EMPLOYMENT TRIBUNALS

Claimant: **Miss Jones**

Respondent: **(1) DePaul UK**
(2) Ms N Harwood
(3) Ms A Murphy
(4) Mr B Smith

Heard at: **London South Employment Tribunal**

On: **1 – 4, 6 – 10, 13 – 17 December 2021**

Before: Employment Judge Dyal, Ms Bharadia, Mr Shanks

Representation:

Claimant: in person

Respondent: Mr Gill, Counsel

RESERVED JUDGMENT

1. The claims fail and are dismissed.

REASONS

Introduction

The issues

1. The parties had both produced lists of issues in preparation for the hearing. The lists were very similar. Mr Gill was content to use the Claimant's list save that he noted that an allegation that was on the Respondents' list was not included in the Claimant's list. We therefore agreed to use the Claimant's list but to add that further issue to it.

2. The tribunal's primary concern about the list of issues was that it identified a few of the issues in a very vague, unparticularised way. For instance, one of the complaints was, "*Failing to respect the Claimant's position, skills or achievements from October 2013*". The tribunal was initially unclear whether issues which were expressed very broadly particularised by the other allegations on the list of issues that were set out in a detailed way. Or whether the particulars of those allegations were something else. We therefore had the most careful discussion of this matter with the parties. The result of the discussion was that the Claimant confirmed in terms that the allegations that were stated broadly in the list of issues were particularised by the other detailed allegations on the list of issues itself. On that basis we were content to adopt the Claimant's list of issues (adding to it the missing allegation that was featured on the Respondents list). We all agreed it represented the issues the tribunal had to decide.

3. There is one further detail: one of the issues complains that Mr Smith sent her emails with a negative tone. We asked the Claimant to, and she did, provide a list of those emails. She did this in her email to the tribunal of 01/12/2021 at 16:02. We identify those emails in a specific section of our findings of fact below.

4. The final list of issues is appended hereto.

The hearing

5. The matter came before the tribunal initially as an hybrid hearing with the parties, the judge and one non-legal member in attendance with the other non-legal member joining by CVP. The parties attended on the first day. Both preferred the hearing to be converted to a fully remote one and it was agreed that the remainder of the hearing would be entirely by CVP.

6. *Documents before the tribunal*:

    6.1. The Respondent's bundle. On Day 2 the Respondent disclosed two further documents, the notes of the Claimant's grievance appeal meeting and an email chain regarding those notes. They were added by consent.

    6.2. The Claimant's bundle: the Claimant had produced her own bundle which she added further documents to and sent to the tribunal at 01.30am on the first day of the hearing. The electronic version was split into a large number of different pdf files. She attended with one hard copy in a plastic wallet and asked the tribunal to make copies for everyone. We declined – the bundle was in excess of 100 pages and the tribunal does not have the administrative resources to prepare bundles of that size for the parties. The Respondent agreed to produce a consolidated electronic version of the Claimant's bundle. On 3 December 2021, the Claimant emailed the tribunal complaining that the Respondent had omitted a number of documents and attaching those said to have been omitted. On analysis the Claimant was in error and the Respondent had included those documents.

7. *Witnesses the tribunal heard from*:

   For the Respondents

   7.1. Mr Brian Smith, Area Director
   7.2. Ms Nicola Harwood, Director of Prevention and Programmes
   7.3. Ms Alexia Murphy, Executive Director of Operations
   7.4. Ms Maria Emerson-Smith, Head of Business Excellence
   7.5. Ms Kate Summers, Executive Director of People and Organisational Development

   7.6. The Claimant
   7.7. Ailsa McWilliam, former Support and Development Manager for Nightstop UK
   7.8. Amy Camara, former employee of First Respondent
   7.9. Joseph Squires, former Young People Counsellor Coordinator
   7.10. Craige Henry, former employee of First Respondent
   7.11. Monica Morris, employee of first respondent (written evidence only)

8. *Closing submissions.*

   8.1. The parties both made detailed closing submissions. In the Respondent's case these were supplemented by Mr Gill's skeleton argument. We considered the closing submissions very carefully.

Findings of fact

9. The tribunal made the following finds of fact on the balance of probabilities.

10. The first respondent is a charity whose work focuses on homelessness in young people. It is a medium-sized employer. It is part of a global group known as DePaul International.

11. The First Respondent runs a community hosting scheme known as Nightstop. The basic premise is that night by night accommodation is provided to young people at risk of being homeless by volunteer hosts in the community. The young person is provided with a room, an evening meal and the use of facilities for a night or two.

12. The Nightstop model is maintained by Nightstop UK, which is a part of the First Respondent. Nightstop UK sets the criteria, standards, policies and procedure pursuant to which the scheme is run. The scheme is then actually run on a regional basis by a range of different providers. In some regions the First Respondent itself is the provider, but in other regions different charities provide the Nightstop service using Nightstop UK's model and standards.

13. In London the Nightstop service was run by the First Respondent and known as Nightstop London. Upon recruitment, the Claimant became the manager of Nightstop London. Nightstop London carried out activities such as recruiting community hosts, training them, dealing with referrals, matching young people

with placements, providing support to the placements and dealing with complaints.

The Claimant and the recruitment of the Claimant

14. The Claimant is a black woman. She is now in her late fifties.

15. The Claimant's employment commenced on 27 October 2013. Initially she was employed a Community Hosting Manager – Nightstop and Supported Lodging. This gave her responsibility for Nightstop London and line management responsibility for three members of staff. She later became Prevention Manager.

16. The Claimant was interviewed by a panel of three people including Ms Val Keen and Ms Ailsa McWilliam. Ms McWilliam's evidence, which we accept, is that the Claimant was the best candidate based on a fair assessment of skills. However, she was not Ms Keen's preferred candidate.

17. Ms Keen had reservations about appointing the Claimant because of her appearance. She was concerned that the Claimant would not present well to commissioners who are responsible for funding decisions. In particular, Ms Keen commented on the Claimant's nails. She did not think they looked very professional. The Claimant had (and has) exceptionally long finger nails that are totally outside the normal range and therefore do look unusual.

18. Ms Keen's initial preferred candidate was a white man who dressed in conventional, professional clothing. Ms Keen did not say anything about race. However, Ms McWilliam had a private suspicion that race may have been an issue. She did not say this at the time or in her witness statement but she did in her oral evidence. Having considered the matter as best we can we do not think the issue Ms Keen had was race:

    18.1. The Claimant did indeed have an unconventional appearance for reasons entirely unrelated to race;
    18.2. It was legitimate to consider and discuss whether that appearance might be a barrier to effective fundraising in a client facing role;
    18.3. The panel discussed the matter, reasoned it out, and unanimously concluded that the Claimant's record showed that whatever her appearance it was not a barrier to her doing the job and that she should be appointed. She was duly appointed;
    18.4. The Claimant herself never suggested or sensed that Ms Keen may have an issue with race.

19. One of the unsuccessful candidates for the role was an existing employee, Isabel, who worked in a more junior capacity for Nightstop London. She was a white woman. The other members of the Nightstop London team were also white. Those three team members were friendly with each other. Isabel held some resentment towards the Claimant because she had wanted the role the Claimant was appointed to.

20. Mr Smith had a good relationship with Isabel and the other Nightstop London team members.

Probationary period

21. The Claimant's employment was subject to a period of probation. When her employment commenced her line manager was Ms Keen. Ms Keen took on some additional responsibilities during the Claimant's probation period. As a result the Claimant's line management passed to Mr Smith in around January 2014. At that point in time no assessment of the Claimant's performance during her probation had been completed.

22. Mr Smith decided that, since the Claimant's performance had not been measured, her probationary period should in effect be re-commenced. Ms Keen agreed with this point of view. A mid-probation review meeting was organised to take place in April 2014.

23. In the meantime a couple of relevant things happened.

24. On 24 March 2014 the Claimant completed a *National Designated Officer Safeguarding Referral Form.* It related to an allegation made by a young person of inappropriate sexual touching by a Nightstop host's son. Mr Smith was critical of this form. He made some corrections to the text as drafted by the Claimant in tracked changes. The changes are relatively few in number, none are wrong or gratuitous, and in on area essential (to make clear that a meeting is yet to happen, rather than as the drafting suggest, already happened). Mr Smith was also critical of there being no recommendation at the end. There is a box at the end of the form titled '*DCPO recommendation'*. In evidence before us, neither the Claimant nor Mr Smith knew who the DCPO was. The Claimant was sure it was not her. Certainly the way the form reads, the DCPO would appear to be the person to whom the referral is made. The Claimant was the person making the referral. However, the wider issue is that the report in the form is somewhat meandering and open ended. We can see why Mr Smith thought there ought to be something more concrete from the Claimant given the serious nature of the issues and the fact that, although the immediate Nightstop client was out of danger, there were safeguarding issues going forwards if the host continued hosting.

25. Some issues arose with respect to the Homeless Transition Fund (HTF):

    25.1.1. HTF was a contract that had been in place prior to the Claimant's and Mr Smith's employment commencing. There was a significant underspend on the contract. That was problematic because in the event of an underspend a possible resolution is for the money to be repaid.

    25.1.2. On 10 April 2014 the Claimant and Mr Smith attended a meeting to discuss the HTF. On the Claimant's account, Mr Smith spoke and attempted unsuccessfully to soothe the funders' concerns. He eventually let her speak. She did so and she successfully soothed the funders concerns.

25.1.3. The allegation is that Mr Smith abruptly got angry with the Claimant during the meeting. In her witness statement the claimant says that Mr Smith lashed out at her verbally. We find it implausible that Mr Smith would have demonstrated any anger with that Claimant at the meeting particularly if what she had just said had soothed concerns. That would have reflected very badly on him in the full glare of the meeting and we think that Mr Smith was far too career savvy to do that.

25.1.4. The Claimant also complains that Mr Smith, more generally, treated the underspend as if it was her fault. We think this is probably a misunderstanding on her part. Mr Smith did not regard the underspend as the Claimant's fault, however he considered it a matter that the Claimant had to deal with and try to resolve. That was because it was, simply, part of her job to do so.

26. On 16 April 2014, the Claimant had a mid-probation review with Mr Smith. He was critical of several elements of her work. The notes of the meeting are detailed and set out what we think is a reasonably cogent basis for the concerns raised: these related to budget management, strategic planning, standards of report writing and information sharing.

27. Mr Smith's notes of the meeting also, in our view, show that he was shaping up to fail the Claimant's probation in due course. The notes record: *"Brian stated that on the evidence to date, there is a clear risk that Yvonne would not meet the standards required as outlined in the competences and probation process."* In our view, these words were paving the way for probation failure in due course.

28. More revealing still is that Mr Smith set the Claimant an incredibly comprehensive set of targets:

- *A full review of current performance against targets for all contracts to be presented a week before final review meeting. The report needs to identify the source of the funding; any conditions of the budget provided by each funder; an analysis of the current provision including a SWAT analysis for Nightstop*
- *A full strategic plan to be provided to demonstrate the aims and purpose of the visits being held with local authority partners. This plan needs to explain the rationale behind the strategy that Yvonne has embarked on and an indication on when this will benefit the future of the service. It needs to link to point one to ensure that current activity is aimed at meeting current commitments*
- *Unit costing for Nightstop. This needs to be explicit as part of any business case. There needs to be a model against which the service operates including cost be night to run the service.*
- *Budget management. It is expected that Yvonne will be able to present to the probation meeting a clear status report of the overall budget including*

up to date income and expenditure, sources of income including statutory and voluntary income with a plan for how this will be used

- *A plan to be prepared for the use of any underspends from previous years carried forward budgets*
- *A clear view on the supported housing service including any involvement with potential bids for this service which will be considered within this period.*
- *Safeguarding report writing. As identified in the meeting on 16/04/14 the standard of report writing was not viewed as sufficient by Brian. Yvonne to reflect on the report and comments made, including the tracked changes to original document and present her view on the standard of the report for discussion.*

29. The point is not only that the targets were so comprehensive and demanding but that the period for achieving them was so short. This meeting occurred on 16 April 2014. Mr Smith's notes indicated that there would be a final probation meeting on 20 May 2014, just a month later.

30. The Claimant fought her corner hard at this meeting and we think this surprised Mr Smith. After the meeting she sent Mr Smith some emails which we have not seen but which she says, and we accept, evidenced the work that she had been doing.

31. There is a dispute about what happened to conclude the Claimant's probation. Mr Smith says that they had a final probation meeting and the Claimant's probation was signed off. The Claimant's case is that there was no such meeting and she simply heard nothing further. We prefer the Claimant's evidence:

    31.1. There are no documents evidencing a final probation meeting;
    31.2. There is no correspondence to or from HR confirming the outcome of the Claimant probation;
    31.3. There is no cogent evidence of any assessment being made of how or that the Claimant had met the targets stated in Mr Smith's notes of the interim probation meeting.

32. We think that what happened is that Mr Smith was dissuaded from taking the course he had been minded to take at the mid-probation review, that is, failing the Claimant's probation. This occurred because it became clear to him that he would have a big fight on his hands with the Claimant if he did and because she sent him further evidence of her work that proved it was better than he had thought. He put no further effort into the probation assessment and the Claimant's employment simply continued beyond it.

33. There is no avoiding the conclusion that the Claimant was treated poorly in relation to her probation period by both Ms Keen and Mr Smith.

Mayor of London awards

34. In around 2016, Nightstop won a Mayor of London award. The Claimant complains that Mr Smith celebrated with all of the team save for her.

35. Mr Smith did celebrate the award and bought the team strawberries and cream. His evidence is that he celebrated with everyone including the Claimant. The Claimant was adamant in oral evidence that this could not be right because she was in Jamaica at the time of the celebrations. We prefer the Claimant's evidence: this was a matter of importance to her but not especially to Mr Smith and thus more likely to be etched more clearly in her memory than his. However, her evidence also shows that there was nothing in the fact that Mr Smith celebrated with the team but not her: she was not there to join the celebration.

Youth forum

36. Mr Smith asked an employee, who was a white female, to speak to the Claimant about how to set up and run a youth forum. The Claimant had successfully led on the setting up of a Youth Forum for Night Stop London. In our view this of itself was recognition by Mr Smith of the Claimant doing good work.

37. The employee in question then did a good job of setting up a Youth Forum and was praised for her work.

Did Mr Smith want the Claimant to be replaced by a white colleague?

38. The Claimant alleges both that Mr Smith wanted her to be replaced by a particular white colleague, Isabel, and that he made a comment to this this effect.

39. Dealing first with the comment aspect of this, the Claimant's evidence that Mr Smith made such a comment is vague and thin. In essence, the evidence is that an unspecified person told her that this is what Mr Smith had said at an unspecified time. On this matter we prefer Mr Smith's evidence that he made no such comment. We found his evidence credible and, again, we think he was too career savvy to be so crude as to tell someone that he wanted the Claimant replaced by Isabel.

40. As to whether Mr Smith wanted the Claimant replaced by Isabel, the Claimant essentially relies on the following primary matters:

    40.1. Both she and Ms Camara observed Mr Smith to be more friendly to white members of staff than to them. We accept that Ms Camara told us honestly what she thought, but we do not think we can place weight on her evidence about Mr Smith. It was clear from her evidence, though she did not recognise it, that she has an axe to grind with him to put it mildly. At one stage she said in her evidence that she said that she did not like or respect Mr Smith. That shone through so strongly in her evidence, which was so one

sided, that we think it would be unsafe to rely on her account of Mr Smith. We also accept that the Claimant has given a subjectively truthful account here. However, we did not find this aspect of her evidence very persuasive. She often complained of a lack of social interaction with her but also repeatedly said that she was not one to mingle at work. Overall, we do not think that Mr Smith's level of friendliness towards colleagues was determined or influence by their race.

40.2. There was a training event on a Saturday at which the Claimant's team were providing the training. The Claimant was herself interested in the training as a recipient of it (not as a trainer). Isabel produced a list of tasks for the event. Among them they listed the Claimant as assisting with sandwiches. The Claimant took mortal offence at this and regarded it as a major insult. She blames Mr Smith for it on the basis that he created an environment in which someone who reported to her felt they could treat her in this way. We see this matter differently. Firstly, we do not think it was an insult for the Claimant to assist with the sandwiches. She was part of the team putting on the training event but was not a trainer. We do not think it is unusual for manager to lend a hand in this way at an event of this sort where there are no serving staff. It is part of a general mucking in to ensure the success of an event. Secondly, we do not think it is fair to blame Mr Smith in any way for this. He was not organising the day and, in short, had nothing to with the matters that the Claimant impugns here.

40.3. In March 2015, Greenwich Council wanted to place a particular homeless person with Nightstop. The referral was made on the same day as accommodation was required. Someone from the Council spoke to Isabel whose job it was to deal with such referrals. There was some dispute as to whether or not the client met the criteria for Nightstop. Greenwich were under the impression that the thresholds had been lowered. Isabel sought assistance from Mr Smith. He gave her some advice and told her to relay it to Greenwich. The following week the Claimant emailed Mr Smith saying that she understood there had been a complaint from Greenwich and asking who Mr Smith wanted to deal with it. In particular whether he wanted Isabel to do so. Mr Smith responded explaining that it was not a complaint as such but that there was a need to re-establish Nightstop's service boundaries with Greenwich. He said he did not mind who did it, whether the Claimant or Isobel. We think this was an essentially benign incident in which Mr Smith did not undermine the Claimant.

41. In our view the only significant indicator that Mr Smith may have wanted Isabel to replace the Claimant is that he at one stage wanted to dismiss the Claimant during her probation period.

42. However, as we have found Mr Smith decided to change course on and abandoned the idea of dismissing the Claimant. Further, we do not think that any

of this shows that Mr Smith wanted to replace the Claimant, at any stage, with Isabel in particular. There would have needed to be recruitment process had the Claimant been dismissed and the outcome of it could not have been predicted.

43. We also found credible Mr Smith evidence that he did not want to replace the Claimant with Isabel, and having measured it against the wider evidence available, accept it.

Receiving no supervision or support meetings from 2014 to September 2017

44. The period in question is the period during which the Claimant was line managed by Mr Smith.

45. What is clear is that there are no notes of any supervision meetings between Mr Smith and the Claimant. It is the Claimant's case that there were no formal supervision meetings. Mr Smith's evidence is a little vague and inconsistent as to whether there were or were not supervision meetings. On the balance of evidence we find there were no formal supervision meetings.

46. During this period of time Mr Smith line managed approximately 16 people (mainly white) and had a demanding range of other duties. We find that Mr Smith also failed to conduct formal supervision meetings with his other reports too.

47. In essence, Mr Smith was overloaded and prioritised his other work above line management. He dealt with the people who reported to him on a more *ad hoc* as required basis. In the course doing that, we find that he did informally meet with the Claimant on a fairly regular basis to discuss any issues the Claimant brought to him and to talk about any matters he wanted to raise with her.

Ms Harwood and Ms Murphy join the Respondent

48. Ms Harwood's employment with the respondent commenced in 2015. She joined as the Head of Nightstop UK. Ms Murphy's employment with the first respondent began in June 2015. She joined as an Executive Director of Services.

Alone in London

49. Alone in London was a well known charity that provided a range of services to homeless people including, counselling, advice, mediation and help with housing. It was also active in trying to prevent homelessness arising in the first place.

50. In 2016, the First Respondent decided to acquire Alone in London as it may otherwise have ceased to operate. This was a big and risky decision because it was not an easy fit with the First Respondent and Alone in London's financial position was very challenging.

51. Ms Murphy was instrumental in the decision to acquire Alone in London and merge it into the First Respondent's services. She, in consultation with Mr Smith,

decided that the Claimant would be the ideal person to take on the project of merging Alone in London into the First Respondent. This was a huge vote of confidence in the Claimant and was also a significance piece of career development.

52. In late 2016 the Alone in London team transferred to the First Respondent under the *Transfer of Undertakings (Protection of Employment) Regulations 2006.* The Claimant and her Nightstop Team initially moved to the existing Alone in London office in order to integrate the two teams under the Claimant's management. After a few months they all moved to the Respondent's new premises at Sherbourne House.

Not allowing the Claimant to attend the partnership meetings of the London Youth Gateway from September 2016 onwards

53. The London Youth Gateway (LYG) was a major project funded by London Councils. It was targeted at young people who were, or were at risk of, becoming homeless. It was delivered by a partnership of around six organisations including the Respondent. The lead partner that coordinated all of the partner organisations was New Horizon Youth Centre.

54. The funding for both Nightstop London and Alone in London came from this contract. The contract contained many different targets and reporting requirements. In essence, it was necessary to prove to the London Councils that the money that they contributed to the contract had been properly spent. If targets were not met and/or there was underspend and/or inadequate reporting then in certain circumstances it was necessary to repay part of the funding to the London Councils. The targets and the reporting requirements were very stringent.

55. It is true that from around September 2016 onwards the Claimant was not allowed to attend the partnership meetings.

56. In his witness statement Mr Smith suggests that in fact the Claimant had never attended those meetings. She was, he says, confusing two different kinds of meetings. Operational meetings, for people at service manger level, and strategic steering group meetings for people at Director / CEO level.

57. In his oral evidence, Mr Smith's account changed somewhat (though he did not acknowledge that he was changing his evidence). His account was that from around September 2016 onwards a steering group was set up. Whereas previously there was only one kind of meeting, which the Claimant indeed attended, thenceforth there were two kinds: operational meetings (service manager level) and strategic meetings (director level).

58. In our view Mr Smith's oral evidence is the accurate version of events. The meetings that the Claimant was not allowed to attend were steering group meetings. As the application for the LYG contract states: *The LYG project will be*

overseen by a Steering Group, meeting at least quarterly, formed by leads from partners at Director level. The Steering Group will review performance, discuss strategic development, assess risks and address any issues not solved at operational level". The Claimant was not at director level.

59. This change was never properly explained to the Claimant and it is therefore not surprising that she felt she was being excluded from meetings that she had once been free to attend.

Restructure 2017

60. In 2017 there was a business restructure of the Respondent. As part of that restructure, Ms Murphy decided that it would be sensible for all of the DePaul run Nightstop services to move to Ms Harwood's management as she was a Nightstop specialist. The executive level of management of Nightstop UK transferred from the CEO to Ms Murphy.

61. In July 2017 the Claimant's primary line management transferred from Mr Smith to Ms Harwood. However, she was 'matrix-managed' which meant that Mr Smith retained a 'dotted line' responsibility for her.

62. By this stage of the chronology the number of Nightstop services that the First Respondent managed had grown from two in 2015 to six with a seventh due to start soon.

Corrections to Quarterly report

63. In around March 2017, the Claimant urgently needed to get Ms Murphy's signature on a quarterly report. She gave Ms Murphy about 15 minutes to review the report, sign it and return it to her. Ms Murphy stopped what she was doing and reviewed the report. When she returned the report to the Claimant she pointed out two corrections that needed to be made. At the time the Claimant was talking to her team.

64. The Claimant found this undermining. However, we are satisfied that it was benign event. Ms Murphy did nothing more than point out two corrections that needed to be made. It was not a serious matter. It was not the sort of thing that was confidential and ought only to have been discussed in private. Time was extremely short because the Claimant had given Ms Murphy just 15 minutes. Ms Murphy certainly had no intention of undermining the Claimant nor, in our view, did she in fact do so. This was a routine exchange and the Claimant's reaction shows over-sensitivity.

White man in a suit comment

65. In July 2017 there was a meeting in the café at Sherborne House between staff and senior management to discuss how the café area was being used. The vision had been that it would be a space in which clients, who were young people,

would feel comfortable and welcome. The idea was that there would be a degree of integration between clients and the First Respondent's staff using the café as they went about their working day. In practice this was not happening. The meeting was, essentially, to discuss why.

66. It is agreed all round that in the course of the meeting Mr Smith referred to himself as a '*white man in a suit'*. He is indeed a white man and he was wearing, and tended to wear, a suit.

67. Mr Smith's account of the event portrays his comment as wholly benign. In essence on his account, he was simply indicating that he understood that he had "white privilege". Young people coming to the building and seeing him may not identify with him and people that looked like him. Most of the Respondent's clients were young and, in London, were black.

68. The Claimant's account of the event is significantly different. On her account members of her team were trying to explain to Mr Smith what the problems were at Sherborne House but that he was aggressively pushing back on everything they said. He made the 'white man in a suit comment' in that context in order to assert racial superiority and dominance. The key passages of her evidence are then as follows:

> *"Brian Smith was seeking to demonstrate and underline his superiority over the mainly black people, including myself assembled at the time in the cafe. The reference to him being 'a white man in a suit' was to suggest that he is from a race of people, namely white people and that men such as himself being a Senior manager over all these black people in front of him are normally dressed in suits that is what distinguished his superiority…. Brian Smith did not like to be challenged by a group of predominantly black people he considered inferior to himself. So he made the offensive remark in an effort to cast insult on this multicultural group of clients and staff including myself." … The comment was made in the cafe it was deliberate and aimed at offending those present. It was not only hurtful and offensive to me but to all the people of colour present in the meeting.*

69. Another account of the event from a student who was present at the meeting says this: "*from what I recall it was along the lines of 'they are uncomfortable because I am a white man in a suit' in a sarcastic tone which I felt completely dismissed the views of the young people."*

70. Also present at the meeting was Mr Joseph Howes, then Executive Director of fundraising. He gave an account of the meeting in an email to the Claimant of 26 November 2020. He said this: "*Before I left I do note that Brian made a comment that upset staff and when a couple of the team mentioned this to me I spoke to you and members of your team to apologise. I have to say, I think Brian would*

absolutely apologise for the comment he made and did not mean to cause offence - it was not appropriate."

71. In an email of 12 July 2017, from Mr Smith to Ms Harwood, Mr Smith was extremely critical of the Claimant and said "*The arguments presented why young people are not coming to Sherborne were frankly unacceptable as no effort has been made by Yvonne to reach a working solution."*

72. In our view, neither Mr Smith's nor the Claimant's account of events is correct and represent the extremes. This was not a wholly benign incident as Mr Smith describes and we do not accept that he referred to being a white man in a suit in a purely reflective, thoughtful way. However, we do not agree that he was attempting to assert racial superiority to anyone nor that someone could reasonably interpret what he said in that way.

73. In our view what happened was that the participants at the meeting were trying to explain what they thought the problem was at Sherbourne House from a young person's perspective. Mr Smith did not agree with them and said what he said in an attempt to rebut their arguments. He was saying that the arguments that were being made boiled down to young people being uncomfortable with him because he was a white man in a suit. The temperature of the conversation was high and the comment he made came as a bit of shock to those who were present.

74. We accept Ms Murphy's evidence, which we found very credible, that she was not present at the meeting at the point that Mr Smith made the comment. She therefore did not hear the comment and did not defend Mr Smith.

75. The day after the meeting, Mr Smith was approached by Gemma Fletcher who was a member of the Nightstop Team that had been at the meeting. She is white. She said to Mr Smith that the meeting had been awkward. He apologised for the awkwardness. Although the Claimant believes that he apologised for the 'white man in a suit' comment, she has no first-hand knowledge of that and we accept Mr Smith's evidence that he did not. His apology was limited to the awkwardness of the meeting.

Oscar's animation and the email signature issue

76. A client of the Respondent, Oscar, was a talented animator. He was interested in using his skills to support the Respondent. The Claimant liaised with him to produce an animation to market / showcase Alone in London.

77. In around May 2018, Oscar sent the animation by email to the Claimant, Mr Smith, Ms Murphy, Mr Howes and others. He had recently moved back to Spain and he explained in his email that he had been unwell. At this point of the chronology the Claimant was working from home because of a back injury. She had been doing that for a month or two and carried on doing so for a few months thereafter.

78. The animation was extremely impressive. An email chain followed in which Mr Smith stated that, as Oscar had moved back Spain, there needed to be clarity on how to take the matter forward and as to who would deal with him. The Claimant responded in a way that implied she was being cut out and was annoyed about that.

79. Mr Smith wrote again and said, in essence, that the animation was so good further work should be done with Oscar - for him to produce animations for other of the Respondent's services. He essentially praised the work Oscar had done to date and said there should be a project team working with Oscar going forwards so that everyone remained involved. However, he said that two particular members of the Respondent's communications team should be the project leads. The Claimant responded contently.

80. However, as it transpired, Oscar did no further work for the Respondent and the Claimant heard nothing more about it.

81. Ms Murphy was in the above chain of emails but did not comment substantively within the chain itself. However, she did two things of relevance.

82. Firstly, she asked the Claimant to remove the following banner from her email auto signature:

83. Secondly, unknown to the Claimant Ms Murphy privately wrote to Oscar complimenting his work. Also unknown to the Claimant, Ms Murphy had been closely involved in assisting Oscar with personal issues including his return to Spain.

84. The Claimant took significant offence both that Ms Murphy did not compliment the work to date (being unaware of Ms Murphy's email to Oscar) and to the request she remove the banner. The Claimant's view is that Ms Murphy had a problem with the banner because it depicted a black woman.

85. However, that was not, we find the reason why Ms Murphy asked the Claimant to remove the banner or that there is any basis for the Claimant's view. The reason was that the link in the banner, to a documentary about Nightstop on More 4, had expired. The documentary was no longer on More 4 and an error message appeared if the link was clicked.

86. There followed an email exchange between Ms Murphy and the Claimant in which the Claimant was rather defensive and difficult in response to what had been a simple and perfectly reasonable request to remove an out of date banner from her auto-signature.

87. There was also a wider context to Ms Murphy's request. There had, in April 2018, been an organisation wide push to standardise email signatures which had been publicised to all staff in a bulletin.

Job evaluation

88. In 2017, there was a job evaluation and benchmarking exercise across the Respondent. The Claimant's job title changed through this process to Prevention Manager and she was awarded a pay increase of nearly 9% backdated to April 2016.

89. There is no allegation about this in the list of issues but we heard some evidence about it.

90. In essence, the Claimant believed that she should have had a higher evaluation because of her Alone in London duties which were not reflected in her Job Description which was the basis of the evaluation. In so far as she pursued any complaint about this matter in this hearing, it was that Ms Harwood did not support, and was a barrier to, her efforts to be re-evaluated in light the Alone in London duties.

91. However, we do not accept that. The evidence shows that Ms Harwood was sympathetic to the Claimant's desire to be re-evaluated and that she assisted the Claimant with this endeavour including by chasing HR to come to a view. The Claimant's complaint about Ms Harwood is that when the Claimant redrafted her job description, Ms Harwood made some deletions. However, those deletions are not before us in evidence. We must therefore look at the matter at a high level of abstraction. It does not surprise us that there would be some negotiations, discussions and amendments in relation to a redrafted job description. Further, Ms Harwood did ultimately put forward the job description in the terms that the Claimant wanted.

92. On balance we do not accept that Ms Harwood was obstructive. On the contrary she was if anything supportive of the Claimant's case.

Audit of Alone in London in August 2018

93. In August 2018, Alone in London was the subject of an internal audit. The Claimant believes that the objective of the audit was to put undue pressure on her, scapegoat her and ultimately get her out of the organisation. She believes that Ms Murphy and Ms Harwood directed Ms Emerson-Smith to conduct the audit.

94. On balance, although we can see the Claimant's perspective, we do not accept that is right. We find it as follows.

95. In May 2016, the Respondent introduced an inspection program called *Policy and Practice Internal Inspection Program.* The purpose of the inspection programme was to ensure that DePaul's policies and procedures were correctly being used and that they were ready for any external audit. Inspections were conducted on 24 hours notice by the quality team.

96. Maria Emerson Smith led the Quality Team. She had a schedule of audits. The schedule for 2018 was prepared at the end of 2017. It anticipated auditing Alone in London during the course of 2018. In the event, the audit happened on 24 August 2018. Neither Ms Murphy nor Ms Harwood influenced the happening or timing of the audit.

97. The audit itself assessed Alone in London as not being entirely satisfactory. However, the outcome of the audit and the terms in which it was expressed in the audit report were pretty moderate. There was a handful of action points that needed to be attended to.

98. However, there were no "*Immediate Remedial Actions*" – these arise where there are the highest levels of concern. The only consequence of the audit not being entirely satisfactory was that it had to repeated. It was due to be repeated in December 2018, but at the Claimant's request was deferred to February 2019 to give additional time to get everything in order. All of that is somewhat inconsistent with the Claimant's beliefs about the purposes and origin of the audit.

99. The Claimant's evidence is that the audit report was unfair in a number of respects in that it suggests that certain policies were not in place when in fact they were but the auditors did not ask to see them. Although we accept this evidence was honestly given by the Claimant, on balance we do not agree with it. We think it is much more likely that the auditors went through the audit in a pretty mechanical way in which they asked a question, and then asked for documentary evidence to support the answer. The audit report, which contains a mixture of positive and negative findings, is more likely to reflect the snap shot picture of what the auditors found, than to be a bad faith misrepresentation of the audit. We also think it is significant that the Claimant asked for an extension of time for the re-audit: if everything was already in order this would not have been needed.

Ginger lives matter comment

100. In November 2018, there was a staff conference. Ms Murphy was on stage presenting a quiz to about 200 people. The audio-visual technology failed so she had to stop what she was presenting and stall for time whilst the technology was fixed. The night before she had been reading a first draft report of an equality and diversity inclusion questionnaire which had been sent to the workforce. It was to

inform an Investors in Diversity Accreditation. Ms Murphy thanked staff for completing the questionnaire. She said to prove that it was important and that they had read all the comments she would quote one of the comments: "*ginger lives matter".* This was indeed a comment that someone responding to the survey had made.

101. Estelle Burns, HR, who has red hair, called out '*yeah!'* and this together with the *"ginger lives matter"* comment made a few people laugh.

102. The Claimant found the comment offensive as did some others including some other black members of staff and among them Monica Morris. They felt that it belittled and trivialised Black Lives Matter.

103. Black Lives Matter of course is a campaign/social movement (amongst other things) against police brutality towards black people and for justice for black people. At the time of Ms Murphy's comment, Black Lives Matter was much less well known in the UK than it is now. The staff conference pre-dated the police murder of George Floyd on 25 May 2020 – the catalyst for an international response that further raised the profile of Black Lives Matter.

104. In her witness statement, Ms Murphy did not say, one way or other, whether she had heard of Black Lives Matter at the time that she made the ginger lives matter comment. In response to a question from the tribunal on this she said "*I don't think I had, I probably had from background, it was pre- George Floyd.*" Her evidence was thus somewhat ambiguous.

105. In our view, it is likely that Ms Murphy had heard of Black Lives Matter at the time of her comment. She worked in a field in which equality and diversity issues were prominent and indeed was a driving force for raising equality and diversity up the agenda at DePaul. We think that Black Lives Matter is likely to have come to her attention by November 2018.

106. Shortly after the conference, there was an EDI meeting chaired by Ms Emerson Smith. Ms Morris attempted to raise the "ginger lives matter" comment at this meeting. Ms Emerson Smith shut the attempt down. She took the view that the EDI meeting was an inappropriate forum for the concern to be raised because it related to an individual case. She told Ms Morris that she could raise the matter as a grievance against Ms Murphy.

107. Ms Emerson Smith told Ms Murphy that Ms Morris had been offended by the ginger lives matter comment. Ms Murphy met Ms Morris either during or shortly after the EDI meeting and apologised to her for the comment.

Alone in London showcase meeting

108. The Claimant organised a meeting for the Alone in London team to showcase and explain the work that they did wider colleagues. This was because the team

felt that there was a lack of understanding of what they did and that they had a low profile especially compared to Nightstop.

109. The meeting was well attended including by the then CEO of Nightstop. However, neither Mr Smith nor Ms Murphy attended nor sent apologies for non-attendance. We accept their evidence that the reason that they did not attend was simply the pressures of their work. They both already knew exactly what the team did. They overlooked sending apologies without any agenda for the oversight.

Client H

110. Client H had a longstanding association with the First Respondent. Initially, his relations with the First Respondent were very good and he became a flag bearer for some of the First Respondent's services. The Claimant had a good relationship with Client H. Client H also had a close relationship with the then CEO of the Respondent.

111. Relations between Client H and the First Respondent, including the then CEO (but excluding the Claimant) began to sour. Client H had a business idea which he felt the Respondent had promised to support and had then reneged on supporting. This upset him greatly and contributed to the breakdown of his relationship with the Respondent. He also had mental health problems and stopped taking his medication.

112. Client H made some allegations on 24 and 26 July 2018 in email complaints about incidents that had taken place in 2017. The complaints included allegations of abuse of him by the then CEO.

113. The Respondent commenced an internal investigation into the allegations. Ms Emerson Smith delegated the investigation to Ms Helen Bulloch, HRBP.

114. On 20 August 2019, Ms Bulloch interviewed the Claimant as a potential witness. In the interview it became apparent that at some point the Claimant had spoken to the alleged preparator (the then CEO) about Client H's issues with him.

115. The notes of the interview show that matters were dealt with quite broadly as distinct from forensically. A consequence of that, was that it remained unclear what the Claimant had actually said to the alleged perpetrator. It left open a concern that the Claimant might have disclosed a safeguarding complaint to the alleged perpetrator - which would be poor practice.

116. On 27 November 2018, the Claimant had a further meeting, this time with Ms Harwood to discuss the matter. The meeting was styled as a reflective discussion. The Claimant draws a sharp contrast between that and a fact finding meeting, which is what she considers the meeting really was. In our view the meeting was both a reflective discussion and a fact find. Ms Harwood's questions

show that she was both trying to establish facts and to reflect with the Claimant on them.

117. There is a dispute about Ms Harwood's notes of the meeting and in particular what the Claimant told Ms Harwood that she had told the alleged perpetrator about Client's H complaints about him. Ms Harwood's notes record essentially this. That the Claimant told the alleged perpetrator that Client H had said that the alleged preparator had been open with him about being in therapy and that the two of them shook hands in a particular way, the implication being a masonic handshake. The Claimant's account is that all she ever did was tell the alleged perpetrator in general terms that Client H was upset with him particularly about a lack of support with a business idea.

118. On balance we think that Ms Harwood's notes are probably broadly accurate. We think that the likelihood is that the Claimant did not perceive the handshake issue or the discussion of therapy as safeguarding matters so did not think it inappropriate to mention them to the alleged preparator. However, in the course of the meeting with Ms Harwood she got the sense that she was being criticised for discussing those matters with the alleged perpetrator and shifted her position accordingly.

119. On 5 December 2018, the Claimant met with Ms Harwood again to finalise the discussion of the issue. The Claimant asked Ms Harwood in terms whether it was her time to leave the First Respondent's employment. Ms Harwood said nothing of that nature was going on.

120. The whole upshot of the Client H issue was that the Claimant was asked to refresh her safeguarding training. The intention was for employees to undertake such training every two years and the Claimant had not undertaken such training since around 2014. She was thus overdue it in any event.

Placing the claimant on a performance improvement plan

121. Ms Harwood conducted regular formal supervision meetings with the Claimant from the outset of her line management of her. The meetings happened approximately every six weeks.

122. Ms Harwood was mostly positive about the Claimant's performance particularly in relation to Nightstop. However, over the course of 2018 she did express concern about a failure to meet certain targets on the London Youth Gateway contract. Those were targets that related to the performance of Alone in London in certain areas of its work.

123. The contemporaneous documentation throws some light on matters. They show fairly consistent under performance against some Alone in London targets over the course of 2018:

123.1. On 22 January 2018, notes record a concern that there is underperformance in four key areas;

123.2. On 4 April 2018, Ms Harwood emailed the Claimant regarding 'Q4 returns'. The email records a number of targets and in particular that they were not being met in a number of strands: schools, housing advice and mediation.

123.3. On 5 July 2018, the supervision notes record: *"The figures have improved on the whole from the last quarter, but there is still some underperformance which needs [to be addressed] this quarter. YJ will monitor each strand in her weekly team meetings, to monitor progress, and put actions in place to ensure they are met."*

123.4. On 16 August 2018, the supervision notes record "*Mediation continues to be under performing but housing advice is now picking up following recruitment of locums."* It was also noted that "*Staffing within the team continues to be a challenge, with recruitment ongoing for Nightstop and mediation posts. In addition, there is the gap within housing advice, which YJ needs to work with HR on resolving."*

123.5. On 25 September 2018, the supervision notes record: *YJ has flagged that mediation is a problem due to the vacant post - the post has now been recruited and has been verbally confirmed. The rest of the contract is on track in terms of outcomes and outputs, with just mediation and borough profiles a risk - the team have worked very hard with YJ on this.*

123.6. On 27 November 2018, the supervision notes record: *YJ has returned the mid quarter London Councils report back, which is on track on the whole due to mediation. Housing advice is flagged as a slight risk due to locum worker Helena being on leave but it shouldn't affect the full quarter.*

124. The Claimant does not accept that the notes of the supervision meetings are entirely accurate. In our view, while not verbatim, they are likely to accurately represent the gist of what was said at the supervision meetings. Ms Harwood was a careful manager who generally acted in a considered and measured way and we think it likely that her notes were broadly accurate.

125. In late November 2018, Ms Van Harskamp (who coordinated the London Youth Gateway contract) contacted both the Claimant and Ms Harwood. It is clear from her email correspondence that she was concerned about some targets and what was being done to explain why there were not being met, particularly family mediation.

126. On 5 December 2018, Mr Smith emailed the Claimant and Ms Harwood about Alone in London targets. The Claimant places significant weight on this email. She reads it as saying that all was well with targets and that all that was necessary was, in effect, to maintain the good work. The email does say "*The good news is most areas are on target. This was good to see".* However, the Claimant's interpretation of it is nonetheless not a fair one. The email also says:

"*More difficult is the family mediation shortfall both on activity and spend; meaning money will have to be returned. This is a glaring shortfall compared to all other activity…*

Nicola, Marike said that you are providing an action plan next week re the problem of mediation, is that on target? There is concern generally about ensuring new users continue to meet the target. This is currently fine but let's keep it that way.

There was a discussion on the outcomes figures presented which is clearly a problem. There were 2,387 new users for the quarter but only 351 outcomes.

All this tells us is we are not capturing impact so it is purely a numbers game. To address this we agreed to trial a way to better reflect the impact of the assessed intervention and Marike [Van Harskamp] will follow up on this. This will only be trialled against 1 indicator and be for internal use at first. Please note that this will be required in the first quarter of next year.

Can we check the borough delivery please. This is appearing better but some boroughs we lead on are still red on the spreadsheet.

There needs to be a follow up to yesterday's audit with some precise information required against activity. This will be required urgently and Marike will outline what this is. Please can we ensure we provide any outstanding information as required.

127. On 7 December 2018 the action plan referred to was produced.

128. 18 December 2018, Ms Van Harskamp responded to the action plan. Her response indicated that there was a significant underspend on family mediation and that there was a risk of having to return some funding.

129. On 8 January 2019, Ms Harwood emailed the Claimant stating:

> *Given some of the ongoing issues with a couple of the areas within Alone in London, it'd be good to catch up about any other ways we might address it for next quarter (I think the year is April to March for London Councils isn't it?)*

130. Nothing in this invitation gave the Claimant any indication that at the meeting of 22 January 2019 she would or might be put on a PIP.

131. The *Effective Performance Management: Policy and Procedures* provide as follows:

Where a manager uses this procedure to manage a performance matter they should provide the staff member with a copy of this policy so they are aware of the procedure being followed.

The purpose of the discussion is to:

Explain the duties and responsibilities of the job, refer to the job description, competencies framework and DePaul UK's Mission, Vision and Values;

- *Explain clearly the standards of performance expected, when appropriate, referring to the competencies framework;*
- *Discuss concerns and provide examples of where the staff member is considered to be under performing;*
- *Listen to the staff member and allow them the opportunity to explain circumstances that may be affecting their performance;*
- *Discuss ways performance might be improved through the support of training, coaching, work shadowing etc;*
- *Set reasonable timescales and very clear targets for improvement;*
- *Check the staff member understands the improvements required;*
- *Set a date for a further meeting to review performance;*
- *Diary in more frequent supervision sessions e.g. fortnightly.*

132. On 22 January 2019, there was an Alone in London team meeting. This meeting marked a step change in the efforts the Claimant was making to ensure that Alone in London's targets were met as a best as possible. It was packed with ideas, plans and action points.

133. That day the Claimant met with Ms Harwood for what had been billed as a 'catch up' meeting. There are competing accounts of what happened at the meeting.

133.1. Ms Harwood's account is that at the meeting she was clear with the Claimant that she was placing her on a PIP;

133.2. The Claimant's account is that there was no reference to a PIP and as far as she understood it the meeting was a catch-up one at which performance on the LGY contract was discussed.

134. On 24 January 2019, Ms Harwood emailed the Claimant with a subject line *'Performance improvement plan'.* The opening paragraph of the email described the meeting of 22 January 2019 and referred to it being a discussion of under performance with the LYG contract. The second paragraph states:

Those actions, along with the areas of improvement are in the attached performance improvement plan. You and I will meet on a fortnightly basis to monitor progress against them, up until the next quarterly report is due in April. We'll then look at what we need to put in place next based on that. As

we discussed we'll schedule those fortnightly meetings after you have met with your team so you have the most up to date information.

135. The Claimant responded:

> *I have received the performance plan... This looks very much like you have put into practice the DePaul Effective Performance Management policy and therefore I now understand the invitation of support requested.*

136. The Claimant went on to state that she was committed to achieving what was reasonably achievable in the targets that she had been set. She referred to some difficulties that existed in achieving the targets. She also explained the steps that she had taken and would continue to take to meet targets. She explained that she did not think that the target of 30 mediations would be met unless mediations conducted in Greenwich would be counted (which was one of the things for her to investigate.) She said that she would work with the team to improve numbers in boroughs but that she would not be able to achieve the targets in every single one. She ended by indicating that it felt like a set up to her.

137. We think it is more likely that Ms Harwood was less than clear at the meeting itself that she was putting the Claimant on a PIP. It was an awkward thing to discuss and she was for that reason 'mealy-mouthed'.

138. On 24 January 2019, Ms Harwood emailed Ms Burns stating:

> *I had a very positive meeting with Yvonne on Tuesday afternoon about her performance. She came to the meeting with a great deal of suggestions as to how to improve her performance, and has had frank conversations with her team about her expectations for this quarter. Good to see her start taking ownership of it.*

139. We accept Ms Harwood's evidence, which were found credible, that it was her decision alone to put the Claimant on a PIP.

PIP Targets

140. The PIP set a number of targets. The Claimant contends that one of those targets was unachievable: to achieve 30 family mediations by the end of the quarter. The actual target in the LYG contract was in fact 70 family mediations per quarter; everyone agrees that was unrealistic.

141. The Claimant's case is that it was unrealistic to achieve 30 mediations because at the time there was no mediator in post. The post had been vacant for some months and attempts to recruit to it had been ongoing but unsuccessful. Two candidates had been offered the job but ultimately not taken it up. At the

time of the meeting it was unlikely that a permanent appointment would be made until February and by the time that they started and were properly inducted it would be March. Further, this type of mediation takes time. Families, generally, do not reconcile easily. The mediator needs to develop trust over the course of a number of sessions; so a new mediator will not achieve instant results. We see some force in all those points.

142. On the other hand:

142.1. The Claimant had been given permission to use agency staff for family mediations;
142.2. The Claimant had recruited Ms Camara to carry out some mediations and she was by then working for Alone in London one day per week;
142.3. There were past candidates for mediation positions who could be contacted to see if they could offer some hours and the Claimant was in the process of contacting one of them.

143. There was also a possibility that mediations that were already carried out for Greenwich could be counted against this mediation target. The Claimant was sceptical that this would be permitted, and sceptical it was even a good idea, but it was something to investigate with New Horizons and do if approved.

144. The target was also set as a result of a positive conversation between the Claimant and Ms Harwood in the meeting of 22 January 2019 at which the Claimant had presented an optimistic picture.

145. All in all, our view is that the target was certainly a stiff one that would be a stretch to meet but it was not 'unachievable'. However, we also think that if the Claimant had done all she reasonably could to meet the target but had not met it, that would have satisfied Ms Harwood. She would have been able to evidence to LYG and others that all that could reasonably have been in relation to the mediation target had been done.

146. The other contentious issue in the PIP related to a member of staff on long term sick leave. Provided that the target "*Take necessary steps to recruit replacement housing advice worker"* is read as meaning to start the process for recruitment rather than actually recruiting, we think the targets were reasonable. That set out a course of action to progress a long running issue that had run on too long. In context we think that must be what was meant by the target.

147. We note that the PIP *pro forma* includes space for recording the employee's agreement to the targets and envisages the PIP being mutually agreed at a meeting. This did not happen.

148. Ms Harwood accepted in her evidence that other Prevention Managers were behind with some of their targets but were not put on a PIP and that none of them

were black women. We so find. Here explanation was that the Claimant's targets in respect of LYG contract arose in the context of a contract funded by statutory funding. A far higher level of scrutiny always applied to such targets than to others. The other Prevention Managers' targets that were behind were non-statutory.

Trainee counsellor incident

149. One of the services offered by Alone in London was counselling. Many of the counselling sessions were provided by volunteer trainee counsellors (it being a requirement for counsellors in training to obtain a certain number of hours of counselling experience.)

150. On 25 January 2019, there was an incident involving one such trainee counsellor, Rupal, and an Alone in London client. It was a Friday evening and the counselling session was happening in a third party building. This meant Rupal was lone-working in the sense that she had no colleagues around though there were other third party people in the building.

151. The client had a history of attempted suicide and aggressive behaviour. He was, that day, talking seriously about taking his own life. Rupal called for an ambulance but it had not attended after an hour had passed and it remained unclear when or whether it would attend. The building was due to close shortly.

152. Rupal needed some advice and reassurance that she was handling the situation correctly. The Respondent has an On-Call policy and rota. Under this policy there is a telephone number employees working out of hours can call to obtain assistance and advice as required. The telephone number is staffed by senior managers on a rota basis. The idea is that there is thus always a senior person available on call. The rota ensures that the system is workable so that no one person has to be on-call too often.

153. However, Rupal had not been told about the On-Call rota. That was because Alone in London did not use it. The mechanism for getting advice that she and all other Alone in London staff had been told (by the Claimant) to use was to telephone the Claimant or Mr Joseph Squires if they needed assistance out of hours.

154. Rupal called Mr Squires but he did not answer (no criticism is intended here). She had been given the Claimant's number but could not find it in her phone. She therefore used her initiative and was able to find Mr Smith's telephone number from the Respondent's web pages. She spoke to Mr Smith who gave her reassurance that she was doing the right things and kept in contact with her until the ambulance finally arrived and took the client into the care of the NHS. This brought the situation to a close.

155. Mr Smith informed the claimant of the situation and its immediate outcome by email on 25 January 2019 at 8:39pm. He asked, and the Claimant agreed, to pick things up on Monday.

156. On 26 January 2019, Mr Smith followed this up with an email to the claimant, Ms Harwood and Ms Murphy. He said:

> I am not at all clear how it is the case that a person in the service was not able to access support while lone working or if it was known she was still dealing with a difficult situation at this time of night which had the potential to be very serious.
>
> I would like to know if the member of staff should have been checking in and out with her line managers as a lone worker and if there is a policy and procedure for this in the service.
>
> Yvonne I see you emailed me today to say you were contacted last night but the worker did not receive a response during the incident hence calling me. Can it be clear who should have responded or been available please.
>
> In my view the worker appeared to be lone working out of hours dealing with a potentially high risk case with no managerial oversight. Should this have ended badly I do not see that we had fully covered Depaul's corporate risk.
>
> I strongly recommend that this case is reviewed to learn how to avoid workers being placed in this position in the future.
>
> As I am away I do not have access to inform but this needs to be logged as a safeguarding concern and that the Operations Director is made aware.

157. Ms Murphy asked Ms Emerson-Smith to investigate the incident in the following terms:

> I would like you to undertake an initial fact finding exercise not limited to the following:
>
> - What are the out of hours reporting arrangements for the counsellors specifically and were they followed in this instance
> - What are the lone working arrangements for the counsellors specifically regarding using the LWD's and Lone Working Policy/Procedures, reporting whereabouts, end of shift etc
> - What are the remote workplace arrangements for the counsellors - particularly health and safety and risk assessment
> - What are the AiL counselling service recording procedures for client information and ISN reporting.

158. Miss Murphy's position is that it was routine to carry out fact-finding exercise after an incident like this which was a near miss incident. This is in accordance with the *Health and safety policy: incidents and near miss reporting and investigation.* It provides that all incidents and near misses must be reported and investigations conducted to identify means of avoiding a repetition. We accept Miss Murphy's position not least because we find it unsurprising and rational that there was a desire to investigate this incident.

159. On 29 January 2019, Ms Emerson Smith emailed the Claimant as well as the other people that she wished to interview indicating that she was conducting an investigation, asking for a succinct written chronology of events and asking for the matter to be kept confidential.

160. The Claimant responded as follows: "*I am aware that I am being hounded out of DePaul as part of the ethnic cleansing process. I will follow your instructions up*

to a point but I will be making public exactly everything that I have been endured over the last 5 years including the pushers behind the scene. I have my own chronicle order."

161. Ms Emerson Smith responded with concern and tried to reassure the Claimant that the investigation was the standard process and that it had nothing to do with race or ethnic cleansing and that she would not take part in the process if it did.

162. Ms Emerson Smith produced a fact-finding report, dated 8 February 2019. It summarised the incident and the various accounts of it, made some findings and gave some recommendations. In summary they related to: compliance with on-call policy and procedures, compliance with health and safety (including incident, safeguarding and near miss policy and procedures) compliance with lone working including buddying system and risk assessments policy and procedures.

163. The Claimant's explanation for counsellors not being told about DePaul's standard on-call procedures is that she thought that Alone in London was like Nightstop. Nightstop did not use the Respondent's on-Call procedure because it had it's own one. There was a Nightstop specific rota which ensured that there was always someone available to take calls for assistance out of hours. The Claimant was sometimes on that rota, but whether she was on it or not, the practice was to escalate matters not only to the person on the rota but also to her. Further the Claimant says that the on-call rota primarily dealt with accommodation based services of which Alone in London was not one.

164. In our view this is an unsatisfactory (though honest) explanation. Unlike in the case of Nightstop, there was no Alone in London rota. The arrangements that were in place, to contact the Claimant or Mr Squires, were inadequate because there was always a possibility that they would not be available, e.g. Mr Squires was asleep when Rupal attempted to contact him. Moreover, it is simply not right or fair on any employee to be on call all the time; in fact it is quite wrong.

Resignation

165. On 30 January 2019 the Claimant was signed off sick.

166. On 4 February 2019, she emailed members of her team. The email set out her view that she was the victim of a witch-hunt which she also described as "ethnic cleansing". In the email the Claimant referred to a good deal of confidential information including in respect H's complaint.

167. The Claimant resigned with immediate effect on 7 February 2019.

168. Ms Summers responded on 8 February 2019 stating, "*thanks for your email. Can you just confirm for me that you consider your last day working for DePaul to be yesterday?".*

169. The Claimant raised a grievance on 18 February 2019. She instructed solicitors and they re-presented the Claimant's grievance in terms that are very similar to the list of issues now before the tribunal.

170. The First Respondent instructed Bharti Nandha, HR Consultant, to deal with the grievance investigation. Ms Nandha tried to set up a meeting with the Claimant but the Claimant declined. She wanted to see statements from those she had impugned first. Ultimately the Claimant's then solicitors produced a document that attempted to clarify and bring some further structure to the Claimant's grievance.

171. The grievance was determined by Paul McKenzie. His gave his outcome in a letter dated 28 June 2019. He dismissed the grievance. The Claimant appealed.

172. The First Respondent instructed an HR consultant, Jon Phillips, to deal with the appeal. It had not previously worked with him. He was recommended by the First Respondent's solicitors.

173. Mr Phillips interviewed the Claimant. He asked the Claimant several times for any corrections to the notes of the interview and for contact details of the witnesses whom the Claimant had provided statements for. The Claimant stated that elements of the notes were incorrect but did not elaborate. She did not provide contact details for the witnesses.

Emails with a negative tone

174. The Claimant complains that Mr Smith emailed her with a negative tone. She identified the following emails:

174.1. 10 March 2015 (p886): an email about who should revert to Greenwich in response to a query one of its officers made. The email has neutral and did not have a negative tone;
174.2. 12 July 2017 (p901): an email about the meeting at Sherbourne House at which Mr Smith made the 'white man in a suit' comment. It is indeed very negative about the Claimant including in tone;
174.3. 21 July 2017 (902): in this email Mr Smith essentially just asks what follow-up Ms Harwood had made following his email of 12 July 2017.
174.4. 11 January 2018 (p915): an email suggesting that the Claimant was not providing the data that was needed in relation to the LYG contract. The email is negative about the Claimant although it is written in a moderate way. This matter was then discussed between the Claimant and Ms Harwood in supervision on 22 January 2018. In essence it was agreed that the Claimant would look at how statistics were recorded and counted and would seek agreement with Mr Smith and Ms Harwood about that. (555)

174.5. 20 April 2018 (p926h): an email in which Mr Smith raised concern about how information including statistics were reported to LYG and when. He wrote: "*There is clearly under delivery against the contract and not an adherence to the process required to make the returns to the lead partner in time. This not only jeopardises the contract but is in danger of incurring reputational damage to DePaul."* This became an action point in the Claimant's next supervision meeting with Ms Harwood on 18 May 2018 (p565): *"Work closely with team to ensure end of quarter stats to London Councils are met & returned on time.*" This email was negative in tone in relation to the Claimant.

174.6. May 2018 (p927): this was an email to all London Managers that was not negative in tone. It just asked them to arrive early to a meeting.

174.7. May 2018 (p941): this email regards the JESS process. It is matter of fact and does not have a negative tone.

174.8. July 2017 (900); a business like email to the Claimant and others about not giving away food from the café; rather recharging it to Alone in London/Nightstop. The email is not rude or in a negative tone.

Lack of praise and support for the Claimant?

175. The Claimant complains that there was a lack of praise or support for her. The evidence shows that she was praised and supported and we collect some examples here.

176. On 18 August 2016 Ms Hargrove sent an email to senior management stating

> *Yvonne's team have been supporting a young person….the London team worked with her to devise a revision timetable mapping out her weeks….they then found her a host she could stay with….and they have just heard today that she got the grades she needed to get into uni. Fantastic result. Yvonne is far too modest to share this phenomenal piece of work, but I couldn't resist sharing it with you all given the fantastic work that has gone into supporting this young woman. Absolutely brilliant work Yvonne!".*

177. This drew further praise from then CEO and from Ms Murphy.

178. Ms Hargrove applied to be a volunteer and volunteer host of night stop. She was trained and supported by the claimant and the team whilst hosting. This was indirect praise for the Claimant in that she was happy to be trained by her and her team.

179. On 22 January 2018, Ms Harwood sent an email praising the claimant stating *"YJ led a successful team awayday which sounded very positive and was a great initiative… This demonstrates a strong team Yvonne leads on how collaborative they are with one another."*

180. In a supervision meeting between the claimant and Ms Harwood in May 2018 there was discussion of next steps for the team the notes of the meeting record *"this was an opportunity to review the team structure and ensure we had everything needed in place we explore the possibility of having a senior in the team to reduce the workload and direct reports for why J to allow further focus on development of night stop in alone in London. YJ stated that she felt having a senior would undermine her".* This shows considerable support for the Claimant and her reaction to the offer of a senior in her team, who would work under her, was surprising.

181. In July 2018 the claimant asked if she could be part of a equality, diversity and investment group which was a working group of staff to support the ongoing EDI strategy. Ms Harwood supported this request and ensured that the claimant had time to do it.

182. In August 2018 in an individual development plan meeting, Ms Harwood praised the claimant stating: *a real highlight for Yvonne watching the team develop and grow… Delivering a great service for young people via Nightstop and alone in London… Another key highlight… Has been overseeing significant changes in delivery of night stop service in London… Nightstop team is very strong and they are real assets of the organisation which is indicative of Yvonne's management of them".*

Further background findings

183. At Executive Level and at Board of Trustee level at all material times almost all of the staff/office holders were white. Women, including older women, were much better represented.

184. In 2018, there were 38 managers above the Service Manager level, of which three were recorded as being from BAME backgrounds. However, 15 were undeclared so the statistics are not very meaningful.

185. In 2018, at Service Manager level there were seven managers in London, of which four were from a BAME background. Five were women and two were men. There are now 10 service level managers in London of which 3 are of a BAME background, four are from white backgrounds and three are undeclared.

186. Upon the Claimant's resignation, her role was initially covered by a black female member of staff on a fixed term contract. She declined a permanent contract. The subsequent incumbent of the role was also a black woman.

187. Mr Smith has recruited a "handful" of managers. Of which two were black or BAME.

188. The Claimant places emphasis in particular on the following:

188.1. Stellamaris Mohammed, Head of People and Organisational Development left the Respondent's employment. She was a black woman, however her employment ended.

188.2. Sam Karuhanga, Executive Director of Finance and Resources left the Respondent's employment. He was a black man, however his employment ended.

189. There is no evidence before us that either of those employees raised any complaint of race discrimination in relation to their employment with the Respondent.

190. We accept the Claimant's evidence that over the course of her employment she discussed race with other black colleagues and that she was not alone in believing the Respondent to be a racist organisation. Her evidence is corroborated by the results of the EDI survey which showed that 33 of the 191 respondents to the survey thought they had been treated less favourably at work. Of those 33, 10 identified race as a ground of treatment, 13 identified gender and 12 identified age.

Law

Direct discrimination

191. Section 13 Equality Act 2010, so far as relevant provides:

> *"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."*

192. *Section 23 (1) provides:*

> *"On a comparison of cases for the purposes of section 13, … or 19 there must be no material difference between the circumstances relating to each case."*

193. The phrase 'because of' has been the subject of a significant amount of case-law. In ***Page v NHS,*** Underhill LJ said this:

> *29. There is a good deal of case-law about the effect of the term "because" (and the terminology of the pre-2010 legislation, which referred to "grounds" or "reason" but which connotes the same test). What it refers to is "the reason why" the putative discriminator or victimiser acted in the way complained of, in the sense (in a case of the present kind) of the "mental processes" that caused them to act. The line of cases begins with the speech of Lord Nicholls in Nagarajan v London Regional Transport [2000] 1 AC 501 and includes the reasoning of the majority in the Supreme Court in R (E) v Governing Body of the JFS ("the Jewish Free School case") [2009] UKSC 15, [2010] 2 AC 728. The cases make it clear that although the relevant mental processes are sometimes referred to as what "motivates" the putative discriminator they do not include their*

"motive", which it has been clear since James v Eastleigh Borough Council [1990] UKHL 6, [1990] 2 AC 751, is an irrelevant consideration: I say a little more about those terms at paras. 69-70 of my judgment in the magistracy appeal, and I need not repeat it here.

194. In ***Page v Lord Chancellor*** [2021] ICR 912, Underhill LJ said this:

69. … is indeed well established that, as he puts it, "a benign motive for detrimental treatment is no defence to a claim for direct discrimination or victimisation": the locus classicus is the decision of the House of Lords in James v Eastleigh Borough Council [1990] ICR 554; [1990] 2 AC 751 . But the case law also makes clear that in this context "motivation" may be used in a different sense from "motive" and connotes the relevant "mental processes of the alleged discriminator" (Nagarajan v London Regional Transport [1999] ICR 877 , 884F). I need only refer to two cases:

(1) The first is, again, Martin v Devonshires Solicitors [2011] ICR 352 . There was in that case a distinct issue relating to the nature of the causation inquiry involved in a victimisation claim. At para 35 I said: "It was well established long before the decision in the JFS case that it is necessary to make a distinction between two kinds of 'mental process' (to use Lord Nicholls' phrase in Nagarajan v London Regional Transport [1999] ICR 877 , 884F)—one of which may be relevant in considering the 'grounds' of, or reason for, an allegedly discriminatory act, and the other of which is not." I then quoted paras 61–64 from the judgment of Baroness Hale of Richmond JSC in the Jewish Free School case and continued, at para 36: "The distinction is real, but it has proved difficult to find an unambiguous way of expressing it … At one point in Nagarajan v London Regional Transport [1999] ICR 877 , 885E–F, Lord Nicholls described the mental processes which were, in the relevant sense, the reason why the putative discriminator acted in the way complained of as his 'motivation'. We adopted that term in Amnesty International v Ahmed [2009] ICR 1450 , explicitly contrasting it with 'motive': see para 35. Lord Clarke uses it in the same sense in his judgment in the JFS case [2010] 2 AC 728, paras 137–138 and 145 . But we note that Lord Kerr uses 'motivation' as synonymous with 'motive'—see para 113—and Lord Mance uses it in what may be a different sense again at the end of para 78. It is evident that the contrasting use of 'motive' and 'motivation' may not reliably convey the distinctions involved—though we must confess that we still find it useful and will continue to employ it in this judgment …"

(2) The second case is Reynolds v CLFIS (UK) Ltd [2015] ICR 1010 . At para 11 of my judgment I said:

"As regards direct discrimination, it is now well established that a person may be less favourably treated 'on the grounds of' a protected characteristic either if the act complained of is inherently discriminatory (e g the imposition of an age limit) or if the characteristic in question influenced the 'mental processes' of the putative discriminator, whether consciously or unconsciously, to any significant extent: … The classic

exposition of the second kind of direct discrimination is in the speech of Lord Nicholls of Birkenhead in Nagarajan v London Regional Transport [1999] ICR 877 , which was endorsed by the majority in the Supreme Court in R (E) v Governing Body of JFS [2010] 2 AC 728 . Terminology can be tricky in this area. At p 885E Lord Nicholls uses the terminology of the discriminator being 'motivated' by the protected characteristic, and with some hesitation (because of the risk of confusion between 'motivation' and 'motive'), I will for want of a satisfactory alternative sometimes do the same."

70. As I acknowledge in both those cases, it is not ideal that two such similar words are used in such different senses, but the passages quoted are sufficient to show that the distinction is well known to employment lawyers, and I am quite sure that when Choudhury J (President) used the term "motivation" he did not mean "motive".

195. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337 at [11-12], Lord Nicholls said:

'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.

The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'

196. Since ***Shamoon***, the appellate courts have broadly encouraged Tribunals to address both stages of the statutory test by considering the single 'reason why' question: was it on the proscribed ground, or was it for some other reason? Underhill J summarised this line of authority in ***Martin v Devonshire's Solicitors*** [2011] ICR 352 at [30]:

'Elias J (President) in Islington London Borough Council v Ladele (Liberty intervening) [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential, and indeed doubting the value of the exercise for that purpose in most cases-see at paras 35–37. Other cases in this Tribunal have repeated these messages- see, e.g., D'Silva v NATFHE

[2008] IRLR 412, para 30 and City of Edinburgh v Dickson (unreported), 2 December 2009 , para 37; though there seems so far to have been little impact on the hold that "the hypothetical comparator" appears to have on the imaginations of practitioners and Tribunals.'

197. Where A is the ultimate decision-maker but has been influenced by others, when assessing 'the reason why', it is the mental processes of the decision maker that are relevant ***(CLFIS (UK) Ltd v Reynolds*** [2015] ICR 1010). However, the ***Reynolds*** decision should not be allowed to become a means of "escaping liability by deliberately opaque decision-making which masks the identity of the true discriminator" (***The Commissioner of Police of the Metropolis v Denby*** (UKEAT/0314/16/RN)).

198. The circumstances in which it is unlawful to discriminate against an employee are, so far as relevant, set out in s.39 EqA. In that regard something will constitute a 'detriment' where a reasonable person would or might take the view that the act or omission in question gave rise to some disadvantage (see ***Shamoon v Chief Constable of the RUC*** [2003] IRLR 285, §31-35 per Lord Hope). There is an objective element to this test. For a matter to be a detriment it must be something which a person might reasonably regard as detrimental.

Harassment

199. Section 26 EQA 2010 provides:

> (1) A *person (A) harasses another (B) if –*
> *(a) A engages in unwanted conduct related to a relevant 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 [for short we will refer to this as a "proscribed environment"].*
> *…*
> *(4) In deciding whether conduct has the purpose or 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."

200. The meaning of 'related to' is distinct from and broader than the 'because of' formulation under s.13. It is not, however, to be reduced to a but-for test and it is not enough to point to the relevant characteristic as the mere background to the events. As the Court of Appeal held at §79-80 in ***UNITE the Union v Nailard*** [2019] ICR 28:

> *'… The necessary relationship between the conduct complained of and the claimant's gender was not created simply by the fact that the complaints with which they failed to deal were complaints about sexual harassment — or, in the case of Mr Kavanagh, that part of the situation that led him to decide to transfer the claimant was caused by such harassment.'*

201. In considering whether a remark that is said to amount to harassment is conduct related to the protected characteristic, the Tribunal has to ask itself whether, objectively, the remark relates to the protected characteristic. The knowledge or perception by the person said to have made the remark of the alleged victim's protected characteristic is relevant to the question of whether the conduct relates to the protected characteristic but is not in any way conclusive. The Tribunal should look at the evidence in the round (per HHJ Richardson in ***Hartley v Foreign and Commonwealth Office Services*** UKEAT/0033/15/LA at [24-2].)

202. In considering whether the conduct is related to the protected characteristic, the Tribunal must focus on the conduct of the individuals concerned and ask whether their conduct is related to the protected characteristic (***Unite the Union v Nailard*** [2018] IRLR 730 at [80]).

203. In ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam*** [2020] IRLR 495 HHJ Auerbach gave further guidance:

> *[21] Thirdly, although in many cases, the characteristic relied upon will be possessed by the complainant, this is not a necessary ingredient. The conduct must merely be found (properly) to relate to the characteristic itself. The most obvious example would be a case in which explicit language is used, which is intrinsically and overtly related to the characteristic relied upon. Fourthly, whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative.*
>
> *[24] However, as the passages in Nailard that we have cited make clear, the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Ms Millns confirmed in the course of oral argument that that proposition of law was not in dispute.*
>
> *[25] Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be.*

204. In ***Weeks v Newham College of Further Education*** UKEAT/0630/11/ZT, Langstaff J said this at [21]:

> *"An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff-room concerned. We cannot say that the frequency of use of such words is irrelevant."*

205. In ***Richmond Pharmacology v Dhaliwal*** [2009] IRLR 336 (at ¶15), Underhill J (as he was) said:

> 15…*A Respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That…creates an objective standard….Whether it was reasonable for a Claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt."*
>
> *22…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…"*

206. In ***Grant v Land Registry*** [2011] IRLR 748, Elias LJ said at para 47:

> *"Furthermore, even if in fact the disclosure was unwanted, and the claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of those words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The Claimant was no doubt upset that he could not release the information in his own way, but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the tribunal did as subjecting the claimant to a 'humiliating environment' when he heard of it some months later is a distortion of language which brings discrimination law into disrepute."*

207. A finding that it is not objectively reasonable to regard the conduct as harassing is fatal to a complaint of harassment. That point may not be crystal clear on the

face of s.26 Equality Act 2010 but see the *obita dicta* of Underhill LJ in ***Pemberton v Inwood*** [2018] IRLR 557 at [88] and the ratio of ***Ahmed v The Cardinal Hume Academies***, unreported EAT Appeal No. UKEAT/0196/18/RN in which Choudhury J held that ***Pemberton*** indeed correctly stated the law [39].

Time limits in discrimination law

208. S.123(1)(a) EqA provides that a claim must be brought within three months, starting with the date of the act to which the complaint relates.

209. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated, and ending with the day of the ACAS certificate, does not count (s.140B(3) EqA). If the ordinary time limit would expire during the period beginning with the date on which the employee contacts ACAS, and ending one month after the day of the ACAS certificate, then the time limit is extended, so that it expires one month after the day of the ACAS certificate (s.140B(4) EqA).

210. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. In ***Hendricks v Commissioner of Police of the Metropolis*** [2003] ICR 530, the Court of Appeal held that Tribunals should not take too literal an approach: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs, in which an employee was treated in a discriminatory manner.

211. S.123(1)(b) EqA provides that the Tribunal may extend the three-month limitation period, where it considers it just and equitable to do so. That is a very broad discretion. In exercising it, the Tribunal should have regard to all the relevant circumstances, which may include factors such as: the reason for the delay; whether the Claimant was aware of his right to claim and/or of the time limits; whether he acted promptly when he became aware of his rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] ICR 1194).

The burden of proof

212. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> (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.

213. The effect of these provisions was summarised by Underhill LJ in ***Base Childrenswear Ltd v Otshudi*** [2019] EWCA Civ 1648 at [18]:

> *'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:*
>
> *(1) At the first stage the Claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):*
>
> *"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 a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.*
> *57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"*
>
> *(2) If the Claimant proves a prima facie case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues: "He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim." He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'*

214. In ***Deman v Commission for Equality and Human Rights*** [2010] EWCA Civ 1279, Sedley LJ observed at [19]: *'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'*

215. In ***Hewage v Grampian Health Board*** [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

216. The Court of Appeal in ***Anya v University of Oxford*** [2001] ICR 847 at [2, 9 and 11] held that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he

relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

Constructive dismissal

217. The essential elements of constructive dismissal were identified in ***Western Excavating v Sharp*** [1978] IRLR 27 as follows:

> *"There must be a breach of contract by the employer. The breach must be sufficiently important to justify the employee resigning. The employee must resign in response to the breach. The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach in terms to vary the contract".*

218. It is an implied term of the contract of employment that: *"The employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"* (***Malik v BCCI*** [1997] IRLR 462).

219. It is for the tribunal to decide whether or not a breach of contract is sufficiently serious to amount to a repudiatory breach. However, a breach of the implied term of trust and confidence is inevitably a repudiatory breach of contract. Whether conduct is sufficiently serious to amount to a breach of the implied term is a matter for the employment tribunal to determine having heard all the evidence and considered all the circumstances: ***Morrow v Safeway Stores*** [2002] IRLR 9.

220. The core issue to determine when considering a constructive dismissal claim was summarised by the Court of Appeal in ***Tullett Prebon Plc v BGC Brokers LP*** [2013] IRLR 420 as follows:

> *19. … The question whether or not there has been a repudiatory breach of the duty of trust and confidence is "a question of fact for the tribunal of fact": Woods v WM Car Services (Peterborough) Limited, [1982] ICR 693 , at page 698F, per Lord Denning MR, who added: "The circumstances … are so infinitely various that there can be, and is, no rule of law saying what circumstances justify*
> *and what do not" (ibid).*
>
> *20. In other words, it is a highly context-specific question. It also falls to be analysed by reference to a legal matrix which, as I shall shortly demonstrate, is less rigid than the one for which Mr Hochhauser contends. At this stage, I simply refer to the words of Etherton LJ in the recent case of Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168 (at paragraph 61): "…the legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."*

221. The implied term can be breached by a single act by the employer or by the combination of two or more acts: ***Lewis v Motorworld Garages Ltd*** [1985] IRLR 465.

222. Breach of the implied term must be judged objectively not subjectively. The question is not whether, from either party's subjective point of view, trust and confidence has been destroyed or seriously undermined, but whether objectively it has been. See e.g. ***Leeds Dental Team v Rose*** [2014] IRLR [25] and the authorities cited therein.

223. In ***Amnesty International v Ahmed*** [2009] IRLR 884, Underhill J gave importance guidance on the relationship between discrimination and constructive dismissal:

> *…The provisions of the various anti-discrimination statutes and regulations constitute self-contained regimes, and in our view it is wrong in principle to treat the question whether an employer has acted in breach of those provisions as determinative of the different question of whether he has committed a repudiatory breach of contract. Of course in many if not most cases conduct which is proscribed under the anti-discrimination legislation will be of such a character that it will also give rise to a breach of the trust and confidence term; but it will not automatically be so. The question which the tribunal must assess in each case is whether the actual conduct in question, irrespective of whether it constitutes unlawful discrimination, is a breach of the term defined in* Malik*. Our view on this point is consistent with that expressed in two recent decisions of this tribunal which consider whether an employee is entitled to claim constructive dismissal in response to breaches by the employer of his duty under the Disability Discrimination Act 1995: see* Chief Constable of Avon & Somerset Constabulary v Dolan *(UKEAT/0522/07) [2008] All ER (D) 309 (Apr), per Judge Clark at paragraph 41, and* Shaw v CCL Ltd *[2008] IRLR 284, per Judge McMullen QC at paragraph 18.*

224. The employee must resign in response to the breach. Where there are multiple reasons for the resignation the breach must play a part in the resignation. It is not necessary for it to be 'the effective cause' or the predominant cause or similar. See e.g. ***Wright v North Ayrshire Council*** [2014] ICR 77 [18].

225. In ***LB Waltham Forest v Omilaju*** [2005] IRLR 35, the CA guided that, the final straw, viewed in isolation, need not be unreasonable or blameworthy conduct. The mere fact that the alleged final straw is reasonable conduct does not necessarily mean that it is not capable of being a final straw, although it will be an unusual case where conduct which has been judged objectively to be reasonable and justifiable satisfies the final straw test. Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

226. In ***Kaur and Leeds Teaching Hospitals NHS Trust*** [2018] EWCA Civ 978 [2019] ICR 1 the Court of Appeal suggested the following approach:

226.1. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
226.2. Has he or she affirmed the contract since that act?
226.3. If not, was that act (or omission) by itself a repudiatory breach of contract?
226.4. If not, was it nevertheless a part…of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term?
226.5. Did the employee resign in response (or partly in response) to that breach?

227. In ***Chindove v William Morrisons Supermarket PLC*** UKEAT/0043/14/BA, Langstaff P said this in relation to affirmation:

24. Had there been a considered approach to the law, it would have begun, no doubt, with setting out either the principles or the name of Western Excavating Ltd v Sharp [1978] 1 QB 761 CA. At page 769 C-D Lord Denning MR, having explained the nature of constructive dismissal, set out the significance of delay in words which we will quote in a moment. But first must recognise are set out within a context. The context is this. There are two parties to an employment contract. If one, in this case the employer, behaves in a way which shows that it "altogether abandons and refuses to perform the contract", using the most modern formulation of the test, in other words that it will no longer observe its side of the bargain, the employee is left with a choice. He may accept that because the employer is not going to stick to his side of the bargain he, the employee, does not have to do so to his side. If he chooses not to do so, then he will leave employment by resignation, exercising his right to treat himself as discharged. But he may choose instead to go on and to hold his employer to the contract notwithstanding that the employer has indicated he means to break it. The employer remains contractually bound, but in this second scenario, so also does the employee. In that context, Lord Denning MR said this:

"Moreover, he [the employee] must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

25. This may have been interpreted as meaning that the passage of time in itself is sufficient for the employee to lose any right to resign. If so, the question might arise what length of time is sufficient? The lay members tell me that there may be an idea in circulation that four weeks is the watershed date. We wish to emphasise that the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by continuing to work in the job

from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do.

26. He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121 , deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test.

27. An important part of the context is whether the employee was actually at work, so that it could be concluded that he was honouring his contract and continuing to do so in a way which was inconsistent with his deciding to go. Where an employee is sick and not working, that observation has nothing like the same force.

Unfair dismissal

228. By s.94 Employment Rights Act 1996 there is a right not to be unfairly dismissed. That includes a right not be unfairly constructively dismissed (s. 95(1)(c) ERA).

229. There is a limited range of fair reasons for dismissal (s.98 ERA). In a constructive dismissal case, the reason for dismissal is the reason that the employer did whatever it did that repudiated the contract and entitled the employee to resign. See ***Beriman v Delabole*** [1985] IRLR 305 [12 – 13].

230. In ***Buckland***, the Court of Appeal gave guidance as to the stages of the analysis in a constructive dismissal claim: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished ***Malik*** test applies; (ii) if acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) it is open to the

employer to show that such dismissal was for a potentially fair reason; and (iv) if he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally, fell within the range of reasonable responses and was fair.

231. It is for the employer to show the reason for the dismissal and that the reason was a potentially fair one. Conduct is a potentially fair reason. The test of fairness is at s.98(4), in relation to which the burden of proof is neutral.

> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)*
> *(a) depends on whether in the circumstances (including the size and administrative*
> *resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

232. In ***BHS v Burchell*** [1980] ICR 303, the EAT gave well known guidance as to the principal considerations when assessing the fairness of a dismissal purportedly by reason of conduct. There must be a genuine belief that the employee did the alleged misconduct, that must be the reason or principal reason for the dismissal, the belief must be a reasonable one, and one based upon a reasonable investigation.

233. The ***Burchell*** guidance is not comprehensive, however, and there are wider considerations to have regard to in many cases. For instance, the severity of the sanction in light of the offence and mitigation are important considerations.

234. In ***Iceland Frozen Foods v Jones*** [1982] IRLR 439, the EAT held that the tribunal must not simply consider whether it personally thinks that a dismissal was fair and must not substitute its decision as to the right course to adopt for that of the employer. The tribunal's proper function is to consider whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

235. The range of reasonable responses test applies to all aspects of dismissal. In ***Sainsbury's v Hitt*** [2003] IRLR 23, the Court of Appeal emphasised the importance of that test and that it applies to all aspects of dismissal, including the procedure adopted.

Discussion and conclusions

236. After making our findings of fact we stepped back from them and looked at them in the round before we decided the complaints on the list of issues. This proved to be a case in which we were able to make positive findings in all issues rather than having to rely upon the burden of proof.

237. All of the complaints set out below are allegations of direct discrimination. Five of them are concurrently complaints of harassment related to race. Where a complaint is both of direct discrimination and harassment we consider it from both of those perspectives.

Failing to show an interest in the Nightstop service from October 2013 (Alexia Murphy and Brian Smith)

238. This allegation fails on the facts.

239. Nightstop was, and was regarded as, one of the Respondent's flagship services (our words and interpretation of the evidence). It attracted a lot of attention. It won a Mayor of London Award which Mr Smith celebrated with the team (save for the Claimant because she was in Jamaica). It was the subject of a documentary on *More4* and generally there was (rightly) a lot of kudos around it in the First Respondent.

240. We think Nightstop London is something that Mr Smith wanted to and did associate himself with as Area Director for London and the South. He was not involved in the day to day running or management of Nightstop but it was not his job to be.

241. The Respondent's commitment to Nightstop grew significantly between 2013 and the termination of the Claimant's employment. This was under Ms Murphy's leadership. She was instrumental in a restructure that saw her take responsibility for it at Executive Level it previously having rested with the CEO.

242. Ms Harwood headed Nightstop nationally. She herself volunteered as a community host. She line managed the Claimant carefully including in relation to Nightstop.

243. In short, there was not a failure to show an interest in Nightstop.

The Claimant's exclusion from attending strategic meetings as from September 2016 (Brian Smith)

244. The Claimant was excluded from meetings of the steering group which were strategic meetings. The reason for her exclusion is that those particular meetings were for people operating at Director Level and above. They were not for operational level managers such as herself. The tender documentation shows this and leaves no room for another or a further explanation.

245. There were operational meetings which the Claimant continued to attend. These also involved elements of strategy and strategic thinking.

246. We reject the Claimant's case that she was excluded from meetings because Mr Smith thought that as a black person she could not think strategically. He did not think that and it was not the reason she was excluded from the meetings.

Failing to respect the Claimant's position, skills or achievements from October 2013 (Brian Smith and Nicola Harwood)

247. This is one of the general allegations which at the outset of the hearing the Claimant stated was particularised by the other matters in the list of issues that are particularised. The complaint fails since all of the particularised complaints fail.

The Claimant being subjected to undermining treatment from 2014 (Alexia Murphy and Brian Smith

248. This is one of the general allegations which at the outset of the hearing the Claimant stated was particularised by the other matters in the list of issues that are particularised.

Comments and observations being made to the effect that the Claimant was incapable of her job in April 2014 (Brian Smith) Nicola Harwood 2019

249. This allegation relates to the Claimant's interim probationary meeting in April 2014 (Mr Smith) and to being placed on a PIP in 2019 (Ms Harwood).

250. In relation to the interim probation meeting:

    250.1. We agree that Mr Smith was commenting and observing to the effect that the Claimant was incapable of her job. He said that there was a real risk that she might fail her probation as a result.
    250.2. The Claimant believes that Mr Smith was, in effect, a white supremacist. She believes that Mr Smith regarded himself as superior to her and other black people because he was white. She believes this explains his assessment of her.
    250.3. We do not accept that Mr Smith had white supremacist views. There is no proper evidential basis for it at all and we think it is totally implausible that he had such views having considered all of the evidence including his.
    250.4. What we have found more difficult to discern is whether there was an element of sub-conscious race discrimination on Mr Smith's part. On balance we do not think that there was.
    250.5. We think the reason for the treatment was that Mr Smith genuinely had concerns about the Claimant's performance. We found his evidence about this credible. We tested it against the wider evidence in the case and think it stands scrutiny. There was a proper basis for him to have some performance concerns. These are set out

intelligibly and with some cogency in the notes he made for that meeting.

251. In relation to the PIP:

251.1. Ms Harwood did not comment or make observations to the effect that the Claimant was incapable of doing her job. In fact she was careful to say quite the opposite thing: that she expected the Claimant to succeed in the PIP.
251.2. That said, the very fact of being put on the PIP implied that there was an issue with under-performance but it was much more gentle than suggesting the Claimant was incapable of doing her job.
251.3. We think that the reason Ms Harwood put the Claimant on a PIP was that she had concerns about the Claimant's performance which were of longstanding and had not resolved through the ordinary supervision process. These concerns related to achieving targets set by LYG contract. There is a specific issue in relation to the PIP were we give some further reasoning which we rely upon also here (see below).

252. We do not think that the Claimant was treated less favourably than a hypothetical comparator would have been nor that protected characteristics were relevant in any way to her treatment.

Conspiring to have the Claimant removed as the Nightstop manager in April 2014 (Brian Smith)

253. Technically a conspiracy must involve at least two people but only one person is impugned here. We should not stand on that technicality but should simply assess whether Mr Smith wanted to remove the Claimant as Nightstop manager in April 2014.

254. As set out in our findings of fact, Mr Smith did want to remove the Claimant as Nightstop manager at this point in time. However, in our view this was not because of any protected characteristic. Rather, for a period of time Mr Smith's assessment was that the Claimant's performance was poor. That is why he was shaping up to fail her probation.

255. The basis of Mr Smith's view that the Clamant was performing poorly was his concerns about budget management, strategic planning, standards of report writing and information sharing. Those concerns were expressed with reasonable cogency in the notes he made in preparation for the probation meeting and corroborate the evidence he gave to the tribunal which we found credible on this point.

256. We were also ourselves able to see the *National Designated Officer Safeguarding Referral Form* which had formed part of the basis of Mr Smith's assessment. Our assessment was that the corrections he made to the form were

reasonable and that his criticism that there was an overall lack of direction or recommendation in the narrative fair. This also corroborated the veracity of Mr Smith's evidence.

257. We do not think that the Claimant was treated less favourably than a hypothetical comparator would have been nor that protected characteristics were relevant in any way to her treatment.

Unnecessary criticism of a Safeguarding report prepared by the Claimant in April 2014 (Brian Smith).

258. We repeat what we have already said about this matter.

Commenting that a particular young white woman should have received the Claimant's position from 2014 (Brian Smith)

259. Our findings of fact are that Mr Smith did not make such a comment. Nor did he want the particular white woman in issue, Isabel, to have the Claimant's job. Nor did he want the Claimant, more generally, to be replaced by a white woman or indeed white man.

Time spent seeking to undermine perceptions as to the Claimant's ability to carry out duties since 2014 (Brian Smith)

260. This is one of the general allegations which at the outset of the hearing the Claimant stated was particularised by the other matters in the list of issues that are particularised.

261. This complaint is presented as both a complaint of direct discrimination and harassment. For the avoidance of doubt, we do not accept that any of Mr Smith's conduct, save for the 'white man in a suit' comment was because of or related to any protected characteristic. We explain below why the 'white man in a suit' comment was neither discrimination nor harassment.

The Claimant receiving no supervision or support meetings from 2014 (Brian Smith)

262. It is true that the Claimant did not receive any formal supervision from Mr Smith from 2014. She did however have informal meetings with him as required which meet the description of what is meant by 'support meeting'.

263. We do not think the Claimant was treated less favourably here than Mr Smith's other reports, nor than a hypothetical comparator would have been. Mr Smith overlooked formal supervision of all of his reports in a similar way.

264. The reason for the lack of formal supervision was, we are satisfied, Mr Smith's workload and the fact that he was overloaded both with work generally and with line management reports. It is notable that this is something that Ms Murphy

noticed and remedied in the 2017 restructure. She found a further line manager for the Claimant, in Ms Harwood, who had fewer reports and was much more careful and diligent with line management.

Abruptly getting angry at the Claimant during a HTF meeting with agency leads about underspend (Brian Smith); 10th April 2014

265. This allegation fails on our findings of fact.

A failing to show the Alone in London team any acknowledgement or support (Brian Smith and Alexia Murphy)

266. This allegation relates specially to Ms Murphy and Mr Smith's failure to attend the meeting that was arranged to showcase Alone in London.

267. As set out in our findings of fact the reason that they did not attend this meeting was in both of their cases that they were too busy with other commitments. They simply could not attend every worthwhile meeting. The Claimant repeatedly made the point that the CEO attended and therefore in her view that Ms Murphy and Mr Smith should have. We do not accept that if follows from the fact that the CEO was able to make time for the meeting that Ms Murphy and Mr Smith could and/or should have.

268. We think it wholly implausible that the non-attendance was anything to with race or any other protected characteristic. The Claimant noted that the Alone in London team were ethnically diverse. We do not think that either Mr Smith or Ms Murphy would avoid work colleagues because of race or any protected characteristic.

Brian Smith suggesting that people had disagreements with him because he was a 'white man in a suit'

269. This is presented as both a complaint of direct discrimination and harassment related to race.

270. As a complaint of direct discrimination it must plainly fail. Mr Smith did not with respect to this incident treat the Claimant less favourably than anyone else. He made the comment openly at the meeting to be heard by people of all races, genders and ages who were present. He thus treated everyone in the same way as regards the making of this self-referential comment.

271. As a complaint of harassment, however, the matter is much less clear-cut.

272. We are satisfied that the conduct was unwanted by the Claimant (and indeed others). The comment did relate to race, it referred to Mr Smith's own race in terms.

273. The Claimant found the comment offensive and perceived it to create an offensive environment. We of course take that into account. However, in our view in all the circumstances of the case, it would not be reasonable to regard it as creating a proscribed environment or violating the Claimant's dignity:

273.1. The purpose of the comment was to try and gain the upper hand in what had become an argument. The purpose of a comment is relevant among other things to the assessment of what effects it may reasonably be considered to have;
273.2. The comment was factually true;
273.3. The comment did refer to race but it was a description by Mr Smith of his own race;
273.4. The words were spoken in the heat of the moment;
273.5. If the meaning that the Claimant attributes to the comment - an expression of racial superiority and white supremacy – were correct it would obviously meet the thresholds of harassment. However, that is not what Mr Smith meant and that was not a reasonable interpretation of what he had said. The words he used simply do not connote the meaning the Claimant ascribes to them;
273.6. We do accept that the comment was not wholly benign and Mr Smith was a bit rude in making it. He was rather parodying the arguments others were making about why young people were uncomfortable in the café to try and get the upper hand in the argument;
273.7. Overall, the comment fell into the bracket that Underhill J (as he was) spoke of in *Dhaliwal* of being an unfortunate phrase that was below the threshold required for legal liability to attach. This is another way of saying that it would not be reasonable to consider the comment to have created an offensive (or otherwise proscribed) environment or to have violated the Claimant's dignity.

Brian Smith failing to apologise for his outburst about being a 'white man in a suit'

274. There are in fact two complaints under this heading: that Mr Smith did not apologise to the Claimant/generally for his conduct at the meeting and that he did apologise to one person, a white person, Gemma.

275. It is our finding of fact that Mr Smith did not apologise for making the 'white man in a suit comment". He did apologise to one person, Gemma, that the meeting had been awkward but he did not apologise for the comment itself.

276. The reason Mr Smith did not apologise for the comment itself was because he did not accept he had done anything wrong. It was not because of race. The reason he offered the apology he did to Gemma but not to others is that she came and spoke to him and told him that she had found the meeting awkward. It was not because of race.

277. We do not think that the Claimant was treated less favourably than a hypothetical comparator would have been nor that protected characteristics were relevant in any way to her treatment.

278. Turning to harassment: we do not think the lack of an apology for the comment was related to race either. There is some distinction between the original comment itself and the omission to apologise for it. The omission to apologise was not related to race; it was simply the case that Mr Smith did not think he had said anything wrong so he did not volunteer anyone an apology.

279. We do not think that the omission to apologise, in all the circumstances of the case, including what is reasonable, created a proscribed environment or violated the Claimant's dignity. We repeat essentially the same factors that we did when dealing with the comment itself (save that we delete the reference to the heat of the moment).

280. We do not think that offering an apology for the awkwardness of the meeting to Gemma was in any way related to race. It was offered to her and not others because she is the only person who came to Mr Smith and said she had found the meeting awkward. In all the circumstances, including what is reasonable, this did not create a proscribed environment or violate the Claimant's dignity.

Alexia Murphy in or around November 2018 at a monthly staff meeting/conference attended by the Claimant made an offensive comment namely 'ginger lives matter'

281. Ms Murphy did make this comment. She said it whilst on stage at the annual staff conference. She said it to everyone who was present and they were of all races, ages and genders. The complaint of direct discrimination therefore fails. The Claimant was treated in exactly the same way as everyone else and there was no less favourable treatment.

282. However, much more difficult is the complaint that this comment was harassment related to race.

283. There is no doubt that the comment was unwanted conduct on the Claimant's part. We are also satisfied that the comment was related to race. The phrase 'Ginger Lives Matter' in our view is a deliberate play on words of Black Lives Matter. Black Lives Matter in turn is inherently related to and about race.

284. We are sure that the Claimant was offended by the comment and perceived it to create an offensive environment. She was not alone in this and some other employees that heard it were also offended.

285. However, in all the circumstances of the case, including in particular what is objectively reasonable, we do not think that this comment created an offensive or otherwise proscribed *environment* nor violated the Claimant's dignity. In approaching this we remind ourselves of what Langstaff J said in *Weeks*:

"An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff-room concerned. We cannot say that the frequency of use of such words is irrelevant."

286. Our reasoning is as follows:

286.1.1. The purpose of the comment was certainly not to cause offence. Its purpose was to fill some time while the technology for the PowerPoint presentation was sorted out. The purpose of a comment is relevant among other things to the effect it reasonably has.

286.1.2. Ms Murphy was in a tight and embarrassing spot. She was feeling uncomfortable and the comment was not the product, and was obviously not the product, of any considered thought. These circumstances would have been apparent to the audience.

286.1.3. The Claimant interpreted Ms Murphy to be in some way belittling the importance of black people's lives.

286.1.4. However, we do not think that this is a fair or reasonable interpretation of what Ms Murphy said. She was making an off the cuff remark in which she repeated what someone else had said in their survey response. It was insensitive because it used the expression Black Lives Matter in a wordplay. But it did not, objectively speaking, have the meaning the Claimant understood it to.

286.1.5. Ms Murphy had never made the impugned comment before and never made it again. Nor was the comment of a piece with anything she had previously said or subsequently said. It was a complete one-off.

286.1.6. Ms Murphy was a champion of diversity in the workplace and was responsible for a variety of diversity initiatives including the EDI survey from which the comment was drawn.

286.1.7. Ms Murphy apologised to Ms Morris for the comment after it was raised in the next EDI meeting.

286.1.8. In our view, overall, this was a comment that was apt to cause a degree of offence. However, when the words are properly set in context, we think any offence could only reasonably be ephemeral in nature. In other words we do not think it would be reasonable to regard this comment as creating an offensive *environment* in the sense explained in *Weeks.*

287. We do take into account the fact that this incident occurred after the 'white man in a suit' comment. However, on the fact, we do not think that is significant. The comment Mr Smith made did not aggravate or contribute or combine in some way with the comment Ms Murphy made to create an offensive environment (or otherwise meet the test of harassment). The two comments were completely

unrelated, the circumstances surrounding them were very different and they were over a year apart.

Sending an email over exaggerating an issue with a counsellor and describing this as a safeguarding issue on 26 January 2019 (Brian Smith).

288. In our view, Mr Smith's email did not exaggerate the issues that had arisen with Rupal the trainee counsellor. Rather it was a reasonable account of the issues as they had presented themselves to Mr Smith at that time.

289. We think that there was, properly so called, a safeguarding issue. A trainee had found herself lone-working with an suicidal, previously aggressive client. Alone in London did not have proper on-call arrangements in place. Proper on-call arrangements are vital for a service of this kind in circumstances of this kind for the safety of both the lone-worker and the client.

290. The allegation fails on its facts. It was also, for the avoidance of doubt, not because of any protected characteristic nor was it related to any protected characteristic.

Emailing the Claimant generally in a negative tone (Brian Smith).

291. In our finding of fact we identified the emails which the Claimant complains of and which we thought had a negative tone.

292. The task now is to identify why those emails with a negative tone had that tone.

293. The first email to consider is that of 12 July 2017. This email is about the meeting at Sherbourne House at which Mr Smith made the 'white man in a suit' comment. It is indeed very negative about the Claimant including in tone. Mr Smith is critical of the Claimant including her body language and tone at the meeting.

294. In our view, the Claimant was disgusted with Mr Smith's approach to this meeting. Her reading of what he was saying is that he was asserting racial superiority over black colleagues, expressing white supremacist views. There is every likelihood that this manifested itself in the Claimant's body language and in her tone when she did speak. We think this, combined with her forceful and direct communication style, explain Mr Smith's perception of her at that meeting. We also think that, Mr Smith was feeling sensitive about the meeting since it had descended into an argument in which he had been the focus of attention and in the minority. We was looking to defend himself by going on the offensive against the Claimant.

295. The email of 21 July 2017 is simply a follow up of the email of 12 July 2017 and has the same explanation.

296. The email of 11 January 2018, is written in a moderate way. It expresses a concern as to whether the Claimant was providing the necessary data to the coordinator of the LYG contract. Mr Smith wrote this email because there was genuinely this concern. This became the subject of a sensible action point in the Claimant's formal supervision with Ms Harwood.

297. The email of 20 April 2018, is written in a negative tone and again raises concerns about data provision to the LYG contract. The concerns Mr Smith raises have their origins in concerns raised by the coordinator of the LYG contract. Mr Smith does refer to potential reputational damage in his email. He explained in his email how that reputational damage could arise, and we agree that a failure to deliver against the contract and to make returns to the lead partner on the contract could result in reputational damage. The email conveys that the matter has become urgent and is essentially a call to urgent action. This became the subject of a further sensible action point in supervision between the Claimant and Ms Harwood. We think the reason for the negative tone of the email is apparent from its content. The content itself, i.e., the substance of the concerns Mr Smith was raising, reflected the reality of the situation at that time.

298. With regard to the emails, we do not think that the Claimant was treated less favourably than a hypothetical comparator would have been nor that protected characteristics were relevant in any way to her treatment.

Placing the Claimant on a performance management exercise in Jan 2019 (Alexia Murphy, Nicola Harwood and Brian Smith).

299. As set out in our findings of fact, the decision to put the Claimant on a PIP was Ms Harwood's and Ms Harwood's alone. She did tell Ms Murphy that she would be doing it, but it was nonetheless solely her decision.

300. In our view, the reasons for placing the Claimant on a PIP were the ones that Ms Harwood has given. Essentially:

    300.1. The Claimant was consistently behind with some targets on the LYG contract;
    300.2. Over the course of 2018 this had been noted consistently in formal supervision;
    300.3. Formalising the matter to a PIP was a step taken to try and better meet the LYG targets.

301. The Claimant was treated differently to other prevention managers in that there were other prevention managers who were behind with targets but who were not put on PIP. We think then that the Claimant was treated more harshly.

302. However, we accept the explanation for this difference of treatment is the one that Ms Harwood gave. Namely that the LYG contract was sustained by statutory funding which attracts a far higher level of scrutiny from the funders. There is less flexibility, less latitude and less forgiveness for missing targets compared to other contracts with non-statutory funding. We have ourselves seen some of the reporting requirements on the LYG contract and they were indeed very detailed and rigid. This in turn is why Ms Harwood took a stiffer line with the Claimant than her peers who were behind target in relation to contracts with non-statutory funding.

303. All of that said, we certainly understand why from the Claimant's perspective it felt harsh to be placed on the PIP. It came rather out of the blue as our findings of fact explain, she was not sent the performance management policy in advance of the meeting and was not given the opportunity to agree/disagree the targets before they were set. There are all points of concern that give rise to a suspicion that something untoward may have been afoot.

304. These concerns combine with the fact that there were several processes around this time that were in some ways adverse to the Claimant: the PIP, the audit of Alone in London, the Client H issues and the lone-worker/on-call issues. Certainly there is a basis for suspicion there was an underlying effort to manoeuvre the Claimant out of the business through dismissal or otherwise. However, ultimately we think that there is a benign explanation for each of those processes and thus the fact that they each happened over the course of a relatively short time period is mere happenstance.

305. In relation to the PIP, we think the contemporaneous correspondence between Ms Harwood and HR shows that Ms Harwood genuinely hoped and expected the Claimant to meet the targets that she was set. It is implausible that the Ms Harwood would have written to Ms Burns in the following terms on 24 January 2019 if the real purpose of the PIP was an improper one such as to trip the Claimant up/secure her dismissal:

> *I had a very positive meeting with Yvonne on Tuesday afternoon about her performance. She came to the meeting with a great deal of suggestions as to how to improve her performance, and has had frank conversations with her team about her expectations for this quarter. Good to see her start taking ownership of it.*

306. We also think, for the reasons given in our findings of fact, the targets in the PIP were not unreasonable.

307. Although this was not an easy issue to decide we ultimately conclude that the Claimant was not placed on a PIP because of any protected characteristic. We do not think that the Claimant was treated less favourably than a hypothetical comparator would have been.

Setting the Claimant, a performance target plan with unrealistic and unachievable targets in January 2019 (Nicola Harwood).

308. We have dealt with this complaint in our findings of fact: we do not think that the targets set in January 2019 were unrealistic or unachievable. They were difficult and were a stretch.

309. For essentially the reasons given when considering the issue of the Claimant being placed on a PIP, we do not think that any protected characteristic was any part of the reason for the targets that were set. We do not think that the Claimant was treated less favourably than a hypothetical comparator would have been.

Alexia Murphy defending Brian Smith at a meeting during held in the DePaul Café which he later accused people of not liking him for being a 'white man in a suit.

310. This issue fails on our findings of fact. We accept Ms Murphy's evidence, that she was not present at the meeting at the point that Mr Smith made the comment. She therefore did not hear the comment and did not defend Mr Smith.

Ignoring positive discussions relating to proposals made by claimant regarding the Alone in London service and instead tackling the Claimant in respect of her email signature on 11 May 2018 (Alexia Murphy)

311. This allegation relates to Oscar's animation that was discussed by email. It is not fair to say that Ms Murphy ignored, what were indeed, positive discussions. She did not reply to the Claimant in relation to them, but she did reply directly to Oscar. The Claimant was not aware of this until disclosure because it was a private reply. The main chain had a significant number of people in it and was already busy with group responses. There was no reason for Ms Murphy to reply to the Claimant about the work itself. She was not managing the work in relation to the animation nor what it might be used for nor whether there be further animations.

312. Ms Murphy did tackle the Claimant in relation to her email signature. However, this was because the link in the banner in her signature was out of date and because there had recently been a company-wide push/communication in relation to email signatures.

313. We do not think that the Claimant was treated less favourably than a hypothetical comparator would have been nor that protected characteristics were relevant in any way to her treatment.

314. We are further satisfied for the avoidance of doubt that the conduct complained of could not, in the circumstances of the case including what is reasonable, create a proscribed environment or violate the Claimant's dignity - not least in light of the explanation for the conduct set out immediately above.

Instigating an audit with a view of forcing the Claimant from the business in September 2018 (Alexia Murphy and Nicola Harwood)

315. As indicated in our findings of fact we do not accept that either Ms Murphy or Ms Harwood instigated the audit. It was instigated by Ms Emerson Smith. The audit was routine and it was not instigated with a view to forcing the Claimant from the business.

Carrying out a fact-finding investigation in a one-sided manner with a view to ensuring disciplinary proceedings were instigated against the Claimant, November 2018 on grounds of race

316. This allegation relates to Ms Harwood's meeting with the Claimant in which they discussed Client H.

317. We accept that the meetings were in part fact-finding meetings. However, we do not accept that they were one-sided. They were meetings in which the Claimant was asked for her account of events.

318. As we also set out in our findings of fact we do not accept that there was an agenda here to find a way of disciplining or dismissing the Claimant. We do not think the matter would have been approached in the way that it was if a disciplinary approach is what anyone had in mind. It was all done with a light touch. It is notable also, of course, that there were no disciplinary proceedings or sanction. The outcome was benign and was simply that the Claimant attend some safeguarding training, which she was overdue for in any event.

319. We do not think that the Claimant was treated less favourably than a hypothetical comparator would have been nor that protected characteristics were relevant in any way to her treatment.

Conspiring with Nicola Harwood to instruct Marie Emerson Smith that the Claimant be investigated under the On-Call Policy with a view to forcing the Claimant out of the business on 29 January 2019 (Alexia Murphy and Brian Smith)

320. We do not accept that there was a conspiracy here or that the investigation was instigated with a view to forcing the Claimant out of the business.

321. Rather, in our view the events happened and unfolded organically. They started when Rupal was unable to get on-call assistance so telephoned Mr Smith. This was entirely out of the ordinary. He was not on the on-call rota and he did not know Rupal. It was Friday night. She explained the circumstances that she was in.

322. From there, we do not think it is at all surprising that an investigation was carried out to establish what had happened, and, to be frank, what had gone

wrong. In turn, it is clear that the on-call arrangements for Alone in London were very unsatisfactory.

323. Thus we do not accept that the investigation was commenced with a view to forcing the Claimant out of the business. Rather it was to establish facts and learn lessons in circumstances in which both of those things were plainly required. The treatment was unrelated to and not because of protected characteristics.

Falsely alleging that the Claimant was underperforming due to her incompetence with a view to forcing the Claimant from the business in January 2019 (Nicola Harwood, Brian Smith and Alexia Murphy).

324. This issue repeats the issues in relation to the PIP. We repeat our reasoning.

Constructive dismissal

325. We start by analysing the reasons for the Claimant's resignation – that is the things in her mind that caused her to resign.

326. In our view, the reasons for the resignation were:

326.1. The audit of Alone in London;
326.2. The inquires that were made of her in relation to Client H;
326.3. Being placed on a PIP and the content of the PIP;
326.4. The response to the lone-working/on-call incident.

327. Although, as is clear from this claim, there are a raft of other things that the Claimant is upset about in relation to her employment, we do not think that they contributed to her decision to resign.

328. In our view, on the evidence, it was the coalescence of the four matters identified above that caused the Claimant to resign. In combination they made her feel as though there was an agenda to get rid of her and that it was her 'turn' to be managed out of the business, so she would not stay and subject herself to that plan. Although undoubtedly there were other things that upset her in the course of her employment, many of which were of long standing, they were not things that caused or contributed to her decision to resign. They were things she could, had and was prepared to live with.

329. We would certainly accept that, subjectively, the coalescence of these four matters did seriously damage the Claimant's trust and confidence in the Respondent. Looking at the matters objectively, however, we do not think that they were calculated or likely to undermine trust and confidence. They were matters that we would accept together put the employment relationship under strain. However, it is a question of degree and when one factors in the relevant

explanation for each of the four matters we do not think that individually or together they meet the threshold of seriously damaging or undermining trust and confidence.

330. This is closely bound up with our view that, in any event, there was reasonable and proper cause for each of the four things that caused the Claimant to resign. At the risk of repetition, our view is that there was reasonable and proper cause in summary because:

330.1. The audit of Alone in London: the service had never yet been audited, a good bedding in period had been allowed since acquiring the service before auditing it, the audit was part of a routine scheduled audit programme. Auditing the service was good governance.
330.2. The inquires that were made of the Claimant in relation to Client H: we have explained in our findings of fact how this arose, the inquiries were made gently, with no ulterior motive, and had a sensible resolution (some routine safeguarding training).
330.3. Placing the Claimant on a PIP and the content of the PIP. We have commented extensively on this already and repeat what we have previously said. We do acknowledge that the procedure for putting the Claimant on the PIP could have been handled better. However, in context we that that is a minor matter that does not alter the overall picture.
330.4. The response to the lone-working/on-call incident: we have analysed this extensively already. It was necessary and proportionate.

331. We therefore do not think that individually or together the matters that the Claimant resigned in response to amounted to a repudiatory breach of contract.

332. We are also of the view that the Claimant affirmed the contract by her email to Ms Harwood of 24 January 2019. She sent that email after considering the PIP. She made clear in that email that her plan was to continue working and to do all she reasonably could to meet the targets that she had been set. She did express some scepticism that she would actually be able to meet all of the target but made clear that that is what she be leading her teams to try and do. In our view this was a clear affirmation of the contract. It showed that she had understood the targets, considered them to be high, considered they might be a ‘set-up’, but nonetheless would be working towards meetings them as best she could.

333. In our view the thing that finally caused the Claimant to resign was the decision to investigate the lone-working/on-call incident. In our view that decision to investigate was objectively reasonable and justifiable given what had happened. It was so plain that there needed to be an investigation that the decision to have an investigation can be properly described as innocuous. We therefore do not think that this incident was capable of being a final straw in the

legal sense that the term is used in *Omilaju* (though it was factually what prompted the Claimant to resign).

334. For these reasons the complaint of constructive dismissal must fail.

Conclusion

335. We would like to thank the parties for the courtesy with which they presented their respective cases. In parts this was not an easy case to adjudicate upon and we were assisted in doing so by the measured approach both sides took.

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Employment Judge Dyal
Date 17 January 2022

APPENDIX TO JUDGMENT & REASONS

CASE NUMBER:
2302574/2019

IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL

BETWEEN:-

YVONNE JONES

Claimant

- and -

(1) DEPAUL UK

(2) ALEXIA MURPHY

(3) BRIAN SMITH

(4) NICOLA HARWOOD

Respondents

FINAL LIST OF ISSUES

A. Direct Race Discrimination – Section 13 Equality Act 2010

1. Was the Claimant subjected to the treatment set out in the table drafted within the Summary of Incidents ('SOI'), namely:

    a. Failing to show an interest in the Nightstop service from October 2013 (Alexia Murphy and Brian Smith); [the details of this complaint are particularised by the detailed allegations on this list of issues]
    b. The Claimant's exclusion from attending strategic meetings as from September 2016 (Brian Smith);
    c. Failing to respect the Claimant's position, skills or achievements from October 2013 (Brian Smith and Nicola Harwood); [the details of this complaint are particularised by the detailed allegations on this list of issues]The Claimant being subjected to undermining treatment from 2014 (Alexia Murphy and Brian Smith [the details of this complaint are particularised by the detailed allegations on this list of issues]
    d. Comments and observations being made to the effect that the Claimant was incapable of her job in April 2014 (Brian Smith) Nicola Harwood 2019
    e. Conspiring to have the Claimant removed as the Nightstop manager in April 2014 (Brian Smith);

f. Unnecessary criticism of a Safeguarding report prepared by the Claimant in April 2014 (Brian Smith);
g. Commenting that a particular young white woman should have received the Claimant's position from 2014 (Brian Smith);
h. Time spent seeking to undermine perceptions as to the Claimant's ability to carry out duties since 2014 (Brian Smith) [the details of this complaint are particularised by the detailed allegations on this list of issues]
i. The Claimant receiving no supervision or support meetings from 2014 (Brian Smith);
j. Abruptly getting angry at the Claimant during a HTF meeting with agency leads about underspend (Brian Smith); 10th April 2014
k. A failing to show the Alone in London team any acknowledgement or support (Brian Smith and Alexia Murphy);
l. Brian Smith suggesting that people had disagreements with him because he was a 'white man in a suit'; held in the DePaul café
m. (Brian Smith) failing to apologise for his outburst about being a 'white man in a suit'; (Brian Smith)
n. Alexia Murphy in or around November 2018 at a monthly staff meeting/conference attended by the Claimant made an offensive comment namely 'ginger lives matter';
o. Sending an email over exaggerating an issue with a counsellor and describing this as a safeguarding issue on 26 January 2019 (Brian Smith).
p. Emailing the Claimant generally in a negative tone (Brian Smith).
q. Placing the Claimant on a performance management exercise in Jan 2019 (Alexia Murphy, Nicola Harwood and Brian Smith).
r. Setting the Claimant, a performance target plan with unrealistic and unachievable targets in January 2019 (Nicola Harwood).
s. Alexia Murphy defending Brian Smith at a meeting during held in the DePaul Café which he later accused people of not liking him for being a 'white man in a suit.
t. Ignoring positive discussions relating to proposals made by claimant regarding the Alone in London service and instead tackling the Claimant in respect of her email signature on 11 May 2018 (Alexia Murphy);
u. Instigating an audit with a view of forcing the Claimant from the business in September 2018 (Alexia Murphy and Nicola Harwood);

v(i). Carrying out a fact-finding investigation in a one sided manner with a view to ensuring disciplinary proceedings were instigated against the Claimant November 2018 on grounds of race [this is the allegation added to the Claimant's list of issues from the Respondent's list of issues]

v. Conspiring with Nicola Harwood to instruct Marie Emerson Smith that the Claimant be investigated under the On-Call Policy with a view to forcing the Claimant out of the business on 29 January 2019 (Alexia Murphy and Brian Smith);

w. Falsely alleging that the Claimant was underperforming due to her incompetence with a view to forcing the Claimant from the business in January 2019 (Nicola Harwood, Brian Smith and Alexia Murphy).

2. In respect of each of the forms of treatment above that the Tribunal finds did occur, does the Tribunal find that the Claimant was treated less favourably than a hypothetical comparator (who was in all respects the same as the Claimant other than her race) was treated or would be treated?

3. If any of the matters found to have occurred at paragraph 1 above occurred prior to the 26th January 2019, were these matters '*conduct extending over a period*' within the meaning at section 123(3)(a) Equality Act 2010? If not, is it just and equitable in the circumstances for the Tribunal to extend time for submission of the claim based upon these events under section 123(1)(b) Equality Act 2010?

B. Direct Gender Discrimination – Section 13 Equality Act 2010

1. Was the Claimant subjected to the treatment set out in the table drafted within the SOI, namely:

   a. A failing to show an interest in the Nightstop service from October 2013 (Brian Smith followed by Alexia Murphy [the details of this complaint are particularised by the detailed allegations on this list of issues]
   b. The Claimant's exclusion from attending the strategic partnership meetings from September 2016 (Brian Smith).
   c. A failing to respect the Claimant's position, skills or achievements from October 2013 (Brian Smith and October 2017 Nicola Harwood) [the details of this complaint are particularised by the detailed allegations on this list of issues]
   d. The Claimant being subjected to undermining treatment from 2014 (Brian

Smith).

e. Comments and observations being made to the effect that Claimant was incapable of her job in April 2014 (Brian Smith).
f. Conspiring to have the Claimant removed as the Nightstop manager in April 2014 (Brian Smith).
g. Unnecessary criticism of a Safeguarding report prepared by the Claimant in April 2014 (Brian Smith).
h. Time spent seeking to undermine perceptions as to the Claimant's ability to carry out duties from 2014 (Brian Smith). [the details of this complaint are particularised by the detailed allegations on this list of issues]
i. The Claimant receiving no supervision or support meetings from 2014 (Brian Smith);
j. Abruptly getting angry at the Claimant during a meeting with agency leads about underspend April 2014 (Brian Smith).
k. A failing to show the Alone in London team any acknowledgement or support from March 2017 (Alexia Murphy and Brian Smith).
l. Brian Smith suggesting that people had disagreements with him because he was a 'white man in a suit'.
m. Brian Smith's failing to apologise for his outburst about being a 'white man in a suit'.
n. Sending an email over exaggerating an issue with a counsellor and describing this as a safeguarding issue on 26 January 2019 (Brian Smith).
o. Emailing the Claimant generally in a negative tone (Brian Smith).
p. Placing the Claimant on a performance improvement plan in January 2019 (Alexia Murphy, Nicola Harwood and Brian Smith).
q. Setting the Claimant, a performance target plan with unrealistic and unachievable targets in January 2019 (Nicola Harwood).

2. In respect of each of the forms of treatment above that the Tribunal finds did occur, does the Tribunal find that the Claimant was treated less favourably than a hypothetical comparator (who was in all respects the same as the Claimant other than her gender) was treated or would be treated?

3. If any of the matters found to have occurred at paragraph 1 above occurred prior to the 26th January 2019, were these matters 'conduct extending over a period' within the meaning at section 123(3)(a) Equality Act 2010? If not, is it just and equitable in the circumstances for the Tribunal to extend time for submission of the claim based

upon these events under section 123(1)(b) Equality Act 2010

C. Direct Age Discrimination – Section 13 Equality Act 2010

1. Was the Claimant subjected to the treatment set out in the table drafted within the SOI, namely:

    a. Instigating an audit with a view of forcing the Claimant from the business in September 2018 (Alexia Murphy and Nicola Harwood).
    b. Conspiring with Nicola Harwood to instruct Marie Emerson Smith that the Claimant be investigated under the On-Call Policy with a view to forcing the Claimant out of the business on 29 January 2019 (Alexia Murphy, Brian Smith and Nicola Harwood).
    c. Placing the Claimant on a performance improvement plan in January 2019 (Alexia Murphy, Nicola Harwood and Brian Smith).
    d. Falsely alleging the extent that the Claimant was underperforming with a view to forcing the Claimant from the business in January 2019 (Nicola Harwood, Brian Smith and Alexia Murphy).
    e. Setting the Claimant performance target plans with unrealistic and unachievable targets in January 2019 (Nicola Harwood and Alexia Murphy).

2. In respect of each of the forms of treatment above that the Tribunal finds did occur, does the Tribunal find that the Claimant was treated less favourably than a hypothetical comparator (who was in all respects the same as the Claimant other than her age) was treated or would be treated?

3. If any of the matters found to have occurred at paragraph 1 above occurred prior to the 26th January 2019, were these matters 'conduct extending over a period' within the meaning at section 123(3)(a) Equality Act 2010? If not, is it just and equitable in the circumstances for the Tribunal to extend time for submission of the claim based upon these events under section 123(1)(b) of the Equality Act 2010.

    .

a. any breaches of the ACAS Code? If so, to what extent?

D. Harassment related to race - Section 26 Equality Act 2010

1. Was the allegation set out in above in Section A, paragraph 1 (h), (m), (n). (o) and (t) of this List of Issues unwanted conduct related to race that had the purpose or

effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, having regard to the Claimant's perception and the other circumstances of the case?

2. If so what is reasonable for the conduct to have that effect?

E. Constructive Dismissal – Section 94 and 95(1)(c) Employment Rights Act 1996

As per the guidance given by the Court of Appeal in the case of *Kaur-v- Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978:-

1. Was the Claimant subjected to the treatment set out in the table drafted within the SOI?

2. Was allowing an environment to exist whereby the Claimant was set unachievable and unrealistic performance targets (as detailed within the SOI) the most recent act or omission on the part of the employer which the employee says caused or triggered her resignation?

3. Has the Claimant affirmed the contract since that act or omission?

4. If not, was that act or omission by itself sufficiently serious as to constitute a repudiatory breach of the implied term of trust and mutual confidence giving rise to an entitlement to treat the contract as terminated with immediate effect?

5. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions (set out within the SOI) (applying the approach in the case of *London Borough of Waltham Forest –v-Omilaju* [2204] EWCA Civ 1493) which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and mutual confidence?

6. Did the employee resign in response (or partly in response) to that breach?

7. What was the reason for the dismissal? i.e. does the Respondent assert any potentially fair reason to dismiss?

8. If the dismissal was unfair, should any compensation be reduced/increased to reflect any breaches of the ACAS Code? If so, to what extent?