THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr CO Duval	**v**	**(1) Fitness First Clubs Limited**
		(2) Xavier Boulanger
		(3) Zuzana Bolekova
		(4) Katie May Austen
		(5) Mark Sumner

Heard at: London Central **On**: 31 May – 6 June 2017

Before: Employment Judge Baty

Members: Ms J F Tombs
Mr S Ferns

Representation:
Claimant: In Person
Respondents: Mr G Self (Counsel)

JUDGMENT

1. **The Claimant withdrew his complaints for unpaid holiday pay and unpaid wages and the First Respondent withdrew its employer's contract claim and all of those complaints were dismissed.**

2. **The Claimant's complaints of direct race and sex discrimination and victimisation set out at paragraph 3.1 (a – d) of the list of issues were presented out of time and it was not just and equitable to extend time. The Tribunal does not therefore have jurisdiction to hear those complaints and they are dismissed.**

3. **The Claimant's other complaints, of direct race and sex discrimination, victimisation and unfair constructive dismissal, all fail.**

4. **An award of costs of £10,000 is made, payable by the Claimant to the First Respondent.**

REASONS

The Complaints

1. By a claim form presented to the Employment Tribunal on 21 October 2016, the Claimant brought complaints of constructive unfair dismissal, direct race and sex discrimination, victimisation, for unpaid wages and for unpaid holiday pay. The Respondents defended the complaints.

2. In addition, the First Respondent included in the response form an employer's contract claim for £498.12 (gross) which the First Respondent maintained was the amount of the holiday taken by the Claimant in the holiday year in which his employment terminated in excess of his pro rata entitlement up termination of employment.

3. The issues of the complaints had been agreed between the parties and Employment Judge Wade at a preliminary hearing on 3 March 2017 and were set out in EJ Wade's note of that hearing. EJ Wade had noted that there was little particularisation of the Claimant's holiday pay and wages complaints and encouraged the parties to try and resolve these matters prior to the main hearing so that they did not unnecessarily distract from other issues. This was not done.

4. However, at the start of the hearing, Mr Self stated that the First Respondent would be happy to withdraw the employer's contract claim if the Claimant withdrew his complaints of unpaid wages and for holiday pay. The Claimant asked if could have some time to think about this and it was agreed that he would do so whilst the Tribunal was reading the witness statements. When the hearing reconvened after this, the Claimant confirmed that he was withdrawing his complaints of unpaid wages and holiday pay and, accordingly, Mr Self withdrew the employer's contract claim. The Tribunal then dismissed all of these complaints.

The Issues

5. At the start of the hearing, the parties agreed with the Tribunal that the issues remain the same as those set out in EJ Wade's note. However, the Judge raised two further potential issues. It was noted that the Respondent was, in relation to the unfair constructive dismissal complaint, claiming that, if the dismissal was unfair, there should be a reduction in compensation, both under the principles in Polkey v A E Dayton and because of alleged contributory conduct by the Claimant. The Judge noted that, as the evidence for these issues came ordinarily from the evidence heard at the liability stage, it would be sensible for the Tribunal to determine these issues at that stage. The parties agreed.

6. Furthermore, the Judge noted that, as regards the discrimination complaints, there may be a jurisdictional issue in relation to time limits. It was agreed that the unfair dismissal complaint was in time. Mr Self also went on to say

that the First Respondent would not be arguing that any of the allegations of discrimination leading up to the dismissal were not part of a succession of acts extending over a period such as to be in time. However, as regards the individually named Respondents, particularly as the allegations against them often included, per Respondent, only one of the various allegations of discrimination, he may be arguing that the complaints as against those individuals (or some of them) were out of time. The parties therefore agreed with the Tribunal that these jurisdictional issues would need to be considered along with the other issues at the liability stage.

7. Mr Self also stated that the First Respondent would not be relying on the statutory defence in relation to any of the acts of the individual Respondents; and that the First Respondent accepted that if any of Respondents Two - Five had discriminated against the Claimant, the First Respondent was liable for that discrimination. He therefore submitted that the Second, Third, Fourth and Fifth Respondents did not need to be named as Respondents and invited the Claimant to withdrawn the complaints against them. The Judge explained the implications of the fact that the First Respondent was not relying on the statutory defence and that, if any of the complaints succeeded, the First Respondent would be liable for them such that, if the Second, Third, Fourth and Fifth Respondents were withdrawn as Respondents, there would be no prejudice to the Claimant in terms of compensation. However, the Claimant stated that he wanted the four individual Respondents to remain as named Respondents.

8. The issues were therefore agreed as per EJ Wade's note (as set out directly below) plus the Polkey/contributory conduct and jurisdictional issues referred to above:-

The issues

Race and sex discrimination

3.1 The claimant says that he suffered less favourable treatment than the fourth respondent, Ms Austen (a white woman), and a hypothetical comparator in the following ways:

a. The fourth respondent made allegations about his capability and conduct to the second respondent by email on 18, 25 and 27 April 2016.
b. The second respondent took disciplinary proceedings against the claimant on 27 April 2016. He did not interview the claimant. He has a pattern of behaviour of less favourable treatment towards black males.
c. The second respondent's conduct at the disciplinary meeting on 13 May; the claimant did not understand the charges against him and the meeting was adjourned when the claimant protested.
d. The third respondent was not independent or impartial as an investigator of the disciplinary allegations. She worked against the claimant with the fourth respondent to his disadvantage.
e. The fifth respondent's decision on the grievance appeal on 10 August. The claimant confirms that he does not allege that the outcome of the grievance, as opposed to the grievance appeal, was an act of discrimination.

3.2 All the allegations above are said to be detriments. The claimant asserts that allegation (e) amounted to a fundamental breach of contract so that he resigned which was a constructive discriminatory dismissal in accordance with Equality Act section 39(7)(b).

3.3 The claimant is reminded of section 23 which says that on a comparison of cases for the purposes of a direct discrimination claim there must be no material difference between the circumstances of the claimant and the comparator.

Victimisation

4.1 The claimant says that his grievance of 18 May 2016 and the appeal of approximately 8 July were protected acts and that allegations (d) and (e) above were also acts of victimisation.

Unfair dismissal

5.1 Did the respondent fundamentally breached the implied term of mutual trust and confidence by allegation (e) above and if so did this amount to constructive dismissal? The claimant does not argue that this was a "last straw" but says that it was the one and only breach which led to his resignation.

5.2 If the claimant was dismissed, was the dismissal fair?

The Evidence

9. Witness evidence was heard from the following:

For the Claimant:

The Claimant himself.

For the Respondents:

Ms Austen, the Fourth Respondent;

Mr Ryan Campbell, the General Manager at Fitness First Haringey;

Mr Boulanger, the Second Respondent;

Ms Bolekova, the Third Respondent;

Mr Neal Davison, the General Manager at Fitness First St Pauls, who heard the Claimant's grievance dated 18 May 2016; and

Mr Sumner, the Fifth Respondent.

10. A bundle of documents was provided to the hearing which was substantially agreed.

11. One issue, however, concerned two tape recordings, alleged transcripts of which were in the bundle at pages B202 following and B213 following. Whilst these transcripts dated from around June 2016, the Claimant had not disclosed to the Respondent the recordings behind those transcripts until last week and, Mr Self said, the second transcript was firstly not complete and

secondly contained some errors of transcription. Mr Self produced a further document, which he had numbered B220a onwards and which was an amended transcript prepared by the Respondents' solicitors, and which he had handed to the Claimant that morning prior to the start of the hearing. The Claimant said that he was happy for it to be included in the bundle so long as he had time to read it and it was agreed that he could read it in the break when the Tribunal was reading the witness statements. It was duly added to the bundle.

12. Furthermore, Mr Self stated that he was aware of a meeting note between the Fifth Respondent and the Second Respondent in relation to a meeting between them after the Claimant's grievance appeal; it was a two page note set out in the Fifth Respondent's day book; it was relevant and therefore he had to disclose it to the Claimant in any event; and he had asked the Fifth Respondent to bring it the next day and provide copies. Copies of these notes were duly produced at the start of the second morning of the hearing. However, the Claimant objected to their inclusion. Both parties made submissions on the issue. The Tribunal adjourned briefly to consider its decision. The Tribunal decided to allow the document to be included in the bundle for the following reasons. Whilst it could have been disclosed earlier, and indeed should have been, mistakes do sometimes happen during the disclosure process, especially with regard to manually written separately held handwritten notes as was the case here. However, Mr Self quite rightly disclosed the document as soon as he had become aware of it. Most importantly, the document was relevant and related to one of the core issues of the Claimant's claim. The relevant witnesses (the Second and Fifth Respondents) could be cross examined on the document if necessary. The document was only two pages long so it was very short and would not take much time for the Claimant to read. If, however, Mr Self wished to cross examine the Claimant on the document, the Claimant could have a break at this point (he was part way through his evidence at the time) to read the document; if not he could read the document in a break later on before the Respondents gave their evidence. For these reasons, we agreed that it was fair and proportionate that the document should be added to the bundle and it was added at pages B324 a & b.

13. Mr Self was not able to rule out the possibility that he might ask a question about the document of the Claimant. The Judge suggested that the Claimant might like a 10 minute break in order to read the document, which the Claimant agreed to. In the event, the Claimant having the document, the parties came back only five minutes later.

14. In discussing documents at the start of the hearing, Mr Self stated that in September 2015 an earlier grievance by the Claimant against the Second Respondent had been raised, although the material related to it was archived. It was not one of the issues of this case. However, it was raised in the Claimant's witness statement. He suggested that this matter might be revisited once the Tribunal had had the opportunity to read the witness statements as, if the Tribunal considered it necessary that material in relation to this grievance should be adduced, it would involve the Respondents going

back over their archives and finding the relevant material. However, the Claimant said that he did not think that it was relevant and therefore there was no need for the Respondent to dig out this material from the archives. The Tribunal agreed on that basis that it was not necessary for the Respondents to do this.

15. The bundle was, therefore, taking into account the issues referred to above, agreed.

16. In relation to issue 3.1(c), Mr Self stated that, as the Claimant had accepted in his witness statement that the Second Respondent was not at the meeting of 13 May 2016, this was therefore a non issue. The Claimant's witness statement did indeed confirm that. However, the Claimant nonetheless said at this point that the Second Respondent was in fact at that meeting so it remained an issue. Therefore, it remained an issue for the Tribunal to determine. (In fact, the Claimant subsequently accepted in cross examination that the Second Respondent was not at the meeting and even cross examined the Second Respondent to confirm the point.)

17. At the start of the hearing, the Tribunal explored with the parties issues of timing and timetabling of the hearing. Mr Self requested three and a half hours to cross examine the Claimant. The Claimant requested a total of over 11 hours to cross examine the various witnesses of the Respondent. The Judge explained that, if this timetable was permitted, then the hearing was likely not to be completed within the five day allocation. He suggested that the Claimant limited his cross examination to 8 hours in total, with freedom to use that time as he saw fit in relation to the various witnesses. The Claimant agreed to this. The Tribunal stated that it would hold the parties to the agreed timetable. In the end, the Claimant completed his cross examination in less than 4 hours and Mr Self completed his cross examination comfortably within his three and a half hours.

18. During his evidence, the Claimant on many occasions failed to answer even relatively simple questions put to him by Mr Self and had to be reminded on numerous occasions, by Mr Self, and also by the Judge, to answer the questions put.

19. During his cross examination of the Respondent's witnesses, the Claimant from time to time put questions to the witnesses which were structured in a way which made it very difficult to understand what was meant and the Judge therefore had to interject to ask the Claimant to rephrase the question so that it was comprehensible and sometimes assisted the Claimant in rephrasing that question so that it was in a form which the witness in question could answer.

20. On one occasion, at the start of Mr Campbell's evidence, Mr Self asked if he could ask one supplemental question of Mr Campbell. The Tribunal would have been minded to allow this given in particular that it was a one off question, but the Claimant objected. Rather than pursue the point, Mr Self simply said that he would not bother to ask that question and withdrew his

request to ask it.

21. Both parties stated at the start that they would produce written submissions and then need 10 or 15 minutes oral submissions to supplement these. In the end, when the evidence was completed, the Claimant asked for some extra time to complete his written submissions and, by agreement, an extra hour was allowed for him to do so before handing them in. Both parties therefore produced written submissions which the Tribunal read in advance. When it came to it, neither party then chose to make oral submissions supplementing those written submissions.

22. The Tribunal then adjourned to consider its decision and, when the parties returned, gave its decision on liability orally to the parties.

23. References in the rest of these reasons to the "Respondent" are to the "First Respondent"; references to Mr Boulanger, Ms Bolekova, Ms Austen and Mr Sumner are to the Second, Third, Fourth and Fifth Respondents respectively.

Amendment Application

24. Notwithstanding the fact that the issues had been agreed at the start of the hearing and what was agreed in relation to the September 2015 grievance documents (see above), the Claimant, when the hearing reconvened after the Tribunal had read the witness statements on the afternoon of the first day, nonetheless sought to add the September 2015 grievance as an additional alleged protected act for the purposes of the victimisation complaint. The Judge discussed this with the Claimant to be clear exactly what the Claimant was seeking and confirmed that, as there was no reference to it in the claim form, an amendment to the claim would be required. The September 2015 grievance was set out in an email of 14 September 2015 at pages B61 and B62 of the bundle.

25. The Judge explained the principles in the case of Selkent Bus Co Ltd v Moore [1996] ICR 836 for the Claimant's benefit, as this was the leading case on amendments. Both parties then had the opportunity to make submissions regarding the application. The Tribunal then adjourned briefly to consider the application. It decided to refuse the application to amend and gave its reasons to the parties which were as follows.

26. As set out in the case of Selkent, in determining whether to grant an application to amend, an Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regards to the interests of justice and the relative hardship that would be caused to the parties in granting or refusing the amendment. Relevant factors would include the nature of the amendment; the applicability of time limits; and the timing and manner of the application.

27. As to the manner of the application, the Claimant had had the Respondent's disclosure since March 2017 and a bundle containing all of the documents since 17 May 2017. The Claimant explained that the reason he had wanted

to have this amendment granted was that, during this process, he became aware of the fact that the Second Respondent had, in relation to the September 2015 grievance by the Claimant (which was about alleged conduct of the Second Respondent), being interviewed for his response to the allegations and this document had only been made known to the Claimant during the disclosure process (the grievance had in fact not proceeded by agreement between the First Respondent and the Claimant). However, the Claimant did not seek an amendment to the claim when he became aware of the existence of these documents and left it to the last minute to make the application, during the hearing, after the issues were agreed and after the Tribunal had read the witness statements. This was therefore a very late application and the manner of it therefore pointed against allowing an amendment. Furthermore, in terms of Tribunal time limits, it was considerably out of time. However, most importantly, the Tribunal read the email and it was clear on its face that it was not a protected act as, whilst it made complaints about the Second Respondent, there was nothing alleging a breach of the Equality Act 2010 and nothing done for the purposes of the Equality Act 2010. Therefore, not to allow the addition of a complaint which was doomed to fail could cause no prejudice to the Claimant. By contrast, however, if the amendment was allowed, there would probably need to be an adjournment as the Respondents, who could not reasonably have assumed that the 2015 grievance would form part of the issues before the Tribunal, would then have to do further disclosure in relation to it which would lead to an adjournment and possibly a relisting of the hearing which would entail considerable prejudice to the Respondents. For these reasons, we did not allow the application to amend.

Findings of Fact

28. We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues.

29. The Respondent is an operator of fitness clubs with numerous branches in the UK, including London.

30. The Claimant was employed by the Respondent from 18 November 2009. He worked at the Respondent's South Kensington Club.

31. The Claimant spent his initial employment as a Membership Consultant (Sales) but had for some time been working as a part time receptionist, latterly working approximately 25 hours per week. At the material time of this claim, the Claimant was also studying for his finals on a degree course and was about to become a father. The Claimant retained his "licence to sell" but was clear in his evidence that he was obliged to pass on sales leads to the sales team if it was "practicable" to do so. The evidence of the Respondent's witnesses was that, if a member of the sales team was there, that person should deal with any sales and that, if a member of the sales team was in the Club, it was always practicable to find that person, such that it would not be necessary for another member of staff to deal with any sales opportunity

which arose whilst the sales team member was in the Club. This evidence was consistent and not challenged and we accept it.

32. In addition, if such opportunities were not passed over to the sales team, it would cost the individual in the sales team a potential commission.

33. The South Kensington Club was a relatively small business unit, running with about 12 staff, and the needs of the business demand that such a small grouping work together if the optimum performance is to be achieved. The Claimant accepted that, if one person was not pulling his weight, it would have a large effect on the business performance.

34. Mr Boulanger was an experienced manager with management experience elsewhere within the Respondent. He became the manager of the South Kensington Club in July 2015. He was brought in specifically to turn around the South Kensington Club because it was regularly at the bottom of league tables when considering a combined range of KPIs. Mr Boulanger attended the Club as a mystery shopper before taking over and noticed the low standards that applied at the Club. Under previous regimes there had been a level of laxity allowed to creep in vis a vis the standards permissible at the Club, and the Claimant and others had become rather used to and fond of that attitude to work. Mr Boulanger made changes to things when he arrived and had higher standards compared to those that had pertained before. All that he was doing was implementing the standards that should always have applied. That was not, however, popular with some of the staff.

35. We have seen a considerable amount of documentary evidence that, over the period from August 2015 to March 2016, the Claimant was given numerous “informal job chats” by Mr Boulanger and training. In addition, prior to the informal job chats, Mr Boulanger brought issues of performance/conduct to the Claimant’s attention by way of ordinary dialogue.

36. The Respondent promotes the use of “informal job chats”, which are designed to bring worries and concerns about an employee’s capability and/or conduct to their attention to give them an opportunity to remedy the same and avoid a formal disciplinary process. Informal job chats are referred to in the Respondent’s employee handbook.

37. The informal job chats with the Claimant covered a wide range of issues. Several matters were of a relatively serious nature and could be described as misconduct, gross or otherwise. These included: training and sleeping whilst the Claimant should have been on duty; cash handling issues; inadequate protection of company stock; and poaching sales contrary to the established process.

38. Throughout the process, the Claimant was given training on areas that he was falling down on and as time went on he was continually advised of the standards that Mr Boulanger and the Respondent wanted to set. There is evidence that the Claimant was not embracing this assistance; the informal job chat record of 11 March 2016 records that the feedback was that the

Claimant was not paying attention or interested at all on one particular training day.

39. We therefore find that there were serious performance issues with the Claimant and that Mr Boulanger dealt with them in a reasonable and proportionate manner. He could have embarked on disciplinary action in relation to many of these issues but gave the Claimant the benefit of the doubt and did not do so at this stage. We find that Mr Boulanger acted in a supportive and appropriate manner in this respect.

40. The Claimant raised a grievance on 14 September 2015 against Mr Boulanger. This was one of several grievances submitted on or around that day by members of the "old team" of staff who had been employed at the South Kensington Club under the previous management as well. The other three were a mixture of male and female employees, and some were white and one was of Indian ethnic origin. The Claimant describes himself as black and of African origin and is male.

41. Whilst the Claimant's grievance refers to Mr Boulanger imposing a "culture of fear and bullying" in a general sense, the specifics of the grievance are for example that Mr Boulanger introduced several new rules including no training on shift and shift rules about punctuality (which are entirely reasonable). The Claimant makes no allegation in his grievance of unfavourable treatment based on his race or sex.

42. Mr Boulanger provided a written response to the grievance for the Respondent's benefit in which he rebutted the allegations. However, matters never got to the stage where this was forwarded to the Claimant because, following a discussion with HR, the Claimant decided not to continue with his grievance.

43. Ms Austen joined the Respondent at the South Kensington Club in February 2016 as a Membership Consultant. In other words, she was a member of the sales team and her job was to deal with membership matters. She earned commission on the sales. Ms Austen's partner is black and her child is mixed race.

44. On 15 April 2016, Ms Austen sent an email to Mr Boulanger to express her concern about the Claimant and his behaviour earlier that day. A member had visited the Club and Ms Austen had noticed the Claimant was in a rush trying to deal with that member. The Claimant was putting a renewal through the system for this individual whereas he should have asked Ms Austen or one of her team to deal with the matter. She managed to check the details and had pointed out that the membership had finished on 27 March 2016 and if the member renewed the previous membership, it would start from that date, meaning that she would lose out. She had recommended that the payment was processed as a "rejoin" but the Claimant had told her that she was wrong and that she would get into trouble. She had not received specific training on the matter and so she reluctantly agreed to follow his advice. She had felt pressured into taking this action and she also then

obtained clarification from a colleague that her understanding was correct. In the light of the disruptive behaviour in the Club, she considered that this was a deliberate attempt by the Claimant to sabotage her sales.

45. On 18 April 2016, Ms Austen sent a further email to Mr Boulanger to highlight an earlier issue that had arisen on 10 March 2016. She had been chasing a sale and had discovered that a prospective member had contacted the Club, asked to speak with Ms Austen and had been told that Ms Austen would call her back. However, the member's details had not been passed on to Ms Austen. Only the Claimant and Mr Manni Eteeh (Fitness Consultant) were working on reception on the day and Mr Eteeh had confirmed that he had not taken a message.

46. Ms Austen considered that Mr Eteeh had previously been exceptionally helpful to her in obtaining sales and so she had no reason to disbelieve him. By contrast, she was aware that the Claimant had previously stated that he wanted to make sure that the sales figures did not stay on budget. Ms Austen had a small baby to support and so the sales were important to her and she explained this to Mr Boulanger in her email.

47. On 27 April 2016, Ms Austen sent a further email to Mr Boulanger in relation to a further incident that occurred involving the Claimant. Ms Austen had started training in the Club and had asked the Claimant to let her know if any new enquiries came into the Club. She noticed the Claimant speaking to two people but he did not make any attempt to contact Ms Austen. She therefore approached the couple and one said that he used to be a member and he had been looking to rejoin but as the Claimant could not find him on the system he would have to pay another joining fee which he did not want to do. Ms Austen immediately found him on the computer system and confirmed he did not have to pay a joining fee. The individual therefore proceeded and Ms Austen joined them both as members. However, the sale was non-commissionable for her.

48. Ms Austen considered that the Claimant's actions impacted on her own finances and on the Club's targets and therefore sent the emails to Mr Boulanger. She also asked Mr Boulanger to consider the emails as a formal grievance against the Claimant and he confirmed that he would do so.

49. Mr Boulanger asked Ms Bolekova to hear Ms Austen's grievance. Ms Bolekova had previously worked for several years elsewhere in the Respondent but had returned to the Respondent with effect from 1 April 2016 at the South Kensington Club as Member Service Manager. She reported to Mr Boulanger and, from 1 April 2016, the Claimant reported to Ms Bolekova.

50. The Claimant has suggested at this Tribunal that, in relation to the 15 April 2016 email, he was right in his approach because he had been following training given to him on 16 September 2015 about a particular one month membership product and he referred to the bullet point summary of that training which stated:

- "The sales team or LTS can only sell this.
- We must renew the membership if expired. We cannot reload member as a new joiner".

51. However, that was a brief summary of an hour's training. Whilst the basic instruction was to "renew" membership, sales staff were expected to consider with the member whether doing so would mean that the member lost out on say on a number of weeks' membership, which might happen because the "renew" button would back date the membership, and in those circumstances they should press "rejoin" which would mean the member would not lose out. In short, Ms Austen was correct and the Claimant was not.

52. Against the background of the previous issues concerning the Claimant poaching sales, and having received three emails from Ms Austen, Mr Boulanger decided to invite the Claimant to a disciplinary hearing in relation to the three incidents described in Ms Austen's email. The emails and other relevant documents were included in the invitation letter of 27 April 2016 which he sent to the Claimant. Whilst the issues to be considered were clear from the documents, the invitation letter itself did not specifically formulate the "charge" against the Claimant.

53. There was no obligation on Mr Boulanger to hold an investigatory meeting before deciding to convene a disciplinary meeting under the Respondent's processes. Mr Boulanger had invited other individuals to disciplinary meetings in the past without holding investigatory meetings first.

54. The Claimant then emailed Ms Kim Walker of the Respondent's HR Department on 29 April 2016 stating that he had concerns about Mr Boulanger overseeing the process and requesting an "independent adjudicator" to oversee.

55. Ms Walker replied the same day confirming that a new disciplinary chairperson would be appointed. Mr Ryan Campbell, the General Manager of the Respondent's Haringey Club, was duly appointed.

56. The date of the meeting was postponed to 12 May 2016 at the Claimant's request because his trade union representative was not available, and then to 13 May 2016 due to Mr Campbell's lack of availability.

57. At the disciplinary hearing on 13 May 2016 were Mr Campbell and Maurice Ryan (the note taker), plus the Claimant and Mr Chris Carroll, his trade union representative.

58. Although the list of attendees in the note of the meeting suggests that Ms Austen and Mr Boulanger were also present, that list is incorrect. All parties acknowledge that they were not present. The references at the bottom of the notes of the meeting to Mr Campbell having to go off to speak to Mr Boulanger further evidence the fact that he was not present at that meeting.

59. At the meeting, Mr Carroll stated that he thought that Mr Boulanger had a duty to investigate the matter before a disciplinary hearing took place and that the Claimant did not know and did not fully understand the charges against him. The meeting was therefore postponed.

60. In accordance with the Claimant's wishes, the Respondent decided to carry out an investigation in relation to the Claimant before reconvening any disciplinary hearing. Ms Bolekova was charged with carrying out this investigation. She duly carried out a thorough a detailed investigation. This included interviews with other relevant employees, including Ms Neringa Adamonyte (Fitness Consultant); Mr Eteeh (Fitness Consultant); Mr Paul Tynan (Health and Fitness Manager); and Ms Austen. Ms Bolekova also obtained a large number of documents, including statements from various other individuals including Mr Boulanger. She also sought to interview the Claimant, which we will return to below.

61. On 18 May 2016, the Claimant raised a grievance. The grievance was against Mr Boulanger and Ms Austen. It is full of references to "protected characteristics" and the Equality Act 2010. The Claimant admitted that he put this together with Mr Carroll. In it he asserts that Mr Boulanger treated him less favourably because he is a black male. However, he makes no such assertion in the grievance about Ms Austen.

62. Mr Neal Davidson, the General Manager of the Respondent's High Holborn branch, was appointed to hear the grievance and wrote to the Claimant on 20 May 2016, inviting the Claimant to a meeting. The Claimant said he was unable to attend until 6 June 2016 on the basis that he had University exams from 25 May to 6 June 2016. Mr Davidson was surprised by this given the seriousness of the issues the Claimant had raised. He therefore wrote asking the Claimant when it was convenient to meet and got no reply. He had to chase him on 31 May 2016. On 2 June 2016, the Claimant replied saying that he and his trade union representative could meet on 10 June 2016.

63. In the meantime, the Claimant had surreptitiously sought to record conversations between management at the Club. This is prohibited under the Respondent's employee handbook, which states:-

> "**Recording**
>
> Any video or sound recordings of members, colleagues, meetings, informal or formal conversations without consent are not permitted. If this is not adhered to, it may result in disciplinary action."

The Claimant admitted in cross examination that he knew that he had no right to make such recordings.

64. The Claimant had left his mobile phone on at least two occasions in what was then the towel room at the South Kensington Club, which has a hollow wall adjoining the office, where management would generally meet, such that one could hear what management were saying. The Claimant did not stay

with his phone as he had to man the reception but left it on record.

65. This resulted in two alleged transcripts of recordings produced by the Claimant, which were before this Tribunal. The dates of the recordings on the transcript (3 June and 8 June 2016) were acknowledged by the Claimant before this Tribunal as being wrong and we understand that the correct dates were 31 May and 3 June 2016 respectively.

66. However, the Respondent was unaware of the existence of these incorrectly dated transcripts until the point during the Claimant's grievance appeal hearing on 3 August 2016, when the Claimant produced the two transcripts. However, even then, the Claimant, despite being asked at that meeting by Mr Sumner, who held that hearing, refused to say how the transcripts were produced or who produced them.

67. The recordings were only disclosed to the Respondent shortly before this Tribunal hearing. Only at this Tribunal hearing itself did the Claimant disclose that it was he himself who had made the recordings and how he did it.

68. There was no challenge by the Respondent that the recordings were not substantially accurate (albeit there were some alleged inaccuracies, hence the provision, at an understandably late stage, due to the late disclosure of the recordings, of the Respondent's transcript).

69. The Claimant's transcripts cover conversations between Mr Boulanger, Ms Bolekova and sometimes others too. Ms Bolekova and Mr Boulanger both accept that, in relation to the investigation which Ms Bolekova was carrying out, Ms Bolekova had asked Mr Boulanger for some guidance on how to carry it out. The first transcript evidences Mr Boulanger suggesting some questions she might want to ask in the course of the investigation.

70. In the second transcript, Mr Boulanger is clearly frustrated by the understandable perception that, by this stage, the Claimant and his representative are trying to delay and string out the process as long as possible. At one point, Mr Boulanger refers to the Claimant as a "fucker".

71. Mr Boulanger acted as a note taker in several of Ms Bolekova's investigation meetings.

72. As a result of Ms Bolekova's investigation, a considerable amount of extra evidence of misconduct by the Claimant had come to light over and above the details of the three emails sent by Ms Austen.

73. Therefore, on 2 June 2016, Ms Bolekova invited the Claimant to an investigatory meeting on 3 June 2016 to discuss the following:-

- "Incidents with Rosanna Welshimer on 15/04/16 and Moni Silva on 17/04/16 – members being reinstated instead of rejoined, losing three weeks on their memberships – compensations given.

- Attempt to sale a weekly pass to Antonoua Ousana at a discounted price without

authorisation.

- Incident with Mr Damion Cole. Not following the correct sales procedure.
- Allegations about you not communicating with the sales team.
- Allegations about you trying to sabotage the sales intentionally to have negative impact on the club's performance.
- Allegations regarding malicious conduct to satisfy a personal vendetta against your General Manager.
- Potential threats made against Katie May Austen (MC) and Xavier Boulanger (GM)"

74. Ms Bolekova explained in her invitation letter that the meeting was a fact finding exercise and not a disciplinary hearing.

75. Ultimately, for reasons we will come to, a disciplinary hearing to consider these allegations never took place. However, we have seen and reviewed the large amount of evidence gathered by Ms Bolekova in her investigations. There are several statements by employees which corroborate each other. In addition there are statements by members of the Club which corroborate them. Having reviewed this material, we find that, on the balance of probabilities, a disciplinary hearing would have found that, based on this material, the Claimant had committed gross misconduct. In particular, many of these incidents go to the issue of trust and honesty.

76. The Claimant responded to Ms Bolekova's invitation on 3 June 2016. He stated, incorrectly, that the "content of your letter" was the subject of his grievance complaint which he was meeting Mr Davidson about, and that it was not appropriate for the Claimant to discuss it otherwise.

77. Ms Bolekova clarified that the meeting was about investigating matters which came to her attention as a result of the investigation that the Claimant had himself specifically requested. However, Mr Carroll wrote back to Ms Bolekova reiterating that he thought it inappropriate for the Claimant to attend. The Claimant did not attend the meeting.

78. In the light of that, Ms Bolekova completed her investigation and completed her report on 7 June 2016. However, she decided to wait until the completion of the Claimant's grievance process before making a decision on further action.

79. The grievance meeting with Mr Davidson took place on 10 June 2016. Present were the Claimant and Mr Carroll and a note taker (Tnielle Duncan). The Claimant was given a full opportunity to discuss his grievance. He also handed in a document giving further details of his complaint. In that document he also alleged Ms Austen's actions were race discrimination.

80. The Claimant asked Mr Davidson to interview various people, which Mr Davidson duly did.

81. Mr Davidson chased the Claimant for confirmation that the minutes of the meeting were accurate. In an email of 18 June 2016, Mr Carroll sent back the notes with some minor amendments. In addition, he stated that he did not consider it appropriate for Ms Bolekova to continue with her investigation; he also stated that, as the Claimant was then on a period of annual leave and paternity leave, the Respondent should not interrupt this by providing the outcome of the grievance in this period.

82. Mr Davidson was unaware of any paternity leave having been authorised by management and asked for clarification.

83. On 27 June 2016, the Claimant submitted a written request for paternity leave from 16 to 31 July 2016, which immediately followed his annual leave of 1 to 15 July 2016. This was authorised on 28 June 2016 by Mr Boulanger.

84. Mr Davidson had in the meantime completed his grievance investigation and forwarded his outcome to the Claimant by letter of 4 July 2016. He did not uphold the grievance in any of its respects save one: he noted that there was no specific allegation on the invitation to the disciplinary hearing, albeit he considered this was a small administrative detail and all of the information provided was clear evidence of what the issue was and that this did not impact on the actual content of the disciplinary hearing.

85. In particular, Mr Davidson did not uphold any of the allegations of race or sex discrimination made by the Claimant.

86. Mr Davidson recommended in his outcome letter that the Claimant return to work after his leave with a positive attitude, to clear up any outstanding investigations/disciplinary action with an honest and pro active approach; he recommended that mediation meetings take place on the Claimant's return, which he would chair.

87. The Claimant appealed by email of 8 July 2016. The grounds simply state in his email:-

    "My grounds of appeal (non exhaustive list) include:-

    1. Misdirection.
    2. Maladministration.
    3. Breach (relevant provisions) of Equality Act 2010."

88. Mr Sumner, an HR Business Partner at the Respondent, was due to hear the appeal. By email of 14 July 2016, Mr Sumner asked for the Claimant to provide some details of his appeal.

89. By reply of 19 July 2016, Mr Carroll said that the information provided to Mr Davidson was untrue and that, because of confidentiality reasons, the further information the Claimant had would only be provided at the appeal hearing.

90. Due to the unavailability of Mr Carroll, the appeal hearing was rescheduled

for 3 August 2016. The Claimant was present with Mr Carroll.

91. At the meeting, Mr Carroll handed Mr Sumner a 16 page "briefing document", which was a critique of Mr Davidson's decision. He also handed him the two transcripts referred to earlier. As noted, this was the first time that the Respondent was made aware of their existence.

92. The meeting immediately needed to be adjourned for Mr Sumner to read these documents, and it then reconvened.

93. In essence, Mr Carroll was suggesting that Mr Davidson's decision was based on untrue information and that it was the information in the transcripts which changed the picture.

94. In spite of Mr Sumner's requests, the Claimant and Mr Carroll would not disclose further details about the transcripts because Mr Carroll said they were confidential. They also identified that they did not feel that the Claimant could work at the Club and Mr Sumner said that he would look into this further to see if the Respondent could accommodate him elsewhere. The Claimant mentioned Mr Campbell at the Haringey Club and said he would be happy to work there. Mr Sumner agreed to investigate this and they agreed that the Claimant would work his normal hours.

95. Following the meeting, Mr Sumner met Mr Boulanger to discuss the allegations contained within the grievance appeal.

96. On 4 August 2016, Mr Sumner sent an email to Mr Campbell to ask if Mr Campbell would be happy for the Claimant to work in his club. Mr Campbell confirmed that he was agreeable to this proposal. Mr Sumner therefore sent an email to the Claimant to identify that, as requested, he could work at the Haringey Club and asked him to report there on 5 August 2016, reporting to Mr Campbell.

97. On 10 August 2016, Mr Sumner sent his grievance appeal outcome to the Claimant. The Claimant had alleged that the accounts given to Mr Davidson had been incorrect and the transcripts confirmed this and this was the basis of his appeal. Mr Sumner identified that, in his opinion, he could not rely on the transcripts because the Claimant had refused to give him any information to show that these were credible pieces of evidence. Mr Sumner was particularly concerned to ascertain in his investigations that Mr Boulanger had been on annual leave on 8 June 2016, which was one of the days (according to the transcripts) on which one of the alleged conversations was marked as having taken place. This also led Mr Sumner to question the validity of the transcripts. Furthermore, he noted that the employee handbook identified that the making of covert recordings of employees is potentially a disciplinary offence and so he would be recommending that the Claimant was subject to an investigation in this respect. He also confirmed in his outcome that he had not found any evidence to support the Claimant's allegations of discrimination. Accordingly, he rejected the Claimant's appeal and gave full reasons for doing so.

98. Mr Sumner also concluded that a change of club was required on account of a breakdown of the relationship between the Claimant and Mr Boulanger and that that step would be considered in the near future. He therefore asked the Claimant to continue to report to Mr Campbell at Haringey for the next couple of weeks to enable him to look into the transfer further.

99. On 10 August 2016, Mr Boulanger sent an invitation to the Claimant inviting him to a disciplinary hearing, essentially covering the issues which had arisen in Ms Bolekova's investigation. However, the Claimant never received this letter.

100. By letter of 11 August 2016, the Claimant resigned. The letter includes the following:-

> "Please be aware that, in accordance with my contractual obligations, I am providing you with notice, as of 11th August 2016, that I am resigning my position within Fitness First. Your conduct in refusing to address Transcript evidence that I provided to you on 3 August 2016 has caused me to take this decision to resign. …"

The letter was addressed to Mr Sumner.

101. There is no dispute that the Claimant's employment terminated with effect from 11 August 2016.

102. Mr Boulanger is about to get married. His fiancée is Asian and his best man is a black male. His has hired two black male employees at the South Kensington Club since he became General Manager.

The Law

Constructive Unfair Dismissal

103. In order successfully to make a complaint of unfair dismissal, an employee must first prove on the balance of probabilities that he or she was dismissed by the employer. Section 95(1)(c) of the Employment Rights Act 1996 ("ERA") states that:-

> "there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct."

104. This form of dismissal is commonly referred to as constructive dismissal. In the leading case on the subject, Western Excavating (ECC) Limited v Sharp [1978] ICR 221, CA, the Court of Appeal ruled that the employer's conduct which gives rise to a constructive dismissal must involve a repudiatory breach of contract. In order successfully to claim constructive dismissal, the employee must establish on the balance of probabilities that: there was a fundamental breach of contract on the part of the employer; the employer's breach caused the employee to resign; and the employee did not delay too long before resigning, thereby affirming the contract and losing the right to

claim constructive dismissal.

105. An employer must not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (Malik v Bank of Credit and Commerce International SA [1977] ICR 606). In assessing whether or not there has been a repudiatory breach, the Tribunal must focus on the conduct of the employer. The conduct in question must go to the heart of the relationship in order to be repudiatory. In relation to the implied term of trust and confidence, there are two elements to the test.

106. The first of these is an assessment of whether the employer acted in a manner calculated or likely to destroy or seriously damage the relationship. In doing so, the Tribunal must focus on an objective assessment of the employer's conduct, rather than on the Claimant's subjective response to events as he perceived them.

107. The second part of the test is that the employer must have behaved in this manner "without reasonable and proper cause". Even if it has acted in a manner calculated or likely to destroy or seriously damage the relationship, it is not enough to amount to a breach of the implied term of mutual trust and confidence if the employer did so with reasonable and proper cause.

Direct Race and Sex Discrimination

108. Under Section 13(1) of the Equality Act 2010 (the "Act"), a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. This is commonly referred to as direct discrimination. Sex and race are both protected characteristics in relation to direct discrimination.

109. For the purposes of the comparison required in relation to direct discrimination between B and an actual or hypothetical comparator, there must be no material difference between the circumstances relating to B and the comparator.

Victimisation

110. Section 27 of the Act provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done, or will do, a protected act.

111. Protected acts include the bringing of proceedings under the Act; giving evidence or information in connection with proceedings under the Act; doing any other thing for the purposes of or in connection with the Act; or making an allegation (whether or not express) that A or another person has contravened the Act. However, giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

Burden of Proof

112. In respect of the above provisions under the Act, the burden of proof rests initially on the employee to prove on the balance of probabilities facts from which the Tribunal could decide, in the absence of any other explanation, that the employer did contravene one of these provisions. To do so the employee must show more than merely that he was subjected to detrimental treatment by the employer and that the relevant protected characteristic applied. There must be something more than that. If the employee can establish this, the burden of proof shifts to the employer to show that on the balance of probabilities it did not contravene that provision and the employer must prove that the treatment was "in no sense whatsoever" because of the relevant protected characteristic. If the employer is unable to do so, we must hold that the provision was contravened and that discrimination, or victimisation as applicable, did occur.

Time Limits under the Act

113. Section 123(1) of the Act provides that proceedings may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Tribunal thinks just and equitable. The primary 3 month time limit is adjusted as a result of the application of the rules on ACAS early conciliation.

114. Section 123(3) provides that, for these purposes, conduct extending over a period is to be treated as done at the end of the period. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96, the Court of Appeal held that the burden is on the Claimant to prove, either by direct evidence or by inference from the primary facts, that alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period".

115. As to the question of whether it is just and equitable to extend time, the Tribunal has a very wide discretion in determining this. It is entitled to consider anything that it considers relevant. However, it is for the Claimant to persuade the Tribunal that it is just and equitable to extend time. There is no automatic presumption that it will be extended. The exercise of this discretion is thus the exception rather than the rule (Robertson v Bexley Community Centre [2003] IRLR 434 CA).

Conclusions on the Issues

116. We make the following conclusions, applying the law to the facts found in relation to the agreed issues.

Direct Race and Sex Discrimination

117. Before turning to the five individual allegations of less favourable treatment, we note that Ms Austen has been named in the list of issues as an actual

comparator for the purposes of these allegations of direct discrimination (although it is not entirely clear whether this is intended to be in relation to all five of them or just certain of them). However, Ms Austen's circumstances are not materially the same as the Claimant's. She is not someone who had a history of performance issues and she is someone who is employed in a different role to the Claimant. The complaints she made about the Claimant are not comparable to the complaint he made about her. In relation to each of the five allegations, her circumstances are therefore different to those of the Claimant. She is not therefore a valid comparator.

118. We turn to the individual allegations.

3.1(a): The Fourth Respondent made allegations about his capability and conduct to the Second Respondent by email on 18, 25 and 27 April 2016.

119. Ms Austen did make complaints about the Claimant's conduct in her three emails of 15, 18 and 27 April 2016. However, she had perfectly acceptable grounds for raising the issues to her line manager, Mr Boulanger, either formally or informally. The reasons for her doing so are set out clearly in the emails, in particular her justifiable perception that the Claimant was abusing the sales process was causing her financial loss and stress and causing the Club financial loss. She was an impressive witness who was clear and consistent in her answers and we had no reason to doubt the reasons she gave for raising the complaints. Even if part of the rationale for her complaints was the impact of the Claimant's behaviour on her own earnings, that is firstly entirely understandable and secondly is in no way connected to race or sex.

120. The Claimant submits that Ms Austen did not approach him first but went straight to Mr Boulanger. However, she was perfectly entitled to do so. In any event, the fact that she chose to do so had nothing to do with the Claimant's race or sex.

121. There is no more than a general allegation from the Claimant that Ms Austen sent these emails because of his race and/or sex. In fact, in contrast to what he did in relation to Mr Boulanger, the Claimant did not even make this allegation about Ms Austen in his grievance of 18 May 2016 (although he added it later). Furthermore, Ms Austen's partner is a black male; it is therefore even more unlikely that she would discriminate on these grounds. There is therefore no evidence at all to shift the burden of proof and Ms Austen has in any event an explanation for making the complaints that is in no sense whatsoever because of race or sex. Therefore, we accept Mr Self's submission that this serious allegation by the Claimant be clearly and unequivocally rejected.

3.1(b): The Second Respondent took disciplinary proceedings against the Claimant on 27 April 2016. He did not interview the Claimant. He has a pattern of behaviour of less favourable treatment towards black males.

122. As regards Mr Boulanger inviting the Claimant to a disciplinary hearing

following receipt of the three emails from Ms Austen, we have again accepted Mr Boulanger's account of his rationale for doing so. Again, we found Mr Boulanger to be a credible witness who was clear and consistent in his answers. His explanation was that he invited the Claimant to a disciplinary only after receipt of the third email from Ms Austen, all of which raised potentially serious issues, and against the background of serious performance/conduct concerns about the Claimant, some related to the same issue of "poaching sales". These had been raised also in various informal job chats.

123. There was no obligation on Mr Boulanger to hold an investigatory meeting first and indeed he had held disciplinary meetings without a prior investigation or interview in the past with other members of staff.

124. There is nothing so far therefore to shift the burden of proof.

125. The Claimant makes a general allegation that Mr Boulanger had a pattern of less favourable treatment against black males. However, this is not borne out by the evidence. Mr Boulanger has appointed black males whilst he has been the manager at South Kensington and his best man is a black male.

126. The Claimant pointed to two examples of what he said was less favourable treatment against black males by Mr Boulanger. However, one of them involved a black male employed who was disciplined but who had the allegations against him dismissed following a disciplinary process, which is hardly an example of unfavourable treatment. The second was a personal trainer: however, the personal trainer was self employed and simply did not have his self employed contract renewed, so the circumstances are different from those in relation to employees, and, secondly, this was all done by the Health and Fitness Manager, Paul Tynan, and not by Mr Boulanger. We therefore find that there is no evidence of less favourable treatment by Mr Boulanger to black males.

127. To deal with some of the allegations in the Claimant's submissions, firstly it is correct that Mr Boulanger did not speak to the Claimant before inviting him to the disciplinary meetings. However, as noted, there was no obligation on him to do so and he was entitled to invite him straight to a disciplinary hearing. There is nothing to suggest that this was because of the Claimant's race or sex.

128. The Claimant submits that Mr Boulanger accepted Ms Austen's complaints with little or no delay. However, that is not true. He merely invited the Claimant to a disciplinary hearing at which the Claimant would have the opportunity to answer these complaints; no decision had been taken. That is clear from the invitation to the disciplinary meeting which merely sets out dismissal as one possibility (which is standard to include because, if no such warning was included and the hearing did determine that dismissal was appropriate, the fairness of the dismissal could be criticised because the individual had not been warned that dismissal could be a possibility).

129. The Claimant suggests that the bad language used by Mr Boulanger in the transcript should lead us to draw an inference that his actions were based on race/sex. However, the meeting to which the transcript relates was behind closed doors and Mr Boulanger did not expect the contents of the meeting to be made public; furthermore, it was borne out of understandable frustration at the attempts by the Claimant and Mr Carroll to string out the process. Finally, the use of the word "fucker" is not linked to either race or sex; the Claimant's attempts to suggest otherwise simply do not reflect reality.

130. The Claimant also suggested that in his interview with Mr Davidson, Mr Boulanger "naturally associated the Claimant as a black male with playing the race card". This is a significant misrepresentation of what was said in that interview. Mr Boulanger simply said "I believe that Calvin is using the race card to strengthen his case against me". This was Mr Boulanger's sincerely held belief and one not without an evidential basis, as this case shows. He did not in any way suggest that it was typical of black males to play the race card; he merely asserted that he thought that was what the Claimant was doing.

131. Therefore, there is nothing whatsoever which shifts the burden of proof in relation to this allegation. In any event, there is an explanation for Mr Boulanger's actions which is in no sense whatsoever because of race or sex. This allegation therefore also fails.

3.1(c): The Second Respondent's conduct at the disciplinary meeting on 13 May; the Claimant did not understand the charges against him and the meeting was adjourned when the Claimant protested.

132. The Claimant accepted that Mr Boulanger was not at the disciplinary meeting of 13 May 2016; therefore he could not have carried out any conduct at that meeting which was alleged to be unfavourable to the Claimant; therefore this part of this allegation is not made out and fails.

133. As regards the second part of his allegation, we do not accept that the Claimant did not understand the charges against him. The Claimant is clearly a reasonably intelligent individual who was able to prepare and structure an Employment Tribunal case representing himself. Furthermore, notwithstanding that his grievance was upheld on this point, it was upheld on the basis of an administrative failure only which did not impact on the Claimant's understanding of the case against him; we agree that there was more than enough information provided in and with the invitation letter for the Claimant to understand the charge against him. The factual basis of this part of the allegation is therefore not made out.

134. Finally, the meeting was adjourned because the Claimant wanted it to be adjourned. That cannot therefore have been detrimental treatment of the Claimant. This part of the allegation is also therefore not made out and it fails.

135. In any event, there is nothing to suggest that any of the alleged actions

referred to above under this allegation were because of race or sex.

3.1(d): The Third Respondent was not independent or impartial as an investigator of the disciplinary allegations. She worked against the Claimant with the Fourth Respondent to his disadvantage.

136. As regards the allegation that Ms Bolekova was not an independent or impartial investigator, Ms Bolekova was asked to carry out an investigation, which was specifically requested to be carried out by the Claimant and Mr Carroll. Ms Bolekova was the Claimant's line manager and therefore, in all normal circumstances, an entirely appropriate person to carry it out. It is a small Club of 12 individuals and so it is inevitable that anyone based at the Club with the knowledge to carry out the investigation will know others at the Club.

137. As we found, Ms Bolekova carried out a very thorough investigation, as evidenced by the numerous relevant individuals she interviewed and the evidence she gathered. As it happens, the investigation turned up a lot more evidence of misconduct by the Claimant than that set out in Ms Austen's three emails; however that is simply a possible consequence of carrying out a thorough investigation; the investigator goes where the evidence leads. It is certainly nothing to do with race or sex.

138. Ms Bolekova took guidance from her line manager, Mr Boulanger. That is normal and to be expected, particularly as carrying out investigations of this kind are not necessarily things which a manager will be required to do on a regular basis.

139. Mr Boulanger took notes at some of Ms Bolekova's investigatory meetings. It would have been better, given that the Claimant had specifically objected to Mr Boulanger's involvement earlier, if someone else had been found to take the notes. However, we accept that it was a small Club with limited numbers of appropriate individuals available to take notes.

140. In any case, the fact that Mr Boulanger was involved in these ways does not give us reason to think that Ms Bolekova did not carry out her investigation independently or impartially. The allegation is not therefore made out.

141. In any event, there is nothing whatsoever to suggest that anything about the way the investigation was conducted by Ms Bolekova was because of the Claimant's race or sex.

142. As to the allegation that Ms Bolekova worked with Ms Austen to the Claimant's disadvantage, Ms Bolekova interviewed Ms Austen as part of her investigations. That is entirely to be expected as Ms Austen made the original complaints. It does not show that Ms Bolekova worked with Ms Austen to the Claimant's disadvantage.

143. In any case, there is nothing to suggest that her decision to interview Ms Austen was anything to do with the Claimant's race or sex.

144. Furthermore, although Ms Austen makes a few comments as set out on the second of the two transcripts, these are peripheral and in no way impact on the assessment set out above.

145. This allegation therefore also fails.

3.1(e): The Fifth Respondent's decision on the grievance appeal on 10 August.

146. As to Mr Sumner's decision on the grievance appeal, we accept Mr Self's submission that it would have been open for Mr Sumner to say that the transcripts were not fresh evidence and that, as they could have been adduced at the original grievance hearing (which took place after they were made), he was not going to deal with them at all. However, he chose not to do that and nonetheless decided to consider them.

147. The basis of the Claimant's appeal rested solely on the evidence provided in the transcripts. Mr Sumner had purported transcripts in front of him without the tapes from which they were derived and without being told how they had been produced and by whom, despite his requests, which the Claimant and Mr Carroll refused to answer. He made appropriate enquiries of Mr Boulanger and it was clear that the date of the second transcript, which purported to be of a conversation involving Mr Boulanger, was a date when Mr Boulanger was on annual leave.

148. Therefore, on the evidence before him, Mr Sumner's conclusions were entirely reasonable.

149. There is nothing whatsoever to suggest that his conclusion was anything to do with the Claimant's race or sex. He made it based on the evidence before him. This allegation therefore also fails.

<u>Victimisation</u>

150. As noted, the Respondent accepted that the 18 May 2016 grievance and the 8 July 2016 grievance appeal were protected acts.

151. Allegations 3.1(a – c) predate the first of these protected acts and therefore could not have been done because of either of those protected acts.

152. As to allegation 3.1(d – e), we have already given our reasons above as to why, to the extent that any of the alleged actions under those allegations were proved, the relevant Respondent acted in that way and we do not repeat them here. However, it follows that they were done not because of the protected acts but were done for the reasons set out above.

153. The victimisation complaints therefore fail.

Constructive Unfair Dismissal

154. As to the constructive unfair dismissal complaint, the Claimant relies on allegation 3.1(e) only as the alleged fundamental breach of contract.

155. However, we have already found that Mr Sumner's decision was a reasonable one. It was not calculated or likely to destroy trust and confidence and it was made with reasonable and proper cause.

156. As there was no breach of contract at all, let alone a fundamental one, the unfair constructive dismissal complaint fails.

157. Therefore, in summary, all of the Claimant's complaints fail.

Polkey/Contributory Conduct

158. It is not therefore strictly necessary for us to address the issues of Polkey and contributory conduct. However, for completeness we do so all the same.

159. We have found that, on the balance of probabilities, the evidence uncovered by Ms Bolekova's investigation would have led to a finding of gross misconduct against the Claimant and, in addition, he had breached the Respondent's policy by taking covert recordings, which was also likely to amount to gross misconduct, particularly as the Claimant knew full well that he should not have been doing so (he admitted this in evidence and his conduct in not revealing the fact that he himself had taken the recordings until this Tribunal is further evidence that he knew full well the consequences for him if the Respondent knew that he had been taking covert recordings).

160. Therefore we find that, on the balance of probabilities, if the Claimant had not resigned, he would have been fairly dismissed for gross misconduct within one month of his resignation date and, under the principles in Polkey, we would have limited any compensatory award for unfair dismissal to one month's pay.

161. Furthermore, we would also have considered that the Claimant contributed 100% to his dismissal by his own misconduct and would have made a 100% reduction in both the basic and compensatory awards for unfair dismissal.

Jurisdiction

162. Applying the ACAS early conciliation provisions to the primary Tribunal time limits, any allegation prior to 8 June 2016 (and, in the case of Ms Bolekova, the dates of whose ACAS early conciliation certificate are different from the others, 13 June 2016) is prima facie out of time. Therefore, allegations 3.1 (e) and the constructive dismissal complaint allegations are in time. As the investigation carried out by Ms Bolekova was completed on 7 July 2016, allegation 3.1(d) is prima facie out of time in relation to both Ms Bolekova and to the First Respondent, and allegations 3.1(a-c) are prima facie out of time.

163. Although Mr Self stated at the start of the hearing that he would not be arguing the various allegations as against the First Respondent did not form part of an act extending over a period, the fact of the matter is that we have found that all of the complaints failed. Therefore there is no act extending over a period. Therefore allegations 3.1(a – d) are out of time.

164. As to whether it is just and equitable to extend time in relation to those allegations, the Claimant has provided no reason why we should extend time. In the light of the merits of the complaints, which have all failed, we consider that it would not be just and equitable to extend time. The Tribunal does not therefore have jurisdiction to hear allegations 3.1 a – d and they are therefore dismissed.

165. The remainder of the complainants' complaints, which were in time, as we have already found, all fail.

Respondent's Costs Application

166. Mr Self then stated that he wanted to make an application for costs on behalf of the First Respondent.

167. The Tribunal's powers to make awards of costs are set out in the Employment Tribunal Rules of Procedure 2013 at Rules 74 - 84. The test as to whether to award costs comes in two stages:-

    1. Firstly, has a party (or that party's representative) acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted or did the claim or response have no reasonable prospect of success? If that is the case, the Tribunal must consider making a costs order against that party.

    2. Secondly, if that is the case, should the Tribunal exercise its discretion to award costs against that party? In this respect the Tribunal may, but is not obliged to, have regard to that party's ability to pay.

168. The Judge explained the above summary of the law for the Claimant's benefit prior to Mr Self making his costs application.

169. Mr Self then made his application. The Claimant then responded to the application and opposed it. At the end of his submissions, the Claimant stated that he sought to have the matter adjourned and relisted for a full hearing to give him the opportunity properly to prepare for the application. At that point, the Tribunal decided to adjourn momentarily to consider the Claimant's request. When it returned, it refused the Claimant's request for the following reasons. Firstly, the parties and the Tribunal were all present and there was a half a day of the hearing left which was ample time to hear the costs application. To postpone at this stage would be disproportionate. It would involve extra cost and time for the parties and for the Tribunal itself,

which would then have to rearrange a further date for the Members and the Judge to reconvene for a further hearing. There was no good reason why it should not be heard today. Furthermore, the Claimant had been put on notice by the Respondent, by email of the previous day (which the Claimant acknowledged receiving) that the Respondent would be making an application for costs at the end of the hearing once the Tribunal had delivered judgment. It was irrelevant that the Respondent had not sent any previous cost letters to the Claimant in the course of the proceedings. Furthermore, the Claimant had been advised both during his employment and in preparation of the claim and certainly at least up to the preliminary hearing by his trade union representative, Mr Carroll (who represented him at the preliminary hearing), and therefore had the benefit of this advice including, presumably, any discussion about the possibility of costs being awarded. In addition, the Judge had explained the law to the Claimant and had asked any appropriate questions of the Claimant (for example as to his means) which reduced any prejudice to him of not being represented at the hearing considerably. We considered that this was just another example of the Claimant trying to delay and string out the process. It would be disproportionate and was not in the interests of justice to put the hearing off and we therefore decided to proceed.

170. At that point, the Claimant was given an opportunity to make any further submissions which he wanted (which he did not take) and, as noted, the Judge asked him a number of questions about his means. Interestingly, the Claimant had ready answers to the Judge's questions about what all his individual outgoings were and appeared to be reading these amounts from his computer, which seemed to indicate that he perhaps had been doing some preparation in anticipation of a costs hearing.

171. After the submissions were completed, the Tribunal adjourned to consider its decision on the costs application. When the parties returned, the Tribunal gave its decision orally.

Stage One

172. We found that all of the complaints brought by the Claimant had no reasonable prospect of success. As noted in our findings, there was nothing in the discrimination complaints which could have shifted the burden of proof in relation to the discrimination complaints, or, as Mr Self put it, there was "not one shred of evidence" against any of the witnesses of the Respondent that there was any race/sex reason for any of the alleged conduct. Mr Self had noted, quite rightly, that the allegations of discrimination only started to arise once Mr Carroll came on the scene. Mr Carroll was the trade union representative (and, we understand, an experienced one) who advised the Claimant throughout (albeit he did not represent him at this hearing). There was no reasonable prospect of the victimisation complaints succeeding, for the same reasons. Furthermore, there was no reasonable prospect of the constructive dismissal complaint succeeding; based as it was on what was, on any reading, a perfectly reasonable decision by Mr Sumner.

173. Furthermore, we also considered that there was unreasonable/vexatious conduct on the part of the Claimant/his representative. Examples include not disclosing the tapes until the last minute; silly objections at this hearing to uncontroversial things, for example objecting to Mr Self requesting to ask a one off supplementary question; the late amendment application at this hearing; in particular, the insistence on keeping the individual Respondents as parties to the claim when the Respondent was clear that they were not relying on the statutory defence so there was no need to keep them as named Respondents (which was explained by the Judge at this hearing and, we understand from Mr Self, also by the Judge at the preliminary hearing); and seeking to delay the costs hearing further by putting it off to another day. These are just some of the examples.

174. For each of the reasons above, therefore, stage one of the test is satisfied and we need to consider whether or not to exercise our discretion to award costs at stage two.

Stage Two

175. First, Mr Self provided a schedule of the costs incurred and which he sought. This totalled £15,778.00 comprising solicitor's costs of £6,328.00 and Counsel's fees of £9,450.00. VAT was not included, as Mr Self acknowledged that this could be recovered. We accepted Mr Self's submissions that the costs were entirely reasonable.

176. In particular, the solicitor's costs, in which the solicitor in question was charged out at just £140 per hour, a special rate for the Respondent, and the solicitors were Bournemouth based where the costs would be lower in any event than a London firm, we remarked as being especially reasonable; we would have expected the costs of preparation for a five day hearing, including the production of six witness statements to have been far in excess of that. Furthermore, Mr Self stated that, although they had a note taker present during the five days of the hearing, they were not seeking to charge for that note taker's costs.

177. Mr Self himself is a 1991 call and his fee for the five day hearing of £7,800.00 was not, we considered, unreasonable. Nor were the other much smaller Counsel's fees in relation to earlier work attending the preliminary hearing and drafting certain documents. The costs sought were therefore reasonable.

178. Secondly, because we found that the complaints had no reasonable prospect from the start, all of those costs flow from the fact that the complaints had no reasonable prospect. This is not a case where, for example, only part of the costs incurred flow from a particular example of unreasonable behaviour.

179. As noted, the Judge had asked the Claimant about his means. The Claimant explained that he was working again on a salary of £22,000.00; that he had no other source of income; that he had no property, savings or shares; that

his partner, with whom he lived, did not work and that they had an 11 month old child; and that he had certain outgoings which totalled £1,255.00 per month (£550 rent; £120 electric and gas; £145 Council Tax; £200 travel expenses; and £240 food); and that he had £500 in the bank and no other debts apart from these.

180. We calculated that this meant that the Claimant's net salary was likely to be around £1,600 per month and that he therefore had a margin of income above his expenses of £345. We acknowledge that it would be difficult, due to these financial means, for the Claimant to pay all of the costs sought, and certainly not in one go (unless he was able to borrow the money). However, Mr Self had confirmed that the Respondent was highly unlikely to try and enforce this in one go or to make the Claimant bankrupt and that, in the past, it had often entered into arrangements with creditors whereby they would pay in instalments. Therefore, it seemed to us that, particularly as the Claimant was a young man who was earning and had future earning potential, he would be able to pay some of these costs.

181. However, we also accepted Mr Self's submission that, unlike other cases, this was not a case where the Claimant was someone who genuinely but mistakenly thought that he had been discriminated against; rather we considered that the Claimant never seriously thought that discrimination had taken place and that his intentions in bringing the claim were otherwise. We noted that the allegations of discrimination in particular started when Mr Carroll, the trade union representative, got involved. The inference which we draw is that, as Mr Self submitted, the Claimant thought that if he kept on bringing claims against the Respondent, he would eventually get some form of payout in the end, but the Respondent, quite reasonably, was not prepared to pay up. Furthermore, we note that the four named Respondent individuals have had these discrimination allegations hanging over them for a year. It was completely unnecessary to name them as individuals in the first place and certainly unnecessary to persist once the Claimant was aware that the Respondent was not relying on the statutory defence and to do so we consider, as Mr Self submits, to have been vindictive on the part of the Claimant.

182. For these reasons, we consider that it is appropriate, notwithstanding the Claimant's means, that any amount of costs awarded is a reasonable amount. Therefore, whilst we take into account the Claimant's means to an extent, we have decided to make an award of costs of £10,000.00, payable by the Claimant to the Respondent. This is an amount which, over time, will be capable of being paid by the Claimant notwithstanding his means.

Employment Judge Baty
17 July 2017