



EMPLOYMENT TRIBUNALS

Claimant: Mrs F Goldsbrough
Respondent: NCI Vehicle Rescue plc
Heard at: Leeds **On:** 4, 5, 6, 7 March 2019
Before: Employment Judge Davies
Mr M Taj
Mr D Wilks

Representation
Claimant: In person
Respondent: Mr Booth (solicitor)

RESERVED JUDGMENT

1. The Claimant's claims of direct discrimination because of race, religion, disability and/or sex; discriminatory dismissal because of race, religion, disability and/or sex; unfavourable treatment because of something arising in consequence of disability; and harassment related to religion are not well-founded and are dismissed in their entirety.

REASONS

Introduction

- 1.1 These were claims of direct discrimination because of race, religion, disability and/or sex; discriminatory dismissal because of race, religion, disability and/or sex; unfavourable treatment because of something arising in consequence of disability; and harassment related to religion brought by Mrs F Goldsbrough against her former employer NCI Vehicle Services plc. The Claimant represented herself. The Respondent was represented by Mr Booth (solicitor).
- 1.2 The Tribunal was provided with a joint file of documents and we considered those to which the parties drew our attention. The Claimant also produced a supplementary file of documents and she referred to some of those by agreement during the course of the hearing.
- 1.3 The Tribunal heard evidence from the Claimant and from Ms Pickering and Ms Wilkinson on her behalf. For the Respondent we heard evidence from Mr Jones (Product Manager, formerly Sales Manager), Ms McDonald (HR Manager), Mr Richards-Smith (Managing Director) and Mr Abdalla (formerly Sales Team Leader).
- 1.4 We discussed what adjustments might assist the Claimant at the outset of the hearing. We took regular breaks and encouraged the Claimant to ask for a break

if she needed one. During parts of the cross-examination, the Claimant also put her questions through the Employment Judge rather than asking them directly.

The issues

- 2.1 The Respondent accepted that the Claimant was disabled within the definition in the Equality Act 2010 at the relevant times, by virtue of the mental impairment of anxiety/depression. Further, it accepted that it knew of the disability at the relevant time. The issues to be determined were therefore as follows:

Preliminary: time limit for discrimination complaints

- 2.1.1 In respect of each of the discrimination complaints relating to events that occurred before 21 September 2017, was there conduct over a period such that the complaints were presented within three months (plus early conciliation extension) of the end of that period?
- 2.1.2 If not, is it just and equitable to extend time for bringing those complaints?

Direct discrimination

- 2.1.3 Did the Respondent subject the Claimant to a detriment as follows:
- 2.1.3.1 Unscheduled one-to-one meetings with Mr Abdalla;
 - 2.1.3.2 Being forced by Mr Abdalla to work excessive shifts (three Saturdays in a row) immediately after returning to full hours and duties;
 - 2.1.3.3 A failure by Mr Abdalla to fully investigate an audit outcome;
 - 2.1.3.4 A failure by Mr Richards-Smith to investigate an audit outcome;
 - 2.1.3.5 A failure by Mr Jones to investigate and resolve the Claimant's grievances; and/or
 - 2.1.3.6 A failure by Mr Richards-Smith to fully investigate the grievances?
- 2.1.4 If so, by doing so did the Respondent treat the Claimant less favourably than a hypothetical comparator in whose circumstances there was no material difference compared with the Claimant's?
- 2.1.5 If so, was it because of race, religion, sex and/or disability?

Harassment

- 2.1.6 Did Mr Abdalla question the Claimant about why she had a Muslim first name and a non-Muslim surname?
- 2.1.7 If so, was that unwanted conduct? The Respondent accepts that, if said, it related to religion.
- 2.1.8 If so, did that conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Unfavourable treatment

- 2.1.9 Did Mr Abdalla subject the Claimant to:
- 2.1.9.1 Unscheduled one-to-one meetings;
 - 2.1.9.2 A requirement to work excessive weekend shifts (e.g. three Saturdays in a row) immediately after her return to full hours and duties;
 - 2.1.9.3 A refusal to grant a six month pay rise from level 4 to level 5 as promised when she was first employed;
 - 2.1.9.4 A failure to investigate an audit outcome.

The Respondent accepts that these things would amount to unfavourable treatment.

- 2.1.10 If so, was it because of something arising in consequence of her disability, namely her anxiety and vulnerable state, being on medication and/or undertaking reduced hours and duties?
- 2.1.11 If so, was the holding of unscheduled one-to-one meetings a proportionate means of achieving a legitimate aim of providing a good level of performance?
- 2.1.12 Was a requirement to work excessive Saturdays a proportionate means of achieving a legitimate aim of providing a service with adequate staffing?

Discriminatory constructive dismissal

- 2.1.13 Did the above discriminatory acts occur as alleged?
- 2.1.14 If so was the Claimant dismissed, i.e.:
 - 2.1.14.1 Was the Respondent in fundamental breach of the implied term of mutual trust and confidence? Were they acts, without reasonable cause, calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties?
 - 2.1.14.2 If so, did the Claimant resign in response and without affirming the contract?

The Facts

- 3.1 The Respondent is NCI Vehicle Rescue plc. It is a company based in Harrogate specialising in car insurance, pet insurance, vehicle recovery and breakdown. It has just over 100 employees.
- 3.2 The Claimant is a British Muslim woman of Kashmiri ethnic origin. At all relevant times she met the definition of disability in the Equality Act 2010, by virtue of the mental health impairment(s) of depression and anxiety.
- 3.3 We begin by making some observations about the witnesses. As will become apparent, the Tribunal did not accept significant aspects of the Claimant's evidence. It seemed to the Tribunal that her perception of events was flawed. In particular, she appeared to have formed a strong adverse view of Mr Abdalla, whom she described as "actively prejudicial against me", "an extremist" and someone who "ostracised and humiliated me without constraint." The Claimant's perception of all Mr Abdalla's actions appears to be underpinned by that view. Some of the accusations levelled at Mr Abdalla could not be reconciled with the contemporaneous documents or other evidence. However, even having seen that evidence, the Claimant persisted in those allegations. That does not mean her evidence was dishonest or that she was deliberately trying to mislead the Tribunal. She may well genuinely believe that events took place as she describes and that people behaved with the motivations she ascribes to them. However, the Tribunal did not agree. By way of example, one of the Claimant's complaints (see below) is that she was promised at her job interview that if she passed her probation she would be promoted, but this never happened. It was Mr Jones who interviewed the Claimant and who, on her case, made the promise. It was also Mr Jones who dealt with her probation review and told her she had passed. He did not promote her. Mr Abdalla did not even join the company until some weeks later. However, the Claimant's complaints about the failure to promote her were directed solely at Mr Abdalla. Another example relates to a failed call audit. There is no dispute that a

selection of each advisor's calls was audited by a separate audit team each month. The Claimant disputed the outcome of one of her call audits, which was classed as a fail. She says that Mr Abdalla failed to investigate that issue and that he did so deliberately because of her race, religion, sex and/or disability. However, the emails from the time show that Mr Abdalla referred the matter to the audit team, going so far as to express his own view that the call was not a fail. The emails show that Mr Abdalla persisted in raising the Claimant's dispute with the audit team and that it was Ms Corps in that team who insisted that the call had been scored correctly. Even after seeing those emails, the Claimant continued to argue that Mr Abdalla had deliberately failed to investigate the call fail because of his discriminatory approach to her.

- 3.4 On many aspects the Tribunal preferred Mr Abdalla's version of events. There were sometimes differences between his evidence and what he had said on previous occasions. However, the Tribunal considered that he was doing his best to recall accurately what had happened, in circumstances where the events took place almost 2 years ago and where he no longer works for the Respondent. He had a clear recollection of certain elements and a less clear recollection of others.
- 3.5 The Tribunal also places on record that it found Ms McDonald to be a wholly credible witness. We found without hesitation that she was at the time doing her best for the Claimant. That is reflected in the documents produced at the time and in her evidence to the Tribunal.
- 3.6 Having made those initial observations, we turn to the events that formed the basis of the Claimant's claims.
- 3.7 The Claimant started work for the Respondent on 23 August 2016 as an Insurance Sales Advisor in a team of 15. As we have already mentioned, her evidence was that Mr Jones promised her at her interview that if she passed her probation after six months she would be promoted from level 4 to level 5. Mr Jones said that he had not made any such promise. The Tribunal preferred Mr Jones's evidence. In reaching that view, we took particular account of the following:
 - 3.7.1 Mr Jones explained in his evidence that this was not what happened in the company generally and said that he therefore would not have said such a thing. The Respondent has a levels document setting out the criteria that must be met in order for employees to meet particular levels. Those criteria are detailed and specific. There was no dispute that Mr Jones had the levels document at the Claimant's interview. One of the criteria for level 5 is that the person should have a "comprehensive understanding of motor, home, breakdown and pet insurance". Plainly the Claimant would not have had such an understanding at that time. Nor would it have been possible to know whether she would have attained such an understanding after six months. That makes it less likely that Mr Jones would have promised a promotion after six months when he interviewed the Claimant.
 - 3.7.2 There is nothing in the probation review documents to indicate that the Claimant complained to Mr Jones that he had promised her a promotion if she passed her probation and was going back on that promise. She did not put in writing a concern or complaint at that time.
 - 3.7.3 At a later stage in July 2017 when Mr Abdalla was her line manager the Claimant covertly recorded a meeting with him. She referred in that meeting

to her wish to move to level 5, but she did not suggest that this had been promised to her by Mr Jones. For example, Mr Abdalla discussed with her what she needed to do or achieve in order to move up the ladder. The Claimant did not say that she should be moving up the ladder simply because that had been promised to her. Rather, she confirmed her understanding of what Mr Abdalla was saying. She talked about being “on track” and wanting to make sure that the goalposts had not moved. Indeed, she referred specifically to her conversation with Mr Jones at the six month review. She said that Mr Jones had told her that everything was fine at that point and that all she needed to do was to be able to train new members of staff and be there for them when they referred things. She said that Mr Jones had told her that her level 5 was “imminent.” Then she said that things had suddenly changed and she was concerned about whether she had to do so much more than she thought. None of that was consistent with the suggestion that, at her interview, Mr Jones had promised her promotion to level 5 if she passed her probation.

3.7.4 In a subsequent grievance (see below) the Claimant said for the first time that she had been promised a pay rise after her six month probationary period. When she was asked about that she said that Mr Jones told her at her six month review that her wages would go up. She did not say that he promised her when she was appointed that she would be promoted to level 5 if she passed her probation.

3.8 There is no dispute that Mr Jones and the Claimant discussed what level she should be on at the interview and that the Claimant wanted to be on level 5. However, Mr Jones told her, by reference to the levels document, that it had to be level 4. He may well have said that after the Claimant had completed her probation they could look again at her level but the Tribunal was quite satisfied that no promise of a promotion at that stage was made. It was clear that this promotion was a matter of great importance to the Claimant. She plainly had a focus on getting to level 5 as soon as possible.

3.9 The probation review meeting to which we have referred took place in February 2017. The Claimant’s evidence was that Mr Jones told her in that meeting that she would be getting a pay increase to level 5, as promised at interview, in the next pay increase month. Mr Jones said that he did not tell the Claimant that she would get a pay rise or move to level 5. Again, the Tribunal preferred Mr Jones’s evidence. We have already found that no promise was made at interview. Further, the probation review form made no mention of a pay increase or promotion and nor did the letter sent to the Claimant by Mr Jones confirming that she had successfully passed her probation. The Claimant took no steps to complain or record in writing that a pay rise and promotion had been confirmed. What she said in the covertly recorded meeting with Mr Abdalla was that Mr Jones told her this was “imminent”, not that he had confirmed, as promised at interview, that she would be getting a pay increase to level 5 in the next pay increase month. Again, given the Claimant’s focus on moving to level 5, there may well have been discussion about that at the probation review. However, the Tribunal was quite satisfied that the Claimant was not told that she would be getting a pay increase in the next pay increase month, nor that she was being promoted to level 5, or would be promoted on a specific date.

- 3.10 Mr Abdalla started as Sales Team Leader on 20 March 2017. This was the first time the Respondent had had a Sales Team Leader and the intention was in part to remove some of Mr Jones's workload. Mr Abdalla decided to hold individual meetings with each member of the sales team at an early stage so as to get to know them. He told Mr Jones he intended to do so.
- 3.11 The Claimant said in her witness statement that Mr Abdalla discriminated against her from the first day of his employment: at her initial individual meeting with him he asked her where her name came from. He said that he knew Fozia was a Muslim name but questioned her surname, which was not. Further, she said that later in the conversation he surprised her by asking if she knew what the word "Jihad" meant. She said, "Sorry?" and he carried on as though he had not said it. It was as though he had dropped this question into the conversation to test her.
- 3.12 In his witness statement, Mr Abdalla accepted that he asked the Claimant about her name when he met her. He explained that he is of mixed race. His mother is Greek and his father is from Egypt. He is a Muslim but his mother was not brought up as a Muslim and converted when she met his father. He wondered whether the Claimant had a similar background as he noted that she had a Pakistani first name but more of an English surname. He did not recall mentioning that she had a "Muslim" first name. In cross-examination, Mr Abdalla repeatedly confirmed that he asked about the Claimant's name because he thought she might be mixed race like him and he thought that this might be a good conversation starter. It was a way of getting to know her and, he thought, finding some common ground. The Tribunal noted that when he was asked in September 2017 during a grievance investigation meeting whether he recalled making "a comment" to the Claimant in relation to her name when he started with the company, Mr Abdalla said that he did not remember. However, the Tribunal was satisfied that Mr Abdalla did now recall the conversation and was doing his best to give an accurate account of it to the Tribunal.
- 3.13 The Tribunal found that at their initial meeting Mr Abdalla asked the Claimant about her name. When the Claimant initially raised a complaint about this in September 2017 she said that Mr Abdalla questioned her name because she has a "Muslim first name". Mr Abdalla could not remember that. In view of what the Claimant said in September 2017, the Tribunal found that he may well have used those words.
- 3.14 The Tribunal accepted Mr Abdalla's clear and insistent evidence in cross-examination that he asked about the Claimant's name because he thought she might have a similar background to him and - rightly or wrongly - he thought that this was a good conversation starter. We had no hesitation in finding that he was genuine in this and did not intend to offend the Claimant.
- 3.15 Mr Abdalla's evidence was that the Claimant did not seem offended at the time. She told him she was of Kashmiri background and she was smiling. The Claimant was asked in her evidence how she felt when Mr Abdalla asked her the question. She said that she was confused and was not sure why he was asking her. She said that she told him that Fozia is a Muslim name and Goldsbrough is her married name. The Tribunal noted that the Claimant did not make any complaint at the time and did not refer to this until mid-September 2017. In the light of that evidence the

Tribunal found that the Claimant was not upset or offended by the question when Mr Abdalla asked it.

- 3.16 As noted above, in her witness statement the Claimant included a further allegation, that Mr Abdalla asked her about the word "Jihad." The first time any such allegation was made was in her ET1 claim form. That was despite the fact that she raised numerous complaints about Mr Abdalla in the "sales team complaint" referred to below. That document also included a complaint about a colleague called Fatima expressing extremist views but it made no reference to Mr Abdalla using the word "Jihad." The Claimant first complained about Mr Abdalla questioning her name in a meeting with Ms McDonald on 13 September 2017. Again, she made no mention of his questioning her about the word "Jihad." If Mr Abdalla had indeed asked her about the word "Jihad" when they first met, the Tribunal would have expected the Claimant to raise that serious allegation as part of the complaints she put forward in August and September 2017.
- 3.17 When this allegation was put to Mr Abdalla in cross-examination he laughed and then insisted, with seriousness, "I would never, ever say that word anywhere. It would be like using the word bomb on a plane."
- 3.18 The Tribunal preferred Mr Abdalla's evidence. We did not consider it plausible that if he had asked her about the word "Jihad" the Claimant would not have mentioned it at any point before submitting her claim form. Further, we found Mr Abdalla's reaction genuine and convincing. By laughing he was not belittling the word or the seriousness of the allegation. On the contrary, we found that he was reacting with astonishment to the suggestion being put to him. He then refuted that suggestion earnestly and with vehemence.
- 3.19 In April 2017 due to personal circumstances the Claimant had to go on medication to help a long-term anxiety and depression illness. She was absent from work at the end of April. Mr Jones conducted her return to work meeting on 2 May 2017 and agreed that she would have a period of reduced hours and duties. In May and June 2017 the Claimant therefore worked four days per week and did not undertake the full range of duties.
- 3.20 In his role as Sales Team Leader, Mr Abdalla instigated a system of one-to-one meetings with the sales team. His first such one-to-one meeting with the Claimant took place on 25 May 2017. They both wrote notes in a one-to-one form. The Claimant's evidence was that she told Mr Abdalla that a pay rise had already been promised to her but that he moved the goalposts. Mr Abdalla said that the Claimant made it clear that she wanted to progress to level 5. He said that he agreed that she was ready to progress and that he told her he would look to try and progress her by the next one-to-one in August 2017. The Tribunal preferred Mr Abdalla's evidence. We have already found that no pay rise had been promised to the Claimant. Further, Mr Abdalla's evidence was consistent with the content of the one-to-one form completed at the time. What the Claimant wrote in the one-to-one form was, "I'd like to be on level 5". She did not say she had already been promised a move to level 5 or that Mr Jones had agreed a date for her pay rise and promotion. The Tribunal found that what she wrote accurately reflected what she said at the time. She was reiterating her wish to move to level 5. Further, this reflected her understanding that she was still working towards that. Mr Abdalla

wrote in the one-to-one form that he felt that the Claimant was well on her way to moving up a level; they just needed to revisit the key points and see where they were at. He would look to move her up by the next one-to-one.

- 3.21 The Claimant returned to full-time duties in July 2017. She had one day's sickness absence on 3 July 2017. Mr Abdalla conducted her return to work interview. He told her that she had triggered stage I of the absence management procedure and that Mr Jones would conduct a stage I review meeting.
- 3.22 We have referred above to a dispute about the outcome of one of the Claimant's call audits. The call took place on 12 July 2017 and was audited on 14 July 2017. The call was an outbound call to a client regarding her breakdown renewal. The client did not want to go ahead. The auditor marked the call as a fail because the Claimant did not complete the data protection requirements relating to confirming the client's identity. The Claimant's evidence was that she listened to the recording and told Mr Abdalla that she believed she had not contravened any rules therefore she had not failed. Mr Abdalla said that he would look into it but failed to do so, although he did engage in a long email conversation with her in which he maintained that she was wrong (the Tribunal was not shown such emails). She said that she later learned from Mr Jones that Mr Abdalla had not mentioned it to him. She lost commission as a result.
- 3.23 Mr Abdalla said that it was normal for the odd call to fail. He would only get involved if a staff member failed the majority of their calls, kept failing for the same reason or wanted to challenge an audit score. He said that the Claimant came to see him about the failed call in July 2017. He listened to it but did not have enough experience to decide whether the Claimant was right or whether the audit team was right. He told the Claimant that he would speak to Mr Jones about it. He did so and Mr Jones seemed to agree with the Claimant although he had not listened to the call. He suggested that Mr Abdalla refer it back to the audit team. Mr Abdalla therefore emailed Ms Corps in the audit team and explained the Claimant's point of view. He confirmed that the Claimant wanted to dispute it and left it with Ms Corps.
- 3.24 The emails in the Tribunal's file were consistent with Mr Abdalla's account. On 18 July 2017 he emailed Ms Corps. He said that he listened to the call and although the Claimant did not go through "DPA" [data protection] the reason she did not confirm any customer details is that the call was short. Ms Corps replied to say that it was agreed that the renewal would not go ahead and that DPA needed to be done before that was agreed. Mr Abdalla replied to say that it was not on "auto DD" for the Claimant to agree this on. He said that he understood what both were saying but that the Claimant would like to dispute this. Ms Corps replied to say that she was confused. As far as she was concerned that was nothing to dispute regardless of whether it was on auto DD or not. DPA was needed 100% on this and all calls. It was a concern for her if the Claimant thought that was not the case. Mr Abdalla replied the next day, 19 July 2017. He said that the information disclosed about whether it would be renewed or not was information that they left in emails anyway so he did not think this was a fail. This prompted Ms Corps to reply asking Mr Abdalla to confirm that he had referred this to Mr Jones. Mr Abdalla replied to say that he had spoken to Mr Jones yesterday. Mr Abdalla had agreed that it may have been a fail but Mr Jones had said that it should not be. The next

day, 20 July 2017, Ms Corps emailed Mr Abdalla to say that she had now spoken to Mr Jones and played the call. After listening to it Mr Jones agreed that the call had been scored correctly. She suggested how Mr Abdalla might feed this back to the Claimant and suggested that if the Claimant did not agree Mr Abdalla should tell her that Mr Jones had listened to the call and that moving forward she needed to be doing DPA on every call.

3.25 The Tribunal accepted Mr Abdalla's evidence as reflected in those emails. Far from failing to investigate, Mr Abdalla pressed Ms Corps, arguing the Claimant's corner.

3.26 Meanwhile, Mr Abdalla's evidence was that at around this time he noticed that the Claimant seem to be chatting with the team more than normal and spending longer periods off the phones. He checked the call statistics and noted that she was falling down the team rankings. He therefore called her into a meeting to make her aware of this. He said that he wanted to give her a push and tell her that she needed to ensure all of her scores were really good if she wanted to progress to level 5. The Claimant referred to this unscheduled meeting in her witness statement. She said that Mr Abdalla commented on her performance results. She said that his assessment was based on the recent period when she had been on reduced hours and duties. She said that Mr Abdalla was comparing her performance with the rest of the team who were on full-time hours and duties and that this was unfair and discriminatory. She said that she protested to Mr Abdalla and told him he was fully aware of the reasons for her altered hours and duties but that he did not care about this. She said that Mr Abdalla clearly knew that the treatment he was subjecting her to would have a negative impact on her health and well-being and the experience was so upsetting that she left the meeting in tears. When she was next in the office Mr Abdalla admitted that his treatment of her was wrong and that he should not have spoken to her the way he did. However, he did not change his assessment and the "promised pay rise" did not materialise.

3.27 It was this unscheduled meeting that prompted the Claimant to ask Mr Abdalla for a further meeting a day or two later on 20 July 2017, which she covertly recorded. The Tribunal read the Claimant's transcript of that recording. We begin by saying that despite the fact that the Claimant knew the meeting was being recorded and Mr Abdalla did not, the transcript shows that he was being supportive and reassuring. Indeed, in cross-examination the Claimant accepted this. She then said that there were lots of other meetings and that they were all completely different. The Tribunal found that completely implausible. It was the Claimant who knew the meeting was being recorded not Mr Abdalla. It was not credible that in the only meeting that was recorded he happened to behave completely differently from the way he behaved every other time. The Tribunal noted the following particular points from the transcript:

3.27.1 The Claimant started by saying that she had been upset the other day with everything that happened, the audit and so on. Mr Abdalla told her that Mr Jones seemed to think that the audit should not be a fail and that it was therefore being disputed. That was the position reflected in the emails as they stood at the end of 19 July 2017.

3.27.2 The Claimant then went on to say that she was concerned that Mr Abdalla had compared her with the rest of the team and asked whether she was being compared with people who were in five days a week and not on reduced duties. Mr Abdalla said that he thought he had not given the right

- message and might have explained it a bit better. He told the Claimant that he was only going to compare the days where she had been on full duties. The Claimant said again that she was worried that she was being compared with people on full hours and duties who could get so many more breakdown calls. Mr Abdalla said that it might have been his fault but what he wanted to do was just to go through with the Claimant and show her where she needed to be in terms of her journey to the next level. Mr Abdalla confirmed that his goal was to get the Claimant onto level 5 and that he would not be basing his assessment on her performance while she was on reduced hours or duties.
- 3.27.3 It was apparent from the transcript that the basis of the Claimant's concern about audit fail was that she was worried this would affect her progression to level 5.
- 3.27.4 The Claimant appeared to accept Mr Abdalla's reassurances and told him that she felt better about it now.
- 3.27.5 The Claimant pressed Mr Abdalla for a date about when she would be on level 5. He told her that he would aim to hold her next one-to-one review towards the middle or end of August so that he had a longer period over which to assess her performance. The Claimant pressed for an earlier date, reflecting what was plainly her concern to move up a level at the earliest possible date. Mr Abdalla reiterated that he would look at matters in mid to late August.
- 3.27.6 The Tribunal did not consider that there was anything in the written record of the meeting that suggested any relationship of tension or conflict between the Claimant and Mr Abdalla, nor was there anything to suggest bullying or inappropriate behaviour by Mr Abdalla. To the contrary, Mr Abdalla was encouraging and reassuring and willing to accept that in their previous discussion he may have been to blame or may not have explained himself properly.
- 3.28 In the light of our findings about the meeting on 20 July 2017 the Tribunal returned to the evidence about the unscheduled meeting a day or two earlier. In view of what he said to the Claimant on 20 July 2017, the Tribunal found that Mr Abdalla may have given the impression that he was basing his assessment of her performance on a time when she was on reduced hours and duties. However, he made absolutely clear on 20 July 2017 that he was not doing so. He would only be assessing the Claimant on the basis of her performance when she was on full hours and duties.
- 3.29 Mr Abdalla's evidence was that soon after that meeting he saw the email from Ms Corps telling him that she and Mr Jones agreed that the audit fail should stand. It was not clear to the Tribunal when that was fed back to the Claimant and it may be that there was some delay in that. However, otherwise it was clear that Mr Abdalla had done all that was required of him as the Claimant's line manager. By 20 July 2017, his own line manager and the responsible person in the audit team had agreed that the call was a fail.
- 3.30 Mr Abdalla gave evidence that sometime after 20 July 2017 he spoke to Mr Jones about his wish to move the Claimant to level 5 in August 2017. Mr Jones told him that the company only does level moves every quarter, so the earliest the Claimant could be moved up would be October. Mr Abdalla had been unaware of this

because he was new to the company. He said that he called the Claimant into a meeting and explained this to her. She did not take it well and again complained that she had been compared to people on full hours and duties when she was on reduced duties. The Tribunal accepted Mr Abdalla's evidence. In her stage 1 meeting on 23 August 2017 (see below), the Claimant said that she had asked Mr Abdalla the previous day when she would have her one-to-one for her level 5 and that he had told her that if she did go up a level it would come into effect from October. She said that that was different from what she had previously been told. That suggested to the Tribunal that the conversation Mr Abdalla recalled took place on 22 August 2017 (see further below).

- 3.31 Another issue of concern to the Claimant relating to this period was about working weekend shifts. The Claimant complains that Mr Abdalla forced her to work three Saturdays in July 2017. The sales team were all contractually required to work Saturdays. There was no dispute that Mr Jones explained to the Claimant at her interview that this was normally around one Saturday in three.
- 3.32 Mr Abdalla was responsible for preparing the rota for the sales team. He emailed them the July rota sometime in June. The Claimant gave evidence that she was down to work three Saturdays that month so she raised that with Mr Abdalla and told him she did not want to work three Saturdays and that it would be bad for her health. She said that he told her she had to work the three Saturdays because of staffing issues. In cross-examination Mr Abdalla could not remember the Claimant raising this with him. He accepted that she might have done. He knew that she should not work three Saturdays and he said that if she had asked he would have changed it.
- 3.33 The Tribunal saw the rota. It was apparent that there were five Saturdays in July 2017, which of course would increase the number that team members had to work in that particular month. In addition, the Tribunal noted that for one of the Saturdays the Claimant was marked as working overtime in the afternoon. During the course of the hearing the Claimant was insistent that she had not worked any overtime in July 2017. However, the Tribunal did note an email in the file from the Claimant to Mr Barrett on 24 August 2017 in which she told Mr Barrett that she had made up five hours' overtime in July 2017, having been off on 3 July. She said that she had worked four of those hours on Saturday 15 July.
- 3.34 In the sales team complaint document (see below) the Claimant complained that she had been made to work three Saturdays in a row against her wishes because of an apparent short-staffing issue. When asked about it in the subsequent investigation meeting she said that it was her first month back in full duties and Mr Abdalla told her they were short-staffed and that she had to do it. She also said that Fatima had been given one Saturday to work and had "tricked" the Claimant into working it for her. In his investigation interview Mr Abdalla said that he had no recollection of the Claimant working three Saturdays in a row or of telling her she was unhappy about that. He said that he had mistakenly put a different colleague down to work three Saturdays on a previous occasion and when that colleague raised a concern he changed it.
- 3.35 The Claimant's complaint about being forced to work three Saturdays in July is of course somewhat inconsistent with her email to Mr Barrett indicating that she had

made up five hours by doing overtime on Saturday 15 July. Nonetheless, given what she said in the sales team complaint and in her subsequent interview, and in circumstances where Mr Abdalla accepted that the Claimant may have raised this with him, the Tribunal found that when the rota came out, the Claimant raised a concern with Mr Abdalla about Saturday shifts and that he told her they were short-staffed and she needed to work the shifts.

- 3.36 However, the evidence before the Tribunal simply did not support an inference that by telling the Claimant that he needed her to work those Saturdays Mr Abdalla treated the Claimant less favourably because of any protected characteristic. In particular, Ms Pickering's evidence was that Mr Abdalla forced her to work a particular Saturday. She also said that Mr Abdalla made efforts to ensure that a colleague called Fatima did not have to work Saturdays. She referred to an occasion on which Mr Abdalla forced another colleague called Sophie to work a Saturday. She went on to say that Mr Abdalla and Fatima were good friends or were related and that Fatima was given preferential treatment for that reason. The Claimant's own evidence was that Fatima was given preferential treatment and that she was friends with or related to Mr Abdalla. The Tribunal also noted that Fatima only joined the company in late May and that new starters do not work Saturdays initially. In those circumstances, the Tribunal had some doubts about whether Fatima was treated preferentially. However, the clear thrust of the evidence was that even if she were, (1) it was not just the Claimant who was obliged to work Saturdays and (2) the reason for it was personal friendship or a family relationship between Fatima and Mr Abdalla. There was no evidence to support an inference that the Claimant was being treated less favourably than a man, a person without a mental health disability or someone of different ethnic origins in respect of Saturday working.
- 3.37 At the end of her witness statement the Claimant asserted that Mr Abdalla and Fatima practised fundamentalist Islam and that he was prejudiced towards her because she did not. Mr Abdalla was not asked about that and there was nothing beyond the Claimant's assertion in her witness statement that he practised fundamentalist Islam. That assertion appears to have been based on the Claimant's perception of the way Mr Abdalla treated her. The Tribunal did not accept the Claimant's evidence that Mr Abdalla practised fundamentalist Islam. The evidence before the Tribunal did not justify any inference that the Claimant was treated less favourably because of religion.
- 3.38 In any event, Mr Abdalla's evidence was that the Claimant's race, religion, gender and disability had nothing to do with his treatment of her. The Tribunal had no hesitation in accepting that evidence.
- 3.39 Another of the Claimant's complaints is that Mr Abdalla refused her request for annual leave to celebrate Eid, but granted Fatima's requests and indeed took such leave himself. The first relevant occasion was in June 2017. The rota for that month shows that Mr Abdalla took annual leave from Friday 23 to Wednesday 28 June and that Fatima took annual leave on Monday 26 and Tuesday 27 June 2017. The Claimant's evidence was that on Wednesday, 21 June 2017 she asked Mr Abdalla in person if she could take leave on Tuesday 27 June to celebrate Eid with her family. Mr Abdalla told her he would check the rota. He did so, then emailed her. The Tribunal saw the email. It said, "Sorry Fozia, if I change days it will leave us

short on two days whereas as it stands we will be short on one day.” The Claimant replied, “OK.” Later that day she emailed Mr Abdalla again to ask whether she could have Monday 26 June instead. She said, “I will be seeing my family for Eid this weekend in Nottingham, so would be great to have a longer weekend. If not let me know and we’ll keep it for the Thursday.” Mr Abdalla replied to say, “Sorry but that would leave two people for the evening!” The Claimant took leave on the Thursday.

- 3.40 Mr Abdalla was asked about the rota. He explained that Fatima was “starred”. That meant that she did not count towards the staffing complement because she was at that stage so new to the role. There was indeed an asterisk next to Fatima’s name on the June rota. The rota was consistent with what Mr Abdalla had said in his emails at the time. A staffing level of three was flagged as orange and counted as short-staffed. The evening shift for 26 June 2017 had only three members of staff and was flagged as orange. If the Claimant had been absent on 27 June 2017 the evening shift on that day would also have reduced from 4 to 3 staff members. The Claimant was scheduled to work the afternoon and evening on 26 June 2017, so giving her that day would indeed have reduced the evening shift to 2 members of staff.
- 3.41 The Respondent’s holiday policy said that employees should request annual leave at least six weeks in advance for more than a week’s leave and at least three weeks in advance for less than a week’s leave. However, Mr Abdalla said that he would grant leave if he could. He did so on a first come first served basis. The reason the Claimant did not get annual leave on this occasion is because she did not ask for it until the week before. He understood completely that the Claimant would only have found out the precise date on which Eid would fall at relatively short notice. However, he had booked the entire possible period by way of precaution and Fatima had booked two days on the same basis. That leave was booked before the Claimant made her request. That is why the Claimant’s request was turned down.
- 3.42 The second occasion about which the Claimant complained was September 2017. She said that on that occasion her request for annual leave on Friday 1 September 2017 for Eid was refused. Fatima asked after her and Fatima’s request was granted. When he was asked about it during the course of the grievance investigation, Mr Abdalla said that he recalled the Claimant being on holiday for the first Eid but did not recall her requesting holiday for the second. He assumed she did not want the day off. In cross-examination Mr Abdalla again suggested that the Claimant had taken leave for the first Eid. That was not entirely correct, but it seemed to the Tribunal that he had assumed that the leave she took on Thursday, 29 June 2017 was to celebrate Eid when it was not. Given Mr Abdalla’s lack of recollection about the September and given that the Claimant’s evidence was consistent with what she said during the grievance investigation, the Tribunal accepted that the Claimant requested a day’s leave which was declined and that Fatima subsequently requested leave and that was granted. However, it was again important to scrutinise the rota. Fatima was scheduled to work in the morning and afternoon, whereas the Claimant was scheduled to work in the afternoon and evening. If the Claimant had taken annual leave there would only have been two members of staff on the evening shift, whereas allowing Fatima annual leave did not have that effect. The Tribunal accepted Mr Abdalla’s evidence that when

considering leave requests he simply looked at the rota to see whether the request could be accommodated. Had he done so, it is clear that the Claimant's request could not be accommodated whereas Fatima's could. Mr Abdalla's evidence was that the Claimant's race, religion, gender and disability had nothing to do with his treatment of her and the Tribunal accepted that.

- 3.43 As mentioned above the Claimant had triggered stage I of the absence management policy. Mr Jones therefore wrote to her on 11 August 2017 to invite her to a stage I meeting on 23 August 2017. The meeting was to be conducted by Mr Jones because Mr Abdalla had not yet conducted such a meeting. However, Mr Abdalla was to attend as an observer. Mr Jones recorded that in his invitation letter.
- 3.44 On 15 August 2017 the Claimant asked to meet Mr Jones. Again, she covertly recorded that meeting. She handed Mr Jones the document referred to above as the sales team complaint. She said that this was a complaint put forward on behalf of the whole sales team. We note that the Claimant had written the document and that a substantial number of the complaints were her own. There were also complaints about Mr Abdalla's competence and about the Respondent's procedures. There was evidence in the Tribunal file to suggest that colleagues had been asked to sign the complaint but had declined. The Claimant's transcript of the meeting shows that Mr Jones read the complaint and then gave an immediate reaction to the concerns raised. He described some of the complaints as "rubbish", gave explanations for other aspects and in some respects assured the Claimant that these matters would be looked into.
- 3.45 The Claimant's evidence to the Tribunal was that she had been raising concerns about Mr Abdalla's treatment of her with Mr Jones for some time. Mr Jones said that this was the first time he was aware that the Claimant had anything other than very minor issues with Mr Abdalla. The transcript appeared to the Tribunal to support Mr Jones's account. The Claimant was not saying to Mr Jones that she had already raised these concerns with him or indeed complaining that he had not done anything about them. On the contrary, she was saying that the team felt that Mr Jones as a manager should know about these things so they had written them down. At one stage she said that the team did not think Mr Jones knew about the concerns. At another stage Mr Jones said that he had "no idea" about them. The Claimant did not contradict him. The Tribunal therefore accepted that this was the first time the Claimant had raised anything other than a minor matter regarding Mr Abdalla with Mr Jones.
- 3.46 On 22 August 2017 the Claimant went to speak to Mr Abdalla again about the failed audit. The failed audit affected the Claimant's pay and her evidence to the Tribunal was that as payday was approaching she wanted to know how much she would be paid so she went to ask Mr Abdalla about it. Her evidence was that he leaned aggressively towards her and said in a threatening voice, "It's a fail." She said that the incident "scared" her.
- 3.47 Mr Abdalla's evidence was that it was the Claimant who was aggressive and shouting at him. He said that he told her he had been through all of the audit fails with Ms Corps. The Claimant asked if he had listened to her call and he said that he had. She asked if it had been referred to Mr Jones and Mr Abdalla confirmed

that it had. She then said in a loud and aggressive voice, “when Ben comes back tell him I need to see him.” Mr Abdalla said that he told the Claimant she could find Ben herself and she made a comment along the lines of, “yes I know I can get to him as I do have legs.” Mr Abdalla said that he did not raise his voice and tried to remain calm but he did think the Claimant was being completely unreasonable and rude.

- 3.48 A number of the Claimant’s colleagues were asked about this incident during the grievance investigation. The Tribunal saw written notes of their interviews, made by Ms McDonald and signed by them. One colleague, NP, said that the Claimant had asked Mr Abdalla why she failed the audit. Mr Abdalla said that he looked over it and that it was a fail and that if the Claimant wanted to discuss it further she would need to go to Mr Jones. The Claimant said that she knew she could go to Mr Jones she had got legs. NP was asked how she would describe the tone of the conversation and she is recorded as saying that the Claimant was “mad” and not happy. Mr Abdalla was “calm” and did not do anything. She said that if anything Mr Abdalla was calm and the Claimant was “bullying” him a bit.
- 3.49 Ms Pickering was also asked about this incident. The notes of her investigation meeting were less than one page long and she signed them on 17 October 2017. They record her saying she did not hear what Mr Abdalla said as he was softly spoken but that she remembered that the Claimant “got quite irate.” She did not hear what she said but Mr Abdalla looked calm and did not look annoyed. Ms McDonald said that Mr Abdalla had mentioned that Ms Pickering had approached him after the conversation to ask if he was okay. Ms Pickering said that she did ask Mr Abdalla if he was alright. The Claimant had spoken to her so she knew how the Claimant had been with Mr Abdalla over the last few weeks. Ms Pickering thought that the Claimant had been unfair towards Mr Abdalla and that it was not nice for him to be in that position, particularly over call audits over which he did not have control.
- 3.50 The version of events set out in Ms Pickering’s witness statement was inconsistent with that. She said that the notes had been manipulated to favour the Respondent, that she would not have used some of the words in the notes, such as “irate”, and that Ms McDonald and Mr Jones did most of the talking. She said that she had said, “Hi, you okay?” to Mr Abdalla as a casual greeting, that he did not appear to be upset in any way and that she did not see or hear anything that might have led her to think so. She was asked in cross-examination why she had signed the notes as accurate at the time and she said that she had not read them before signing them. They were very brief and the Tribunal noted that they were not signed there and then but were provided to Ms Pickering after the event to sign. We found her evidence that she did not read them implausible. The Tribunal noted that Ms Pickering indicated in her witness statement that Ms McDonald had subsequently asked for her permission to use the grievance investigation notes in these proceedings. She said that she had told the Respondent that she did not give her permission to use anything “against” the Claimant in any way. She was asked in cross-examination why she thought what she had said would be used against the Claimant, if she had not given a version of events that was critical of the Claimant. At one stage she said that she believed her words would be twisted and she did not want that to happen. At another stage she said that she did not want it to affect her friendship with the Claimant. The Tribunal found that the version of events Ms

Pickering gave during the course of the grievance investigation was accurate. That version was consistent with what others said at the time. Her evidence that she did not read the notes at the time was implausible. If she had told the investigators the version of events she gave the Tribunal, she would have no reason to refuse consent for it to be disclosed.

- 3.51 Accordingly, the Tribunal preferred Mr Abdalla's version of events, which was consistent with what the Claimant's colleagues said in the grievance investigation. We find that the Claimant approached Mr Abdalla. It was she who was irate and unhappy and who raised her voice. Mr Abdalla remained calm and behaved appropriately.
- 3.52 As noted above, it also appears to have been 22 August 2017 when Mr Abdalla told the Claimant that if she did go up a level it would come into effect from October not August.
- 3.53 That day the Claimant wrote a letter of resignation. She said that she had been subjected to unacceptable discrimination and that the salary increase she had been promised at interview when she completed her six-month probationary period had not materialised. She referred to a detrimental impact on her health and well-being. She said that her concerns had not been taken seriously and that in the absence of support she had no choice but to resign.
- 3.54 The Claimant did not immediately submit her resignation. Rather, she attended the stage I meeting the next day, 23 August 2017. The meeting was conducted by Mr Jones. Ms McDonald was present and Mr Abdalla was there as an observer. Ms McDonald kept notes. After the introductory parts of the meeting the Claimant said that Mr Jones and Mr Abdalla had been overheard earlier in the week saying that she had confirmed her attendance at the stage I meeting by letter. The Claimant had been told that Mr Jones had said that they sent hundreds of these letters and no one had ever responded in writing. She had also been told that Mr Jones and Mr Abdalla had been saying that the Claimant "could not argue this one" and that it was "black and white." Mr Jones accepted that he might have said what had been reported to the Claimant because she was the first person to respond in writing. The Claimant asked what was meant about her not being able to argue her way out of this one. Mr Abdalla said that all he thought Mr Jones said was that this was a sickness meeting and was fairly straightforward.
- 3.55 That was the only occasion on which Mr Abdalla is recorded as speaking during the entire meeting, which lasted almost an hour. The Claimant placed great weight on the fact that Mr Abdalla had spoken on that occasion. She said that it showed that he was wrong to say that he was only present as an observer. In turn, she said that this showed that the reason Mr Abdalla had not denied accusations made about him later in the meeting was because they were true. Mr Abdalla said that he was biting his tongue all through the meeting because he was aware that he was just supposed to be observing, but he wanted to respond to the Claimant's allegations and defend himself against them. The Tribunal accepted Mr Abdalla's evidence. We did not consider that the fact he spoke once at the start of the meeting, in the circumstances described, shows that he was actively participating in it. He did not speak again during the meeting. That is plainly consistent with his

being there as an observer, and that being the reason he did not respond to the Claimant's accusations there and then.

- 3.56 The first part of the meeting was a discussion of the Claimant's absence record and reasons for her absences. After an adjournment, Mr Jones told the Claimant that he had decided not to issue a sickness absence warning or target. In making the decision he had taken into account her ongoing condition, how it had arisen and what the Claimant had done to try and help her recovery. He also gave the Claimant an assurance that some of the concerns she had raised would be looked into and said that if anything else cropped up she should bring it to him.
- 3.57 The Claimant referred at that stage to her view that Mr Abdalla had moved the goalposts in terms of her level 5. She said that he had told her yesterday that if she did go up a level it would come into effect from October. She referred to "everything else that happened yesterday" as well as her health and said that she was leaving. She handed over her resignation letter. Mr Jones and Ms McDonald made clear that they did not want the Claimant to resign. They also made clear that the concerns she had raised during the meeting and in the document given to Mr Jones the previous week would be looked into. The Claimant said that she would work her notice period and she was told that she could withdraw her resignation at any point during her notice period.
- 3.58 Ms McDonald wrote to the Claimant on 25 August 2017. She reiterated the assurance that she and Mr Jones would be looking into the Claimant's concerns. She also confirmed that it remained open to the Claimant to withdraw her notice or to ask for some time away from the business to consider her decision.
- 3.59 Ms McDonald kept a log of conversations with the Claimant after that date. Among other things, it was agreed that Mr Jones would speak to Mr Abdalla and ask him not to speak to the Claimant during her notice period. On 1 September 2017 Jones confirmed that he had done so.
- 3.60 On 13 September 2017 the Claimant went to see Ms McDonald because she had failed another call audit for the same reason as the disputed call from the previous month. Ms McDonald said that this would need to be referred to Mr Richards-Smith along with the Claimant's other call. The Claimant asked Ms McDonald if her concerns were being taken seriously because she did not feel that anything was going to result from raising them. She said that she had pretty much been told that Mr Abdalla would not be leaving and she asked how he could still be working there when this had been said about him and he was in his probation period. Ms McDonald assured the Claimant that her concerns were being taken seriously but made clear that decisions could not be made without a thorough investigation. That was happening. The Claimant then said that she thought that Mr Abdalla "hated" her and it was at this stage that she mentioned that he had questioned her name when she first started. Ms McDonald said that she would arrange a meeting between herself, the Claimant and Mr Jones that afternoon to discuss the audit. In the event, the Claimant requested that the meeting take place the following day.
- 3.61 A meeting did take place the following day, 14 September 2017. Ms Wilkinson also attended. During the discussion, Ms McDonald and Mr Jones confirmed that Mr

Jones was the next level to consider the second disputed audit outcome and Mr Jones confirmed that he would look into it.

- 3.62 Ms McDonald's notes subsequently indicate that a meeting was arranged by Mr Richards-Smith on 20 September 2017 between the Claimant and Ms Corps to discuss the audit fails. Mr Richards-Smith gave evidence that he only got involved in the audit process if there was a disagreement between the line manager and the audit team. He could not remember the Claimant's audits being referred to him in that context. He was aware that Ms Corps was due to meet the Claimant. Emails in the Tribunal's file confirm that arrangements were made for the Claimant to meet Ms Corps on 20 September 2017. The Tribunal was not told the outcome of that meeting.
- 3.63 The Claimant went to speak to Mr Richards-Smith on 21 September 2017. She told him that she felt uncomfortable because Mr Abdalla was looking at her in a strange way. Mr Richards-Smith confirmed that he had already spoken to Mr Abdalla that morning, after receiving the Claimant's email requesting a meeting. He confirmed that he had asked Mr Abdalla to have as little interaction with the Claimant as possible. The Claimant again said that she did not feel her concerns were being properly investigated and Mr Richards-Smith assured her that the investigation was in hand. The Claimant again said that she had been told that nothing would happen to Mr Abdalla as a result of her concerns. Mr Richards-Smith assured her that a decision had not been made and also reminded her that a decision could not be made until the investigation was complete. It was suggested to Mr Richards-Smith in cross-examination that he failed to investigate the Claimant's grievance. He said that the people qualified to investigate it did so. He was responsible to make sure it was investigated. He did that. He did not personally investigate it. There is no suggestion that the Claimant raised any further concern about her failed call audit when she spoke to Mr Richards-Smith on 21 September 2017.
- 3.64 The Claimant's last day of employment was 22 September 2017.
- 3.65 Mr Jones investigated the issues raised in the sales team complaint and the concerns the Claimant raised subsequently with Ms McDonald and others. There was some delay in holding an initial meeting with the Claimant, partly because of annual leave and partly because of sick leave. The meeting took place on 12 September 2017. It lasted almost an hour and the Claimant was asked in detail about all the matters she had raised. We have already made some reference to what was said at that meeting above. Mr Jones then interviewed Mr Abdalla on 27 September 2017 and we have also referred to the notes of that meeting. Five other team members were interviewed in early October, including Ms Pickering and NP, again see above. Mr Jones prepared a detailed investigation report, which he signed on 11 October 2017. In some respects concerns raised by the Claimant were upheld and Mr Jones set out steps that had been taken or would be taken. For example, one of the concerns was that Mr Abdalla did not know about the company's roles or products and yet was telling the sales team how to do their job. Mr Jones set out the training that had been provided to Mr Abdalla and would be provided to him. That included specific audit training with Ms Corps, so that she could discuss each call in detail with Mr Abdalla and explain to him the reason for any marks and the related policies. Other aspects of the grievance were rejected.

For example, one complaint was that the sales team were being given extra tasks such as wrap notes which were totally unnecessary and time wasting. Mr Jones confirmed that wrap notes had been implemented in all operational departments and were regarded as important. There was an acknowledgement that the audit feedback or appeal process could have been handled more effectively by Mr Abdalla and Mr Jones referred again to the audit specific training for Mr Abdalla and also confirmed that a specific audit feedback/referral/appeal process had been agreed and implemented with immediate effect. As regards the Claimant's complaint about not being promoted to level 5, Mr Jones said that he did not promise the Claimant a pay rise upon successful completion of her probationary period. Mr Jones confirmed that Mr Abdalla had misunderstood the process when he told the Claimant that her level would be reviewed in August. The soonest that a change could take effect was October. Mr Jones said that the business acknowledged that there had been miscommunication and that Mr Abdalla had since been informed of the dates that changes to levels of pay could take effect. Overall, the Tribunal considered that a careful and thorough investigation and consideration had been carried out. The outcome reflected a willingness to learn and improve as a business and set out the changes and improvements that had been made or proposed.

- 3.66 The Claimant drew attention to the fact that Mr Jones finalised and signed the report on 11 October 2017 at a time when some of the investigation notes had not yet been signed. Mr Jones was of course present at the meetings and knew what had been said. He said that if any of the witnesses had changed the notes he would have made changes to the report if he had to. The Tribunal accepted that evidence. Given the thoroughness and balance of the report, we were quite satisfied that Mr Jones, with the advice of Ms McDonald, took the Claimant's concerns seriously and wanted to ensure they were properly investigated and addressed.

Legal principles

- 4.1 Claims of discrimination are governed by the Equality Act 2010, s 4 of which provides that race, religion, disability and sex are protected characteristics. Section 39 Equality Act 2010 makes it unlawful for an employer to discriminate against an employee by, among other things, subjecting her to detriment or dismissing her and s 40 makes it unlawful for an employer to harass an employee.
- 4.2 Section 39 Equality Act 2010 makes clear that dismissal includes what is usually called constructive dismissal, i.e. where the employee terminates the employment contract in circumstances where she is entitled to do so without notice by reason of the employer's conduct. In considering whether an employee has been constructively dismissed, the issues for a Tribunal are:
- 4.2.1 Was there a breach of the contract of employment?
 - 4.2.2 Was it a fundamental breach going to the root of the contract, i.e. such as to entitle the employee to terminate the contract without notice?
 - 4.2.3 Did the employee resign in response and without affirming the contract?
- 4.3 It is an implied term of the contract of employment that the employer will not, without reasonable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Individual actions taken by an employer that do not by themselves

constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust and confidence, thereby entitling the employee to resign and claim unfair dismissal. The final act in such a series (or “last straw”) need not be of the same character as the earlier acts but it must contribute to the breach of the implied term.

- 4.4 The time limits for bringing claims of discrimination are governed by s 123, which provides, so far as material, as follows:

123 Time limits

(1) Subject to sections 140A and 140B, proceedings on a complaint within section 120 may not be brought after the end of -

- (a) the period of 3 months starting with the date of the act to which the complaint relates, or
- (b) such other period as the employment Tribunal thinks just and equitable.

...

(3) For the purposes of this section -

- (a) conduct extending over a period is to be treated as done at the end of the period;
- (b) failure to do something is to be treated as occurring when the person in question decided on it.

...

- 4.5 As regards extending time, the Tribunal has a wide discretion under s 123(1)(b) to do what it thinks is just and equitable in the circumstances. Whether a Claimant succeeds in persuading a Tribunal to grant an extension in any particular case is a question of fact and judgment, to be answered case by case by the Tribunal.

- 4.6 The factors that are to be considered by the civil courts under s 33 of the Limitation Act 1980 in determining whether to extend time in personal injury actions may provide a helpful checklist. Under that section the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the Claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

- 4.7 The burden of proof is dealt with by s 136 of the Equality Act 2010. The Court of Appeal in *Igen Ltd v Wong* [2005] ICR 931 gave authoritative guidance as to the application of these provisions and the Tribunal has had regard to it. The Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 made clear that it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

- 4.8 Turning to the types of discrimination that are raised in this claim, sections 13, 15, and 26 Equality Act 2010 provide, so far as material:

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

...

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if –

- (a) A treats B unfavourably because of something arising in consequence of B's disability, and
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

...

26 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.

...

- 4.9 Under s 13, direct discrimination arises where (1) an employer treats a person less favourably than it treats or would treat others and (2) the difference in treatment is because of a protected characteristic. In answering the first question the Tribunal must consider whether the employee was treated less favourably than an actual or hypothetical comparator whose circumstances were not materially different. The second question entails asking why the employee received less favourable treatment: was it because of a protected characteristic or was it for some other reason?
- 4.10 Under s 26, there are three elements to the definition of harassment: (1) unwanted conduct; (2) the specified purpose or effect; and (3) that the conduct is related to a relevant protected characteristic.
- 4.11 When considering the proscribed purpose or effect, the EAT has made clear that the word “violating” dignity is a strong word and means more than hurting or offending. Further, an environment means a state of affairs. A one-off incident is not a state of affairs. It may be created by a one-off incident but only if the effects are of longer duration. In considering whether the conduct had the specified effect, the Tribunal must consider both the actual perception of the complainant and the question whether it is reasonable for the conduct to have that effect. That entails consideration of whether, objectively, it was reasonable for the conduct to have that effect on the particular complainant.

Application of the law to the facts

- 5.1 Against the detailed findings of fact set out above, the Tribunal turns to the issues in this case. In many respects our conclusions flow inevitably from the findings of fact, so the conclusions can be more briefly stated.
- 5.2 We started with the complaints of direct discrimination. In the light of the findings above, the Tribunal's conclusions were as follows:
 - 5.2.1 Mr Abdalla did sometimes hold unscheduled meetings with the Claimant, for example the meeting on about 18 or 19 July 2017. However, there was nothing to suggest that by doing so he subjected her to a detriment. This was just a part of normal line management. Sometimes, managers need to discuss matters with those who report to them. In any event, no evidence was presented to the Tribunal to suggest that by holding unscheduled meetings with the Claimant, Mr Abdalla treated her less favourably than he treated or would treat anybody else. The Claimant has not proved facts from which an inference of discrimination could be drawn.
 - 5.2.2 The Claimant was put down on the rota to work three (or two and a half) Saturdays in July 2017. She did raise that with Mr Abdalla and he told her that he needed her to work the shifts because he was short-staffed. That did amount to a detriment. However, as explained in the findings of fact, the only person with whose treatment she compared her own was Fatima. On the Claimant's own case, the reason Fatima was given preferential treatment was a friendship or family relationship with Mr Abdalla. The Tribunal rejected the bald assertion that Mr Abdalla and Fatima practised fundamentalist Islam and that this led to a difference in the treatment of the Claimant. We found that if there was a difference in treatment between the Claimant and Fatima as regards Saturday shifts, that was because of a friendship or family relationship between Fatima and Mr Abdalla. It was not because of the Claimant's race, religion, gender or disability. The Claimant did not prove facts from which an inference of less favourable treatment on any of those grounds could be drawn. In any event, the Tribunal accepted Mr Abdalla's evidence that his treatment of the Claimant had nothing to do with any of those protected characteristics.
 - 5.2.3 As set out in the findings of fact, Mr Abdalla did not fail to investigate the Claimant's failed call audit. He raised that with Ms Corps, whose decision it was, and pursued it on the Claimant's behalf. Ms Corps then addressed it with Mr Abdalla's line manager and they agreed that the call had been correctly marked as a fail. It may be that there was some delay in Mr Abdalla communicating that decision to the Claimant, but he did not fail to investigate or deal with that audit outcome. In any event, the Tribunal accepted Mr Abdalla's evidence that his treatment of the Claimant had nothing to do with any of her protected characteristics.
 - 5.2.4 For the reasons given in the findings of fact, there was no failure by Mr Richards-Smith to investigate an audit outcome. He only became involved with disputed audits if there was a disagreement between the line manager and the audit team. Here, the audit was in fact referred to a more senior line manager, Mr Jones, and there was no dispute between him and the audit team. There was no evidence that the audit was referred to Mr Richards-Smith before mid-September 2017. It was Ms McDonald who first mentioned involving Mr Richards-Smith when the Claimant spoke to

her about the second failed audit. She then corrected the position, to say that the next step was for Mr Jones to look at it, and on 14 September 2017 he confirmed that he would do so. Mr Richards-Smith became involved on about 20 September 2017. He was aware at that stage that Ms Corps was going to meet the Claimant to discuss the audits. That was her role. That happened on 20 September 2017. The Claimant did not raise any concern with Mr Richards-Smith about the audits when they spoke the next day. There was nothing to suggest that Mr Richards-Smith should have investigated the audit outcome, was asked to do so or failed to do so. As Managing Director, he had oversight. He was aware that the appropriate person was addressing it with the Claimant. In any event, the Claimant identified no evidence to suggest that Mr Richards-Smith treated her any differently from the way he treated or would have treated anybody else of a different race, religion or gender, or without a mental health disability.

5.2.5 For the reasons set out in the findings of fact, there was no failure by Mr Jones to investigate and resolve the Claimant's grievances. There was some delay, but that was in part because of annual leave and in part because of sick leave. The Claimant was repeatedly reassured that her concerns would be investigated. Mr Jones did carry out a thorough investigation and addressed the concerns raised. From the comments she made to Ms McDonald and Mr Richards-Smith, it appears that what the Claimant wanted to happen was for Mr Abdalla to be removed from his post. As Ms McDonald and Mr Richards-Smith both reiterated, that would have been entirely inappropriate before any investigation had been carried out and concluded. Once that had happened, the Claimant's concerns were upheld in part and steps taken to address them. They were not upheld in other respects. The Claimant may disagree with the outcome of the grievance, but that does not mean that Mr Jones failed to investigate or resolve her concerns. In any event, the Claimant identified no evidence to suggest that Mr Jones treated her any differently from the way he treated or would have treated anybody else of a different race, religion or gender, or without a mental health disability.

5.2.6 There was no failure by Mr Richards-Smith to investigate the Claimant's grievances. That was not his job as Managing Director. His job was to ensure that they were investigated and addressed by the appropriate people and he did so. In any event, the Claimant identified no evidence to suggest that Mr Richards-Smith treated her any differently from the way he treated or would have treated anybody else of a different race, religion or gender, or without a mental health disability.

5.3 For those reasons, none of the complaints of direct discrimination is well-founded.

5.4 We turn next to the harassment claim. As set out in the findings of fact, the Tribunal found that Mr Abdalla asked the Claimant about why she had a Muslim first name and a non-Muslim surname. The Tribunal was also prepared to accept that this was unwanted conduct by the Claimant. She referred to being confused and wondering why the question was asked, and the Tribunal considered that this was sufficient to indicate that the conduct was unwanted. As the Respondent accepted, it plainly related to religion. The key question for the Tribunal was whether it had the purpose or effect of violating the Claimant's dignity or creating an intimidating,

hostile, degrading, humiliating or offensive environment for her. The Tribunal found that it did not. As set out in the findings of fact, it did not have that purpose. Mr Abdalla's purpose was not to offend the Claimant, but to see whether they had something in common, namely being of mixed race. The Tribunal was also quite satisfied that the question did not have the effect proscribed. The Claimant's own evidence was simply that she was "confused". That does not reach the threshold of violating her dignity. Further, this was a one-off question asked in private that was answered without any indication of concern at the time and never referred to again. That did not create an ongoing environment of the kind referred to in s 26. The complaint of harassment therefore does not succeed.

- 5.5 The next complaints are those of unfavourable treatment because of something arising in consequence of disability.
- 5.6 As set out above, the Tribunal found that Mr Abdalla did sometimes hold unscheduled meetings with the Claimant. Although the Respondent accepted that this was unfavourable treatment, the Tribunal found that this was just part of normal line management. Even if it was unfavourable treatment of the Claimant, the Tribunal had no hesitation in finding that Mr Abdalla did not hold unscheduled meetings with the Claimant because of her anxiety and vulnerable state, the fact that she was on medication or the fact that she undertook reduced hours and duties for a period. There was nothing in the evidence to suggest that any of these things *caused* Mr Abdalla to hold unscheduled meetings with the Claimant.
- 5.7 Again, as set out above, the Tribunal found that Mr Abdalla did put the Claimant down on the rota to work three (or two and a half) Saturdays in July 2017. She did raise that with him and he told her that he needed her to work the shifts because he was short-staffed. The Tribunal accepted that this amounted to unfavourable treatment. However, again, there was nothing in the evidence to suggest that Mr Abdalla did this *because* of the Claimant's anxiety and vulnerable state, the fact that she was on medication or the fact that she undertook reduced hours and duties for a period and the Tribunal found that he did not.
- 5.8 For the reasons set out above, no promise was made to the Claimant that she would be granted a promotion or pay rise to level 5 after six months. Strictly speaking, the unfavourable treatment complained of did not take place. However, even if the complaint of unfavourable treatment had simply been not moving the Claimant to level 5, the context in which Mr Abdalla discussed the Claimant's wish to move to level 5 with her on 25 May 2017 was that no promise had been made. At that stage, he told her that he would look to move her up at the next one-to-one. For the reasons explained in detail above, the Tribunal found that Mr Abdalla may then have given the impression on about 18 July 2017 that he was basing his assessment of the Claimant's performance on a time when she was on reduced hours and duties. However, he made absolutely clear on 20 July 2017 that he was not doing so. He would only be assessing the Claimant on the basis of her performance when she was on full hours and duties. After that, he continued to try to have her moved up a level at her next one-to-one. It was only because Mr Jones told him that October was the first occasion on which a level move could now take place that Mr Abdalla was unable to progress the Claimant as planned. Therefore, the Tribunal found that the reason the Claimant was not moved from level 4 to level 5 had nothing to do with an assessment of her performance based on a time when

she was not doing full hours or duties. Nor was it because of her anxiety and vulnerable state, or the fact that she was on medication.

- 5.9 For the reasons explored in detail above, the Tribunal found that Mr Abdalla did not fail to investigate the Claimant's audit outcome. Even if he had, there was no basis for suggesting that his approach to the audit outcome had anything to do with the Claimant's anxiety and vulnerable state, the fact she was on medication or the fact that she had a period on reduced hours and duties.
- 5.10 There was therefore no unfavourable treatment because of something arising in consequence of the Claimant's disability. The Tribunal did not consider whether the Respondent's actions were a proportionate means of achieving a legitimate aim in those circumstances.
- 5.11 Although it is, of course, a preliminary issue, the Tribunal turned next to the question of time limits. On the face of it, the Claimant's discrimination complaints above related to events that took place before 21 September 2017, and were therefore out of time. The Tribunal considered whether it was just and equitable to extend time for bringing them. We found that it was. Fundamentally, the Tribunal was able on the evidence before it to determine the Claimant's complaints. The Respondent had already been required to deal with those claims at the Tribunal. Furthermore, the question of what was just and equitable included a consideration of justice to both parties. The Tribunal considered that it was just to the Claimant to determine her complaints, given that it was able on the evidence to do so, but also that justice to the Respondent militated in favour of extending time, to enable those complaints to be determined on their merits.
- 5.12 That brings us finally to the allegation of discriminatory constructive dismissal. For the reasons set out above, none of the discriminatory acts occurred as alleged by the Claimant. That means that no complaint of discriminatory constructive dismissal can succeed: even if the Respondent had been in fundamental breach of contract, none of its conduct was discriminatory.
- 5.13 For those reasons, none of the claims is well-founded.

Employment Judge Davies
28 March 2019

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