



EMPLOYMENT TRIBUNALS

Claimant: Mr M Maggott

Respondent: Sample Logistics Ltd

Heard at: London South

On: 20th – 24th March 2023

Before: Employment Judge Reed, Mr C Mardner and Ms Woodward

Representation

Claimant: Ms Gayle Colver, (Lay representative)

Respondent: Mr Thomas Wood, Counsel

RESERVED JUDGMENT

1. The claims for unfair dismissal, discrimination, holiday pay and unauthorised deduction from wages fall outside the territorial jurisdiction of the Tribunal. Accordingly those complaints are dismissed.
2. The claims for breach of contract (wrongful dismissal / expenses / travel subsistence and accommodation) are not well founded and are dismissed.

REASONS

Claims and issues

1. The claimant, Mr Maggott brings claims of:
 - a. Constructive unfair dismissal,
 - b. Direct race discrimination,
 - c. Direct age discrimination,
 - d. Direct sex discrimination,
 - e. Breach of contract / Wrongful dismissal,
 - f. Holiday pay,
 - g. Unauthorised deductions from wages, and
 - h. Breach of contract (expenses / travel subsistence / accommodation)

2. A list of issues was produced by Employment Judge Beale following her discussion with the parties at the preliminary hearing of 21st June 2022, p83-94. At the beginning of the hearing both parties confirmed that the list accurately reflected the issues in dispute.
3. In addition to the agreed issues, at the beginning of the hearing the Tribunal raised with the parties issues of both territorial jurisdiction and potential illegality. These arose from the fact that a) Mr Maggott had worked, for most of his employment, in South Africa and b) his immigration status during the time he worked in the UK was unclear.

Procedure, documents and evidence heard

4. The Tribunal heard evidence from the claimant, Mahlon Maggott and, on behalf of the respondent, Mrs Faye Hamann (Director), Mr Henry Hamann (Director), Mr Adrian Wong (Manger).
5. There was a tribunal bundle of 301 pages. References to page numbers in these reasons are references to that bundle, unless indicated otherwise. In addition the claimant provided a supplementary bundle of 72 pages.
6. This judgment has taken significantly longer than anticipated to produce due to the pressure of other work and personal circumstances. I apologise to the parties for the delay.
7. We considered the oral evidence and the documentary evidence to which we were referred. All findings of fact are made on the civil standard of proof. That means that they are reached on the basis that there are more likely to be true than not.
8. The written findings are not intended to address every point of evidence or resolve every factual dispute between the parties. We have made the factual findings necessary to resolve the legal disputes before us. Where we have made no findings or made findings in less detail than the evidence presented, that reflects the extent to which those areas were relevant to the issues and the conclusions reached.

Issue of Territorial Jurisdiction

9. Although evidence and submissions on the issue of territorial jurisdiction was dealt with in the course of the hearing, it is convenient to deal with it in these reasons as a separate issue.

Territorial Jurisdiction – Findings of fact

10. The broad facts relevant to territorial jurisdiction are not in dispute. At all relevant times, the respondent has had its head office in the UK, but also maintained offices internationally, including in South Africa. Between November 2012 and February 2020 Mr Maggott worked in the South African

office. He visited the UK office in 2016, for a period of about 4-6 weeks in order to meet staff there and to better understand the work.

11. On 28th February 2020 Mr Maggott arrived in the UK. The motives for bringing Mr Maggott to the UK are in dispute but it is agreed that he was expected to continue working for the respondent during this time; it was in that sense a work visit.
12. When it began, Mr Maggott's visit was expected to last approximately two to three months. His time in the UK, however, was significantly extended by the covid pandemic and its impact on international travel. This resulted in Mr Maggott remaining in the UK until after his employment ended upon his resignation on 16th November 2020.
13. The Tribunal were not provided with a copy of Mr Maggott's visa. Mr Maggott's evidence was that he came to the UK on a 'standard visitor visa', which lasted for six months. He said that, to arrange this, he provided the UK authorities with an invitation letter from Sample Logistics, stating that he would be in the UK for training purposes and that expenses would be covered by the company. This was not challenged by the respondent. Mr Wong agreed that Mr Maggott's visa did not permit him to carry out paid work, as distinct from vocational training.
14. In his witness statement Mr Maggott described the work that he did in the UK as his normal duties. He says that he worked with his UK colleagues on client accounts, in the same way as he had done in South Africa.
15. The most detailed account from the respondents as to Mr Maggott's duties in the UK was from Mr Wong. He said that when Mr Maggott first came to the UK he was engaged in training 'on the job' for Sample Logistics new IT system. He said that this involved entering data into the system and reporting how the system was working. He would also be involved in testing the system and assisting the IT staff with developing it.
16. After about March covid lockdown, Mr Wong accepted that Mr Maggott's role changed. He said from that time he was expected to perform his usual duties as he had done in South Africa, but he also continued to work on the system and provided feedback on the new system daily. Mr Wong said that he did not have any concerns about Mr Maggott's activities in the UK, because he was engaged in training.
17. It is agreed that Mr Maggott did not have the right to work in the UK, although his visitor visa permitted him to attend work related training.
18. The Tribunal did not receive detailed legal submissions on the extent of the activities permitted under Mr Maggott's visa. We concluded, however, that on any account his work activities went far beyond the sort of work-related training that is permitted under a standard visitor visa.
19. Data entry work, testing and providing feedback on a new computer system are all forms of work. They were not simply Mr Maggott being taught or learning about the new system. Rather they were him using the system to carry out tasks required by Sample Logistics in the course of their business.

20. No doubt there were elements of practical learning and gaining experience of the new system as well. But it does not follow that because there is a training component to someone's work they are therefore permitted to undertake all aspects of that work in the UK without the right to work in the UK. Many, if not most, jobs will include some expectation that an employee will gain practical experience and develop their skills in the course of their work. If that was sufficient to permit such activities to be carried out within the definition of work-related training and therefore under a visitor visa, the scope of such a visa would be exceptionally wide.
21. In any event, from around the 23rd March 2020 when the covid lockdown occurred, we accept Mr Maggott and Mr Wong's evidence that Mr Maggott was carrying out his usual tasks, in addition to any training work that he was performing. That was well outside the scope of activities permitted by his visitor's visa.
22. We accept, however, that nobody at the time believed they were acting wrongly or unlawfully. Neither Mr Maggott or anyone at the respondent focussed their mind on the precise requirements of the visa or the extent to which they might be being infringed.
23. Throughout his employment Mr Maggott was paid in South African rand to a South African bank account. He paid taxes in South Africa. He did not pay tax in the UK. This remained unchanged throughout his time in the UK.
24. It is common ground that, in September to November 2020, while Mr Maggott was signed off sick, he was paid on the basis of UK Statutory Sick Pay. Mr Maggott suggests that this was wrong and that he was entitled to be paid his full pay, on the basis that South African law provides for employees to receive full pay, provided a sick note is produced.

Territorial Jurisdiction – Law

25. The majority of Mr Maggott's claims relate to UK statutory employment rights, i.e. unfair dismissal, discrimination, unauthorised deduction from wages and holiday pay.
26. The starting point, as might be expected, is that UK employment law does not have worldwide effect. It does not purport to apply to the employment relationship between employees and employers wherever they are in the world.
27. The main consideration in determining whether the Employment Tribunal has jurisdiction over an employment relationship is where the work of an individual is located, see *Lawson v Serco Ltd* [2006] ICR 250.
28. As the House of Lords set out in *Lawson* the paradigm case where this Employment Tribunal will have jurisdiction is an employee working in Great Britain. Similarly, the paradigm case where the Employment Tribunal lacks jurisdiction is where an employee works outside the UK.
29. Inevitably, however, there are circumstances that do not fall into these clear categories. *Lawson* sets out a number of potential circumstances outside the

'standard case' of an employee working in the UK, where jurisdiction might nonetheless apply. These include:

- a. Peripatetic employees, such as salespeople, mariners or pilots, who spend considerable amounts of their working time travelling abroad.
- b. Expatriate employees, who work for a UK business abroad, but who the connection between the employment relationship and the UK is overwhelmingly stronger than its connection with the country in which they work.

30. It is clear that having a UK based employer is not sufficient to establish this Tribunal's territorial jurisdiction, see *Lawson* ¶37.

31. The potential categories set out in *Lawson*, however, are illustrative examples, not definitive categories. The fundamental question, as confirmed by the Supreme Court in *Ravat v Halliburton Manufacturing and Services Ltd* [2012] IRLR 315, is whether an employee has a much stronger connections with the UK and with British employment law than any other system of law. *Ravat* also confirms the general rule that the place of employment is decisive to the issue of territorial jurisdiction, ¶28. An employee who both lives and works outside the UK would require an especially strong connection to Great Britain and British employment law before an exception could apply to them.

32. The applications of these principles to employees on secondments or placements to the UK from abroad was considered by the Employment Appeal Tribunal in *Pervez v Macquarie Bank Ltd* [2011] ICR 266. There the EAT upheld the Tribunal's decision that, where an employee had been seconded to the UK on a 'settled (and indefinite) basis' as part of the UK operation, he was therefore working in Great Britain at the material time. Then President Underhill noted, however, that such questions are highly fact specific and it was relevant to consider the length of a secondment and the extent to which an employee was integrated into the UK business.

33. In relation to the discrimination and holiday pay elements of the claim, it is also necessary to consider the Bleuse principle, which arises from the Employment Appeal Tribunal's decision in *Bleuse v MBT Transport Ltd* [2008] IRLR 264.

34. The Bleuse principle arises from the requirement to ensure the EU law principle of effectiveness, which requires member states to provide legal mechanisms to guarantee EU law rights. It means that the Tribunal will have jurisdiction to consider a claim, notwithstanding the normal territorial jurisdiction position where:

- a. The applicable law to the employment contract is English law;
- b. The claimant has a sufficient connection with the EU; and
- c. A modification to the ordinary principles of territorial limits on jurisdiction is required to ensure that the claimant has an effective remedy for a breach of EU or retained EU law.

35. The extent of the necessary connection with the EU was considered by the EAT in *Wittenberg v Sunset Personnel Services Ltd* [2017] ICR 1012. The EAT regarded the question of whether there was a sufficient connection with the EU to be a factual issue. They concluded that the Bleuse principle did not go as far

as suggesting that EU law rights applied worldwide. It was relevant to consider where an employee's work took place, their nationality, where they were based and the system of law under which the employment contract was made.

36. Mr Maggott also brings claims for breach of contract and therefore pursuant to the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. The approach to territorial jurisdiction in relation to these claims, is somewhat different, since they do not involve UK statutory employment rights.
37. The Employment Tribunal has jurisdiction over a contract claim, by an employee, in certain circumstances as set out at article 3 of the Extension of Jurisdiction order. The relevant part in respect of territorial jurisdiction is the requirement at Article 3(a) that claim be one 'which a court in England and Wales would the law for the time being in force have jurisdiction to hear and determine'.
38. The territorial jurisdiction of the courts of England and Wales is set out in Part 6 of the Civil Procedure rules. In brief they will have jurisdiction to hear a contract claim if a company is registered or incorporated in England and Wales (or in certain additional circumstances which are not pertinent to this claim).
39. This however is not the only relevant issue to territorial jurisdiction in respect of contract claims. This is because there must also be consideration of whether the British court or tribunal is best placed to adjudicate the dispute when compared to any overseas court or tribunal. This is the doctrine of *forum non conveniens*.
40. The general principles of the doctrine have been set out by the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460. Fundamentally the question is whether it is in the interests of justice and all the parties for a claim to be determined in a foreign jurisdiction. This requires consideration of which legal forum has the most real and substantial connexion with the claim. It will also require consideration of practical matters, such as the location of witnesses together with convenience and expense parties.
41. Where there is a forum outside of England and Wales which is more appropriate to hear a claim generally the tribunal should grant a stay in order to allow this to occur. This, however, is not automatic. There will be cases where, once all circumstances are properly considered, it is not in the interests of justice for a state to be granted.

Territorial Jurisdiction - Conclusions

42. We concluded that, prior to his arrival in the UK in 2020, it was clear that Mr Maggott's employment did not have sufficient connection with the UK for the Tribunal to have jurisdiction over any of his claims.
43. Mr Maggott lived and worked outside the UK. The only connections to the UK were a) the fact that the respondent was based there; b) that his work involved contact with colleagues in the UK and c) his short visit in 2016. It is relevant that Mr Maggott was paid in South African rand, paid taxes in South Africa and kept South African public holidays while he was working in South Africa.

44. All of this falls well short of the sort of exceptional circumstances that would be required for the Tribunal to have jurisdiction over an employee who lived and worked outside the UK. Mr Maggott's situation was not analogous to a UK employee who had been posted from the UK to a foreign country. Rather, he was a South African citizen working in the South African office of an international business (albeit one headquartered in the UK).
45. We gave careful consideration to whether, either at the point that Mr Maggott came to the UK or some time thereafter, he developed a sufficiently strong connection with the UK and with UK employment law that this connection became stronger than his connection to South Africa and South African law. We concluded that he did not.
46. The following factors were of particular relevance:
- a. The great majority of Mr Maggott's time in employment was spent residing and working in South Africa. Not only had this been the case in the past, it was also expected to remain the case indefinitely in the future.
 - b. The initial intention, of all parties, was for the visit to the UK to be a short one, for a limited purpose.
 - c. The extension arose out of the exceptional circumstances of the covid pandemic and its effect on international travel. This would not necessarily prevent a connection developing with the UK but provides important context. An employee who is effectively stranded in a country by reasons of travel restrictions, ill health or some other factor will, inevitably, be much less likely to develop a strong connection with that country than an employee who remains there working voluntarily when they are able to return to their previous residence.
 - d. It remained all parties' intention that Mr Maggott would return to South Africa once that became practical.
 - e. At no stage did Mr Maggott have, or indeed seek to obtain, the right to work in the UK. Again, we did not think this necessarily precluded a connection developing with the UK, but it forms an important part of the context. In particular, the fact that Mr Maggott could not lawfully work in the UK acted as a strong impediment to him developing a connection with the system of UK employment law.
 - f. No steps were taken, by either party, to seek to change those elements of the employment relationship that connected Mr Maggott to South Africa. Most significantly, Mr Maggott continued to pay tax in South Africa and did not pay any UK tax.
 - g. Both the respondent's payment of statutory sick pay and Mr Maggott's reliance on South African law in relation to his wages claim were of extremely minor relevance. We concluded that the respondents' payment of SSP occurred without any real thought as to the correct legal position. Similarly, Mr Maggott's reliance on South African law in these

proceedings did not provide any real indication of his understanding of the position at the relevant time.

47. For the same reasons, we concluded that there was insufficient connection with the EU for the Bleuse principle to apply. Mr Maggott was not an EU citizen and his normal place of work was outside the EU. A short visit to the UK would not be sufficient to create the necessary connection to the EU. When Mr Maggott's stay became extended, the level of connection increased. But it did not become sufficient to engage the principle of effectiveness, bearing in mind in particular that Mr Maggott at no stage acquired the right to work within the EU. This inevitably strictly limited the extent to which he could be said to be connected to the EU, in the context of his right to enforce EU derived employment law.
48. In relation to the contractual claims there is no dispute between the parties that the respondent is a company registered in England and Wales. Therefore, the tribunal has jurisdiction over the contract claim.
49. So far as the appropriate venue is concerned, the tribunal concluded that this was a claim which would have more appropriately been heard in South Africa. That is the location which has the most real and substantial connexion to the claim. Nonetheless it would not be in the interests of justice to stay the claim at this stage, after the case has been fully argued. It is not in the interests of justice or the interests of the parties for the contractual claims to be fully reheard in another jurisdiction.
50. Although our conclusion in respect of territorial jurisdiction means that the claims (with the exception of those based on breach of contract) must be dismissed) the Tribunal went on to consider how we would have resolved these claims had there been jurisdiction.

Findings of fact

Background

51. The respondent is a family-owned business, with offices in the UK, South Africa and Singapore. Its main business is managing the logistics of having fuel oil samples from shipping vessels tested in order to comply with marine regulations.
52. The respondent is owned and run by Mrs Faye Hamann and her husband Mr Henry Hamann. Mr Maggott and Mrs Hamann are siblings. Starting in November 2012 Mr Maggott worked for the respondent as a Logistics Administrator, based in South Africa.
53. Gayle Colyer, who has represented Mr Maggott in these proceedings, is the sister of Mr Maggott and Mrs Hamann. At various points in these proceedings, there has been discussion of Ms Colyer's relationship with Mrs Hamann and various disputes between them that fall outside the factual circumstances of these claims. It has been suggested that these may have motivated Ms Colyer in her support of Mr Maggott. In our view, none of this is relevant to these proceedings and we have not sought to make findings of fact on these matters.

54. It is relevant to Mr Maggott's claim for race discrimination that in 2019 he was in a romantic relationship with Judith, a woman who has been described to us as 'Cape Coloured'. It is common ground that this was a term used during the apartheid era of South Africa to refer to individuals who of mixed race.
55. There was some dispute in evidence as to whether it is now a racially offensive term. Mr Maggott said that it was not offensive and simply a factual term to describe an individual's ethnicity. Mrs Hamann said that it was very much a term referring back to the apartheid system and therefore a derogatory term.
56. Broadly, we accepted Mr Maggott's evidence on this point. As is often the case, much depends on the circumstances and nuance of how a term is used. The most innocuous term can be used in a highly offensive manner. Equally, a term that is usually of the most derogative type may, in particular circumstances, not be offensive at all. The Tribunal accepted, however, that the term 'Cape Coloured' as used by the principals in this case and in the context of the South African vernacular, did not in itself have the generally offensive connotation that describing someone as 'coloured' would have in the UK.

Mrs Hamann's knowledge of Mr Maggott's relationship

57. Mrs Hamann's evidence was that she had first learnt that Mr Maggott was seeing someone in October 2019. She had visited South Africa at that time and says that Mr Maggott told her about his relationship when they met. Mrs Hamann says that she discussed the new relationship with other family members on her return to the UK in October and November.
58. Mrs Hamann says that she was aware of Judith's race from around this time. This was on the basis of the way she had been described in appearance and from she lived. It was suggested to Mrs Hamann that, since designated areas where people from particular ethnic groups had been abolished at the end of the apartheid era, this was not credible. We, however, accepted Mr Hamann's evidence. We accepted that, while designated areas have been abolished in South Africa, there are as in other countries patterns in where people of particular demographics reside. It is therefore plausible that the combination of a physical description together with a place of residence would allow her to deduce someone's race.
59. Mr Maggott suggests that Mrs Hamann was aware of the relationship significantly earlier, from January 2019. On balance, however, we have accepted Mrs Hamann's evidence. Her account of how she learnt of the relationship is a credible one.
60. If, as Mr Maggott suggests, she was aware of the relationship and disapproved, it seems unlikely there would be no evidence of this – particularly since she and Mr Maggott lived in different countries and frequently communicated by text or email. There is no documentary evidence, either communication between Mr Maggott and Mrs Hamann or communication between Mr Maggott and other family members that indicated Mrs Hamann was aware of the relationship before December 2019.

Plan for Mr Maggott to visit the UK

61. There is some dispute between the parties as to when it was first suggested that Mr Maggott come to the UK. Mr Maggott says that in September 2019 he was told that he would need to come to the UK. Mr and Mrs Hamann, together with Mr Wong, say that he was invited in January 2020.
62. We accepted Mr Maggott's evidence that there was discussion of him visiting the UK as early as September 2019. It is plausible that there would be informal discussion before a definite decision was made. An invitation to come to the UK for several months, on only about six weeks' notice, would be a significant request to make of any employee. The commercial factors put forward for the invitation – the handover of one of Mrs Hamann's clients and the work of the computer system -- were also of fairly long standing. This was not a situation involving an emergency or sudden crisis. Again, all of this makes it more plausible that there was informal discussion prior to the formal invitation.
63. We did not accept Mr Maggott's allegation that Mrs Hamann was motivated at this stage by a desire to interfere with or put an end to his relationship with Judith. The plan that he visit the UK for a period (as he had done in 2016) was formulated before she was aware of the relationship.

Christmas 2019 Incident

64. Over the Christmas of 2019 there was a significant disagreement between Mr Maggott and Mrs Hamann.
65. Mr Maggott and Mrs Hamann had planned for Mr Maggott to take their mother to lunch for Christmas. The plan was made relatively close to the day and there had been some difficulty in booking a table. Ms Hamann had, however, succeeded in securing a reservation for the two of them.
66. On Christmas morning, Mrs Hamann learnt that Mr Maggott intended to bring his girlfriend with him to this Christmas lunch. They had a long, intermittent, text conversation on that day, beginning in the morning and continuing later into the evening. This has been produced, p149-153.
67. Mrs Hamann's reaction was strongly negative and disapproving. She writes that she will not allow Mr Maggott to 'smack me in the face again' and says that he will 'embarrass and shame me again'. She describes him as being like 'a dog going back to his vomit by chasing after something that is wrong and immoral'.
68. Writing shortly before 2pm, Mr Maggott replies that he had intended to spend Christmas with his partner before the suggestion of a family lunch had been made. Mrs Hamann accuses him of hiding his intentions and says that his actions are 'so bizarre that it's shameful'.
69. Mr Maggott replies that he is sick of being told by his family how to live his life and that he is happy with his partner. He suggests Mrs Hamann is being short sighted and selfish.

70. That evening Mrs Hamann replies that it is clear that Mr Maggott is unable to make good choices and that it's clear that 'your choices compromise class'. There is a plain suggestion that Judith has mercenary motives in that Mrs Hamann asks, rhetorically 'Of course it's easy to love someone when you are offering everything including a place to stay. Who is going to turn that down ... ?' She asks if he is so needy that 'you have lowered your standards and overlooked class just to have someone?' She describes him as 'despicable and an absolute disgrace' and says that 'You have brought shame on me for doing what you have done'. Judith is described as 'your low class friend'.
71. Later that evening Mrs Hamann also had a text conversation with Ms Colyer. This has been provided p153-157. Mrs Hamann tells Ms Colyer that Mr Maggott brought his partner to the lunch. Ms Colyer agrees that this was devious, and both describe Mr Maggott's behaviour, in various ways, as poor.
72. The element of the conversation that is most relevant to these proceedings is that Ms Colyer, in reference to Judith's behaviour writes 'Of course! Like only a cape coloured would behave and turn up with the white family?'
73. Ms Hamann's next text occurs just under a minute later, writing 'Yes exactly Gayle.. even from afar he is so deceitful and just kept quiet knowing full well the plan he had up his sleeve.'
74. In her evidence Mrs Hamann denied that she was expressing agreement with Ms Colyer's suggestion that Judith's race explained her poor behaviour. Rather, she said, she was agreeing with a previous message, in which Ms Colyer described Mr Maggott as deceitful. She said that she was agitated and upset at the time. Both she and Ms Colyer were typing and sending messages quickly. Both were angry. It was not therefore a calm or considered exchange, in which each statement was carefully weighed and points of potential disagreement were clearly identified or resolved. She also noted that it takes time to type and to send a message in response, which means that what may appear to be a reply to one message may, in fact, be a reply to a message earlier in the exchange.
75. On balance, however, we concluded that Ms Hamann did express agreement with Ms Colyer's statement regarding people of Cape Coloured ethnicity and their negative behaviour. The previous message from Ms Colyer, which Ms Hamann says she was replying to was sent almost two minutes before Ms Hamann's statement of agreement. Reading the messages in sequence, it appears more likely that Mrs Hamann was agreeing with Ms Colyer's suggestion about those of Cape Coloured ethnicity.
76. Turning to Mrs Hamann's overall response to this incident, Mrs Hamann suggests that her reaction was reasonable irritation with Mr Maggott's poor behaviour. She insisted that her reaction had nothing to do with it being Mr Maggott's partner as the addition to lunch, simply to Mr Maggott bringing any third person. She denied being motivated by any racial element.
77. We did not accept this evidence. Mr Maggott's intention to bring a third person to a lunch booked for two was, at the most, a mild social gaffe. It is simply implausible that it would prompt Mrs Hamann's incandescent response if that

was all there was to it. Equally, all of Mrs Hamann's specific references to Mr Maggott's poor decisions and to his partner make little sense if there is not some level of personal criticism being made.

78. Mrs Hamann also suggests that, in part, her reaction was because she believed that Mr Maggott was living a dissolute lifestyle, having relationships with many different women while making commitments to them that he then failed to fulfil. She suggest that, as a result, she was frequently rung up by Mr Maggott's girlfriends. We did not accept this. It is wholly incredible that, if Mr Maggott was living such a lifestyle, he would be providing his girlfriends with Mrs Hamann's phone number when he would have known she was likely to disapprove. There would be absolutely no reason for him to do so.
79. We also concluded that it was right to draw an inference from the repeated references to 'class' by Mrs Hamann. 'Class' is often used as a proxy term to refer to race or its use represents a stereotyped negative view of someone of a particular race. This does not mean that whenever someone refers to someone of a different race to themselves as 'lacking class' or some similar term they are invariably acting on racial grounds. That is, however, a possibility that should be born in mind.
80. In this case, the combination of Mrs Hamann's unreasonable and disproportionate response, her use of highly emotive language, her references to class and her agreement with Mrs Colyer's explicit invocation of race, led the Tribunal to conclude that Mrs Hamann's highly negative response was, to a significant degree, influenced by disapproval of Mr Maggott being in a relationship with a woman of a different race.

Arrival in the UK

81. Mr Maggott arrived in the UK on 28th February 2020. He stayed at Mr and Mrs Hamann's house, which was close to the UK office.
82. Mr Maggott suggests that the invitation to the UK was motivated by Mrs Hamann's desire to bring his relationship with Judith to an end. He says he was given no choice but to come to the UK – that he was, in effect, given an ultimatum. He says that Mrs Hamann's intention was to break up his relationship with Judith. We did not accept this. As noted above, the plan for Mr Maggott to come to the UK was of long standing and its formulation had predated Mrs Hamann's knowledge of his relationship. We also do not think that Mrs Hamann would have expected that a relatively short visit to the UK would be likely to bring Mr Maggott's relationship to an end.
83. There was undoubtedly tension between Mr Maggott and Mrs Hamann at this time. That was inevitable following their significant disagreement at Christmas.
84. It was reflected in the conversation that Mr Maggott had with Mr Hamann in January 2020, which is referred to in their email exchange on the 21st January 2020, p161-162. Mr Hamann refers to a conversation in which Mr Maggott has said that it is difficult to work with Mrs Hamann and with family. Mr Hamann suggests that family issues should not affect work, but noted that Mr Maggott's

role reported to Mrs Hamann. He suggests that, if that is not acceptable, Mr Maggott will need to consider whether he can remain in the role.

85. Mr Maggott replies, suggesting that Mr Hamann is aware of Mrs Hamann's 'controlling nature'. He suggests that the line between work and private family life is difficult, because there will always be some overlap. He denies that he has any problem working with Mrs Hamann but says that he takes exception to her seeking to control his private life. He says, however, that he has no problem coming to the UK.
86. At this stage, Mr Maggott, Mrs Hamann and Mr Hamann were conscious of the tensions in their relationship and the potentially difficult situation they were in. The friction between Mr Maggott and Mrs Hamann, arising from his relationship and her disapproval of Judith, would have been difficult even if the only relationship was their familial one. The employment relationship in addition to that added an extra layer of complication. Nonetheless, at this stage, all parties wished to make it work.
87. Mr Maggott says that when he arrived in the UK he also agreed with Mr and Mrs Hamann that he would receive 'travel subsistence' of £20 a day while he was in the UK. This is denied, although Mr Hamann agreed that he gave Mr Maggott £100 when he arrived.
88. We accepted Mr Hamann's evidence on this point. It was plausible that Mr Hamann might gift Mr Maggott some spending cash when he first arrived. It is much less plausible that he would agree, in addition to paying Mr Maggott's usual wage and providing him with accommodation / food during his visit, to pay him a substantial additional sum, for which there was no obvious need.
89. Mr Maggott has also suggested that, while he was in the UK, he was entitled to be reimbursed for certain expenses. He refers specifically to the cost of his mobile phone, the cost of a Voice of IP protocol service for phone calls, and accommodation.
90. In respect of his mobile, Mr Maggott accepts that he was never previously paid expenses in respect of his phone.
91. In relation to the VOIP service Mr Maggott accepted that this was used when he was in South Africa in order to make international phone calls. He described it as a pre-paid service, in which he needed to top up his account.
92. In relation to the accommodation, we have concluded that there was no agreement to pay Mr Maggott in respect of accommodation. This was unnecessary, since the intention was that he stay with the Hamanns during his visit. Nobody gave any thought at this stage to the possibility that Mr Maggott might reside elsewhere during his stay.

Work during the UK Visit

93. The nature of Mr Maggott's work in the UK, in broad terms, has been dealt with above.

94. Mr Maggott's evidence was that, during his work in the UK, Mrs Hamann was extremely demanding and difficult. In his witness statement he describes her as 'constantly yelling, bullying and harassment in her house and her snide remarks and offensive comments to me that made me feel intimidated, offended, anxious, humiliated, uncomfortable and threatened'. He suggests that there was significant tension whenever he made a phone call to Judith back in South Africa. He suggests that Mr and Mrs Hamann deliberately moved the household dinner time to 8pm, because that was the time he had arranged to speak to her. He says that Mrs Hamann would regularly make negative remarks and show irritation during those phone calls.
95. Mr Maggott, however, was also inconsistent in his evidence. In particular, under cross-examination, he denied that his relationship with Mrs Hamann was difficult during his time in the UK. This is wholly inconsistent with his allegations that her behaviour was so extreme that he felt threatened and intimidated.
96. The respondent has produced a number of photos of Mr Maggott with the Hamanns and suggests that this demonstrates a happy and contented relationship. This is not particularly persuasive – any photo inevitably captures a single moment in time, which may be wholly unrepresentative of the wider situation.
97. There is a notable lack of specificity in Mr Maggott's allegations, save in relation to the two incidents that are dealt with below. Again, this is not congruent with his allegations of constant extreme behaviour on the part of Mrs Hamann.
98. On balance the Tribunal concluded that, although there was some ongoing tension between Mr Maggott and Mrs Hamann, it did not come close to the sort of bullying behaviour that he now alleges. There were occasions on which Mrs Hamann was unhappy with Mr Maggott's work and felt that he was not performing particularly well. And there was ongoing tension arising from Mr Maggott's relationship with Judith. We found it wholly plausible, given our earlier findings in reference to the incident at Christmas, that there would be an atmosphere of tension in that regard. This was not, however, the level of oppressive atmosphere that Mr Maggott now describes.
99. It is agreed that during his time in the UK Mr Maggott was required to attend the office to work during business hours. He has made reference to two female colleagues who he says were treated differently. First, Celia, who was permitted to work from home during her notice. Second, Tracey, who was permitted to leave early in order to pick her children up from school and sometimes to work from home to look after them.
100. Mr Maggott also suggests that he was frequently asked to deal with work matters outside his normal working hours. We did not, however, accept this. With the exception of the May incident described below Mr Maggott has not provided any examples of him being asked to work excessively or being required to deal with work matters at the evening or weekend. No doubt there was some discussion of work matters after hours, as might be expected where three people working in the same business reside in the same house. But it was not to any degree unreasonable and Mr Maggott was not asked to do significant work outside work hours.

May Incident

101. Mr Maggott describes a particular incident that took place in May 2020. Mrs Hamann approached Mr Maggott with a work query after hours. He was not able to provide her with an immediate answer. He says that she became irritated and suggested that he should have this information at his fingertips. He says that she compared him with a younger colleague, Stefan Engler, suggesting that he would have been able to answer her question. He says that she went on to yell "You're stupid!" at him.
102. Mrs Hamann accepts that she did raise a client query and that she was unhappy when Mr Maggott was not able to provide the answer. She suggests it was the sort of routine information that he should have been able to provide. She denies making any comparison with Mr Engler, behaving in an intimidating way or describing Mr Maggott as stupid.
103. We accepted that Mrs Hamann was unhappy when Mr Maggott was unable to provide the information she sought. We also accept that she suggested that Mr Engler would have been able to answer her question. We did not, however, accept that she described Mr Maggott as stupid or acted in an intimidating manner.
104. Mrs Hamann says that that this led on to a more personal argument in which Mr Maggott made negative remarks about her sons. She says that at that point she left the room to have a conversation with her husband. Mr Maggott accepts that he had made reference to Mrs Hamann's sons in this conversation.
105. There was then a meeting between Mr Hamann, Mr Maggott and Mrs Hamann in which Mr Hamann made some effort to clear the air. He suggested the Mr Maggott that he needed to work with Mrs Hamann, as the Director and his superior within the business. He asked Mr Maggott not to bring issues about their sons into the workplace. Mr Maggott accepts that he apologised for doing so.

26th August Incident

106. On the 26th of August Mr Maggott was in the garden of the Hamann residence when Mrs Hamann came home. She came out to join him. They entered into a conversation about family. Mr Maggott made a comment about one of his nieces to the effect that she had changed quite a bit from being a sweet young girl. He says that Mrs Hamann agreed and suggested this was the cause of her father's choice in partner. He says that she went on to suggest that he should take note because he was making a similar poor choice. Mr Maggott says that she said 'It is not morally right for you to live together with your non-white girlfriend before getting married!' He also says that she said he should not disgrace his family by 'going out with someone low class from a poor background'.
107. Mrs Hamann accepts that there was an argument. She says that her comments referred to making sound choices in life and this included not living

together before marriage. She denies making any direct reference to Judith or to anybody's race.

108. We accepted that Mrs Hamann did not make a direct reference to Judith's race, but also accept Mr Maggott's evidence that she spoke about his relationship in strongly disapproving terms and described Judith as 'low class'. It is clear from Mrs Hamann's messages on Christmas 2019 that she was willing to express herself to Mr Maggott in such terms when she was angry and it is plausible that she did so again on this occasion.
109. Similarly, it is plausible that she would not, on this occasion, directly refer to Judith's race, just as she had not done so at Christmas. We concluded, however, that her disapproval of Judith and her references to her as 'low class' arose from racial prejudice.
110. Mr Maggott re-joined that Mrs Hamann was not in a position to judge his actions because she allowed her sons to live with their girlfriends under her roof and had supported them in living together despite not being married. He describes Mrs Hamann as then flying into a rage and storming off. Mrs Hamann also describes Mr Maggott by this stage as being exceptionally angry.
111. We find that both Mr Maggott and Mrs Hamann had thoroughly lost their temper and were shouting allegations of hypocrisy at each other. Mr Maggott also shouted that he would not take instructions from Mrs Hamann. Both Mrs Hamann and Mr Hamann suggest that this was a reference to instructions within the workplace. We do not, however, accept this. In context it was clearly a reference to Mrs Hamann's remarks about his personal life.
112. At about this time, Mr Hamann arrived home in time to catch the tail end of the argument. Mr Maggott had gone upstairs to his bedroom and Mr Hamann initially spoke to his wife.
113. Mrs Hamann suggests that at this stage she told her husband that the fundamental problem was that Mr Maggott's attitude spilt over into work and that this meant she was unable to give him a reasonable work-related instructions. We do not accept that evidence. It is implausible that at this stage she was speaking in such a calm or measured manner.
114. Mr Hamann then went upstairs to speak to Mr Hamann. Mr Hamann describes him as storming in and being aggressive. Mr Hamann suggests he was a bit annoyed, but calm. The truth is between those points. Mr Hamann was significantly calmer than either Mr Maggott or Mrs Hamann, but more than slightly annoyed. He told Mr Maggott that he must not talk about their sons in the way that he had and described this as 'Strike Two'.
115. Mr Maggott has placed considerable emphasis on this reference to 'Strike Two' suggesting that it could only have meant that any further reference by himself to the Hamann's family would result in his dismissal from employment. This, of course, is in reference to baseball where a third strike results in a batter being dismissed. We accepted that in certain circumstances the face can bear the connotation that Mr Maggott places on it. We do not accept, however, that it did so here. First, Mr Hamann's remarks were not made in a workplace context, but rather in reference to the family argument that was

taking place. They did not therefore carry the implication that there would necessarily be any employment consequences as Mr Maggott suggests. Second, we accept that in this context the reference was simply to the fact that this was the second serious altercation in which Mr Maggott had made references to the Hamann's sons. It was not intended to, and in context did not, carry the implication that some definite consequence would result from a repetition.

116. During this conversation Mrs Hamann was stood behind Mr Hamann, so distance back from him, telling him that she wanted Mr Maggott 'out'. She remained at this stage significantly upset and agitated. Mr Maggott suggests that this was clearly a reference to him being dismissed from his employment. We do not accept that. At this point Mrs Hamann probably did not have any very clear intention in mind. She was simply exceptionally angry and expressing that anger.

117. Similarly, Mr Hamann suggests that he (and indeed Mrs Hamann) had in mind the fact that any disciplinary action towards an employee would require a proper procedure. We find this implausible. It is unlikely that in the heat of the moment anyone was considering any such thing. They were engaged in a family argument about their personal lives.

118. Mr and Mrs Hamann then left the house and did not return until much later in the evening.

119. Mr Maggott suggests that during the confrontation with Mr Hamann he feared for his safety. He suggests that even after the Hammans left he was unwilling to leave his room to get anything to eat. We have found that this is an exaggeration. He was upset, as Mr and Mrs Hamann were by the incident. There was, however, no reason for him to fear physical violence and certainly not to the extreme degree that he now suggests.

After the August incident

120. Mr Maggott attended work on the 27th August. Neither Mr or Mrs Hamann spoke to him or made any contact with him on that day.

121. On the 28th August Mr Maggott spoke to another family member, who agreed that he could stay with him. He therefore moved out of the Hamann's residence on the 28th.

122. On Monday 31st August Mr Maggott sent Mr Wong a text message indicating that he had some personal affairs to take care of and was intending to work remotely, p214.

123. On 4th September Mr Maggott sent Mr Wong an email saying that there have been some personal issues between him and Mrs Hamann. As a result, he said, he was no longer staying with her. He said that he would be working remotely while he remained in the UK.

124. On 7th September 2020 Mrs Hamann sent Mr Maggott an email, p219. It indicated that, as of 1st September 2020, all staff had been required to return

to the office. It went on to say that his decision to work remotely was unacceptable and that permission was required to work remotely.

125. Finally, Mrs Hamann wrote that Mr Maggott had repeatedly stated that he was unable to take instruction or advice from her and that with this in mind she could not see the working relationship continuing. She refers to repeated incidents where he had openly disrespected her position and suggested that this meant she was not able to provide relevant training or instruction. She says that therefore they needed to discuss alternative arrangements in order to reach an amicable conclusion.
126. Mr Maggott did not reply to this email.
127. On the 9th September 2020 Mrs Hamann phoned Mr Maggott. Both Mr Hamann and Mr Wong were in the room with her and monitored the call.
128. She says that she wanted to speak to him about his failure to report to the office for work. She says that almost immediately he started to shout at her saying that he was unwilling to speak unless she apologised to him and that he then terminated the call. Mr Maggott says that, after Mrs Hamann raised the fact that he had not attended the office she asked him whether he had anything to say at which point he noted that he had not received an apology. He says that this caused her to become belligerent and that she began shouting at him. He says that this caused him to end the call.
129. We concluded that both Mrs Hamann and Mr Maggott were both somewhat agitated during this call. Mrs Hamann wanted to proceed on the footing that this was a work call and to keep the emphasis on Mr Maggott's attendance in the office. Mr Maggott wanted her to apologise for the way that she had behaved during their argument. When he sought to insist on this, Mrs Hamann did try to insist that they discuss his attendance at which point he terminated the call.
130. Mrs Hamann then sent Mr Maggott an email, p218-219. It refers to her having stated that the purpose of the call was Mr Maggott's lack of response to the 7th September email and his continued absence from the office. Mrs Hamann suggests that Mr Maggott's response was a reference to a personal relationship breakdown rather than business relating to Sample Logistics.
131. Mr Maggott then sends an email to Mrs Hamann on the 11th September, p218. He refers to the phone call and to Mrs Hamann's email. He says that he had not responded to the correspondence because he had not received an apology. He says that he therefore informed Mrs Hamann that he did not intend to return to the company premises and until his return to South Africa would continue to work remotely. He also refers to having been told 'in no uncertain terms' that he was not to continue to stay at Mrs Hamann's house.
132. On the 15th September Mr Hamann replies to this email, p217-218. He denies the allegation that Mrs Hamann had told him he could not remain under her roof. He suggests that her references to 'I want him out' related to the work situation and Mr Maggott's 'clear contempt' for her position as operations Director. He suggests that there are both personal and work issues involved and that Mr Maggott is allowing his personal issues to interfere with work. He

suggests that Mr Maggott is blatantly ignoring the direct instruction to report to the office. He also says that 'we will no longer continue this dialogue regarding your issues with [Mrs Hamann] which is clearly a personal issue'.

133. In his evidence Mr Maggott suggests that there was another email sent to him on the 15th. This is dealt with below.
134. On 17th September Mr Maggott sent an email to Mr Wong saying 'I am feeling poorly due to work related stress and won't be able to work today', p221.
135. On Friday 18th September Mr Maggott writes again to Mr Wong saying 'unfortunately, I am not getting any better and won't be at work next week', p222.
136. On the 18th September Mr Maggott also returned to the Hamann residence to collect his belongings. Neither Mr Hamann or Mrs Hamann was present at the time. In addition to his belongings Mr Maggott removed some wifi boosters that he had installed for the Hamanns.
137. On 23rd September Mr Maggott obtained a sick note from his doctor. On 24th of September he attempted to send that sick note to Mr Wong. At that point discovered that his access to the Sample Logistics computer system, including his email, had been withdrawn.
138. The respondent's case is that the decision to remove Mr Maggott from the computer system was taken by Mr Wong. In his evidence Mr Wong sought to uphold that position. He accepted, based on the e-mail evidence, that access must have been withdrawn at some point between the 18th and the 24th of September. He said that he took the decision without consulting with Mr or Mrs Hamann or telling them what he had done.
139. Mr Wong said that in his view Mr Maggott's behaviour during the 9th September call had amounted to misconduct. He said that he was concerned that Mr Maggott might harm the respondent. When pressed for an example he suggested emailing clients in a way that slandered the company or bringing his allegations against Mrs Hamann to a wider audience. He said that, on that basis, he thought it was appropriate to remove his access.
140. In our view however this is all wholly implausible. Mr Wong was plainly in a very difficult position. He was being drawn into what was clearly, to a significant degree, a family argument in which his immediate line managers and the Directors of the company were involved. It was a situation where any sensible person would wish to proceed carefully and to avoid making the situation worse. That was obviously a significant risk of offending both Mr and Mrs Hamann. It is simply most unlikely that in those circumstances Mr Wong would have acted unilaterally in the way he suggests. It is even less likely that he would not even have told either Mr or Mrs Hamann what he had done.
141. We have therefore concluded that there was a discussion between Mr Wong, Mr Hamann and Mrs Hamann in which it was agreed that Mr Maggott's access would be revoked. Mr Wong then implemented that decision. To a significant degree the decision was based on annoyance with Mr Maggott,

particularly over him having entered Mr and Mrs Hamann's house without informing them and removing the wifi boosters.

25th September Grievance

142. On 25th September Mr Maggott wrote to Mr Wong, raising a formal grievance, p227.
143. He said that there had been a breakdown in communication between him and Mr & Mrs Hamann, which he said had resulted in health and wellness challenges. He says that he has evidence that he has been subject to conduct that amounts to:
- a. Intimidation
 - b. Bullying and harassment
 - c. Threats of job security
 - d. Discrimination
 - e. Stress in the workplace
144. Mr Maggott says that this constant treatment in the workplace has caused him great anxiety and stress. He describes it as conduct that it intolerable and unacceptable.
145. Although the replies to Mr Maggott in relation to his grievance were sent by Mr Wong, it was accepted that he discussed the grievance with Mr Hamann and Mrs Hamann. At each stage they discussed Mr Maggott's communications and how they should reply. Those decisions were then implemented by Mr Wong.
146. The grievance was emailed to Mr Wong at 5.49pm on Friday 25th September. Mr Wong replied on Monday 28th September at 6.28pm, p226. He response was a holding reply, in which he said he would need more time to consider the grievance and to respond.
147. On 2nd October Mr Wong sent a further holding reply, indicating that he still needed time, but would reply substantively by the 7th October, p232.
148. On the 7th October Mr Wong sent a substantive reply, p230. He invited Mr Maggott to a grievance meeting on the 14th October. He also requested that Mr Maggott provide the evidence that he had referred to in his grievance letter.
149. On 13th October Mr Maggott emailed Mr Wong to say that he was not feeling well enough to attend the meeting, p232. He said that he would let Mr Wong know by the end of the following week whether he was fit to attend a meeting by telephone.
150. On 21st October Mr Maggott emailed Mr Wong indicating that he would be available to attend a telephone meeting on the 27th October, p236-237.
151. Mr Wong then replied on the 21st October, p236. This acknowledged Mr Maggott's email but raised two matters.

152. First, Mr Wong wrote that Mr Maggott had raised very serious allegations and said that he had evidence to support them. Mr Wong noted that he had requested that this evidence be provided, but this had not yet happened.
153. Second, Mr Wong raised for the first time a potential issue with Mr Maggott's visa. He writes that Mr Maggott was 'in the UK initially under a work visa', which he understood had now expired. He suggests that the respondent would not be able to hear the grievance until they had confirmation that the visa had been extended. He suggests that, if that is not forthcoming, the grievance would need to be conducted by video once Mr Maggott had returned to South Africa.
154. Mr Maggott replies on the 26th October, p238. He describes the refusal to hold the grievance meeting while he is in the UK as intransigent. He says that his visa remains compliant 'without any legal obligations to the company'. In relation to the evidence Mr Wong had requested he says that 'All evidence requested for the grievance hearing is available on the company's email correspondence to me from both [Mr & Mrs] Hamann'.
155. Mr Wong replies on 28th October, p239. He reiterates that the respondent will facilitate a grievance meeting but repeats that he is concerned about the visa position. He describes Mr Maggott as refusing to send evidence of his immigration status. He says that the respondent has commenced a check on Mr Maggott's immigration status with the Home Office. He says that, if Mr Maggott does not provide evidence of his current immigration status by the 30th October, this will be taken as a refusal of a reasonable management instruction, which will probably lead to a disciplinary process.
156. Mr Maggott did not reply to this email and Mr Wong wrote again on the 3rd November, p239. He referred to his previous email and indicated he had unsuccessfully tried to ring Mr Maggott, but received no reply. He notes that he had not received any evidence of Mr Maggott's immigration status. He again requests that Mr Maggott provide this and sets a new deadline of the 5th November. If evidence is not received by then, he suggests that the respondent will have no choice but to bring Mr Maggott's visa status to the attention of the Home Office.
157. We have given careful thought to Mr Maggott's allegation that the requests that he provide evidence of his immigration status were fabricated excuses in order to delay or avoid consideration of his grievance.
158. There is no direct evidence to support the allegation. But it is not a situation where we would generally expect direct evidence to exist or to be provided. An employer who was willing to lie about such a concern would hardly be likely to write to Mr Maggott saying so – and might well fail to comply with their duties of disclosure, if they had ever recorded their deceit in writing to begin with.
159. We agree with Mr Maggott that the timing of the concern, to at least some extent, supports his allegation. It is notable that having taken an approach to Mr Maggott's immigration status that was casual to the point of being reckless, there is suddenly a much greater level of concern that coincides with Mr Maggott raising a grievance.

160. The respondent's explanation for this change was given in Mr Hamann's evidence. He said that, in the course of dealing with the grievance the respondent sought advice about how to proceed and that this advice led to a greater level of concern. Mr Hamann was not asked about the detail of this advice, which may well have been privileged in any event. On balance we do find it a plausible explanation for the heightened level of concern, particular in conjunction of the fact that the respondent was aware that Mr Maggott's initial visa had been for a period of six months, which had ended.
161. We also noted that the Respondent only raised the issue of the visa after agreeing to hold a grievance hearing. This tends to show that they intended to deal with the grievance, rather than immediately seeking an excuse not to do so.
162. It is also relevant that it would have been obvious to the Hamanns and Mr Wong that, at best, the issue of Mr Maggott's visa status would only delay dealing with his grievance. As they suggested in Mr Wong's email of the 21st September, if it could not be dealt with while Mr Maggott was in the UK, it would need to be dealt with when he returned to South Africa. There was simply no good reason to go to such extreme lengths in order to delay the inevitable.
163. For all of these reasons, we reject Mr Maggott's allegation that the concerns raised in Mr Wong's emails about his visa status were fabricated.

Resignation

164. On 16th November Mr Maggott wrote to Mr Wong tendering his resignation, p247.
165. Mr Maggott describes Mr Wong's actions since he raised his grievance as 'relentless harassment' while he has been off sick. He suggests there has been no support or care for his poor health arising from work stress. He says that the situation has been exacerbated by him being stranded in the UK and describes the respondent as 'obdurate in their demand to know my visa status'.
166. Mr Maggott writes that his grievance 'clearly sets out the basis on which the employer had seriously breached my contract'. He describes the failure to hear the grievance as a breach of the duty of care and a fundamental breach of the implied term of trust and confidence'.
167. Mr Maggott also refers to the fact that his access to the Sample Logistics system has been removed. He says that this has forced him to use his personal email and suggests that it was done in order to erase what he describes as 'a scathing email' from Mr Hamann on 15th September.
168. In his evidence, it was suggested to Mr Maggott that the email Mr Hamann sent on the 15th, while critical of him, was not 'scathing'. In response Mr Maggott said that there had been another email sent by Mr Hamann on the 15th, which was scathing. He described it was threatening his position with the company and reiterating Mr Hamann's unhappiness with him. He suggested that this had been concealed by the respondent.

169. We did not accept this. Mr Maggott's witness statement did not suggest that there had been two emails sent to him on the 15th. It was also implausible that Mr Hamann would draft and send two emails on the 15th, dealing with similar matters.

The Law

Constructive dismissal

170. Unfair dismissal necessarily requires that an employee have been dismissed by their employer. s95(1)(c) of the Employment Rights Act 1996 creates a legal route by which a dismissal can be established on the basis of an employee resigning (with or without notice). This will be deemed to be a dismissal if the employee is entitled to resign without notice, because of the employer's conduct. This is known as a constructive dismissal.

171. For there to be such a constructive dismissal there must be:

- a. A breach of contract by the employer, that is sufficient serious to be repudiatory / fundamental.
- b. The employee must have resigned in response to that breach.
- c. The employee must not have affirmed the contract prior to the resignation.

172. Not every breach of contract is a fundamental breach. The conduct involved must be a significant breach that goes to the root of the employment contract or which demonstrates that the employer no longer intends to be bound to an essential term, see *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761.

173. In this case the claimant argues that there was a breach of the implied term of trust and confidence. This is an implied term, established in its current form in *Malik v Bank of Credit and Commerce International* [1997] ICR 606. The term requires that an employer must not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and his employer.

174. The test is therefore in two parts. First, whether there has been conduct that is calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties. Second, whether that conduct was without reasonable and proper cause.

175. Any breach of the implied term of trust and confidence will amount to a fundamental breach the contract because there can only be a breach if there is action that is calculated or likely to destroy or seriously damage the employment relationship.

176. The implied term of trust and confidence may be breached by a course of conduct in which a number of acts and omission together amount to a breach of the term – even if the individual actions do not do so, see *Omilaju v Waltham*

Forest LBC [2005] ICR 481 and *Kaur v Leeds Teaching Hospital NHS Trust* [2019] ICR 1.

177. In *Kaur* the Court of Appeal laid down guidance for dealing with constructive dismissal claims based on an alleged breach of the implied term of trust and confidence. It is generally sufficient to consider:
- a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
 - b. Has he or she affirmed the contract since that act?
 - c. If not, was that act (or omission) by itself a repudiatory breach of contract?
 - d. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of mutual trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation because the final act revives the employee's right to resign in response to the prior breach.)
 - e. Did the employee resign in response (or partly in response) to that breach?
178. It is possible for a number of different acts and omissions to collectively amount to a breach of the implied term of trust and confidence, even if no single event is sufficiently serious to reach that threshold, see *Omilaju v Waltham Forest LBC* [2005] ICR 481.
179. Consideration of the implied term of trust and confidence in this case is complicated by the familial nature of the relationships. This is not a matter on which significant legal submissions were made. We have not been referred to any case law dealing with the correct approach and the tribunal itself is not aware of appellate authority dealing with this matter. We therefore approach question from first principles.
180. The starting point must be that the implied term of trust and confidence applies to the employment relationship and not any wider relationship that might exist between the parties to an employment contract. It is not a general duty that an employer behaves reasonably in every aspect of their life in which they may encounter their employee.
181. At the same time, behaviour that occurs outside the workplace may be such that it is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and employer. In our view the correct approach is to consider that factual question: has the employer acted in such a way? In doing so it will be relevant to consider how closely connected the behaviour is with the employment relationship and its likely impact upon that relationship. Each case must be approached on its own facts.

Direct discrimination

1. Following s13 and s39 of the Equality Act 2010, we must determine whether the respondent, by subjecting the claimant to a detriment, discriminated against

him by treating him less favourably than it treated or would have treated someone else, because of a protected characteristic.

2. In this case the claimant relies on three protected characteristics, as follows:
 - a. Race, specifically the race of his girlfriend Judith, who is described as Cape Coloured.
 - b. His age, specifically that he is older than many of the respondent's other employees.
 - c. His sex, specifically male.
3. A detriment is anything that a reasonable person in the claimant's place would or might consider to their disadvantage. It does not require that there be physical or economic consequences for the claimant – but an unjustified sense of grievance is not a detriment, see *Shammon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11.
4. Consideration of direct discrimination is an inherently comparative exercise. 'Less favourable treatment' requires that the complainant be treated less favourably than a comparator was or would be. The comparator may be an 'actual comparator'; that is someone in materially the same circumstances of the claimant. The tribunal may also need to consider how a 'hypothetical comparator' would have been treated. In some cases, identifying a suitable hypothetical comparator may be difficult and it may be appropriate to focus on considering why a claimant was treated in a particular way, using any evidence as to how other people are treated to inform that view, even if they are in materially different circumstances.
5. If there has been less favourable treatment, the Tribunal must go on to consider whether that was because of a protected characteristic.
6. In some circumstance, however, separating the question of whether there has been less favourable treatment from the issue of why that less favourable treatment occurred will be artificial or cumbersome. In such cases the Tribunal may consider both questions together – essentially asking whether an employee has been treated less favourably because of a protected characteristic, see *Shammon*.
7. One consequence of this comparative approach is that the fact that someone has been treated unreasonably does not mean that they have been discriminated against. For that matter, an employee who has been treated objectively reasonably may still have been discriminated against if they nonetheless have been treated less favourably than an appropriate comparator because of a protected characteristic.
8. Direct discrimination is not necessarily conscious or deliberate. The tribunal must decide 'what, consciously or unconsciously, was the reason for the treatment', see *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48. For there to be direct discrimination it is sufficient that the protected

characteristic be a material influence on the reason for the treatment. It does not need to be the only or main reason for the treatment.

9. In relation to all of this, the burden of proof is on the claimant initially to establish facts from which the tribunal could decide, in the absence of any other explanation, that the respondent discriminated. This requires more than a difference in treatment combined with a difference in protected characteristic, see *Madarassy v Nomura International PLC* [2007] ICR 867. There must be something further from which it could be concluded that the protected characteristic influenced the decision. If this is established it is for the respondent to show that they did not discriminate.
10. If, however, a tribunal is able to make positive findings on the evidence it is not necessary to apply the burden of proof provisions mechanistically. In such a case a Tribunal may proceed directly to considering the reason for the treatment, see *Hewage v Grampian Health Board* [2012] UKSC 37.
11. Section 13 refers to less favourable treatment 'because of' a protected characteristic. This encompasses what is often termed associative discrimination, in which an individual is treated less favourably because of the protective characteristic of someone whom they are associated with, rather than that they themselves possess. The question for tribunal in such cases is whether the association in question had the relevant effect on the treatment of the claimant?, see *Thompson v London Central Bus Co* [2016] IRLR 9.
12. In relation to the Equality Act an employer is liable for anything done in the course of their employment, see s109. The leading authority on the definition of 'in the course of employment' is *Jones v Tower Boot Co Ltd* [1997] ICR 254. This established that the appropriate approach was to consider it as a question of fact in the circumstances each case to be determined the ordinary meaning of the words.
13. Further guidance has recently been given by the Employment Appeal Tribunal in *Forbes v LHR Airport Ltd* [2019] IRLR 890. President Choudhury, as he then was, reiterated that the question was ultimately one of fact, but indicated it was likely to be relevant to consider whether an act was done at work or outside of work, and if done outside of work, whether there was nonetheless a sufficient connexion with work such as to render it in the course of employment.

Illegality

182. The illegality doctrine is a venerable one, dating back to the principle established in *Holman v Johnson* (1775) 1 Cowp 341 that 'no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act'.
183. In its modern form, the doctrine has been set out by the Supreme Court in *Patel v Mirza* [2016] UKSC 42 (a commercial claim relating to share dealing and insider trading). Guidance on applying those principles to the employment context has been provided by the Court of Appeal in *Okedina v Chikale* [2019] IRLR 905.

184. From these cases we took the following principles:
- a. There is a distinction between two forms of the illegality defence: statutory illegality and common law illegality.
 - b. Statutory illegality applies a legislative provision either a) prohibits the making of a particular contract or form of contract, so that such a contract is unenforceable by either party or b) provides that a contract, or some particular term of a contract is unenforceable.
 - c. Statutory illegality requires a clear implication that this is the statutory intention and courts should be slow to give a statute that effect if it is not expressly stated.
 - d. The statutory prohibitions on working in the UK without the right to work did not reach the threshold of statutory illegality, see *Okedina*, ¶49-50.
 - e. Common law illegality arises where the formation, purpose or performance of the contract involves conduct that is illegal or contrary to public policy and where denying enforcement to one or both parties is the proportionate response to that conduct.
 - f. This requires a factual assessment of what the public interest requires in a particular case.
 - g. In employment cases, particularly those involving contravention of the immigration rules, an important factor will be what is known as 'knowledge plus participation'. That is the extent to which an employee knew that what was occurring was unlawful and the extent to which they participated in or benefited from that illegality.

Conclusions

185. Applying the relevant law to our findings of fact, we reach the following conclusions. They are structured by reference to the parties' agreed list of issues, although they do not replicate them precisely.

Did Mrs Hamann intimidate Mr Maggott by calling him stupid when he could not provide answers about a work-related query without checking the system in May 2020?

186. We have concluded that this did not occur as Mr Maggott alleged. Mr Hamann was unhappy that Mr Maggott was unable to provide the information she requested, but she did not describe him as stupid or act in an intimidating fashion.

On 26 August 2020 did a) Mrs Hamann make derogatory comments about Mr Maggott's girlfriend; b) Mrs Hamann tell Mr Hamann that he must remove Mr Maggott from the house and c) Mr Hamann storm into Mr Maggott's bedroom and threaten him?

187. Mrs Hamann did make highly derogatory comments about Mr Maggott's girlfriend on 26th August, in particular referring to her as 'low-class'. Although there was not an explicit reference to Judith's race, we have found those remarks to be racially motivated.

188. Mrs Hamann did say that she wanted Mr Maggott 'out' although we find that it was said in the heat of the moment, at a point of considerable anger. It was an expression of that anger and not in the manner of an instruction to Mr Hamann, who did not take it in that fashion.

189. Mr Hamann did come into Mr Maggott's bedroom in some anger, although not to the point that he could be described as 'storming in'. He did not threaten Mr Maggott.

Did Mrs Hamann constantly criticise Mr Maggott for working in a different style or format to which she expected?

190. We concluded that, although Mrs Hamann did, on occasion, criticise Mr Maggott, she did not do so unreasonably or excessively.

191. The main specific occasion that Mr Maggott relies upon is the incident in May 2020, in which Mrs Hamann did no more than express the view that he should have known a particular piece of information. This cannot be said to amount to constant criticism.

Did Mrs Hamann spread gossip and malicious rumours within the family (a) that the Claimant was raising complaints at work for financial gain; and (b) in relation to the Claimant's girlfriend?

192. The allegations that Mr Maggott raises in this respect refer to events after his resignation. They are not, therefore, relevant to his complaint of unfair constructive dismissal. Whatever the rights or wrongs of these allegations therefore, they are not matters for this Tribunal and we have not sought to resolve them.

Did the respondent bully and harass Mr Maggott, while he was on sick leave, by threatening him with a return to South Africa and with his visa status?

193. The respondent did, through Mr Wong's correspondence, raise Mr Maggott's visa status and suggest that, if his visa had not been extended, the grievance would not be able to be resolved until he was able to return to South Africa.

194. We have, however, rejected Mr Maggott's suggestion that this was a fabricated concern concocted for the purposes of putting pressure on him or bullying him.

195. In the circumstances, we have concluded that the respondent's actions were not unreasonable. They had genuine concerns about proceeding with the process, given the uncertainty surrounding Mr Maggott's immigration status. They raised those concerns with him. Again, it is possible to criticise the way in

which this was done and it might have been pursued more tactfully. The references in November to reporting Mr Maggott to the Home Office can be seen as heavy handed. Against that, the deadline for Mr Maggott to provide information / evidence was extended.

196. Stepping back, it is not unreasonable for an employer who has concerns about an employee's immigration status to seek to clarify the position. The respondent did not go beyond that. Its actions did not amount to bullying or harassment of Mr Maggott or to threatening him.

Was Mr Maggott given an ultimatum to work in the UK?

197. We concluded that he was not. There was a proposal that he visit the UK, in part for training purposes that Mr Maggott agreed to. He had some concerns about doing so, given his recent argument with Mrs Hamann, but chose to agree.

In or around 2018, threaten the Claimant's job because a large contract was coming to an end?

198. This point was not pursued to any real degree by Mr Maggott. He accepted in his evidence that in 2017 the respondent had lost a major client and he had some discussion with Mr Wong about his future, in which Mr Wong raised the possibility of redundancy. The possibility of relocation to the UK was also raised, as was the possibility of some form of termination package. Mr Maggott accepted that nobody threatened to dismiss him.

Was Mr Maggott told that he would not be able to find another job as a man of his age?

199. Similarly, this was not a point pursued to any real degree by Mr Maggott. He did not allege that anyone had said this to him directly, although he suggested that the possible difficulty he might face in finding work was in their mind and affect, in particular, how Mrs Hamann behaved.

Did the respondent make unreasonable changes to the Claimant's place of work by requiring the Claimant to work from the office from 7 September 2020?

200. Generally, an employee who is expected to work from their employer's office cannot unilaterally declare they will henceforth work remotely. It follows that an instruction to return to the office will generally fall well within the managerial prerogative. It will therefore be a lawful and reasonable instructions.

201. We accept that the circumstances in this case on the 7th September were somewhat different. Both Mr Maggott and Mr & Mrs Hamann were in a difficult situation. It was inevitable that their personal disagreement was going to, at least some degree, spill over into their workplace relationship. Mr & Mrs Hamann's efforts to suggest that the two things could or should have been kept entirely separate are, to be frank, unrealistic.

202. At the same time, it is not correct to characterise the respondent's actions as making a change to Mr Maggott's workplace. He had worked in the office since his arrival in the UK in February.

203. On balance we concluded that the instruction to return was not unreasonable. It might have been better or wiser to take a more conciliatory or tactful approach. But the same might be said of Mr Maggott's unilateral decision not to attend the office. In the circumstances, it was not unreasonable to seek to require him to attend.

Did the respondent unreasonably block Mr Maggott's access to the computer systems?

204. As set out above, Mr Hamann, Mrs Hamann and Mr Wong did block Mr Maggott's access to the computer system.

205. On balance the tribunal did not think that this was justified. There was no particular reason for the expressed concern that Mr Maggott might misuse his access.

206. At the same time while he was on sick leave there was no particular requirement that he have access and the seriousness of the incident has to be judged in that light. It is also relevant to note that to a very real extent Mr Maggott had been absent without leave, prior to his sick leave, because he was refusing to attend the office. Again, this incident has to be seen in that context.

Did the respondent fail to address Mr Maggott's grievance between 25th September and his resignation on 16th November?

207. The respondent had not made significant progress in considering Mr Maggott's grievance at the point that he resigned.

208. In the circumstances however we have concluded that this was not unreasonable. The grievance had been raised on 25th September. The respondent had initially scheduled a grievance meeting for the 14th October. That had been postponed because of Mr Maggott's ill health.

209. Mr Maggott then suggested a telephone meeting on 27th October. That did not go forward because of the respondent's concerns about his visa status. For the reasons set out above we have found that those concerns were reasonable and that the respondent was acting in good faith.

Did one or more of these actions breach the implied term of trust and confidence?

210. We concluded that none of the actions, whether individually or together amounted to a breach of the implied term of trust and confidence.

211. In the majority of cases we have concluded that either the actions did not occur as alleged or the respondent was acting reasonably.
212. We did accept that Mrs Hamann made highly derogatory statements towards Judith, Mr Maggott's girlfriend and this was, to a significant degree, motivated by prejudice against her race. This however was in the context of a family argument, not in the workplace. At the time Mr Maggott was also making derogatory and negative remarks about both Mr Hamann and her family. Both Mr Maggott and Mrs Hamann were angry and behaving badly. In these circumstances we were satisfied that this was not behaviour in breach of the implied term of trust and confidence.
213. We also accept it that Mr Maggott's access to the respondents' computer system was removed. This was not, in all the circumstances, reasonable. In our view however it was not a serious enough matter to amount to a repudiatory breach of contract.
214. We have therefore concluded that the claimant was not constructively dismissed.

Direct (associative) Race Discrimination

Did the respondent require the Claimant to relocate to the UK to separate him from his girlfriend?

215. For the reasons set out above we have concluded that it did not. The plan for Mr Maggott to visit the UK predated Mr Hamann's knowledge of his relationship. We were satisfied that his association with Judith played no part in requesting that he visit the UK.

Did the respondent make derogatory comments about the Claimant's girlfriend, in particular on 26 August 2020?

Did the respondent tell the Claimant that he must pay attention and take notice that he chooses the right kind of woman for a girlfriend and wife, one of good social standing, and that he should not disgrace the family by dating someone low class who came from a poor background?

Did the respondent engage in an altercation with the Claimant and throw him out of the Hamann's house?

216. For the reasons set out above we concluded that Mrs Hamann did argue with Mr Maggott About his relationship with Judith. This did include making derogative comments, which were motivated by racial prejudice.
217. We concluded, however, that these were remarks were made in the context of a personal argument outside the workplace. They were made in the context of Mr Maggott and Mrs Hamann's family relationship and not their employment one.

Did the respondent spread malicious gossip about the Claimant's girlfriend?

218. These allegations relate to events after Mr Maggott's employment ceased. We concluded that for the same reasons they related to the personal relationship not the employment one and therefore fell outside the tribunal's jurisdiction.

Did the respondent constructively dismiss Mr Maggott?

219. The Respondent did not constructively dismiss Mr Maggott for the reasons set out above.

Direct Age Discrimination

Did the Respondent do the following things:

- *Fail to increase the Claimant's salary, promote him or increase his benefits for five years before his resignation;*
- *Require the Claimant to relocate to the UK;*
- *Repeatedly compare the Claimant unfavourably to a younger member of staff, Stefan Engler;*
- *Require the Claimant to work long hours at night and over the weekend when others finished at 5 p.m.;*
- *Tell the Claimant that a man of his age would not be able to find other work;*
- *Constructively dismiss the Claimant.*

220. It is appropriate to deal with these allegations together since they can be addressed quite shortly.

221. We were satisfied that in relation to Mr Maggott's pay and conditions, his visit to the UK and his working hours that the respondent was not influenced to any degree by his age. Mr Maggott had not established that he was treated differently to anyone else in the same position or that he would have been treated differently had his age been different.

222. We accept that Mr Maggott was at one point compared to Mr Engler to his disadvantage in that Mrs Hamann suggested that Mr Engler would have been able to answer her questions while Mr Maggott could not. Beyond, however, the difference in their age there was nothing to suggest that this was on the basis of age. It is far more likely, as indeed Mr Maggott suggested, that Mr Engler was familiar with the client group involved while he was not. It may well be that the comparison was therefore somewhat unreasonable, but that does not make it discrimination.

223. Mr Maggott accepted in the course of his evidence that he was not told that a man of his age would not be able to find other work. We therefore reject this allegation.

224. For the reasons set out above the respondent did not constructively dismiss Mr Maggott.

Direct Sex Discrimination

Did the respondent do the following things:

- *Fail to increase the Claimant's salary, promote him or increase his benefits for five years before his resignation;*
- *Require the Claimant to relocate to the UK;*
- *Refuse to permit the Claimant to work flexibly or from home when female employees were allowed to do so;*
- *Tell the Claimant that a man of his age would not be able to find other work;*
- *Constructively dismiss the Claimant.*

225. It is appropriate to deal with these allegations together since they can be addressed quite shortly.

226. We were satisfied that in relation to Mr Maggott's pay and conditions, his visit to the UK, and his working hours that the respondent was not influenced to any degree by his sex. Mr Maggott had not established that he was treated differently to anyone else in the same position or that he would have been treated differently had he been a woman.

227. In relation to flexible working, we concluded that the two comparators suggested by Mr Maggott were in quite different factual circumstances to him. The point at which Mr Maggott was seeking some flexibility was after his argument with Mrs Hamann in August. There was nobody else in anything like a similar situation at the respondent and no evidence to suggest that Mr Maggott would have been treated any differently if he had been a woman in the same situation.

228. Mr Maggott accepted in the course of his evidence that he was not told that a man of his age would not be able to find other work. We therefore reject this allegation.

229. For the reasons set out above the respondent did not constructively dismiss Mr Maggott.

Time Limits

230. Mr Maggott's claim form was received on 15th February 2021. ACAS Early Conciliation lasted between 23rd November 2020 and 23rd December 2020. It follows from this that, so far as the claims relate to matters prior to 17th October 2019 they fell outside the statutory time-limits. This solely affects the discrimination claims, since the other claims were brought in time.

231. The Tribunal concluded that, had we concluded that the Tribunal had jurisdiction, we would have found that it was just and equitable to extend time in relation to events from the 26th August onwards. These were so intrinsically linked to the claims that were in time, in particular the claim for unfair dismissal, that it would have been unjust not to consider them.

232. It would not have been just and equitable to extend time beyond that. Many of Mr Maggott's claims are significantly out of time, in particular those dealing with his pay and terms / conditions. No real explanation had been provided for the delay at all.

Wrongful Dismissal

233. For the reasons set out above in relation to the unfair dismissal claim we have concluded that Mr Maggott was not constructively dismissed. He resigned with immediate effect and was not therefore entitled to any payment in relation to his notice period.

Holiday Pay

234. It was common ground between the parties that Mr Maggott was not paid any accrued holiday pay on termination and there was no evidence to suggest he had taken any annual leave in the calendar year 2020.

235. It follows that, had we concluded that UK employment law, including the provisions of the Working Time Regulations, applied to Mr Maggott this claim would have succeeded.

Wages

236. Mr Maggott's wages claim was based on not having received his normal salary during the period he was off sick between October and November. He accepted that he received statutory sick pay. His claim was based on his assertion that South African law provides for employees to receive their full pay as long as a sick note is provided.

237. Beyond Mr Maggott's assertion there was no evidence to establish the legal position regarding sick pay in South Africa. We concluded that Mr Maggott had not established that the respondent was liable to pay him his full pay during sick leave.

238. While it was not necessary to reach a final conclusion on this point we doubted that it was tenable to suggest that there was a sufficiently close connexion with UK law to allow a claim to be enforced here, while at the same time relying on provisions of South African law to establish liability. Given our other findings, however, this was an academic point.

Breach of contract expenses

239. We concluded that Mr Maggott was not entitled to be paid the expenses he claimed. No written agreement was produced supporting these claims and Mr Maggott did not suggest (save in relation to the Voice Over IP costs) that he had received such expenses in the past.

240. There was therefore no basis to suggest any contractual liability for the costs of Mr Maggott's mobile phone or his travel expenses.

241. For the reasons set out above, we concluded that the respondent had not agreed to pay him any travel subsistence. Similarly, there was no agreement that he be paid any expenses in relation to accommodation.

242. In relation to the VOIP costs we accepted the respondents' submissions that there was no need for Mr Maggott to incur these expenses while he was in the UK, since he was able to use the respondents' UK facilities to make calls.

Conclusions on illegality

243. It follows from our findings of fact set out above, that Mr Maggott did not have the right to work in the UK. Despite this he was undoubtedly doing work for the respondent throughout his time in the UK. The contract was therefore being performed unlawfully.

244. We concluded, however, that it would not be appropriate to deny enforcement of the contract or any associated employment rights to Mr Maggott under the doctrine of illegality. Neither party, at any stage, believed that they were acting unlawfully. The most that can be said against them is that they should have been more careful. This mutual carelessness does not justify the draconian step of denying Mr Maggott any enforcement of the contract.



Employment Judge Reed

11th July 2023

Date

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON:
12 July 2023



Mr J Azam
FOR EMPLOYMENT TRIBUNALS