks' notice to book time off work and make travel arrangements to give evidence in London.
- Madame Al-Hassawi was resident in Kuwait where she was caring her elderly mother who was extremely unwell, possibly with not long to live.

3 Regional Employment Judge Taylor granted the postponement.

4 By letter dated 20 April 2022, the final hearing was relisted to start today. Prior to the postponed April 2022 hearing, the parties had agreed to vary the date for exchange of witness statements. Whilst in subsequent correspondence other dates were proposed, no revised date was agreed. Other than an email in June 2022 from the Respondent's solicitor to the Taking of Evidence Unit dealing with video evidence from abroad, little if anything was done by the Respondent to progress the case. By contrast, the Claimant's solicitor made repeated contact with the Respondent's solicitors seeking to agree a bundle and date for exchange of witness statements to which they received no reply. As a result, on 29 July 2022 the Claimant applied for the Response and contract claim to be struck out as they were not being actively pursued. The procedural chronology set out in the application makes clear that the Claimant's solicitors attempted to correspond with at least four appropriate people at the Respondent's solicitors in an attempt to progress preparation for the final hearing. The Claimant renewed his application for strike out on 24 August 2022, now also relying on what he described as the profound and deliberate delay by the Respondent and its legal advisors, including lack of engagement, non-compliance with Case Management Orders, failure to obtain permission from witnesses from overseas to give evidence, failure to engage properly with disclosure and late provision of witness evidence. It alleged that this was a deliberate tactic and risked delay or ambush of the Claimant at the final hearing.

5 The Respondent's solicitors finally replied, on 24 August 2022, denying any deliberate failure to progress matters. It appears that the solicitor with conduct was pregnant, had been unwell and then commenced a period of maternity leave.

Preliminary Matters

6 At the outset of today's hearing, the Tribunal was prepared to hear the Claimant's strike out application. The Respondent indicated that it intended to apply for a further postponement as Professor Arif and Madame Al-Hassawi were in countries where there was no permission for taking evidence by video. Mr Barnett, on behalf of the Respondent, withdrew the employer's contract claim. As this was withdrawn in contemplation of possible proceedings in the County Court, that claim is not dismissed. He also confirmed

that if the Claimant was contractually entitled to carry forward untaken annual leave, then he would be owed 57.7 days holiday pay at the date of termination.

7 Applying **Blockbuster Entertainment Limited v James** [2006] IRLR 630 and **Harris v Academies Enterprise Trust and others** [2015] IRLR 208 EAT, the Tribunal reminded itself that:

- Strike out is a draconian power which is not to be too readily exercised. The cardinal conditions for exercise are either that the unreasonable conduct is taking the form of a deliberate and persistent disregard of the required procedural steps or that it has made a fair trial impossible. Even if one or both of those conditions are fulfilled, it is still necessary for the Tribunal to consider whether striking out was a proportionate response or whether there is a less drastic solution which may be adopted.
- A strike out application should not be made at the point of trial rather than the time to deal with the persistent or deliberate failure to comply with rules and orders to decide to secure a fair and orderly hearing, is when they have reached the point of no return.
- The Tribunal must consider why the party in default behaved as it had and the nature of what has happened.
- Repeated failure to comply with orders of the Tribunal over some period of time, may give rise to the view that a further indulgence is granted, the same will simply happen again. Equally, any failure may be an aberration and unlikely to reoccur.
- Justice is not simply a question of the Tribunal reaching a decision on the issues that is fair between the parties but also involves delivering justice within a reasonable period of time.
- The Tribunal must also have regard to costs and overall justice which means that each case should be dealt with in a way that ensures that other cases are not deprived of their own fair share of the resources of the court.
- There is no requirement for an Unless Order as a prerequisite of strike out.

8 The Tribunal also took into account the overriding objective to avoid unnecessary delay and cost, the provisions of Rule 30A which requires that where a postponement application is made less than seven days before the start of a hearing, and is not agreed, it should only be granted where there are exceptional circumstances and we had regard to the interests of justice, balancing prejudice and hardship between the parties of either granting or refusing the postponement.

9 The Tribunal were not satisfied that the Respondent's default and disengagement from hearing preparation was either deliberate or contumelious. Whilst the explanation is not fully satisfactory, given the size and resources of the Respondent's solicitors, we accept that it is genuine and default was caused by oversight and poor planning rather than deliberate. Furthermore, the only Order breached was for the exchange of witness statements on 21 February 2022 and the parties had agreed, albeit not with permission of the Tribunal, to vary that date. The Tribunal points out that an Order is not a polite request, suggestion or aspirational target to be disregarded by solicitors, especially where no alternative date is agreed. The consequences of such conduct has been confusion and delay. Whilst the Claimant's solicitor subsequently sought to progress matters, this was a problem in the making of both parties' conduct.

10 The Tribunal is not satisfied that it is no longer possible to have a fair trial. The Claimant is here, his witnesses are here, they are able to give their evidence and the Claimant has largely produced the bundle and is therefore familiar with its contents. Whilst provision of witness statements occurred only three working days before this final hearing, Mr Horan was not able to identify any particular prejudice beyond a general assertion of inadequate time to prepare. However, the Claimant is represented by experienced and well regarded Counsel who has clearly been able to get on top of his brief quickly. There is no undue advantage to the Respondent as Mr Barnett has also been recently instructed and had little time to prepare. The Response is not struck out.

11 The Respondent's application to postpone is made for the same reasons as their successful application in April 2022. With the exception of one email in June 2022, to the Taking of Evidence Unit, the Respondent can show no steps taken to enable their witnesses to attend, either in person or by video from a country which would give permission. The application to postpone is made very late and is not properly supported by evidence. Professor Arifi has had more than the 8 weeks necessary to make arrangements to attend in person but there is no evidence that he has even attempted to do so. Whilst Mr Barnett relies on Madame Al-Hassawi's caring responsibilities for her ill mother, again there is no evidence of that illness or attempts to make other arrangements.

12 In refusing the application to postpone, the Tribunal takes into account the fact that the Respondent will be deprived of the ability to call oral evidence by its own inaction. If postponed, the hearing could not be relisted until 2024, some four years after dismissal. The delay would cause undue cost to the Claimant who has instructed Counsel for this hearing. It would place additional pressure on the listing of other cases in this region. It would have a potentially adverse effect on the quality of the oral evidence, in a case which does not feature a large amount of contemporaneous documentary evidence. The Tribunal accepts that the two witnesses attending today to give evidence on behalf of the Claimant may not be able or willing to attend in 14 months' time and witness recollection of events is likely to be adversely affected.

13 The prejudice to the Respondent of refusing to postpone can be mitigated by permitting it to rely upon its written statements. The Tribunal is well used to written statements by parties who do not attend to give evidence and appropriate weight will be attached to their evidence given that the statements are not signed, the witnesses have not attended for cross-examination and there is no evidence to support a good reason for non-attendance. Mr Barnett may cross-examine the Claimant and his witnesses, putting them to proof and may rely on the contents of pleadings and contemporaneous documents to put his client's case.

14 Having decided to proceed, the Tribunal heard evidence from the Claimant and, on his behalf, Ms Mehnaz Khan and Mr George Farah. We heard evidence on behalf of the Respondent from Mr Tommy Lee and read the statements of Madame Al-Hassawi and Professor Arifi and attached such weight as we considered appropriate. We were provided with an electronic bundle of documents and read those pages to which we were taken in evidence.

Findings of Fact

15 The Respondent is part of the FMH group of companies which invests in and manages a portfolio of real estate globally but mainly in Kuwait, the UAE, the UK, Spain

and Asia. The Respondent is responsible for managing a European real estate portfolio including residential and office accommodation, historic buildings and land with development potential. For the purposes of this case, the most significant properties are Wildwood Manor (a country home), 25 Princes Gate (residential property in London), Tobacco Dock, Sovereign Court and Sovereign Place. Madame Al-Hassawi was the founder of the FMH Group and she exerts a considerable degree of day-to-day control and authority over the companies and their employees.

16 The Claimant is a British citizen of Pakistani ethnic origin. He commenced employment on 20 May 2016, initially as Group Chief Mechanical and Electrical Engineer but was promoted to Group Facilities Manager on 9 October 2017. From July 2018, he was line managed by Mr George Farah. The Claimant's role was wide reaching, it included property management of Wildwood and undertaking personal tasks for Madame Al-Hassawi, such as driving or shopping. Although contracted to work from 9am to 5pm, contemporaneous WhatsApp messages show that the Claimant was regularly required to be available outside of those core hours. In return, the Claimant received an on-call shift allowance and paid overtime.

17 Clause 7 of the Claimant's initial contract of employment gave him an entitlement to 20 days holiday per annum, with additional public and bank holidays. Clause 7.5 permitted the Claimant to carry over 5 days' untaken holiday entitlement into a following holiday year with the express approval of his line manager. Clause 21 is an "entire agreement" clause: the terms of the contract supersede all previous contracts, agreements, arrangements or undertakings. Clause 20 does not expressly address any subsequent agreements or arrangements. By clause 22, the company reserves the right to make changes to the terms and conditions of employment, including but not limited to pay and hours of work.

18 The Respondent subsequently exercised its power under clause 22.1 of the contract to vary the contract by removing overtime and replacing it with the right to time off in lieu). The introduction of time off in lieu increased the overall number of days to be taken off work by the Claimant and he struggled to use his full annual leave entitlement. On 1 January 2020, the Claimant advised Mr Farah and Weightmans (who provide the Respondent with HR support) that he would be carrying forward 34 days leave into the next year. No objection was received.

19 When contacted by Madame Al-Hassawi, the Claimant would respond swiftly and comply entirely with her requests, whether within the scope of his contracted job or more for the personal benefit of Madame Al-Hassawi. There can be no doubt from the contemporaneous communications between the two that the Claimant would only communicate with Madame Al-Hassawi when invited to do so by her and that he would not dream of challenging her. His approach to Madame Al-Hassawi, as appears to have been the case of other employees dealing directly with her, could best be described as extremely deferential.

20 There is no evidence before the Tribunal of any significant problems in the working relationship prior to 2020. Indeed, the Claimant received annual bonuses in respect of his performance and we find that he was regarded by his manager and by Madame Al-Hassawi as hardworking, committed and loyal.

21 Once appointed Group Facilities Manage, it was part of the Claimant's job to identify any work required at the various properties and to obtain quotes. If the work was of low value (£500- £1,000), the Claimant was authorised to pay for it on the company credit card with the approval of his line manager, Mr Farah. Works of larger value went to the project team and required approval from Madame Al-Hassawi. The Tribunal accepts as credible and plausible the evidence of the Claimant and Mr Farah, that the properties managed by the Respondent in the United Kingdom suffered from a lack of investment. Madame Al-Hassawi was reluctant to authorise significant capital expenditure for repairs as she did not consider it a priority. This is consistent with Mr Lee's evidence that the funding has only recently been approved for work at Princes Gate which he identified as necessary in his report dated 1 August 2020.

22 The contemporaneous emails dating back to 2019 and the contents of the conversation on 23 June 2020 are consistent with the Claimant's evidence, supported by Mr Farah, that he had been raising work required on Wildwood, including a leak in the swimming pool room. Madame Al-Hassawi did not authorise funding for this work.

23 From February 2019 and into early 2020, there are emails in which the Claimant repeatedly raised the need to repair the Princes Gate roof – he obtained three quotes for the work in 2019 and a further three quotes in 2020. In an email sent on 31 May 2020, copied to Madame Al-Hassawi, the Claimant said that the work needed to be addressed urgently. The failure to execute the required work was not due to inaction by the Claimant but lack of authorisation from Madame Al-Hassawi or the project team.

24 As the effects of the COVID pandemic became increasingly serious for many countries around world, the United Kingdom entered a period of lockdown from 23 March 2020 with severe restrictions on people's ability to travel. Whilst previously, Madame Al-Hassawi would visit Wildwood on occasion and stay for a relatively short period of time, the effect of the pandemic and the lockdown was, as she put it in her statement, to strand her in the UK for a longer period of time than expected. Although in her statement, Madame Al-Hassawi says that she was not able to believe the terrible state of disrepair at Wildwood, the WhatsApp messages between March 2020 and June 2020 are about mundane matters such as spiders in the house, security concerns, installation of CCTV, building a small green house, a chicken coop and a possible children's play area.

25 As is clear from the WhatsApp messages, during the lockdown the Claimant attended Wildwood to meet Madame Al-Hassawi and carry out tasks for her. On one such occasion in early June 2020, they engaged in a conversation whilst in the garden in which Madame Al-Hassawi expressed respect for her father and a desire to honour his memory. The Claimant said that he wanted to do something charitable in his home country of Pakistan in honour of his own father.

26 The Claimant knew that there were leaks at Wildwood, as did the household staff and Mr Farah. The Tribunal also find that Madame Al-Hassawi was aware that there were leaks, not least as the Claimant had sent her a quote dated 7 June 2020 for the required works. The work had not been authorised by Madame Al-Hassawi by 18 June 2020, when there was heavy rain which turned the existing leak in the pool room into a more serious water ingress. It is clear that Madame Al-Hassawi was very unhappy about what she described as being a flood and her instant response in the contemporaneous WhatsApp messages was to blame the maintenance team.

27 On 22 June 2020, the Respondent employed Mr Lee. He was an architect by qualification but given the job title of Senior Design Manager and no job description for his role has been provided in the bundle.

55 Also on 22 June 2020, the Claimant told Mr Farah, but not Weightmans, that his outstanding holiday entitlement was now 57.7 days. He asked Mr Farah to confirm that it could be carried forward as they had been very busy and taking time off was not possible. Mr Farah provided the requested approval to carry forward and thanked the Claimant for his hard work.

28 On 23 June 2020, Madame Al-Hassawi held a meeting with Mr Farah and others including Ms Khan, but at which the Claimant was not present. As we accept was standard practice, it was recorded via Webex. The conversation was largely in Arabic and the Tribunal has been provided with a translated transcript of part of the meeting during which Madame Al-Hassawi repeatedly questioned the Claimant's competence and angrily referred to him in extremely offensive terms. Madame Al-Hassawi called the Claimant a moron, a jerk, an idiot, scum, low-life, uneducated, a dog, the son of 16 donkeys and said at one point that the Claimant should be thankful that she did not hit him with her shoe. The Respondent does not deny that Madame Al-Hassawi made the comments at paragraph 4.1 of the agreed list of issues, namely '**do not speak to me about the son of the bitch Malik**', '**this bull Malik**', '**ass/donkey Malik**'. Although clearly offensive, nothing in the comments is overtly related to the Claimant's Pakistani ethnic origin.

29 It is clear from the transcript that Mr Farah tried to defend the Claimant but was shut down firmly by Madame Al-Hassawi. The Tribunal find that the following comments by Madame Al-Hassawi are relevant to the issues in this case (with time stamp on the recording):

> **01:00.02 "I will tell him to leave my office loud and clear if the employees do not care about my business, nor do they care about my hard earned money for which I work day and night and at the expense of my personal life."**
>
> **02.31.02, referring to the installation of camera to keep employees under observation and the risk of trespass, "would you be happy to see my money stolen?"**
>
> **06.56.15, she refers to the Claimant "not being good" and says "how much is he and his management paid, he gets £180,000 or £200,000 a month, he and all his management compare that to the work he is done, investigate the matter, get me accurate numbers".**
>
> **07.25.23 that they should consider getting a contractor even if they pay 10 percent extra.**
>
> **09:23:15, she refers to reducing to having three or four employees, saying 'I do not need that big herd on my heel, sucking my blood dry, no! If they have faithful and do their job properly, then I would happily have them, but they are lowly and they do such lowly things like what is happening now with all this negligence"**
>
> **11.10.18 "Don't talk to me about those cameras today or explain the actions of those lowly moron, Malik. Don't you dare do that! He is losing his job either way. He will not be staying here, so do not you ever talk about him."**
>
> **11:30:24 "only the necessary things needed to protect the house will remain. And all of our investments … we will outsource contractors to do that".**

> **15.07.16, again referring to the Claimant, "He's ignorant, and my money is going down the drain with him. The sewerage where poop goes! This is where my money is going with him. Don't defend him!"**
>
> **15.54.10 "I don't leave anyone behind. And if I think that someone is incompetent, I will fire him before I leave and now I know who gets to stay and who gets to leave."**

30 The Tribunal find, based upon the comments above, that Madame Al-Hassawi had irrevocably decided that the Claimant's employment would be terminated. Mr Farah understood that clearly as he commented, after Madame Al-Hassawi left the call, "**she is getting rid of him for the wrong reason**".

31 On 24 June 2020, the Claimant was asked by Weightmans, a firm of solicitors who provide HR support and legal services to the Respondent, to provide details of his duties and the contact numbers of any external people with whom he dealt. The Tribunal infers that the purpose of the request was to ensure the smooth provision of services to tenants and properties in the anticipation and knowledge that the Claimant was going to be dismissed.

32 On 25 June 2020, the Claimant was advised by Weightmans that he was at risk of redundancy. He was invited to a Zoom meeting on 26 June 2020. By this date, the Claimant had been removed from staff WhatsApp groups and contacted by four members of staff who said that they had heard that he had been dismissed. On 28 June 2020, he was required to return his company van.

33 The Zoom meeting took place between the Claimant and Ms Linford of Weightmans on 30 June 2020. It was said to be a first consultation meeting but also a protected conversation within section 111A of the Employment Rights Act 1996 and Ms Linford made an offer of settlement on behalf of the Respondent. The Claimant was given no specific time to consider the offer but was asked to indicate whether he would be inclined to accept subject to legal advice and "some time to think". The Claimant stated that he believed that this was an unfair dismissal, he was not redundant and he would take the Respondent to Tribunal if they did not treat him fairly. The Tribunal does not accept the Respondent's case that the comment could be characterised as a threat in the context of settlement discussions in a protected conversation. The notes of the meeting do not suggest that Ms Linford regarded the comment as an inappropriate threat.

34 Also on 30 June 2020, Mr Lee and Ms Paarman attended Tobacco Dock and spoke to the Claimant. There is a conflict of evidence about the content of the conversation. The Claimant says that he spent hours going through his duties with Mr Lee and Ms Paarman, in the manner of a handover. Mr Lee says that the conversation lasted about 10 to 15 minutes outside the property and that he did not speak. The Tribunal do not consider it necessary to decide the length of the conversation as it is not in dispute on either account that the Claimant introduced Mr Lee to George (part of the maintenance team) and gave an explanation of the work being undertaken by the maintenance team and the work required. We find on balance that the content of the conversation served the purpose of a handover, with the Claimant providing information required to ensure that Mr Lee and Ms Paarman could assume his duties without disruption after the termination of his employment.

35 On 1 July 2020, the Claimant sent an email setting out his concern about the events of the day before and his doubt that his redundancy was genuine. Ms Linford

acknowledged receipt, said that she understood that it was a stressful time and therefore he was not required to attend work. Ms Linford's email does not suggest that the requirement not to attend work was in any way linked to the Claimant's previous reference to possible Tribunal proceedings. Ms Linford later sent an email informing the Claimant that any work should be directed to Mr Lee and Ms Paarman (as well as three others). The Tribunal infers that the Respondent knew that the Claimant was to be dismissed, he had provided the required handover information and therefore could be removed from the workplace without further delay, with an instruction that any further work queries from external contacts be redirected.

36 On 3 July 2020, there was second meeting which was described as a consultation meeting. The invitation letter wrongly gave the Claimant's job title as "Group Chief Mechanical and Electrical Engineer" Whist Ms Linford maintained that no firm decision to dismiss the Claimant had yet been taken, the Tribunal finds for the reasons set out above that the definite decision to dismiss was made by Madame Al-Hassawi on 23 June 2020 and thereafter the meetings were for the sole purpose of making it appear to be a redundancy dismissal after a fair procedure. In reaching this finding, the Tribunal accepts that Ms Linford may not have been aware of the comments made by Madame Al-Hassawi on the Webex call and may have genuinely believed that she was conducting a legitimate redundancy process based upon the instructions of her client.

37 On 5 July 2020, the Claimant submitted a grievance giving detailed reasons why he thought his redundancy was a sham and providing a copy of the recording of the meeting on 23 June 2020.

38 On or about 6 July 2020 (it may have been 9 July 2020 but nothing turns on the precise date), the Claimant's evidence is that Madame Al-Hassawi attended the office and said words to the following effect to Ms Khan and another employee, Ms Pop-Hristic:

> **"I hate these crook Pakistanis like Malik, I would not have hired him if I knew he was Pakistani."**

39 Madame Al-Hassawi, in her witness statement, describes the Claimant's allegations of discrimination as "quite simply absurd" and denied making any derogatory comments about the Claimant on account of his Pakistani race. She relies upon the extremely diverse nature of the Respondent's workforce, her close working relationship with Ms Khan (who is also Pakistani) and very senior positions held by other Pakistani employees (unnamed).

40 Ms Khan in her witness statement recalls that on more than one occasion Madame Al-Hassawi had said to her that she did not trust Pakistanis and on one occasion, in June or July 2020, Ms Pop-Hristic had been there. The Tribunal approached Ms Khan's evidence with particular caution as she has her own Tribunal claim against the Respondent. In response to a question from the Tribunal, Ms Khan confirmed that she did recall words to the effect set out by the Claimant and in the list of issues. Ms Khan was able to provide further context which the Tribunal found be spontaneous, plausible and have ring of truth, namely that Madam Al-Hassawi had gone on to explain that her father had had a bad experience with a person from Pakistan and that was why she did not trust them. Overall, the Tribunal found Ms Khan to be a credible witness who did not seek to embellish her evidence.

41 The difference between the Claimant's recollection of the comment and Ms Khan's recollection was not material and is readily explained by the frailty of human memory when giving evidence about things said over two years ago. Indeed, it would have been more odd had each witness remembered exactly the same words. It is clear from the language used by Madame Al-Hassawi in the meeting on 23 June 2020 that she was prepared to express her opinions about the Claimant to other employees in forthright and offensive terms and that she was fixated on the idea that the Claimant was either stealing from her or misusing her money. Madame Al-Hassawi has demonstrated her willingness to use offensive and very personal language to criticise the Claimant in her heightened emotional state.

42 Even though the Claimant did not raise the comment as an allegation in his grievance or during the meetings with Ms Linford, he did plead it in his claim form. Given the nature of the relationship and power imbalance between the Claimant and Madame Al-Hassawi, it is not surprising that the Claimant did not feel able to raise it with her at the time. The Claimant regarded the redundancy exercise as a sham, he was aware that Madame Al-Hassawi was the ultimate decision maker at the Respondent. The Tribunal accepts that the Claimant did not want to make such an incendiary allegation as he still retained some hope that Madame Al-Hassawi may change her mind and save his job. Furthermore, he lacked confidence that any complaint would be taken seriously if raised with the solicitors providing the HR support who had equally not taken seriously his reasons for believing that the redundancy process was a sham, instead sticking to the instructions provided by their client that this was a redundancy.

43 Having carefully considered all of Mr Barnett's submissions on credibility, the Tribunal does not accept that any of the points raised are such as to undermine our own assessment of the Claimant and Ms Khan as witnesses of truth. Madame Al-Hassawi may have regarded Ms Khan at least initially as a trusted employee but this is not inconsistent with a reference to "crook Pakistanis like Malik", in other words that Ms Khan was the exception to her general view of the honesty of Pakistani people. On balance, we find that the comment was made by Madame Al-Hassawi as alleged by the Claimant.

44 On 8 July 2020, tenants of the Respondent were advised that the Claimant no longer worked for the Respondent. There was a meeting the same day at which the Claimant was not present but during which he alleges that Madame Al-Hassawi screamed "**stupid Malik"** on hearing the Claimant's name. Again the Tribunal considered Madame Al-Hassawi's witness statement and general denial of derogatory comments because of race. Having regard to the behaviour and language of Madame Al-Hassawi on 23 June 2020 and the Claimant's reference in his grievance appeal letter to a transcript containing the comment, albeit not a transcript included in our bundle, the Tribunal find it more likely than not that the comment was made as alleged.

45 A further meeting was held on 13 July 2020 under the guise of consultation and investigation of the Claimant's grievance. It was chaired by Ms Duddles, a principal associate at Weightmans. The Claimant made clear that he regarded redundancy as a sham because he had been removed from the WhatsApp group, had his van removed, been told by colleagues that he had been dismissed, been excluded from work, had been asked to give a handover to the newly recruited Mr Lee and tenants had been informed that he no longer worked for the Respondent. It appears from the notes that Ms Duddles had a copy of the recording on 23 July 2020 but no transcript in English.

46 Despite the considerable amount of information provided to Ms Duddles, and access to the full recording which the Claimant said included Madame Al-Hassawi saying that he no longer worked for her, the Claimant was told that he would be given the outcome of the grievance at a meeting on 21 July 2020, which would also be a further redundancy consultation meeting.

47 The Claimant was told at the meeting on 21 July 2020 that his grievance was not upheld and that he was dismissed by reason of redundancy because as a result of the Covid pandemic, he work was now being covered by other employees. Ms Duddles told the Claimant that she had looked into the points which he had raised before stating that there had been consultation for over a month which had looked at alternatives. Ms Duddles informed the Claimant that she did not accept that it was a sham exercise. Having regard to the notes of the meeting, the absence of any contemporaneous evidence of an investigation and the compelling documentary evidence provided by the Claimant about his removal from the WhatsApp group and instruction to tenants, the Tribunal find as a fact that Ms Duddles did not engage properly or at all with the substance of the Claimant's grievance. She simply repeated the position, we infer based upon her client's instructions, that the Respondent had decided that it no longer needed him to do the work and a process had been followed, so it was not a sham.

48 The Claimant's dismissal was confirmed by letter dated 22 July 2020. The rationale given was that the impact of Covid-19 on cashflow had led to various decisions to reduce costs, namely deferring salary and bonus and furloughing employees. The Tribunal was not provided with any evidence, oral or documentary, to confirm that any such cost cutting measures were in fact taken at the time.

49 The Claimant appealed against his dismissal on 28 July 2020 in a lengthy and detailed letter, setting out the chronology of events and including the comments made in the meeting on 8 July 2020. Although we do not have that transcript, the Claimant quotes timestamps for certain comments which he puts in quotation marks. There is no challenge at the time to the accuracy of the comments alleged. The Tribunal finds that they are an accurate record of Madame Al-Hassawi calling the Claimant stupid, making clear that he no longer worked for the Respondent (nearly two weeks before his actual dismissal) and demonstrating anger at the mere mention of his name.

50 On 1 August 2020, Mr Lee sent a report on the Claimant's work to Madame Al-Hassawi and others at the Respondent. The opening sentence makes clear that he had been instructed by Madame Al-Hassawi to provide a report on the Claimant's work, rather than the work required at the properties. The Tribunal finds on balance that Madame Al-Hassawi was deliberately trying to evidence to support a claim that the Claimant had not been working to a satisfactory standard. This is consistent with Mr Lee's second email to Professor Arifi about an insurance claim following an accident which did not address the building or the cause of the accident but only how the Claimant had dealt with the insurance claim. Mr Lee's closing comment, that he trust that it will be of assistance, is also consistent with an attempt to obtain evidence to besmirch the reputation of the Claimant. In producing his report, the Tribunal finds that Mr Lee relied entirely on what he was told by Madame Al-Hassawi and was not aware of the 23 June 2020 meeting or the background to the problems with obtaining authorisation for works. Indeed, of the work required on the properties identified in Mr Lee's report, only about 50 to 60% of it had been completed at the date of this hearing, over two years later.

51 The Claimant's appeal was heard by Mr Hartley on 7 August 2020 and was not upheld. The decision does not engage with the Claimant's clear evidence that the decision to dismiss him had been taken before the consultation period had ended, indeed before it had even started. Mr Hartley rejected the Claimant's complaint about the verbal abuse and derogatory language used by Madame Al-Hassawi, describing it as a mere expression of frustration and that the Claimant had not been present. Having regard to the transcript and the nature of the comments made, the Tribunal find that this strong evidence to support our finding that this was not an independent or impartial consideration of the Claimant's appeal.

52 Mr Farah and Ms Khan were subsequently dismissed by the Respondent, both for the purported reason of redundancy. Each disputes that this was the genuine reason or that their dismissal was far and each has brought their own proceedings in the Employment Tribunal which are yet to be heard. The Respondent also asserts that other employees of a range of races were dismissed at around the same time, including Mr Ismail (English of Indian heritage), Ms Pop-Hristic (European), Mr Gudka (English of Indian heritage) and Mr Salih (English of Sudanese origin). The Respondent has not produced evidence as to the dates or reasons for dismissal (for example letters of dismissal) or any evidence from which the Tribunal could safely make any finding as to the reason for their dismissal.

Law

Discrimination and Harassment

53 Section 13 Equality Act 2010 provides that a person discriminates against another if, because of a protected characteristic, he treats that other less favourably than he treats or would treat others. Disability is a protected characteristic. Conscious motivation is not a requirement for direct discrimination, it being enough that the protected characteristic had a significant influence on the outcome. The crucial question is why the complainant was treated in the way in which they were, particularly in cases where there are no actual comparators identified, **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285.

54 Section 136 Equality Act 2010 on the burden of proof states:

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

54 In **Igen Ltd v Wong** [2005] IRLR 258, the Court of Appeal provided the following guidance (which is not to be treated as a substitute for the statutory language itself):

(1) … it is for the claimant who complains of … discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of discrimination against the claimant which is unlawful … . These are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of … discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

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

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

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

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw … from an evasive or equivocal reply to a questionnaire…

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant …

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

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

(11) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the [prohibited ground] …, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

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

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

56 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 we could conclude that there had been discrimination, **Madarassy v Nomura International plc** [2007] IRLR 246, CA at paras 54-57.

57 The higher courts have recognised that tribunals risk getting bogged down in technicalities if they apply the burden of proof rule in a strict and mechanical way in every discrimination case. Employment Tribunals should be wary of treating the burden of proof provisions (and the judicial decisions explaining them) as such a rigid template that the forensic approach of an Employment Tribunal to evidence becomes different to that of other fact finding first instance tribunals, **Veolia Environmental Services UK v Gumbs** UKEAT/0487/12. So, if the tribunal can make positive findings as to an employer's motivation, it may not need to revert to the burden of proof rules at all, **Martin v Devonshires Solicitors** [2011] ICR 352, EAT.

58 Unfair or unreasonable treatment of itself is not sufficient, but where there is a comparator who is treated more favourably the absence of an explanation for the unreasonable treatment may amount to the 'something more', **Anya v University of Oxford** [2001] ICR 847, CA.

59 Harassment is defined in section 26 of the Equality Act 2010 as follows:

> **"(1) A person (A) harasses another (B) if -**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of -**
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **(2) A also harasses B if—**
>
> **(a)A engages in unwanted conduct of a sexual nature, and**
> **(b)the conduct has the purpose or effect referred to in subsection (1)(b).**
>
> **…**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account -**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect."**

60 In **Richmond Pharmacology v Dhaliwal** UKEAT/0458/08/CEA, the EAT provided guidance to the effect that an Employment Tribunal deciding harassment claims should consider in turn: (i) the alleged conduct, (ii) whether it was unwanted, (iii) its purpose or effect and (iv) whether it related to a protected characteristic. As to effect in particular, at paragraph 15, the EAT made clear the importance of the element of reasonableness, having regard to all of the relevant circumstances, including context and in appropriate

cases whether the conduct was intended to have that effect. At paragraph 22, Underhill LJ (then President), held that:

> **"We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."**

Unfair Dismissal and Protected Conversations

61 It is for the employer to show the reason for dismissal and to satisfy the Tribunal that it is a potentially fair reason, section 98(1) Employment Rights Act 1996 ('ERA'). Redundancy is a potentially fair reason for dismissal, section 98(2)(c) ERA.

62 Section 139 ERA states that:

> **(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to:**
>
> **(a)The fact that his employer has ceased or intends to cease-**
> **(i) to carry on the business for the purposes of which the employee was employed by him, or**
> **(ii) to carry on that business in the place where the employee was so employed or,**
>
> **(b)The fact that the requirements of that business-**
> **(i) for employees to carry out work of a particular kind, or**
> **(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,**
> **have ceased or diminished or are expected to cease or diminish."**

63 In considering whether the Respondent has established that there was a redundancy situation, the Tribunal must consider whether there was (i) cessation of the business; and/or (ii) cessation or diminution in the Respondent's requirement for an employee to do the work of the kind done by the Claimant. A need to save cost, alone, will not amount to a redundancy within s.139 ERA.

64 In **Williams –v- Compair Maxam Ltd** [1982] IRLR 83, the EAT set out guidelines for considering the fairness of a dismissal by reason of redundancy. These are guidelines only and are not principles of law. The guidelines provide *inter alia* that there should be: (i) as much warning as possible and (ii) consultation about ways of avoiding redundancy, such as the possibility of alternative employment.

65 The obligation to consult requires the Respondent to give a fair and proper opportunity to understand the matters about which consultation is taking place to express views and have those views properly and genuinely considered, **Crown v British Coal Corporation, ex parte Price (No. 3)** [1994] IRLR 72.

66 It is not a requirement for there to be a perfect procedure nor is the employer obliged to agree with the proposals put forward by an employee. The Tribunal must take

great care not to substitute its decision for that of the employer but to apply the above law and have in mind the issue of reasonableness.

67 Section 111A of the Employment Rights Act 1996 provides that:

> **(1) Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111. This is subject to subsections (3) to (5).**
>
> **(2) In subsection (1) "pre-termination negotiations" means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.**
>
> **(3) Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in, or made under, this or any other Act requires the complainant to be regarded for the purposes of this Part as unfairly dismissed.**
>
> **(4) In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.**
>
> **(5) Subsection (1) does not affect the admissibility, on any question as to costs or expenses, of evidence relating to an offer made on the basis that the right to refer to it on any such question is reserved.**

68 A complaint under s.111 ERA is one of unfair dismissal. Complaints brought under other provisions of the ERA and/or the Equality Act 2010 do not fall within the scope of s.111A.

69 In order to qualify for protection even in an unfair dismissal case, the negotiations must be held *before* termination of employment and must be *with a view to it being terminated on terms agreed*. There is an exception where there has been *improper behaviour.*

70 ACAS have published a Code of Practice on Settlement Agreements under s.111A of the ERA. The Code has no legal effect but must be taken into account by Tribunals (as with other ACAS Codes). Paragraph 18 of the Code gives examples of what ACAS consider may amount to improper behaviour. These include putting undue pressure on a party, for instance not giving reasonable time for consideration and an employer saying before any disciplinary process has begun that the employee will be dismissed if they reject the settlement proposal.

71 Section 122(2) of the Employment Rights Act provides for reduction of the basic award where the Tribunal considered that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce it. Section 123(6) provides that if the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

72 The correct approach to reductions was given in **Steen v ASP Packaging Ltd** [2014] ICR 56. For there to be any reduction, the Tribunal must identify the relevant conduct and find whether or not it is blameworthy. This does not depend upon the

Respondent's view of the conduct, but that of the Tribunal. For section 123(6), the Tribunal must find that the conduct caused or contributed to dismissal to some extent. For both sections, it must consider to what extent it is just and equitable to reduce the award. Although not necessarily required, the reduction to each award will typically be the same unless there is a good reason to do otherwise, **Charles Robertson (Developments) Ltd v White** [1995] ICR 349.

73 The parties addressed us on the well-known case of **Polkey v A. E. Dayton Services Ltd** [1987] IRLR 503, HL and, in particular, the judgment of Lord Bridge of Harwich at paragraph 28 which states that:

> **'…in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation. If an employer has failed to take the appropriate procedural steps in any particular case, the one question the Industrial Tribunal is not permitted to ask in applying the test of reasonableness posed by [s.98(4)] is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of [s.98(4)] this question is simply irrelevant. It is quite a different matter if the Tribunal is able to conclude that the employer himself, at the time of the dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under [s.98(4)] may be satisfied.'**

74 Finally, **Polkey** is also authority for the proposition that if a dismissal is unfair due to procedural failings but that the appropriate steps, if taken, would not have affected the outcome, this may be reflected in the compensatory award (see for example per Lord Bridge at paragraph 30). This may be done either by limiting the period for which a compensatory award is made or by applying a percentage reduction to reflect the possibility of a fair dismissal in any event.

75 Guidance for the assessment of loss following dismissal and the correct approach to **Polkey** reductions was given in **Software 2000 Limited v Andrews** [2007] ICR 825, EAT as follows:

- in assessing compensation for unfair dismissal, the Tribunal must assess loss flowing from dismissal; this will normally involve assessing how long the employee would have been employed but for the dismissal;

- in deciding whether the employee would or might have ceased to be employed in any event had fair procedures been adopted, the Tribunal must have regard to all relevant evidence, including any evidence from the employee;

- there will be circumstances where the nature of the evidence is so unreliable that the Tribunal may reasonably decide that the exercise is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. However, the Tribunal should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation. A degree of uncertainty is an inevitable feature of the exercise and the mere fact

that an element of speculation is involved is not a reason for refusing to have regard to the evidence;

- a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence that employment might have terminated sooner is so scant that it can effectively be ignored.

76 The appropriate order for deductions is as follows:-

(i) Calculate the total loss suffered;
(ii) Deduct amounts received in mitigation and payments made by the formal employer other than excess redundancy payments;
(iii) Make any **Polkey** deductions;
(iv) Make any adjustment for failure to follow statutory procedures;
(v) Make any deduction for contributory fault;
(vi) Apply the statutory maximum.

Conclusions

Unfair Dismissal

77 The Tribunal considered it logical to consider first the unfair dismissal claim as this requires us to analyse the sole or principle reason for dismissal which will, in turn, be relevant to the direct discrimination claim.

78 In its Response, the Respondent's case was that although the Claimant was told that the reason for dismissal was redundancy, the real reason was misconduct or some other substantial reason. At the outset of this hearing, the Respondent changed its position and said that the sole or principal reason for dismissal was indeed redundancy and relied upon the effect of the Covid pandemic, financial loss and cost-cutting measures pleaded in the Response but not supported by evidence in the bundle. In the alternative, Mr Barnett submitted that it could be a capability dismissal based on the Claimant's alleged poor performance. In other words, over the course of the litigation, the Respondent has relied at various times and to various degrees on each of the potentially fair reasons for dismissal within section 98 of the Employment Rights Act 1996. There is no explanation for why the asserted reason for dismissal has changed. The Response was settled by experienced Counsel who must have been acting on his lay client's instructions. We find that the Respondent's changing stance on the reason for dismissal significantly undermine its final position that this was a dismissal because of a genuine redundancy situation.

79 In any event, a redundancy situation is about the need of the employer for employees to do work of a particular kind. Whilst it has the consequence of dismissal if not alternative employment can be found, it is the job and not the employee which is terminated. In this case, however, it is clear that the decision was taken by Madame Al-Hassawi as early as 23 June 2020 that the Claimant would be dismissed. It was only once she decided to dismiss the Claimant that there was then a decision to redistribute his work to other employees. The invitation letter to the consultation meeting states that it is the job of "Group Chief Mechanical and Electrical Engineer" which was being removed, not the Claimant's actual job of Group Facilities Manager. The Tribunal concludes that there was no proper consideration of the work done by the Claimant prior to being

informed that he was at risk and that this is consistent with our conclusion that the decision to remove the actual role of Group Facilities Manager was as a result of the Claimant's dismissal, not the cause of it. This was not a genuine redundancy situation and redundancy was not the reason for dismissal.

80 Nor do we accept Mr Barnett's alternative submission that this was a capability decision. The report produced by Mr Lee and the focus on the quality of the Claimant's work was a deliberate attempt to try to find evidence to justify a decision to dismiss which had already been taken. No previous concern about capability had been raised before 23 June 2020, quite the contrary, the Claimant's good performance had been rewarded by bonuses and his line manager was very complimentary about his work. The Claimant had properly identified work required and had obtained quotes. The failure to carry out required work, whether at Princes Gate, Wildwood or Tobacco Dock, was not due to any default on the part of the Claimant but due to Madame Al-Hassawi's failure to provide the required authorisation for expenditure. The outstanding work identified by Mr Lee was not immediately undertaken, indeed much of it remained outstanding some two years later.

81 It is undoubtedly the case that Madame Al-Hassawi was critical of the Claimant and his work on 23 June 2020. Her comments make that abundantly clear. However, the Tribunal find that they were uttered in a fit of temper and were entirely unjustified by any evidence. Even if they were genuinely held, they appear to relate to a mistaken belief that the Claimant had been taking financial advantage of Madame Al-Hassawi or had shown a lack of care for her money, rather than a failure to take proper care of the Respondent's properties. Looking at the evidence and inferences which we have drawn, the Tribunal does not conclude that the Respondent has shown a fair reason for dismissal. The dismissal was capricious, borne of pique and an unwarranted personal dislike of the Claimant following the leak at Wildwood even though this was a problem he had previously raised.

82 Furthermore, no genuine procedure was followed by the Respondent. The so-called consultation meetings were little more than going through the motions with no genuine consideration of the matters raised by the Claimant which called into doubt the then asserted reason of redundancy. Madame Al-Hassawi had decided that the Claimant would be dismissed on 23 June 2020 before the meetings began. After 23 June 2020, the Respondent acted as if the Claimant no longer worked for them – informing colleagues and tenants of his departure, removing him from the WhatsApp group, requiring return of the company van and to provide a handover of information relevant to his work. All of this was done well before the decision to dismiss was given to the Claimant and whilst meetings were being held supposedly to consider redundancy and possible alternatives. The Tribunal has no hesitation in finding the dismissal unfair.

83 For the reasons set out above, and having regard to our findings of fact, the Tribunal concludes that even if a fair procedure had been dismissed (whether for redundancy, capability, conduct or some other substantial reason), the Claimant could not have been fairly dismissed. There was no negligent, culpable or otherwise blameworthy conduct on his part. There will be no deduction for either **Polkey** or contributory fault.

84 In our findings of fact, the Tribunal has referred to the discussions on 30 June 2020. The contents of the discussion have not been material to our conclusions on unfair dismissal and our findings on the reason for the Claimant's removal from work have been based on the subsequent emails. In any event, the Claimant was given no specific time to

consider the proposed settlement offer, the decision that he would be dismissed had already been taken and on the very same day he was required to provide information to Mr Lee and Ms Paarman to ensure that they could assume his duties without disruption after his inevitable dismissal. The consultation process was a sham. The Tribunal therefore conclude that there was improper behaviour by the Respondent such that the conversation loses its protected status even in the unfair dismissal claim.

Direct Discrimination because of Race

85 The Tribunal has rejected the Respondent's case that there was a potentially fair reason for dismissal, the issue in deciding the direct race discrimination claim is whether his race was a material cause of the decision to dismiss him. Based upon our findings of fact, the decision to dismiss was taken by Madame Al-Hassawi and communicated to those in the meeting on 23 June 2020. The comments about the Claimant made by Madame Al-Hassawi in that meeting did not overtly refer to him being Pakistani. However, there were repeated references to money being spent, money being wasted and a sense that she felt that she was being bleed dry. They demonstrate a belief by Madame Al-Hassawi that the Claimant had been taking financial advantage of her, had shown a lack of care for her money and there is a reference to money being stolen from her. We infer from the comments that Madame Al-Hassawi did not trust the Claimant and believed that he had behaved dishonestly towards her.

86 The Tribunal has also found as a fact that on 6 July 2020 Madame Al-Hassawi did make the comment "**I hate these crook Pakistanis like Malik; I would not have hired him if I knew he was Pakistani**", thereby linking her belief that he was dishonesty with his race. The Claimant has proved that the reason for dismissal, redundancy, was a sham and borne out unjustified temper and personal dislike of him by Madame Al-Hassawi. He has also proved that some time shortly before his dismissal, whilst Madame Al-Hassawi was at Wildwood due to the pandemic lockdown, he made it known during their conversations about their fathers that his home country was Pakistan. The Tribunal is satisfied that the Claimant has proved facts from which we could conclude that his race was a material cause of his dismissal such that the burden passes to the Respondent to provide a non-discriminatory explanation.

87 The Respondent's primary case that this was a redundancy and alternative that it was a capability dismissal has already been rejected for reasons given above. Insofar as Mr Barnett sought to rely on other employees of a range of races being dismissed at about the same time, the Respondent has not adduced any evidence to support the reasons for dismissal or from which we could conclude that they were proper comparators. The Tribunal simply does not know whether or not there employees were made redundant and, even if they were told it was redundancy, if this was the genuine reason given that we have found that it was a sham reason for the dismissal of the Claimant.

88 For reasons set out in the sections on preliminary matters, the Respondent's only witness to give evidence was Mr Lee and he played no part in the decision to dismiss the Claimant. The witness statements of Madame Al-Hassawi and Professor Arifi are not signed and there is no good reason why they could not attend this hearing, either in person or by video from a country which has given the required permission, especially as this hearing was listed in April 2022 when the previous hearing was postponed for the same reasons. Nor has the Respondent provided documentary evidence about the asserted effects of Covid, cashflow problems or other financial savings made at the time.

Despite Mr Barnett's best efforts, his client had not provided the evidence to support some of the assertions made on its behalf. Even if we were to accept Mr Barnett's submission (again without evidence) that the Respondent had subsequently employed another Pakistani man, it does not undermine our conclusion that the Respondent has not shown that Madame Al-Hassawi's hostility to the Claimant and her decision to dismiss him was in no sense caused by her view that Pakistanis generally were not to be trusted, based it appears upon her father's experience.

89 The claim of direct discrimination in respect of dismissal succeeds.

Harassment

90 The comments made by Madame Al-Hassawi on 23 June 2020 and 8 July 2020 as set out in the list of issues at paragraphs 4.1 and 4.3 were evidenced in transcripts of the meetings (albeit the Tribunal did not have sight of the 8 July 2020 transcript). Although undoubtedly unwanted, offensive and humiliating (both subjectively and objectively), these comments are not overtly related to race and the Tribunal carefully considered whether they are comments that could or would have been made by Madame Al-Hassawi when angry and feeling let down by any employee irrespective of race.

91 The Tribunal considered relevant our findings that the Claimant had had a discussion with Madame Al-Hassawi in the garden in which he had mentioned his Pakistani race in early June 2020. On 23 June 2020, Madame Al-Hassawi's anger at the Claimant was because she believed that he had taken financial advantage of her, had shown a lack of care for her money and referred to money being stolen from her from which have inferred that Madame Al-Hassawi did not trust the Claimant and believed that he had behaved dishonestly towards her. The Tribunal has found on balance that the comment alleged at paragraph 4.2 of the issues was made. It is evident from the nature of the comment that it was unwanted and, when told about it, the Claimant was offended. This comment overtly equates dishonesty (being a crook) and employment with the Claimant's race. This comment makes clear Madame Al-Hassawi's state of mind and opinions about the Claimant's personality related to his race.

92 As Mr Horan submitted, the Respondent has not provided any explanation for the comments or shown that Madame Al-Hassawi used such language about other employees more generally. Looking at the harassment claim holistically, and the material effect of race in the very decision to dismiss with which these comments are inextricably bound, we conclude that Madame Al-Hassawi's extremely derogatory comments were all linked to a negative view of the Claimant's race once things went wrong in the employment relationship.

93 For these reasons, each of the allegations of harassment related to race succeeds.

Holiday Pay

94 The initial contract of employment was varied when the entitlement to overtime payment was replaced by time off in lieu. This was valid consideration for the variation. That variation affected the annual leave entitlement to the extent that it rendered it more difficult to find appropriate time to be absent for annual leave in addition to the extensive time off accrued by the Claimant. Clause 22.1 permits the employer to vary the contract and the emails sent by the Claimant in 2020 request permission to carry forward in excess

of the 5 days permitted by the express term of the contract. Mr Farah provided the approval. This variation of the express term was supported by valid consideration of the goodwill and the continued employment relationship. The Claimant notified HR in January 2020 and there was clearly no concern or suggestion that this was anything other than a perfectly proper agreement by Mr Farah in his capacity as General Manager, with authority to bind the Respondent.

95 In the circumstances, the Tribunal did not consider it necessary to consider whether carry forward of more than 5 days' holiday per year had become custom and practice. However, an investigation by Weightmans following the Claimant's dismissal into holiday carry forward made clear that this was an arrangement that had been in place for a number of years. It had never been challenged by Mr Farah. Weightmans had never challenged it either and it applied to a number of employees, not just the Claimant and Mr Farah.

96 For all of the reasons therefore, we are satisfied that the Claimant was contractually entitled to carry forward 57.7 days holiday entitlement which remained outstanding on the termination of his employment.

Employment Judge Russell
Dated: 26 January 2023