

# EMPLOYMENT TRIBUNALS

## BETWEEN

Claimant

MISS Z ALIPOURBABAIE

AND

Respondent

DYSON TECHNOLOGY LTD (R1)  
MR IAN MINARDS (R2)

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL      ON: 9<sup>TH</sup> / 10<sup>TH</sup> / 11<sup>TH</sup> / 12<sup>TH</sup> / 13<sup>TH</sup> / 16<sup>TH</sup> / 17<sup>TH</sup>  
MARCH 2020

EMPLOYMENT JUDGE MR P CADNEY  
(SITTING ALONE)

MEMBERS: MR C WILLIAMS  
MR H LAUNDER

APPEARANCES:-

FOR THE CLAIMANT:- MS K ANNAND (COUNSEL)

FOR THE RESPONDENT:- MR P EPSTEIN Q.C. (COUNSEL)

## JUDGMENT

The unanimous judgment of the tribunal is that:-

### First Respondent

1. The claimant's claims of harassment related to the protected characteristic of religion as set out in allegations 1,2 and 6 are well founded and upheld.
2. The claimant's claims of harassment relating to the protected characteristic of religion in allegations 3, 5,8,9,10 are not well founded and are dismissed.
3. The claimant's allegations of harassment related to the protected characteristic of race are not well founded and are dismissed.

4. The claimant's claim of direct discrimination on the grounds of religion in allegation 3 is well founded and upheld
5. The claimant's claim of direct discrimination on the grounds of race in allegation 3 is not well founded and is dismissed.
6. The claimant's allegations of direct discrimination on the grounds of the protected characteristic of race and/or religion in allegation 1,2, 5, 6, 8, 9,10 are not well founded and are dismissed.
7. The claimant's allegations of victimisation are not well founded and are dismissed.
8. The claimant's claim of constructive unfair dismissal is well founded and is upheld.

#### Second Respondent

9. The claimant's allegations of direct race and/or religious discrimination against the second respondent not well founded and are dismissed.

### Reasons

1. By this claim the claimant brings allegations of direct discrimination (s13 Equality Act 2010 on the basis of the protected characteristics of race and religion) against the first respondent; harassment (s26 Equality Act 2010 race and religion) against the first respondent; victimisation (s27 Equality Act 2010) against the first respondent; and constructive unfair dismissal against the first respondent; and claims of direct discrimination (race and religion) against the second respondent. The claims are set out in a Schedule "Clarification of Claims" which will form the basis of this judgment. The allegations set out in that document also form the basis of the events the claimant relies on as individually or cumulatively amounting to a fundamental breach of contract on the part of the respondent in respect of the constructive dismissal claim.
2. In respect of the protected characteristic of race the claimant relies on her Middle-Eastern Asian ethnic origin and her Iranian nationality. In respect of religion she relies on the fact that she is a Muslim, albeit non-practising. There is no dispute that the claimant is entitled to rely on both the protected characteristics.
3. We will as briefly as possible set out the background facts that are not in dispute, and to avoid repetition will set out the relevant factual disputes and our conclusions in relation to the individual allegations in the discussion of them.

## Background Facts

4. The claimant (referred to as Mehri in some of the internal documents) began working for the first respondent in December 2014 as an Electronic Systems Engineer. In early 2016 she began working on a new project Automotive N526. She reported to Mr Claudio Zizzo who had been appointed to lead the Electronic Engineering team for the project. Mr Ian Minards (R2) was appointed as Vice President Automotive in 2016. In January 2017 Mr Kamaljit Chana (referred to as Kam in some of the internal documents) joined N526 as Senior Technical Project Manager. By this point the claimant had been appointed as Acting Systems Team Lead. In her witness statement the claimant contends that she had no problems at work prior to this point, and all of the allegations with which we are concerned start from this point.
5. Promotion – As a significant part of the claimant’s claims relate to the failure to promote her, we will set out the factual narrative here. Where there are disputes that it is necessary for us to resolve they will be dealt with as part of the individual allegations.
6. The respondent has a somewhat unusual promotion procedure. Individuals do not apply for promotion but are recommended by the “Head of” the relevant section. There was no formal system for assessing the individuals, or of seeking any feedback from anyone other than the person proposing them and no paperwork recording the decision or the reasons at any stage. There were twice yearly promotion rounds but there were other promotions “off cycle”. In the claimant’s case that meant that a recommendation for promotion would have to be made by Mr Zizzo to Mr Minards. If he approved the recommendation, he in turn sent a list to the CEO for his approval. It is a system which self evidently lacks transparency, and which allows for very little retrospective analysis of any particular decision. However, whilst it may be open to criticism that does not make it, or any particular decision made by it, necessarily discriminatory.
7. In November 2017 Mr Zizzo proposed the claimant for promotion to Systems Team Lead which was the role she was acting up into at the time (a post in the People Leadership Stream i.e a management role). On 28<sup>th</sup> November Mr Minards put forward his proposals to the CEO and it did not include the claimant which necessarily suggests (although this is in dispute) that he had made the decision by that stage. The claimant and Mr Zizzo attended a meeting with Mr Minards on 6<sup>th</sup> December 2017 (the purpose of which is in dispute) after which Mr Zizzo made a second recommendation for promotion to Associate Principal Engineer (a post within the Technical Stream). Put simply the distinction is between a management role (Systems Team Lead) and a more senior technical role (Associate Principal). The claimant was not promoted at that point into the Associate Principal role either. Mr Minards’ evidence is that the particular promotion round had closed on 5<sup>th</sup> December and that this recommendation would need to be considered in the next round.
8. One of the conclusions of the claimant’s grievance (see below) was that the promotion application should be reassessed to see if the decision had been influenced by Mr Chana. A meeting took place between the claimant and Mr Minards

- on 22<sup>nd</sup> March 2018 prior to which Mr Zizzo had re-submitted the second (AP) promotion recommendation. However, by the time of the meeting the claimant was no longer performing the role that had generated that recommendation. On 23<sup>rd</sup> March Mr Zizzo submitted a third recommendation for promotion within the FuSa role the claimant was now performing. Mr Minards did not promote the claimant “off cycle” at that point. The claimant had not, therefore been promoted between November 2017 when the first recommendation was made and her subsequent resignation.
9. Grievance - On 2<sup>nd</sup> February 2018 the claimant lodged a grievance against Mr Chana, alleging that he had made the comments set out in allegation 1 below, and that he had bullied and harassed the claimant. It was investigated by Ms Jessica Middlemiss. She interviewed the claimant, Mr Zizzo, Mr Chana and two other colleagues. She did not uphold the first allegation as she concluded in the final analysis ( for the disputed circumstances of which see below) that in the light of the complete disparity of the accounts of Mr Chana and the claimant, and the absence of any independent evidence that she could not be sure that the conversation had occurred as alleged by the claimant. In respect of the second she did uphold the allegation of bullying and harassment particularly by reference to emails he had sent in which he was critical of the claimant and which he had copied to others; and she accepted Mr Zizzo’s evidence that Mr Chana had excluded the claimant from meetings. She recommended that the decision not to promote the claimant be reviewed.
  10. Disciplinary/ Grievance (Mr Chana) – As a consequence of the finding of bullying and harassment against Mr Chana a disciplinary investigation was undertaken by Mark Leaver. During his investigation Mr Chana alleged that he was being targeted by the claimant and Mr Zizzo, which Mr Leaver agreed to investigate as a grievance alongside the disciplinary investigation. Mr Leaver found two of the allegations (unjustified criticism and exclusion from meetings) proven and that they amounted to misconduct serious enough to justify a final written warning. He recommended that the situation regarding Mr Chana and the claimant continuing to work together be reviewed.
  11. Claimant’s second grievance – In May 2018 the claimant had submitted a grievance relating to the failure to promote her which was investigated by Matthew Wilson. Mr Wilson confirmed the outcome on 17<sup>th</sup> July 2018. He did not uphold the grievance.
  12. Resignation – Whilst that grievance was ongoing the claimant resigned on 22<sup>nd</sup> June 2018. The grounds for her resignation are set out in relation to the constructive dismissal claim.

## The Law

13. There is no dispute between the parties as to the relevant law. Where necessary in the discussion of the individual allegations we will set out findings as to the law if necessary. However we set out the primary statutory provisions (in so far as they are relevant to these claims) below:-

### 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.*

*(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*

*(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*

*(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.*

*(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.*

### 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.*

*(2) A also harasses B if–*

*(a) A engages in unwanted conduct of a sexual nature, and*

*(b) the conduct has the purpose or effect referred to in subsection (1)(b).*

*(3) A also harasses B if–*

*(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,*

*(b) the conduct has the purpose or effect referred to in subsection (1)(b), and*

*(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.*

*(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.*

### *27 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–*

- (a) bringing proceedings under this Act;*
- (b) giving evidence or information in connection with proceedings under this 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.*

*(4) This section applies only where the person subjected to a detriment is an individual.*

*(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.*

14. The following is agreed or uncontroversial:-

- i) As is set out above the claimant relies upon the protected characteristics of race and religion and there is no dispute as to either.
- ii) In respect of the victimisation claims it is not in dispute that the claimant's grievance of 2nd February 2018 is a protected act within the meaning of s27.

- iii) The same conduct cannot amount to both direct discrimination and harassment, or victimisation and harassment (s212 (1) Equality Act 2010). A finding in respect of one therefore precludes a finding in relation to the other. Where in our judgment we have found from facts from which the conclusion that any of those claims is made out, and we have found the case proven in relation to that claim into which it most naturally falls, of necessity the other formulations of that claim fail.
- iv) In determining whether an act is “because of “ a protected characteristic (direct discrimination) the protected characteristic must have a “significant influence on the outcome” ( Nagarajan v London Regional Transport [1999] ICR 877), significant in this context meaning more than minor or trivial (Igen V Wong [2005] ICR 931).

15. General Findings / Burden of Proof - For the reasons set out below we have concluded that we accept the claimant’s evidence as to the comments which are the subject of allegation 1. That in our view has the following general consequences. Given that finding of fact the obvious inference, and one which we draw, is that what Mr Chana said was true and that, put simply, he did not like Muslims. Given that Mr Chana denies making the comments there is in any event no evidence from which we could in our judgement draw any other inference. As is set out in greater detail below there are a number of specific instances in which Mr Chana has expressed highly critical views of the claimant and had excluded her from some meetings. In our view the fact that we have held that Mr Chana stated that he “did not like Muslims” and the conclusion we have drawn that this was true, is enough to satisfy Stage1 of the Igen v Wong test and to transfer the burden to the respondent to demonstrate that those comments and actions were not in any sense whatsoever tainted by that discriminatory attitude.

### Individual Allegations

16. Allegation 1 – At the end of February 2017, in a one to one meeting with Mr Chana, a few weeks after he joined the company, said to the claimant “I do not like Muslims”, “Muslims are violent” and “Pakistani men are grooming our girls” (Direct race and/or religion discrimination / Harassment related to race/religion).

17. Although there is a dispute as to whether it occurred towards the end of January or in February 2017 there is no dispute that as part of a series of meetings with other members of the team shortly after joining, that Mr Chana had a one to one meeting with the claimant. It is during this meeting that these comments were alleged to have been made. The claimant’s case is that in the course of the conversation he asked where she was from and that she told him that she was from Iran. He asked if she was a Muslim and she replied that she came from a Muslim family but was non practicing. After telling her of his own background he asked if she was Sunni or Shia, and then said “*that he did not like Muslims. He said they are violent, talked about terrorist attacks, and repeated that he did not like Muslims and they are violent. The*

- claimant said he should not generalise as violence happens in all religions. Mr Chana talked about 9/11 and said his family did not take flights anymore because they were scared.....He went on to say Pakistani men are grooming our girls.”* (Claimant witness statement para 3). She goes on to say that she then left the meeting as she felt uncomfortable and shocked.
18. Mr Chana’s account is that during the meeting he asked the claimant where she was from “*..to which she answered Iran. I had never met someone from Iran before, so I commented that that was interesting and Iran seemed to be in the news a lot. I am interested in politics, so I told her that I didn’t understand Iranian politics or the difference between Shia and Sunni people which always seemed to come up in the news. The claimant told me that she was not a Muslim and had rejected Islam because of its treatment towards women.... That part of the conversation must have lasted for no more than three or four minutes and I quickly moved on to work related matters.*” (Mr Chana witness statement paras 7 and 8). Mr Chana denies completely saying any of things attributed to him by the claimant.
19. There first question is therefore whose account we accept on the balance of probabilities. The claimant submits that we should prefer her account for, in summary, the following reasons. Firstly, in an email exchange in February 2018 Mr Zizzo confirmed that in February 2017 she had told him of uncomfortable comments made by Mr Chana, and he has confirmed this in his evidence to the tribunal. Secondly Mr Chana, as has been found in relation to both the internal grievance had made unjustifiable criticisms of her, undermined her, attacked her personally, unjustifiably excluded her from important meetings and had spread malicious rumours about her (grievance outcome) and had bullied and harassed her (disciplinary outcome) despite him denying having done so. Moreover, in his grievance interview Mr Chana did not, as he now asserts, deny the allegations but stated that he could not remember.
20. The claimant also relies heavily on the fact that Ms Middlemiss who investigated the claimant’s grievance at least initially expressed the view that she believed the claimant and not Mr Chana, and at least initially intended to uphold this allegation. A good deal of the cross examination of Ms Middlemiss in particular was directed at the process by which she came to change her mind as to the appropriate conclusion and the extent of the involvement of members of the HR department. We accept Ms Middlemiss’s evidence that she genuinely changed her mind, as she was entitled to, and that her final conclusions were genuinely the ones she believed to be correct. As is set out below, however, in our view and in terms of findings of fact, despite the importance the claimant attributed to it, nothing significantly turns on this dispute.
21. The claimant also alleges that Mr Chana also treated two other employees of Muslim origin less favourably than non- Muslims, which if true supports her case.
22. The respondent expressly does not allege that the claimant is consciously lying to the tribunal; but contends that her recollection is not reliable. The first account she gave of the conversation was in a grievance letter of 2<sup>nd</sup> February 2018 and was followed up in her grievance interview of 18<sup>th</sup> February. This was approximately a year after



- the event during which the claimant and Mr Chana clearly had a very difficult working relationship; and when she had been passed over for promotion for which she blamed Mr Chana at least in part. It asserts that by the early part of 2018 she was in her emails manifesting lengthy and extreme hostility to Mr Chana, Mr Minards and the respondents HR department amongst others; and that we should conclude from this that her evidence is inherently unreliable. It contends that the allegation that Mr Chana should have taken the opportunity in the first one to one interview he had with her to insult the religion in which she had been brought up and which he might reasonably believe that at least some of her family and friends still practiced is wholly implausible. In addition, Mr Chana is an elected councillor for an ethnically and religiously diverse London borough. The idea that in those circumstances he would feel comfortable in expressing Islamophobic views to someone who was very nearly a complete stranger heaps implausibility on implausibility.
23. More generally it relies on the fallibility of memory and the fallacy of believing that the more vivid the experience or recollection the more likely the evidence to be accurate and reliable. The human mind is demonstrably capable of constructing a narrative of past events which includes memories of events which did not in fact occur. They rely on the well-known passage in the judgment of Legatt J in *Gestmin v Credit Suisse [2013] EWHC 3560 (Comm)* discussing these issues, and invite us to conclude that in the absence of contemporaneous support for the allegation, that however plausible a witness, that the claimant's own recollection is not an evidentially sound basis for concluding that the events had occurred as she recollects on the balance of probabilities.
24. In considering these submissions we have reached the following conclusions. Despite the significance the claimant accords to Ms Middlemiss's conclusions and the process by which she changed her mind, it is in reality of little significance for the task we have to undertake. Fundamentally the fact that Ms Middlemiss at least initially believed the claimant's account is of no more relevance than had she disbelieved it, or that she finally concluded that the allegations were unproven. We have to form our own conclusions on the evidence before us.
25. Equally we have concluded that we should exercise very considerable caution about drawing conclusions from the allegations that Mr Chana treated Tawhid Khan and Hassan Kayali unfavourably, and that he did so because they were Muslim, as supportive of the claimant. Firstly, there is no complaint from them about the matters on which the claimant relies and they have not been called to give evidence, and secondly there is in fact no evidence in respect of either as to whether they were or are Muslim. The claimant's evidence is that she assumed it from their names. In our judgement we should exercise very considerable caution. There is no evidence before us from which we could find that either was in fact Muslim, or that Mr Chana believed them to be. In the absence of calling them to give evidence the only factual evidence before us relates to an incident a meeting involving Mr Khan and Mr Chana in which Mr Zizzo and Mr Chana's evidence is very different, and of their omission from an email. However, there is in our judgment no evidence from which we could safely conclude that Mr Chana had made assumptions about their religious beliefs or

- background or had treated the differently because of that. We have accordingly decided that it is simply unsafe to place any weight on these allegations.
26. In the end we have to make our own assessment. Firstly, as is tacitly conceded by the respondent the claimant's evidence was both compelling and persuasive. Were it not the issues of the fallibility of memory would not arise. However, for the reasons the respondent gives, relying on the subjective impression of our own assessment of a witness does present the dangers they refer to. Equally however that does not mean that all unsupported evidence is bound inevitably to be rejected. In our judgement the two most important, and competing, considerations are that firstly the claimant is supported by Mr Zizzo and that there is evidence of a contemporaneous complaint, albeit in relatively general terms. Secondly and on the other side of the scale we find it very puzzling, that given the interaction between the claimant and Mr Chana and her complaints about him that there was no reference to this conversation between her mentioning it to Mr Zizzo and her formal complaint almost a year later. It is that consideration that gives us most pause for thought in deciding whether we accept the claimant's account. However, there are equally reasons to doubt the accuracy and reliability of Mr Chana's evidence as is set out below. As is set out in relation to allegations 2 and 3 below we have very significant doubts as to the accuracy and reliability of at least some of the evidence he has given to this tribunal which necessarily calls into question whether we can accept his unsupported evidence in relation to this allegation.
27. Having considered all the evidence and the submissions summarised above we have concluded that on the balance of probability that claimant's account is the more accurate, and we accept her evidence.
28. In our judgement this is most naturally considered as harassment. We accept the claimant's evidence that it was unwanted conduct; and that it caused the proscribed effect. It follows that the claim is made out subject to the comments being related to a protected characteristic. In our judgement the comments fall into two categories. Firstly, there is a direct expression of hostility to Muslims ("I do not like Muslims"), followed by an explanation of characteristics he associates with Muslims ("Muslims are violent"). Secondly there is the comment about Pakistani men. In context in our view that is not a separate view but an extension or example of hostility to Muslims and the use of the word Pakistani is in reality a proxy for, or at least encompasses, Muslim. That in our view is a permissible conclusion in context and, in our judgement all of the comments are therefore necessarily related to the protected characteristic of religion. It follows that the claim for harassment in relation to the protected characteristic of race is dismissed. (We have noted the law as to the distinction as it is set out at paras 1-7 of the claimant's Submissions on the Law" which we accept as accurate). For the avoidance of doubt had we formed the view that the second comment related to race (or more strictly nationality "Pakistani") we would have held that that comment was harassment related to the protected characteristic of race.
29. As the same conduct cannot be both harassment and direct discrimination necessarily the direct discrimination claims must also be dismissed.

Allegation 2 - Commencing in August 2017 Mr Chana excluded the claimant from meetings.  
(Direct race/religion discrimination / Harassment related to race/religion)

30. As is set out above, as we have concluded that Mr Chana did make the remarks in allegation 1, and that that taken with any unfavourable treatment of the claimant is sufficient to transfer the burden of proof. It follows that in determining whether this allegation is made out the question becomes whether the respondent has discharged the burden of demonstrating that the conduct was in no sense whatever (Igen v Wong) affected by that discriminatory attitude.
31. It is not factually in dispute that Mr Chana did not invite the claimant to some meetings to which she otherwise would have been invited. The respondent has accepted this in its Grounds of Resistance, and in the grievance outcome Ms Middlemiss concluded that the claimant had been excluded from meetings to which she should have been invited, and Mr Leaver reached the same conclusion in the disciplinary hearing. Mr Chana's evidence is that he did hold three or four meetings for resource leads to the first two of which the claimant was invited but "She attended and displayed her usual disruptive behaviour. For the remaining meetings on that project (around one or two) because of how she behaved in the other meetings I decided not to invite her.." (Mr Chana witness statement para 14 and repeated at para 16). It is therefore not in dispute that the claimant was not invited on at least one or two occasions to meetings she normally would have been.
32. Given that in our judgement the burden of proof has passed to the respondent the question is whether we accept Mr Chana's explanation and, if we do, that it completely accounts for the exclusion. His current explanation was not given to Mr Leaver during the disciplinary hearing where he stated it was because of the role/function of the meeting. In our judgement if the evidence now being given is correct this is inexplicable. If Mr Chana now recalls that the claimant was specifically not invited to meetings to which she otherwise would have been because of her own behaviour why did he not recall or tell Mr Leaver this? We have no explanation for that and in the absence of one, or of any corroborative evidence in support of Mr Chana's allegations, we do not on the balance of probabilities accept his evidence. The evidence he now gives is diametrically opposed to the explanation he gave at the time and is not supported by any other evidence.
33. If that explanation is rejected, which we have, we are left with the unexplained fact that the claimant was not invited to meetings which she should and would otherwise have been expected to be. It follows that in our judgement the respondent has failed to discharge the burden of proof. Equally in our judgment this is for the same reasons given above most naturally considered as harassment related to religion. That claim is for those reasons made out and for the same reasons as are set out above the alternative formulations relating to the same facts must be dismissed.

Allegation 3 – *At some point prior to December 2017 (the claimant does not know when) Mr Chana expressed unjustified critical views about the claimant to the second respondent.*

34. Although couched in general terms the essence of this allegation is that Mr Chana specifically expressed “unjustified critical views” about the question of whether the claimant should become Systems Team Lead. The respondent does not dispute that Mr Chana did express negative views to Mr Minards about the claimant in her capacity as Acting Team Lead (Ian Minards’ witness statement para 18). In addition in an interview with Mr Wilson Mr Minards stated “*I have been clear that Kam expressed an opinion on Mehri taking over the Lead role..*” This reflects views expressed by Mr Chana in an email of 30th August 2017 in which he urged HR to “*.. focus maximum effort on finding the position for Systems Team Lead within the electronics team. This is very urgent.*” It is in our judgement impossible to draw any other conclusion than that Mr Chana was extremely anxious that the claimant should neither remain as Acting Team Leader nor be promoted to Team Leader. In this respect his views were diametrically opposed to those of Mr Zizzo, who was sufficiently happy with her performance as Acting Team Lead to recommend her for promotion to the permanent role.
35. For the reasons set out above in our judgement the combination of the fact (as we have found) of Mr Chana’s remarks combined with his hostility to the claimant remaining as Acting Team Lead or being promoted are sufficient to transfer the burden of proof.
36. In determining whether the burden of proof has been satisfied the respondent submits that there is no evidence that Mr Chana did not honestly hold these beliefs. However, in our judgement that is in reality not an answer to the question posed by the allegation. Given that it is not in dispute that he made the criticisms, were they consciously or unconsciously affected by an underlying discriminatory attitude? The fact that the views may have been honestly held does not preclude the possibility that they were at least unconsciously affected. It is also for the reasons set out below not Mr Chana’s evidence that he ever made those remarks, which makes the contention that he honestly held the views difficult to sustain.
37. The central difficulty for the respondent is that whilst Mr Minard’s accepts that Mr Chana expressed those opinions to him, Mr Chana states that he did not express any view to Mr Minards as to whether the claimant should be promoted (witness statement para 18). Clearly both of the respondent’s witnesses cannot be right about this and we have concluded that we accept Mr Minards’ evidence in this respect. In those circumstances in our judgment there is no evidence which would allow us to conclude that the burden of proof has been satisfied because there is no evidence from Mr Chana himself as to why he expressed them.
38. It follows that in the absence of the respondent discharging the burden of proof this allegation is made out. This in our view is more naturally considered an allegation of direct discrimination because of religion; and for the reasons set out above the alternative formulations must be dismissed.

39. This leads on to the question of whether the decision not to promote the claimant was itself tainted by that discrimination. The claimant relies on *Reynolds v CLFIS (UK) Ltd [2015] ICR 1010*. We should approach a “tainted information” claim on the basis that the act of Mr Chana in supplying that information is a separate act from that of Mr Minards who acted on it. There is no dispute between the parties that if it did have a more than trivial influence on Mr Minard’s decision then the decision is tainted and the first respondent can be liable for the consequences of the discrimination (the failure to promote) even if Mr Minard’s own decision is not discriminatory (See allegation 4 below). In his witness statement Mr Minards states that the decision not to promote was based on his own observations and that the feedback from Mr Chana was not the reason for his decision. If this is correct and it did not affect his decision necessarily it played no part at all and the test above would not be satisfied. However in his interview with Mr Wilson Mr Minards describes Mr Chana’s opinion as “.. *not the prime reason why I didn’t agree with it.*” This is reflected in a letter sent to the claimant on 27<sup>th</sup> April 2018 which states that Mr Minards sought feedback from a number of sources and that Mr Chana had expressed an opinion but that “...*the primary reasons for Ian’s decision are shown above.*” Self evidently if those earlier descriptions are correct Mr Chana’s opinions did play some part in the decision not to promote. In our view the natural implication of both the references is that Mr Chana’s comments played a more than trivial part, if not the major part in the decision. It follows that this allegation is also made out.

Allegation 4 The second respondent did not promote the Claimant to the role of Team Lead or Associate Principal (Direct Race/religious discrimination)

Allegation 7 Between March 2018 to June 2018 the Second Respondent, when reviewing the earlier decision not to promote the claimant decided again not to promote the claimant (Direct race/religious discrimination)

40. As these relate to all of the occasions on which Mr Minards decided not to promote the claimant it is sensible to deal with them together. There were in fact five separate decisions made by Mr Minards:-

- i) A decision not to promote the claimant to System Team Lead in November/December 2017;
- ii) The decision not to promote the claimant to Associate Principal (IBM) in December 2017;
- iii) The decision not to appoint the claimant to Systems Team Lead on review in March 2018;
- iv) The decision not to appoint the claimant to Associate Principal (IBM) upon review in March 2018;

- v) The decision not to promote the claimant to Associate Principal (FuSA) in March 2018.
41. In respect of the first failure to promote we have already concluded that it was discriminatory for the reasons given above, but the fact that the decision was influenced by Mr Chana to the extent set out above does not in and of itself provide any basis for concluding that Mr Minards' decision was itself discriminatory ( See *Reynolds above*) All of the allegations are of direct race/religious discrimination and accordingly we have to determine whether Mr Minards' decision not to promote the claimant on each or any of these occasions was "because of" (in the sense set out above) either claimant's race or religion. The claimant contends that the failure to promote was not simply discriminatory on the basis set out in allegation 3 above but that Mr Minards' decisions were themselves discriminatory. For the reasons set out below the claimant contends that for a variety of reasons, that we should conclude that the burden of proof has shifted and that the respondent cannot satisfy that burden. The respondent submits that there is no evidence sufficient to transfer the burden of proof and/or that in any event we should accept Mr Minards' explanations.
42. We will firstly set out the facts, and where there is dispute our factual conclusions, in respect of the promotion applications and then set out our conclusions.
43. The first allegation relates the decision not to promote the claimant to the Systems Team Lead role. Mr Minards' evidence, which we accept, is that by 27<sup>th</sup> November 2017 that he had made a decision not to promote the claimant based in part on his own observation and in part on feedback from other members of the team (See allegation 3 above). He informed Mr Zizzo of this in a meeting on 28<sup>th</sup> November 2017 and followed it up with an email setting out his reasons on 29<sup>th</sup> November 2017. The decision is confirmed in a spreadsheet sent on 30<sup>th</sup> November 2017 which clearly states that the claimant was not to be recommended for promotion. In our judgement all of the contemporaneous documentary evidence supports Mr Minards' contention that the decision to promote the claimant to Systems Team Lead had been made by this date.
44. The central dispute concerns the status of a meeting held on 6<sup>th</sup> December 2017. Both Mr Zizzo and the claimant contend that a decision not to recommend her for promotion had not been made by this stage and that the meeting was in effect a promotion interview. Mr Minard's evidence is that he had intended it to be a presentation to the other Heads of Department, as he had suggested to Mr Zizzo in the 29<sup>th</sup> November 2017 email, and was not in relation to promotion to the Systems Team Lead promotion as that decision had already been taken. Given our findings above this in our judgement must be correct.
45. The second allegation relates to the failure of Mr Minards to promote the claimant to Associate Principal (IBM) in December 2017. It is not in dispute that after the meeting on 6<sup>th</sup> December 2017 that Mr Minard's and Mr Zizzo had a conversation in which Mr Minards suggested that the claimant would be more suitable for promotion within the technical than the managerial stream. In consequence Mr Zizzo submitted the

promotion recommendation the following day for promotion to Associate Principal (IBM). Mr Minard's evidence is that he did not consider it at that stage as the 2017 promotion round had passed but would consider it at the next round in 2018. Mr Zizzo's and the claimant's is that their expectation was that it would be considered at that point as this was in the context of the 2017 promotion application and that Mr Minards did not tell Mr Zizzo that it would not be considered at that point. In our judgement whilst that may have been their expectation there is no evidence to contradict Mr Minard's evidence and we accept it.

46. Allegation 7 relates to the reconsideration of the two earlier promotion applications; and the new application submitted in the circumstances described below. The claimant contends that on review of the earlier decisions that it was discriminatory not to decide to promote the claimant to one of those roles at that point; and discriminatory not to promote her on the basis of Mr Zizzo's third recommendation.
47. As is set out above one of the recommendations of the grievance outcome was that the decision not to promote the claimant in December 2017 should be reviewed. On 12<sup>th</sup> March 2018 Mr Zizzo re-submitted to Mr Minards the Associate Principal (IBM) promotion recommendation from December 2017. Mr Minards' evidence, as set out above, is that he had not yet considered it as it would be considered at the next promotion round. On 15<sup>th</sup> March 2018 he had a meeting with Mr Zizzo, who afterwards sent Mr Minards an email which referred to the claimant no longer performing the IBM role. In a separate email on 19<sup>th</sup> March 2018 Mr Zizzo confirmed that the claimant was now working on functional safety. Mr Minards' evidence, which we accept, is that this was the first that he knew that the claimant no longer had responsibility for IBM but had moved to Functional Safety (FuSa). The claimant and Mr Minards met on 22<sup>nd</sup> March 2018; and on 23<sup>rd</sup> March Mr Zizzo submitted a revised promotion recommendation to Associate Principal (FuSa).
48. The explanation given by Mr Minards in respect of the five applications are in essence:-
- i) He did not consider the claimant suitable for promotion to Systems Team Lead in November 2017 because of a combination of his own observation and feedback from a number of others.
  - ii) He did not consider the application for promotion to Associate Principal in December 2017 as that promotion round had passed.
  - iii) He did not promote the claimant to Systems Team Lead in March 2017 on review as he did not change his view (and in any event the claimant was by that point no longer Acting Team Lead and had effectively changed jobs).
  - iv) He did not promote to Associate Principal (IBM) in March 2018 on review as by that point the claimant was no longer working in that field.
  - v) He did not promote her to Associate Principal (FuSa) in March 2018 as she had not been in the role long enough to evaluate her technical competence. In addition,

Mr Coultate was due to join the department in April he wanted to give Mr Coultate the opportunity to assess it; and he still had concerns as to the claimant's communication skills.

49. The claimant's submissions centrally concern the explanations given for the failure to promote in December 2017 after the review in March 2018. Firstly the claimant submits that despite the review being specifically concerned to examine whether Mr Chana had influenced the promotion process Mr Minards did not at the stage admit to or make any reference to his own discussions with Mr Chana, or go back to either Mr Codling or Mr Parker, both of who had expressed unfavourable views about the claimant, to attempt to discover the extent to which those views may themselves have been influenced by Mr Chana. Secondly the reasons given in the meeting were that the claimant had not been promoted because of feedback from IT and because she had been promoted twice already. She contends that these are not a satisfactory explanation. Thirdly Mr Minards did not in fact reconsider in March 2018 but had told the claimant that any promotion decision would be made in the 2018 summer cycle, despite reconsideration being the purpose of the exercise. Finally, as accepted by Mr Minards, the reasons given for not promoting the claimant as set out in Mr Minards' witness statement are different from those set out in a draft Report prepared by Katie Allen. The claimant submits that the information Ms Allen acted on must have come from Mr Minards. Moreover, the final report referred to the claimant's performance at the meeting of 6<sup>th</sup> December 2017 which Mr Minards now says is incorrect. Finally, the letter which was finally sent to the claimant on 27<sup>th</sup> April contains two reasons which differed again from the earlier draft and the reasons the Mr Minards now gives. There are put simply a number of different versions of the reasons, all of which must have come from Mr Minards, and all of which necessarily cannot be correct.
50. For all the reasons given above the claimant submits that we should conclude that all of the matters summarised above are sufficient to transfer the burden of proof and that, if this correct, we should for the same reasons reject the explanation given in evidence by Minards. If both these propositions are correct it follows that we should conclude that the burden of proof has not been satisfied and that her claims should succeed.
51. The respondent makes a number of relatively straightforward points. The first is that unlike Mr Chana there is no evidence or allegation that Mr Minard's has ever overtly expressed or held any discriminatory views. There is no evidence that he has ever treated anyone more or less favourably in relation to promotion or anything else on the basis of race or religion, or any other protected characteristic. Whatever criticisms there may be of the process of reconsideration, or the explanation of that process does not alter the fact that there is no evidence from which the tribunal could properly infer, even in the absence of an explanation that the decision not to promote the claimant was tainted by any discriminatory motive whether conscious or unconscious. In the end whatever criticisms the claimant makes of the process either around her original promotion applications or the subsequent reconsideration and explanation after the grievance there is no evidence from which we could conclude that that Mr Minard's decisions were in any way discriminatory. Even if the first stage is satisfied



- and the burden of proof transferred Mr Minard's explanations as to the various decisions are cogent and there is no evidence to contradict them and therefore, no reason to disbelieve them.
52. In our judgement the essential difficulty the claimant faces is encapsulated in the well-known passage from the judgment of Mummery LJ in *Madarrasy v Nomura International PLC ICR 867* "The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination." In the context of this case even if the claimant is correct that the criticisms summarised above should lead us to doubt that the reasons given by the Mr Minards are the true reasons what is the evidence from which we "could conclude" that any less favourable treatment was because of and/or related to the claimant's race or religion? To take an obvious point the claimant is female, but she has made no claim that she has been the victim of sex discrimination. However, there is in reality no more evidence from which we could conclude that there is a prima facie case that Mr Minards discriminated against her on the grounds of race or religion than any other protected characteristic, or indeed non protected characteristic. It follows that in our judgement the claimant is not satisfied Stage 1 of the *Igen v Wong* test in respect of these allegations.
53. However, in case we are wrong in the conclusion set out above we have gone on to consider the position had we concluded that the burden had transferred. We have concluded that we accept Mr Minards' evidence as to the reasons for the failure to promote the claimant and that had the burden transferred then the respondent would have discharged it.

Allegation 5 – Prior to 2 March 2018 Mr Chana expressed inappropriate and critical views about the claimant's abilities and/or work to her colleagues Daniel Stroud and Chimba Chiwese (with the result that they were critical of the claimant's work in a meeting despite not having read her work). (Direct race/religion discrimination / harassment related to race/religion / victimisation)

54. The claimant's evidence is that in a meeting on 2<sup>nd</sup> March 2018 Daniel Stroud and Simba Chiwese expressed views critical of her work. When challenged they apparently agreed that they had not read the work in question. From this the claimant invites us to conclude that they had been influenced by somebody else and that person was Mr Chana. In our judgement that is an inference too far. Whilst for the reasons given above it is appropriate to draw inferences from factual findings as to Mr Chana's conduct the claimant is in effect inviting us to reverse engineer the process and to infer primary facts for which there is no evidence. In our judgement there is no evidence that Mr Chana played any part in influencing the views of either and there is therefore no factual basis for this allegation.

Allegation 6 – On 5<sup>th</sup> March 2018 Mr Chana forwarded an email (titled “Are M1 vehicles expected to go on public roads”) to a range of people who were due to be in a meeting on 6<sup>th</sup> March 2018 regarding this issue, but excluded the claimant. As a result, it was apparent in the meeting that the claimant did not have the information and she was embarrassed. (Direct discrimination race/religion; Harassment race/religion/ victimisation.)

55. The context of this allegation is that the grievance investigation had started in February. It is not in dispute that Mr Chana did not include the claimant in this email when she ordinarily would and should have been. Mr Chana’s evidence is that he did not include the claimant in this email deliberately but that that was not because of her race or religion, or the fact of her complaint against him but because he had agreed with Mr Zizzo that he would not contact the claimant directly wherever possible but would copy in Mr Zizzo who would then decide whether or not include or copy it on to the claimant. However, Mr Zizzo’s evidence is that there was no such conversation until the 13<sup>th</sup> March, eight days after this email was sent. If this is correct, we again would have an unexplained failure to include the claimant and an explanation which is demonstrably untrue.
56. The claimant submits that we should reject Mr Chana’s explanation. Firstly, it is not the pleaded defence, which asserts that the failure to include the claimant was “not deliberate” (Amended Grounds of Response para 66). It appears for the first time in Mr Chana’s witness statement, and is not referred to in his interview with Mr Leaver . Secondly Mr Zizzo’s recollection of the agreement taking place on 13<sup>th</sup> March 2018 is supported by an email from Pok Hay (HR) to the claimant on 13<sup>th</sup> March 2018. We accept Mr Zizzo’s evidence in respect of this. It follows that for the reasons set out above in our view the burden has shifted to the respondent and we reject the explanation given. It follows that we do draw the inference that the failure to include the claimant was an act of discrimination. The question is which. For the reasons set out above we consider that this would most naturally fall within the description of harassment on the grounds of religion. It follows that the other formulations in respect of this factual allegation must be dismissed.

Allegation 8 - In April 2018 as a result of the disciplinary process, Mr Chana to a different role, but remained working in the same wider “526” team as the claimant (Direct race/religious discrimination/ harassment related race/religion / victimisation)

Allegation 9 – April – June 2018 Failure of HR to deal with her concerns adequately, specifically the failure to investigate the concern she raises in an email on 14<sup>th</sup> May 2018 that two other employees who are Muslim had been excluded by Mr Chana. (Direct race/religious discrimination / harassment related to race/religion / victimisation)

Allegation 10 19<sup>th</sup> June 2018 Mr Coultate’s failure to address concerns she had raised that she was being excluded. ( Direct race/religious discrimination / harassment related to race /religion)

Allegations 8/9/10 General points

57. Although we consider each of these separately, in her written submissions (para 127) the claimant makes a general point that all three of these alleged acts of discrimination stem from a “*negative perception*” that she was “*over sensitive*”, and that “*This perception arose because she was complaining about race /religion discrimination i.e it was because of race/religion and is direct discrimination.*” As a general proposition this does not appear to us to correct. Even if it is factually correct that that was the respondent’s perception, perceiving someone as being over-sensitive in making allegations of race/religion discrimination is not in and of itself necessarily discriminatory, unless, for example, that view is itself tainted by stereotypical views of an individual of that race/religion. It was not suggested to the relevant witnesses that held any such views. In effect we are being invited to conclude that because the respondent did not act in a way which the claimant found satisfactory in each case that we should hold the respondents actions to be discriminatory because the underlying complaints related to discrimination without needing to find any evidence of discrimination on the part of the individuals involved. In our judgement this cannot be correct.

Allegation 8 – *As a result of the disciplinary process Mr Chana was moved to different role but he remained working in the same 526 team as the claimant (Direct discrimination race/religion / harassment race/religion/ victimisation)*

58. The essence of this allegation is that the steps taken to separate the claimant and Mr Chana were insufficient. Mr Chana was moved to work in the chassis division where he would have some contact with the claimant and would still work in the same building in reasonably close proximity. The claimant categorises this as “insufficient action”. In the course of cross examination and in her submissions the claimant sets out in great detail why she believes this decision was wrong. The evidence before us, which we accept, is that the decision was taken by Mr Minards. He had been informed that the outcome of the disciplinary hearing was that Mr Chana had been issued with a final written warning and that a recommendation had been made that the company investigate alternatives to the claimant and Mr Chana continuing to work together. He discussed the position with HR and decided to offer Mr Chana a vacant position in the chassis team. The respondent points that there had not by that stage been any finding of discrimination, simply that Mr Chana’s conduct had fallen within the respondents internal bullying and harassment policy.

59. The question for us therefore is not whether Mr Minards was right or wrong or whether there were other ways that the respondent could have achieved greater separation between the claimant and Mr Chana but whether Mr Minard’s decision was itself in any way affected by the claimant’s race, religion or was an act of victimisation. Put simply in our judgement there is no primary evidence that would allow us to draw that inference.

60. In any event we accept the respondent’s evidence that it was honestly and genuinely attempting to reflect the outcome of the disciplinary hearing and separate the claimant and Mr Chana.

*Allegation 9 – Failure of HR to deal with her concerns adequately specifically the failure to investigate the concern she raised in an email on 14 May 2018 that two other employees who are Muslim had also been excluded by Mr Chana.*

61. As is set out above even if we accepted the claimant's contention that there was a perception (held in this case by members of HR) that she was "over sensitive", that would not in and of itself make the conduct discriminatory. In any event in our judgement there is no specific evidence that would allow us to draw that conclusion.
62. In order to place this in context the evidence of Ms Cherry which we accept, is that following an email from the claimant on the 19<sup>th</sup> April 2018 they had a meeting on 23<sup>rd</sup> April 2018. At that meeting the claimant alleged that Mr Chana's behaviour was not simply directed at her but others as well. However, at that stage she was not willing to identify those others. At this stage both the earlier grievance and disciplinary process had concluded. Ms Cherry emailed the claimant the same day indicating that she could raise a fresh grievance about any new concerns. Following further correspondence the claimant sent the email in question at 12.16 on 14<sup>th</sup> May 2020, to which she attached the email of 19<sup>th</sup> April 2020 and named both Tawhid and Hassan as also being omitted from it. Ms Cherry's evidence which again we accept is that this email was the same email that the claimant had already copied to her on the 19<sup>th</sup> April and which had been forwarded to Mr Leaver.
63. For completeness sake we record that the evidence is that on 14<sup>th</sup> May 2020 the claimant sent two emails. One was a grievance in relation to the promotion decisions. She subsequently confirmed in a grievance meeting with Mr Wilson that this was a complaint solely about the promotion itself and that she was not alleging discrimination, although she reserved the right to pursue that separately. In the second email, which is the subject of this allegation, she alleged that two other Muslim employees had also been excluded from an email of Mr Chana's on 19<sup>th</sup> April. She followed up on 20<sup>th</sup> May 2018 saying that it was clear that Mr Chana's behaviour had "racist roots". She contends that this allegation was not investigated.
64. As set out above we accept Ms Cherry's evidence that she understood that the underlying email about which complaint was made had been copied to Mr Leaver as part of the disciplinary process. Even if this wrong, and Mr Leaver's evidence is that he did not consider it, it had as far as Ms Cherry understood it been considered by Mr Leaver. As a matter of fact on the evidence before us Mr Leaver is correct and Ms Cherry is wrong in that the email that had been sent to Mr Leaver was an earlier email sent on 19<sup>th</sup> April, not the one attached to the claimant's email of 14<sup>th</sup> May 2018. However, this does not fundamentally affect the question before us. If Ms Cherry genuinely believed that the email had been acted on, which we accept she did, by definition she did not fail to act, or to do so for a discriminatory reason. In our judgement this automatically excludes any finding of a discriminatory failure to act on it. In addition, as all of the claimant's communication with HR at around this time was with Ms Cherry it is Ms Cherry's actions which are the relevant ones for our consideration.

Allegation 10 – The claimant raised with Mr Coultate who had recently been recruited to the Systems Team Lead role ongoing concerns about her exclusion from email chains and meetings in June. His response did not address her concern that she was being excluded.

65. Mr Coultate joined the respondent on 30<sup>th</sup> April 2018. His understanding, which we accept, is that he had become her line manager. The allegation relates to his response which did not address her concerns. It is not now alleged that he had in fact unreasonably excluded her.
66. The respondent submits that this allegation is simply factually incorrect. Firstly, the claimant's email complaining of being excluded is dated 15<sup>th</sup> June at 09.12. Mr Coultate's reply was timed at 09.34 some eighteen minutes later. The claimant's email reads "*Hi Ted, I realised that you are excluding me from the activities that I have been assigned to lead on and do. One example is Ricardo meetings to discuss the continuation of their support of definition of vehicle state requirements and power modes based on my vehicle state model. Considering you have joined Dyson just a few weeks ago I would like to know if this your decision or you have been asked and directed to do so and what is the rationale for this.*" His reply is "*Hi Mehri, There have been no meetings with Ricardo to discuss the Vehicle State activities. There have been discussions with regard to the VCU/MPS requirements side.. We need to sit down and agree the next steps for the state work.... We can sit down now to discuss the vehicle state approach and what we need (or not) from Ricardo.*"
67. The respondent therefore submits firstly that the underlying allegation that Mr Coultate had held meetings in relation to Vehicle State (the area involving the claimant) is incorrect; and that he did specifically address her concerns by making this clear within a few minutes of the claimant's complaint. Thus, the basic factual allegation that his response did not address her concern is incorrect. Moreover, he specifically invited her to discuss it with him.
68. In addition, in relation to the underlying facts Mr Coultate had taken a decision which fell well within his competence to extend the Ricardo contract by three weeks. Moreover he had specifically informed the claimant of his intention to do so in an email of 4th June to which she had replied " Sure, you will follow up with the PO for a further three weeks?" to which he replied yes. Accordingly, the claimant knew of the proposal to extend and in his email of 15th June explained that the claimant had not been excluded from any meetings relevant to her work. The claimant in essence complains her allegation that she was being excluded was not being taken sufficiently seriously. In our judgement that is not factually correct. Mr Coultate replied promptly and answered her concerns specifically. There is in our judgement no evidence to support this allegation factually.

### Time Limits

69. As set out above we have found allegations 1, 2, 3 and 6 well founded. What links them is that they are all acts of discrimination on the part of Mr Chana. Given that on our findings they are acts of discrimination which reflect an underlying discriminatory state of affairs, in our judgment they can be regarded, and we do regard them, as a continuing act. The claim was lodged on 8<sup>th</sup> August 2018. The respondent contends that any allegations predating 21<sup>st</sup> March 2018 are out of time. In our judgement this is correct, and it follows that the claims are out of time.
70. In terms of the question of extending time we have to decide whether it would be just and equitable to do so applying the well-known Keble v British Coal factors. The respondent contends that the claimant had legal advice by February 2018, and has provided no specific explanation for the delay which it describes as an “unpromising” basis for asking the tribunal to exercise its discretion.
71. In the claimant’s favour are the fact that the length of the delay is relatively short and in particular that it has not in any way affected the cogency of the evidence. The respondent has been able to call Mr Chana and does not contend that the delay has affected his evidence in any way. In terms of the balance of prejudice (or hardship as it is sometimes referred to) the hardship to the respondent is in having to meet claims to which the time point is a complete defence, and the hardship to the claimant is potentially being kept out of meritorious claims. The tribunal has concluded on the basis of the short period of the delay, the absence of any specific prejudice and the absence of any effect on the cogency of the evidence that the balance favours the claimant and time will be extended in respect of those allegations.

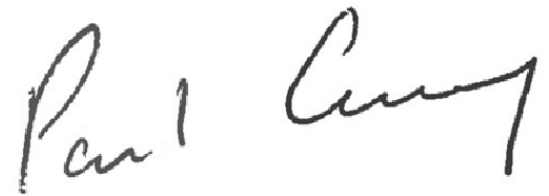
### Constructive Dismissal

72. As with the discrimination claims there is no dispute as to the relevant law. The employee must resign promptly in response to a fundamental/repudiatory breach of contract. In this case the claimant relies on the fundamental term of mutual trust and confidence. She asserts that the matters set out above individually or cumulatively amount to breach of the implied term.
73. In her resignation letter of 22<sup>nd</sup> June 2018 the claimant relies on five alleged breaches. Firstly discrimination in promotion; continuous bullying and harassment, lack of duty of care which makes the working environment unsafe and disrespectful; no investigation into the 14<sup>th</sup> May email; HR denying the claimant the right to have a companion at the 22<sup>nd</sup> March meeting, HR attempting to distort facts; and HR being biased and not being impartial in the formal process.
74. The respondent contends that it follows that the allegations against Mr Coultate cannot be taken into account in any event as they are not set out as part of the reason to resign in the letter; and that the last allegation (HR being biased) though set out in the letter is not now one relied on as part of allegations 1 – 10 above and equally therefore cannot be relied on by the claimant. In our judgment this is correct. It follows that the last allegation which is both contained in the resignation

- letter and is relied on as part individually or cumulatively of a breach of the implied term is the alleged failure to investigate the email (allegation 9 above).
75. The specific allegations of discrimination which we have found proven, and which are necessarily fundamental breaches of contract are allegations 1; allegation 2, allegation 3, and allegation 6. Also as is set out above in relation to the time issue the acts of M Chana can be regarded as a continuing act and that it follows that in our judgement the claimant has established that she was subject to continuing discrimination over a significant period of time by Mr Chana continuing until 5<sup>th</sup> March 2018. We have not upheld any of the other allegations as acts of discrimination; although the fact that they were not in our judgment discriminatory does not necessarily prevent them from contributing to a breach of the implied term. However given that in our judgement the discriminatory acts up to 5<sup>th</sup> March 2018 are sufficient in themselves to constitute a fundamental breach of contract it is not necessary to revisit any of the earlier allegations in this context.
76. The only allegation relied on which postdates the 5<sup>th</sup> March 2018 is that relating to the alleged failure to investigate the claimant's email. As is set out above although Ms Cherry believed the email of 14<sup>th</sup> May to have been acted upon in that it had been sent to Mr Leaver for his consideration it had not in fact been sent. Is the failure to do so therefore, capable of constituting or contributing to a breach of the implied term? As the respondent points out the claimant did not lodge any grievance other than that in relation to promotion. The allegation is, therefore that HR should unilaterally have decided to investigate an allegation in an email of their own volition despite no formal complaint being raised by the claimant and no complaint at all by the others named by the claimant. They submit that there is self-evidently no obligation to do so and that the failure cannot therefore amount or contribute to any fundamental breach of contract. In our view this must be correct.
77. That leads onto the question of affirmation. The respondent submits that even if the claimant were entitled to rely on allegation 9 she has affirmed by waiting too long before resigning. On the basis of our findings, the last act which contributes individually or cumulatively to a fundamental breach occurred on 5<sup>th</sup> March 2018. However, the decision not to promote her on review was communicated to her on or about 27<sup>th</sup> April. From that date she knew that she had been unsuccessful in the promotion applications. There was then a delay of something of the order of eight weeks before she resigned. In waiting for some eight weeks before resigning did she affirm? Delay is not in and of itself affirmation. However, on the basis of our findings all of the matters which constitute and or contribute to the fundamental breach of contract were known to the claimant by early March 2018. However, she did lodge a grievance about the failure to promote her which was one of the reasons for her resignation. There is no allegation that the conduct of the grievance by Mr Wilson was discriminatory or in any way unfair and the outcome was only communicated on the 17<sup>th</sup> July 2018, which post-dates the resignation and therefore can have played no part in the decision. However, it equally follows that at the time of her resignation there was an ongoing grievance about at least one of the matters said to constitute a fundamental breach of contract. It follows in our judgement that there was no affirmation and that the claimant's claim of constructive dismissal is therefore upheld.

Remedy

78. The case will be listed for a TPH to give directions in respect of remedy.




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**EMPLOYMENT JUDGE CADNEY**

**Dated: 5th August 20**

**Judgment entered into Register  
And copies sent to the parties on**

**11 August 2020**

  
**for Secretary of the Tribunals**