



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondents**

**Mr T Sylvester v**

**Echo Sourcing Limited**

**Heard at:** London Central

**On:** 24 February to 4 March 2020

**Before:** Employment Judge E Burns  
Dr V Weerasinghe  
Ms J Cameron

## **Representation**

**For the Claimant:** In person

**For the Respondent:** Mr J McCracken (counsel)

## **RESERVED JUDGMENT**

The unanimous judgment of the Employment Tribunal is as follows:

- (1) The tribunal does not have jurisdiction to consider the claimant's claim of constructive unfair dismissal as it was submitted out of time (issues 5 - 6 below).
- (2) The tribunal does not have jurisdiction to consider the claimant's claim of direct race discrimination contrary to section 13 of the Equality Act 2010 (issues 7 - 10 below) as it was submitted out of time and it is therefore dismissed.
- (3) The tribunal does not have jurisdiction to consider the claimant's claim of indirect race discrimination contrary to section 19 of the Equality Act 2010 (issues 11 - 14 below) as it was submitted out of time and it is therefore dismissed.
- (4) The tribunal does not have jurisdiction to consider the following claims of harassment related to contrary to section 26 of the Equality Act 2010 as they were submitted out of time:

- Making fun of the claimant's spelling mistakes and reading them out loud to others (dyslexia) (issue 15.1 below)
- Making fun of his omission of capital letters; taping down the caps lock (dyslexia) (issue 15.2 below)
- Asking "what's wrong with you" when the claimant speaks of issues 15.1 and 15.2 (January 2018) (dyslexia) (issue 15.3 below)
- Requiring the claimant to visit clothes shops abroad as it is part of his contract, despite being informed this made him the subject of unpleasant attention because of being black (September 2016, November or December 2016, April 2017, January 2018) (race) (issue 15.4 below)

These claims are therefore dismissed.

- (5) The claimant's remaining claims of harassment are dismissed, namely:
- Insisting the claimant remove headphones at work (June 2018) (anxiety and depression) (issue 15.5 below)
  - Shouting at the claimant when he speaks of depression (6 September 2019) (anxiety and depression) (issue 15.6 below)
  - Asking the claimant to apologise to Nick Sayer and refusing him separate workspace 11 September (anxiety and depression) (issue 15.7 below)
- (6) The tribunal does not have jurisdiction to consider the following claims of victimisation contrary to section 27 of the Equality Act 2010 as they were submitted out of time:
- Insisting it is a contractual requirement to travel abroad (Issue 21.1 below)
  - Belittling his anxiety about it (January 2018) (Issue 21.2 below)
  - Making the claimant revise his annual review letter to omit reference to bullying related to dyslexia (August 2017) (Issue 21.3 below)

These claims are therefore dismissed.

- (7) The claimant's remaining claims of victimisation are dismissed, namely:
- Shouting at him (Nick Sawyer January 2018) – this one on withdrawal by the claimant (issue 21.4 below)
  - Shouting at him (Nick Sawyer 6 September 2018) (issue 21.5 below)
  - Not accepting his letter of grievance (issue 21.6 below)

- Asking the claimant to apologise to Nick Sawyer (issue 21.7 below)
- Discouraging the claimant from lodging grievance 17 September 2018 (issue 21.8 below)
- Refusing an alternative workspace (11 September 2018) (issue 21.9 below)

## **REASONS**

### **CLAIM AND ISSUES**

1. By a claim form presented on 12 March 2019, the claimant brought complaints of direct race discrimination, harassment on the grounds of race and victimisation.
2. The presentation of the claim form followed a period of early conciliation against the respondent between 9 January 2019 and 5 February 2019.
3. The claimant describes himself as British Afro-Caribbean. He is black. He has had dyslexia all of his life. He was diagnosed with severe depression and anxiety in March 2018 (55). The respondent did not initially accept that he was disabled, but conceded this point following a preliminary hearing held for case management purposes.
4. The list of issues agreed at that case management hearing and confirmed at the start of the final hearing was as follows:

### **Unfair dismissal claim**

5. Did the respondent, without reasonable and proper cause, by its conduct fundamentally breach the implied term of mutual confidence and trust? The conduct relied on is:
  - (1) The bullying course of conduct outlined below as harassment related to disability
  - (2) Acts set out under victimisation
  - (3) Insisting he go on work trips despite expressing discomfort September 2016, April 2017, January 2018
  - (4) Making fun of him in summer 2017
  - (5) Shouting at him in April 2017
  - (6) Saying in April 2018 he had not made earlier recommendations, and shouting at him
  - (7) Shouting at him on 6 September 2018
  - (8) Discouraging a grievance
  - (9) Refusing a change of workspace
  - (10) At various stages failing to act on his complaints of bullying treatment
  - (11) Telling him on 15 October 2018 no action will be taken on the 6 September episode

6. Was that conduct an effective cause of the claimant's resignation on 15 October 2018?

**Section 13: Direct discrimination on grounds of race**

7. Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely insisting he participate in work trips abroad to visit clothes shops and take clothes to the changing rooms to photograph stock, despite the claimant telling them this made him the subject of unwelcome and unpleasant attention because he was black?
8. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on hypothetical comparators.
9. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?
10. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

**Section 19: Indirect discrimination on grounds of race**

11. Did the respondent apply the following provision, criteria and/or practice ('the provision') generally, namely to visit clothes shops abroad and photograph the stock in the changing room?
12. Does the application of the provision put other black people at a disadvantage when compared with white people?
13. Did the application of the provision put the claimant at that disadvantage?
14. Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent has not pleaded that this was the case, but relies on the fact that it did not force employees to partake in trips.

**Section 26: Harassment related to disability or race**

15. Did the respondent engage in unwanted conduct as follows:
  - 15.1 Making fun of the claimant's spelling mistakes and reading them out loud to others (dyslexia)
  - 15.2 Making fun of his omission of capital letters, taping down the caps lock (dyslexia)
  - 15.3 Asking "what's wrong with you" when the claimant speaks of 15.1 and 15.2 (January 2018) (dyslexia)
  - 15.4 Requiring the claimant to visit clothes shops abroad (see below) as it is part of his contract, despite being informed this made him the

- subject of unpleasant attention because of being black (September 2016, November or December 2016, April 2017, January 2018) (race)
- 15.5 Insisting the claimant remove headphones at work (June 2018) (anxiety and depression)
  - 15.6 Shouting at the claimant when he speaks of depression (6 September 2018) (anxiety and depression)
  - 15.7 Asking the claimant to apologise to Nick Sawyer and refusing him a separate workspace 11 September 2018 (anxiety and depression)
16. Was the conduct related to the claimant's protected characteristic?
  17. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
  18. If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
  19. In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

**Section 27: Victimisation**

20. Has the claimant carried out a protected act? The claimant relies upon the following:
  - 20.1 Complaining to Minesh Parmar he was racially profiled (as a potential thief) by shop staff in September 2016
  - 20.2 The same in November or December 2016,
  - 20.3 The same in January 2017 (2016 in letter 1 July), and also to Nick Sawyer, Guillaume Maurin and Emily Naismith
  - 20.4 1 August 2017 Complaint on annual review of bullying treatment related to dyslexia
  - 20.5 On some date between September and December 2017, complaint to Reda Hassan, HR manager, about racial profiling on foreign trips and a requirement to participate nevertheless
  - 20.6 On a date between 10 and 30 January 2018, complaint as 21.2
  - 20.7 1 May 2018, complaint to Minesh Parmar, and then to Shafiq Hassan, of ill health caused by "discriminative behaviour" of Minesh Parmar and Nick Sawyer.
  - 20.8 6 September 2018. Complaint to Nick Sawyer that he has mistreated another colleague
  - 20.9 Grievance letter 11 September 2018 about Nick Sawyer
  - 20.10 17 September 2018. Complaint about Nick Sawyer to Reda Hassan and Minesh Parmar.

21. If there was a protected act, has the respondent carried out any of the treatment identified as harassment, or identified below, because the claimant had done a protected act?
  - 21.1 Insisting it is a contractual requirement to travel abroad.
  - 21.2 Belittling his anxiety about it (January 2018)
  - 21.3 Making claimant revise annual review letter to omit reference to bullying related to dyslexia (August 2017)
  - 21.4 Shouting at him (Nick Sawyer January 2018)
  - 21.5 Shouting at him (Nick Sawyer 6 September 2018)
  - 21.6 Not accepting his letter of grievance
  - 21.7 Asking the claimant to apologise to Nick Sawyer
  - 21.8 Discouraging the claimant from lodging grievance 17 September 2018
  - 21.9 Refusing an alternative workspace (11 September 2018)

### **Time/limitation issues**

22. The claim form was presented on 12 March 2019. Early conciliation Day A is 9 January 2019 and Day B is 5 February 2019. Accordingly, were the claimant's claims submitted within the normal time limit?
23. Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?
24. If presented outside the normal time limit, is the tribunal satisfied that it was not reasonably practicable for the claimant's complaint of unfair dismissal to be presented within the normal time limit. If so, was the claim presented within such further period as the tribunal considers reasonable.
25. Was any complaint of discrimination presented outside the ordinary time limit presented within such other period as the tribunal considers just and equitable? The tribunal will consider the reason for any delay, the effect of delay on the cogency of the evidence, and the balance of prejudice between the parties in allowing any claim to proceed out of time.

### **Remedies**

26. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.
27. There may fall to be considered a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest. The claimant found work about three months ago with a small continuing loss.
28. In the unfair dismissal claim, there may be a basic award. Compensation may be reduced if there has been a failure to follow the ACAS Code on Discipline and Grievance.

## THE HEARING

29. The hearing was held over the course of eight days. The claimant represented himself. The respondent was represented by counsel. The first day of the hearing was a reading day. Witness evidence and submissions on liability were heard over the course of the following five days leaving the panel with two days to deliberate. The parties agreed that judgment should be reserved.
30. The tribunal heard evidence from the claimant himself. For the respondent we heard evidence from five witnesses in the following order:
- Mr Minesh Parmar, Menswear Design Manager, who line managed the claimant at all material times
  - Mr Nick Sawyer, Senior Graphic Designer in the Menswear Team managed by Mr Parmar
  - Mr Ish Hassan, Commercial Director
  - Ms Emily Naismith, Menswear Garment Design Manager
- Mr Shafiq Hassan, one of the original founders of the respondent and its current Chief Executive Officer.
31. In advance of the hearing, the claimant had written to the tribunal on 21 January 2020 asking about a witness order for Reda Hassan, former HR Manager for the respondent and the nephew of Mr S Hassan. The tribunal wrote back to the claimant requesting more information. Although he provided this information, the claimant did not confirm he wished to proceed with a formal application and a witness order was not made. The claimant did not seek to make a fresh application during the hearing.
32. There was a main trial bundle of documents made up of four lever arch files (1535 pages). We admitted into evidence some additional documents from both parties with the agreement of the other. We read the evidence in the bundles to which we were referred. We refer to the page numbers of key documents that we relied upon when reaching our decisions in this judgment.
33. In addition to his witness statement, the claimant relied on the following as his evidence in chief:
- (a) The timeline attached to his claim form (14 – 15D)
  - (b) The extended timeline dated 1 July 2019 (58 – 64)
  - (c) His Disability Impact Statement (86 - 103)

The claimant exhibited a number of extracts of Whatsapp conversations and text conversation to his witness statement. We also refer to the Exhibit Numbers and page numbers of the ones that we have relied upon. The parties should note that where we have quoted from these, we have amended some of the spelling and language to ensure they make sense.

34. We explained the reasons for various case management decisions carefully as we went along, including our commitment to ensuring that the claimant was not legally disadvantaged because he was a litigant in person. We regularly visited the issues and explained the law when discussing the relevance of the evidence.
35. We also sought to ensure that the claimant was not disadvantaged because he was dyslexic or because of his mental health condition and encouraged him to let us know if he was experiencing any difficulties or needed additional breaks at any time.
36. The judgment was reserved and unfortunately it has taken much longer than originally envisaged to produce it due to the COVID -19 pandemic. We apologise to the parties for the length of time they have had to wait.

### **FINDINGS OF FACT**

37. The tribunal's primary findings of fact are set out below. Where we have had to reach a conclusion in relation to disputed facts, we have made our findings on the balance of probabilities. The inferences that we have drawn and our overall conclusions on the specific matters are set out in the analysis and conclusions section.
38. We considered that the witness evidence of all the witnesses was sincere and honest, but not always reliable. Memories fail for a number of reasons. Therefore, in reaching our findings of fact we have relied heavily on the contemporaneous written material available to us in the form of the Whatsapp conversations. In doing so, we have taken into account that the claimant did not fully share his concerns with his friend Alison Tang because she was dealing with difficult personal circumstances.
39. We have also relied upon the contents of the claimant's grievance document prepared in October 2018 at around the time of the termination of his employment.

### **Background**

40. The respondent is part of a global business designing and making garments for major fashion retailers globally. It has sites in the UK, Bangladesh and Turkey offices with a global turnover of in the region of £120 million. The respondent is the UK subsidiary. It employs around 35 people and effectively constitutes the head office function and design studio.

### **The Claimant's Job Interview**

41. The claimant was interviewed by the respondent in May 2014. The interview comprised three elements. There was an initial interview, a design test and a subsequent interview. The subsequent interview was with Minesh Parmar and Eric Reynolds, who jointly managed the Menswear Design Team at that time.



42. The claimant made a spelling mistake and inaccurately spelt the word Brooklyn during the design test. He apologised for this at the subsequent interview and explained that it was because he had dyslexia. Mr Reynolds acknowledged this in a light-hearted way. This did not lead to a detailed discussion about the condition and the impact it had on him.
43. We find that Mr Parmar was present during this discussion, but because the subject of the claimant's dyslexia was only touched upon very briefly, he did not later recall it.

### **Early Employment History and Team Structure**

44. The respondent was very impressed with the claimant's design work and offered him the role of Junior Graphic Designer within the small Menswear Team. He commenced employment on 30 May 2014. At the time he joined the team, it consisted of only five or six people and did not get bigger than this throughout his employment.
45. One of the claimant's colleagues was Nick Sawyer. He had been employed by the respondent as a graphic designer since March 2014. When recruited, it was on the basis that he was understood to be more senior to the other members of the Menswear Design Team, sitting just below the two managers.
46. For a considerable part of the claimant's early employment, the claimant and Mr Sawyer sat together at the back of the design studio. According to Mr Sawyer, they became close friends during this period.
47. Other colleagues were Samad Boughalan, who was a member of the team between 2009 and 2015 and Guillame Maurin who was employed at all material times. Mr Boughlan moved department in 2015 and left the respondent altogether around six months later.
48. In August 2016, Mr Sawyer was promoted to Senior Graphic Designer. Shortly after this, Mr Reynolds left the respondent and Mr Parmar took over the sole management of the Menswear Design Team.
49. A new member of the team joined in around April 2017, David Kingett. He sat directly next to the claimant when he joined.
50. Initially the claimant mainly performed administrative tasks. He progressed to become a designer and was confirmed in the role of Graphic Designer in April 2016. The claimant was frustrated and unhappy with the length of time it took for him to progress to become a designer.
51. Although the claimant cannot remember it, we find that he was issued with a new contract of employment when he moved into the role of Graphic Designer, which he signed on 18 May 2016 (112 - 120).
52. The contract includes the following provisions:
  - (a) Under the heading "*Place of Work*":

*“You will also be required to undertake such travel as the company requests, to include work meetings and business trips, in order for you to fulfil your duties to the satisfaction of the company.” (113)*

(b) Under the heading “*Notice of Termination*”:

*“The minimum period of notice you are required to give to the company is one week for up to 2 years continuous service, thereafter you are required to give an additional 1 week of notice for every subsequent year of service completed up to a maximum of 12 weeks.” (116)*

### **Background to Trips**

53. The designers employed by the respondent often undertook business trips. These were to locations in Europe and further afield.
54. The main reason for the trips was to enable the designers to undertake “research”. This consisted of visiting clothes shops and photographing clothes that were being sold in them. These photographs were presented to potential buyers, together with designs inspired by them, who would identify the designs they liked and commission the company to make similar items.
55. In order to take the photographs, the employees involved would be required to take a large number of items of clothes into the shop’s changing rooms and photograph the clothes there. They would also occasionally photograph the clothes on the shop floor.
56. The employees on the trips would also take photographs of the scenery to inspire designs. The trips were generally considered to be an enjoyable “perk” for the employees involved as they enabled them to travel.
57. A large part of the claimant’s case concerns how he felt about the business trips. The claimant believed that the research undertaken on the trips was “*morally wrong*” because it involved “*ripping off higher end designs.*” However, this was not his main objection to the trips. His main objection concerned his participation in the research as a black man.
58. The claimant is tall (6 ft 3 inches) and black. He says that as a result of his colour and height, people view him suspiciously in various settings. This includes in shops where he is often racially profiled and the staff and security guards assume he is a potential shop lifter. As a result, he gets more attention in shops than other customers. He is often watched and followed which causes him considerable anxiety. This echoes the way he is viewed in other public settings such as when travelling on public transport. He feels similar anxiety in such public settings.
59. The claimant was very concerned that the potential for him to be racially profiled as a shoplifter would be exacerbated by the research activities he was required to carry out on the trips. He felt that the activity of showing an interest in particular and expensive items of clothing, repeatedly picking

them up, taking them to the dressing rooms (to photograph them), but ultimately leaving the shops without making any purchase would result in increased suspicion of him.

### **Berlin and Amsterdam**

60. The first trip that the claimant went on was to Berlin and Amsterdam. The claimant travelled with Nick Sawyer. The claimant makes no complaint about having to go on this trip.
61. The claimant did not express any concerns before going on the trip to Berlin and Amsterdam. During the trip, however, he talked to Mr Sawyer about not enjoying the research aspect of the trip. Mr Sawyer's understanding was that the claimant, like him, was fairly introverted and did not like drawing attention from the staff in the shops generally. He did not appreciate the link between the claimant's concern and the claimant's race.
62. Notwithstanding, the conversation about the shopping experience, Mr Sawyer thought that the claimant had enjoyed the trip overall and that he and the claimant had become closer on the trip and increased their friendship.

### **Trip to LA and New York – September 2016**

63. The next trip that the claimant went on was scheduled for September 2016. On this occasion the trip was with Mr Parmar to New York and Los Angeles. The claimant says he was forced to go on the trip despite telling the respondent about his concern.
64. The respondent accepts that before the trip, the claimant told Mr Parmar, that he was concerned about going and shared with him that his concern was because he anticipated being racially profiled in the shops. We find that the claimant was genuinely scared of how he might be viewed by the American police and what they might do while he was undertaking the research.
65. Mr Parmar sought to reassure the claimant that they would be together on the trip and he would look after the claimant. Mr Parmar thought that the trip represented an amazing opportunity for free travel, and wanted the claimant to benefit from this so strongly encouraged him to go. He denies pressuring the claimant to go on the trip and told us the claimant went voluntarily.
66. According to the claimant's evidence, he was not the other member of staff who raised this concern. He told us that his colleague, Mr Boughalan who is of Moroccan descent shared this concern. Mr Boughalan was worried that his middle eastern appearance would put him at risk of being racially profiled as a possible terrorist. The claimant told us that he and Mr Boughalan discussed these concerns at around the time of the Paris terrorist attack. The claimant alleges that Mr Boughalan was excused from having to go on trips because he raised this concern with the respondent.

67. Mr Parmar disagreed with this. He told us that the reason Mr Boughalan stopped going on trips was because he moved out of the Menswear Department. Mr Parmar believed that Mr Boughalan had really enjoyed going on the two trips he had been on to the USA and to Barcelona. He was not aware of any conversations where Mr Boughalan had mentioned a concern about racial profiling.
68. We note that the Paris terrorist attack took place in November 2015 and therefore the timeline suggested by the claimant is plausible. We find that it is likely, on the balance of probabilities, that the claimant and Mr Boughalan did discuss racial profiling and trips at around this time. There is no evidence, however, that these conversations were conducted in the presence of others (and in particular Mr Parmar or Mr Sawyer) or that it was the reason why Mr Boughalan stopped going on trips.
69. The discussions between Mr Parmar and the claimant did not reach a point where the claimant said that he was not prepared to go on the trip. We find that he went voluntarily. However, the respondent's position at this stage was that trips were a requirement of the claimant's role.
70. The claimant says he did not enjoy the trip to the US overall. He acknowledged, when giving his evidence, however that he did not convey this impression to his work colleagues and instead posted a number of pictures on social media which suggested otherwise.

#### **Trip to Seoul and Tokyo - April 2017**

71. The next trip was to Seoul and Tokyo which the claimant went on in April 2017 with Mr Parmar.
72. The claimant voiced concern about going on this trip in November or December 2016 when the trip was being planned.
73. The claimant met with Mr Parmar at around this time. He says he was very explicit about saying he did not want to do any trips because of his concerns about being racially profiled in shops. The claimant says that Mr Parmar called Mr Sawyer to join the meeting in an effort to put him under pressure to agree to go.
74. Mr Parmar accepted that the meeting took place and that he called Mr Sawyer to join it. He says it was an informal meeting and that he and Mr Sawyer encouraged the claimant to go on the trip. He says that the claimant was reassured by what they said and agreed voluntarily to go on the trip. Mr Parmar also said that despite his reluctance to go on the trip to the US, Mr Parmar believed the claimant had enjoyed the trip and would enjoy further trips in the same way.
75. Mr Sawyer confirmed that he joined the informal meeting and that the claimant talked about his concern about being racially profiled in shops abroad. Mr Sawyer told us that this was the first time the claimant had opened up to him about this underlying reason for not wanting to go on the

trips and that previously he had just thought that the claimant's introverted nature was at the heart of his concern.

76. The discussions between Mr Parmar, Mr Sawyer and the claimant did not reach a point where the claimant said that he was not prepared to go on the trip. We find that Mr Parmar and Mr Sawyer sought during the discussion to encourage him rather than force him to agree to the trip and ultimately he did voluntarily. However, the respondent's position at this stage was that trips were a requirement of the claimant's role.

### **28 March 2017**

77. In the meantime, before the trip, the claimant first consulted his GP about symptoms of anxiety. This was on 28 March 2017. It is notable that he told his GP that he felt he had had problems with anxiety for a year or so and that the cause was connected to having noisy neighbours resulting in him not sleeping well. He specifically reported that he was not experiencing stress at work (129).

### **Headphones**

78. At around this time, Mr Parmar recalls asking the team not to wear headphones while working in order to promote better communication between the team members. This was related to the arrival of the new member of the team, Mr Kingett in April 2017.

### **3 April 2017**

79. At an early point in the trip to Seoul, the claimant and Mr Parmar had a heated discussion which became an argument. It began at dinner and continued on the return journey back to their hotel, until it was eventually concluded in a corridor in their hotel.
80. Mr Parmar and the claimant agree that the heated discussion arose when Mr Parmar sought the claimant's feedback about various aspects of work and particularly his management. The discussion had nothing to do with the trips, but general aspects of work. The claimant, having been invited to do so, was critical of aspects of Mr Parmar's management.
81. Mr Parmar admitted before us that he became frustrated during the discussion and at one point raised his voice with the claimant. He says, however, that they resolved the argument by hugging in the corridor and he apologised to the claimant for shouting. He says that he and the claimant had both been drinking at the end of a long day and the discussion was fuelled by alcohol. The claimant agreed with this account, except he says that he only had one drink and was not drunk.
82. We do not consider it is not necessary for us to make a finding about whether the claimant was drunk or not. We find that the conversation was informal, albeit about work. The tension did not arise because of the claimant's race or disabilities, but because the two men disagreed about Mr Parmar's style of management. Mr Parmar was unwise to initiate the

conversation with the claimant. We do not consider his behaviour to have constituted bullying.

83. The rest of the trip abroad passed without incident. However, following the argument on the trip, the claimant became convinced that Mr Parmar was treating him differently to other members of staff and valued him less. This came to a head at the time of the claimant's appraisal in August 2017 when he raised concerns about how he was being treated related to his dyslexia.

### **Dyslexia - Emails**

84. The claimant alleges that since the start of his employment, Mr Sawyer regularly read out emails that the claimant had written and made fun of the spelling mistakes in them in front of team members. The claimant did not adduce any evidence of specific examples of this.
85. Mr Sawyer acknowledged in his evidence that spelling was an important issue for the respondent as spelling mistakes in designs could have significant economic consequences of the respondent. He cited two examples when spelling mistakes in designs had resulted in the respondent losing money because the mistakes had not been caught before production started. He recalled one design was Mr Palmer's and the other was Mr Reynolds'. As a result, he acknowledged that spelling was often discussed within the team, but denied that he made fun of the claimant's spelling as alleged. We accept the evidence he gave.

### **Dyslexia - Caps Lock Issue**

86. Another way in which the claimant felt he was being ridiculed in relation to his dyslexia concerned the protocol for naming design files. The protocol that had been in place for several years was that the names of all designs should be in capital letters.
87. The claimant often did not follow the naming protocol and used a mixture of capitals and small case letters in no particular order. As far as he was concerned, the use of capital letters was not necessary and had no functional importance. He therefore did not want to make any special effort to use capitals when this presented some difficulties for him because of his dyslexia.
88. Mr Parmar spoke to the claimant about his failure to use capital letters on several occasions. The claimant did not respond by telling Mr Parmar that he wanted to be excused from using capital letters due to his dyslexia. When the claimant did not change his behaviour, Mr Parmar came to the view that the claimant was being deliberately defiant. On 20 May 2017, Mr Parmar sent the claimant an email with the subject "CAPITOL LETTERS!!!" and the message "Good designs though Trev!" (151).
89. When the claimant still did not adapt his behaviour, Mr Parmar admits sending him a further email with the same subject heading on 22 June 2017 timed at 16:51. In the body of the email, Mr Parmar wrote a message

("NICE DESIGNS THOUGH!") in block capitals and increased the font size to 300pt so that the letters were several centimetres high (152 – 155A).

90. The claimant alleges that Mr Parmar sent the email to the whole Menswear Team who laughed at the claimant's expense when they opened it. We find that this was not the case.
91. In order to be sure who the email was sent to, the panel viewed it on Mr Parmar's laptop during the course of the hearing. This confirmed that the email at pages 152 to 155A of the bundle was blind copied to Mr Sawyer and no-one else was copied in.
92. The claimant invited us to find that Mr Parmar had sent another email which was sent to the whole team. He said this had not been disclosed by the respondent and was therefore not included in the bundle. The claimant relied on a Whatsapp conversation with Mr R Hassan as proof of this.
93. Following the termination of the claimant's employment with the respondent, the claimant did some design work for Mr R Hassan and regularly spoke to him via Whatsapp.
94. On 16 January 2019, the claimant contacted Mr R Hassan with the following message:  
  
*"Also, need a favour if you can, need to date on the email when [Mr Parmar] tells me to use capital letters. As I forwarded it to you?"* (Exhibit 27, page 52).  
  
Mr R Hassan replied: *"22 June 2017 at 15:51"* (Exhibit 20, page 53).
95. The claimant relies on this exchange as evidence that the email contained in the bundle was not the only email sent by Mr Parmar because the timing of the email in the bundle (16:51) is different to the email identified by Mr R Hassan (15:51).
96. We are not persuaded by this evidence. We note that the timings are different by exactly an hour, with the email referred to by Mr R Hassan to being an hour earlier. We consider it unlikely that Mr Parmar would have sent an email to the claimant openly copying in the whole team and then exactly an hour later, sent the same email blind copying in only Mr Sawyer. We find that the most likely explanation is there was only one email and that either there is either a typographical error in Mr R Hassan's message or that the one hour time difference is explained by a quirk of British Summer Time.
97. At around the same time as sending the email, most probably in the same week, Mr Parmar admits that, in his frustration, he also taped down the CapsLock key on the claimant's keyboard as alleged by the claimant.

## 1 August 2017 Appraisal

98. When the claimant had his annual appraisal meeting on 1 August 2017, he attended with his review form. One of the claimant's allegations is that he wrote on his review form that Mr Parmar and Mr Sawyer were discriminating against him on the ground of his dyslexia. The claimant says that he was forced to withdraw this complaints and remove it from his form. He also complains that Mr Parmar and Mr Sawyer denied being aware that the claimant was dyslexic at the appraisal meeting.
99. Mr Parmar and Mr Sawyer accept that the topic of the claimant's dyslexia was discussed in the review meeting, but they deny that he included it on his appraisal form. They accept that they did ask him to change his appraisal form. The reason was because the form included complaints about other members of staff, including Mr Parmar. They both felt that the form should only contain information about the claimant's own performance.
100. The original form was not provided to us. The claimant exchanged Whatsapp messages with his girlfriend in the afternoon on 1 August 2017. In those messages he said:
- "day is going ok, just had another mini review as on my feedback sheet I put, there needs to less ego and something else and they had questions! So I told them everything! Was ok but they said they somehow missed the fact I was dyslexic....as I said I really didn't like the whole folder capital letter shit and it's hard for me to always focus on this crap with it." (Exhibit 12 page 18)*
101. In a subsequent Whatsapp chat with Ms Tang on 22 January 2018, the claimant describes his relationship with Mr Parmar following the argument in Seoul as follow:
- "When I was in Korea and I had words with him about what he needs to do as a manager. He didn't like it even though he asked me. And was really passive aggressive towards me for about 4 months and had a go at me and tried to poke fun at me wherever he could. Made a massive deal of me not putting full capital letters on my design files (it makes 0 difference. He just wanted it that way.) And even sent me an email with massive wording saying "USE CAPITAL LETTERS!!!" and copied in the rest of the team. Then laughed at me for a while about it. I didn't look happy. Also he taped down my key board on the shift key.....*
- So at the end of year review I put it in [my form] but in a very non descriptive way. And they ([Mr Parmar] and [Mr Sawyer]) asked me to clarify as it would go to the higher ups. So I said why and said it's hard for me to always have good grammar as I'm dyslexic so have to work hard to just spell!! (Exhibit 15 page 20)).*
102. In a subsequent grievance letter written by the claimant and dated 15 October 2019, the claimant said the following about this meeting:



*“And a time before this at the last personal review. I was asked by [Mr Parmar] and [Mr Sawyer] to come and talk alone about what I had put on my review feedback paper. They were referring to a part where I had said that there is unfair and unequal treatment among the team and some of us are treated badly. They asked me to specify what I was on about as it might not make sense to [Mr Ish Hassan] and they would have to explain it.*

*I told them about how some of us are treated, said I felt like I was being picked on and gave the example of the time [Mr Parmar was] unhappy with the fact I don't put all capital letters when naming the pre-cad designs (these files are not that often seen by other members of the team let alone buyers) [and] sent me an Email in big capital letters saying USE CAPS LOCK!!!” (238)*

103. These documents lead us to find that the claimant referred to having general complaints in his review form which led to a discussion in which the claimant then raised his dyslexia-related concerns. The dyslexia-related concerns were not included in the form.
104. At the meeting, Mr Parmar accepts that he told the claimant that he was not aware of the claimant being dyslexic at the meeting. He had forgotten that the claimant had mentioned his dyslexia at his interview 4 years earlier.
105. The claimant says that he was so open with his colleagues about his dyslexic, that it is not believable that Mr Parmar could not have known. We do not accept that this was the case.
106. The claimant's dyslexia had not caused him any difficulties in the workplace that needed to be addressed suggesting that it was not something that needed to be in Mr Parmar's knowledge.
107. In addition, when the claimant contacted two ex-employees of the respondent when preparing for the claim via Whatsapp and asked them both if they were aware of his dyslexia it is notable that neither of them confirmed they were (Exhibits 5 (14) and 18 (25)). In her evidence before the tribunal, Ms Naismith confirmed that she only knew about the claimant's dyslexia as a result of him talking about the incidents he raised in the review meeting on 1 August 2017 and he had not been aware of it before this date.
108. Mr Sawyer accepts that he did know about the claimant's dyslexia before the review meeting. Mr Sawyer's brother is dyslexic, and he and the claimant had discussed this. We find that Mr Sawyer did not deny knowing about the claimant's dyslexia at the review meeting held on 1 August 2017. Mr Sawyer's evidence was that in response to the claimant expressing concerns about his dyslexia, rather than deny knowledge of it, he said that he had not realised that the claimant's dyslexia affected him so significantly. We find that the claimant misunderstood what what Mr

Sawyer said and incorrectly interpreted it as a denial of knowledge of his dyslexia.

109. When the claimant raised the issue of his dyslexia at the meeting Mr Parmar apologised to the claimant for the capital letter emails and the incident with the CapsLock key. Both he and Mr Sawyer told us from August 2017 onwards they were extremely careful not to say anything to the claimant that might be interpreted by the claimant as a criticism linked to his dyslexia. The claimant confirmed that there were no further incidents.

### January 2018 – Discussions with Mr Parmar

110. The next occasion when the claimant raised concerns with Mr Parmar about feeling unhappy at work was in January 2018. On this occasion, it was Mr Maurin whose actions initiated the discussions that followed.
111. Mr Parmar was away in Turkey for work at the start of 2018. He delegated some of his leadership responsibilities to Mr Kingett. This upset Mr Maurin because Mr Kingett was the newest member of the team. Mr Maurin emailed Mr Parmar to complain and copied in the claimant (158). This led to Mr Parmar arranging one to one meetings with each of them.
112. Mr Parmar met with the claimant on 8 January 2018. In addition to discussing the email with him, Mr Parmar wanted to discuss a plan for forthcoming trips. By that time, a decision had been taken at a senior level not to send junior designers on any further long haul trips. This was because they were very expensive. Mr Parmar was therefore planning a series of trips to Europe for members of the Menswear design team. These were to be combined with research trips in London shops to photograph clothes there.
113. Mr Parmar accepted in his evidence to the tribunal that the claimant expressed concerns about the trips during their meeting because of his fear of being racially profiled in the shops. He also accepts that he told the claimant that all of the respondent's designers were required to go on the trips and it was a normal practice for designers in the industry. He did not, however, accept that he told the claimant that the trips were a requirement under his contract.
114. Neither Mr Parmar nor the claimant took notes of the meeting held on 8 January 2018. However, the claimant referred to it in a Whatsapp message later that same day with his then girlfriend in which he told her what Mr Parmar had said about the trips:

*"He thinks that's what we need to do. That it will get us inspired. I said its not any different from looking at [the clothes] online and he started banging on about feeling the garments."* (Exhibit 14 (19-20)).

115. We do not consider that we need to make a finding that Mr Parmar expressly told the claimant that going on trips was a requirement under his contract. We are satisfied that Mr Parmar left the claimant with the

understanding that he had to go on the trips and undertaking research on-line was not an acceptable substitute.

116. At some point during the following fortnight, however, the claimant spoke to Mr R Hassan about the meeting and shared his concerns with him about the planned trips. The claimant's evidence was that he was so anxious about the requirement to go on trips that he almost broke down into tears when speaking to Mr R Hassan. The claimant told Ms Tang via Whatsapp on 22 January 2018 that he had met HR so the meeting with Mr R Hassan must have happened by then (Exhibit 15 (20)).
117. The claimant was subsequently not required to go on any trips being planned in January 2018. It is not entirely clear if this was a result of Mr R Hassan speaking to Mr Parmar on the claimant's behalf or a subsequent conversation between Mr Sawyer and the claimant (considered below) that led to Mr Sawyer speaking to Mr Parmar on the claimant's behalf.

### **January / February 2018 - Discussions with Mr Sawyer**

118. The claimant says that at around this time he had a conversation with Mr Sawyer which left him feeling betrayed. The claimant says that during the course of the conversation Mr Sawyer admitted he and Mr Parmar had lied at the August review meeting about not knowing that the claimant had dyslexia. He says that Mr Sawyer asked him "what's wrong with you?" when he referred back to the August review. The claimant did not, before us, accuse Mr Sawyer of shouting at him at this meeting and later withdrew this allegation.
119. The claimant's date for this meeting is very confused.
120. In his witness statement the claimant cites the contents of the conversation itself as the betrayal and that immediately following this conversation, on the way home from work, he experienced his first episode of derealisation, such that his perception of time, sounds and colours was distorted. He states that the conversation with Mr Sawyer preceded him speaking to Mr R Hassan which would date it as taking place between 8 and 22 January 2018 (paragraph 37 – 40).
121. In his Disability Impact Statement (paragraph 13 – page 91) the claimant describes the conversation with Mr Sawyer as taking place in January 2018. He says in that statement that following the conversation, Mr Sawyer shared details of it with Mr R Hassan and Mr Parmar and says that this betrayal was the trigger for his first derealisation episode (paragraph 14 – page 92)
122. In the extended timeline (62) he says the conversation with Mr Sawyer takes place about a week after his meeting with Mr Parmar which would make it around mid-January and again attributes his first episode of derealisation to learning that Mr Sawyer had betrayed his confidence and told Mr R Hassan and Mr Parma about the conversation.

123. Mr Sawyer recalled that he instigated a conversation with the claimant in around January 2018 because it had been evident for a few weeks that the claimant was “*visibly very moody.....very quiet [and] he seemed very tired all the time.*” By way of context he told us that he had several conversations with the claimant about fatigue during the spring of 2018 and was aware that the claimant was seeking medical help concerning this. They talked about insomnia and finding methods and techniques to resolve the problem of getting insufficient sleep plus shared information about family and personal matters.
124. Mr Sawyer told us that because he was concerned about the claimant, he initiated a conversation with him in a private space when they were discussing a design brief. He said it was a lengthy conversation in which the claimant described his issues with Mr Parmar to him, including his belief that Mr Parmar was bullying him. He referred to the caps lock issue with dyslexia and at some length, his concern over research trips. Mr Sawyer denied making any admissions that he had Mr Parmar had lied to him in August 2017 about knowing he had dyslexia or being challenging to him in any way, including asking him “What’s wrong with you?”
125. Mr Sawyer told us that the meeting ended with the two men hugging. He recommended that the claimant share his concerns with Mr R Hassan and Mr Parmar directly and asked the claimant if he was happy for him to speak to them on his behalf to set up a meeting, to which the claimant agreed. The claimant says he did not agree to Mr Sawyer speaking to anyone on his behalf.
126. The only contemporaneous evidence of the meeting is found in two Whatsapp exchanges. The first is between Mr Parmar and Mr Sawyer which confirms that Mr Sawyer and the claimant must have met on 6 February 2018. In it Mr Sawyer tells Mr Parmar that he “thinks [the claimant] just needs to have a bit of a clear the air talk. He adds that they “*mostly went through design stuff and then talked about the same stuff s usual.*” Mr Parmar responds saying, “*thanks for tackling it mate, not easy, I just want him to be happy, just need to nip this in the bud, before it spirals*” (332).
127. We were also referred to a WhatsApp message between the claimant and Mr Sawyer of 11 Feb 2018 in which Mr Sawyer says:  
  
“*So sorry to bring it up on your weekend – didn’t get a chance to chat to you Friday – but I spoke to [Mr Parmer] last week in the end – and just to let you know that he’s more than happy to sit down with you and [Mr R Hassan} if you still wanted, nothing formal (unless you want) just to get it all out and try and figure out how to learn from it and make it better.*” (162 – 164)
128. We find that Mr Sawyer was supportive of the claimant when they spoke and as a result was trying to find a solution to the claimant’s apparent unhappiness.

### March 2018

129. As 2018 progressed, the claimant felt more unwell. His symptoms included feeling flat in mood with no energy and poor sleep. As noted above he discussed this with other team members from time to time, including Mr Sawyer. The conversations came up as everyday conversations in which they discussed the potential benefits of exercise and various natural remedies.
130. On 28 March 2018, the claimant attended a psychology assessment with Dr Gemma Allison, a clinical psychologist which he had arranged privately. She assessed him as presenting with symptoms of low mood and anxiety. He cited psychological stresses at work and an unresolved issue of noise disturbance from his neighbours as the causes (73).
131. The claimant was also waiting for the results of blood tests at around this time as he was investigating whether there was a physical cause for his lethargy and tiredness. His medical notes suggest that he had blood tests in April 2018, the results of which arrived in June. They did not show any significant abnormality (375F).

### 24 April 2018 Meeting

132. The claimant attended a team meeting of the Menswear Design team on 24 April 2018. Both the claimant and Mr Parmar found the meeting difficult.
133. The claimant says that Mr Parmar “gaslighted” him at the meeting. The claimant had suggested a change to the way the team should work about a year earlier, but the suggestion had not been taken up. At this meeting however, Mr Parmar told the team that they should adopt the new way of working. According to the claimant, Mr Parmar did not acknowledge the initial suggestion made by the claimant. Mr Parmar says that he not only acknowledged the claimant’s suggestion, but he also apologised for not adopting it earlier.
134. No notes were taken of the meeting. The only contemporaneous evidence is found in an exchange of WhatsApp messages between Mr Sawyer and Mr Parmar later that day (335 - 336). In the exchange, the two men discuss the fact that the meeting was difficult and that the claimant appeared to have a particularly negative attitude towards Mr Parmar. Mr Parmar expresses the view that *“I just feel like me and [the claimant] will never be sorted, I don’t even think he wants to resolve anything...it seems like whenever I’m around him his attitude just goes to shit”* (335) The exchange does not record the discussion about the particular work suggestion though. We prefer Mr Parmar’s evidence on this issue.

### 1 May 2018 Meeting

135. On 1 May 2018, the claimant had a meeting with Mr Parmar. We were not told how the meeting came about, but it appears likely that it was initiated by the claimant. Following his meeting with Mr Parmar, the claimant asked

to meet with Shaiq Hassan. This was the first time he had met with Mr Hassan on a one to one basis.

136. Mr Parmar acknowledges that during their meeting the claimant disclosed to him that he was seeing a therapist privately who had diagnosed him as having depression. He also told Mr Parmar that he had been having panic attacks. The claimant reiterated that he continued to be concerned about undertaking research in the shops. He also said he wanted to be able to wear his headphones in office. Mr Parmar apologised to the claimant for anything he may have done to contribute towards the claimant's condition. He agreed that the claimant did not have to undertake any more research trips and agreed that he could come up with an alternative way of doing research. The claimant subsequently did this using on-line sources and was not required to go on any research trips again.
137. Mr Parmar also told the claimant that he could wear his headphones whenever he wished and that the respondent would support him with regards to his mental health and he could take as much time off as he needed. Mr Parmar and the claimant hugged at the end of the meeting.
138. The claimant also met with Mr S Hassan on 1 May 2018. Mr S Hassan also told the claimant that he did not have to undertake any research trips and that the respondent would support him if he needed to take time off due to his mental health condition.
139. Mr Parmar was concerned what the claimant might be saying to Mr S Hassan. His concerns were expressed in a WhatsApp exchange with Mr Sawyer. In that exchange he recorded the complaints the claimant had raised with him as including:
- Mr Parmar's lack of organisation
  - Forcing the claimant to go on trips
  - Favouritism towards Mr Sawyer

Mr Parmar also commented that "*at least mine and [the claimant's] relationship could be on the mend*" (337).

140. Later that day the claimant sent a WhatsApp message to Reda Hassan saying: "*Thanks for the talk Red, I spoke to both of them and it helped! Hopefully things should get better now!*" (173).

### **17 May 2018**

141. The claimant consulted his GP about his ongoing anxiety symptoms on 17 May 2018. His GP notes record that he said he felt he had been suffering from depression for almost a year. The notes say; "*feels trigger was work, felt picked on by boss and also noisy, rude neighbours and was having some difficulties in relationship at around this time*" The claimant's reason for contacting the GP was to find out about access to therapy on the NHS as he felt that seeing a therapist privately was helpful, but expensive. The

notes record that the claimant did not feel he needed medication at this time (375F).

**Summer 2018**

142. Mr Sawyer got married on 3 June 2018 and invited the entire menswear team, including the claimant and his partner. The claimant sent Mr Sawyer a generous wedding gift with a very friendly personal message (177).
143. Throughout the summer, the claimant was able to take time as much time off as he wished due to his mental health condition. This included flexible start and finish times in the office and taking some time off. The claimant was not asked to provide medical evidence for his medical condition. He was paid in full throughout this period.
144. The claimant claims that despite agreeing that he should be able to wear headphones in the office, Mr Parmar asked him to remove them on repeated occasions. The claimant accepted that he was not asked directly to take his headphones off after the meeting in June 2018. His allegation is that Mr Parmar forced him to take his headphones off through asking him questions. The claimant alleges that Mr Parmar already knew the answers to these questions, but was asking them to make it appear as if he had a legitimate reason for the claimant to take his headphones off.
145. Mr Parmar admits asking the claimant some questions that meant he had to take his headphones off temporarily a few times. He denies asking him questions to which he already knew the answers. We accept Mr Parmar's evidence on this point.

**6 September 2018**

146. Although the claimant was able to take this time off, his mental health was not improving, and he began to have an increased number of panic attacks. One such attack took place on Wednesday 5 September 2018 at work. The claimant went to the office kitchen when it occurred. He was convinced that Mr Sawyer witnessed the attack, but he denies this. Mr Sawyer said he did not see the attack, but did observe that the claimant appeared to be unwell when he came back to the office. Mr Sawyer suggested the claimant should go home which he did.
147. An incident occurred the following day, Tuesday 6 September 2020 between the claimant and Mr Sawyer. The claimant was working in the office. He was approached by Mr Sawyer who could see that he was looking very down. Mr Sawyer invited him to speak with him. The claimant was reluctant to do so, but Mr Sawyer insisted, and they went to another part of the office close by to have a private conversation.
148. The conversation did not go well. As a result of the incident the claimant accused Mr Sawyer of shouting at him and left the office. He then took sickness absence until 11 September 2018.

149. We have reviewed the evidence available to us about the incident. The claimant and Mr Sawyer prepared accounts of their exchange relatively quickly after it occurred. Mr Sawyer's account is contained in an email addressed to his wife. We find that it is a genuine document that he prepared shortly after the incident took place. The claimant's account is contained in his grievance letter. He also referred to it in various WhatsApp exchanges (see below) and told his GP about it on 7 September 2018 (375E).
150. In addition, Ms Naismith was present in the respondent's offices and witnessed a small part of the exchange between the claimant and Mr Sawyer.
151. Overall, the accounts provided by the two men are very similar with regard to the factual content of the conversation. They both record that the claimant informed Mr Sawyer that he was being treated for depression. Mr Sawyer denied having prior knowledge of it from Mr Parmar.
152. They also both say that when the claimant said he was tired of the "*all the lies and bullshit that happens at work*" and that it was getting him down and having a bad effect on him, Mr Sawyer reacted. The claimant says Mr Sawyer became angry. Mr Sawyer denies being angry, but admits that he became defensive. The discussion briefly touched upon a member of staff who the claimant felt had been lied to about performing well when the respondent actually wanted to get rid of her. Both men agree that within a few minutes of further discussion the claimant then brought the conversation to an end saying that he had told Mr Sawyer that speaking to him would not make any difference. At this point the claimant left the room.
153. The claimant says Mr Sawyer shouted after him and told him to come back and that he was acting like a child. He went back to the design room, got his bag and left. Mr Sawyer admits calling after the claimant (not shouting) to come back and telling him he should behave like an adult.
154. The claimant messaged Mr R Hassan very quickly following the incident saying:
- "Just walked out of work! Tried to talk to Nick about the atmosphere of lies and bullshit. And he got super defensive and argumentative! So I've gone home! Think I'm at my limit!"*
- Mr R Hassan replied to suggest C take a few days off. (173)
155. The claimant also told Ms Tang about the incident on WhatsApp that same night. He said:
- "Had a panic or anxiety attack yesterday and had to leave early.*
- Then Nick pulled me aside when I got into work to talk about it. I said the atmosphere is shit and too much lies and bullshit. He got defensive and not cool, so walked out!"* (Exhibit 20 – page 27)



156. It is notable that in both of these exchanges the claimant does not refer to being shouted at by Mr Sawyer, but instead describes him as defensive and argumentative.
157. Ms Naismith arrived at work while the two men were having their conversation. She did not therefore witness its beginning. She saw the claimant come back into the design room, pack his bag and leave. She did not hear Mr Sawyer shouting at the claimant. We accept her evidence on this point.
158. The parties confirmed to us that the distance between the location of the conversation and the design room was only a few metres. It is clear to us that had Mr Sawyer shouted at the claimant it would have been heard by Ms Naismith.
159. The Whatsapp exchange between the claimant and Ms Tang later that night contains some notable entries. Ms Tang and the claimant discuss whether the claimant can afford to leave his job. The claimant says he is considering sickness absence or asking for gardening leave for a while. He then says he cannot stay so he will have to leave soon, but still needs to be smart. There is a discussion about whether the respondent would be prepared to pay him off and him being happy to "*Watch Menswear burn!*" (Exhibit 20 pages 28 – 29)
160. It is particularly notable that when Ms Tang asks the claimant if he feels bullied, he replies "*Not right now, as I told the HR manager and then it stopped. But the damage is done*" (Exhibit 20 pages 28-29)

### **11 September 2018**

161. Having taken a few days off, the claimant returned to the office on Tuesday 11 September 2018. He admits that on arrival Mr Sawyer approached him, but that he somewhat aggressively told Mr Sawyer not to speak to him. Both Mr Sawyer and the claimant agree that the claimant later apologised for the way he spoke to Mr Sawyer that morning of his own volition.
162. Mr Parmar was absent from work at this time as he had had a car accident at the weekend. He had sent the claimant a short supportive text message the day before telling him not to worry about work and take as much time off as he needed (181).
163. As Mr R Hassan was also absent from work, the claimant asked Mr I Hassan to meet with him who agreed. There is no note of the meeting. Mr I Hassan and the claimant exchanged brief messages after the meeting took place however (183) and the claimant sent a message to Ms Tang on WhatsApp telling her about the meeting the following day (Exhibit 23 page 33). He also sent a brief message to Mr R Hassan (Exhibit 21 page 30 – 31).

164. Based on those messages, we find that the claimant told Mr I Hassan that he was thinking of leaving his job because he was so unhappy and asked if it would be possible for him to have paid garden leave. Mr I Hassan told him that he was a valued employee that the respondent did not want to lose. He was very sympathetic to the claimant's mental health and told the claimant that the respondent would support him in anyway it could, including taking time off work with pay if required. The claimant asked if he could change his location in the office so that he could work away from the Menswear team, but Mr I Hassan said this would be impractical. His follow up message was supportive and indicated a desire to sort out the problems that the claimant had said he was experiencing. The claimant thanked Mr I Hassan.
165. We find that the claimant did not hand Mr I Hassan a grievance letter at the meeting. There is no mention of a grievance in the exchange with Mr I Hassan after the meeting, or in the message sent to Ms Tang. Had the claimant initiated the grievance procedure at this time, we feel sure he would have messaged Mr R Hassan to tell him this.
166. In addition, there was no evidence before us to suggest that Mr I Hassan asked the claimant to apologise to Mr Sawyer as he has alleged.
167. The claimant took the rest of the week off work with full pay with the intention of returning when Mr Parmar was back in work.
168. Mr I Hassan told us that there were two reasons why he had not agreed to the claimant changing location. The first reason was because he did not consider it was practical due to a shortage of meeting rooms and private offices. The only person who had their own office was the Building Manager. All other rooms were shared. The offices had three meeting rooms which were in constant use for internal and external meetings, one of which was also the staff dining room.
169. He also told us that he did not think relocating the claimant was the right solution. He felt that the Menswear Team needed to remain located together to work effectively, and that it was therefore important to resolve the relationship difficulties that the claimant had described to him.

### **17 September 2020**

170. The claimant had returned by work 17 September 2018. There were some further meetings on this date firstly between Mr R Hassan, Mr Parmar and Mr Sawyer and then between Mr R Hassan, Mr Parmar and the claimant. No notes were adduced in evidence of what was said in the meetings.
171. At the meeting he attended with Mr R Hassan and Mr Parmar, Mr Sawyer acknowledged that he should not have pushed the claimant into talking to him. He also acknowledged that he had reacted defensively to the accusations that the claimant had made and admitted calling after him to behave like an adult as the claimant walked away. He denied shouting or other aggressive behaviour.

172. From the respondent's perspective, it understood that the claimant had been prescribed anti-depressants and was considering submitting a grievance. It decided to obtain some legal advice about the claimant (184). Although we accept that the claimant may well have begun drafting a grievance letter at this stage, we think he had not given it to the respondent. This was because the advice the respondent received on 12 October 2020 was to ask the claimant to put his grievance in writing (185).
173. We find that the claimant felt somewhat reassured by what was said to him on 17 September and formed the view that it might be possible for him to stay at the respondent. He was, however, also actively working on an 'exit plan' from the respondent. This is based on what he told his GP on 20 September and 11 October 2018 when he had a medication review and various messages that he sent during this period. The claimant also told the respondent that he had been prescribed anti-depressants and was suffering some side effects as a result (184).
174. We were not presented with any evidence that the claimant that the outcome of the meeting was that the claimant was required to apologise to Mr Sawyer.
175. The claimant took some further time off a few days following the meeting on paid sickness absence, again without having to produce medical evidence.
176. The claimant consulted his GP for a medication review on 20 September 2018. The notes record:
- "feeling OK  
had a panic attack at work 2d ago – was feeling quite agitated – had to do a task on the data base, freaked out – was not able to focus  
work seem to be OK with his not going to work –  
HR have accepted that he is being treated poorly and now seem to be trying to make amends  
This is mainly because his evidence was overwhelming and as such HR have been forced to accept that the managers behaviour has been unacceptable  
part of the reason he is anxious is that his senior colleagues are not nice people"* (375D-375E)
177. On 27 September 2020, the claimant exchanged Whatsapp messages with Ms Naismith. In response to a message from her asking how if he was taking time, off the claimant replied "Yer I'm off the next two weeks, get my head and my shit together so I can get ready to leave" (Exhibit 19 – page 27).
178. On 11 October 2019, at a further medication review with his GP, the claimant's GP notes record:
- "has had last two weeks off from work  
has been taking the time to produce his portfolio and review"*

*not sure how he will feel when he goes back to work on Monday” (375D)*

## **Resignation**

179. The claimant returned to work on Monday 15 October 2018. This was the day he resigned. The respondent agreed to pay the claimant three months’ pay as a lump sum. This was more generous than his contractual entitlement to notice.
180. Mr R Hassan prepared a short resignation letter which the claimant signed (290) and at 14:31 emailed an announcement to the respondent’s employees explaining that the claimant had left the company with immediate effect by way of a mutual agreement between him and the company (239A).
181. The claimant told us that he did not go to work that day with the intention of resigning. He took with him the latest version of his grievance letter, but was persuaded by Mr R Hassan that the grievance would be pointless as nothing would change and instead, he would be better off leaving and pursuing the issues in the grievance as a legal claim. His decision not to submit the grievance was also influenced by his desire to get the respondent to agree to give him three months’ pay.
182. We have reached this conclusion based on the contemporaneous WhatsApp messages he had with Ms Tang that day (C – 34). The WhatsApp messages between the claimant and Mr R Hassan at this time are also very illuminating. These reveal that Mr R Hassan engaged the claimant to do some designs for a clothes business that Mr R Hassan was trying to establish. They had discussed this before the claimant resigned.
183. We do not find that the claimant resigned in order to go into business with Mr R Hassan. He resigned because he was unhappy as a result of the ongoing relationship difficulties between him, Mr Parmar and Mr Sawyer. The relationship difficulties existed because the claimant viewed Mr Parmar as a poor manager who did not value him as much as the claimant felt he should have.

## **Post termination**

184. Following the claimant’s resignation, he remained in contact with Mr R Hassan, doing some work for him, while he looked for another job.
185. The claimant was contemplating making a legal claim at the time of his resignation. He waited before doing so for Mr S Hassan to contact him as he believed that Mr S Hassan wanted to make him some sort of settlement offer. When Mr S Hassan had not been in touch, he initiated the early conciliation process. This was on 9 January 2019. He also messaged Mr R Hassan on the same day to say that he had given Mr R Hassan’s contact details to ACAS.
186. The EC certificate was issued on 5 February 2019. The claimant did not present his claim to the tribunal until 12 March 2019.

187. The claimant says that he was unwell after he left the respondent and unable to present a claim any earlier. He accepts that he was well enough to make a large number of job applications, however, but says that this used up all his available energy and capacity.
188. The claimant's medical notes record that he consulted his GP on 15 November 2019 for a medication review. The claimant reported that he had run out of medication a week earlier and did not want to restart. The notes say, "*looking for work – has been working with someone – feels fine, concentration is better and feels does not want to start the citalopram*" (375C)
189. There is a further entry on 15 February 2019. The notes record that the claimant is experiencing mild anxiety. The claimant requested a medical certificate to support an application for universal credit, but was refused one. The GP has noted "*I apologise I would not feel comfortable issuing a med 3 as I do not think he is too unwell to work.*" (375D)
190. The claimant also told us that he had legal expenses insurance to cover employment tribunal claims. He says he contacted the insurance company on 9 January 2019, but they needed his medical records before the cover could be confirmed. The GP notes record that the claimant contacted the surgery about obtaining his notes on 21 February 2019. They record that he felt his anxiety was getting "a little worse." He was advised to attend in person and sign a consent form for the notes (375C - D). The notes were ready for collection on 13 March 2019 (375C).
191. The claimant was offered a new job on 19 March 2019, having attended an interview (403). He started the new job on 25 March 2019 (246). The claimant commenced taking anti-depressants again from 29 June 2019 (375C).

## THE LAW

### Time Limits – Unfair Dismissal Claim

192. The normal time limit for a claim of unfair dismissal is found in subsection 111(2)(a) of the Employment Rights Act 1996. That section provides that a claim must be brought before the end of the period of three months beginning with the effective date of termination of employment (as defined in section 97 of the same act).
193. Subsection 111(2)(b) goes on to say that a tribunal may still consider a claim presented outside the normal time limit if it is satisfied that:
- it was not reasonably practicable for the claim to be presented within the normal time limited and
  - the claimant has presented it within such further period as the tribunal considers reasonable.

194. This is a strict two stage test. The burden of proof for establishing that it was not reasonably practicable to present the claim in time is on the claimant.
195. The factors that can be taken into account will vary from case to case (*Marks & Spencer plc v Williams-Ryan* [2005] EWCA Civ 470).
196. A serious incapacitating illness of an employee is one of the factors that can be considered. Whether the illness is sufficient to make it not reasonably practicable to submit the claim in time will be a question of fact for the tribunal based on medical evidence.
197. The normal three month time limit need to be adjusted to take into account the early conciliation process and the extensions provided for in subsections 207B(3) and (4) of the Employment Rights Act 1996.
198. Subsection 207B(3) says in working out when a time limit set by a relevant provision expires the period beginning with the day after Day A (the day early conciliation is initiated ) and ending with Day B (the date the early conciliation certificate is issues) is not to be counted.
199. Subsection 207B(4) says if a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.
200. Those provisions apply sequentially such that subsection 207B(3) applies in every case and then subsection 207B(4) should be applied, if the limitation date, as extended by subsection 207B(3) falls in the period between Day A and one month after Day B (*Luton Borough Council v Haque* UKEAT/0180/17).

### **Time Limits – Discrimination Claims**

201. The relevant time-limit is at section 123 Equality Act 2010. According to section 123(1)(a) the tribunal has jurisdiction where a claim is presented within three months of the act to which the complaint relates. Alternatively, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable as provided for in section 123(1)(b).
202. By subsection 123(3)(a), conduct extending over a period is to be treated as done at the end of the period. This is known as a “continuing act” case.
203. In *Hendricks v Metropolitan Police Commissioner* [2002] EWCA Civ 1686, the Court of Appeal stated that the test to determine whether a complaint was part of an act extending over a period was whether there was an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably.
204. It is not necessary to take an all-or-nothing approach to continuing acts. The tribunal can decide that some acts should be grouped into a

continuing act, while others remain unconnected (*Lyfar v Brighton and Sussex University Hospitals Trust* [2006] EWCA Civ 1548; The tribunal in *Lyfar* grouped the 17 alleged individual acts of discrimination into four continuing acts, only one of which was in time.

205. By subsection 123(3)(b), a failure to do something is treated as occurring when the person in question decided on it. In the absence of evidence to the contrary. A person is taken to decide on a failure to do something when that person does an act which is inconsistent with doing it or, in the absence of such an inconsistent act, on the expiry of the period on which that person might reasonably have been expected to do it.
206. The normal three month time limit needs to be adjusted to take into account the early conciliation process and any extensions provided for in section 140B Equality Act. Section 140B of the Equality Act 2010 mirrors sections 207B of the Employment Rights Act 1996.
207. The tribunal has a wide discretion to extend time on a just and equitable basis. Nevertheless, tribunals should not extend time unless the claimant convinces them that it is just and equitable to do so: the exercise of discretion should be the exception, not the rule (*Bexley Community Centre (t/a Leisure Link) v Robertson* [2003] EWCA Civ 576).
208. Factors that the tribunal should consider, when deciding whether or not to extend time, were considered in the case of *British Coal Corporation v Keeble* [1997] IRLR 36, and include:
  - the length of and reasons for the delay;
  - the extent to which the cogency of the evidence is likely to be affected by the delay;
  - the extent to which the respondent has co-operated with any requests for information;
  - the promptness with which the claimant acted once they knew of the possibility of taking action;
  - the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

### **Constructive Unfair Dismissal**

209. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is taken to be dismissed by his employer if “the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct”.
210. It is established law that (i) conduct giving rise to a constructive dismissal must involve a fundamental breach of contract by the employer; (ii) the breach must be an effective cause of the employee’s resignation; and (ii) the employee must not, by his or her conduct, have affirmed the contract before resigning (*Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761).

211. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: (*Malik v Bank of Credit and Commerce International SA* [1998] AC 20).
212. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract (*Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666). The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship.
213. The test of whether there has been a breach of the implied term of trust and confidence is objective.
214. The breach of this implied obligation of trust and confidence can consist of a series of actions on the part of an employer which cumulatively amount to a breach of the term, even though each individual incident and in particular, the last act (or omission) may not do so in isolation.
215. In *Omilaju v Waltham Forest LBC* [2003] EWCA Civ 1426 the Court of Appeal confirmed that that “*Although the final straw may be relatively insignificant, it must not be utterly trivial.*”(16) It said; “*The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer.*” (20)
216. Where an employee has mixed reasons for resigning, the resignation will constitute a constructive dismissal if the repudiatory breach relied on was at least a substantial part of those reasons.

### **Protected Characteristics**

217. Disability and race are both protected characteristic under section 4 of The Equality Act 2010 (the Act). According to section 9(1) of the Act, race includes colour, nationality and ethnic or national origins. The claimant in this case relies on colour.

### **Direct Discrimination**

218. Section 39(2) of the Equality Act 2010 prohibits an employer discriminating against one of its employees by dismissing him or by subjecting the employee to a detriment. This includes direct discrimination because of a protected characteristic as defined in section 13.
219. Section 13 of the Equality Act 2010 provides that ‘A person (A) discriminates against another (B) if, *because of* a protected characteristic, A treats B less favourably than A treats or would treat others’.
220. Under section 23(1), where a comparison is made, there must be no material difference between the circumstances relating to each case. It is possible to compare with an actual or hypothetical comparator.



221. In order to find discrimination has occurred, there must be some evidential basis on which we can infer that the claimant's protected characteristic is the cause of the less favourable treatment. We can take into account a number of factors including an examination of circumstantial evidence.
222. We must consider whether the fact that the claimant had the relevant protected characteristic had a significant (or more than trivial) influence on the mind of the decision maker. The influence can be conscious or unconscious. It need not be the main or sole reason, but must have a significant (i.e. not trivial) influence and so amount to an effective reason for the cause of the treatment.
223. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as he was.
224. Section 136 of the Equality Act sets out the relevant burden of proof that must be applied. A two-stage process is followed. Initially it is for the claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination.
225. At the second stage, discrimination is presumed to have occurred, unless the respondent can show otherwise. The standard of proof is again on the balance of probabilities. In order to discharge that burden of proof, the respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the claimant's race. The respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-discriminatory.
226. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong* [2005] EWCA Civ 142; [2005] IRLR 258 and we have followed those as well as the direction of the court of appeal in the *Madarassy* case. The recent decision of the Court of Appeal in *Efobi v Royal Mail Group Ltd* [2019] ICR 750 confirms the guidance in these cases applies under the Equality Act 2010.
227. The Court of Appeal in *Madarassy*, states:
- '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.'* (56)

228. It may be appropriate on occasion, for the tribunal to take into account the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (*Laing v Manchester City Council and others* [2006] IRLR 748; *Madarassy v Nomura International plc* [2007] IRLR 246, CA.) It may also be appropriate for the tribunal to go straight to the second stage, where for example the respondent assert that it has a non-discriminatory explanation for the alleged discrimination. A claimant is not prejudiced by such an approach since it effectively assumes in his favour that the burden at the first stage has been discharged (*Efobi v Royal Mail Group Ltd* [2019] ICR 750, para 13).
229. We are required to adopt a flexible approach to the burden of proof provisions. As noted in the cases of *Hewage v GHB* [2012] ICR 1054 and *Martin v Devonshires Solicitors* [2011] ICR 352, they will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they may have little to offer where we in a position to make positive findings on the evidence one way or the other.

### Indirect Discrimination

230. The reference to discrimination in section 39(2) of the Equality Act 2010 includes indirect discrimination as defined in section 19.
231. Subsection 19(1) of the Equality Act 2010 provides that:
- “A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.”
232. Subsection 19(2) provides that for the purposes of subsection 19(1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
  - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
  - (c) it puts, or would put, B at that disadvantage, and
  - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
233. In establishing whether a PCP places persons of a protected characteristic at a particular disadvantage, the starting point is to look at the impact on people within a defined "pool for comparison". The pool will depend on the nature of the PCP being tested and should be one which suitably tests the particular discrimination complained of (*Grundy v British Airways plc* [2008] IRLR 74. The EHRC Employment Code provides useful guidance on this question. A strict statistical analysis of the relative proportions of

advantaged and disadvantaged people in the pool is not always required. Tribunals are permitted to take a more flexible approach.

234. The claimant must also establish that he is actually put to the disadvantage.
235. Indirect discrimination is not unlawful where it can be objectively justified. The burden is on the respondent to prove justification. This involves two questions:
- Can the respondent establish that the measures it took was in pursuit of a legitimate aim that corresponded to a real business need on the part of the employer?
  - If so, can the respondent establish that the measures taken to achieve that aim were appropriate and proportionate i.e. did it avoid discriminating more than necessary to achieve the legitimate aim?

*(Bilka-Kaufhaus GmbH v Weber von Hartz [1986] IRLR 317, Enderby v Frenchay Health Authority and another [1994] IRLR 591, Homer v Chief Constable of West Yorkshire Police [2012] IRLR 6001)*

## Harassment

236. Section 40(1)(a) of the Act provides that an employer must not, in relation to employment by it, harass a person who is one of its employees. The definition of harassment is contained in section 26 of the Act
237. Section 26(1) of the Equality Act 2010 provides:
- “A person (A) harasses another (B) if
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
  - (b) the conduct has the purpose or effect of—
    - (i) violating B's dignity, or
    - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.”
238. A similar causation test applies to claims under section 26 as described above to claims under section 13. The unwanted conduct must be shown “to be related” to the relevant protected characteristic.
239. The shifting burden of proof rules set out in section 136 of the Act can be helpful in considering this question. The burden is on the claimant to establish, on the balance of probabilities, facts that in the absence of an adequate explanation from the respondent, show he has been subjected to unwanted conduct related to the relevant characteristic. If he succeeds, the burden transfers to the respondent to show prove otherwise.

240. Harassment does not have to be deliberate to be unlawful. If A's unwanted conduct (related to the relevant protected characteristic) was deliberate and is shown to have had the *purpose* of violating B's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, the definition of harassment is made out. There is no need to consider the effect of the unwanted conduct.
241. If the conduct was not deliberate, it may still constitute unlawful harassment. In deciding whether conduct has *the effect* of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, we must consider the factors set out in section 26 (4), namely:
- (a) the perception of B;
  - (b) the other circumstances of the case;
  - (c) whether it is reasonable for the conduct to have that effect.
242. The shifting burden of proof rules can be also be helpful in considering the question as to whether unwanted conduct was deliberate.

### **Victimisation**

243. Section 39(4)(d) of the Equality Act 2010 provides that an employer must not victimise its employees. The definition of victimisation is contained in section 27 of the Act.
244. Section 27(1) of the Act provides that:
- 'A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.'
245. The definition of a protected act is found in section 27(1) and includes:
- (a) bringing proceedings under the Equality Act 2010;
  - (b) giving evidence or information in connection with proceedings under the Equality Act 2010;
  - (c) doing any other thing for the purposes of or in connection with the Equality Act 2010; and
  - (d) making an allegation (whether or not express) that an employer or another person has contravened the Equality Act 2010
246. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith (section 27(3)).
247. If the tribunal is satisfied that a claimant has done a protected act, the claimant must show any detriments occurred because he had done a protected act.

248. The analysis the tribunal must undertake is in the following stages:
- (a) we must first ask ourselves what actually happened;
  - (b) we must then ask ourselves if the treatment found constitutes unfavourable treatment;
  - (c) finally, we must ask ourselves, was that because of the claimant's protected act.
249. The test for detriment was formulated in the case of *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 where it was said that it arises where a reasonable worker would or might take the view that they had, as a result of the treatment complained of, been disadvantaged in the circumstances in which they had to work.
250. The shifting burden of proof found in section 136 of the Equality Act sets applies. Initially it is for the claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the respondent, that the reason for any unfavourable treatment was because of the claimant's protected act. If the claimant succeeds, discrimination is presumed to have occurred, unless the respondent can show otherwise.

## **ANALYSIS AND CONCLUSIONS**

### **Time Limits – Unfair Dismissal**

251. The claimant's claim for unfair dismissal was submitted outside of the normal time limit, even when account is taken of the extensions available for early conciliation.
252. The claimant's effective date of termination was 15 October 2018. The normal time limit, without any extension, would have been 14 January 2019.
253. He initiated the early conciliation process within three months on 9 January 2019 (Day A). The early conciliation certificate was issued on 5 February (Day B). Applying subsection 270B(3) of the Employment Rights Act gave him an extension of 27 days to 10 February 2019.
254. This adjusted time limit is less than one month after Day B, so the claimant benefits from section 270B(4) and his ultimate deadline is one month later, i.e. 10 March 2019. The claimant did not present his claim until 12 March 2019.
255. The claimant was not ignorant of the fact that there was a short time limit for presenting his claim. He sufficiently aware of the normal three month time limit to commence the early conciliation process within this period. He also contacted his legal expense insurance provider on this date who ought to have been able to advise him of the likely deadline for presenting

his claim following the conciliation process. It is likely the Acas conciliator also informed him that he had a month from date of issue of the early conciliation certificate to present a claim.

256. The claimant says that his mental health condition meant that that he was too ill for it to be reasonably practicable for him to submit a claim. The medical evidence we have seen does not support this.
257. As noted above, the claimant's GP refused to provide him with a medical certificate signing him off as too unwell to work on 15 February 2019. This does not support his contention that he was too ill to present a claim. We note that he was well enough to make contact with his GP about his medical records including attending providing his GP with a written consent. Finally, he was well enough to apply for and secure a new job during the critical period.
258. We conclude that it was reasonably practicable for the claimant to present his claim in time. As he did not, his claim for unfair dismissal is out of time and we do not have jurisdiction to consider it.
259. We add that it is open to the claimant to seek a reconsideration of this decision if he is able to provide medical evidence that supports his contention that he was too ill to present his claim in time.

### **Time Limits - Discrimination Claims**

260. The claimant has invited us to treat his separate allegations of discrimination relating to different protected characteristics as a single course of bullying conduct by Mr Parmar. We do not consider the facts to justify this. Instead we have adopted the approach recommended by the *Lyfar* case and grouped the allegations made by the claimant into five groups. We consider four of these groups constitute separate continuing acts, namely
- his allegations relating to his dyslexia
  - his allegations relating to the trips
  - his allegations relating to his depression
  - some of his allegations of victimisation
261. The fifth group is 'stand-alone' allegations that in our view do not form part of a continuing act.

### **Dyslexia**

262. With regard to the allegations relating to dyslexia, the claimant accepts that following the appraisal meeting on 1 August 2017 with the Mr Parmar and Mr Sawyer he was not subjected to any further unwanted or less favourable treatment related to his dyslexia.

263. The only additional complaint he makes that has any connection to his dyslexia is his allegation that Mr Sawyer said, "What is wrong with you?" to him during their conversation that took place on 6 February 2018.
264. In our judgment, the date from which the time limit should run in relation to this continuing act is 6 February 2018. This means that the claimant's claim, having been submitted on 12 March 2019 is well over a year out of time.
265. We do not consider it would be just and equitable to extend time in relation to these allegations because of the length of the delay in pursuing them. The claimant was well aware that his allegations were of a serious nature and must have appreciated that legal action was open to him. He chose not to take such action.
266. We therefore find that the tribunal does not have jurisdiction to consider the claimant's allegations relating to his dyslexia, whether argued as harassment or victimisation. This includes the allegations at numbers 15.1, 15.2, 15.3 and 21.3 of the list of issues.

### **Trips**

267. With regard to the allegations relating to dyslexia, the claimant accepts that he was not required to go on any trips from January 2018 onwards. It is unclear whether or not the respondent made a decision that the claimant would be excused from all trips in January 2018. Such a decision was made however, and clearly communicated to the claimant in May 2018 as a result of his meeting with Mr S Hassan.
268. In our judgment, the date from which the time limit should run in relation to this continuing act is some time in January or February 2018. This means that the claimant's claim, having been submitted on 12 March 2019 is significantly out of time.
269. We do not consider it would be just and equitable to extend time in relation to these allegations because of the length of the delay in pursuing them.
270. We therefore find that the tribunal does not have jurisdiction to consider the claimant's allegations relating to the trips, whether argued as direct discrimination, indirect discrimination, harassment or victimisation. This includes the allegations at numbers 7 – 10, 11-14, 15.4, 21.1 and 21.2 of the list of issues.

### **Depression**

271. The allegations that the claimant makes relating to his depression start in June 2018 and continue into September 2018. The last allegation concerns the refusal to change the claimant's workplace which is said to have been decided on 11 September 2018.
272. In our judgment, the date from which the time limit should run in relation to this continuing act is 11 September 2018. This means that the claimant's

claim, having been submitted on 12 March 2019 is out of time, but only by a matter of a few months.

273. We consider it would be just and equitable to extend time in relation to these allegations. These allegations from part of the events that made up the denouement of the claimant's employment. Although we find that time runs from 11 September 2018, it was not unreasonable for him to assume the time limit was his last date of employment, namely 15 October 2018. His claim is only 2 days late in relation to this date. Although we have not extended time to accommodate the 2 days lateness under the strict test applicable to unfair dismissal claims, it is just and equitable to do so in respect of the discrimination claims.
274. We therefore find that the tribunal does have jurisdiction to consider the claimant's allegations relating to his depression. This includes the allegations at numbers 15.5, 15.6, 15.7 of the list of issues.

### **Victimisation**

275. We have treated the allegation of victimisation in relation to the discussion between the claimant and Mr Sawyer on 6 February 2018 as a separate stand-alone allegation (number 21.4) The claimant's claim in relation to this allegation is out of time by a significant margin. We do not consider it would be just and equitable to extend time in relation to it because of the length of the delay involved.
276. We have treated the allegation of victimisation in relation to the discussion between the claimant and Mr Sawyer 6 September 2018 as a separate stand-alone allegation (number 21.5). The claimant's claim in relation to this allegation is out of time by a relatively short period of time. We consider it would be just and equitable to extend time in relation to it for the same reasons as set out at paragraph 273 above.
277. We have grouped together allegations 21.6, 21.7, 21.8 and 21.9 on the basis that they are all connected by being part of the events that led to the denouement of the claimant's employment. The last of these was said to be on 17 September 2018. We consider it would be just and equitable to extend time in relation to it for the same reasons as set out at paragraph 273 above.

### **Direct Race Discrimination**

278. Although we have found this claim to be out of time, we have nevertheless considered its merits. Our decision is that the claim should fail in any event.
279. In relation to the trips, the claimant was not treated any differently to any of the other members of staff in the same role. All of the staff in the Menswear Design Department had to go on trips. He has therefore not established any facts that suggest that requiring him to go on the the trips constituted less favourable treatment of him when compared to his colleagues who were not black.



280. The claimant pursued an additional allegation of direct race discrimination in relation to the trips. He argued that both he and Mr Boughalan complained about having to go on the trips for similar reasons to do with their racial profiles. He contends that Mr Boughalan was able to stop having to go on trips, but he was not and invites us to find that this was because of his race.
281. We found, as a matter of fact, that the reason Mr Boughalan stopped having to go on trips was because he moved into a different role. The respondent has provided a coherent explanation for the difference in treatment between Mr Boughalan and the claimant which has nothing whatsoever to do with race. This claim therefore also fails.

### **Indirect Race Discrimination**

282. Although we have found this claim to be out of time, we have nevertheless considered its merits. We have decided that the claim would have succeeded had it been presented in time.
283. As noted above, the requirement to go on trips and undertake research on the shops was applied to all of the staff working in the Menswear Design Department. The test in section 19(2)(a) of the Equality Act 2020 is therefore met.
284. We were not presented with any statistical evidence that the requirement put black people at a disadvantage when compared with others. However, the panel considered, from our own knowledge, that the experience of which the claimant spoke was real. We were convinced that black people are racially profiled when shopping and more likely to be assumed to have criminal intent. Our view was informed by our knowledge of police “stop and search” statistics in the UK.
285. We were satisfied that the claimant was at greater risk than his colleagues of being identified as a potential shop lifter when undertaking shopping research trips. The fact that he did not actually experience any difficulties when undertaking trips does not negate this greater risk.
286. The reason for sending its designers on trips was because the respondent considered doing so was necessary for genuine business reasons. This was a legitimate aim. However, as demonstrated in this case, alternative methods of undertaking research were available to it. The success of the claimant’s own on-line research product shows that the respondent could have achieved its legitimate aim in a less discriminatory way. We therefore conclude that the discrimination was not objectively justified in this case.

### **Harassment**

287. Although we have found several of the harassment allegations to be out of time, we have nevertheless considered all of the allegations on their merits.

288. Several of the allegations of harassment fail on their facts. This includes:
- 15.1 Making fun of the claimant's spelling mistakes and reading them out loud to others (dyslexia)
  - 15.5 Insisting the claimant remove headphones at work (June 2018) (anxiety and depression)
  - 15.6 Shouting at the claimant when he speaks of depression (6 September 2018) (anxiety and depression)
  - 15.7 (the first part) Asking the claimant to apologise to Nick Sawyer (anxiety and depression)
289. In relation to the allegation at 15.2 "Making fun of his omission of capital letters, taping down the caps lock (dyslexia)", this has effectively been admitted by the respondent. We judge that this was unwanted conduct related to disability that had the effect of violating the claimant's dignity. If this allegation had been made in time, we would have found in favour of the claimant. We do not conclude that Mr Parmar intended to violate the claimant's dignity, however.
290. In relation to the allegation at 15.3 "Asking "what's wrong with you" when the claimant speaks of 15.1 and 15.2 (January 2018) (dyslexia)", this actually refers to what Mr Sawyer is alleged to have said to the claimant in their discussion on 6 February 2018. We note that Mr Sawyer denied using these words. The claimant failed to articulate what it was about these words that he felt constituted harassment related to his dyslexia. Our overall view of the discussion on 6 February 2018 is that Mr Sawyer was genuinely trying to help the claimant resolve the difficulties the claimant perceived he had with Mr Parmar and therefore we make no finding of harassment in relation to this allegation.
291. In relation to the allegation at 15.4 "Requiring the claimant to visit clothes shops abroad (see below) as it is part of his contract, despite being informed this made him the subject of unpleasant attention because of being black (September 2016, November or December 2016, April 2017, January 2018) (race)", we do not find this allegation to constitute harassment.
292. As noted above, we were not presented with any evidence that the claimant experienced unpleasant attention when on the research trips. Therefore, although requiring the claimant to go on the trips had the potential to create an intimidating, hostile, degrading, humiliating or offensive environment for him, this did not happen.
293. In relation to the second part of the allegation at 15.7 "refusing him a separate workspace 11 September 2018 (anxiety and depression)" the conduct complained of is Mr Hassan's decision to refuse the claimant's request to move. This conduct, of itself, did not have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The allegation is badly framed in our view and does not constitute harassment.

## Victimisation

294. Although we found some of the victimisation allegations to be out of time, we have nevertheless considered all of the allegations on their merits.

## Protected Acts

295. We first considered whether the claimant made any protected acts.
296. We find that the claimant did raise concerns connected with his race about going on the trips with Mr Parmar in September 2016 and November or December 2016 and January 2018. Mr Sawyer was made aware that his concerns were connected to his race in November or December 2016 and they had a further discussion about this on 6 February 2018. The claimant later shared his concerns with Mr R Hassan and Mr S Hassan. We find these discussion constituted protected acts.
297. The claimant made specific complaints about bullying treatment related to dyslexia during his annual review of 1 August 2017. This also constituted a protected act.
298. We do not find that when the claimant met separately with Mr Parmar and Mr S Hassan on 1 May 2018, that his ill health has been caused by the “discriminative behaviour” of Mr Parmar and/or Mr Sawyer. The claimant referred to the dyslexia issue and to his concerns about the trips and told both Mr Parmar and Mr Hassan that he had been diagnosed with depression, but did not make a link between the two. Nevertheless, what the claimant did say constitute a protected act
299. We do not find that the claimant made a protected act during the course of his conversation with Mr Sawyer on 6 September 2018. Although the claimant raised that one of his colleagues was being lied to by the respondent, the claimant did not say anything that amounted to making an allegation that the respondent has contravened the Equality Act 2010 in relation to that colleague.
300. We have found that the claimant did not give the respondent a grievance letter on 11 September 2018. He nevertheless expressed concerns to Mr I Hassan about the behaviour of Mr Sawyer towards him and connected it to his depression. We consider this was sufficient to constitute a protected act. The claimant repeated the same protected act when he met with Mr R Hassan and Mr Parmar on 17 September 2018.

## Detriments

301. We turn now to the detriments that the claimant alleges he suffered as a result of making the protected acts.
302. The first of these, 21.1, is the allegation that Mr Parmar insisted that the claimant was subject to a contractual requirement to travel abroad. We have not found that Mr Parmar told the claimant that it was a contractual requirement to go on trips. However, we do not think this makes a material

difference. Mr Parmar's genuine view was that trips were part of the claimant's role and we have found that Mr Parmar did tell the claimant that he was required to go on trips.

303. In our view, however, the claimant did not suffer a detriment as a result of being told that the trips were part of his role. He was simply being provided with information that was correct. This allegation is not upheld on its merits as well as being out of time.
304. The next allegation, 21.2, is that the respondent belittled the claimant's anxiety about the trips in January 2018. There was no evidence before us to support this allegation. It therefore fails on its facts as well as being out of time.
305. We also found, as a question of fact that the claimant did not include any reference to bullying related to dyslexia on his annual review form completed for the appraisal meeting on 1 August 2017. This allegation, 21.3, of detriment therefore fails on the fact as well as being out of time.
306. The same is true for the claimant's fourth and fifth allegations of detriment. We made findings that Mr Sawyer did not shout at him during their discussions on either 6 February 2018 or 6 September 2018. Allegations 21.4 and 21.5 fail on the facts.
307. Dealing with allegations 21.6 and 21.8 together, our factual finding in relation to the claimant's grievance is that the claimant did not present a written grievance to the respondent on either of 11 or 17 September 2018. Allegation 21.6 therefore fails on its facts.
308. We find that there was a discussion about a potential formal grievance on 17 September 2018. We find that the purpose of the meeting on 17 September between the claimant, Mr Parmar and Mr R Hassan was to understand the claimant's concerns and seek to address them informally without embarking on a formal process. This is a normal way for employers to approach employee grievances. It did not prevent the claimant from raising a formal grievance and was not intended to discourage him from doing so. He therefore suffered no detriment as result and allegation 21.8 is also not upheld.
309. With regard to allegation 21.7, we found that the claimant was not asked by anyone to apologise to Mr Sawyer. This allegation therefore fails on the facts.
310. The final allegation, 21.9, concerns Mr I Hassan's refusal to agree that the claimant should move to an alternative workspace on 11 September 2018. Mr Hassan accepted that this was factually correct, the claimant did ask if it was possible for him to move to a workspace away from the rest of the Menswear team, but he refused this request.
311. We are satisfied that Mr I Hassan's reasons for refusing the claimant's request were not because of any of the claimant's protected acts. He

explained that the two reasons he refused the request were because he did not consider it was practical due to a shortage of space and also told us that he did not think relocating the claimant was the right solution. In our judgment these reasons were genuine. This allegation therefore also fails.

### **Unfair Dismissal**

312. Although we found the claimant's unfair dismissal claim to be out of time, we have nevertheless considered the claim on its merits.
313. We have found that not all of the conduct that the claimant relies upon took place. This leaves the following allegations which have some factual basis:
- The capslock issue in the summer of 2017
  - Insisting he go on work trips despite expressing discomfort in September 2016 and April 2017
  - Mr Parmar shouting at him on 3 April 2017
  - Refusing a change of workspace (11 September 2018)
  - Discouraging a formal grievance (17 September 2018)
314. The most serious of these allegations are the first three. We do not consider they constitute conduct, when viewed objectively, that amounts to a breach of the implied term of trust and confidence. This is the case when considered in isolation and cumulatively. Our reasons are as follows.
315. The CapsLock issue consisted of two emails and one incident of taping down the claimant's keyboard. Mr Parmar believed that the claimant was being deliberately defiant in relation to the policy of using capital letters to name files and deliberately not following it. He sought humour to try and persuade him to do otherwise. He did not intentionally subject the claimant to harassment related to the claimant's disability. As soon as the claimant explained why he objected to Mr Parmar's behaviour he apologised and ensured he did not repeat it. This was in August 2017, more than a year before the claimant's resignation.
316. It was a requirement of the claimant's role that he travel abroad to undertake research shopping trips. The respondent ought to have been more receptive to the claimant's concerns about the trips, but we find Mr Parma and Mr Sawyer genuinely thought the claimant would enjoy and benefit from the trips. They therefore sought to encourage and reassure him of this although we note this had the effect of making the claimant feel that he was being forced to go on the trips.
317. As noted above, the respondent changed its position in relation to the trips. The claimant did not have to go on a trip after April 2017. It is possible this was communicated to him in early 2018, but at the latest this was confirmed by Mr S Hassan on 1 May 2018.
318. Finally, we have found that Mr Parmar's behaviour towards the claimant while they were away on one of the trips on 3 April 2017 was inappropriate for a manager. The behaviour was clumsy and not intended to damage the

relationship between him and the claimant. Mr Parmar was a new manager at this point in time. He was immediately apologetic for getting angry with the claimant and apologised.

319. Even if our view is wrong and the conduct viewed cumulatively amounted to a breach, the conduct was finished by May 2018 at the very latest. We find that any breach was subsequently waived by the claimant. It was not until more than five months later that he resigned.
320. We do not consider that the respondent behaved unreasonably towards the claimant in any way in relation to the latter two allegations. By themselves they do not constitute breaches of the term of confidence and cannot constitute last straws in relation to the earlier allegations.
321. In our judgment the claim of constructive unfair dismissal does not succeed on its merits as well as being out of time.

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**Employment Judge E Burns**  
**16 November 2020**

Sent to the parties on:

18/11/2020

For the Tribunals Office