EMPLOYMENT TRIBUNALS

Claimant: B Bongoso Lopo

Respondent: ADT Fire and Security plc

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: Manchester **ON:** 4-8 + 11 January, 31 August and 1 September 2021 (in chambers: 2 + 3 September 2021)

BEFORE: Employment Judge Batten
C Bowman
S Moores-Gould

REPRESENTATION:
For the Claimant: J Yamba, advocate
For the Respondent: K Barry, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. the complaint of unfair dismissal is well-founded; and

2. the claimant suffered unlawful victimisation by the respondent's failure to properly investigate the claimant's grievances.

REASONS

1. By a claim form dated 17 November 2019, the claimant presented claims of constructive unfair dismissal, disability discrimination, race discrimination and breach of contract in respect of a suspension of sick pay. On 20 December 2019, the respondent submitted a response to the claim. A case management preliminary hearing took place on 22 January 2020 before Employment Judge Allen, at which the complaints were discussed in detail and a lengthy list of issues was drawn up.

2. On 2 September 2020, the claimant made an application to amend her claim to include an additional allegation of direct race discrimination. On 15 October 2020, and again on 13 December 2020, the claimant applied for strike out of the response. The respondent objected to all 3 applications and it was decided that the applications should be determined at this final hearing. At this hearing, the Tribunal noted that the applications for strike out related to allegations that the respondent had breached case management orders. The alleged breaches had since been remedied and the claimant had suffered no prejudice. It was also noted that extensions to the Tribunal's case management orders had been discussed and/or agreed between the parties and that the respondent had acted in reliance on such agreement, making the claimant's application unsustainable. In the circumstances, the Tribunal declined to strike out the response – see also paragraph 9 below.

3. Whilst the case was originally listed for 6 days, the oral evidence was not completed in 6 days. The case was adjourned, part-heard for a significant period of time due to pressure on the Tribunal lists as a result of the pandemic. The oral evidence and submissions were only completed on the eighth hearing day. The Tribunal therefore reserved its judgment, meeting in chambers on 2 later dates in order to deliberate.

Evidence

4. A bundle of documents comprising 349 pages was presented at the commencement of the hearing in accordance with the case management Orders. The claimant produced a supplementary bundle, in which certain documents already appeared in the main bundle.

5. The claimant made a number of applications relating to documents at the start of the hearing. The claimant sought to exclude 3 documents from the main bundle, contending variously that the documents were not genuine due to apparent dating errors or not recognised by the claimant or had not been included in the draft index for the proposed hearing bundle which the respondent had supplied in September 2020. The claimant also complained that she had not had the documents long enough and/or had not had

sufficient time to check the bundle fully in order to prepare for the hearing. It was established that the bundle had been sent to the claimant by the respondent on or about 16 October 2021. The claimant's applications were refused and all the documents in question remained in the bundle. The Tribunal considered the claimant's objections to be unsubstantiated and found that the documents in question were relevant to the issues and were referred to in witness statements.

6. In addition, several documents had been redacted by the parties without reference to the other party and without the Tribunal's permission, and 3 pages of a medical report on the claimant were missing. The parties were ordered to provide unredacted copies and the missing pages by the start of day 2 of the hearing.

7. After almost 2 hours of discussion and determination of the issues relating to documents, the Tribunal heard that witness statements had been exchanged very late in December 2020 and that Mr Roden's statement had since been amended. The respondent was ordered to produce a copy with the amendments tracked and the claimant's advocate indicated that he would cross-examine Mr Roden on the matter.

8. After lunch on the first hearing day, the Tribunal and the parties reviewed the list of issues which had been drawn up at the preliminary hearing on 22 January 2020 but which had not been finalised or agreed – see paragraph 12 below.

9. At this point, the claimant raised the application which had been made on 2 September 2020, to amend the claim to include a new allegation of direct race discrimination, about a failure to investigate the claimant's grievance and appeal by interviewing witnesses because of her race, using a named comparator. The application was granted and appears as 5.5 in the list of issues below in addition to those matters appearing at 5.4 and 5.6, because the matters had originally been pleaded variously as a detriment including in the victimisation complaint and the Tribunal considered it to be a relabelling. It could have not been included under direct discrimination before, as the circumstances of the comparator had not been known of and a named comparator was not identifiable from the information which the claimant had. As a result of the naming of the comparator, the respondent was given time to effect disclosure of documents relevant to the named comparator. This all led to the Tribunal commencing the hearing of oral evidence on the third hearing day.

10. In addition, a number of further documents were added to the bundle in the course of the hearing. References to page numbers in these Reasons are references to the page numbers in the bundle.

11. The claimant gave evidence herself by reference to a written witness statement. The respondent called 3 witnesses, being: Naman Rafique – the claimant's line manager; Philip Roden – a manager who heard the claimant's grievance; and Jennifer Shaw – an Associate Director who heard the claimant's appeal against the grievance outcome. All of the witnesses gave evidence from written witness statements and were subject to cross-examination.

Issues to be determined

12. A list of the legal issues had been prepared at the case management preliminary hearing on 22 January 2020. At the outset of this hearing, the Tribunal discussed the list of issues with the parties in order to identify with precision the factual allegations applicable to each complaint. After lengthy discussions over the first 2 hearing days resulting in a number of amendments, it was agreed that the complaints and issues to be determined by the Tribunal at this hearing were as follows.

Harassment related to race and/or disability (section 26 Equality Act 2010 "EqA"))

1. Did the respondent act as alleged in paragraphs 29, 30, 31 and 32 of the Grounds of Complaint?

1.1 In December 2017, during a 1-2-1, Mr Rafique said to the claimant that she was the worst member of staff at the respondent?

1.2 In August 2017, when the claimant expressed an interest in a business analyst post, Mr Rafique said to the claimant that she was biting off more than she could chew and that Muheeb was more suited to the post?

1.3 In September 2018, Mr Rafique said to the claimant "I'm not your dad and I am not there to hold your hands"?

1.4 On 19 February 2019, Mr Rafique said to the claimant, in front of the team and R Smith, a team mentor, "Why send me emails, stop underlining it. Why do you do that? And stop highlighting everything?

2. If so, were the respondent's actions/conduct unwanted?

3. Was the conduct related to the claimant's race or disability?

4. Did the respondent's actions/conduct have the purpose or effect of: violating the claimant's dignity; or creating an intimidating, hostile, degrading, humiliating or offensive environment?

Direct discrimination because of disability and/or race (section 13 EqA)

5. Did the respondent treat the claimant as alleged in paragraphs 33, 35 and 36 of the Grounds of Complaint?

5.1 In September 2018, the claimant was denied support with training and development?

5.2 On 23 September 2019, the respondent took 18 weeks to provide the grievance appeal outcome?

5.3 On 20 May 2019, the claimant's sick pay was suspended for the claimant refusing mediation?

5.4 An attempt to impose mediation on the claimant?

5.5 The respondent's failure to investigate the claimant's grievances and appeal by interviewing witnesses?

5.6 The way the grievance process was handled by the respondent and its outcome, including Mr Rafique's involvement?

6. If so, did the respondent treat the claimant less favourably than the following comparators:

a. in relation to the allegation at paragraph 33 of the Grounds of Complaint, the specific comparators of Leon, Renee, Charlotte, Paul and/or Ben, and/or a hypothetical comparator;

b. in relation to paragraph 35 and 36 of the Grounds of Complaint, in comparison to Suzanne and/or a hypothetical comparator; and

c. in relation to items 5.4, 5.5 and 5.6 above, in comparison to Suzanne Gregory?

7. If so, was the less favourable treatment because of the claimant's disability and/or race?

Discrimination arising from disability (section 15 Equality Act 2010)

8. Did the respondent treat the claimant as alleged in paragraphs 33, 35 and 36 of the Grounds of Complaint?

8.1 In September 2018, the claimant was denied support with training and development?
NB: the claimant relies upon her inconsistent performance as the 'something arising'.

9. If so, was this unfavourable treatment of the claimant because of something arising in consequence of her disability?

10. Can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?
The legitimate aim relied upon by the respondent is to have a member of staff perform adequately.

Indirect discrimination related to disability (section 19 EqA)

11. Do the requirements in paragraphs 37, 38, 39 and/or 40 of the Grounds of Complaint amount to a provision, criterion or practice ("PCP")?
The respondent accepted that the below 4 requirements were PCPs.

11.1 A requirement to complete emails and call-out bookings whilst on the phone to a customer;

11.2 A requirement of 98% availability to answer calls;

11.3 A requirement for a monthly average of 20 seconds to conclude work after each call;

11.4 A requirement for a monthly average talk time on a call of between 150–160 seconds.

12. If so, did the respondent apply that PCP to persons who are not dyslexic?

13. Did the PCP put persons with dyslexia at a particular disadvantage when compared with person who are not dyslexic and, if so, what is that disadvantage?

14. Did the PCP put the claimant at that disadvantage?

15. Was the PCP a proportionate means of achieving a legitimate aim?
***The legitimate aim relied upon is to have a member of staff perform adequately*.**

Duty to make reasonable adjustments (sections 20 and 21 EqA 2010)

16. Do the requirements in paragraphs 37, 38, 39 and/or 40 of the Grounds of Complaint amount to a PCP?
The respondent accepted that the below 4 requirements were PCPs.

16.1 A requirement to complete emails and call-out bookings whilst on the phone to a customer;

16.2 A requirement of 98% availability to answer calls;

16.3 A requirement for a monthly average of 20 seconds to conclude work after each call;

16.4 A requirement for a monthly average talk time on a call of between 150–160 seconds.

17. If so, did the PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at the relevant time?
The disadvantage relied upon by the claimant is dismissal.

18. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage?

19. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time.

Victimisation (section 27 EqA)

It is agreed that the following are all *protected acts* for the purposes of section 27 EqA:

A= the claimant's grievance of 25 April 2019;

B= the claimant's appeal letter of 31 May 2019; and

C= the claimant's grievance against O Verbickiene of 19 June 2019.

20. Did the respondent act as alleged in paragraphs 41.4, 41.5, 41.6 or 41.7 of the Grounds of Complaint?

20.1 Delaying in providing the claimant with the appeal outcome (18 weeks);

20.2 Suspending the claimant's sick pay;

20.3 Failing to properly investigate the claimant's grievances;

20.4 Ms Shaw's appeal reasoning, designed to protect Mr Rafique.

21. If so, did the same amount to the respondent subjecting the claimant to a detriment?

22. If so, did the respondent subject the claimant to that detriment because the claimant had done one or more of the protected acts?

Jurisdiction (this applies to all of the discrimination claims)

23. Were each of the claimant's complaints of discrimination presented within the time limit set out in section 123 of the Equality Act 2010?

24. In particular, were the allegations presented to the Tribunal within three months of the date upon which they occurred (as extended by section 140B of the Equality Act 2010?

25. In respect of the allegations that were not, do they form part of conduct extending over a period which ended within that time limit, within the meaning of section 123(3)(a) of the Equality Act 2010?

26. If not, were they presented within such a period as the Tribunal considers just and equitable?

Unfair (constructive) dismissal

27. Was the claimant dismissed, that is: was there a fundamental breach of the claimant's contract of employment with the respondent?
The claimant relies upon the express terms of her contract in relation to her entitlement to sick pay; and/or the implied term of trust and confidence.

The claimant alleges that the following were breaches:

27.1 not paying her sick pay to which she was entitled;

27.2 failing to investigate her grievance;

27.3 taking 18 weeks to provide the outcome of an appeal; and/or

27.4 refusing her the right to appeal against the outcome of her grievance relating to O Verbickiene.

28. If so, did the claimant affirm the contract of employment/delay too long before resigning?

29.

29. Did the claimant resign in response to that breach?

Remedy ***[The issues of remedy will be dealt with at a separate hearing]***

30. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

31. The claimant is alleging that she has suffered a personal injury as a result of the alleged discrimination.

Findings of fact

13. Having considered all the evidence, the Tribunal made the following findings of fact on the basis of the material before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their

evidence with surrounding facts. Having made findings of primary fact, the Tribunal considered what inferences it should draw from them for the purpose of making further findings of fact. The Tribunal have not simply considered each particular allegation but have also stood back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination. The findings of fact relevant to the issues which have been determined are as follows.

14. The claimant is a black African from the Democratic Republic of Congo. The claimant is disabled by reason of dyslexia which has been conceded by the respondent. The claimant was employed by the respondent from 21 July 2014, as a customer service associate, handling customer enquiries by telephone. The claimant worked in the respondent's call centre which is an open-plan environment where people's conversations can be overheard, and where desks are close together.

15. The respondent is part of the Johnson Controls group of companies and the group has a grievance resolution policy which appears in the main bundle at pages 68 -73.

16. From 24 April 2016, the claimant was managed by Naman Rafique upon her return from maternity leave. Mr Rafique conducted a Performance review with the claimant for 2016-17. It appears in the bundle at page 130 onwards. The outcome was that the claimant was determined to have "inconsistently met expectations". In her self-assessment, the claimant rated herself as 'consistently meets expectations although she recorded that "most of the time I always meet my expectations" and went on to record "still no progress with my adherence not consistent and still up and down … we are looking to tackle this asap …".

17. In August 2017, the claimant put in a request for flexible working. On 21 August 2017, Mr Rafique emailed another manager about discussions held between himself accompanied by another manager and the claimant in which they had discussed the claimant's options. The claimant's flexible working request was turned down.

18. The claimant appealed and an appeal hearing took place on 12 September 2017 conducted by Carol Garner who did not uphold the claimant's appeal but offered the claimant shifts of 20 hours per week, working Monday, Tuesday and Friday, starting from 2 October 2017.

19. The Tribunal found no evidence of Mr Rafique saying, in August 2017, that the claimant was "biting off more than [she] could chew" as alleged, and the claimant raised no complaint about such a comment at the time.

20. The Tribunal also found no evidence to support the allegation that, at a 1-2-1 meeting in Dec 2017, Mr Rafique said that the claimant was the worst

employee at the respondent, and the claimant raised no complaint about such a comment at the time.

21. The claimant's Performance review for 2018 appears in the bundle at page 162 onwards. She is rated by Mr Rafique as 'consistently meets expectations' albeit that he records them having "discussed the inconsistency this year to improve for next year".

22. The claimant wanted to progress at the respondent. She spoke to Mr Rafique about this, seeking his help. In September 2018, in the course of a discussion, Mr Rafique told the claimant that he was "not there to hold [her] hand when it came to seeking other roles at the respondent.

23. On 29 October 2018, the claimant was called to an informal attendance management meeting due to the number of absences recorded against her for dependent reasons. The outcome appears in the bundle at page 170 and requires the claimant to make a sustained improvement in her overall attendance in the next 6 months to the extent of having no further instances of absence.

24. On 21 January 2019, the claimant was subject to a first stage capability mtg which led to her being issued with a first Improvement Warning. The Tribunal noted that the warning letter on page 184 records that since 29 October 2018, the claimant had had only one absence for dependent's leave, on 14 December 2018.

25. On 1 February 2019, the claimant wrote a letter to Mr Rafique to object to the warning on the basis that her child being sick and having no childcare for such an eventuality was out of her control. The claimant wrote that she would limit her dependent time off as best she can and would get a doctor's note if her child was sick in future and that she would try to make up her shift hours. The claimant also asked what being monitored for 6 months meant.

26. In February 2019, Mr Rafique had cause to speak to the claimant about certain of her emails wherein text had been underlined and highlighted, and how that might be perceived by the recipient. There had been feedback from the respondent's planning team which led to Mr Rafique speaking to the claimant. The conversation took place in the presence of Rebecca Smith who was shadowing Mr Rafique and being mentored by him, so she was privy to the conversation.

27. On 15 March 2019, the claimant went off sick, with work-related stress.

28. On 25 April 2019, the claimant submitted a grievance about her manager, Mr Rafique. The grievance is in the bundle at page 203. The respondent

accepts this grievance is a protected act for the purposes of the claimant's victimisation complaint.

29. In her grievance, the claimant says "*I felt I was discriminated against as a mother, belittled and bullied too which you are fully aware at the time*" and the claimant stated that Mr Rafique had spoken to her disrespectfully, that he questioned her about personal matters, that he denied her training and favoured other members of the team, without giving any examples of the conduct complained of.

30. Mr Roden, the respondent's Operations Manager, was appointed to handle the grievance and he arranged a meeting with the claimant on 9 May 2019. At the grievance meeting, the claimant said Mr Rafique was disrespectful of her and she mentioned also several others in the team who had experienced such conduct, including a white colleague but she did not mention race as a factor. At one point in the meeting, the claimant said that she was dyslexic, and that she has brought this to Mr Rafique's attention because she felt that Mr Rafique highlighted areas of her work that she considered were affected by her dyslexia. At the end of the meeting, Ms Verbickiene from HR, suggested mediation. She explained that mediation meant the claimant and Mr Rafique would sit down together so that the claimant could say how she feels about his conduct, in order to get their relationship back on track and to look at ways for them to work together. In response, the claimant said that she wanted to think about mediation and that she didn't want to deal with Mr Rafique. The respondent asked the claimant how they could fix things and the claimant said, "Change teams". At this, Ms Verbickiene said that Mr Rafique would still be around in the workplace so it would not work. It was also suggested that, for the claimant to move, there would need to be a vacancy and she would have to apply, and so the respondent did not consider that changing teams was an option. Ms Verbickiene pressed the claimant, saying "the longer you stay off, the harder it's going to be" and then suggested mediation again. Eventually, the claimant accepted that mediation should take place before she returned to work. Ms Verbickiene then announced that mediation would take place on 20 May 2019 and that, in the interim, the respondent would conduct a formal investigation and the claimant would be sent an outcome letter in the post. In those circumstances, the Tribunal considered that the claimant was pushed into mediation.

31. On 17 May 2019, Ms Verbickiene emailed the claimant stating that she had agreed to return to work on 20 May 2019 and that mediation would take place on her first day back, at 12 noon.

32. On the morning of 20 May 2019, the claimant emailed Ms Verbickiene to say that she had only just read Ms Verbickiene's email. The claimant stated that she had only said she would consider mediation and had not agreed to mediation nor a return to work that day. The claimant apologised, and stated

that she was not yet ready, she felt distressed and that her GP had advised her not to go into work.

33. Later that day, 20 May 2019, Ms Verbickiene replied to the claimant and said the claimant's sick pay was suspended at the respondent's discretion "*due to the fact that you are not engaging with the mediation despite prior agreement, we have no other option …"* – bundle page 217

34. On 20 May 2019, the claimant replied saying that she considers the respondent was bullying her into mediation, regardless of her health concerns and Ms Verbickiene replied saying "*I apologise if I offended you*". Within 2 weeks, the claimant's sick pay was reinstated by Ms Garner following a well-being meeting on 10 June 2019.

35. In the meantime, Mr Roden conducted what he described as an investigation of the claimant's grievance which he said consisted of speaking to Mr Rafique and trying to glean information from the claimant in the grievance meeting, despite that the meeting notes do not show him probing the claimant for details. However, in the grievance meeting, the claimant gave only one name, Ben, who she said Mr Rafique pushed towards sales and who was given training. The claimant also mentioned that Mr Rafique "*has selective arrogance*" with others but the claimant was not asked for names or examples of specific behaviour. Mr Roden decided not to speak to Ben because he did not think it appropriate and took the view that he was investigating bullying and the way Mr Rafique spoke to the claimant, even though lack of training and progress were also allegations in the claimant's grievance letter. The Tribunal considered the investigation of the claimant's grievance to be inadequate - Mr Roden was too quick to accept Mr Rafique's word without looking for independent evidence to corroborate or refute matters. When asked about this, Mr Roden said he had not interviewed any witnesses because he could not question the whole team. The Tribunal noted however that the claimant had not named the whole team and considered that Mr Roden was at best reluctant to conduct any further enquiries.

36. On 23 May 2019, Mr Roden sent the claimant a letter setting out the grievance outcome, which appears in the bundle at page 225. Mr Roden did not uphold the claimant's grievance because he said he found no evidence to substantiate the points raised.

37. He explained that Mr Rafique had asked the claimant personal questions for the purpose of understanding the claimant's situation when considering her request for flexible working and that he found Mr Rafique had not encouraged the claimant because of her inconsistent performance and attendance issues. The letter concludes by strongly recommending mediation or a change of teams or role.

38. On 31 May 2019, the claimant appealed the grievance outcome. Her letter reads as a rewrite of her grievance. The claimant mentions that the first issue was her request for flexible working as a new mum which she said was "*not met with great support by my manager*". In response to Mr Roden saying that she had struggled to recall specifics, the claimant gave examples including that emails in which she has underlined or highlighted words, were mentioned in front of Rebecca Smith, and she also gave examples of what Mr Rafique had said, and names of colleagues who she believed would "*be able to say more about the behaviours*". The claimant also contended that her sick pay was stopped because she did not enter mediation and said she suspected this decision was made for discriminatory reasons – see bundle page 233. The claimant declared in her appeal letter that "I have tolerated discrimination in all aspect (sic) from my manager to the point it relate (sic) towards my capabilities as an individual in aspect (sic) of my background as a minority in the company".

39. On 19 June 2019, the claimant put in a grievance about Ms Verbickiene stopping her sick pay.

40. Ms Shaw was appointed to handle the claimant's appeal. On 19 June 2019, an appeal hearing took place. The notes of this meeting appear in the bundle at pages 244-246 and convey the focus as a back to work meeting rather than an appeal against a grievance outcome. The claimant opened by saying that Mr Rafique belittles her because she is dyslexic. In response, Ms Shaw said that the claimant's previous grievance was not upheld and asked what does the claimant want. Mediation is again suggested but the claimant said she was not ready for mediation although she suggested using ACAS as an independent mediator. The claimant asked if an investigation had taken place and Ms Shaw commented that Mr Roden had interviewed Mr Rafique. The claimant said that no one was taking her seriously. In response, Ms Shaw focussed on getting the claimant back to work and how the respondent could help the claimant. There was no attempt to hold either a re-hearing, as the claimant sought, given the content of her appeal letter, nor did Ms Shaw proceed to review Mr Roden's decision on the original grievance. The claimant mentioned names in her appeal letter and also in the appeal meeting. However, Ms Shaw decided not to interview any of those named. Her evidence was that this approach was taken because she did not want to conduct a "witch -hunt" and that "it was not a personality contest". The Tribunal considered this to be a bizarre description of the appeal as the claimant's personality was not, or should not, have been in issue.

41. After the appeal meeting, Ms Shaw spoke to Mr Rafique and looked at the claimant's performance statistics on spreadsheets. She also requested the demographics, by race and/or nationality, of the UK and Manchester, and of the respondent's customer service centre. Ms Shaw told the Tribunal that this information was requested because the claimant had said she was in a

minority and the information would have helped her to understand whether the claimant was in fact in a minority because Ms Shaw described the claimant as being one of a very diverse workforce. In any event, the statistics were not able to be produced.

42. On 28 June 2019, Ms Verbickiene emailed Ms Shaw and Ms Thompson of HR, because Ms Verbickiene had been doing "an investigation". In this email, it is apparent that HR had compiled a list of the employees named by the claimant in her appeal and reported on them. The information given by HR to Ms Shaw is highly prejudicial, comprising details of each named individual in negative and derogatory terms. There are inaccuracies, such as a statement that Suzanne Gregory's grievance was rejected when the outcome letter, which appears in the bundle at page 135A-B, states that the grievance was "partially upheld". The one named individual with no adverse record is nevertheless described as "high maintenance". Ms Shaw said in evidence that she thought she had not seen the email at the time because she was only copied into it. However, the Tribunal found, on a balance of probabilities, that the information would have been shared by Ms Thompson with Ms Shaw in the course of Ms Thompson's role as HR support to the appeal. The respondent offered no other explanation for it.

43. There was a delay of over 3 months in providing the grievance appeal outcome to the claimant due in part to a run of holidays. Ms Shaw wanted to speak to Mr Rafique a second time and then Ms Garner was not available for a short period. In addition, and more importantly, Ms Shaw was taken seriously ill; she was hospitalised for over 3 weeks and then off work unwell for much longer thereafter.

44. On 26 September 2019, the respondent sent the claimant its grievance appeal outcome letter, turning down the appeal – see bundle page 271. The letter bears little relation to the content of discussions at the appeal hearing. It is structured with subheadings, to address some of the points in the claimant's appeal letter. It reads as if the outcome is the result of a re-hearing of the claimant's grievance albeit that additional matters not in the first grievance, are also covered. There is a section towards the end of the letter, under the heading, "Equal Opportunities", in which Ms Shaw wrote that the respondent took the allegations very seriously but that she could not identify specific examples and that the claimant was unable to back up what she said with examples in support. As a result, Ms Shaw did not find any discriminatory, bullying or harassing practices had taken place in the respondent. No account was taken of the claimant's mental health although Ms Shaw noted that the claimant *"… claimed that* [the claimant's] *relationship with Naman was causing* [the claimant] *stress and anxiety and therefore prevented* [her] *coming into work*". The letter suggests that Mr Rafique would be prepared to apologise " *… if* [the claimant] *found any of his questions offensive or intrusive in any way*."

45. On 29 September 2019, the claimant resigned in response to the grievance appeal outcome. The claimant said her resignation decision was *"… motivated by the fact that I was badly treated by* [the respondent] *because of disability and race*".

The applicable law

46. A concise statement of the applicable law is as follows.

Discrimination complaints

47. The complaints of race discrimination and disability discrimination were brought under the Equality Act 2010 ("EqA"). Race is a relevant protected characteristic as set out in section 9 EqA and disability is a relevant protected characteristic as set out in section 6 EqA.

48. Section 39(2) EqA prohibits discrimination by an employer against an employee by dismissing her or by subjecting her to any other detriment. By section 109(1) EqA an employer is liable for the actions of its employees in the course of employment.

49. The EqA provides for a shifting burden of proof. Section 136 so far as is material provides as follows:

> *(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.*

50. Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the EqA. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

51. In *Hewage v Grampian Health Board [2012] IRLR 870* the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in *Igen Limited v Wong [2005] ICR 931* and was supplemented in *Madarassy v Nomura International PLC [2007] ICR 867*. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the

reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Direct discrimination

52. Section 13 EqA provides that 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. The relevant protected characteristics include race and disability.

53. Section 23 EqA provides that on a comparison for the purposes of section 13 there must be no material difference between the circumstances relating to each case. The effect of section 23 EqA as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person not of the claimant's race or not having the claimant's disability.

54. Further, the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including *Amnesty International v Ahmed [2009] IRLR 884*, that in most cases where the conduct in question is not overtly related to a protected characteristic, the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator. If the protected characteristic (in this case, race or disability) had any material influence on the decision, the treatment is "because of" that characteristic.

Discrimination arising from disability

55. The prohibition of discrimination arising from disability is found in section 15 EqA. Section 15(1) provides: -

> *(1) A person (A) discriminates against a disabled person (B) if –*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

56. The proper approach to causation under section 15 was explained by the Employment Appeal Tribunal in paragraph 31 of *Pnaiser v NHS England and Coventry City Council EAT /0137/15* as follows:

(a) *A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*

(b) *The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.*

(c) *Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant …...*

(d) *The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links …[and] may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*

(e) *….. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.*

(f) *This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.*

(g) *…..*

(h) *Moreover, the statutory language of section 15(2) makes clear …. that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so.*

57. In *City of York Council v Grosset [2018] WLR(D) 296* the Court of Appeal confirmed the point made in paragraph (h) in the above extract from *Pnaiser*: there is no requirement in section 15(1)(a) that the alleged discriminator be aware that the "something" arises in consequence of the disability. That is an objective test.

58. The Equality and Human Rights Commission Code of Practice in Employment ("the EHRC Code") contains provisions of relevance to the justification defence. In paragraph 4.27, the EHRC Code considers the phrase "a proportionate means of achieving a legitimate aim" (albeit in the context of justification of indirect discrimination) and suggests that the question should be approached in two stages:-

(1) is the aim legal and non-discriminatory, and one that represents a real, objective consideration?

(2) if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

59. As to that second question, the EHRC Code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. It goes on to say the following at paragraph 4.31:-

> *"… although not defined by the Act, the term "proportionate" is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But "necessary" does not mean that the [unfavourable treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."*

Indirect discrimination

60. Section 19 EqA provides as follows:

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Reasonable adjustments

61. The duty to make reasonable adjustments, in section 20 EqA, arises where:

(a) the employer applies a provision criterion or practice which places a disabled employee at a substantial disadvantage in comparison with persons who are not disabled; and

(b) the employer knows or could reasonably be expected to know of the disabled person's disability and that it has the effect in question.

62. As to whether a "provision, criterion or practice" ("PCP") can be identified, the EHRC Code paragraph 6.10 says the phrase is not defined by EqA but "*should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one-off decisions and actions*".

63. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, section 212(1) EqA defines substantial as being "*more than minor or trivial*". In the case of *Griffiths v DWP [2015] EWCA Civ 1265* it was held that if a PCP bites harder on the disabled employee than it does on the able-bodied employee, then the substantial disadvantage test is met for the purposes of a reasonable adjustments claim.

64. The duty is to take such steps as it is reasonable, in all the circumstances, to take to avoid the provision criterion or practice having that effect. The duty is considered in the EHRC Code. A list of factors which might be taken into account appears at paragraph 6.28, but (as paragraph 6.29 makes clear) ultimately the test of reasonableness of any step is an objective one depending on the circumstances of the case. An adjustment cannot be a reasonable adjustment unless it alleviates the substantial disadvantage resulting from the PCP – there must be the prospect of the adjustment making a difference.

65. Under section 136 EqA, it is for an employer to show that it was not reasonable for them to implement a potential reasonable adjustment.

Harassment

66. Section 26 EqA provides:

(1) A person (A) harasses another (B) if-

(a) A engages in unwanted conduct related to the 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 behaviour of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1) (b).

(3) ….

(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.

(5) The relevant protected characteristics are- … Disability … Race

67. The concept of harassment under the previous equality legislation was the subject of judicial interpretation and guidance by Mr Justice Underhill in *Richmond Pharmacology and Dhaliwal 2009 IRLR 336*. The Tribunal has applied that guidance, namely:

"There are three elements of liability (i) whether the employer engaged in unwanted conduct; (ii) whether the conduct either had (a) the purpose or (b) the effect of either violating the claimant's dignity or creating an adverse environment for her; and (iii) whether the conduct was on the grounds of the claimant's race (or ethnic or national origins)."

Victimisation

68. Section 27 EqA provides that 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 B has done or may do a protected act.

69. A protected act includes making an allegation (whether or not express) that A or another person has contravened the Act. Making a false allegation is not a protected act if the allegation is made in bad faith.

70. There is a helpful analysis of the previous similar provisions by Mr Justice Underhill in *Martin v Devonshires Solicitors UKEAT/0086/10* namely:

> *"The question in any claim of victimisation is what was the "reason" that the respondent did the act complained of: if it was, wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation; and if not, not. In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable. The most straightforward example is where the reason relied on is the manner of the complaint."*

Jurisdiction – time point(s) for discrimination complaints

71. The time limit for complaints of discrimination is found in section 123 EqA as follows:-

> *(1) Subject to Sections 140A and 140B proceedings on a complaint within Section 120 may not be brought after the end of –*
>
> *(a) the period of three months starting with the date of the act to which the complaint relates, or*
> *(b) such other period as the Employment Tribunal thinks just and equitable.*
>
> *(2) ...*
>
> *.*
>
> *(3) For the purposes of this section –*
>
> *(a) conduct extending over a period of time is to be treated as done at the end of that period;*
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –*
>
> *(a) when P does an act inconsistent with doing it, or*
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

72. A failure to do something is therefore to be treated as occurring when the person in question decided on it*, or does an act inconsistent with doing it,* or on the expiry of the period in which that person might reasonably have been expected to do it.

73. The case law on the application of the "just and equitable" extension includes *British Coal Corporation –v- Keeble [1997] IRLR 336*, in which the Employment Appeal Tribunal ("EAT") confirmed that in considering such matters a Tribunal can have reference to the factors which appear in Section 33 of the Limitation Act 1980. As the matter was put in *Keeble*:-

> *"that section provides a broad discretion for the court to extend the limitation period of three years in cases of personal injury and death. It requires the court to consider the prejudice which each party would suffer as a result of the decision to be made and also to have regard to all the circumstances and in particular, inter alia, to –*
>
> *(a) the length of and reasons for the delay;*
> *(b) the extent to which the cogency of the evidence is likely to be affected by the delay;*
> *(c) the extent to which the party sued had cooperated with any request for information."*

74. In *Robertson –v- Bexley Community Centre (T/A Leisure Link) [2003] IRLR 434* the Court of Appeal considered the application of the "just and equitable" extension and the extent of the discretion and concluded that the Employment Tribunal has a "wide ambit".

Constructive dismissal

75. Section 95(1)(c) ERA provides that an employee is dismissed if the employee terminates their contract of employment, with or without notice, in circumstances such that the employee is entitled to terminate their contract without notice by reason of the employer's conduct.

76. The case of *Western Excavating (ECC) Ltd v Sharp [1978] ICR 221* provides that the employer's conduct that gives rise to a constructive dismissal must involve a repudiatory breach of contract, or a significant breach going to the root of the contract of employment, showing that the employer no longer intends to be bound by one or more of the essential terms of the contract of employment. In the face of such a breach by the employer, an employee is entitled to treat themself as discharged from any further performance under the contract, and if the employee does treat themself as discharged, for example by resigning, then they are constructively dismissed. If, however, the employee delays in resigning after the employer's breach, the employee may be taken to have affirmed

the contract and, if so, may lose the right to claim that they have been constructively dismissed.

77. A course of conduct by an employer can, cumulatively, amount to a fundamental breach of contract entitling an employee to resign following a "last straw" incident even though the last straw does not by itself amount to a breach of contract, as held in the case of *Lewis –v- Motorworld Garages Ltd [1985] IRLR 465*. However, the last straw must contribute in some way to a breach of the implied term of trust and confidence.

Unfair dismissal

78. If a claimant establishes that they were constructively dismissed, section 98 ERA sets out a two-stage test to determine whether an employee has been unfairly dismissed. First, the employer must show the reason for dismissal or the principal reason and that reason must be a potentially fair reason for dismissal. The respondent in this case has not advanced any reason for the claimant's dismissals.

79. If the employer shows a potentially fair reason in law, the Tribunal must then consider the test under section 98 (4) ERA, namely whether, in the circumstances of the case, including the size and administrative resources of the respondent's undertaking, the respondent acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the claimant and that the question of whether the dismissal is fair or unfair shall be determined in accordance with equity and the substantial merits of the case.

80. The issue of the reasonableness of the dismissal must be looked at in terms of the set of facts known to the employer at the time of a claimant's dismissal. The Tribunal must also consider whether the decision to dismiss fell within the band of reasonable responses open to a reasonable employer in the circumstances of the case: *Iceland frozen Foods Ltd -v- Jones [1982] IRLR 439*. The range of reasonable responses' test applies both to the decision to dismiss and to the procedure by which that decision is reached: *Sainsbury's Supermarkets Ltd –v- Hitt [2003] IRLR 23*.

81. In the course of submissions, the Tribunal was referred to a number of additional cases by representatives of the parties, as follows:

- WE Cox (Toner) International Ltd v Crook [1981] ICR 823
- Malik v Bank of Credit & Commerce International SA [1997] ICR 606
- Nagarajan v London Regional Transport [2000] 1 AC 501
- Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337
- Hendricks v Metropolitan Police Commissioner [2003] IRLR 96

- Law Society v Bahl [2003] IRLR 640
- Smith v Churchill's Stairlifts plc [2005] EWCA Civ 1220
- Lyfar v Brighton & Sussex University Hospitals NHS Trust [2006] EWCA Civ 1548
- London Borough of Islington v Ladele [2009] IRLR 154
- Johal v Commission for Equality and Human Rights UKEAT/0541/09
- Nazir + Aslam v Asim + Nottinghamshire Black Partnership [2010] ICR 122
- Cordell v Foreign & Commonwealth Office UKEAT/0016/11

The Tribunal took these cases as guidance but not in substitution for the statutory provisions.

Submissions

82. The representative of the claimant tendered written submissions and made a number of detailed oral submissions which the Tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:- the claimant's evidence should be preferred over that of the respondent's witnesses; the claimant worked in a hostile environment where communications were poor; the respondent knew the claimant was a disabled person by reason of her dyslexia and that her performance was impacted by it but it treated her badly regardless; the claimant was entitled to reject the respondent's assurances about mediation and that upon a return to work things would be better; the claimant's grievance was not investigated; she resigned promptly in response to the grievance outcome; the last straw was the fact that the grievance outcome took 18 weeks; and that all of the events complained of were connected to one person, Mr Rafique, and therefore brought in time.

83. Counsel for the respondent also tendered written submissions and made a number of detailed submissions which the Tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:- the discrimination claims had not been made out as no evidence had been brought about the claimant's disability or how such impacted her and the claimant has not shown less favourable treatment because of race or disability; a number of matters complained about were never raised by the claimant during her employment with the respondent despite numerous opportunities to do so; the claimant had not established any disadvantage for the purposes of her indirect discrimination complaint or the reasonable adjustments complaint; sick pay was discretionary and the respondent was entitled to suspend it, albeit that the matter was corrected at no loss to the claimant; there was no fundamental breach of contract entitling the claimant to resign; and even if there were a fundamental breach, the claimant did not resign in response because the evidence suggests that the claimant had no intention of returning to work after she went off sick, she simply did not want to work with Mr Rafique.

84. On 4 September 2021, the claimant's representative sought to tender further written submissions in reply to the respondent's submissions, but these were received after the Tribunal had completed its deliberations and so were not taken into account.

Conclusions (including where appropriate any additional findings of fact)

85. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

Harassment – race and disability

86. The claimant made a number of factual allegations as the basis for this complaint which the Tribunal considered with care. The Tribunal found no evidence that Mr Rafique had said to the claimant, during a 1-2-1 in December 2017, that she was the worst member of staff at the respondent as alleged in paragraph 29 of the grounds of complaint. In fact, evidence in the bundle at page 180 suggested the claimant was not "the worst" overall. Likewise there was no evidence that, in August 2017, Mr Rafique had said to the claimant that she was "biting off more than [she] could chew" or that a colleague, Muheeb, was more suited to the role of business analyst, as alleged in paragraph 30 of the grounds of complaint.

87. In respect of the allegation that, in September 2018, Mr Rafique had said to the claimant "I'm not your dad and I am not there to hold your hands" as alleged in paragraph 31 of the grounds of complaint, under cross-examination Mr Rafique accepted he had said to the claimant that he was not there to hold her hand, in discussion about her applying for roles. In addition, the Tribunal found that, on 19 February 2019, Mr Rafique had spoken to the claimant, in front of Ms Smith, about the style of her emails to him and that he told her to stop underlining things, asking her "Why do you do that?" as alleged in paragraph 32 of the grounds of complaint. However, Ms Smith was an employee of the respondent who was shadowing and being mentored by Mr Rafique. She was present as a member of the general public as alleged. The Tribunal considered that it was appropriate for Ms Smith to be present when Mr Rafique spoke to team members, as part of her shadowing of him.

88. Whilst the conduct found above amounted to unwanted conduct, the Tribunal found no evidence that the conduct was related to the claimant's race or disability. The Tribunal considered Mr Rafique's comments about the claimant's emails and the highlighting or underlining in the text. The claimant brought no evidence of how her dyslexia manifested itself and the Tribunal was therefore unable to conclude that the claimant's highlighting or underlining the text of her emails to others was due to her dyslexia or a

feature of it. Further, there was no evidence to suggest that Mr Rafique had the claimant's dyslexia in mind when he spoke to the claimant on the 2 occasions found above. In those circumstances, and having regard to section 26(4) EqA, the Tribunal considered that it was not reasonable for the claimant to perceive that Mr Rafique's conduct had the effect of creating an intimidating, degrading, humiliating or offensive environment for the claimant. The Tribunal therefore considered that the complaint of harassment was not made out.

Direct discrimination – race and disability

89. The claimant made a number of factual allegations as the basis for this complaint which the Tribunal considered with care. In respect of the allegation that, in September 2018, the claimant was denied support with training and development, as alleged in paragraph 33 of the grounds of complaint, the Tribunal has found that Mr Rafique said to the claimant that he was not there to hold her hand, in a discussion about her applying for roles. The Tribunal did not consider that this single comment amounted to a denial of all or any support as suggested by the claimant or in the circumstances of the case. The respondent's evidence was that it took the view that employees needed to be pro-active and take ownership of their career and that, in order to be eligible for progression, the respondent would expect the claimant to do some things herself and put herself forward, as it would expect any employee so to do. The Tribunal accepted the respondent's evidence and considered that the respondent's approach was not unreasonable nor was such an approach adopted because of the claimant's race or disability.

90. Paragraph 35 of the grounds of complaint contains an allegation that the respondent took 18 weeks to provide the grievance appeal outcome, on 26 September 2019. This is factually correct. However, the delay was caused by the unfortunate absence of Ms Shaw from work; she had been taken seriously ill. The alternative, given the incapacity of Ms Shaw, would have been to start the grievance appeal again, conducted by another manager. the Tribunal considered that this would not have led to an outcome any sooner and may in fact have delayed matters further. The unfortunate delay that arose had nothing to do with the claimant's race or disability.

91. On 20 May 2019, the claimant's sick pay was suspended as a result of the claimant refusing to engage in mediation; see paragraph 36 of the grounds of complaint. The Tribunal found that the respondent had attempted to impose mediation on the claimant. There was an insistence on mediation, regardless of the claimant's view. The Tribunal considered that the respondent was not listening to the claimant on this, see for example the findings of fact at paragraphs 30 – 32 above. No account appeared to have been taken of the fact that the claimant was ill nor of the effect of the respondent's conduct on the claimant. The respondent behaved as if there

was no other option except mediation. It moved with unexplained haste and was dismissive of the claimant's request to change teams.

92. The Tribunal considered the allegation that the respondent failed to investigate the claimant's grievances and her appeal by interviewing witnesses and found this allegation to be made out on the facts. Neither Mr Roden or Ms Shaw made efforts to find and interview witnesses and they adopted a very narrow approach to the matters they were tasked to handle. Mr Roden conducted what he described as an investigation of the claimant's grievance which consisted of speaking to Mr Rafique and trying to glean information from the claimant in the grievance meeting, despite that the meeting notes do not show him probing the claimant for details. Mr Roden dismissed matters largely on the basis that there were no witnesses to what the claimant had said happened. However, he did not explore or probe what the claimant was alleging and consequently developed little understanding of her grievance. In the grievance meeting, the claimant gave a name, Ben, who she said Mr Rafique pushed towards sales and who was given training. The claimant also mentioned that Mr Rafique "*has selective arrogance*" with others but the claimant was not asked for names or examples of any specific behaviour. Mr Roden decided not to find or speak to Ben because he did not think it appropriate and he took the view that he was only investigating bullying in the way Mr Rafique spoke to the claimant, even though lack of training and progress were also allegations in the claimant's grievance letter. The Tribunal therefore considered the investigation of the claimant's grievance to be inadequate - Mr Roden was too quick to accept Mr Rafique's word without looking for independent evidence to corroborate or refute matters. When asked about this, Mr Roden said he had not interviewed any witnesses because he could not question the whole team. The Tribunal found however that the claimant had not named the whole team and that interviewing everybody was unlikely to be necessary and so the Tribunal considered that Mr Roden was at best reluctant to conduct any further or wider enquiries. Unsurprisingly, Mr Roden explained that he did not uphold the claimant's grievance because he said he found no evidence to substantiate the points raised.

93. At her appeal, the claimant said that she had suffered discrimination but she was not asked what she meant by such a sweeping statement. The allegation was effectively ignored. When asked about discrimination, Mr Roden had struggled to articulate what he understood the word meant but he became indignant when he thought that he was being accused of racism. Nevertheless, the Tribunal noted that Mr Roden had not reacted with the same concern about the claimant's allegation that she had suffered race discrimination. In all the circumstances, the Tribunal considered that Mr Roden made an assumption that what was alleged by the claimant either could not have happened or, if it did, it resulted from a breakdown in relations between an employee and her manager, and nothing more. Ms Shaw did not look further. She adopted a view that the claimant's previous

grievance was not upheld and that she should focus on asking what the claimant wanted, when it was clear to the Tribunal that the claimant was asking the respondent to investigate matters more deeply and properly.

94. In respect of the way the grievance process was handled by the respondent and its outcome, including Mr Rafique's involvement, as alleged in the amended grounds of complaint, the Tribunal also found that, in effect, the respondent accepted Mr Rafique's explanations for the claimant's allegations. Under cross-examination, Mr Roden said that he believed them both and then could not explain why he preferred Mr Rafique's account, beyond saying that "it was about feelings with the claimant and I believed she felt that way".

95. The Tribunal considered whether the respondent had treated the claimant less favourably than the comparators contended for – see the list of issues at 6 a), b) and c). No evidence was brought of how the comparators had in fact been treated or their circumstances and the Tribunal was therefore unable to conclude that they were valid comparators – EqA section 23(1) provides that on a comparison for the purpose of establishing direct discrimination there must be 'no material difference between the circumstances relating to each case'. Likewise, the characteristics of any hypothetical comparator were not identified. There were documents in the bundles to show that Ms Gregory's grievance was about dependency time off and was handled by other managers but the mechanics of or extent of any investigation were not shown. It was noted that the respondent took only 4 weeks to produce an outcome letter for Ms Gregory in contrast to 18 weeks for the claimant but there were valid non-discriminatory reasons for the delay in the claimant's case. There was also evidence in the bundle to show that Mr Rafique's behaviour towards a number of staff had been questionable, and that it was not just the claimant who experienced such. The evidence was that Mr Rafique became irritated by people being off work. The Tribunal accepted the respondent's explanation of the fact that staff absences, in a pressurised work environment such as the call-centre, impacted adversely on others and caused difficulties for all managers trying to manage and improve response times.

96. In light of the above findings, whilst the Tribunal considered that the handling of the claimant's grievances and her appeal were far from perfect, the Tribunal did not find that such broad allegations amounted to less favourable treatment of the claimant for the purposes of a claim of direct discrimination. No comparisons were made out and the claimant has not identified a hypothetical comparator nor shown that such, in the same circumstances, would have been treated any differently. The Tribunal considered that the respondent's managers made poor judgment calls about how to deal with the claimant's grievance and failed to deal with matters as they should have. However, the claimant has not shown facts or brought evidence from which the Tribunal could draw conclusions as to the

reason why the respondent handled her grievance poorly, nor could the Tribunal conclude, from the evidence, that it was because of race or disability or that those characteristics had a significant influence on matters.

Discrimination arising from disability

97. This complaint is based on one allegation of unfavourable treatment, namely that, in September 2018, the claimant was denied support with training and development. The Tribunal has also examined this allegation in paragraph 89 above and found no evidence that training or support was denied to the claimant either in September 2018 or at all. At most, Mr Rafique had said to the claimant that he was not there to hold her hand, in a discussion about her applying for roles. That discussion was not related to any issue of the claimant's performance being inconsistent; rather it was about the claimant seeking help to progress her career. The claimant's evidence was that the pressure of work and trying to keep up had led to her inconsistent performance. However, the Tribunal noted that, the claimant had never raised such difficulties in her regular performance reviews. If the claimant had genuinely felt that her performance was suffering as a result of her dyslexia, the Tribunal considered, on a balance of probabilities, that the claimant would have raised the matter at the time or at the very least in her grievance letter in April 2019. In any event, there was statistical evidence in the bundle to suggest that the claimant's performance was not the worst in the team and not so inconsistent as was suggested. In those circumstances, the Tribunal found that the allegation of unfavourable treatment was not made out on the facts and such discussions as had taken place were not related to any inconsistent performance of the claimant.

98. Nevertheless, the Tribunal accepted the respondent had a legitimate aim of expecting adequate performance from its staff and found that it had provided appropriate support and training to address any performance issues where necessary.

Indirect discrimination related to disability

99. The claimant contended for 4 PCPs in respect of this complaint – see the list of issues, section 11 above. The respondent accepts that all 4 are PCPs. However, it was the respondent's case that the PCPs were not applied to all employees or not to employees who were not dyslexic because the respondent had accepted that the PCPs could put persons with dyslexia at a disadvantage and it submitted that, because of this possibility, the PCPs were subject to adjustment(s) where necessary.

100. The claimant brought no evidence that she had in practice been put at a disadvantage by any of the PCPs and, as the Tribunal had already found, the statistical evidence showed that the claimant's performance was not so bad. The claimant was able to meet her targets and indeed other employees

in her team were performing to a lower standard, when there was no suggestion that any of them were dyslexic. In addition, at no time did the claimant ever complain to the respondent about any of the PCPs or targets set by the respondent. In light of the above, the Tribunal considered that no disadvantage had been made out. In addition, the Tribunal accepted the respondent's contention that setting targets were a proportionate means of achieving the legitimate aim of adequate staff performance.

Duty to make reasonable adjustments

101. For this complaint, the claimant relied upon the same PCPs as for the indirect discrimination complaint. The respondent accepted these were PCPs.

102. As explained above under 'indirect discrimination', the claimant has not identified any disadvantage created by these PCPs and she brought no evidence of such. The respondent's unchallenged position was that the PCPs were subject to adjustment where necessary. In this case, the Tribunal found that he respondent set targets for performance and the claimant met her targets.

103. However, in respect of the reasonable adjustments complaint, the claimant contended that the substantial disadvantage she suffered was her dismissal. The Tribunal rejected this contention. The claimant was not expressly dismissed; she resigned. When the claimant resigned, she did not cite the way her performance was being handled nor any of the PCPs contended for, as reasons for her resignation/constructive dismissal. Rather, she resigned in response to the outcome of her grievance which in turn was not about how her performance was managed against the PCPs nor any other performance measurements and the claimant did not suggest that the outcome of the grievance was in some way because of her performance. In any event, the Tribunal could not conceive of any steps that the respondent could put in place in relation to these PCPs to alleviate/avoid the claimant's resignation. In those circumstances, the Tribunal considered that this complaint must fail.

Victimisation

104. It was agreed by the parties that the 3 acts identified in the list of issues under the heading 'Victimisation' are all protected acts for the purposes of a victimisation complaint.

105. The Tribunal considered the factual allegations of detriment. In respect of the allegation in the grounds of claim paragraph 41.4, that the respondent delayed in providing the claimant with the appeal outcome for 18 weeks the Tribunal has found that there was delay but that such was excusable, for a

non-discriminatory reason and not because of any of the protected acts – see paragraph 90 above.

106. The Tribunal has considered the suspension of the claimant's sick pay at paragraphs 33 and 91 above. This was clearly detrimental to the claimant albeit that the cancelled sick pay was paid up within a matter of 2 weeks. It had been designed to punish the claimant for failing to engage in mediation which the respondent had forced onto her.

107. In respect of the investigation of the claimant's grievances, the Tribunal has made findings on this aspect at paragraphs 92, 93 and 94 above. The Tribunal has found the investigation to be inadequate and considered that to be a detriment to the claimant. The Tribunal made no finding that Ms Shaw's appeal reasoning was somehow designed to protect Mr Rafique as alleged, noting that this allegation was not addressed in the claimant's witness statement nor was Ms Shaw cross-examined on the matter.

108. For a claim of victimisation to succeed, the respondent must have subjected the claimant to detriment because the claimant had done one or more of the protected acts. In this regard, the Tribunal did not find that the suspension of the claimant's sick pay was because of any of the 3 protected acts but was a response to the claimant's refusal to engage in the mediation process that the respondent had decided upon and which it mistakenly thought had been agreed.

109. In respect of the respondent's failure to undertake a proper or effective investigation, the Tribunal considered that this meant the claimant's grievance was not effectively resolved. The grievance process was flawed. At the grievance meeting, the claimant was not giving formal evidence but the respondent was not probing her as would be expected in order for the respondent to understand the substance of the complaints and where/how to investigate or make enquiries. Here, the Tribunal accepted the claimant's evidence that this led her to feel that she was not believed. Ms Shaw's meeting with the claimant was not conducted as an appeal; the Tribunal considered it to amount to a meeting for the purpose of getting the claimant back to work, rather than an appeal against a grievance outcome – see paragraph 40 above. Ms Shaw was cross-examined about what enquiries she undertook for the appeal. She told the Tribunal candidly that she had sought statistics from HR on diversity in the respondent's workforce. The intention had been to show the claimant that she was not in a minority at the respondent. The Tribunal understood this to mean that such statistics would be used to support the proposition that there could be no discrimination at the respondent because it had a diverse workforce and so the statistics would be used to dismiss the claimant's grievance. The Tribunal found this approach, designed as it was to find a simple way to dismiss the claimant's discrimination complaints, was disrespectful of the claimant and her views. The claimant's grievance required proper investigation and consideration,

and not to be dismissed in a peremptory manner. The Tribunal considered that the claimant's grievance, and in particular the fact that it was about discrimination, had a significant influence on how the respondent's managers chose to address the claimant's complaints, and upon their decision-making. From the evidence of the grievance process and the notes of meetings, the Tribunal found for example that Ms Shaw's attitude could be summed up as 'let's stop this silliness and get back to work'. The records show that the claimant told Ms Shaw that she thought she was not listening to her and not taking her seriously, and the Tribunal found this to be the case. The respondent was not inclined to look at the substance of the claimant's grievance nor was it inclined to resolve it in any meaningful way. Ultimately, the claimant felt compelled to mediation because the respondent was unwilling to countenance any other was forward and the Tribunal considered that mediation was seen by the respondent's managers as a way to close down difficult issues such as those raised by the claimant. Further, no account was taken of the claimant's mental health although the respondent was well aware that the claimant was off work with stress and anxiety, which was not taken into consideration. In light of all the above, the Tribunal considered that the claimant suffered unlawful victimisation in the respondent's approach to the claimant's grievance of 25 April 2019 and appeal of 31 May 2019 by its failure at each stage to properly investigate the claimant's grievances, and the respondent's approach to such investigation constituted a detriment.

Jurisdiction – discrimination complaints

110. The Tribunal has found that the claimant suffered unlawful victimisation in the respondent's failure to properly investigate the claimant's grievances. This conduct extended over the period of the grievance process, which ended with the grievance appeal outcome letter dated 26 September 2019. The claimant commenced ACAS early conciliation on 29 September 2019. The complaint of victimisation is therefore in time.

Unfair (constructive) dismissal

111. In considering this complaint, the Tribunal first had to decide whether there a fundamental breach of the claimant's contract of employment with the respondent entitling the claimant to resign. The claimant relied upon the express term of her contract in relation to sick pay entitlement and also the implied term of trust and confidence.

112. The claimant alleged that the respondent was in breach by not paying her sick pay to which she was entitled. That happened on or about 20 May 2019 and was remedied within 2 weeks, long before the claimant's resignation. There was no evidence to conclude that the suspension of sick pay had been an operative cause of the claimant's resignation on 29 September

2019 and the Tribunal concluded that the claimant had not resigned because of the cancellation of her sick pay.

113. When the claimant resigned, she wrote that her resignation was in response to the grievance appeal outcome. The Tribunal has found that the grievance process culminating in the appeal outcome was an act of unlawful victimisation and, in those circumstances, the Tribunal considered that the respondent was a breach of the implied term of trust and confidence. The claimant's resignation in response constituted a constructive dismissal.

114. The claimant also contended that the respondent was in breach of contract because it had refused her the right to appeal against the outcome of her grievance relating to Ms Verbickiene. The Tribunal disagreed. It found that the claimant was not so refused an appeal although the respondent did not at first tell the claimant that she could appeal the outcome of her grievance about Ms Verbickiene. However, when the respondent did tell the claimant that she could appeal, the claimant did not avail herself of the right to do so.

115. As the claimant was constructively dismissed, it is for the respondent to show what was the reason for that constructive dismissal. The respondent has not propounded any such reason or any fair reason in law and, in those circumstances, the Tribunal finds that the claimant was constructively unfairly dismissed.

Remedy

116. As the claim of unfair dismissal is well-founded, and the Tribunal has found that the claimant suffered unlawful victimisation, the case shall proceed to a remedy hearing on a date to be fixed.

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Employment Judge Batten
23 December 2021

JUDGMENT SENT TO THE PARTIES ON
6 January 2022

FOR THE TRIBUNAL OFFICE