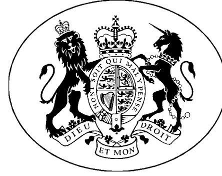

EMPLOYMENT TRIBUNALS

BETWEEN

Claimants	**AND**	**Respondent**
(1) Mr H Makkar (2) Mr J Bakiu		Neve Jewels Ltd t/a Diamonds Factory

Heard at: London Central (in person) **On**: 20-23 and 26 June 2023

Before: Employment Judge Stout
Tribunal Member R Pell
Tribunal Member P Madelin

Representations
For the claimant: In person
For the respondent: Ms D Ajibade (legal representative)

JUDGMENT

The unanimous judgment of the Tribunal is:

(1) Mr Bakiu's claim of constructive unfair dismissal under Part X of the Employment Rights Act 1996 (ERA 1996) is well-founded.
(2) Mr Makkar's claim of constructive unfair dismissal under Part X of the ERA 1996 is well-founded.
(3) Mr Makkar's claim of race-related harassment under ss 26 and 40 of the Equality Act 2010 (EA 2010) is dismissed because it is out of time under s 123 of the EA 2010.

REASONS

1. The Claimants, Mr H Makkar, and Mr J Bakiu, were employed by Neve Jewels Ltd (the Respondent) as, respectively, Assistant Store Manager and Store Manager in their Austen & Blake Hatton Garden Store. They were previously employed by Beverley Hills Ltd, but their employment transferred to the Respondent pursuant to the *Transfer of Undertakings (Protection of Employment) Regulations 2006* (TUPE) on 8 September 2021. They both resigned within the year (Mr Bakiu on 9 May 2022, and Mr Makkar on 6 June 2022) and both bring claims of constructive unfair dismissal under Part IX of the Employment Rights Act 1996 (ERA 1996). Mr Makkar also brings a complaint of race-related harassment under ss 26 and 40(1) of the Equality Act 2010 (EA 2010) and Mr Bakiu brings a claim of failure to make reasonable adjustments for his disability under ss 20 and 39(5) of the EA 2010.

The issues

2. The issues to be determined had previously been identified in outline at a case management hearing before Employment Judge Snelson on 19 January 2023. Subsequent to that, Mr Makkar and Mr Bakiu provided lists of the matters that they rely on for their constructive unfair dismissal claims and Mr Bakiu provided a list of the days and times relevant to his claim of failure to make reasonable adjustments. By letter of 20 March 2023, the Respondent also conceded disability. At the start of the hearing we therefore confirmed with the parties that the issues for us to decide at the liability stage of the hearing were as follows:-

<u>Time limits</u>

(1) Mr Makkar's claim of race-related harassment on 11 November 2021 was brought outside the primary time limit in s 123(1)(a) of the Equality Act 2010. Is it just and equitable to extend time under s 123(1)(b) for that act?

<u>Unfair dismissal</u>

(2) Was each Claimant dismissed, i.e.:

   a. Did the Respondent do the following things:
      i. Mr Makkar's list is at p 102;
      ii. Mr Bakiu's list is at p 172.

   b. Was that conduct calculated or likely to destroy or seriously damage the trust and confidence between each Claimant and the Respondent?
   c. If so, was there reasonable and proper cause for that conduct?

(3) Did the Claimant resign in response to the breach?
(4) Did the Claimant affirm the contract before resigning?
(5) If the Claimant was dismissed, what was the reason or principal reason for dismissal (i.e. what was the reason for the breach of contract)?
(6) Was it a potentially fair reason? (The Respondent is relying on conduct as the potentially fair reason)
(7) Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

Harassment related to race (Equality Act 2010 section 26)

(8) Did X on 11 November 2021, having expressed that she did not like the smell of his aftershave, ask Mr Makkar where it came from and when he replied “India” she said “Sounds about right”?
(9) If so, was that unwanted conduct?
(10) Did it relate to race?
(11) Did the conduct have the purpose of violating Mr Makkar’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for Mr Makkar?
(12) If not, did it have that effect? The Tribunal will take into account Mr Makkar’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

(13) Did the Respondent know or could it reasonably have been expected to know that Mr Makka had the disability (Type 1 Diabetes)? From what date?
(14) A “PCP” is a provision, criterion or practice. Did the Respondent have the following PCP: requiring employees to work alone in locked premises (the list of dates for Mr Bakiu is at p 175)?
(15) Did the PCP put Mr Bakiu at a substantial disadvantage compared to someone without the his disability, in that it left Mr Bakiu vulnerable to a hypoglycaemic episode?
(16) Did the Respondent know or could it reasonably have been expected to know that Mr Bakiu was likely to be placed at the disadvantage?
(17) What steps could have been taken to avoid the disadvantage? Bakiu suggests: arranging matters so that he was not required to work on his own and/or in locked premises.
(18) Was it reasonable for the Respondent to have to take those steps and when?
(19) Did the Respondent fail to take those steps?

The Evidence and Hearing

3. The Respondent had produced a bundle for the hearing which comprised 367 pages at the start of the hearing and 391 pages by the end as a result of additions by both parties during the hearing. The Respondent wished to call six witnesses as follows:

a. Mr Broomfield (Chief Operating Officer);
b. Ms Jethwa (HR Director from November 2021 to November 2022);
c. Mr Stinson (Head of E-commerce);
d. Mr Harris (Regional Sales Manager);
e. Mr Freeth (Operations Manager);
f. Mr French (Regional Sales Manager).

4. The Claimants had two witnesses in addition to each other:
    a. Mr Hannington (Assistant Store Manager until he resigned on 9 May 2022);
    b. Ms Radziunaite (Assistant Store Manager until she left just before Christmas 2021).

5. Witness statements had been ordered to be exchanged on 19 May 2023. The Claimants had sent their statements to the Respondent on that date. Their statements consisted of Mr Hannington's, Ms Radziunaite's and their own statements for each other's cases. They had not realised that they needed to do statements for their own cases.

6. The Respondent did not send any of its statements by the date ordered. It sent three of its statements (Mr Broomfield's, Mr Stinson's and Mr Freeth's) to the Claimants very late the night before the hearing. Three more (the statements for Mr Harris, Mr French and Ms Jethwa) were produced only after the hearing started mid morning on Day 1.

7. We explained to the parties that, given the very late service of the Respondent's witness statements, in breach of the case management orders, the jurisdiction to strike out the Respondent's response under Rule 37(1)(b) had arisen and/or that we could make an order preventing the Respondent from relying on the evidence of one or more of its witnesses. We explained that we needed to consider whether a fair trial was still possible and what orders were necessary in light of the overriding objective, in particular doing justice in the case and ensuring that the parties are on an equal footing so far as reasonably practicable. On Day 1, it was agreed that we should start by hearing the Claimants' evidence as even if we struck out the Respondent's response we would still need to hear evidence from the Claimants to decide the case. We gave the Claimants time to reflect over night on whether they wished to make any applications in relation to the Respondent's late witness statements or whether they were able to deal with the statements that had been served so late.

8. On the morning of Day 2 the Claimants applied to strike out the Respondent's response or for them not to be allowed to rely on the statements of Mr Broomfield and Ms Jethwa (the longest statements). We refused that application for reasons given orally at the hearing, but in summary because we considered that, notwithstanding the extremely serious breach of the Tribunal's orders, a fair trial was still possible because the Claimants had not actually served witness statements of their own dealing with their own cases so there could have been no 'tailoring' of statements by the Respondent (and,

having read the Respondent's statements, we could see no evidence of that having happened), the Claimants were very familiar with their own cases and we considered that they were well able to prepare questions for the Respondent's witnesses based on what they already had in the bundle, and the time that they had to prepare before they needed to cross-examine Mr Broomfield and Ms Jethwa (which was not scheduled until Day 3).

9. The Claimants' failure to serve witness statements on their own cases we dealt with (without objection from Ms Ajibade) by requiring them to rely by way of evidence in chief on their claim forms and lists of points they had provided for their constructive unfair dismissal and reasonable adjustments claims, together with the short statements they had provided for each other's cases.

10. We also record here that we asked a number of the Respondent's witnesses (specifically Mr Broomfield, Ms Jethwa, Mr Freeth and Mr Harris) whether they had carried out a search for relevant documents for the purposes of disclosure in these proceedings, but they all said that they had not. Some of them had looked for some emails in connection with their witness statements, but despite the Respondent being represented throughout (by Peninsula Business Services) they all said that they had not been asked to look for and disclose relevant documents. There were a large number of obviously relevant documents missing from the bundle at the start of the hearing, including . Some of these documents were located and supplied in the course of the hearing (some at our request, others at the behest of the parties), but there remained gaps in the documentation as noted in our findings of fact below. Where there were gaps, we considered whether we needed that documentation in order to fairly resolve the issues in dispute, but decided that we did not. Insofar as either party failed to produce a document that was relevant to their case, we considered that they had had ample opportunity to do so and it was not for us to attempt to remedy more generally the deficiencies in the documentary evidence put before us by the parties.

Rule 50

11. Of our own motion in the course of the hearing, we raised with the parties that in our provisional view it would be appropriate to anonymise two individuals who are mentioned frequently in the evidence but who have not, we were told, been informed about the proceedings and thus have had no opportunity to seek to participate if they wish to. One (X) is alleged to have racially harassed Mr Makkar, but has had no opportunity personally to answer that allegation in these proceedings. The other (Y) is also the subject of allegations of racist and/or otherwise unreasonable conduct, and we have also been provided with sensitive personal information about her health. Although we heard all of that information in a public hearing, there were in fact no members of the public present at the relevant points in the hearing so for practical purposes and in order to save time we did not make any orders during the hearing (although we would have addressed the issue earlier if a member of the public had attended).

12. In relation to both of these individuals, however, we consider that their rights under Article 8 ECHR would be engaged if they were to be named in the judgment and that the judgment would be capable of affecting their reputations in the workplace thereafter, their mental health and personal integrity. Although we have not received evidence to support this, given that they are unaware of the proceedings, we consider the likely impact on their Article 8 rights to be self-evident. Although names are important to the principle of public open justice and the Convention right to freedom of expression, our judgment in this case can be fully comprehended without knowing their names and their identities are unimportant to the facts. We consider that it is both necessary to protect the Convention rights of these individuals and in the interests of justice (given that they have had no opportunity to participate in these proceedings to answer the allegations against them) to anonymise them in this case by order under Rule 50(1).

13. By Rule 50(4) any person with a legitimate interest, who has not had a reasonable opportunity to make representations before this order was made, may apply to the Tribunal in writing for the order to be revoked or discharged, either on the basis of written representations or, if requested, at a hearing.

The facts

14. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

<u>Background: the TUPE transfer from Beverley Hills</u>

15. Mr Bakiu was employed for 15 years as a Store Manager at a jewellery shop in Covent Garden until he resigned with effect from 9 May 2022. Mr Makkar was employed as an Assistant Manager in the same store from 29 May 2014 until he resigned on 6 June 2022.

16. They were both originally employed by Jade Jewellers (Beverley Hills Limited), until it was purchased by the Respondent and their employment transferred under TUPE on 8 September 2021. Their continuous period of employment for the purposes of s 211 of the ERA 1996 is deemed to begin with their Beverley Hills employment.

17. The Respondent has two linked jewellery businesses, Austen & Blake (A&B) and Diamonds Factory (DF). It has 14 stores in various cities in the United Kingdom, including two in Hatton Garden, one being A&B, in which the Claimants worked, and the other being DF, which was run by a store manager who we anonymise as “X”. Both DF and A&B also have online retail aspects and take bookings for appointments online with jewellery then being made

for pick-up in stores. In-store, they operate mainly on a 'samples' basis, meaning that they do not have real jewellery ready for immediate sale, they have glass and base metal samples of styles and designs which customers can then order and return to collect the real item. This was a change from the Beverley Hills model, which had been based principally on having real stock ready for sale.

18. Mr Makkar alleges that, around the time of the transfer, comments were made by Regional Area Manager Mr French that the Respondent was not interested in taking on the Claimants and their colleagues because they were paid so much more than comparable staff and that the Respondent only wanted the shop and not the staff. Ms Radziunaite and Mr Hannington confirmed witnessing this conversation, Ms Radziunaite specifying in oral evidence that this was as they were going to lunch one day. Mr French accepted that the Claimants and their colleagues were paid more than equivalent staff at the Respondent, but denies having said that the Respondent did not want to take on the Beverley Hills staff. Mr Broomfield also denied having thought or said this. Mr Broomfield said he wanted the business to succeed and that he put a lot of effort into trying to help the Claimants be successful.

19. As to what the Claimants allege that Mr French said about the Respondent not wanting them and their colleagues because they were paid more, we accept the evidence of the Claimants and their witnesses on this and prefer that to Mr French's evidence. The Claimants and their witnesses have given consistent evidence both as between each other and over time (the allegation is recorded in writing as early as Mr Bakiu's email of 25 January 2022: p 389), and the Claimants and their witnesses all appeared to us to be honest and credible and, for the most part, we have also found the Claimants also to be reliable witnesses. We therefore find that around the time of the transfer Mr French did say to the Claimants words to the effect that the Respondent did not want to take them on because they were paid too much.

20. Both Mr Makkar and Mr Bakiu were employed by Beverley Hills under contracts that stipulated that their working hours were 9am to 6pm with 30 minutes lunch break Monday to Friday (20 minutes Saturday/Sunday) and that their *"public holiday entitlement"* was 8 days. The written contracts provide that the Claimants *"may be … required to work at other times"* outside their contractual hours and make no provision for payment for overtime. Working days were not specified.

21. In practice, Mr Makkar explained that, prior to the TUPE transfer, there had been a flexible start time of between 9am and 10am, with them starting work sometimes at 9.15am, or 9.30am or 9.45am. The store actually opened to the public at 10am. In practice, both Claimants had prior to the transfer not been required to work bank holidays.

22. Employee information was provided by Beverley Hills to the Respondent on transfer in the form of an Excel spreadsheet. Working from that spreadsheet, by letter of 6 October 2021, Mr French provided Mr Makkar with a letter of

confirmation that he was employed 5 days per week, 10am to 6pm with a salary of £38,000, plus commission, and a yearly travel benefit of £1,500. Ms Jethwa denied that the working hours were specified on the spreadsheet and did not know where Mr French had got the working hours from.

23. As to the position prior to the transfer regarding working hours, we find that the Claimants' contractual terms required them to work from 9am to 6pm and as reasonably required at other times. In practice, we find on the basis of Mr Makkar's evidence that the 9am start had not been enforced, but there had not been a formal variation of the contract to any other specific start time. We note that the Claimants have sought to contend, on the basis of Mr French's letter of 6 October 2021, that following the transfer it had been *"agreed"* with Mr French that their start time was 10am, but Mr French's letter is not in our judgment evidence of such agreement – it is a letter supposedly confirming Mr Makkar's existing contractual terms, but if (as we find) those were not the existing contractual terms, it cannot change the actual contractual terms.

October 2021

24. On 14 October 2021 Mr French sent an email to the whole London Group team with the Code of Conduct for A&B asking the Team to let him know if they disagreed with anything and saying he would like to add, as it was not on the list, *"Honesty and Integrity"* because *"I prefer honesty, and people to own up to mistakes when made. It is how we learn and grow. We have to take ownership of any issues that arise and not try to bury them. If I ever ask a question and find that I have not received an honest answer, I will take this very personally."* Both Mr Bakiu and Mr Makkar complain that this email was threatening and personal. Mr Bakiu's evidence was that he challenged Mr French about this at the time, and that at the time Mr French said that no one in this store had caused him to write that, but he had had an experience with someone being dishonest in a store he worked in previously (p 138). In oral evidence, Mr French's answers suggested that he did want to add honesty and integrity for personal reasons as he considered that the Claimants had been lying to him about smoking outside the shop on the steps, taking extended lunch breaks, covering for others, etc. There was agreement, however, that the new store had not opened until 16 October 2021 so that these things could not have happened before he sent the email of 14 October 2021. We find that Mr French in oral evidence had misremembered the sequence of events and that things he believes he has learned about the Claimants since October 2021 have coloured his recollection of what happened.

25. Even after the store opened there was still a lot of building work going on which made it difficult to operate as a shop. Despite that, they were given a high target of £300k per month for November and December 2021 and ongoing. Mr Bakiu considered this to be unrealistic given that under Beverley Hills management the shop had only taken £100k-£200k each month, the DF store had rarely reached that target (p 355) and A&B as a brand were new to the south. The DF store in Hatton Garden was also, Mr Bakiu felt, effectively

a competitor for A&B Hatton Garden as the DF store would have 'first priority' on customers coming through the DF website and would only pass those customers on to A&B if they were unable to deal with them – a factual point that Mr Broomfield agreed with. At the Respondent's other stores, each store in each city dealt with customer traffic from both the DF and A&B websites. Mr Broomfield considered the targets to be reasonable. He explained that they were based on projections that reflected the Respondent's marketing spend on the store and expectations for what could be achieved in Hatton Garden. He emphasised that they were his targets too and he was doing all he could to help the team to meet those targets. Our conclusions on the targets issue are set out in the Conclusions section at the end of this judgment.

<u>November 2021</u>

26. On 11 November 2021 Mr Makkar alleges X made a racist comment about his aftershave. He alleges that she expressed an opinion that his aftershave was too strong and asked him where it came from and when he replied *"India"* she said *"sounds about right"* (as identified to EJ Snelson at the case management hearing and as he put it at the grievance hearing: p 92) or *"that it explains it then"* (as the allegation was taken to be by Ms Jethwa when she interviewed X about it on what she said was 10 May 2022, although for reasons set out below we consider she must have got this date wrong and the date is more likely around 10 April).

27. We have not received a witness statement or heard oral evidence from X. When X was interviewed about this comment on or around 10 April 2022 by Ms Jethwa (p 84) (six months after the event), X's response was that she had said she thought Mr Makkar's aftershave was an *"oud"* smell, which some of the girls wear as well and she does not like it because it gives her headaches, and she said she told Mr Makkar that. She said that what she actually said after he said he got it from India was *"oh okay, that's nice"*. She also said that for three weeks after the remark Mr Makkar gave her 'the silent treatment' until she approached him about it and he said that he had not liked her racist remarks about his aftershave. She said that she then apologised for offending him, saying that it was not racial and she did not mean anything by it. She said that they then hugged and after that she thought the incident had been forgotten.

28. X's account as set out on p 84 was not put to Mr Makkar or shown to him at any point prior to being provided to him in these proceedings. Mr Makkar in oral evidence said he had no recollection of any conversation with X in which she had apologised or that they hugged and 'made up'.

29. As we have not received any evidence from X, and we have found Mr Makkar generally to be an honest witness, who has been complaining about this incident in broadly consistent terms since his formal complaint of 11 January 2022, we find that X did say to Mr Makkar words the import of which were that it was only to be expected that aftershave that was too strong/unpleasant

had come from India. We so find even though Mr Makkar did not raise a complaint about it immediately but only at the point that Ms Jethwa wanted him to go and work in X's store. We find it understandable that, as Mr Makkar did not normally have to work with X, he chose not to complain about it until he was faced with the prospect of having to work with her on a daily basis.

30. We further find that Mr Makkar genuinely perceived X's remarks to have been derogatory and racist from the outset as even on X's account Mr Makkar was obviously upset at the time and stated that he considered the remarks to be racist.

31. By WhatsApp of 17 November 2021 (p 225) Mr Broomfield told Mr Bakiu that he could work and be paid two hours overtime rather than taking time off in lieu as he had said he was doing in his previous WhatsApp message. There is nothing ambiguous about this message: it was clearly a statement that the Respondent would pay overtime in money and not always as time off in lieu.

<u>December 2021</u>

32. In December 2021 during the Covid-19 pandemic, Mr Bakiu was concerned for his health as he is Type 1 diabetic and clinically vulnerable. He was asked to send staff to cover at DF. He did not want to send any staff as that would mean mixing shop bubbles. He told Ms Jethwa about his diabetes and his reasons for refusing and she responded *"well you can catch it on the train to work so what's the difference"*, which he felt disregarded his and his team's safety. Ms Jethwa denies this conversation, but we accept Mr Bakiu's evidence on this point as we have found him to be an honest and generally reliable witness, whereas we have found Ms Jethwa to be unreliable in many respects (in particular as regards the part she played in dealing with Mr Makkar's grievance and disciplinary).

<u>January 2022</u>

33. On 11 January 2022 Ms Jethwa visited the A&B store in Hatton Garden. She informed Mr Makkar that the Respondent had recruited someone new (X's sister, Y) as an Assistant Manager in the A&B store and that she wanted him to move to DF. Ms Jethwa's oral evidence was that she asked because she could not have X and Y working together as they were sisters, but this explanation does not appear in her witness statement. In Mr Makkar's formal email complaint of the same day, however, he wrote that Ms Jethwa had told him that she had *"got someone better for this job"* and wanted him to move to a different location and that she *"questioned [his] ability, [his] skills and [his] experience"*. Mr Makkar's account is inconsistent with Ms Jethwa having given him at the time any explanation about it having to be him who would move because Y and X were sisters. Given the specific, detailed content of his email on the subject, written the same day, we accept Mr Makkar's written account of this meeting over that given by Ms Jethwa in oral evidence.

34. Mr Makkar in response to the threat to move him to DF then raised the *"personal issues"* he believed that X had with him, referring to the 21 November 2021 aftershave incident, in response to which in his email he says that Ms Jethwa 'verbally threatened' him that Neve Jewels could terminate their contracts without reason within two months. Mr Bakiu overheard the conversation which happened downstairs in the shop while he was upstairs and he (Mr Bakiu) refers to it in similar terms in his email of 25 January 2022 (see below).

35. Although Ms Jethwa sought in oral evidence to deny making any such threat, in her witness statement she accepted that she had *"informed Makkar that based on his original contract … the clause stated we could terminate his contract by giving the correct notice and without reason"* but added *"as Neve Jewels we are not brash hence, we would not do that"*. Although Mr Broomfield's later email of 24 February 2022 on the same topic contains a caveat of the sort added by Ms Jethwa in her witness statement, we find that she did not add any such caveat when she spoke to Mr Makkar. We have found Ms Jethwa not to be a reliable witness in relation to her role in Mr Makkar's disciplinary and grievance processes (see below) and we find her evidence relating to this January incident is also unreliable. Ms Jethwa's account in her witness statement omits the context of these remarks about the contract, which were that she was wanting to move Mr Makkar to the DF store. As such, the only reason for alluding to what she believed were the Respondent's powers to the terminate the Claimants' contracts on this occasion was by way of a threat because Mr Makkar was not agreeing to move to DF as she wanted him to. When the purpose of her remarks is understood, it is apparent that she would not have added any neutralising remark or that, even if she did, the import of her message was clear: she was intending to, and did, threaten Mr Makkar with what she regarded as the Respondent's powers of dismissal in response to Mr Makkar being unwilling to move to the DF store to work with someone who he alleged had racially insulted him. (We add that, as a matter of fact, Ms Jethwa was wrong about what the Respondent's rights were because both Claimants had more than two years' service and thus had the right to claim unfair dismissal and could only be dismissed for potentially fair reasons following a fair procedure. The Lay Off/Short term working clause to which she and, later, Mr Broomfield referred is not as a matter of law a power to dismiss employees at all.)

36. As already noted, Mr Makkar raised a formal complaint about Ms Jethwa's conduct on 11 January 2022 and X's conduct previously in respect of the alleged racist incident on 11 November 2021, by emailing Mr Jain and Mr Broomfield. None of the Respondent's witnesses had dealt with this complaint in their witness statements even though the alleged failure to deal with this grievance was point 5 in Mr Makkar's list of matters he was relying on for his constructive unfair dismissal claim. In oral evidence on Day 3, Mr Broomfield said that he had asked Ms Jethwa to investigate the bit about X and Mr Stinson to investigate and to speak to Peninsula about the allegation against Ms Jethwa and not mention it to Ms Jethwa. He said he believed that Mr Stinson had got an instruction from Peninsula to follow a procedure and that Mr Stinson had not thought there was enough in it. Mr Broomfield did not

believe anyone had reverted formally to Mr Makkar. Mr Stinson had already given evidence by this point and no application was made by the Respondent to recall him to deal with this. Ms Jethwa's recollection was that Mr Makkar's complaint about X had been dealt with by Mr Stinson as part of the grievance (i.e. after Mr Makkar raised it again on 2 March, not in response to this first formal complaint of 11 January) and that Mr Broomfield (not Mr Stinson) had spoken to her about the complaint against her and she had responded *"whatever he is stating that is not true"*.

37. On Day 4 of the hearing Mr Broomfield said that, having checked his emails over night, he believed he had got back to Mr Makkar in response to the email of 11 January and that Mr Makkar was lying about him not responding. We asked Ms Ajibade if there was any application to admit further evidence, but none was made. We note, however, that in the agreed transcript of the grievance meeting on 16 March 2022 (p 345) Mr Makkar refers to Mr Broomfield having spoken to him after he received the email saying that he would look into it but that he had not then done anything.

38. Doing the best we can with the evidence we have, we find that Mr Makkar's formal complaint of 11 January 2022, which is a formal grievance to which the ACAS Code of Practice on Disciplinary and Grievance Procedures applies (see paragraphs 1 and 32 of the Code), was not dealt with by the Respondent in accordance with the Code. He was not invited to a meeting to discuss it, no one carried out any investigation and no one provided him with a written response to his grievance or a right of appeal. Further, we do not accept that Mr Stinson was appointed to investigate any part of this complaint as, if so, it is inexplicable that he did not deal with it in his witness evidence, and inexplicable that Ms Jethwa would say she was spoken to by Mr Broomfield and not Mr Stinson. In short, although Mr Broomfield did verbally acknowledge receipt of the complaint to Mr Makkar, we find that nothing was actually done at that stage in relation to any part of his complaint. None of it was dealt with at all until Mr Makkar raised some of it again at the beginning of March 2022.

39. On 25 January 2022 there was a team meeting between Mr Bakiu, Mr Hannington, Mr Makkar, Ms Jethwa and Mr Broomfield about them not hitting sales targets. WhatsApp messages late in the afternoon of the previous day (p 231) indicate that this was due to take place at 10am and that Mr Hannington was going to dial in. Mr Broomfield in oral evidence was adamant that the meeting was at 12 noon. We prefer the evidence of Mr Bakiu and the documents on this point (i.e. the WhatsApp messages and Mr Bakiu's email of 25 January – see below). The team meeting was at 10am. It was an 'Expectation Meeting'. In this meeting, Mr Broomfield told them they were losing £25k per month, that takings were very low and that they would close the shop and would all be out of a job if they did not take more money. Mr Broomfield indicated he wanted to change contracts, but Mr Bakiu said he did not think that was possible because of TUPE and Ms Jethwa agreed. Mr Broomfield said he would change working hours from 10am to 6pm (the time that Mr Bakiu in his claim said had been 'previously agreed with Mr French when joining') to 9am to 6pm as that was what it actually said in the contract.

Mr Broomfield felt it was obvious that they had to start prior to 10am as 10am was when the shop opened. It appears to be agreed that the discussion went along the lines of a negotiation: the Respondent offered for the Claimants to work 10am to 6pm if they took on an obligation to work Bank Holidays. The Claimants opted not to do that but to revert to the contractual hours of 9am to 6pm.

40. Mr Bakiu requested a 1-2-1 meeting with Mr Broomfield later that day, which took place at 12.30 as arranged by WhatsApp the afternoon before (p 231). Mr Broomfield had no recollection of this meeting, and in oral evidence was adamant that there had only been one meeting on 25 January being a team meeting at 12 noon and not also a 1-2-1 with Mr Bakiu stated that he believed the email to be a forgery. However, we find that it happened as arranged by WhatsApp the day before and as confirmed by Mr Bakiu in the email he sent the same day after the meeting (p 388). Mr Bakiu's email of 25 January was alluded to by Mr Bakiu in his claim form, but was not produced until Day 2 of the hearing along with some other key missing emails. Through oversight by Ms Ajibade the 25 January email was not added into the bundle with the others, but was raised on Day 4 of the hearing by Mr Bakiu when he sought to ask Mr Broomfield about it in cross-examination. After an adjournment, Ms Ajibade made an application for the email to be excluded, which we refused for reasons given orally at the hearing. Our reasons for refusing that application included that there was no reasonable basis for alleging the email was a forgery and we now find as a fact that it was not a forgery: the email was referred to and described in Mr Bakiu's claim form; the format of the time stamp is not suspicious, being the same as others in the bundle at pp 193-196; the timing of the meeting referred to in the email is consistent with Mr Broomfield's WhatsApp messages at p 231; and, in the form that the email was subsequently added to the bundle (p 388), it can be seen that it had been copied to Mr Bakiu's A&B email account and forwarded back to himself from there on 3 May 2022 before being forwarded on to the Tribunal clerk and the Respondent on 21 June 2023. We therefore accept the email to be genuine. We further find that, as a contemporary document written by Mr Bakiu who we have found in general to be an honest and reliable witness, it is the best evidence of what happened in the meeting on 25 January 2022.

41. In the email, Mr Bakiu notes that Mr Makkar is now not going to be moved to DF and sets out his requirements for cover for the shop on 15, 16 and 20 February. He raises concerns about Ms Jethwa having said that he (as well as Mr Makkar) has a problem with X, which he considered to be untrue as he had never complained about X. He raised Ms Jethwa having twice said to Mr Makkar in a conversation in the basement on 11 January (audible to Mr Bakiu upstairs) that *"we can fire you with no reason given as it states in the Beverley Hills contract that we have taken on"*. He asked Mr Broomfield if that was correct, which in the meeting Mr Broomfield agreed to check. He said that things were beginning to 'mount up' and raised Mr French's comments following the transfer about the staff being expensive and not wanted. In the meeting, Mr Broomfield did not reply to Mr Bakiu raising these matters. Mr Bakiu also complained about the £300k target being *"extremely excessive"* and notes that in the meeting Mr Broomfield agreed with that. He concluded

that he would wait to hear back from Mr Broomfield, but Mr Broomfield never replied to this email. He believes that he never received it, and that he has looked for it recently and been unable to find it, but we find as a fact that it was received and not replied to. We draw that inference because we are not satisfied that the Respondent has made a proper search for documents relevant to this case (all the witnesses we asked having not been instructed to make a search) and because we find the email to be genuine and it is part of a pattern of non-response to the Claimants' emails by Mr Broomfield and Ms Jethwa that we have seen in these proceedings.

<u>February 2022</u>

42. On 8 February 2022 Mr Bakiu had a WhatsApp conversation with Mr Broomfield about Mr Makkar being paid overtime for the day that he covered for Mr Bakiu in January (see p 229) when he went to pick new stock for the shop from Birmingham. Mr Bakiu had been told by Ms Jethwa that the Respondent did not pay overtime and he queried this with Mr Broomfield given that Mr Broomfield had on 17 November 2021 told him that he could have been paid for overtime rather than taking time off in lieu. This time Mr Broomfield said that *"company policy is that overtime is usually paid with time off in lieu"* (p 234). Mr Bakiu queried this, referring back to the previous message from Mr Broomfield which he considered (and we agree) was clear. However, Mr Broomfield apologised that he was *"not clear"* previously and that *"taking time off in lieu is still a form of payment"*. He then went on immediately, *"We need to be clear on your working hours as well"*. Mr Bakiu argued that it was not fair for Mr Makkar not to be paid overtime as he had had to pay for extra childcare in order to cover the extra day. Mr Broomfield agreed to speak to payroll about pay on this occasion and a few other planned overtime dates.

43. Ms Jethwa then emailed on 9 February to confirm that effective from 15 February the working hours for the Claimants and Mr Hannington (but not Y) would be 9am to 6pm as per the employment contracts and that the Respondent understood that this would mean that they were not required to work statutory bank holidays, but that if they chose to work bank holidays they could take time off in lieu. (The email actually says *"these will be paid as days in lieu"* which does not make sense – either someone is paid for overtime or they take days off in lieu; in context, it is clear that time off in lieu is what is intended, but the email continues by saying that overtime worked to date would be paid). Mr Bakiu perceived this as retaliation for his asking about overtime payments, and we find that it was at least in part because Mr Broomfield in the WhatsApp messages clearly raises it in response to Mr Bakiu's challenging him about overtime, and because Ms Jethwa's email followed the very next day. At the time, however, Mr Bakiu replied *"Thank you for your email. That's perfect, no questions"*. This was because there had been a discussion between the parties in the interim in which the Claimants had been given the option as to whether to work 9am to 6pm in strict accordance with their contracts or to maintain a flexible or 10am start time but to work Bank Holidays. The Claimants chose the former and Ms Jethwa's

email confirmed this. We observe that the combination of the Claimants' contractual terms not requiring them to work Bank Holidays and the Respondent deciding not to pay for overtime but only time in lieu was inevitably likely to lead to difficulties around staffing the stores on Bank Holidays as no one could be required to work and anyone who volunteered to work would then be entitled to an extra day off, thus potentially just moving the short-staffing problem to another day.

44. In the meantime, on 8 February 2022 Ms Jethwa asked Mr Makkar to carry out training for new starter Y on 14 February 2022. Mr Bakiu and Mr Makkar both knew Y from working with her previously and she was the sister of X. Mr Bakiu considered that Y had 'quite a temper' and was hard to work with.

45. Y started at the store on Monday, 14 February 2022. As to what happened during her first three days, the evidence we have is principally from Y's email of complaint about Mr Makkar written at the end of the day on 16 February 2022, emails from Mr French and Mr Makkar himself, and Mr Makkar's account as given in the disciplinary hearing he subsequently faced on 3 March 2022 (the notes of which start at p 85). We deal with the disciplinary process below, but there is an issue in relation to it that we need to resolve now in order to set out the parties' accounts of what happened on 14, 15 and 16 February 2022. In the disciplinary hearing Mr Makkar stated that he was not working on either Monday 14 or Tuesday 15, but gave an account of the two days when he believed he was working with Y as being the Wednesday and Thursday. There has never been any dispute between the parties that Y and Mr Makkar worked together for two days in her first week and that she was then not working again until the Saturday. In fact, it is clear from Mr Makkar's own emails of 16 February (pp 117 and 118) that Y was not working Thursday and Friday and the two days they worked together must therefore have been Tuesday and Wednesday. In the disciplinary hearing, Mr Freeth did not challenge Mr Makkar about his recollection as to which days he was working. Mr Makkar was not provided with Y's email of complaint and the contents of her email were not put to him. Her complaint was presented to him by Mr French in the investigation meeting on 25 February and again in the meeting on 2 March 2022 as being that she had complained that he had *"blanked her for 2 days"*, which Mr Makkar denied (but apologised if that was how he made her feel). Mr Freeth in the disciplinary hearing did not even put the 'blanking' allegation to Mr Makkar, or any of Y's more detailed complaints in her email. Nor did he draw Mr Makkar's attention to his own emails in order to get the dates right; indeed, Mr Freeth just went along with Mr Makkar saying that it was Wednesday and Thursday that he and Y worked together.

46. The disciplinary hearing outcome letter states that Mr Makkar *"lied"* when he said that he was not working on the Tuesday. The suggestion that he was lying had of course not been put to Mr Makkar at the disciplinary hearing as he had not been challenged on his recollection of the dates he was working. In his appeal against the final written warning that he was issued, Mr Makkar explained that he had made a mistake about the dates, attributing it to the difference between the rotas as they had been previously when working for Beverley Hills and as they were now for the Respondent. At the appeal stage

(p 378), the decision that he had lied about not working on the Tuesday was upheld on the basis that he could not have made a mistake about the rota. In our judgment, the finding that Mr Makkar was 'lying' in the disciplinary hearing about the days that he had worked was unreasonable, unfair and outwith the range of reasonable responses open to an employer. We infer that it was included because whoever wrote the disciplinary and appeal outcome letters (in substance, we find, Ms Jethwa) believed that the most serious allegations made by Y in her email related to what happened on the Tuesday (although the outcome letters do not actually say this). However, as Y's email and her allegations were not put to Mr Makkar in that way, the significance of whether Mr Makkar worked with Y Tuesday/Wednesday (as was the case) or Wednesday/Thursday (as per the account he gave in the disciplinary hearing) can never have been apparent to him and there is no reasonable basis for making the very serious finding that he lied rather than that he was mistaken about the dates.

47. The upshot of this for the findings that we make about what actually happened on 14-16 February 2022 is that we take Mr Makkar's account in the investigation and disciplinary hearings of what he did on the two days that he was working with Y as if he had got the dates right and match his account of the two days up with Y's account as set out in her complaint email of 16 February 2022.

48. On 14 February 2022 when Y started, Mr Makkar was not working. Y's email of complaint of 16 February 2022 indicates that she was trained by Mr Hannington on the Monday. The next day, 15 February 2022, Mr Makkar and Y were working together. Y's email of complaint states that she was trained virtually by Mr French in the morning, and that after that Mr French told her to tell Mr Makkar that she was to shadow him, which she did although he appeared not to have heard as he was preoccupied with something on the computer. She stated that Mr Makkar did not train or help her and had effectively ignored her apart from towards the end of the day when he had offered to help her with the display cabinets (which she refused as she felt he had not helped her previously). She stated that Mr Makkar also sent her an email with a spreadsheet to fill out for the day. At the end of the day, according to Mr French, Y raised a complaint orally with Ms Jethwa and Mr French was aware that she had done so. However, Mr French did not mention this complaint to Mr Makkar, or get in touch with Mr Makkar at all, until an email at 1.07pm on 16 February when he wrote to Mr Makkar an email that began, *"As you know [Y] is going through the same induction training that you guys did in your 1st week. With Jurgen off and me occupied most of today can you please take [Y] thoroughly through …"*. He then set out in detail what Mr Makkar needed to do with Y by way of training. The email reads as if it is the first time that Mr Makkar is being asked to do training. In the meantime, according to Y's complaint, she came in and got on with cleaning and Mr Makkar did not engage her until after Mr French's email.

49. In Mr Makkar's Investigation Meeting on 25 February 2022 he denied blanking her for two days. He said he was very busy the first day and that when she had told him that she felt like he was ignoring her, he had

apologised to her. He said he had shown her how to do tickets and deals later in the afternoon and the next day she had been very busy cleaning but they had also done some training. His account in the Disciplinary Meeting on 3 March 2022 was much the same, although he was unclear about whether Y cleaning was on the first and second or just the second day. He said that she told him that Mr Bloomfield had asked her to do that so he had thought he could not override that instruction. He added that he had on the first day showed her H&S charts, hazards and fire exits and the second day he had taken her through creating deals, rockets, Zoho, CRM, sales. In both meetings, he pointed out that he was still learning the systems himself but that he had shown her what he could.

50. Mr Makkar e-mailed a reply to Mr French's email about training at 16.45 on 16 February 2022 saying that *"today Y decided to clean the downstairs office and kitchen"*. He stated that he had offered Y training but she had said she was busy and would go through it when she was free (p 117). At 17:48, he sent a further email stating that Y had now had time so he had shown her how to create a deal etc and that he would go through more training when she was back on Sautrday (she was due to be off for two days).

51. Y's lengthy email of complaint about Mr Makkar was sent to Mr French at 5.14pm on 16 February 2022. From the timing, between Mr Makkar's two emails, it is clear that at least part of the time that Y was telling Mr Makkar she was too busy cleaning to be trained by him, she was actually busy composing a long email of complaint about him. We further infer that Y had discussed her complaint with Ms Jethwa before sending it to Mr French because in the email she refers to Mr French in the third person and the final paragraph reads in a way that it only could if it had been discussed with Ms Jethwa: "*since the email requesting I should be trained by himself, [Mr Makkar] is now telling me he needs to train me but it was agreed on the 8th Feb that he would be training me this week as [Mr Bakiu] is off. [Ms Jethwa] asked him if he knew everything and was confident with the systems and what to do to be able to show me and [Mr Makkar] said yes, so I am surprised it has taken your email for [Mr Makkar] to insist on training me when he was already under the instruction by [Ms Jethwa] to do so already."*

52. On 24 February 2022 Mr Broomfield emailed Mr Makkar setting out the Lay Off/Short Term Working Clause in his contract (p 109) and stating, as Ms Jethwa did on 11 January 2022, that pursuant to that clause he could be dismissed on 7 weeks' notice without any reason, but that this was not a stance they liked to take at the Respondent and any dismissal would be following a proper process.

53. On 25 February 2022 Mr French conducted the aforementioned formal 'Investigation Meeting' with Mr Makkar regarding the allegation that he had 'blanked' Y for two days. This meeting was recorded without Mr Makkar's knowledge or consent.

54. On 28 February 2022 Mr Bakiu complains that Mr Burley (Manchester store manager) arrived at the store, called him into a private meeting and said that

Ms Jethwa and Mr Broomfield had asked him to have a recorded conversation with him regarding his store keys (the spare keys that had been given to the builders prior to the TUPE transfer). Mr Bakiu felt uncomfortable with this being recorded and refused. Ms Jethwa then called asking why he would not be recorded and he explained he had already discussed the spare keys with Mr Broomfield via text. Ms Jethwa then came to the store to speak to him and agreed to do it without recording. He expressed concerns about how he was being treated and she said that if the store started making money they would not mind and would *"get off your back"*. Ms Jethwa denies making this particular comment and neither side cross-examined the other on it so we make no findings. We further find that Ms Jethwa made an error in her witness statement when she said that she had recorded this meeting when in fact she had agreed not to and stated as much in the outcome letter. The meeting was not recorded.

<u>March 2022</u>

55. On 2 March 2022 Mr Makkar attended another meeting with Mr French. There are notes of that date titled "Summary Investigation Notes" (p 89). The purpose of this meeting appears to have been to summarise what was said at the Investigation Meeting on 25 February, although we note that it does not appear to be an accurate summary based on the notes we have. For example, Mr French's summary on 2 March states that on 25 February Mr Makkar had stated that Y spent two days cleaning, but the notes of the 25 February meeting show that he said it was really one day she was cleaning. Likewise, the notes of the 2 March meeting suggest that Mr Makkar had been very clear that on 8 February Ms Jethwa had asked him to train Y, but in the 25 February meeting the notes show that initially Mr Makkar had no recollection of the conversation, and then that he did remember Ms Jethwa coming in, but there is nothing in the notes showing that he agreed he was clear about what he had to do.

56. By WhatsApp of 2 March 2022 at 9.47am Mr Makkar asked for a further investigation regarding the alleged racist comments by X from Mr Broomfield. Mr Broomfield asked him to put it fomally in an email. By email of 2 March 2022 at 15:35 Mr Makkar asked for a further investigation 'regarding racist comments by X' (p 111).

57. In the meantime, by email of 2 March 2022 at 14.27 (p 113) Mr Makkar was invited by Mr Freeth to a disciplinary hearing to discuss the allegation of *"failure to follow a reasonable management instruction, namely that you failed to obey a reasonable management instruction issued to you verbally by Sunita Jethwa on Tuesday 8th February 2022, to carry out training for Y"*. There is also a formal letter of the same date (p 90) although there is no evidence that this letter was given to Mr Makkar. The letter states that the notes from the investigation meetings with Mr French were enclosed and Mr French's email of 16 February instructing Mr Makkar to carry out training for Y. The letter classifies the allegation as *"serious misconduct"*.

58. We interpolate here that the Respondent's disciplinary policy (pp 62-63) provides that in cases of unsatisfactory conduct, there may be a formal verbal warning on the first occasion, a written warning on the second occasion and a final written warning on the third occasion. 'Misconduct' should be a written warning on the first occasion and a final written warning on the second occasion, whereas 'serious misconduct' is a final written warning at the first offence. What is meant by 'serious misconduct' is explained in the policy as being that a final written warning may be issued for a first 'offence' *"Where one of the unsatisfactory conduct or misconduct rules has been broken and if, upon investigation, it is shown to be due to your extreme carelessness or has a serious or substantial effect upon our operation or reputation"*. 'Failure to follow reasonable management instruction' is listed in the policy as 'unsatisfactory conduct' or 'misconduct' (it is not specified which).

59. Mr Makkar suggests that the invitation to the disciplinary was in retaliation for him asking for 'a proper investigation' into the alleged racist comment, but we find that he ought reasonably to have regarded this as a coincidence. We accept Mr Broomfield's evidence that Mr Freeth and Ms Jethwa were acting independently of him on 2 March and, in any event, the disciplinary proceedings really commenced on 25 February 2022 with the investigation meeting, so they were already underway when Mr Makkar asked for his grievance to be properly investigated.

60. On 3 March 2022 Mr Makkar attended a disciplinary hearing with Mr Freeth (p 85). Ms Jethwa had told Mr Freeth to go ahead with the meeting as Mr Makkar had had *"the minimum legal notice of 24 hours"* and Mr Makkar confirmed he would attend even though there had not been sufficient time to arrange for someone to accompany him. The meeting took place on the shop floor. Ms Jethwa was there covering the store and so in the room within earshot, although Mr Freeth does not seem to have noticed her and Mr Makkar did not object at the time to her being there. We observe that as the disciplinary involved an allegation of failure to comply with her instruction, it would have been better practice for her not to be present at all. Disciplinary hearings should also be conducted in suitable private locations where possible. However, although Mr Makkar at this hearing appeared to be very concerned that Ms Jethwa had been in the room, and appears now to regard this as intimidating, he does not rely either on the short notice of this meeting or Ms Jethwa's presence in his list of things that he relies on for his constructive unfair dismissal claim.

61. On 6 March 2022 Mr Bakiu approached Y about a racist remark she had made on the shop floor the previous day in front of Mr Bakiu and Mr Hannington. She had spoken about an Asian taxi driver, saying that *"he stunk like the slums of India"*. Mr Bakiu explained to Y that this could be offensive. Y became aggressive and 'stormed out', although did later come back calmer and apologised.

62. On 7 March 2022 Mr Bakiu informed Ms Jethwa and Mr Broomfield about the Y incident. This included that Y had made a racist comment about a taxi driver *"smelling like the slums of India"*. Ms Jethwa asked him whether he thought

the message he had given to Y had got through sufficiently or whether Ms Jethwa needed to get involved. Mr Bakiu's reply was that he hoped Y had understood and been that she had apologised. He did not ask Ms Jethwa to get involved and so she did not. We find that if Mr Bakiu considered that Y should be dealt with more formally in relation to this incident, he should have asked. As Mr Bakiu was the manager, in principle it was reasonable for Ms Jethwa not to intervene in relation to a more junior member of staff unless he requested that she do so. However, we nonetheless consider it significant that Ms Jethwa did not commence disciplinary proceedings against Y in relation to this incident as, being an offensive, race-related comment, it was clearly potentially a disciplinary matter and this is one of the respects in which Y was, we find, treated more favourably than Mr Bakiu and Mr Makkar. We return to this issue in our conclusions.

63. On 8 March 2022 (p 212) Ms Jethwa emailed Mr Bakiu an "Investigation outcome Letter of Concern". This stated that if the keys had been lost that was a security risk and that as the store manager, despite the decision to give the spare keys to the builder having been taken by the previous senior management, Mr Bakiu ought to have checked with the Respondent's managers following the transfer that this was all right. The letter concluded that *"Should there be any repeat of this conduct, or indeed any misconduct in general, you may be subject to formal disciplinary action"*. We observe that this sentence is inappropriately threatening. Ms Jethwa had not in fact identified any misconduct by Mr Bakiu in her letter, just made an observation that Mr Bakiu ought to have thought to inform the Respondent of something his previous senior managers had done, yet she refers to 'any misconduct in general' and threatens formal disciplinary action. Mr Bakiu was unclear what conduct he was to avoid in future and emailed Ms Jethwa a long response asking for clarification to which she did not reply.

64. On 10 March 2022 Mr Bakiu contacted his doctor because he was 'in a state' and stressed. The doctor advised him to take two weeks off, but he did not want to because of his concerns about his job.

65. On 14 March 2022 Ms Jethwa met with Mr Bakiu to discuss concerns he had about Y's behaviour, which included her repeatedly trying to discuss personal matters with him that he did not want to discuss (including whether he would be unfaithful to his wife and sensitive matters to do with his childhood), her asking him to peel an orange for her and saying petulantly *"[Mr Hannington] would do it"* when he would not and her inappropriately asking two customers in one day about their religion. Ms Jethwa advised Mr Bakiu to address the matters directly with Y after she had left the store. Mr Bakiu did this, but Y became aggressive again. He called Ms Jethwa back and she herself witnessed Y's aggressive manner. In evidence, Ms Jethwa agreed that Y was 'shouting and screaming' at Mr Bakiu. She allowed it to continue until Y stopped and then she explained to Y that she was not happy with her conduct and *"would not be happy if Y was to react like that to her".* Mr Bakiu felt that Ms Jethwa only got involved because she had no choice and even then was more concerned about herself than Mr Bakiu.

66. On 15 March 2022 Ms Jethwa informed Mr Bakiu that Y would not be in as she would be meeting with her and Mr Broomfield in Head Office. Ms Jethwa confirmed in evidence that this was not a formal disciplinary meeting. Later, Mr Bakiu received an email from Ms Jethwa (p 216) addressed to both him and Y as if they were equals who had made comparable complaints about each other. In this email she stated that she had met with Y and *"overall we agree it went well".* She stated that Y accepted her 'outburst' was not professional and would not happen again, and that although she was *"happy to have basic banter"* in future *"no one is to ask her anything personal and she will do the same"*. Ms Jethwa stated that future *"constructive feedback"* for Y, whether good or negative, should be in her presence only, that Y should go direct to Mr French for work-related advice and training *"given you and the rest of the team are still in training yourself"*, that they should avoid being on the same shift and that (when X was not working in DF), Y could go to DF to work and someone from DF could come to A&B and Ms Jethwa would also try to work from the store more often. Mr Bakiu felt that this email made it look as if it was Y who had complained about him rather than him about Y, and that he was equally at fault with Y. Mr Bakiu emailed back to complain about this, but Ms Jethwa did not reply. Ms Jethwa says that Y had indeed complained about Mr Bakiu on this occasion, although not in writing. We accept Ms Jethwa's evidence on this point, but whereas Mr Bakiu's complaints about Y were put to Y and she was given a chance to respond in the meeting, whatever Y said about Mr Bakiu, he did not have a chance to respond, but simply received this outcome email that made it appear as if he was equally to blame for an incident in which he had been shouted and screamed at by an employee for whom he had management responsibility when he tried to raise with her a number of important points about her conduct towards staff and customers. The effect of the email was to take away his management responsibility for Y and prevented him from even speaking to her about any matter of substance without Ms Jethwa being present.

67. Ms Jethwa in evidence accepted that she was deliberately treating Y more favourably and seeking to protect her. She explained that this was because Y was in the early stages of pregnancy and also receiving counselling for a mental health problem. Although this is the sort of information that ought ordinarily to be shared with a line manager (with the employee's consent), this information was not shared with Mr Bakiu, nor were either of Mr Makkar or Mr Bakiu even told in general terms (without revealing sensitive information) that there were potentially good reasons for treating Y more favourably in some respects. They accordingly just saw Y being treated more favourably for no good reason.

68. On 16 March 2022 Mr Makkar met with Mr Stinson to discuss his grievance, which he had set out by phone on 3 March in a recorded message. He also brought documents to the meeting. Mr Makkar raised a grievance about three things: (i) the alleged racist remarks X had made about his after shave; (ii) Ms Jethwa threatening him that she could 'fire' him without reason; (iii) various comments by Mr French, including him saying *"on Day 1"* that the Respondents did not want the Beverley Hills staff because of what they were

paid, commenting on a subsequent occasion about *“we guys pay you a lot and you can’t even do this small petty job”* and Mr French’s email adding honesty and integrity to the Company Handbook. The meeting was recorded and the recording given by Mr Stinson to Ms Jethwa. Ms Jethwa typed up minutes of the meeting (pp 92-94). She stated that her version was intended to be a transcript and not a summary, but it is clearly a summary as the agreed transcript of the meeting typed up by Mr Makkar for these proceedings (pp 344-354) contains a lot more text. It is apparent even from Ms Jethwa’s version that Mr Makkar in the course of the meeting identified Mr Bakiu as a witness to Ms Jethwa’s threats and Mr French’s comments. Mr Makkar also said that he did find Mr French had been really helpful to him, but that the comments that had been made and the things he was complaining about were making him feel awful, anxious, stressed and that what was happening was not good for his mental health.

69. At the end of the meeting (p 353) the agreed transcript (but not Ms Jethwa’s summary) shows that Mr Stinson said he was going to look at all the evidence presented and feed it back to Ms Jethwa *“with how what my view is and how I how I see it”* and then *“the process is, is via hr and Sunita”*. Mr Makkar understood from this that Ms Jethwa was going to deal with his grievance, even though part of it was about her.

70. Mr Stinson’s witness statement stated that he could not recall there being any evidence about Mr Makkar’s grievance other than the meeting he had with him and ‘pieces of paper’ he brought to the meeting. He stated that Ms Jethwa had provided him with the written outcome and he had sent it to Mr Makkar. In oral evidence, Mr Stinson said that he thought he had carried out some investigation into the grievance by speaking to X about the aftershave, but he did not take any notes of his investigations, and he had not spoken to anyone else about the grievance. He did not interview Ms Jethwa or Mr French about the allegations that had been made against them. Nor did he speak to Mr Bakiu who had been mentioned in the grievance hearing as a witness to their conduct. He accepted in oral evidence that having not interviewed witnesses he had not carried out a proper investigation. He said that he had given his views to Ms Jethwa about the grievance generally. We reject much of Mr Stinson’s oral evidence as unreliable; he was telling us what he belatedly realised in response to questions he should have done rather than what he did at the time. We find that if he had carried out any investigation at all, he would have mentioned it in his witness statement and there would have been some record kept of it.

71. As it is, we do have notes of an investigation meeting that Ms Jethwa carried out with X (p 84). The content of what X said in this meeting is reflected in the grievance outcome letter that was sent to Mr Makkar on 10 April 2022. Mr Stinson confirmed in oral evidence that he had never seen these notes. Ms Jethwa in oral evidence said she thought the meeting had taken place on 10 May 2022, but she was hesitant about the date and we find that she has the date wrong. The meeting must have taken place prior to the writing of the grievance outcome letter on 10 April 2022 in order for its contents to appear in the grievance outcome letter.

72. There is a further piece of the jigsaw it is convenient to deal with at this point, and this concerns the question of who was the author of the various formal letters in Mr Makkar's case, i.e. the disciplinary outcome on 23 March 2022, the grievance outcome on 10 April 2022, the disciplinary appeal outcome on 12 May 2022 and the grievance appeal outcome on 2 June 2022. Each of the witnesses who had formally been appointed to deal with those matters (i.e. Mr Stinson, Mr Freeth and Mr Harris) all stated in their witness statements, and maintained in oral evidence, that the relevant outcome decisions had been taken, and the letters drafted, by Ms Jethwa. They just sent them out in their names without considering whether they were correct or justified or not. Mr Freeth and Mr Harris also confirmed both in their statements and oral evidence that they had not carried out any investigation in relation to the matters they were charged with dealing with; they simply carried out the meetings with Mr Makkar and then handed the recordings over to Ms Jethwa. As noted above, this was also what Mr Stinson had said in his witness statement although in oral evidence he said he had done some investigation (evidence we rejected for the reasons set out above).

73. Ms Jethwa in her witness statement did not deal with these investigations or decisions at all. When the Tribunal put to her in oral evidence what each of the Respondent's other witnesses had said in their statements, she said that in fact she had outsourced the handling of these formal processes to Peninsula, that Peninsula had provided guidance notes to each manager and that Peninsula had drafted the letters. None of this evidence was in her witness statement. Mr Stinson had already given evidence and been released by the time Ms Jethwa gave this evidence, so we were not able to ask him whether he was aware of Peninsula's involvement, but we were able to put Ms Jethwa's evidence about Peninsula to Mr Freeth and Mr Harris. Each of them denied having received any guidance from Peninsula or Ms Jethwa on how to carry out their roles; each of them denied even having heard of Peninsula. We note that the grievance appeal outcome letter in Mr Makkar's case (p 99) at point 4 explicitly denied that there had been any involvement from the Respondent's external HR company and asserted that it had been dealt with internally. There is no documentary evidence at all of Peninsula's involvement and the evidence of Mr Freeth and Mr Harris contradicts Ms Jethwa's on this. We conclude that Ms Jethwa did not tell us the truth when she said that Peninsula had drafted the letters. We further observe that, even if Ms Jethwa did engage Peninsula to draft the letters (which we do not accept), each of the letters contains substantive content which is not covered in the notes of meetings with Mr Makkar and which had to have been provided by someone at the Respondent. As it was not Mr Stinson, Mr Freeth or Mr Harris who provided that substantive content, we infer that it must have been Ms Jethwa. This is consistent with her having carried out the one investigation meeting with X for which we do have notes. We therefore find that, in substance, all of the key decisions in Mr Makkar's case – his disciplinary warning, disciplinary appeal, grievance and grievance appeal were taken by Ms Jethwa.

74. Returning to the handling of Mr Makkar's grievance, it follows that not only was Mr Makkar told by Mr Stinson that Ms Jethwa would be dealing with his grievance, part of which was about her, but that Ms Jethwa did in fact deal with his grievance. Further, there was no reasonable investigation of Mr Makkar's grievance. He was never given an opportunity to respond to what X had said in her interview. In the outcome letter (see below), X's account was simply accepted over Mr Makkar's. No other witnesses were interviewed: not Ms Jethwa or Mr French against whom the grievances were made, or any other witnesses to the alleged comments, including Mr Bakiu who had been identified by Mr Makkar as being present for many of the allegations.

75. On 23 March 2022 Mr Makkar was issued with a final written warning following the disciplinary hearing of 3 March 2022 (p 96). The letter was sent from Mr Freeth, but the decision was (as we found above) taken by Ms Jethwa. The letter repeated the point made by Mr French in the summary meeting on 2 March 2022 about Mr Makkar *"very clearly acknowledging that you understood the instructions given to you verbally"* by Ms Jethwa on 8 February – a point which we have previously observed appears to have no basis in the meeting notes of any meeting with Mr Makkar that we have seen (although it is the case that we do not understand Mr Makkar to dispute that he was aware in general terms that he was supposed to be training Y). The letter states that it is considered that Y had been given insufficient training, that Mr Makkar had used the fact that he understood that Mr Broomfield had instructed Y to clean as an 'excuse' not to give training and had lied about saying he was not in store on Tuesday 15th. The letter also states that Mr Makkar was not telling the truth about not having received formal 1-2-1 training himself when joining the company.

76. We have already found above that there was no justification for the conclusion that Mr Makkar had 'lied' about the dates he was working. We add that, although it is correct to state that Mr Makkar had received formal training, he had not been denying that, his point (which we do not understand to be disputed) was that he had not received formal 1-2-1 training of the sort that they expected him to carry out with Y. In any event, the point of substance was that he had not yet been fully trained himself and this was agreed by Ms Jethwa as her email of 15 March (see above) had accepted that Mr Makkar and Mr Bakiu were still 'in training' themselves. In those circumstances, the expectations on Mr Makkar in terms of the *quality* of the training he was expected to give Y appear to have been unrealistic.

77. Mr Makkar appealed against the final written warning (p 95) and Mr Harris was appointed to deal with the appeal hearing.

78. On 25 March 2022 there was a managers' conference in Birmingham. When it was originally booked, Ms Jethwa said that everyone would go together and Mr Bloomfield booked tickets for everyone from London except Mr Bakiu even though the tickets were on 'buy one get one half price'. They asked him to travel up alone as they told him they wanted the train journey to catch up with X. That same day Mr Bakiu had heard that Mr Makkar received a formal disciplinary warning, which made it clear to Mr Bakiu that the Respondent

really wanted all the former Beverley Hills employees 'out' and 'in a fluster' Mr Bakiu got on the wrong train to Birmingham and was late to the conference.

79. Each month the company does a draw of everyone whose birthday is that month and the winner gets a voucher. Mr Bakiu's name was not put in the draw for March. Ms Jethwa said that this was perhaps because his birthday was in the system in American format, but when he pointed out that in that case he ought to have been in the draw for April but was not (his birthday being 4 March), she said that he had been put in the draw for April anyway to make up for not being in it in March. We reject Ms Jethwa's evidence on this point. There is no evidence that Mr Bakiu complained about being left out of the draw at the time and if he did not complain, we cannot see why Ms Jethwa would have known to add him into the draw for April and, as she did not tell him she was putting him in the draw for April, we find she did not do so. However, while we find that Mr Bakiu was as a matter of fact left out of the draw, there is no evidence this was intentional. It is more likely it was an error.

80. Mr Bakiu also complains that during the managers' conference the managers were required to give their favourite chocolate bar for inclusion in the Newsletter and Mr Bakiu's was left out. Ms Jethwa suggested this was because he had missed this exercise which occurred at the start before he arrived as his train was late. We do not accept that this is the explanation for the omission as it is apparent that Mr Bakiu was asked to give his favourite chocolate bar. However, again we find there is no evidence that he was omitted intentionally rather than through oversight.

<u>April 2022</u>

81. Mr Bakiu was on holiday for the first two weeks of April. He emailed Ms Jethwa on 16 and 23 March 2022 letting her know that there were not enough staff to cover bank holidays as she had authorised Y (who was required to work bank holidays) to have that time off. He received no response, then on his first day of annual leave he received emails from Ms Jethwa complaining that the store was not open. For the rest of his holiday, Ms Jethwa and Mr Broomfield then got DF staff to provide additional cover period so that Y was not alone (both Mr Hannington and Mr Bakiu also being off), but the same was not done for the Mr Bakiu and Mr Makkar and they were required to work alone (an issue to which we return below). Ms Jethwa accepted that this was another respect in which Y was treated more favourably than Mr Makkar and Mr Bakiu deliberately because of her vulnerabilities and relative lack of experience.

82. On 5 April 2022 Mr Bakiu believes that Y wrote a complaint email to Mr French, but sent a draft to Ms Jethwa first to ask for her input. Mr Bakiu has a photograph of this (p 219). However, it is not possible to tell from this how he came by the email or whether it was sent and who was its author and we do not accept Mr Bakiu has proved his case on this point. The factual point

that Y felt comfortable enough with Ms Jethwa to speak to her before raising formal complaints is already clear from her email of 16 February 2022 which has evidently been discussed with Ms Jethwa for the reasons we have already set out above.

83. Mr Makkar says that on 7 April 2022 he was given more tasks/work load than another staff member in the same position (i.e. Y) and he emailed Ms Jethwa to complain (p 120). Ms Jethwa agreed this was the case, but again justified it to us in Tribunal (but not to Mr Makkar at the time, to whom she did not respond) by reference to Y's vulnerabilities and inexperience. Ms Jethwa did not reply to Mr Makkar's email.

84. By email of 7 April 2022 Mr Makkar also complained again about Mr French having said that the company did not want the Beverley Hills employees, X's alleged racist comment, Ms Jethwa saying they can be fired without reason, unfair written warning and treatment of Y that day *"shouting and screaming on the shop floor"* and also saying to him that *"talking to me is like talking to the wall"*. He stated that Y had apologised for this, but pointed out that he has complained about Y on many occasions but nothing has been done and he is now worried and anxious about coming into work. Ms Jethwa did not respond to this email either. In oral evidence, she said that she felt the A&B store in Hatton Garden was 'like a playground'. We observe, however, that the 'playground' element on the evidence before us seems to be one-sided: Mr Makkar in this email raises an apparently reasonable complaint about what does indeed sound like childish, offensive and deeply inappropriate behaviour by Y, but no action is taken.

85. Mr Makkar was signed off sick with anxiety from 7 April until 20 April 2022. Ms Jethwa was aware of this as she was sent the sick notes.

86. By letter of 8 April 2022 Mr Harris invited Mr Makkar to a meeting to hear his appeal against the disciplinary warning (376). Mr Makkar replied by email that he was signed off sick with anxiety and feeling mentally stressed due to many work related issues. By email 11 April Mr Harris replied saying that HR (i.e. Ms Jethwa) had advised that despite being off sick he could still attend the appeal meeting as it would be held remotely and would speed up resolving the matters causing him stress, but that if he wanted to wait until his return to work *"then that's absolutely fine too"*. Mr Makkar replied asking to reschedule until after 20 April, which the Respondent did.

87. By letter of 10 April 2022 Mr Makkar was informed that his grievance was not upheld. We have found above that in substance the decision-maker in relation to the grievance was Ms Jethwa. The letter identifies the three elements of Mr Makkar's grievance in vague terms and deals with each in one sentence. As to the complaint about X, it states, *"The comments did not have racist roots and through our investigation have found that this was resolved informally by yourself and the party in question"*. Not having 'racist roots', Mr Stinson explained in oral evidence, meant it was not intentional. However, he had not actually formed any view on what had been said and was unaware of what the allegation was – evidence that further confirms our

conclusion that it was Ms Jethwa who made the decision. Certainly, it is not possible to tell from the letter why Mr Makkar's grievance has not been upheld since it is not explained that there was a dispute between Mr Makkar and X about what was said, which version was preferred, and the suggestion that the matter had been resolved informally between Mr Makkar and X was understandably baffling to Mr Makkar who did not think this was what had happened and had not been told that this was X's evidence.

88. In relation to the allegation against Ms Jethwa about making threats to terminate their contracts, the outcome letter stated, *"We have been unable to find evidence to this having taken place as part of a personal conversation meant to be directed at an individual"*. However, it is clear that the reason why no other evidence was found to support Mr Makkar's evidence was because – despite the assertion in the letter that there had been investigation – in fact there was no investigation into this allegation at all. The letter does not explain why Mr Makkar's account was rejected in any event.

89. As to the third allegation against Mr French, this was just avoided by saying that, *"You state that Tony is always available to help and that you really appreciate him"*, which was no answer to the allegation.

90. The letter concluded by offering Mr Makkar the right to appeal to Ms Jethwa within 5 days. Mr Makkar was even at the time concerned about having to appeal to Ms Jethwa who he believed had made the original decision as Mr Stinson had said she would. He was also concerned about the timing because he was at that point (to Ms Jethwa's knowledge) signed off with anxiety until 20 April 2022. However, no indication was given that the time limit for appealing would be extended to take account of him being off sick. Mr Stinson was unaware that he was off sick.

91. On 16 April 2022 Mr Bakiu returned from annual leave and went to DF to ask if a member of staff could cover the shop for 5 minutes if he needed as he was working on his own, but Saskia (who was running DF that day) said that Mr Broomfield had categorically told her not to send Mr Bakiu any staff today. Mr Bakiu spoke to Mr French about this who seemed surprised at what Ms Jethwa and Mr Broomfield were doing and how they were making him feel but nothing was done. (This was also the conversation in which Mr Bakiu says he told Mr French that he was Type 1 diabetic and raised concerns about the implications of that for his working alone on a locked door policy. We deal with this aspect of the conversation below.) Mr Broomfield denied having told Saskia any such thing and as it is his word against Saskia's and we have not heard from Saskia, we prefer Mr Broomfield's evidence as to what he said to Saskia. However, it does not follow that Saskia did not say to Mr Bakiu what he says she said. He has been consistent in his complaint on this point and there is no dispute that Mr Broomfield and Ms Jethwa were openly frustrated with Mr Bakiu and his difficulties getting staff to cover his store so we accept therefore that Saskia might have got the impression that she was not to help him out and we accept Mr Bakiu's evidence as to what Saskia said to him.

92. On Mr Makkar's return to work on 20 April 2022 after two weeks' signed off with anxiety, Mr Makkar spoke to Ms Jethwa about his concerns about the grievance, the disciplinary and concerns about Y. Ms Jethwa said to Mr Makkar (as she recounts in her conversation with Mr Bakiu on 3 May 2022 for which we have a transcript) that 'if he was that unhappy with the company, why was he still there, if the company is that bad and he was not treated right, why not leave' (p 288). In oral evidence, she explained that she said this because he was complaining about his treatment by the Respondent so much. She did not appear to recognise, or if she did she thought it was fine, that whereas she was elaborately careful not to upset Y with her pregnancy and mental health issues, and went out of her way to make sure Y was happy, with Mr Makkar as an employee returning from period of absence as a result of anxiety her attitude was markedly different – indeed, we find, her remarks showed a callous disregard for him and his mental health.

<u>May 2022</u>

93. On 3 May 2022 Ms Jethwa asked Mr Bakiu for a 'catch up' at headquarters that day and then sent an email inviting him to a 'fact finding' meeting on 5 May.

94. The 'catch up' on 3 May turned out to be the 'fact finding' meeting and both Mr Bakiu and Ms Jethwa recorded it. Ms Jethwa reminded him about the previous informal warning following the conversation about the keys, and that standards that were expected. Mr Bakiu pointed out that he had sought clarification about what she meant in that letter but that she had not replied to his email. They then spoke about a number of things. Ms Jethwa told him there had been many complaints about him, including customer complaints. Mr Bakiu had alleged that these complaints were *"fabricated"*, in part because Ms Jethwa appeared to have got a customer's name and gender wrong (Denise rather than Dennis, in part because they were not in writing). In oral evidence, however, he accepted that he did not necessarily mean 'fabricated' as in 'completely made up', but rather that they were 'trumped up', i.e. made to seem more serious than they were. Ms Jethwa denied this. She said they were real complaints and she had even arranged flowers for one customer by way of apology. On this issue, we find that the complaints were not made up by Ms Jethwa, they were genuine complaints. However, it is clear that they are all being raised with Mr Bakiu for the first time in the meeting, rather than discussed with him first in the ordinary course of business as we would normally expect to happen with this sort of customer complaint about apparently poor service.

95. The meeting went on to cover a large number of other topics, including about arrangements for ensuring the shop was open on Bank Holidays despite all the former Beverley Hills staff not being contractually obliged to work Bank Holidays. During the meeting, Mr Bakiu raised with Ms Jethwa about being unhappy working on a locked door policy because of the medical risk as a result of his diabetes (280). We deal with this aspect of his case below.

96. The next day, 4 May, Mr Bakiu was left alone to work again for one hour at lunch time. Mr Bakiu says he emailed Ms Jethwa about this but received no reply. We have not seen this email and we find that there is no reason why Ms Jethwa should have known he was going to be working alone that day without him telling her. It is not reasonable for him to have expected her to check his rota.

97. On 5 May 2022 Mr Bakiu resigned by email, asking what period of notice was required from him. He did not raise a grievance before resigning as he felt that Ms Jethwa was 'just trying to trip him up', that she had fabricated the alleged customer complaints and there was no point.

98. The same day, Mr Makkar was told he would need to operate on his own under the lock and key policy (p 114).

99. Ms Jethwa replied to Mr Bakiu on 6 May saying he needed to give 12 weeks notice but if he wanted to leave sooner to let her know. She reminded him about the non-compete clause in his contract if he was going to a competitor.

100. On 6 May 2022 Mr Makkar attended a meeting with Mr Harris regarding his appeal against the disciplinary warning. The Respondent has not produced any notes for this meeting.

101. On 9 May 2022 Mr Bakiu and Ms Jethwa spoke on the phone and then he emailed to confirm he was leaving with immediate effect because of the effect that the work placement was having on his health.

102. By letter of 9 May Ms Jethwa offered him the opportunity to reconsider his resignation and/or to raise a formal grievance. She stated that he had made the company aware of his diabetes on 3 May 2022 and that the company was in the process of changing procedures to accommodate this. She added that if he retracted his resignation *"it would still be our intention to address the outstanding disciplinary matters which existed prior to your resignation"*. We observe that this makes clear that Ms Jethwa regarded the 'catch up' meeting on 3 May as being the first stage in a disciplinary process.

103. On 12 May 2022 Mr Makkar was informed that his appeal against the disciplinary warning had been dismissed. The letter was signed by Mr Harris but was we find (for the reasons we have set out above) decided on and written by Ms Jethwa. Although the letter is more detailed than the original final written warning letter, it essentially repeats in more entrenched terms what was stated in the original letter.

104. Also on 12 May 2022 Mr Makkar appealed the grievance decision. Mr Harris was also appointed to hear the appeal against the grievance. There was, however, no grievance appeal meeting because Mr Makkar was signed off sick again with anxiety and too unwell to participate. He agreed to the appeal being determined without a meeting.

105. On 13 May Bakiu sent a further email having sought legal advice stating that he considered he had been treated unfairly from the TUPE transfer. He indicated that if matters could not be resolved through ACAS he would have 'no option' but to issue a claim for constructive dismissal.

106. Between 21 May 2022 and 29 May 2022 Mr Makkar was again signed off with anxiety.

June 2022

107. By letter of 2 June 2022 signed by Mr Harris but, we find, for the reasons we have set out above, written by Ms Jethwa (p 99) Mr Makkar was informed that his appeal against the grievance outcome had been dismissed. This does a better job of explaining the reasons for rejecting Mr Makkar's grievance, but still suffers many of the substantive flaws of the first decision. Thus, X's word is still preferred to Mr Makkar's without any reason being given for that. There was still no investigation into the allegation against Ms Jethwa, the excuse now being given that Mr Bakiu could not be interviewed because he had resigned. Although the letter states that the allegations against Mr French have been 'investigated further', there is no evidence that there was any investigation at all, and we find there was none. The finding that *"there is no evidence to suggest that the business did not want you to join the business but this is your perception"* was therefore without foundation. It is also clear from the outcome letter that Mr Makkar had raised as part of his appeal an expectation that his grievance would be dealt with by someone independent of Ms Jethwa (the sole HR person for the Respondent), but was told that it had been dealt with internally.

108. By email of 6 June 2022 Mr Makkar resigned referring to the effect on his mental health of working for the Respondent. His resignation was accepted by Ms Jethwa by letter of 7 June 2022 (p 101). Orally at this hearing, he explained that his main reasons for resigning were that he had made numerous complaints that were not dealt with, that he was told he would get support from HR, that he believed the majority of decisions on his grievances were made by Ms Jethwa and that he had accordingly 'lost trust' in the Respondent and could not cope with continuing to work for the company.

The locked door working arrangements and the Respondent's knowledge of Mr Bakiu's diabetes

109. Prior to the TUPE transfer employees of Beverley Hills had not been required to work alone. The Respondent does not plan for anyone to work alone either, but does have a policy that where as a result of unforeseen staff absence an employee is on their own in the shop, they work on a locked door policy only dealing with appointments and customers they are happy to serve. Under the policy, hourly checks should be made by the Regional Manager on employees who are lone working, but Mr Bakiu's evidence (which we have no reason not to accept) was that that did not happen in this case.

110. From 20 March 2022 onwards there were occasions when Mr Bakiu and Mr Makkar were required to work alone on a locked door basis. Mr Bakiu was unhappy about this as he is diabetic and felt that working alone behind a locked door placed him at risk because if he had a hypoglycaemic episode he would have no one to help him and medics would not easily be able to get to him behind a locked door.

111. Ms Jethwa in her statement agrees that as a diabetic the locked door policy should not have been applied to Mr Bakiu. However, the Respondent's case is that they were not aware that Mr Bakiu was diabetic prior to 3 May 2022.

112. Mr Bakiu says that he had made Beverley Hills aware he was diabetic on an employee form. Ms Jethwa denied seeing this, and on this particular point we accept her evidence as it is plausible that this was not handed over to the Respondent.

113. Mr Bakiu gave evidence that he had had numerous ("about 10") conversations with Mr French about his diabetes over the period of employment following the TUPE transfer, in the course of which Mr French had shared that he suffers from asthma. Mr French denied any knowledge of such conversations. Mr Bakiu said that discussions about him being diabetic had occurred in the context of discussing shielding from Covid, and also on 16 April 2022 when spoke to Mr French and explained his concerns about the locked door policy for him as a Type 1 diabetic. Mr Bakiu's evidence was that Mr French on this occasion said he understood but nothing was done about it. Mr French denied this conversation in oral evidence.

114. Ms Radziunaite recalled a conversation with Mr French, Mr Makkar, Mr Harrington and Mr Bakiu regarding Covid during which Mr French mentioned that he had asthma and Mr Bakiu said he had diabetes and they both talked about having to shield because of Covid. Mr Hannington recalled such a conversation in the first week following the transfer.

115. Mr Bakiu also gave evidence that he had told Ms Jethwa in the context of refusing to mix the 'bubbles' from the DF and A&B store in December 2021 because he was concerned about his own Covid risk as a result of his diabetes and Mr Harrington was also living with his vulnerable grandmother.

116. Regarding the question of whether and when Mr Bakiu informed Mr French and Ms Jethwa about his diabetes, we accept Mr Bakiu's evidence. It is supported by the evidence of Ms Radziunaite and Mr Hannington, and Mr Makkar. It is plausible as being a Type 1 diabetic has a significant impact on a person's life (and Mr Bakiu gives evidence in his disability impact statement of the impact it has on his) and we would expect him to raise such concerns. We have found Mr Bakiu to be a generally reliable witness, whereas Ms Jethwa was not as we have found her to be unreliable in her evidence about her involvement in Mr Makkar's grievance and disciplinary processes. Mr French was unable to explain how Mr Bakiu came to know about his asthma

if they had not had the kind of mutual exchange conversation that Mr Bakiu alleged and so we prefer Mr Bakiu's evidence.

117. There is no dispute that Mr Bakiu did not complain in writing about the locked door policy or link it to his diabetes at any point prior to 3 May 2022. The only alleged verbal complaint was to Mr French on 16 April 2022. We accept Mr Bakiu's evidence that he did raise it with Mr French that day.

118. Mr Bakiu worked all day on his own on a locked door basis on 20 March, 25 March, 16 April, 19 April, and for 1 hour on his own on 28 February, 2 March, 7 March, 8 March, 14 March, 15 March (2 hours), 29 March and 4 May.

119. Mr Makkar was required to work on locked door on 5 May 2022 (p 114).

120. Both Mr Makkar and Mr Bakiu claim that they were made to work alone on a locked door, and that in this respect they were treated differently to Y, for whom additional cover was provided by Ms Jethwa/Mr Bloomfield in the two weeks that Mr Bakiu was away at the beginning of April 2022. Ms Jethwa agreed that cover had been provided for Y. She was of the view that Mr Bakiu as Store Manager ought to have arranged this and that Y required cover as she was new, inexperienced and also vulnerable as a result of being in the early stages of pregnancy and also suffering mental health difficulties.

121. Mr Bakiu complained that on 4 May Ms Jethwa should have realised he was going to be on his own for an hour by looking at the schedule and should have taken steps to provide cover. For the reasons set out above, we find that there was no reason for Ms Jethwa specifically to be aware that Mr Bakiu would be working on his own for an hour on 4 May.

Conclusions

Race-related harassment

The law: substance

122. By s 40 EA 2010 an employer must not harass any employee or applicant for employment. By 26(1) of the EA 2010 a person harasses another if: (a) they engage in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of (i) violating the claimant's dignity or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

123. By s 26(4), in deciding whether conduct has the requisite effect, the Tribunal must take into account: (a) the perception of the claimant; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect. In *Land Registry v Grant* [2011] EWCA Civ 769, [2011] ICR 1390 at [47] Elias LJ focused on the words of the statute and observed: *"Tribunals must not cheapen the significance of these words. They are an*

important control to prevent trivial acts causing minor upsets being caught by the concept of harassment".

124. While the threshold for the type of acts that may amount to harassment is higher than the detriment threshold for the purposes of direct discrimination, the EAT (Slade J) explained at [31] in *Bakkali v Greater Manchester Buses (South) Ltd* [2018] ICR 1481, that harassment involves a broader test of causation than discrimination and a *"more intense focus on the context of the offending words or behaviour"*. The mental processes of the putative harasser are relevant but not determinative: conduct may be 'related to' a protected characteristic even if it is not 'because of' a protected characteristic.

125. The burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931. The Supreme Court has recently confirmed that this remains the correct approach: *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] 1 WLR 38.

The law: time limits

126. The general rule under s 123(1)(a) EA 2010 is that a claim concerning work-related discrimination under Part 5 of the EA 2010 (other than an equal pay claim) must be presented to the employment tribunal within the period of three months beginning with the date of the act complained. For this purpose: conduct extending over a period is to be treated as done at the end of that period (s123(3)(a)); failure to do something is to be treated as done when the person in question decided on it (s123(3)(b)); in the absence of evidence to the contrary, a person is taken to decide on failure to do something either when the person does an act inconsistent with deciding to do something or, if they do no inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it (s123(4)).

127. The primary time limit is subject to the extensions of time permitted by the ACAS Early Conciliation provisions, i.e. by virtue of s 140B of the EA 2010, any period of ACAS Early Conciliation is to be ignored when computing the primary time limit, and if the primary time limit would have expired during the ACAS Early Conciliation period, it expires instead one month after the end of that period. The early conciliation period does not extend time where the time limit has already expired: *Pearce v Bank of America Merrill Lynch and ors* (UKEAT/0067/19/lA) at [23].

128. If a claim is not brought within the primary time limit, the Tribunal has a discretion under s 123(1)(b) to extend time if it considers it is just and equitable to do so.

129. The burden is on the Claimant to convince the Tribunal that it is just and equitable to extend time: *Robertson v Bexley Community Centre t/a Leisure*

Link [2003] EWCA Civ 576, [2003] IRLR 434 at [24]. The discretion whether or not to extend time is a broad one to be exercised taking account of all relevant circumstances, in particular the length of and reasons for the delay, and balancing the hardship, justice or injustice to each of the parties: see *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23. In an appropriate case the substantive merits may also be relevant, provided that the Tribunal is properly in a position to make an assessment of them: *Kumari v Greater Manchester Mental Health NHS Foundation Trust* [2022] EAT 132 at [63]. The fact that an internal appeal is ongoing is not ordinarily sufficient of itself for time to be extended, although it is one factor to be taken into account: see *Apelogun-Gabriels v Lambeth* [2001] EWCA Civ 1853, [2002] ICR 713 at [16].

Conclusions

130. We found as a fact that on 11 November 2021 X did say to Mr Makkar words the import of which were that it was only to be expected that aftershave that was too strong/unpleasant had come from India. We further find that this was unwanted conduct so far as Mr Makkar was concerned as, even on X's account, she noticed that he had been offended by her. We do not consider that his delay in raising it as a formal complaint undermines this: it is understandable that he chose not to raise a formal complaint given that he was not working with X on a daily basis and his fears that the Respondent wanted to get rid of him, and that he did not complain until he felt he had to because Ms Jethwa was threatening to move him to work with X on a daily basis. We consider that the remarks were reasonably perceived by him to be offensive as it would be offensive to say to anyone other than a close friend (and Mr Makkar and X were not close friends) that you did not like something as personal as their aftershave. We also find that the remarks were related to race/nationality as the specific suggestion was that it was only to be expected that aftershave from India would be unpleasant.

131. We therefore find that as a matter of substance this claim succeeds. Mr Makkar was subjected to race-related harassment by X (for which the Respondent is responsible by virtue of EA 2010, s 111) on 11 November 2021.

132. However, that complaint has been brought outwith the primary time limit in EA 2010, s 123(1)(a). We have therefore to decide whether it is just and equitable to extend time. The burden in that respect is on Mr Makkar. He says that he delayed in bringing the claim because he did not find out about Employment Tribunals and his rights to claim until later and he was waiting for the Respondent to deal with his grievance about it, which was not completed until 2 June 2022.

133. We have considered very carefully whether it is just and equitable to extend time for consideration of this complaint. We have found the claim to be meritorious and so refusing to extend time will mean that Mr Makkar will not receive compensation for an established act of race-related harassment, while the Respondent will escape liability for that. After a full a trial, we

understand that there could be a perception of injustice if time is not extended.

134. However, our judgment itself serves as vindication for Mr Makkar on this claim and the issue is solely whether it is just and equitable to extend time so that he can receive compensation for that isolated act of harassment by X.

135. We consider in this case that it would not be just and equitable to extend time for the following reasons. First, time limits are important. They are there for a reason to prevent old matters being made the subject of legal proceedings unless they are part of a 'continuing act' or justice and equity requires otherwise. Secondly, the delay in bringing the claim is significant: the claim was in the end brought on 7 September 2022, following a period of ACAS Early Conciliation between 13 June and 13 July 2022. The claim is therefore approximately six months out of time. Thirdly, the reason for the delay is significant: Mr Makkar chose not to complain about this incident at the time. He only formally complained on 11 January 2022 when he was threated with having to move to X's store. He then did not raise the complaint again until 2 March 2022 when he was under threat of disciplinary proceedings. By that point, he was already outside the primary time limit. Although the Respondent thereafter delayed in dealing with his grievance, the most important period of delay was attributable to choices made by Mr Makkar. Fourthly, we infer from the foregoing that the X incident is not something that Mr Makkar would have chosen to pursue legal proceedings for unless the Respondent had done all the other things that he relies on in his constructive unfair dismissal claim (which includes not dealing properly with his complaint about X). Fifthly, we consider that it is because the X incident was not important enough to him in and of itself that he did not immediately start researching his legal rights at an earlier stage. Sixthly, Mr Makkar's delay meant that the Respondent did not have the opportunity to investigate the comments shortly after they were made (and in saying that we acknowledge that the Respondent did not take the opportunity it was subsequently given by Mr Makkar to investigate the incident until several months later, but it remains the case that things might have been different if Mr Makkar had raised a prompt complaint in November 2021, not in response to a threat of being moved store and at a time before relations between the parties had further soured).

136. In the circumstances, bearing in mind the foregoing, although the compensation that Mr Makkar may receive for this act of harassment is probably worth more to him than it is to the Respondent (given the difference in the sizes of their respective pockets), such that a refusal to extend time will have a more significant financial impact on Mr Makkar than on the Respondent, compensation for an isolated act of harassment like this will not be very large, and we consider that justice and equity requires in this case that Mr Makkar bear the consequences of his delay in raising this claim. The delay in reality reflects the relative unimportance of the X incident to him. His actions show that what mattered to him most was not X's remarks, but what the Respondent did (or, rather, did not) do about them and its subsequent treatment of him – i.e. the matters that form the subject of his constructive

unfair dismissal claim. In the circumstances, Mr Makkar has not persuaded us that it would be just and equitable to extend time.

Disability discrimination

The law

137. Under s 20 of the EA 2010, read with Schedule 8, an employer who applies a provision, criterion or practice ('PCP') to a disabled person which puts that disabled person at a substantial disadvantage in comparison with persons who are not disabled, is under a duty to take such steps as are reasonable to avoid that disadvantage. Section 21 provides that a failure to comply with a duty to make reasonable adjustments in respect of a disabled person is discrimination against that disabled person. By section 212(1), 'substantial' in this section means 'more than minor or trivial'.

138. A respondent is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know both that the complainant has a disability and that he or she is likely to be placed at the relevant substantial disadvantaged (EA 2010, Sch 8, para 20): see further *Wilcox v Birmingham CAB Services Ltd* (UKEAT/02393/10) at [37].

139. In considering a reasonable adjustments claim, a Tribunal must identify: (a) the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer, (c) the identity of non-disabled comparators (where appropriate) and (d) the nature and extent of the substantial disadvantage suffered by the claimant: *Environment Agency v Rowan* [2008] ICR 218, EAT at [27] *per* Judge Serota QC. The Tribunal must also identify how the adjustment sought would alleviate that disadvantage (*ibid,* at [55]-[56]), although an adjustment may be reasonable even if it is unlikely wholly to avoid the substantial disadvantage: *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265, [2017] ICR 160 at [29]. The nature of the comparison between disabled and non-disabled people is not like that between claimant and comparator in a direct discrimination claim: it is immaterial that a non-disabled person with all the characteristics of the disabled person but for the disability would be treated equally, what matters is whether *"the PCP bites harder on the disabled, or a category of them, that it does on the able-bodied"* as a result (for example) of the disabled person being more likely to be disadvantaged by the PCP than a non-disabled person: see *Griffiths v Secretary of State for Work and Pensions* [2015] EWCA Civ 1265, [2017] ICR 160 at [58].

140. What is reasonable is a matter for the objective assessment of the Tribunal: cf *Smith v Churchills Stairlifts plc* [2006] ICR 524, CA. The Tribunal is not concerned with the processes by which the employer reached its decision to make or not make particular adjustments, nor with the employer's reasoning: *Royal Bank of Scotland v Ashton* [2011] ICR 632, EAT.

141. Under s 136 EA 2010, the Claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that

there are facts from which it could reasonably be inferred, in the absence of an explanation, that the duty has been breached. There must be evidence of some apparently reasonable adjustment which could be made, at least in broad terms. In some cases the proposed adjustment may not be identified until after the alleged failure to implement it and this may even be as late as the tribunal hearing itself. Once that threshold has been crossed, the burden shifts to the Respondent to show that the proposed adjustment is not reasonable: *Project Management Institute v Latif* [2007] IRLR 579, EAT.

Conclusions

142. There is no dispute in this case that the Respondent had a PCP of requiring employees to work alone on a locked door policy where the shop was short-staffed. There is also no dispute that this placed Mr Bakiu as a Type 1 diabetic at a substantial disadvantage and that it would be reasonable to make an adjustment so that he did not have to work alone. From the point that Ms Jethwa accepts that she knew both of Mr Bakiu's diabetes and his concerns about the locked door policy, Ms Jethwa accepted that adjustments needed to be made. However, that was not until 3 May 2022. Mr Bakiu's claim principally concerns what happened before that date.

143. The issue for us turns on the Respondent's *actual or constructive knowledge* of both the Claimant's disability and the substantial disadvantage. Those questions are answered by our findings of fact. We accepted Mr Bakiu's evidence that he had by the end of 2021 told both Ms Jethwa and Mr French that he was diabetic. They therefore had actual knowledge of his disability a long time before the locked door policy was applied to Mr Bakiu for the first time on 20 March 2022. However, there is no evidence that they actually knew that being diabetic would place him at a substantial disadvantage in relation to a locked door policy prior to Mr Bakiu raising this with Mr French on 16 April 2022 (a conversation in respect of which we again accepted Mr Bakiu's evidence over that of Mr French for the reasons set out in our findings of fact). We have therefore considered whether they ought reasonably to have known before Mr Bakiu explained the problem to Mr French on 16 April 2022 that the locked door policy would place him as a diabetic at a disadvantage. We do not think they should have known. Although it is relatively well known that Type 1 diabetes gives rise to a risk of hypoglycemic episodes, there is no evidence that Mr Bakiu specifically told Mr French or Ms Jethwa in previous conversations that he was Type 1 diabetic rather than 'just' diabetic and, in any event, we do not consider that an employer can reasonably be expected to make assumptions about the risks to a particular individual from being Type 1 diabetic. It will depend to an extent on the precise features of their diabetic condition and how they manage it. We therefore consider that the Respondent could not reasonably know about the disadvantage to Mr Bakiu of the locked door policy until he explained this. He did that to Mr French on 16 April and accordingly thereafter the Respondent came under a duty to make reasonable adjustments, but unreasonably failed to do so (since it is accepted that it would have been reasonable to adjust and we can see no reason why adjustments could not have been made

immediately as Ms Jethwa said she was doing after 3 May), with the result that Mr Bakiu suffered the disadvantage on three occasions on 16 April, 19 April and 4 May.

Time limits for the disability discrimination claim

144. We add that we have considered the implications of our decision for the application of time limits to this claim. As a failure to make reasonable adjustments is a 'continuing omission' (*cf Kingston upon Hull City Council v Matuszowicz* [2009] ICR 1170), the provisions of s 123(3)(b) and (4) of the EA 2010 apply. By virtue of s 123(4), in the absence of evidence to the contrary, a person is to be taken to decide on a failure to do something (so that time starts running for the purposes of s 123(1)) when the person does an inconsistent act or on the expiry of the period when the person might reasonably have been expected to do it. It follows from our findings that 16 April is the date when time started to run because that was the date when there was an unreasonable failure to make a reasonable adjustment.

145. The primary limitation period under s 123(1)(a) for bringing this claim of failure to make reasonable adjustments therefore would have expired on 15 July 2022. However, the extension for the ACAS Conciliation Period under s 140B EA 2010 applies. Mr Bakiu contacted ACAS on 19 May 2022 (i.e. within the primary three-month limitation period) (Day A) and the certificate was issued on 29 June 2022 (Day B). That 41-day period is not to be counted by virtue of s 140B(3) for the purposes of calculating the limitation period. Adding 41 days to the original time limit of 15 July 2022 gives a time limit of 25 August 2022. There is no further extension by virtue of s 140B(4) because 25 August 2022 is more than one month after Day B. Mr Bakiu submitted his claim on 7 September 2022 which was therefore outside the primary time limit in s 123(1)(a) (as extended by s 140B(3)). We will therefore need to consider whether it would be just and equitable to extend time for this claim. The parties have not had an opportunity to address us on it, so this will be an issue to be considered at the Remedy Hearing.

Constructive unfair dismissal

The law

146. Section 95(1)(c) of the Employment Rights Act 1996 (ERA 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"*.

147. It is well established 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.

148. Not every breach of contract is a fundamental breach: the conduct of the employer relied upon must be *"a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract"*: *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761. The assessment of the employer's intention is an objective one, to be judged from the point of view of a reasonable person in the position of the claimant. The employer's actual (subjective) motive or intention is only relevant if *"it is something or it reflects something of which the innocent party was, or a reasonable person in his or her position would have been aware and throws light on the way the alleged repudiatory act would be viewed by such a reasonable person"*: *Tullett Prebon v BGC Brokers LLP and ors* [2011] EWCA Civ 131, [2011] IRLR 420 at [24] per Maurice Kay LJ, following Etherton LJ in *Eminence Property Development Ltd v Heaney* [2010] EWCA Civ 1168, [2011] 2 All ER (Comm) 223, at [63].

149. In this case, the Claimants rely on breach of the implied term recognised in *Malik v Bank of Credit and Commerce International* [1998] AC 20 that the employer should not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and her employer. Both limbs of that test are important: conduct which destroys trust and confidence is not in breach of contract if there is reasonable and proper cause. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract because the essence of the breach of the implied term is that it is (without justification) calculated or likely to destroy or seriously damage the relationship: see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, 672A and *Morrow v Safeway Stores* [2002] IRLR 9.

150. In *Kaur v Leeds Teaching Hospital NHS Trust* [2018] EWCA Civ 978 [2019] ICR 1 the Court of Appeal held (at para 55 per Underhill LJ, with whom Singh LJ agreed) that, in the normal case where an employee claims to have been constructively dismissed as a result of a breach of the implied term of trust and confidence it is sufficient for a tribunal to ask itself the following questions:
(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
(2) Has he or she affirmed the contract since that act?
(3) If not, was that act (or omission) by itself a repudiatory breach of contract?
(4) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of mutual trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation because the final act revives the employee's right to resign in response to the prior breach.)

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

151. In determining whether a course of conduct comprising several acts and omissions amounts to a breach of the implied term of trust and confidence, the approach in *Omilaju v Waltham Forest LBC* [2004] EWCA Civ 1493, [2005] ICR 481 is to be applied: see *Kaur* at [41]. The approach in *Omilaju* is that a breach of the implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so, and the 'final straw' may be relatively insignificant, but must not be utterly trivial. Where prior conduct has constituted a repudiatory breach, however, the claim will succeed provided that the employee resigns at least in part in response to that breach, even if their resignation is also partly prompted by a 'final straw' which is in itself utterly insignificant (provided always there has been no affirmation of the breach): *Williams v The Governing Body of Alderman Davie Church in Wales Primary School* (UKEAT/0108/19/LA) at [32]-[34] *per* Auerbach J.

152. If a fundamental breach is established, the next issue is whether the breach was an effective cause of the resignation, or to put it another way, whether the breach played a part in the dismissal. In *United First Partners Research v Carreras* [2018] EWCA Civ 323 the Court of Appeal said that where an employee has mixed reasons for resigning, the resignation would constitute a constructive dismissal if the repudiatory breach relied on was at least a substantial part of those reasons. It is not necessary, as a matter of law, that the employee should have told the employer that he is leaving because of the employer's repudiatory conduct: see *Weathersfield Ltd (t/a Van & Truck Rentals) v Sargent* [1999] ICR 425, at 431 per Pill LJ.

153. Although the Court of Appeal's decision in *Kaur* limits the role for the question of 'affirmation' in a constructive dismissal case, it remains the case that, in accordance with ordinary contractual principles, an employee who affirms the contract in response to a fundamental breach (or series of incidents amounting to a fundamental breach) loses the right to resign and claim unfair dismissal. The general principles set out by the EAT in *WE Cox Turner (International) Ltd v Crook* [1981] ICR 823 remain good law: "*Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged may be evidence of an implied affirmation... Affirmation of the contract can be implied. Thus,* if *the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to affirm the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract.*" However, in the employment context an employee will not necessarily affirm a contract by remaining in post and not resigning immediately. As the EAT stated in *Quigley v University of St Andrews* UKEATS/0025/05/RN at [37]:

> "…in the case of an employment contract, every day that passes after the repudiatory conduct will involve, if the employee does not resign, him acting in a way that looks very much like him accepting that the contract is and is to be an ongoing one: if he carries on working and accepts his salary and any other benefits, it will get harder and harder for him to say, convincingly, that he actually regarded the employer as having repudiated and accepted the repudiation. The risk of his conduct being, as a matter of evidence, interpreted as affirmatory will get greater and greater. Thus, if he does stay on for a period after what he regards as repudiation has occurred he would be well advised to make it quite clear that that is how he regards the conduct and that he is staying on only under protest for some defined purpose such as to allow the employer a chance to put things right. It needs also, however, to be recognised that even that might not work if it goes on too long; it is all a matter of assessing the evidence."

Conclusions: Mr Makkar's case

154. We have considered each of the 13 items in Mr Makkar's list of matters he relies on as constituting, individually or cumulatively, the repudiatory breach in response to which he resigned. For the reasons we set out below, we find that many of these matters were capable of contributing to a breach of the implied term and that some of them would, even individually, have constituted a breach of the implied term. We find that these are the matters in response to which Mr Makkar resigned, and we find that he did not affirm the contract prior to resigning. He continued in employment, reasonably, up until the point at which his grievance appeal was dismissed. The handling of Mr Makkar's grievance was in our judgment one of the most serious breaches of the implied term in his case, and he resigned almost immediately following receipt of the outcome of his grievance. It follows that Mr Makkar's constructive unfair dismissal claim succeeds.

<u>1. Mr Tony French said company didn't want us as staff and wanted just store alone – 6th September 2021</u>

155. We found as a fact that Mr French did say at the time of the transfer that the Respondent did not want the Beverley Hills staff and only wanted the store. Further, when Mr Bakiu raised this with Mr Broomfield at the meeting on 25 January 2022 and in his subsequent email of the same date, Mr Broomfield did not deny it, and when Mr Makkar raised it as part of his grievance at the meeting on 16 March 2022 (p 93), it was not dealt with by Mr Stinson/Ms Jethwa at the first stage and at the appeal stage Mr Harris/Ms Jethwa simply asserted that there was *"no evidence"* of this and it was just *"your perception"* even though no investigation had been carried out with any relevant witness at any point (including Mr French, Mr Bakiu or anyone else in the shop). At no point were Mr French's remarks 'neutralised' by anyone at the Respondent reassuring the Claimants that the business <u>did</u> want them. In the circumstances, and in context, we conclude that Mr French's remarks following the TUPE transfer were capable of, and did so far as both Claimants were concerned, damage the relationship of trust and confidence that ought to exist between employer and employee. There was no just and proper cause for those remarks as, even if true, the Claimants were entitled by TUPE to retain their employment and telling anyone they are not wanted is

unnecessary and unreasonable and liable to lead them to feel insecure about their job.

2. Mr Tony French threatened me in email, he will take personal if not being honest. For no reason – 14th October 2021

156. We find that Mr French's email of 14 October 2021 is wholly unobjectionable on its face. Adding honesty and integrity to the Code of Conduct was a reasonable thing to do. The email was addressed to the team and there was no reason for the Claimants to have taken it personally. Further, when questioned at the time, Mr Bakiu's own evidence is that Mr French reassured him that it was not personal. That should have been enough to remove any doubts at the time. We find this is not capable of contributing to a breach of the implied term of trust and confidence.

3. X made racist comment about my aftershave, nothing was done about this – 11th November 2021

157. We have found Mr Makkar's complaint of race-related harassment by X to be made out on its facts, but the failure by the Respondent to do anything about it at the time is wholly explained by the fact that Mr Makkar did not complain about it until 11 January 2022. While the race-related harassment is capable of contributing to a breach of the implied term of trust and confidence, accordingly, the failure to do anything about it at this point is not.

4. Sunita threatened me, Neve Jewels can get rid of me without any reason – 11th Jan 2022

158. We found as a fact that this threat was made by Ms Jethwa. As a deliberate threat, this was conduct that was both calculated and likely to damage the relationship of trust and confidence. There was no justification for making the threat because she was as a matter of fact wrong about the meaning of the short-time working/lay off clause in the contract (which deals with those matters and not termination) and as Mr Makkar had sufficient service to have acquired the right not to be unfairly dismissed, it was not true that the Respondent could dismiss him 'without reason'. Moreover, there was no justification for threatening him with dismissal simply because he did not wish to move to the DF store in the light of his experiences there with X, which he raised with Ms Jethwa. This conduct by Ms Jethwa was, we find, therefore capable of contributing to a breach of the implied term.

5. Raised grievance and it wasn't dealt with correctly – 11th Jan 2022

159. We found as a fact that Mr Makkar raised a serious formal complaint on 11 January 2022, including complaints about racial harassment and Ms Jethwa's threatening comments, which was not dealt with at all. This was a breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures. It was also unreasonable conduct that was likely to damage the relationship of trust and confidence. There was no justification for not dealing

with this formal complaint. This is therefore capable of contributing to a breach of the implied term.

6. After confirming I wanted to take my racist claim further, I was immediately given disciplinary hearing – 2nd March 2022

160. We found as a fact that the timing of the invitation to the disciplinary hearing was a coincidence. Further, we do not consider that Mr Makkar was reasonable in regarding this as retaliation because the disciplinary process had already commenced with the investigation meeting on 25 February 2022. This conduct was not capable of contributing to a breach of the implied term.

7. Treated differently and unfairly (made to work alone on locked door, Y was never made to work like this. Only me and Jurgen))

161. Although we find elsewhere that the Claimants' complaints of more favourable treatment of Y are made out, so far as working on the locked door policy is concerned, we consider that the justification for not having Y as the newest and least experienced member of staff working alone is obvious. In Mr Makkar's case, therefore, we do not find that the application of the locked door policy was conduct that was even capable of contributing to a breach of the implied term.

8. Told my grievances will be dealt with by Sunita even though they were aware part of it was about her – 16th March 2022

162. We found as a fact that Mr Makkar both was told that Ms Jethwa would deal with his grievance and that she did in fact deal with and decide his grievance, as well as his disciplinary, and the appeals against both decisions. He also raised on his grievance appeal about whether there could be an external investigation, but was told that his grievance had been dealt with internally, which in his mind at the point of resignation he believed (correctly) meant that Ms Jethwa had dealt with it. Such conduct was, we find, in and of itself likely seriously to damage or destroy the relationship of trust and confidence that should exist between employer and employee. There was no justification for it. Even in a small employer, such conduct was fundamentally unfair. It was also dishonest to give the impression that 'independent' individuals had been appointed to deal with each stage of the disciplinary and grievance processes but in fact for Ms Jethwa to be the decision-maker behind the scenes. It was even worse that she did this when part of the grievance was about her. We acknowledge that Mr Makkar could not have known the full extent of Ms Jethwa's involvement at the point that he resigned, but he believed that Ms Jethwa was behind the grievance decisions, this belief was reasonable because it was based not just on (correct) intuition but also on what Mr Stinson told him and what it said in the appeal outcome letter, and this belief was one of the major reasons in his mind for his loss of trust in the Respondent and his resignation. This conduct was in and of itself a breach of the implied term of trust and confidence. It was also, we observe, in breach of the ACAS Code of Practice on Disciplinary and Grievance procedures in that the grievance was dealt with by a manager who was in part the subject

of the grievance (paragraph 32), and the appeal by a manager who had previously been involved in the case (paragraph 43).

<u>9. Got unfair final and written warning – 23rd March 2022 – other staff members had done worse than what they claim I done and hadn't got any warnings.</u>

163. Giving someone a final written warning is conduct that is likely seriously to damage the relationship of trust and confidence, but if there is just and proper cause for the warning there will be no breach of the implied term. In this case, we are not satisfied that there was just and proper cause for giving a final written warning.

164. We have in the course of our findings of fact identified a number of flaws with the Respondent's process and conclusions in relation to this warning. Those findings must be read together with these conclusions. There are, however, two main reasons why we find that the warning was not justified and was outwith the range of reasonable responses open to an employer:-

165. First, under the Respondent's disciplinary policy a final written warning should only be issued for a first offence where there has been 'serious misconduct', which means misconduct/unsatisfactory conduct due to 'extreme carelessness' or conduct that had a 'serious or substantial effect upon our operation or reputation'. Apart from what we found to be the unjustified conclusion that Mr Makkar had 'lied' in the disciplinary hearing about the days that he was working, there is nothing in the outcome letter that comes anywhere near explaining or justifying a conclusion that the conduct of which Mr Makkar had been found guilty was serious misconduct of this nature. Even taking the outcome letter on its face, what the conduct comes down to is that Mr Makkar did not give Y as much training as was expected over two days, during which it was accepted that for much of the time he believed she had been instructed by Mr Broomfield to carry out cleaning. It can hardly be said (and it is not said in the letter) that a failure to carry out as much training as expected amounted to 'extreme carelessness', especially given that Ms Jethwa had herself accepted in an email only the week previously that Mr Makkar was still in training himself. Nor can it reasonably be said that a failure to override a senior manager's instruction about cleaning amounted to 'extreme carelessness' rather than just an error of judgment.

166. Secondly, the disparity between Mr Makkar's treatment in relation to this training issue and the treatment of other employees is stark. Thus, X was not even subject to a formal disciplinary investigation when she made an alleged racist remark about Mr Makkar's aftershave, nor was Y for making an alleged racist remark about a taxi driver smelling like the slums of India, nor for shouting and screaming at Mr Bakiu, nor for telling Mr Makkar that talking to him was 'like talking to a wall'. Mr Broomfield, as the most senior witness representing the Respondent, accepted in oral evidence that the disparity in treatment was unfair, and we agree.

167. Giving Mr Makkar this final written warning was therefore also conduct that in our judgment constituted a breach of the implied term.

<u>10. In written warning I was called a liar for a human error on dates I had worked, they also made a human error with dates on the same letter – 23rd March 2022</u>

168. In our findings of fact we have set out why we agree that the Respondent was not justified in calling Mr Makkar a liar, either in the warning letter or on appeal. Calling someone a liar is very strong language. Calling someone a liar without justification and without even giving them an opportunity to comment on the basis for the allegation first is in our judgment conduct that is likely to destroy or seriously damage the relationship of trust and confidence. This is also by itself sufficient to breach the implied term.

<u>11. I was given more tasks/work load than other staff member in same position – 7th April</u>

169. The Respondent did not dispute this. The reason for it was said to be Y's vulnerabilities in terms of her relative inexperience, pregnancy and mental health. However, this was never explained to Mr Makkar (even in a way that preserved Y's confidentiality). Instead, his complaint about this (also a grievance within the definition of the ACAS Code of Practice) was ignored. In those circumstances, while there was justification for expecting Mr Makkar with his greater experience to do more than Y, there was no justification for doing that without explaining the reasons for it when he challenged what was happening. In the absence of that justification, this conduct was also likely to damage the relationship of trust and confidence and contributed to a breach of the implied term.

<u>12. Was emailed saying the racist matter was settled mutually, which was not true – 10th April 2022</u>

170. This was part of the conclusion on the grievance. Ms Jethwa essentially accepted what X said about she and Mr Makkar having 'made up' about three weeks after her alleged race-related remark about his aftershave. The acceptance of X's evidence in that regard, and inclusion of it in the outcome letter, without having given Mr Makkar a chance to comment and hear his side of the story was unfair. It was also insulting to use this as a basis for dismissing his grievance since even if they had 'made up' it did not mean that X had not made a race-related remark or that Mr Makkar had not been offended by it. We have also found that it was not true as a matter of fact because we prefer Mr Makkar's evidence. The Respondent was not, of course, as part of an internal grievance process bound to accept Mr Makkar's word over that of X, but it was reasonably required to deal fairly with his grievance, and this is one respect in which it did not. Although this is a smaller point, we find that this too was conduct that was capable of contributing to a breach of the implied term.

<u>13. Returning from sick leave – Sunita told me “if I’m not happy here why am I here” – 20th April 2022</u>

171. We found as a fact that Ms Jethwa did make this remark. We find that it was a callous thing to say to Mr Makkar, who was returning from sick leave having been signed off with anxiety. The comparison with the ‘kid gloves’ treatment that Ms Jethwa afforded to Y with her pregnancy and mental health issues is again stark. We find that this comment too was capable of contributing to a breach of the implied term.

172. Mr Makkar’s claim of constructive unfair dismissal therefore succeeds.

Mr Bakiu: Conclusions

173. We have considered each of the 18 items in Mr Bakiu’s list of matters he relies on as constituting, individually or cumulatively, the repudiatory breach in response to which he resigned. For the reasons we set out below, we find that many of these matters were capable of contributing to a breach of the implied term. We further find that, taken altogether, these matters cumulatively seriously damaged the relationship of trust and confidence without justification and thus breached the implied term. We further find that the matters that contributed to the breach were the main matters in response to which Mr Bakiu resigned, and we find that he did not affirm the contract prior to resigning. He resigned in response to what was for him the ‘final straw’ of a second unfairly heavy-handed disciplinary investigation. It follows that Mr Bakiu’s constructive unfair dismissal claim succeeds.

<u>1. 6th September 2021 (our first day) – Tony French told us they never wanted us, they only wanted the shop</u>

174. For the same reasons as in Mr Makkar’s case, we find that this remark was made and is capable of contributing to a breach of the implied term of trust and confidence.

<u>2. 14th October 2021 – Threatening email sent by Tony French</u>

175. For the same reasons as in Mr Makkar’s case, this email is not capable of contributing to a breach of the implied term.

<u>3. November 2021 – Set us TOTALLY unrealistic and unachievable targets, setting us up to fail</u>

176. We find that the £300k target set for the A&B Hatton Garden store by the Respondent was ambitious and aspirational. Given that the store had only just opened under new management following building work and was not taking anywhere near £300k per month, and was in a significant sense competing with the Respondent’s established DF store, the target would in our view have been unreasonably high if the setting of it was coupled with threats of personal consequences if the target was not achieved, but that is

not the Claimant's evidence. The Claimants' evidence was that the threat that they would be out of a job related to the fact that if they carried on taking so little money that they were losing money each month, rather than that if they did not make the target they would be dismissed. We also accept Mr Broomfield's evidence that the target was his target too and he saw it as being a team issue to achieve the target. In those circumstances, we do not find that the setting of such a high target as in itself capable of contributing to a breach of the implied term. A business is entitled to set ambitious, aspirational targets.

4. 11th January 2022 – Sunita threatened she could fire us without any reason. Graham confirmed this in a email

177. For the same reasons as with Mr Makkar, this conduct by Ms Jethwa was capable of contributing to a breach of the implied term. It is immaterial that the conduct by Ms Jethwa was directed at Mr Makkar and Mr Bakiu just overheard it. Ms Jethwa's comments applied equally to Mr Bakiu's contract.

5. 25th January 2022 - Expectation meeting – Aggressive meeting, threatened to close shop and lose our jobs, and change our contract

178. We do not find that there was anything in the specific conduct of the meeting of 25 January 2022 that contributed to a breach of the implied term. It is reasonable for a business that is losing money to hold a team meeting such as that in order to encourage people to work harder/more effectively and devise strategies for success.

6. 8th Feb 2022 - whats app conversation with graham regarding unpaid overtime, threatened to extend my working hours because of me questioning the unpaid overtime

179. We found as a fact that prior to the transfer the Claimants' contractual terms required them to work from 9am to 6pm, and there was no formal change to that prior to the transfer although in practice the 9am start was not enforced and the Claimants started work on a flexible basis between 9am and 10am. We further found that, subsequent to the transfer, there had been no agreement to vary their start time to 10am and that Mr French's letter of 6 October 2021 in respect of Mr Makkar was not effective to change their contractual terms as it was merely purporting to confirm the existing terms of Mr Makkar's contract and, we find, it was incorrect about Mr Makkar's contractual hours. It did not apply to Mr Bakiu at all. In legal terms, we find that there was no mutual agreement to vary the hours at any point, nor was there any clear and unequivocal variation by dint of custom and practice, nor was there any consideration for any change.

180. What happened on 8/9 February 2022 was not therefore that the Claimants' working hours were extended, but that the Respondent hardened its stance and gave them the option of either adhering to the strict terms of their contracts as regards working hours or giving up their rights not to work Bank Holidays. The Claimants chose the former.

181. There is nothing wrong in principle with the negotiation that took place about working hours. It was something that the Respondent was justified in raising with the Claimants as a post-transfer issue regarding working arrangements that needed to be cleared up, particularly given that, as the shop needed to be opened at 10am, we agree with Mr Broomfield that there had at least to be a requirement to start work earlier than that. We also note that Mr Bakiu did not complain at the time about what happened with working hours.

182. However, we do find that the Respondent's decision to harden its stance on working hours and put the Claimants to their election as between working hours and bank holidays was raised by Mr Broomfield and Ms Jethwa in direct response to Mr Bakiu questioning Mr Broomfield about overtime, and it is the element of retaliation that we find to be unreasonable. That is especially so given that Mr Broomfield refused to acknowledge that he was changing his previous position on overtime. He had, we found, previously been crystal clear that the Claimants could claim paid overtime rather than taking time off in lieu. He then maintained he had never said that and had just been 'unclear'. Such conduct by Mr Broomfield could reasonably appear to the Claimants to be disingenuous (we make no finding as to whether it was intended by him or was a mistake), and to follow up such apparent disingenuity by a retaliatory action of hardening its stance on working hours is, we find, capable of damaging the relationship of trust and confidence that should exist between employer and employee and thus of contributing to a breach of the implied term.

<u>7. 14th Feb 2022 – Working hours extended for only myself, Hardy & Corey (not Y who worked in the same store)</u>

183. We do not understand the Respondent to dispute this allegation. This was one of a number of respects in which the Respondent deliberately treated Y more favourably. Alongside the other more favourable treatment of Y, this was, we find, capable of contributing to a breach of the implied term.

<u>8. 28th Feb 2022 – Michael (Manchester store manager) sent by Sunita & Graham to my store to have a recorded conversation with me, that I wasn't previously made aware off</u>

<u>9. 28th Feb 2022 – Sunita came for 'informal' chat however again wanted to record me</u>

<u>11. 8th March 2022 – "Investigation outcome" email was unfair and unclear, when asked for clarity was ignored</u>

184. We take allegations 8, 9 and 11 together. Although the meeting on 28 February 2022 was not in the end recorded because Mr Bakiu objected, we find that Ms Jethwa's purpose in instructing that Mr Burley hold this meeting and then holding it herself was to treat the issue as a formal disciplinary investigation meeting. We find that the handling of the issue with the keys

was heavy-handed. The matter proceeded straight to a formal misconduct investigation when there was no basis to consider the matter one of misconduct. It is true that what happened with the keys being given to the builder was extraordinarily lax, putting the security of the store at risk, but there is no dispute that was not Mr Bakiu's decision and the only communication with Mr Bakiu about the keys before the decision to treat it as a disciplinary was Mr Broomfield in a WhatsApp on 14 February saying that it *"makes sense"* for the builders to have the keys (p 208).

185. To go straight from that to a disciplinary investigation was in our judgment unreasonable, particularly given the markedly more lenient approach taken to the complaints made by the Claimants about other people (eg Ms Jethwa and X on 11 January 2022, and Y on various dates, as dealt with elsewhere). The allegations against Ms Jethwa, X and Y were all clearly potentially disciplinary matters concerning alleged racist/harassing conduct, and threatening staff with dismissal. None of those allegations were dealt with by the Respondent by way of formal investigation meetings, even, and none of them proceeded to the formal step of issuing a letter of concern (or anything beyond that). This differential treatment was, as Mr Broomfield accepted in oral evidence, unfair and we find it was outwith the range of reasonable responses.

186. We further observed in our findings of fact that the letter of concern does not actually identify any misconduct by Mr Bakiu, just observes that Mr Bakiu ought to have thought to inform the Respondent of something his previous senior managers had done. As such, we agree with Mr Bakiu that it is unclear what conduct he is to avoid repeating in future (particularly given that the situation of new management taking over during the course of building works is unlikely to happen again). Ms Jethwa's failure to respond to his request for clarification was also unreasonable and unjustified. We find that all this conduct taken together was capable of significantly damaging the relationship of trust and confidence, albeit that it is not in our judgment quite enough in and of itself to amount to a breach of the implied term.

<u>10. 6th March 2022 – Y made a racist remark & was aggressive, Graham and Sunita aware and nothing was done</u>

187. In our findings of fact we found that it was in principle reasonable for Ms Jethwa not to intervene with Y on this occasion because she had asked Mr Bakiu if she should do and he had not asked her to. However, we nonetheless consider it significant that Ms Jethwa did not commence disciplinary proceedings against Y in relation to this incident as, being an offensive, race-related comment, it was clearly potentially a disciplinary matter and this is one of the respects in which Y was, we find, treated more favourably than Mr Bakiu and Mr Makkar. Although the handling of this particular incident did not in our judgment in and of itself contribute to a breach of the implied term, it is illustrative of a difference in treatment that was unfair. We are confident that if a similar allegation had been made against Mr Bakiu or Mr Makkar they would have been subject to disciplinary proceedings by Ms Jethwa, even if

their direct manager had already (as Mr Bakiu had with Y) dealt with the matter informally.

12. 14th March 2022 – Aggressive & inappropriate behaviour by Y not dealt with, yet turnt on myself

188. We agree with Mr Bakiu that Ms Jethwa's response to the situation that arose between him and Y on 14 March 2022 was inappropriate. As Y's manager, he needed to be able to speak to her about inappropriate conduct. It was only on 6 March that he had had to speak to her about making a racist comment and she had reacted badly but eventually apologised, as he had told Ms Jethwa. Her behaviour on 14 March 2022 was evidently equally inappropriate. Ms Jethwa agreed that Y was shouting and screaming at Mr Bakiu. Ms Jethwa's perception appeared to be that this was because Mr Bakiu was not listening to Y, but he was the manager who was trying to confront Y about seriously inappropriate comments to customers about their religion. Ms Jethwa's response treated them both like children (and, indeed, that appears to be how she was thinking about it as in oral evidence she considered the store was *"like a playground"*). However, in our judgment Ms Jethwa's response was not appropriate because Mr Bakiu had identified issues of real concern about Y's behaviour (including racist comments, potentially offensive/inappropriate questioning of customers and gross insubordination in terms of shouting at her manager). The only reasonable response to that situation was to provide management support to Mr Bakiu and to set clear expectations for Y's behaviour going forward. Instead Ms Jethwa undermined Mr Bakiu's authority by instructing him not speak to Y apart from with Ms Jethwa present, stating that Y should go direct to Mr French with matters and that they should avoid encountering each other. We find that her conduct on this occasion is capable of making a significant contribution to a breach of the implied term.

13. 20th March 2022 – First of a number of days made to work alone on locked door policy

189. We have considered the locked door policy as it was applied to Mr Bakiu in the context of his claim of failure to make reasonable adjustments. To the extent that we have found the Respondent failed in its duty to make reasonable adjustments for Mr Bakiu's disability (i.e. from 20 April 2022 onwards) we find that this conduct was also capable of contributing to a breach of the implied term. Even though it is from that point on a breach of a statutory duty, however, we do not find that of itself this was sufficiently serious to breach the implied term – that would only be the case if the Respondent had persisted in this conduct after formal complaint by Mr Bakiu, but it never got to that point. We do not otherwise consider that the operation of the locked door policy was capable of contributing to a breach of the implied term, for the reasons we gave in relation to Mr Makkar's claim.

<u>14. 24th March 2022 – Managers conference, all London staff travelled together and all London staff's tickets purchased by Graham except mine, I'm told to travel separate</u>

190. We find that there was no reasonable justification for this treatment. The purported reason was so that they could catch up with X, but Mr Bakiu had made clear in his email of 25 January 2022 that he did not personally have any problem with X and, in any event, this does not explain or excuse the failure to buy Mr Bakiu a ticket and the exclusion of him from joint managers' travel arrangements in this way. This conduct was capable of making a small contribution to a breach of the implied term.

<u>15. Excluded from company newsletters on two occasions, all other managers were named on</u>

191. We found that this conduct happened, and although it was not (we found) intentional, we accept that it reasonably appeared to Mr Bakiu (in the light of the other matters) to be further evidence that the Respondent did not want him and/or wished to exclude him. This conduct was capable of making a small contribution to a breach of the implied term.

<u>16. 5th April 2022 – Y sent email to Sunita asking if a complaint email she was sending to Tony was ok and she would be open to adding anything that Sunita suggests.</u>

192. We rejected this allegation as a matter of fact.

<u>17. 16th April 2022– Working alone although Diamond Factory store had 4 members of staff, however Graham pacifically told Saskia not to give me any staff</u>

193. We found that Mr Broomfield did not say this to Saskia, but that Saskia did say it to Mr Bakiu and that its effect on Mr Bakiu was reasonably perceived by him as upsetting and distressing because the result was that he had to work alone on a locked door without a reasonable adjustment for his disability. As such, and given that the Respondent is responsible for the conduct of Saskia as it is for the conduct of Mr Broomfield, we find that this remark was capable of making a small contribution to a breach of the implied term.

<u>18. 3rd May 2022 - Fact finding meeting. Fabricated complaints.</u>

194. We find that holding the 3 May meeting as a formal 'fact finding', regarded by Ms Jethwa as the first stage on a disciplinary (as is clear from her subsequent letter and evidence to this Tribunal) was again heavy-handed and unreasonable. The issues raised in this meeting all needed to be discussed, but they were on their face ordinary management issues that could not reasonably be treated as disciplinary matters at all without a preliminary conversation about each issue to see whether there was anything that actually merited formal disciplinary investigation. That is true of the customer

complaints as well as the other matters. It became apparent during the course of the hearing that Mr Bakiu did not really mean that the customer complaints were 'fabricated' but that they were 'trumped up'. On that revised allegation, we agree: the complaints related to alleged poor service were 'trumped up' in that they were immediately elevated to the status of disciplinary matters rather than first being discussed in the ordinary course of business. 'Catch up' was what the meeting should have been, as Ms Jethwa first proposed, not a formal recorded 'fact-finding'. Again, the difference in treatment as compared with Y and X is stark, and the harking back by Ms Jethwa at the start of the meeting to the heavy-handed previous Letter of Concern strengthens the unreasonableness in our judgment. This conduct was, we find, capable of making a further significant contribution to a breach of the implied term.

195. It follows that Mr Bakiu's unfair constructive dismissal claim also succeeds.

Overall conclusion

196. The unanimous judgment of the Tribunal is:

(1) Mr Bakiu's claim of constructive unfair dismissal under Part X of the Employment Rights Act 1996 (ERA 1996) is well-founded.
(2) Mr Makkar's claim of constructive unfair dismissal under Part X of the ERA 1996 is well-founded.
(3) Mr Makkar's claim of race-related harassment under s 26 and 39(5) of the Equality Act 2010 (EA 2010) is dismissed because it is out of time under s 123 of the EA 2010.

Directions

197. There will be a Remedy Hearing on **19 and 20 October 2023 starting at 10am in person** before the full Tribunal panel, at which the question of whether it would be just and equitable to extend time for Mr Bakiu's claim of failure to make reasonable adjustments for his disability will be considered.

198. In advance of the Remedy Hearing, the parties must comply with the following directions:-

a. By **5 September 2023** both Claimants must prepare and send to the Respondent:

    i. Updated Schedules of Loss setting out their losses from effective date of termination to the date of the hearing (19 October 2023);
    ii. Witness statements dealing with the steps they have taken to seek alternative employment and otherwise to mitigate their losses and also (in Mr Bakiu's case) with why he did not submit his reasonable adjustments claim in time;

iii. Documentary evidence relating to Remedy, i.e. documentary evidence of job searches, benefits received since termination, payslips and contracts from their new employments.

b. If the Respondent wishes to rely on any witness statement or documentary evidence in relation to remedy, it must send these to the Claimants **by 19 September 2023**.

c. The Respondent must then prepare, index and paginate a bundle for the Remedy Hearing, including this judgment, both parties witness statements and documents and any other documents relevant to Remedy. The Respondent must send copies of the bundle to the Claimants by **26 September 2023**.

d. The Respondent must bring **five copies** of the bundle to the Tribunal **by 9.30am** on the first day of the Remedy Hearing.

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Employment Judge Stout

Date: 16/07/2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

17/07/2023

FOR THE TRIBUNAL OFFICE