# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **Claimant** | | **Respondent** |
|---|---|---|
| **'SL'** | **AND** | **'ABC'** |

**(ANONYMITY ORDER MADE)**

**HELD AT** London Central **ON** 2 – 5 October and in chambers on 30 November 2018

**EMPLOYMENT JUDGE** Keith **MEMBERS:** Dr J Ballard
Mr M Simon

**Representation**
**For the Claimant:** In person
**For the Respondent:** Ms W (in-house Solicitor)

**RESERVED JUDGMENT**

1. The claim of automatic unfair dismissal, allegedly by virtue of having made protected disclosures, fails, and is dismissed.

2. The claims of victimisation fail and are dismissed.

3. The claims of direct race discrimination fail and are dismissed.

4. With the exception of one claim, specified in [5] below, the claims of racial harassment fail and are dismissed.

5. The claimant's claim that she has racially harassed, as identified in paragraph 3.5.1 of the list of issues in Appendix 1 of these reserved

reasons, succeeds. The respondent is ordered to pay to the claimant the sum of **£3,042.93**, which comprises: an award for injury to feelings of £2,500, uplifted by 10% to £2,750, as a result of the respondent's unreasonable failure to comply with the ACAS Code of Practice in relation to the claimant's grievance; and interest of £292.93.71.

6. The Recoupment Regulations do not apply to the award as there was no compensation for loss of office. The award has not been grossed up to take into account the effect of tax, as the award is not taxable.

## RESERVED REASONS

### Introduction

7. The claimant was employed by the respondent from 7 August 2017 until her resignation on 29 August 2017, as a Deputy Nursery Manager, at a nursery on the site of a customer of the respondent.

### Anonymity order made

8. The claimant's claims included allegations of abuse of children in the respondent's care, by fellow employees. We noted the serious impact on the claimed perpetrators, of the wider dissemination of such allegations, were they later shown as unfounded, as well as the children concerned, and following discussion with the parties, we regarded it as appropriate to make anonymity orders in respect of the claimant's fellow employees and the children referred to in evidence. We did later conclude that the allegations of the abuse of children were not well-founded. Pursuant to Rule 50 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, unless and until a tribunal or court directs otherwise, we order that the claimant; the respondent's employees, and the respondent's customer and any children in the respondent's care which were the subject of, or concerned by the claimant's allegations, are granted anonymity. No report of these proceedings shall directly or indirectly identify them. This direction applies both to the claimant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings. The parties shall be at liberty to apply for discharge of this order.

### The issues

9. The claimant presented the claim form on 27 November 2017. A preliminary hearing (PH) took place on 12 April 2018 before Employment Judge Davidson. EJ Davidson attempted, following lengthy discussion, to clarify the basis on which the claimant brought her claims. EJ Davidson compiled a provisional list of issues, with the requirement that the claimant

should produce a document setting out her case, so that the respondent could formulate its response. The list of issues recorded by EJ Davidson were expressed as being subject to possible further refinement on receipt of the claimant's further particularised claim.

10. On 24 April 2018, the claimant provided further particulars of her claim. On the first day of this hearing, we discussed with the claimant the provisional list of issues made by EJ Davidson. We cross referred these to the further particulars of claim at [44] to [57] of the claimant's bundle. For completeness, these are set out in Appendix 1 of this determination, as anonymised following discussions at the beginning of the hearing. Where the claimant had referred to other facts in her written witness statement, we indicated that we would consider these by way of background evidence rather than specific claims.

**Application for witness orders and late production of evidence**

11. On the morning of day 1 of the Hearing, the claimant asked us for witness orders compelling the attendance of five witnesses, whose attendance she had not previously indicated she would seek. These included four employees or former employees of the respondent, including an alleged perpetrator, employee 'A', as well as an employee of the respondent's third-party client at the premises where the respondent operated a nursery. In respect of that third-party employee, the context was that it had been suggested that the claimant had been rude to the employee, who was a receptionist, whereas the claimant disputed that allegation.

12. We asked the claimant for an explanation as to why she had not sought such witness orders previously and the relevance of such witnesses to the issues in the case. The claimant asserted that justice demanded that she should be able to call all of these witnesses. The respondent objected, noting the likely impact on the hearing which would inevitably go part-heard as well as the fact that some of the employees concerned were no longer employed.

13. We unanimously refused to grant the application for witness orders. The applications were made late, on the morning of the Hearing, despite there previously having been a preliminary hearing at which such witness orders could have been sought; while some witnesses might potentially give relevant evidence, such evidence was neither necessary for a fair hearing, nor proportionate. By way of example, the receptionist employed by a third party was not relevant to the issues, in the context of dismissal for a claimed protected disclosure. The remainder of the witnesses would be 'hostile' witnesses, for whom there were no written witness statements and whom the claimant could not cross-examine. In that context, their evidence would be of more limited assistance to us and witness orders would be

disproportionate, weighed against the likely substantial delay in concluding the Hearing, were their attendance required. The alleged perpetrator, employee A, was no longer employed by the respondent.

14. In relation to the late production of documents, on day 2 of the Hearing, the claimant sought permission to disclose a short set of handwritten, dated, notes which she claimed were contemporaneous and which corroborated her claimed version of events. Despite having complained herself about the respondent deliberately failing to disclose relevant documents, the claimant explained that she had been unwell and without legal representation. While initially objecting to the disclosure as there had not had an opportunity to consider what witness evidence to call, if any, in relation to the notes, the respondent then indicated that it was willing for us to consider the evidence, although it submitted that no weight should be attached to the notes, as their provenance was questionable and the contents were self-serving.

15. During the witness evidence of employee 'E' on day 3 of the Hearing, E referred to handwritten notes that she had made of a meeting on 17 August 2017, which had not been disclosed. Overnight, E obtained these notes as well as a typed document purportedly dated 21 August 2017. The claimant consented to admission of this evidence, although she asserted that the documents had been fabricated. We admitted and took the evidence into account.

**Allegation of bias and harassment**

16. During the course of day 1 of the Hearing, the claimant was cross-examined by the respondent's representative. We were very conscious that the claimant was not legally represented. We spent 1.5 hours on day 1 going through the issues previously identified by EJ Davidson, to check the claimant's understanding of the issues. During day 1, we became concerned that when the claimant was asked questions, she would speak very quickly, at significant length, but not directly answering questions put to her. We warned the claimant that if she did not answer the questions, despite them having been put to her, we would need to move on to the next topic or question. We also indicated that some of the claimant's comments were not appropriate, for example asking the claimant's representative whether she was a mother. At that stage, the claimant indicated that she was very hurt about the suggestion that she was not answering questions. We emphasised that we were not questioning the claimant's honesty and had made no findings at that stage about credibility – it was simply that if a witness did not answer a question and instead continued to speak at length, there may not be a further opportunity to answer that question. We also suggested to the claimant that, when it was her turn to cross-examine witnesses the following day, she should structure her questions by reference to the agreed list of issues.

17. On day 2, we intervened when the claimant continued to interrupt the respondent's representative during questions and made generalised remarks that everyone in the Tribunal was 'blond and British', to which the respondent's representative pointed out that she was Irish. When the claimant began to raise her voice and point at employee 'B' during the claimant's cross-examination of employee B, who indicated that she was becoming distressed, we warned the claimant that questioning a witness in this way was not appropriate and we may need to consider whether a fair trial remained possible. We asked that the claimant put her questions through us, which we would then put to the witness. At this stage, the claimant indicated that she would be writing to the Regional Employment Judge and seeking that the hearing restart with a different Judge. We treated this as an allegation of bias and therefore invited both parties to provide further comments.

18. For her part, the claimant said that she had been told what to say and how to say it; she disputed having been rude to anyone and said that my conduct, as opposed to the wider Tribunal, had amounted to racial harassment and bullying. The claimant complained that we had never stopped any of the respondent's representative's questions. The respondent had done serious things to the claimant and children and she had suffered. The respondent's representative did not agree with the allegations, indicating that we had, at various stages, assisted the claimant in locating documents and in framing questions to witnesses so that they could answer them. The representative said that the claimant had been adversarial and aggressive, particularly in respect of employee B, who was treated in a derogatory way by the claimant in her questions, which had caused employee B distress, and impacted on her ability to give evidence.

19. We considered not only whether we had been biased but whether our case management of the hearing could be reasonably be perceived as amounting to bias. We gave an oral decision on the bias issue at the Hearing, which these written reasons repeat. We began by saying that we did not regard ourselves as actually biased. The claimant interrupted me at this stage saying that it was degrading and horrible; that she wanted a different Judge; that she had been bullied and harassed; and she then left the Hearing room. We conveyed via our clerk that we would proceed, if necessary, in the claimant's absence, at which stage the claimant returned to the Hearing. We then provided further oral reasons for not recusing ourselves. Our constraints on the claimant related to her frequently interrupting those questioning her; we sought to direct her to the questions asked of her, the answers to which otherwise would frequently go off at tangents. We had provided a series of staged warnings about our concerns that she was answering the questions and interrupting us and respondent's representative. In her questions, the claimant had repeatedly used prefixes

prior to a person's name, for example "racist [name]" and sought to interrupt the witness. Our case management reflected the claimant's conduct in asking and answering questions, and we concluded did not give a reasonable appearance of bias. We explained that we had to hear all of the evidence and witnesses needed to be questioned in a way that did not make them unnecessarily uncomfortable. We reiterated that we had made no findings of fact yet. The claimant then continued to participate for the remainder of the Hearing on days 3 and day 4.

20. Although this was not a factor that we considered when reaching our recusal decision, on day 4, the claimant handed us a written document, at the end of which she stated that she wanted, "*to thank so very much the tribunal for providing this very remarkable hearing in order to bring very much needed justice and fairness to children their parents and my case in which I confirm that to date respondent always knowingly unwittingly failed to deliver it. I therefore would like to extend my gratitude to the judge and panel members from making all the outstanding efforts to make our society a better and fairer place to live and work and it is very much appreciated.*"

## The Facts

21. The claimant is a British national and considers herself British, having been naturalised as a British citizen after studying very hard for exams through the naturalisation process. She is married to an English man and describes her son as "half English." She is of Turkish ethnic origin, having entered the United Kingdom more than 26 years' ago. She claims racial discrimination on the basis of her Turkish ethnic origin.

22. The claimant is an experienced nursery and pre-school manager, with an employment history including as a "deputy head leader" in a pre-school setting; as a key worker for children aged up to 5 years' old; and as family support worker. In the latter capacity, she has provided advocacy for Turkish-speaking families to enable them to access educational opportunities, including translation and interpretation services. This experience dates back from the present date to 2003. Her qualifications in nursery care are extensive, with training in health and safety; food safety and hygiene, child protection to level "3"; first-aid, with a two-day intensive training course; and as 'CACHE' level 5 in leadership and management of health and social care.

23. The respondent is a large organisation with several hundred nurseries, including at the places of work of its clients' employees. Those clients include large organisations. The respondent has extensive safeguarding policies, copies of which were included in the Tribunal bundle and which were also referred to in the claimant's contract of employment dated 4 August 2017. Paragraph 6.3 of her contract required the claimant to accept

personal responsibility for acting in accordance with the respondent's "keeping everyone safe" statement, and other policies and procedures as amended from time to time. Paragraph 6.8 referred to the respondent issuing policies and rules about the conduct expected from its employees. Whilst the policies did not form part of the contract, they were stated as being accessible to all employees and could be obtained via the claimant's line manager.

24. Her contract also stated that it was the claimant's responsibility to familiarise and comply with the content of the respondent's procedures and policies. It was put to the claimant in cross-examination that she would have been provided with an induction pack which had referred to these procedures. Whilst the respondent was not able to provide a signed copy of that induction pack (a generic one was disclosed) it was also put to her that posters were up around the nursery where she worked, which referred to safeguarding and in particular how employees could raise any safeguarding concerns. The claimant disputed knowing about the induction pack or having any knowledge of the processes by which she should raise any concerns. Noting the claimant's experience of 15 years in the childcare profession, as well as her qualifications, we did not accept as plausible her assertion that she did not seek to familiarise herself with the induction pack and in particular how she should raise any concerns. Her credibility on this issue was further undermined by the fact that while she later claimed to have reported matters to the police, sometime after her employment ended, she was unable to explain why she had not done so during her employment by the respondent.

25. We find that had the claimant genuinely had the safeguarding concerns of such seriousness as she claimed, she would have made a report to the respondent's designated safeguarding lead at the time; to the local authority designated officer (LADO); or if matters were even more serious and being ignored, to the regulator, Ofsted or where there were immediate and serious risks, to the police. We find that her failure to do so undermined her credibility.

26. In terms of the sequence of events prior to, during, and after the claimant's brief employment by the respondent, we had difficulty in identifying all of the specific dates and events to which the claimant referred and the substance of her allegations. The reason for this is both the manner in which the claimant conveyed her complaints to her employer, and her written and oral evidence to us. By way of example, both her written witness statement for us and her grievance letter to the respondent dated 28 August 2017 included lengthy passages of strongly critical assertions, for example, references to gross unprofessionalism, but frequently out of any sequence in time and more importantly, mostly lacking detailed facts, dates, or identifying perpetrators or witnesses in a coherent way.

27. We were conscious that the claimant was legally unrepresented and as a tribunal we have experience of parties having very strong views which they seek to convey, but lacking factual detail, as well as parties with a difficulty in conveying their claims in a sequence or structure. As a consequence, we paid particular attention to piecing together a basic sequence of events. On the other hand, the fact that the claimant was willing to make assertions without any real detail or evidence to back up her assertions did further damage her credibility.

28. In terms of the sequence of events, the claimant was only briefly employed from 7 August 2017 until 29 August 2017, when the claimant was dismissed summarily with payment of one month's pay in lieu of her notice. She only worked Mondays to Fridays, not weekends. She was also absent through illness on Friday, 11 August, and was allowed to be absent on Friday, 18 August by a senior employee, employee F, who suggested she take a day off work. Following disagreements with colleagues, including employee B, she left her place of work on Friday, 25 August 2017, never to return, except to attend a probation review meeting on Tuesday, 29 August 2017, at which she was dismissed. In summary, she was present at work for 13 days in the period from 7 to 29 August 2017.

29. The claimant had also attended the respondent's premises prior to her employment starting. She attended the nursery for an interview on 20 July 2017, following which the respondent offered her a job. In her witness statement, the claimant described having concerns even during that initial visit and interview that she saw children had been left unsupervised, although her concerns on that initial visit were not the basis of her claims before us.

30. The claimant also attended a team meeting training prior to her employment starting on 2 August 2017, at which she first met employee A, with whom, along with her immediate manager, employee B, most of the claimant's allegations related. It was at the training meeting that the claimant claimed that employee A was not taking her seriously when she was discussing her own professional qualifications, and the gist was that she saw employee A was 'rolling his eyes', because of her Turkish ethnic origin and was also seeking to spread disharmoney amongst fellow employees because he was disengaged from his employment and was critical of the respondent's management.

31. At this stage, we make findings about the context of the subsequent disagreements which rapidly developed. The nursery where the claimant had been about to start work had been temporarily closed. The reason for this was said to be environmental health concerns, specifically an infestation of mice, rather than any safeguarding concerns. It is clear that

the claimant regarded the standards of care at the respondent's nursery as not satisfactory. Both her immediate manager, employee B and the more senior manager, employee F in part agreed in their oral evidence that at least one of the employees in the nursery setting, employee A, was on a performance improvement plan. He has subsequently left the respondent's organisation. For her part, the claimant asserted that the respondent's organisation was institutionally racist. In her words, at paragraph [19] of her witness statement, "*the top and highly paid jobs are always for the white British people who are overrated, overpaid and talentless but yet they all crowned as being senior managers, the HR and the lawyers are all being the white and born and bred from the UK while the low paid and ordinary job roles are given to the black people and ethnic minorities*."

32. In essence, the claimant presents herself as having been in a position where she had concerns about low levels of care at the nursery, which were tainted by discrimination in the sense that there was a two-tier workforce with predominantly white management at one level and employees of non-white racial origins at the more junior level. She specifically asserts that the respondent's recruitment practices were discriminatory. She was caught in the situation that when she raised those concerns, more junior employees on the one hand were upset; whilst the managers on the other hand then sought to criticise her for causing that upset.

33. The respondent's version of events was that whilst there were performance concerns, at least in respect of employee A, such concerns around performance had to be addressed in an appropriate way. By way of example, the claimant's immediate line manager, employee B, was worried that the claimant believed it was possible simply to dismiss summarily a large proportion of the more junior members of staff when in fact if there were performance concerns, relevant processes had to be followed, such as the performance improvement plan for employee A. The respondent also distinguished between on the one hand performance concerns which might not be themselves a safeguarding issue; and those which were safeguarding issues.

34. Employee B recalled that if cleaning chemicals had been left within reach of a child, she would have intervened and moved the chemicals straightaway, with the suggestion that on occasion, potential risks such as that might arise. That being said, the respondent's witnesses did not regard there as having been a safeguarding issue which required the referral to the designated safeguarding lead or to the local authority designated officer under the respondent's procedures.

35. In terms of these two competing contexts for the specific allegations – either on the one hand of an institutionally racist organisation where those who raised concerns were subjected to victimisation and where there were

frequent and serious breaches of safeguarding; and on the other hand of an organisation where reporting a safeguarding issue was encouraged but that from the respondent's perspective, it was the way in which the claimant expected employees with performance concerns to be dealt with which was not realistic – we regarded the context described by the respondent as more plausible than the claimant's claims. We do so for a number of reasons.

36. First, even as late as the grievance letter of 28 August 2017, which was lengthy, the claimant herself made no reference to differential treatment on grounds of race. The grievance letter itself was put in strong terms and had the claimant genuinely perceived such a difference, we had no doubt that she would have referred to it expressly in the letter, even noting her ill-health at the time. We simply regarded as implausible that she would have genuinely perceived differential treatment and not mentioned it at all at this time.

37. Second, we also assessed the claimant's evidence, which was frequently put in generalised terms and made assertions without reference to specific facts against witnesses. In contrast, employee B and employee F gave detailed and specific evidence. We found them to be candid and straightforward witnesses and who were ready to concede points, specifically that they had concerns around performance but where there had to be ways in which performance concerns were addressed, which was not simply by dismissing employees at the claimant's insistence.

38. Third, we noted that the claimant could on occasions embellish particular allegations. By way of example, the grievance letter referred to a "group of children" having been left "by the door" ([119] of the tribunal bundle). In the claimant's witness statement in contrast, at paragraph [22], she referred to many times in which she was found "babies" left "behind" the door.

39. Fourth, we noted that many of the claimant's allegations or complaints about her fellow staff members in fact related to them allegedly standing around talking or gossiping, and she described employee B as being lazy and talking about her private life. There was a similar allegation levelled against a receptionist who was an employee of the client, who engaged in what the claimant saw as gossiping. Whilst the claimant regarded such gossiping as unprofessional and described it as "toxic", we regarded it as consistent with the candid evidence of the respondent's managers that such behaviour may be a performance concern, but did not go beyond that to safeguarding issues that would require immediate intervention.

40. In summary, we find that the claimant has not proven facts from which we could infer that the respondent is racist in its recruitment or the appointment of managers; or that it is an organisation which has frequent breaches of safeguarding which would necessitate a referral to the designated

safeguarding lead. The claimant bases her assertions on recruitment merely on the staff of the nursery at which she worked and the 3 managers with whom she had dealings. She pointed to no details about the nature of their appointments or the lack of promotion about more junior members of staff.

41. Instead, we find that the claimant was an employee who expected high standards of care; was evidently not impressed by what she saw; regarded a number of colleagues (junior and more senior) as lazy and engaged in gossiping, when she had no desire to discuss their or her private lives; and we find, noting the claimant's own conduct and the way in which she asked questions before us, that she was somebody who would have raised these issues in a way which would have been perceived, for reasons unconnected with her ethnic origin, as confrontational, by those with whom she took strong exception. We find that whereas in this case the claimant had strong views, if she had genuinely perceived a safeguarding issue, she would have expected those in more senior management to have taken immediate action and she would have referred her concerns externally had they not done so. We accept as plausible the explanation of employees B and F that for performance issues that were not safeguarding matters, they were constrained to an extent in what they could do by way of appropriate performance management procedures. This was different to where there was a safeguarding concern for which there was the designated safeguarding procedure.

42. In terms of the alleged incident on 2 August 2017 that employee A "shook his head" and "rolled his eyes" whenever the claimant spoke, it was suggested to the claimant in cross-examination that the reason he may have done so was because of his disenchantment with members of management and the fact that she had not even joined the respondent's organisation, so that employee A felt he knew more about the organisation; rather than in any sense because of the claimant's ethnic origin. We find that the claimant has not proven facts from which we could infer our that the treatment was because of the claimant's ethnic origin, particularly in the context of body gestures or movements, which may be otherwise entirely innocuous.

43. Following the claimant attending the training meeting on 2 August 2017, the claimant was also asked to attend on the morning of Saturday, 5 August to help set up the furniture prior to the nursery reopening. More junior members of the staff were not in attendance and it was not suggested that there were any further events of concern which occurred on that occasion.

44. Instead, the claimant started work full time on Monday, 7 August 2017. It was on the second day or thereabouts, 8 August 2017, that the claimant alleges at paragraph [54] of her statement, how employee A had told other

colleagues "*how crap my English was, I didn't speak any English at all nor could he understand it. Therefore he had to repeat himself at least five times and who would employ me?"*

45. The claimant, although not raising this in her grievance letter, did subsequently raise it as part of her grievance at a meeting which took place on 7 September 2017. References to the claimant's comments in the meeting notes are at [131]. The response from the grievance manager was at [143] to [145]. The response referred in general terms to the claimant's claims of aggressive and hostile behaviour by team members towards her. The letter stated that the claimant had been asked to provide specific examples in order for her to investigate the allegation including dates, times, witnesses and what specifically was said or done. The letter stated that the claimant was unable to provide those details to the investigating manager, who was unable to investigate them or uphold the grievance.

46. In oral evidence, the manager investigating the grievance confirmed that despite the specific details of the claimant's English being described as "not good" by employee A, the manager had not investigated with employee A, or anyone else, whether employee A had made such a comment. This was not because of the lack of detail. Instead, she gave a different reason for doing so, stating that she did not believe the comment describing somebody's English as being not good could amount to discrimination. Whilst it might not be "acceptable" it did not amount to racism, she said.

47. We found that there were facts, in this instance of employee A making the one isolated remark, critical of the claimant's English from which we could infer that the claimant had felt subjected to a hostile environment on grounds of her English origin. An important nuance was that while the allegation identified by EJ Davidson was that employee A had described the claimant's English as "crap", in fact, the notes of later meetings at both [131] and [135] recorded the claimant as alleging that employee A regarded "her" as crap, and that she could not speak English. Whilst the two are conflated in meeting notes at [133] where there is a reference to her English being crap, we find on balance the claimant's repeated references to employee A believing her to be crap and her English as "not being good" is what was stated by employee A.

48. The context in which the remark was said was relevant, but equally the manager investigating the grievance had the opportunity to investigate that context and did not do so because of her own preconceptions as to whether such a comment could or could not be racially discriminatory. We find that the burden had passed to the respondent, and we do not find that the respondent has shown that the adverse treatment was not in any sense connected with the claimant's ethnic origin. We conclude that the claimant genuinely felt hurt as a result of the comment.

49. However, we find that employee B, as opposed to the grievance manager, did not ignore the claimant complaining about the alleged remark. We find that the claimant did not mention the allegation to her. The claimant had one-to-one meetings with employee B on 14 and 22 August 2017.

50. The claimant was absent by reason of illness on Friday, 11 August 2017. There is no evidence that that illness was caused by any treatment by the respondent. The claimant returned on Monday 14 August 2017, at which she raised concerns about general staff performance.

51. The notes of the meeting on 14 August, which were signed by the claimant, made no reference to the allegation of racist harassment. We find it implausible that the claimant would have raised the allegation with employee B, but would not have insisted that she include it in the meeting notes, when she insisted that other amendments reflecting her performance should be added. Instead, the meeting record stated that the claimant was "incredibly enthusiastic" and had dealt "very well with a very busy week". She was "quick to ask questions" and "would offer her support" which was described as "amazing" by employee B. Employee B also referred to the claimant as having some excellent leadership ideas which she was keen to put into practice. However, employee B added that the claimant needed to make sure that she gave the team time to get used to her and all the changes that they are being asked to work through. Employee B said that each line manager of the employees about whom the claimant had raised concerns would discuss matters directly with the employees. Employee B said that she needed to check where the employees were in terms of their management.

52. Employee B also referred to concerns that the team had raised about the way in which the claimant spoke to them and had been critical of them. The notes recorded that the claimant felt this was not the case "at all" although employee B explained that on occasion, the claimant herself had spoken over employee B, so the way in which the claimant spoke to people was consistent in that regard. Employee B explained that the team had to be allowed to raise concerns. While she was there to support the claimant, that didn't mean she wouldn't react to concerns raised by others. The claimant was described as having a lot to offer the team, but needed to give the time team time to get used to her; and for her to get used to them.

53. The meeting notes were consistent with employee B's own witness statement and oral evidence that no allegations of racist remarks or harassment were raised with her. Rather, the claimant had raised concerns about the level of performance within the team, but employee B had also been approached by 5 employees – around half the nursery workforce

where the claimant worked – raising concerns about how the claimant spoke to them, within a week of the claimant starting work.

54. The claimant has alleged that employee B's failure to address the matters amounted to harassment on grounds of race. We find that the employee B's explanation, which was in no sense related to the claimant's race; and which in any event did not amount to a hostile environment for the claimant, reflected employee B having to juggle how to address the claimant's concerns on the one hand, with those more junior than the claimant, on the other. What employee B was effectively trying to do was to reconcile concerns by giving both parties time to address the performance concerns which underlay the claimant's frustrations.

55. The claimant asked employee B for a meeting with all of the employees who had raised concerns about her. We accept employee B's evidence that this would not have been appropriate and instead it was appropriate for concerns to be addressed on an individual basis. Employee B feared a confrontation by the claimant with more junior members of staff. We do not regard employee B's refusal to entertain such a collective face-to-face meeting with the junior staff and the claimant as in any sense because of the claimant's ethnic origin, or as inappropriate.

56. In terms of the next events, it was clear that the claimant remained unhappy. On 17 August 2017 she had spoken to the more senior manager, employee F, about a possible transfer to the site of another client. Although the claimant later described employee F as being discriminatory towards her in their dealings, at the time, the claimant was highly complimentary about employee F, as recently as 25 August 2017, shortly before her dismissal, describing the employee F as an "outstanding professional and an amazing human being" ([116]). The evidence of employee F, which we concluded was reliable, was that whilst she had no desire to lose the claimant and was keen to find out whether a transfer to the alternative client site was possible, she did not make any promise of a transfer, as asserted by the claimant. We make this finding are on the basis that first, there would need to be a reorganisation of staffing at the site at which the claimant worked; and second that arrangements would need to be made at the new client premises.

57. Following discussions with employee F, and at employee F's suggestion, the claimant had a day's absence on Friday, 18 August. That was a Friday and she then returned to work for the final week of her employment on Monday, 21 August. The claimant has alleged that between 14 August and 28 August, employee B discriminated against her by referring to the claimant as been confrontational, critical and hostile. Other than the comments at the one-to-one meeting on 14 August 2017, the claimant was unable to point to any direct comments made by employee B, which were

critical of her. We accept employee B's evidence that she did raise the fact of a complaint by a client on 22 August 2017, but did not reach any conclusions herself on that complaint, or seek to criticise the claimant. The notes of her discussion with the claimant, at [115], indicate that she agreed that the claimant would keep communications with the receptionist to a minimum and not seek to gain entry again to the premises before 7.30am.

58. The claimant has alleged that the failure to transfer her to another site amounted to direct discrimination. However, it was only a matter of days after the discussion on 17 August that the incident took place on 22 August 2017, after which, following a disagreement between a client's receptionist at the client's premises and the claimant, the client complained to the respondent about what it regarded as the claimant's inappropriate tone of communication towards the receptionist. Employee B informed employee F of the fact of the complaint about the claimant. The gist of the complaint was that the claimant had apparently arrived early at the nursery and was asking for early access to the site, which the receptionist declined to agree to, following which the receptionist had been rude to her. When it was put to the claimant whether a white comparator would have been treated any differently in terms of a site transfer, or treated differently if they had also been the subject of complaints not only by fellow colleagues but also the client, the claimant did not advance an alternative case. We find that the reason for employee F's decision not to transfer the claimant and ultimately to dismiss her was not in any sense connected with the claimant's ethnic origin, but because of the rapidly deteriorating relations between the claimant, her colleagues, and the respondent's client.

59. The next event was on the penultimate day of the claimant's work with the respondent, Thursday 24 August when she complained that employee B had come to the kitchen where she was cooking and cleaning up, threw a "dirty pink plastic plate" right next to dishes that the claimant was washing, and expected the claimant to wash it, without saying a word. Employee B had no recollection of such an incident. She had indicated that the claimant was required to cook and prepare food, as well as wash up, as employee B did not have the requisite food safety hygiene qualification. This was particularly where there was a risk of the transfer of food, which could present safety risks in the context of food allergies. We find that employee B's expectation that on occasion, the claimant should cook and wash-up, whereas she could not, was explained by the lack of employee B's relevant qualification. It was not, despite the claimant's later assertion, because the claimant was being treated in any subservient way, or in any sense connected with the claimant's race. While the claimant stated to us that it was like "slaves and serfs in mediaeval times", in reality, the preparation and tidying up of foodstuffs in child nursery environment is an important safety issue which does require the appropriate level of qualification. Employee B explained that while she was scheduled to complete the

relevant qualification, she had been asked, as a more senior manager, to prioritise other matters ahead of the food hygiene qualification. We find this explanation as plausible, in the context of the nursery reopening and performance concerns with employee A that needed to be addressed. We do not find that the claimant being required to have that qualification was in any sense because of her racial origin.

60. The same day, 24 August, the claimant also alleged that employee A "whispered," to another junior colleague, who then left the room in distress, resulting in employee B needing to discuss with that other junior colleague an unspecified matter in a coffee-shop away from the nursery (page [48]). The claimant did not complain of the fact of employee B intervening; rather the fact of employee A having whispered something to a fellow colleague. The claimant was unclear as to how any of those claimed events created an adverse environment for her, on grounds of her race, and we find that she had not shown facts from which we could infer such an environment. Employee B gave evidence, and we find as reliable, that she had taken an employee away from the nursery briefly because the employee didn't wish to appear distressed in front of her colleagues. There was no evidence that this related to employee A, or any claimed whispering.

61. In addition, on a date which the claimant did not specify, she asserted that employee B had criticised her for raising an issue of the lateness of a colleague, employee C. Employee B was not able to recall the date but she candidly admitted that she did recall an occasion when the staff member was late for work and filled in a timesheet to suggest that she had entered work on time. Employee B had spoken to the staff member, who explained that there had been significant train delays and employee B reminded her of the importance of entering accurate timesheet records. Employee B said that for reasons of privacy she was unable to confirm at the time to the claimant the nature of the discussion she had had with employee C. Once again, we find this was a plausible explanation, ie, that when discussing performance or potential conduct issues, it would not have been appropriate for the claimant's line manager to have revealed to the claimant discussions with the other employee in detail, other than to assure her that a discussion had taken place. We regard this as more plausible than the claimant's assertion that employee B told the claimant that she was not "liked" as a result of raising the issue. Once again we do not find that there has been any detrimental treatment, whether at all, or in any sense because of the claimant's race.

62. Matters reached a head on Friday, 25 August, at the end of which the claimant raised concerns to different manager, employee E; had a row with employee B; and then the claimant walked out. First of all, the claimant alleges that a colleague, employee D, had allegedly shouted at the claimant when she criticised his remarks about a child with autism, which he had

repeated late that afternoon. It was put to the claimant during cross-examination that employee D had in fact raised concerns because of his training to deal with children with autism. The claimant's criticism related to whether employee D should be discussing a child's autism within a working environment. Employee B gave evidence that the claimant came to see her on 25 August following the discussion, when the claimant raised her voice; appeared angry and began to shout at employee B. Employee B described the nursery as a relatively small space with doors to the nursery rooms being open, making it likely the staff and children would have heard the claimant shouting, which employee B regarded as unacceptable. We find as more reliable the assertion that the claimant had raised her voice (noting that she did so on a number of occasions in front of us – despite repeated requests not to) rather than other employees, including employee B and D, shouting at her.

63. The claimant then left the nursery without authorisation. We accept that the claimant also told manager E about her concerns about autism being discussed, before leaving the nursery. However, we concluded that there was no failure by manager E to deal with the matter in any sense because of the claimant's race. What in reality happened was a fairly swift series of events, escalated from an initial disagreement with employee D, to the claimant shouting at employee B and then leaving, after which the claimant then sought to make contact directly with employee F. There was little that either employee B, having been shouted at, or employee E, after the claimant had left, could do. We not accept that employee E had 'taken' employee B's side, in that context.

64. Employee F indicated in an email at 2.49pm that afternoon ([122]) that she had missed the claimant's telephone call. In her email, she said she was sorry to hear that the claimant was unwell and had left the nursery, and asked her to come along to an alternative site in Reading on 29 August at 10:30am. Employee F wished to conduct a probation review meeting and talk through in further detail the claimant's concerns. The claimant later sought to criticise the respondent for the location of the meeting – ie, in Reading, whereas her normal place of work was in central London. Employee F's explanation, which we found as plausible, was that employee F had a meeting with another large prospective client from whom she was seeking to win business, in the same area and that was the reason for the location. Employee F also said that had the claimant raised concerns about the location then the meeting would have been rescheduled. Instead, the claimant replied on 27 August 2017, thanking employee F for her email and apologising that she hadn't responded any earlier as she had not been well; saying that Tuesday would be fine and thanking employee F for her time, ongoing help and support, which was very much appreciated. At the time, there was no complaint about the meeting location.

65. The claimant then followed up, on 28 August, with an email to employee E, copying in employee F, which enclosed the grievance letter as an attachment ([118] to [120]).

66. Importantly, employee F gave evidence as to when she had decided to dismiss the claimant. She gave evidence and we find as a fact that she had already decided to dismiss the claimant when she sent the claimant the email at 2.49pm on Friday, 25 August 2017. Her reasons were simple. She believed that the claimant was not suited to the working environment of the respondent's organisation, having received complaints from both staff and a client; as well as the incident as it developed on 25 August where the claimant had apparently shouted out employee B. We took account of the brief period of time in which the claimant had worked for the respondent's organisation; that this was somebody who had barely started employment; that it was clear in employee F's view that the relationship had broken down on 25 August – i.e. before she received the grievance letter – and that a transfer to alternative client's premises was not appropriate. Therefore, bearing in mind the timing, employee F's decision predated the grievance letter and we find that the claimant's dismissal was not related to a public interest disclosure. Indeed, we find that the claimant sent the grievance letter, *after* she had been notified of the probation review meeting, anticipating that she was about to be dismissed. While we do not propose to recite the grievance letter in full, the claimant comments at [120] that she had made a "real difference" and she was very sad and very hurt that, despite the fact she had been working very hard at the setting, she "could not complete my targets and goals in order to achieve the very best outcomes for the children." We inferred from this comment that the claimant saw that she would be unable to fulfil any targets in the future because she anticipated, having walked out after shouting at employee B, that she was about to be dismissed. We regarded the grievance letter as the claimant seeking to protect her position by raising protected disclosures, when in reality she had not done so previously.

67. In terms of the contents of the grievance letter itself, it is lengthy and as previously indicated, repeats a number of highly critical conclusions but with relatively few facts. The only assertions of note are the reference, as previously made, to children being left "by doors" as well as lack of emotional warmth and love for them. It refers to an employee coming in late; the claimant being made to cook; and the colleague making comments about a child with autism.

68. The claimant attended a meeting with employee F, at which, following a discussion about the events in the week commencing 21 August 2017, employee F dismissed the claimant. The claimant was informed of this on the day and this was followed up in a letter dated 7 September 2017 at [129], which offered a right of appeal. The letter gave as the reasons for

dismissal, concerns about the claimant's conduct and professionalism, including a client's complaint and numerous complaints from members of nursery staff, which had been raised with the claimant. The claimant was paid one months' pay in lieu of notice and she was offered a right of appeal. Had we considered a claim of ordinary unfair dismissal, it appears that while the letter offered a right of appeal, in fact there was a delay of nearly a month, until 3 October 2017, as well as a failure to provide the subsequent appeal decision, which would have raised concerns about the fairness of the process within the meaning of the ACAS code of conduct. However, we were conscious that we were not considering an ordinary unfair dismissal claim, but a claim relating to the claimant's protected disclosure.

69. In terms of the claimant's complaint of victimisation, namely that she had victimised for complaining about employee A to employee B, we find that the complaints about employee A were not the reason for the claimant's dismissal. The real reason was, as asserted by employee F, the breakdown in the relations with the claimant.

70. Another senior manager, employee H wrote to the claimant on 31 August 2017 inviting her to a meeting to discuss her grievance letter of 28 August and advising her of her right of accompaniment. Notes of the meeting were at [130] to [138]. Employee G was an HR manager and not responsible for the outcome of the grievance.

71. The claimant criticised the accuracy of the records and employee H accepted that they were not intended to be verbatim. We are however critical of employee H, in respect of her subsequent grievance letter of 2 October 2017, in which she asserted that the claimant had not provided details of the allegations which she could investigate i.e. specific dates, times, and witnesses as to what was said or done ([144]). In fact, as the notes reveal, there were references to employee A. We also noted that there was a delay between the meeting itself which took place on 7 September and the grievance outcome letter which was issued on 2 October 2017. We asked employee H for an explanation for the delay. Employee H had suggested that any delays in speaking to witnesses were because of holiday; or in the alternative, suggested that it was not a requirement of the grievance procedure that she conclude matters within a specified time period.

72. In respect of employee H, we regarded neither assertion as accurate. The respondent grievance policy at [160] provided that within 10 working days of a final grievance meeting the employee should be informed of the decision and the right of appeal. If the deadline cannot be met it should be communicated to the employee and an agreed alternative date should be arranged. In fact, we accept that the claimant's evidence in this regard that she herself had to chase up for the outcome of the grievance. In addition,

whilst employee H had referred to needing to speak to potential witnesses, she did not in fact have any notes of discussions with colleagues with whom she had discussed the allegations. We inferred that the assertion about holiday absences was no more than a speculative explanation, to justify a failure to comply with the timeframes in the grievance procedure. We regarded the delay from the grievance meeting until 2 October as unreasonable in the circumstances, being outside the respondent's stated grievance timeframes. While we did not regard the grievance outcome as an act of discrimination itself, in the sense that the response was not because of the claimant's race, (for which employee H provided an explanation, namely that criticism of someone's English, without more, was not racist, but she had failed to investigate the context), the outcome was delayed unduly.

73. On a final general allegation, the claimant had alleged that she was discriminated against on grounds of her ethnic origin by having to work longer hours than her manager, employee B. Whilst we did not have access to any time records of the two employees' working hours, we do not regard the two employees as comparable, as employee B was more senior. The real gist of the claimant's complaint was that employee B had apparently been permitted to leave the nursery early to work from home in order to attend a birthday party of her partner. The claimant clearly took exception to this and referred to "endless birthday parties" but in reality, we regarded the ability of a more senior manager to work on occasions from home was plausible and entirely unconnected to the claimant's ethnic origin.

## The Law

## Direct discrimination

74. Section 13 of the Equality Act 2010 defines direct discrimination as "if, because of a protected characteristic, A treats B less favourably than A treats or would treat others", in this case, the claimant's race. In making the comparison, Section 23 confirms that there must be no material difference between the circumstances relating to each case. In turn, Section 39 prohibits discrimination by employers against employees, by dismissing them or subjecting them to any other detriment.

75. Section 136 includes a provision that if there are facts from which the court could decide, in the absence of any other explanation, the person contravened the provision concerned, the court must hold that the contravention occurred. That provision, however, does not apply if the alleged perpetrator shows that it did not contravene the provision.

76. We recognised that, as per the authority of **Ayodele v Citylink Ltd [2017] EWCA Civ 1913**, the two-stage process remains the starting point. The

claimant would need to prove facts from which we could conclude in the absence of an explanation that the respondent had committed an unlawful act, from all of the evidence. The second stage would require the respondent to prove that it hadn't committed the unlawful act, although we were conscious that it should not be a mechanical exercise.

77. We reminded ourselves also that in order for the claimant's claim to succeed, it was not necessary for us to conclude that the claimant's race was the sole or even principal reason for the treatment complained of. It is sufficient if we conclude that it was a material reason contributed to her treatment. Direct discrimination can occur both consciously and subconsciously. Where, as in this case the claimant alleges that there had been a number of incidents of this country conduct, we needed to look at the wider picture, drawing and all of our findings of fact. Whilst, in our findings, we have set out our conclusions in relation to each of the distinct complaints, we drew on our findings of fact and the overall picture emerging from them as a whole.

**Harassment**

78. Section 26 of the 2010 Act includes provisions defining harassment:

*"(1) A person (A) harasses another (B) if—*

*(a) A engages in unwanted conduct related to a relevant protected characteristic, and*

*(b) the conduct has the purpose or effect of—*

*(i) violating B's dignity, or*

*(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

*(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*

*(a) the perception of B;*

*(b) the other circumstances of the case;*

(c) *whether it is reasonable for the conduct to have that effect*."

79. The same two-stage process referred to above applies when we considered the claims of harassment. The treatment needed to be in some sense

related to the claimant's race, which was broader that the test of direct discrimination 'because' of her race.

**Victimisation**

80. Section 27 of the Equality Act 2010 states:

*"Victimisation*

*(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*

*(a) B does a protected act, or*

*(b) A believes that B has done, or may do, a protected act.*

*(2)Each of the following is a protected act—*

*(c)doing any other thing for the purposes of or in connection with this Act;*

*(d)making an allegation (whether or not express) that A or another person has contravened this Act.*

*(3)Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."*

**Public interest disclosure**

81. The claimant's claim was of automatic unfair dismissal because she had made a protected disclosure. She would not otherwise have sufficient continuous employment (two years) to bring a claim of 'ordinary' unfair dismissal. In that context, the claimant needed to show that she was dismissed for the automatically unfair reason, or if for more than one reason, the principal reason of that disclosure, i.e. the fact of her public interest disclosure, as per the authority of **Smith v Hayle Town Council** [1978] ICR 996. The wider 'reasonableness' of the respondent's dismissal of the claimant was not relevant.

82. We reminded ourselves that the claimant did not need to make any protected disclosures in good faith; rather, she had to reasonably believe any such disclosures to have been in the public interest. That reasonable belief also had to be that the information disclosed tended to show a relevant failure. The reasonableness of belief was that of the claimant, not of a 'reasonable worker'; we needed to take into account her personal perceptions and circumstances, including the fact that she was an

experienced professional, but the genuineness of her belief was not sufficient. Conversely, the fact that her beliefs were ultimately inaccurate did not prevent them from being protected disclosures. In assessing the reasonableness of the claimant's belief that the disclosure was made in the public interest, we noted the Court of Appeal's decision in **Chesterton Global Ltd (t/a Chestertons) v Nurmohamed** [2017] EWCA Civ 979; in particular, some of the factors identified in that case:

*"(a) the numbers in the group whose interests the disclosure served – see above;*

*(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;*

*(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;*

*(d) the identity of the alleged wrongdoer – "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though this should not be taken too far."*

## Applying the law to the facts

83. For the reasons set out in our findings, we do not believe that the claimant has shown facts from which we could infer that there was unwanted conduct on grounds of the claimant's race, with the single exception of employee A's description of her English as not being good and that she was "crap" (on 8 August 2017).

84. Based on our findings, we also concluded that the claimant has not shown any less favourable treatment on grounds of her ethnic origin, for the purposes of the claimant's claim of direct discrimination.

85. With regard to the claim of victimisation, the claimant had not in fact raised any complaint of race discrimination until her complaint to employee H in the context of the grievance meeting. By way of example, she had not raised it in the grievance letter of 28 August 2017. Noting that the asserted victimisation was continued bullying by employee A, and that the claimant did not continue to work with employee A after 25 August – ie. before the date of the complaints of race discrimination – A's treatment of her cannot

have been caused by her complaint. Furthermore, she had not raised the complaint of race discrimination in her grievance letter and, therefore, could not have been victimised by employee E, who dismissed her.

86. In respect of the allegation of the protected disclosure, based on our findings, we concluded that the claimant did not disclose information which in her reasonable belief tended to show either that a criminal offence was committed, or that a legal obligation to which the respondent or any of its employees were subject was breached. By way of example, we considered the case of babies being left behind a door, which might be such a breach – this was not something that was expressly stated in the grievance letter, which dealt with little more than the complaints already identified, for example being made to cook or employees coming in late. Given the claimant's level of professional experience, we did not assess any belief that these might tend to show a criminal offence or breach of a legal obligation as being reasonable. As a consequence, this meant there was no protected disclosure. Even had we concluded differently, we had found that the respondent had already decided to dismiss the claimant before she raised her grievance and was not dismissed because of it. As a consequence – and bearing in mind that the claimant's claim was of automatically unfair dismissal, as opposed to 'ordinary' unfair dismissal – the claim of unfair dismissal could not succeed.

87. This meant that one of the claims succeeded in relation to a single comment that was made on 8 August 2017 by employee A, for which we made an award for injury to feelings set out below.

**Award for injury to feelings**

88. In respect of the claimant's injury to feelings, we considered the Presidential Guidance of 5 September 2017, which provided updated guidance on the amount of awards for injury to feelings, following the decision of **De Souza v Vinci Construction (UK) Ltd** [2017] EWCA Civ 879. That guidance was relevant, noting that the claimant presented her claim after the date of that guidance, on 27 November 2017.

89. We concluded that the award should be in the lower band of awards, for comparatively less serious cases. Before adjustments and interest, we concluded that the claimant should be awarded £2,500 for the injury to her feelings. We reached this conclusion, having found that it was a single instance of racial harassment, which she described as horrible and disgusting; but employee A was in a more junior position, rather than abusing a position of power; and taking the claimant as she was, there was no evidence that she had a pre-disposition towards anxiety and distress. The claimant's subsequent illness and wider distress was not something we attributed to employee A's single comment towards the claimant, noting that

the claimant had linked her subsequent ill-health to the large number of claims, which apart from the allegation in relation to the claimant's English, did not succeed.

90. We considered whether there should be any adjustment for a failure by the respondent to comply with the ACAS Code of Practice on Discipline and Grievance, in the context of the respondent's unreasonable delay in producing the grievance outcome. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 give us the discretion to adjust an award where it appears to us that the respondent has failed to comply with the Code; that that failure was unreasonable; and we consider it just and equitable in all the circumstances, by no more than 25%.

91. Employee H provided the claimant with an opportunity to attend a meeting and explain her concerns; and confirmed her decision on the claimant's grievance. However, we concluded that there was an unreasonable delay in informing the claimant of the grievance outcome and employee H did the respondent no favours in seeking to blame this on holiday absence, without any other evidence. We concluded that there should be an uplift of the award of injury to feelings of 10%.

**Calculation of total award**

92. The date of the discriminatory act was 8 August 2017. In terms of interest, regulation 3(1) of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 provides for interest on a simple basis from the date of discrimination. Regulation 6(1)(a) provides that the period of the award of interest starts on the date of the act of discrimination complained of and ends on the day on which we calculated the amount of interest, 7 December 2018. The interest rate is 8%.

93. Taking £2,500 as the principal sum, adjusted by 10% to £2,750, the interest from 8 August 2017 to 7 December 2018 is 8% @ 486 days is £292.93.

94. The **total award**, including interest, is therefore £3,042.93.

95. The award is not subject to grossing up for taxation, as the discriminatory act was prior to dismissal and so the award is not taxable. The award is also not subject to the Employment Protection (Recoupment of Benefits) Regulations 1996 as it does not relate to compensation for loss of the claimant's employment.

Signed by ___ _____ on _7 December 2018

Employment Judge Keith

Judgment sent to Parties on
12 December 2018

_____

## Appendix 1 – list of issues

The numbering below adopts the numbering in EJ Davidson's record of preliminary hearing on 12 April 2018.

### Public interest disclosure claim

3.

3.1. Did the claimant make a protected disclosure for the purposes of section 43B of the employment rights act 1996? The claimant relies on her grievance dated 28 August 2017.

3.2. If so, was information disclosed which in the claimant's reasonable belief tended to show one of the following?

3.2.1. A criminal offence had been committed

3.2.2. a person had failed to comply with a legal obligation to which he was subject

3.2.3. the health or safety of any individual had been put at risk

3.2.4. the environment had been put at risk

3.2.5. or that any of those things were happening or were likely to happen, or that information relating to them had been or is likely to be concealed?

3.3. If so, did the claimant reasonably believed that the disclosure was made in the public interest?

3.4. Was the making of any proven protected disclosure the principal reason for the dismissal?

### Section 26: harassment on grounds of race

3.5. Did the respondent engage in unwanted conduct as follows:

3.5.1. A colleague, 'A', commenting that the claimant's English was 'crap' on or about 8 August 2017;

3.5.2. A colleague, 'B', failing to address the claimant's complaint about A's comment on or about 9 August 2017;

3.5.3. on or about 14 August 2017, on the claimant's return from sick leave, B alleging complaints had been made against the claimant without any supporting documentation;

3.5.4. on several occasions between 14 and 28 August, B calling the claimant 'confrontational', 'critical' and 'hostile';

3.5.5. requiring the claimant to cook and wash up for a day when the regular cook was absent and B expecting the claimant to wash up her plate and treating her regally;

3.5.6. B telling the claimant she was not liked when she complained about the lateness of a colleague, 'C';

3.5.7. a colleague, 'D' shouting at the claimant when she criticised the comments he made about a child with autism;

3.5.8. 'A' shouting at a child who was sitting with the claimant, which the claimant contends was indirectly aimed at her;

3.5.9. on every occasion when she complained about B to senior management, the senior management took B's side.

3.5.10. In addition, as identified at paragraph 14, page 48, on 24 August, A was whispering to another colleague C;

3.5.11. in addition, as identified at paragraph 25, page 51, A had, on or around 2 August 2017, rolled his eyes and shook his head sarcastically whenever the claimant joined discussions at a training event.

3.6. Was the conduct related to the claimant's protected characteristic (non-native English speaker and/or not ethnically British)?

3.7. Did conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

3.8. If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for claimant?

3.9. In considering whether the conduct had that effect, the tribunal would take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

3.10. Did the respondent take all reasonable steps to prevent its employees from engaging in such conduct.

**Section 13: direct discrimination on grounds of race.**

3.11. Has the respondent subjected the claimant to the following treatment falling within section 39 of the equality act, namely:

3.11.1. having to work longer hours than B;

3.11.2. A criticising her English in front of colleagues (hypothetical comparator);

3.11.3. B failing to investigate her complaints (hypothetical comparator);

3.11.4. a more senior manager E, ignoring her complaints (hypothetical comparator);

3.11.5. being required to finish her Level 3 qualification when B was not so required (B relied on as a comparator);

3.11.6. a more senior manager, F, failing to allow her to transfer to another location (hypothetical comparator);

3.11.7. other senior managers, G and H failing to give an outcome to the claimant's grievance (hypothetical comparator).

3.12. Has the respondent treat the claimant as alleged less favourably treated or would have treated the comparators? The claimant relies on the comparators identified above.

3.13. If so, has the claimant approved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the claimant's race?

3.14. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

3.15. Does the respondent have a defence that it took all reasonable steps to prevent its employees from doing the discriminatory act or from doing anything of that description?

**Section 27: victimisation**

3.16. Has the claimant carried out a protected act? The claimant relies on the following:

3.16.1. complaining to B about A being racist;

3.16.2. complaining to E about A being racist;

3.16.3. on 29 August 2017, complaining to F about A and B being racist.

3.17. If there was a protected act, has respondent carried out any of the following treatment because the claimant had done a protected act?

3.17.1. Continued bullying by A?

3.17.2. Dismissal of the claimant on 29 August 2017.