

JB1



EMPLOYMENT TRIBUNALS

Claimant: Mr D Scarpa

Respondent: (1) The Victory Services Association Limited
(2) Mr M Field
(3) Ms M Miotti

Heard at: London Central

On: 19-21, 24-25 July 2017

Before: Employment Judge Goodman

Members: Ms S Samek
Mr J Carroll

Representation

Claimant: in person

Respondent: Mr D Hutcheon, Counsel

JUDGMENT having been sent to the parties on 26 July 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. These are claims for unfair dismissal, race discrimination and harassment. There were additional claims of breach of contract (unpaid wages) and for holiday pay which were abandoned in the course of the hearing and they are dismissed on withdrawal.
2. The Claimant presented his claim on 20 January 2017 with a detailed and literate Claim Form. The issues were explored at a Preliminary Hearing, following which a list of issues was prepared by the Tribunal. The list of

unwanted conduct alleged as discriminatory or harassment will be appended to the Judgment.

3. The Tribunal heard evidence to decide the issues from

Dario Scarpa, the Claimant, who had prepared a 19 page witness statement, with appendices of around 30 pages, plus a remedy statement, which was articulate and detailed. In asking questions, he experienced the common difficulty of litigants in person in formulating a challenge rather than restating elements of his own evidence, and from time to time the Tribunal stepped in to assist.

4. Other witnesses were:-

Melanie Miotti, the Third Respondent and Front of House Manager, who was the Claimant's line manager, against whom many allegations of discriminatory treatment or harassment are made.

Mark Field, the Operations Director, who was Ms Miotti's line manager and who is the Second Respondent. It was he who suspended the Claimant and investigated his conduct after complaints were made about him.

Simon Spence, the Support Services Director who dismissed the Claimant.

Nigel Beet, the Chief Executive Officer, who heard the appeal against dismissal.

5. At the conclusion of the evidence, both sides submitted written submissions, the Respondent's, headed "skeleton" is 25 pages and comprehensively dealt with points in evidence, the Claimant focused on the four allegations which led to unfair dismissal but questions were asked of him about other issues too.

Findings of Fact

6. The Respondent is a private members club for servicemen, serving and retired. We do not know the total number of staff but were told that they were multi-ethnic and comprised 27 or more nationalities. We also heard that they have multi-ethnic membership, given that many people in the British Armed Forces are now of Commonwealth origin.
7. The Claimant has been in hotel work since about 1998 and was employed by the Respondent from 3 September 2012 as Night Manager. On 24 February 2015 he was appointed Senior Night Manager, subject to 6 months probation. In an appraisal, written in March 2015, of his performance to date, he was described as willing and capable, firm but fair, and with a demeanour which was too confrontational at times. It said that he might make decisions before thinking about the consequences. These were given as reasons for putting him on probation in the promoted position.
8. From July 2014, one of the night porters on the Claimant's staff was Ibukunoluwa Christopher Johnson, known as Chris, who was studying for an MA Course at university and supporting himself by this work in the meantime, he is also a member of the Territorial Army. On 21st May 2015, conflict between the Claimant and Mr Johnson became evident. Mr Johnson had confronted a member about smoking an e-cigarette within the club, and Mr Wildman, another Night Manager, and the Claimant as Senior Night Manager, took Mr Johnson into their room for a discussion of this and a number of other concerns. The meeting became confrontational: the Tribunal has been shown a short CCTV clip of the meeting which has no audio track; we are invited to find that Mr Johnson pointed the finger at the Claimant and spoke to him critically. We doubt whether we can see that, what we do see a great deal of hand movement with repeated gestures from the Claimant indicating that Mr Johnson should leave the room at the same time as others are coming and going. It is evident that it was hectoring in manner. Mr Johnson is said to have called the Claimant a fucking liar. The Claimant reported this together with a long list of other perceived defects of Mr Johnson's conduct at work to the Respondent.

9. As a result, Mr Johnson received a first written warning for his behaviour, but it is noted that Mark Field, for one, felt that this episode had not been well handled by the Claimant, in that Mr Johnson had not been given any warning of rebuke, and that the meeting was not properly conducted. The Claimant meanwhile believed that Mr Johnson should have been dismissed for his aggression, not given a warning, and on 23 August 2015, he wrote to Melanie Miotti, after an episode where Mr Johnson had been late for work but refused to fill in a late form. The Claimant told Ms Miotti that Mr Johnson was challenging his authority, he described him as “a liar, manipulative”, said he was “taking the piss all the time, he was disrespectful, he is trying to push me until I crack and I do something wrong. I don’t want him anymore in the night team”, and, “I want him gone out from the night team once and for all, I want the guy out of the Club by the end of next week, I don’t want to see him or his name again.”

10. This was copied to Mark Field, who on receipt commented to Ms Miotti: “I have some strong concerns about the Claimant’s management capabilities. Chris’s behaviour if as explained below is unacceptable please investigate.” We can see that immediately following, Ms Miotti emailed Mr Johnson, copying the Claimant and Mr Wildman, asking him to meet her the following morning to discuss “a matter that arose yesterday”. The Claimant has challenged whether Ms Miotti took any action on the complaint he had made about Chris Johnson’s behaviour. In our finding there was a meeting with Chris Johnson on that day, we accept her evidence, we can see that it was arranged, and we can also see that on the day of the meeting, Chris Johnson, later in the morning, emailed Ms Miotti saying “thank you for your email and the opportunity to meet you this morning”. We have no notes of this meeting and we know that she took no further action, but in our finding she did discuss the allegations with him, and we know that it concerned failure to fill in the late book.

11. The morning after that meeting, Mr Johnson told Ms Miotti that he wanted to air his own concerns about the Claimant: “he is actively exploiting every opportunity to discredit me and might have a personal vendetta”. He attached a five page document listing shortcomings in the Claimant’s

behaviour and competence as a manager. He said that he was abusing his power having been promoted. This was treated as a grievance about the Claimant. Next day there was a grievance meeting.

12. This coincided with a report to management of the Claimant's involvement in a confrontational episode with a club member called Brown. Mr Brown and his male partner were returning to the Club; one or both were challenged by Mr Johnson for evidence of membership. The pair interpreted this as homophobic behaviour, and one came behind Mr Johnson to take a photograph of him on his phone. Mr Johnson took hold of the phone and then would not give it back. The Claimant offered Mr Brown a complaint form and he used the opportunity. The outcome was that Mr Johnson was given a final written warning. His defence was that when the phone came up behind him he did not know that it was only a telephone. It was held that his error was refusing to give it back when he discovered it was only a phone.
13. It was against this background - a grievance by Mr Johnson about the Claimant and a complaint by the Claimant about Mr Johnson - that the decision was made on 2nd September 2015 not to confirm the Claimant in his promoted post, but instead to extend probation by three months to 30th November 2015. Eight reasons were set out in writing, these included needing to follow HR procedures better, better working relations with front of house day and night staff; training was offered. There was also mention of better paperwork, spending more time at the desk, and implementing the Respondent's policies on lateness and sickness absence.
14. The stated reasons for deciding to extend probation were Ms Miotti being concerned about the intemperate email she received on 23 August demanding Mr Johnson's dismissal, and Mr Field expressing doubts, in the light of this, whether the Claimant was capable of making the step up, that he was not listening to staff and he was treating them differently. He expressed concern about his conduct and management style. Ms Miotti felt she could not recommend him, but she wanted to see if he could change his behaviour. We can see that throughout that autumn, attempts were

made to persuade the Claimant to take a more measured approach to staff management.

15. On 8 September 2015, there was a manager's meeting lasting four hours, at which the Claimant tells us he made complaints about Chris Johnson which were not minuted. The 'minute' is a short note of a long meeting, with no detailed record of discussion, just action points.

16. The Claimant says that at this meeting, when he complained about Mr Johnson, he was advised not to take further action because of the risk that Mr Johnson would bring a race discrimination claim against the Club, though at other times the Claimant said that this was said to him on 23 August, or at a later meeting on 2nd October. It is contested by the Respondent that this was ever said. On the balance of probabilities, we concluded that it was. It is plausible that this would be mentioned, and if it was, that it would not be minuted. All members of the panel have come across many examples of this in the workplace. It is plausible that it was said in the context of persuading the Claimant to go slow on his handling of Mr Johnson, and if he perceived poor behaviour to collect evidence and discuss it with his own managers, rather than to go for head on confrontation, leading to an episode like that in May 2015. We also note, in this context, that during this period the Claimant was being asked to go easy on white staff too, for example, during the autumn, the Claimant typed up and handed over to the day staff a handover record, mentioning other shortcomings of staff by name. One was where a guest is said to have blamed a member of staff called Kate. Kate is white. He was advised not to criticise staff by name in a general report. In another example, on 2 November, the Claimant had complained about the kitchen brigade being at fault in a particular episode, and Ms Miotti asked him not to identify others being at fault to their colleagues because of the widespread readership of the handover note. The Claimant complained of Ms Miotti, "she only cared that I did not upset the day team", but the ethnicity of the day team is unknown, and there is no evidence of any difference in the instructions to the Claimant on how to handle his colleagues by their ethnicity.

17. On 2nd October, Ms Miotti met the Claimant to discuss Mr Johnson's grievance about the Claimant; she told him that it was not going to be upheld. The Claimant responded that in that case he wanted to make a grievance about Mr Johnson making false accusations about him; Ms Miotti advised him not to pursue this course of action. This is one of the occasions when the Claimant may or may not have been told that pursuing a grievance against Mr Johnson would be race discrimination. The Tribunal comments that any manager is likely to have told a junior manager wanting to lodge a grievance about a subordinate it would be better not to; it is obvious that this is not the way to take matters forward, regardless of race difference.
18. On 8th October, Mr Johnson was told that his grievance was not being upheld. His criticisms of the claimant had not been substantiated; the conflict was described as personality clash. It would be managed going forward by structured one to one meetings with his manager to discuss differences between them.
19. The next episode alleged as discrimination or harassment is that on 18 December 2015 the Claimant was told he was confirmed in his post and that his period of probation was over, but nevertheless there were concerns that he still needed to make improvements. On HR issues the Claimant was to go to Ms Miotti first before taking any action. On the front desk he was to give more attention to detail, prepare weekly observations on his staff, set up review meetings in advance, and file the notes after, (it was a concern he was not methodical in his management tasks). Lastly his attitude should be "friendly and helpful at all times", by which we understand that members occasionally voiced concern that he was grumpy.
20. Through this autumn period the Claimant had meetings with HR staff to give him specific guidance on how to handle colleagues in general and Chris Johnson in particular. He was also given specific guidance by Ms Miotti on what to do in particular management confrontations.

21. The following day, the 19th December, the Claimant was asked by Ms Miotti to speak to Mr Johnson about the fact that he had been late on eleven occasions recently; she suggests the Claimant should have picked this up before. He was to take it seriously, as it was unacceptable. The Claimant responded that he would do so when Mr Johnson returned from his holiday, (28 December), but in the event we have no evidence from the Claimant's witness statement, or any document, that he did discuss lateness with Mr Johnson. The background is that when Mr Johnson had sought to book holiday for two weeks, he had only been granted one. He was due to return from a visit to Nigeria on the 28th December, but in the event did not return until the 8th January. When he returned he brought a letter from a clinic in Nigeria saying that he had suffered from malaria and that he had been unfit to travel. The Claimant became convinced that when Mr Johnson said his return was delayed because of malaria that this was false, made up to get the second week of holiday he wanted. He said in evidence that in Africa, and in Nigeria in particular, any document could be brought, as the country was corrupt, and therefore he needed to see a certificate from a UK General Practitioner as to his illness and health.

22. At a later Disciplinary Hearing, the Claimant persisted in demands that Mr Spence investigate Mr Johnson's flight tickets to confirm whether he had always had a return flight booked for 28 December or 7 January. The correspondence seen shows that Mr Johnson had to rebook for 7 January, and then postpone a day further because of a dubious blood test. The Claimant pursued both issues here vehemently.

23. The Club rules require, as is common, that absence due to illness longer than 7 days must be the subject of a medical certificate. There is also a rule that if the absentee has suffered an infectious or contagious disease, he must produce a medical certificate that he is now clear and fit for work. There is also guidance to managers on Club rules about false overstayers, that is staff who say they have been ill when they return late from holiday, to the effect that staff have to prove beyond reasonable doubt there was a genuine medical reason for absence, including producing flight tickets and medical certification. Mr Johnson did return with a hospital letter confirming

the reason for his delay, and he was eventually able to demonstrate that he had had to rebook his flight.

24. It was against this background that when the Claimant conducted a return to work interview on 11 January, he insisted that Mr Johnson produce a UK GP note to say that he was fit for work. He also asked Mr Johnson for his flight tickets, but he was not given them. The Claimant's real reason, we concluded, was that he believed Chris Johnson was acting dishonestly. His overt reason for requiring a certificate was that he wanted to be satisfied that he was in fact fit for work.
25. The matter was taken over by Ms Miotti presumably to avoid confrontation, and the Claimant was and is unhappy that Ms Miotti did not insist on seeing the flight documentation.
26. The Claimant has said that other people became concerned that Chris Johnson had returned from Africa with a contagious illness, and the question later arose, in the context of disciplinary proceedings, of whether the Claimant had discussed Chris Johnson's health with other staff. We can see that on 15th January, Ms Miotti emailed the Claimant asking him to remind Mr Johnson to see a GP to "appease himself and us" that he had a clean bill of health. We do not know if Ms Miotti pursued this; her evidence was that Mr Johnson did eventually see a GP, but there is no fit note.
27. The issue resurrected itself in April 2016, but in the meantime there was a dispute with Ms Miotti about staff rotas produced by the Claimant as Senior Night Manager.
28. On 21 January 2016, Ms Miotti made some changes to the Claimant's Sunday rota, reducing the number of staff on duty from four to three.
29. On 28 January, the Claimant put up a rota for the forthcoming period and when upbraided angrily by Ms Miotti for doing so, he responded equally angrily. The Club had asked Mr Johnson to reduce his five day working to four, and Ms Miotti had asked the Claimant not to put up the next rota

(which would show which days he was working) until Mr Johnson had actually signed the new contract. In a contemporary email the Claimant agreed not to put up the rota until the 30th January; in fact he put it up on the 28th January, at a time when Mr Johnson had not yet signed the contract. The Claimant has later argued that he knew that Mr Johnson had verbally agreed to the change so it was of no consequence that he had not signed it. When Mr Johnson saw the rota, he went to ask Ms Miotti about it, which provoked her rebuke.

30. We could understand why Ms Miotti was angry that her instruction had been disregarded. It is quite possible that the Claimant forgot, or that he was, as he stated, under pressure from other staff to tell them when they were going to be on duty in the forthcoming period, it is possible that he disagreed with the instruction, but one way or another he was unable satisfactorily to explain why he had put it up two days before he said he was going to and without checking that Mr Johnson had signed the contract.
31. The next episode that brought the Claimant into contact with Ms Miotti was in February, when Liam, one of the managers reporting to the Claimant, rang in sick, and the Claimant said that there was going to be no one to cover. Ms Miotti's firm response was that the Claimant had to arrange cover, and if necessary work it himself. The Claimant said that he was not very well himself, that there was no one else to cover, as towards the end of the week Kevin Wildman would not be available. He wrote an angry email to Ms Miotti, saying that he did not like her tone at all. He complained about lack of support, and of being told in front of two other staff that he was ultimately responsible for the rota. He said he was being taken for granted. The reference to being told that he was responsible for the rota may perhaps explain his subsequent resentment about Ms Miotti's changes to the rota on 21 January.
32. As it happened, in the morning Mr Field fixed the rota so that the Claimant did not have to cover, but the irate terms of this dispute led to Ms Miotti summoning the Claimant to a meeting on 15 March to discuss his tone and language, which she stated was "inappropriate". They discussed this, and

the need for the Claimant to cross check his staff's work, and the Claimant's general attitude to her. The Claimant complained that he had not received any HR training, and about her handling of the rota delay issue. The meeting became very argumentative, and Ms Miotti complained about that too. Towards the end of the meeting, in the context of the Liam episode, and there being a lot of sickness, the Claimant said, "it is since Chris came back, he may have brought something and passed it on". This was an odd comment to make, given the known diagnosis of malaria. The meeting concluded after one hour with Ms Miotti saying to him, "if we don't see some changes", meaning to his behaviour, "we may have to take disciplinary action".

33. On 11 April 2016, Mr Johnson called in sick, leaving a message that he was unwell and thought it might be a relapse of his malaria. The Claimant asked Mr Johnson to bring in a doctor's note because he concluded that he had been sick for more than seven days. Due to a change in the rota it is unclear whether some of these days were taken as holiday or Territorial Army duty, so not sickness requiring a note. The Claimant sent an email to other staff that the Chris Johnson had malaria and that he had asked him to get a note from his GP to make sure he was not contagious. Mark Field, to whom this note had been copied, responded to all the managers "for everyone's information malaria is not contagious and you can't catch it from physical contact with someone who has had it." The Claimant has complained to the Tribunal, as he did at the disciplinary panel, that Mark Field was not medically qualified to say this. The panel comments that in our general knowledge malaria comes from mosquito bites, the Claimant, who said that he had lived in Africa at one point in his life, expressed concern in this Tribunal that it could be communicated from body fluids. In any event, that was the Claimant's explanation of requiring a medical certificate for Mr Johnson. We note too that underlying it was the Claimant's suspicion that Mr Johnson has not always truthful about his reasons for absence.
34. From February 2016 the Claimant started holding one to one meetings with his team and making brief minutes of them. The minutes were then passed

to HR to file. A set of minutes from 11 March records a dispute with Chris Johnson about whether he was arguing with the Claimant, or having arguments with other managers. Mr Johnson refused to sign what appears to have been an accusatory minute that required him to have no more arguments. The minutes of other meetings show the Claimant commenting that Chris, (Mr Johnson) can be very difficult: staff were asked to report to the Claimant in writing if arguments with him occurred.

35. When Sophie Ashbury in HR saw these, she was asked him to meet her on 17 March. Because of the Claimant's ill health and holiday the meeting did not take place until 21st April. Discussion focused on the Claimant inappropriately accusing one member of staff of wrongdoing in the face of his colleagues, then seeking evidence of this from other team members. He was issued with a letter of concern which was said not to be part of the disciplinary process, but a reasonable management instruction. As breach of a reasonable management instruction can be a disciplinary offence, we take this as a warning that if he did not follow this advice disciplinary action would follow.

Suspension

36. We move next to two complaints about the Claimant which led to the institution of disciplinary proceedings and his eventual dismissal. The first came from Tim Hooker, a regular member of the Club. Mr Hooker first spoke to Ms Miotti on 19 May, confirming this in an email of 20 May. He said that when present at the night reception late in the evening, but when people were still in the restaurant, he overheard the Claimant's banter with staff. He had told the Claimant that he should 'not be talking like that' with the night receptionist Pardeep Sandhu. Mr Hooker did not identify the actual language he used, but said to Ms Miotti, 'some of the language was bordering on the racial'. Mr Hooker was sufficiently concerned to speak to the CEO about it too. When Mr Hooker was later seen by Mr Beet as part of the Claimant's appeal, there is still no record of what words he had heard.

37. The second complaint about the Claimant's conduct came from Chris Johnson in an email to Ms Miotti of 23 May. His complaint was that he had said that he feared he had malaria, although the illness had proved to be swine flu, from which he had made a recovery, and his subsequent absence was for Territorial Army duty. His complaint was: "I have been on the receiving end of what can only be described as discriminatory and racially motivated overtones/attacks. Originating from the Senior Night Manager Dario (the claimant)." He said that "Dario's inexplicable and sometimes irrational actions, his ability to misconstrue information and the extreme lengths he took to portray me in a negative light, but now he has sunk to a new low by utilising highly offensive stereotypes and making insinuations of a racist nature. For a while now Dario has been informing members of staff across the Club that because I am African and travelled to Africa recently, I have brought back some kind of foreign disease that is causing people to fall ill. Albeit how irrational this claim is, it is potentially plausible to a less discerning mind, especially when circulated by an individual in the position of authority. Understandably I have observed change/weariness towards me among certain members of staff following this rumour circulated by Dario; I can reliably state that Dario has created an environment where night staff can freely call in sick." He went on to say that Dario's comments are "racist, abhorrent and unacceptable, especially in a professional multi-culture environment; no one should be subjected to this kind of malice, client or staff." He said that Dario's persistent belligerence was motivated by racism.
38. In the face of these two complaints, the Claimant was suspended from duty "following an allegation that you have made racially discriminatory remarks about members of the night team".

Disciplinary Investigation

39. On 27 May, Mark Field began investigation of both matters. He saw Pardeep Sandhu about Mr Hooker's complaint. He explained that the language used was the Claimant saying he was "skinny because I have to fight for food in the garden." The Claimant was also interviewed. On the

Hooker episode, he said that he had been joking; it concerned Mr Sandhu being underweight and becoming a member of the gym. He said that he was a skinny wanker, (later amended to “skinny guy”), he needed to build muscle. He said it was a stupid joke, “I said that his mother needed him to catch food, to go in the garden and catch a chicken.” The Claimant said that his jokes were not offensive and he was told that Pardeep Sandhu had said “it would be offensive if they had not been friends”.

40. The Claimant was then interviewed about Chris Johnson’s illness. Mr Field reminded him that he had told them that malaria is not contagious. He was asked if he had given information to the other junior team; and “have you made comments that Chris is contagious and making other people sick.” Asked why he required Mr Johnson to produce a certificate when he had not required it from others, he said “they have not come back from Africa with malaria”, adding “maybe there was something else which would require a certificate that he was healthy.” As for being told not to discuss Mr Johnson’s health with junior staff he said: “they approached me with their concerns”. They discussed whether a note was needed when he was only off sick for four days.

41. Mr Field interviewed Mr Johnson that day, Mr Johnson complained of offensive stereotypes. He spoke of an episode when a member had had a toilet accident in the lobby by the lift, the Claimant had asked someone to clean up, Mr Johnson had done it. The Claimant took pictures of the floor of the lobby before it was cleaned up and then shown these pictures to other people. The Claimant said that Mr Johnson must have extensive experience of cleaning, which Mr Johnson found racially offensive stereotyping. Mr Johnson also complained that the Claimant had the attitude that only those who had been to Africa would require a certificate of health. The December episode was long distant, but on 29 April he was still being asked for a fit note in the presence and hearing of the food and beverage team and the night staff, who could hear everything. Others now treated him with distance, and one person had used alcohol gel to wipe his hand after shaking it. The Claimant had also made a remark about African people buying jewellery whenever they got some money. He accused the

Claimant of picking on a night manager who had been dismissed for sleeping, (Franklin) who is black, when others sleeping had not. Asked why he had not complained about earlier episodes before, he said it was due to the 'increasing tempo' of the Claimant's treatment of him.

42. Mr Field next reviewed the one to one meeting notes that had recently been reviewed by HR and had led to the letter of concern. He became concerned that these showed that the Claimant was soliciting evidence about Mr Johnson, which in his view was bullying behaviour by a manager. He concluded that there was a case to answer in disciplinary proceedings and on 8 June the Claimant was invited to a disciplinary meeting.

Disciplinary Proceedings

43. The case against him consisted of four allegations, firstly that he had made remarks to Mr Johnson which were racially discriminatory and created a hostile working environment. Secondly, that he had breached confidentiality in discussing Mr Johnson's sickness record with junior members of the team, causing Mr Johnson to lose faith in his integrity. Thirdly, that he had been bullying, meaning ignoring or deliberately excluding and spreading rumours towards Mr Johnson and had used his position to influence others to behave in a similar manner. Fourthly, that he made inappropriate remarks to a junior colleague in the presence of a club member which led to the member complaining and which may be construed as racially motivated having the purpose or effect of creating a hostile working environment.
44. The disciplinary proceedings were conducted by Mr Spence. There was a meeting on 24 June when the Claimant was represented by, Mr O'Shea of Unite. Mr O'Shea said Mr Johnson had built up a grudge against the Claimant, because the Claimant had insisted on seeing medical certificates and flight tickets from the episode in January 2016. They wanted Mr Spence to investigate whether Chris Johnson did have the documentation to demonstrate that his delayed return was in fact due to illness. Next the meeting reviewed a number of documents from the Claimant about various matters other than those alleged. There was then review and discussion of

the video of May 2015 of the Claimant and Chris Johnson. They also discussed the episode involving Mr Brown and the photograph which had led to Mr Johnson's final written warning. The Claimant said that everyone knew that Mr Johnson had malaria, because it was another receptionist who took the call saying that his malaria return was delayed, it did not come from him. Then there was a review of the one to one reports and then discussion of Franklin sleeping on duty. Finally, it came out that the Claimant was keeping a file at home on Mr Johnson. He did not keep a file on anyone else.

45. Following that meeting the Claimant sent more documents to Mr Field about 30 pages to Mr Spence. Mr Spence also had discussions with Melanie Miotti about the airline tickets and with Ms Ashbury about what the Claimant had been advised to do arising out of the one to one meeting notes. Both these signed their statements (unlike the statements prepared for Mr Field's investigation).
46. The disciplinary hearing resumed on 15 July. Mr Spence said that he investigated the flight documents, and they showed a return flight had been booked for 28 December and had then had to be extended, so that suspicion was not borne out. They then went through the four allegations. He said the documents he had seen did not bring up anything new. Focusing on the allegations, the Claimant said that when he said that Mr Johnson had extensive experience of cleaning, he was intending to praise him not to belittle. He said he took the photographs so that Mr Johnson would get extra pay for it. The Claimant added, according to the minute, that Mr Johnson had previously been asked to clean up on an earlier occasion but had failed to do so, and suggested he could not understand clear instructions, so perhaps Mr Johnson had misunderstood what the Claimant had said to him on the cleaning up episode. The Tribunal comments that if the Claimant said that he was intending to praise Mr Johnson it was odd that he should immediately follow it with criticism about an earlier episode.

47. On confidentiality, the Claimant said that everyone knew about the illness, not because he had said it but because another person had taken the call. He was asked if Melanie Miotti said he could discuss this illness with junior staff, noting that Ms Miotti had talked only of sickness not of the specific diagnosis. The Claimant asked whether he should have known not to discuss it with other staff. Mr Spence's view was an experienced manager that medical conditions should not be discussed with other staff but kept confidential.

48. On the bullying episode, they went through the one to one notes which seemed to show that the Claimant was asking the night team for evidence of Chris Johnson arguing. The Claimant said that he was simply following instructions to make sure that he reported what had been said rather than confronting Chris Johnson directly.

49. Discussion moved on to the rota disputes, and then to the May 2015 episode when Chris Johnson had rebuked a guest for smoking, and the mobile phone incident when he got the final written warning. It was said that other people had a problem with Mr Johnson, who was persistently late and he had been collecting paperwork on Chris Johnson ever since October 2015 when Mr Johnson had lodged a grievance about the Claimant. Mr Spence says that this is the first he knew that there had been an earlier grievance by Mr Johnson.

50. On the Pardeep Sandhu remarks, the Claimant disputed that he had said "skinny wanker", rather than "skinny guy", then offered the explanation of the chicken reference, it was to a film, Rocky, of which the Tribunal has been shown a short clip. This concerns a boxer in training in New York who is asked to chase a chicken around the yard, to improve his footwork or his fitness. The Claimant agreed that he should not have said so loudly in front of members. It was put to him that Mr Hooker had thought that it was borderline racist. Mr Spence challenged the Claimant as to why he should say to Pardeep that it was about his mother telling him to chase chickens, which is not what the film was about.

51. On other matters, the Claimant said it was strange that staff were getting sick if Mr Johnson did have malaria. They went through the Claimant's annotations of the accuracy of 27 May 2016 interview. The Claimant was still unhappy about the airline tickets and said so; he insisted the Respondent check other absences, in particular the April absence either for university study or for Territorial Army duty. The Claimant introduced the ACAS Guidance on conducting investigations, with a view to criticising Mr Field's actions. He denied racism, saying that the episode with Pardeep Sandhu was a joke.

Dismissal

52. Nothing occurred from 15 July until 15 September when the Claimant was sent a letter saying that he was dismissed without notice for gross misconduct. The explanation for the delay is that there were discussions between the two sides to explore the possibility of settlement. This is not denied by the Claimant, and for obvious reasons we have no further information; we accept it was the reason for the delay.
53. The dismissal letter stated that on the balance of probabilities the charges were made out. In the context of the wider investigation, the remarks about cleaning up after the guest seemed to be offensive and racially motivated in suggesting that Chris Johnson would be good at cleaning up faeces because he is black. This was reinforced by the comment about Chris' inability to understand clear English instructions, when to Mr Spence's knowledge Chris Johnson was articulate and had degree level qualifications in English. He also concluded that the Claimant had breached medical confidentiality on the diagnosis, surprising for an experienced manager of 17 years. The one to one interviews showed that he had tried to influence colleagues against Chris Johnson, as did a statement on a conversation with the night receptionist Leonardo. He was not convinced by the defence about Pardeep Sandhu: the member in question was on good terms with the staff on duty and had often joked with the Claimant, so was unlikely to react unless the comments went beyond reasonable banter. He did not credit Pardeep's comments that they were not offensive, because he was a

subordinate and may have been in a less strong position to make a complaint. The explanation at the disciplinary hearing was not convincing. He concluded that the comment to Pardeep was entirely inappropriate and on the balance of probabilities racially discriminatory.

Appeal Against Dismissal

54. The Claimant registered an appeal of 10 pages on 23 September 2010. He complained that the witness statements prepared by Mr Mark Field had inaccurate and unsigned, that the tickets had not been substantiated, and Mr Johnson's credibility was dubious. The Claimant had a clean record, unlike Mr Johnson. On specific episodes, Mr Spence had been fishing. Mr Johnson was disgruntled and expressing fantasies. He had never been told he could not discuss sickness absence with other team members. There was no proof that he created a hostile environment and he had not been instructed not to discuss this with others, nor had he been instructed not to retain data at home. On the Pardeep episode, there was no evidence from Mr Hooker of what exactly had been said, and Mark Field had not discussed this with others.

55. At the same time he lodged a seven page grievance about Ms Miotti. He complained that she had bullied him and caused stress, that Mr Field and Mr Johnson were both from Southern Africa which was "one of the racist and most corrupt countries in the world." He complained about being told to reduce the rota from four to three members of staff, he doubted Mr Johnson's evidence was accurate, he resented Mark Field saying that malaria is not contagious, 'impersonating a doctor' when he said so. He denied that he said he would wait until the Saturday to post the rota.

56. There is only one mention buried in the lengthy grievance of Ms Miotti's treatment of the Claimant being racist or race harassment. He says of the September 2015 episode, "I was the one being discriminated against because of Chris' colour", which we think was a reference to the Claimant being told not to bring a grievance against him. In context it reads as a very tentative allegation. He rounds up the grievance by accusing Ms Miotti of incompetence and bullying.

57. An appeal meeting was conducted by Alistair Beet on 14 October 2016. They first discussed the CCTV of May 2015 and the Claimant demanding that Mr Johnson be sacked. Then they went through the four allegations. When the Claimant said he took the photographs as proof, did not take photographs of every episode. He complained about probation being extended and that Ms Miotti was 'out on a limb' on this and implied that he wanted Mr Johnson sacked. On confidentiality, the transcript indicates the Claimant being cagey in answering questions about not discussing Mr Johnson's condition. He said "define discuss", and it is clear the Claimant began to shout. There was more than one adjournment.
58. Put to him that he seemed only to be concerned about people returning from Africa, the Claimant said that Ms Miotti had "an agenda to damage my reputation". On the bullying, he said that he had been told to report concerns about Mr Johnson's treatment, that was why he was asking others to do it. He was told that it was not the process he was following, it was the content.
59. On the Pardeep Sandhu episode, he said that it was not shown that the language he used was racist represented. It was put to him that Mr Hooker was not pressured to make a complaint, but had felt concerned enough to do so. The Claimant concluded by asking Mr Beet to investigate Mr Johnson's absence and whether it was genuinely due to Territorial duty, as well as to go over the flight tickets again. He said Mr Johnson was not a credible witness.
60. After this meeting, Mr Beet spoke to Mr Hooker. He said he met him, not by arrangement, in the club office. There is no minute of this discussion and it does not appear that Mr Hooker was able to say what words exactly were used.
61. On 11 November, in a letter of four pages, Mr Beet told the Claimant that the appeal was not successful. It was implausible that the cleaning up reference was praise for Mr Johnson when he had not gone out of his way

to praise Mr Johnson at any time before, and had otherwise criticised him. On his health, he concluded that he had created an unsubstantiated association that the trip to Nigeria had brought illness to the club. On the bullying episode, he quoted the Claimant's letter to Ms Miotti, requiring Mr Johnson's dismissal, and the evidence of the one to one meetings. The Claimant had not been acting in a fair and balanced way to Chris Johnson. He was trying to influence his own junior staff to complain about him, which was bullying.

62. On the Pardeep Sandhu episode, this was construed as discriminatory, and that to behave in such a way in front of the club members, was also unprofessional. There was no evidence that Ms Miotti had an agenda against the Claimant: she had supported his promotion.

Relevant Law

63. In relation to the unfair dismissal claim, Section 98 of the Employment Rights Act 1996 says that we must first consider the Respondent's reason for dismissing, and whether it was a potentially fair reason. In deciding what was the reason we have regard to *Abernethy v Mott Hay and Anderson*: a reason is a set of facts or beliefs known to the employer.
64. Next under Section 98 (4), we have to consider whether the dismissal was fair or unfair having regard to the reason shown by the employer, which depends on whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.
65. *British Home Stores v Burchell [1978] ICR 376*, reminds Tribunals in the context of a dismissal for a conduct reason, that we must examine whether the reason given was genuine, whether the employer had reasonable grounds for that belief, including conducting a reasonable investigation of the facts on which to base that belief, and finally whether dismissal for that

reason was within the range of responses of a reasonable employer. We must not substitute our own judgment. If the Tribunal would not have dismissed for that reason, we must consider whether any reasonable employer would dismiss for that reason.

66. We are reminded of *Taylor v OCS Group Limited*, that a defect in one stage of the process can be rectified at a later stage; the process should be reviewed as a whole.
67. We were also directed to *Robinson v Combat Stress*, UKEAT 0310/14 a case where a Tribunal thought some of the reasons were justifiable and others not. The Tribunal must examine the Respondent's actual reasons for dismissing, and look at it as a whole if there was more than one. It was still possible that one reason could justify a dismissal. The example given was that if there was theft from the till, one episode would justify dismissal even if other allegations were not made out. Close evaluation of all the Respondent's reasoning, not just those that the Tribunal thought might be justifiable, was required.
68. On the Equality Act 2010 claims, there is a claim under Section 13: "a person (A) discriminates against another (B) if because of a protected characteristic (A) treats (B) less favourably than (A) treats or would treat others". In this case the chosen comparator is Mr Johnson, but we also bore in mind a hypothetical comparator, given the Claimant's lack of legal background. Section 23 provides that when making a comparison, there must be no material difference between the circumstances relating to each case. In relation to harassment, Section 26 defines this as where (A) engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. This has to be decided taking into account the perception of the person being harassed, the other circumstances of the case, and whether it was reasonable for the conduct to have that effect. We bear in mind the special burden of proof in discrimination cases set out in Section 136. We must consider what facts the Claimant has proved, and then consider if they

could without explanation amount to discrimination, before considering what explanation has been offered. *Igen v Wong [2005] ICR 931* sets out the process in detail, but other case guidance to Tribunals shows that it can be permissible to proceed direct to the Respondent's explanation. *Bahl v The Law Society [2004] EWCA Civ 1070* was cited to us to demonstrate that unreasonable behaviour, plus a difference of race, would not by itself be sufficient to amount to race discrimination. We must consider what other evidence there is to establish that.

69. We were also taken to *Redfearn v Serco [2006] IRLR 623*, a decision of the Court of Appeal about a bus driver dismissed for membership of the British National Party, which excludes non-white members, against a background of concern that many of the passengers were Asian. The Tribunal found that this was dismissal not for race but for health and safety grounds. On appeal, it was held that an action taken "on racial grounds", did not mean anything to do with race. An example given was of dismissing someone for racial abuse of a colleague. That could not be said to be a dismissal on racial grounds, simply because race was the part of the misconduct.
70. Finally, there is the question of time limits. In respect of the dismissal there is no issue, but in respect of all matters proceeding the Claimant's suspension, the Respondent relies on the Section 123, that a claim has to be presented within three months of the act complained of, unless the Claimant can show that there was conduct extending over a period, or if the Tribunal considers it just and equitable to extend time, for which we must have regard to the matters as set out in *Keeble v British Coal Corporation [1997] IRLR 336*.

Discussion

Discrimination and Harassment

71. The Claimant's case on the equality issues is that Chris Johnson, who is black, was not dismissed and got much softer treatment than the Claimant, who was dismissed with a clean record, on less substantial grounds. This

difference in treatment is the difference in race, on the evidence of the remark made to him that he must go carefully with Mr Johnson who might otherwise bring a race discrimination complaint.

72. We examine the episodes of specific conduct complained of, to see whether they are factually made out, and if they are what in our view they demonstrate by way of discriminatory treatment or harassment. Of the thirteen items identified on the list, two (numbers 5 and 12) are not pursued by the Claimant, and so are not discussed.

1.1 Extending Probation

73. The first allegation was that it was discriminatory treatment or harassment to extend the Claimant's probation by three months in August 2015 because the Claimant had complained about Chris Johnson. The Respondent's explanation was that probation had been extended because of concern as to how the Claimant handled Chris Johnson, in particular the intemperate email of 23 August. There was no obvious comparison with Mr Johnson. The Claimant's submission is that the Respondent was worried about a race complaint by Mr Johnson, and that is why his probation was extended.

74. Our conclusion, examining the Respondent's reasons for their actions and looking objectively at the evidence of the Claimant's conduct towards Mr Johnson in May and August 2015, is that these episodes would lead any employer, regardless of the difference in race, to doubt the Claimant's ability to manage people satisfactorily. Reading the email of 23 August 2015, demanding Mr Johnson's dismissal, we could not see how any manager could not be concerned about the Claimant's ability to handle staff, and exercise caution in extending his probation. We note that the Claimant was, despite this concern, given the benefit of the doubt, and not returned to the ranks, which had been made explicit to him at the outset as the consequence of failing probation. Factually this is not made out, and we accept the Respondent's explanation.

1.2 No Action of Complaints

75. The second allegation is that no action was taken on the Claimant's complaint about Chris Johnson. As set out in the ET1, this could concern only what he was told on 8 September, but we will also cover the failure to investigate the Claimant's complaint on 23 August. As stated, we accept Ms Miotti's evidence that she did in fact meet with Chris Johnson to discuss his lateness, and that she chose not to pursue it. As for the 8th September, it seemed to us that it was completely appropriate for managers to require the Claimant to avoid confrontation with Mr Johnson, and in the alternative to take a more measured approach to management, in particular by having one-to-one meetings to discuss his concerns as they went along, and to keep evidence of his concerns with a view to later action. We also know that by 8th September Mr Johnson had already been given not just one warning but a final warning too. This did not to our mind indicate that they were avoiding confronting of his conduct for fear of race complaints. The Claimant's complaints about Mr Johnson were not ignored. The way they were handled was nothing to do with any difference in race.

1.3 Denying or Discouraging Grievance

76. As for the third allegation, this is of denying the Claimant the opportunity or discouraging him from launching a grievance against Chris Johnson and refers to the meeting in October when the Claimant was being told that Mr Johnson's grievance against him was being dismissed. The Claimant says that Ms Miotti advised him that it was better to do nothing. It seemed to us that it was appropriate advice to a subordinate manager to give a manager who wanted to launch a grievance against a subordinate who was aggrieved about him. When a manager starts launching grievances against a subordinate it is a sign not only that relations have broken down, but the manager is not managing adequately. The advice given on how to handle perceived insubordination by Chris Johnson was entirely appropriate. The grievance had been investigated, it had been knocked back. The complaints about the Claimant had been rejected, but it was noted that there was an ongoing difference which required more careful handling. We could not see this as evidence of race discrimination or of the Claimant being harassed.

The relevant difference in treatment of each grievance (actual or potential) was that the Claimant was Chris Johnson's manager, not race.

1.4 Failing to Discipline C Johnson

77. The fourth allegation is that on 19 December, Ms Miotti failed to discipline or dismiss Chris Johnson for persistent lateness when he was on a final warning. We know that Ms Miotti in stern terms asked the Claimant to speak to Chris Johnson saying his behaviour was unacceptable. The Claimant said that he would do so, but we have no evidence that the Claimant in fact did so, or emailed back. In oral evidence, Ms Miotti said that if the explanation (which it appeared to be) was public transport difficulty, that would not be a reason to dismiss of itself, even on a final warning. Making the comparison, the Claimant's argument is that if Ms Miotti had dismissed the Claimant at that point, none of the later events would have occurred and the Claimant himself would not have been dismissed. We do not see that this 'but for' argument makes a case against the Respondent of a racially discriminatory dismissal or a racially discriminatory conduct thereafter. We note that the Claimant did not get back to Ms Miotti. It fitted into the sequence of Ms Miotti picking up the Claimant for not managing staff in a methodical or systematic way. She was inviting him to have a discussion about something that she had noted but he appeared not to have acted on. Further, if the Claimant was suggesting that Ms Miotti should have dismissed Mr Johnson for lateness at this point without first referring it back to the Claimant, it was of a completely different order of magnitude to what was alleged against the Claimant himself in May 2016. This is not shown to have been less favourable treatment, nor harassment.

1.6 Chris Johnson's Medical Certificate

78. Episode six is about the insistence on a medical certificate for Chris Johnson and then failing to discipline Chris Johnson for breach of the rules. This relates to the Claimant pointing out that Ms Miotti had asked the Claimant to get a medical certificate from Chris Johnson. We know that she

says that Mr Johnson did visit a GP, but have not seen a certificate. We know that this took place against the background of the Claimant being suspicious that Mr Johnson was taking unauthorised holiday, and wanting a certificate from a UK GP because he believed a Nigerian certificate to be corrupt. Ms Miotti does not seem to have followed up the requirement for the certificate, but we note too that according to the policy it is unclear that a certificate was in fact required. The Nigerian certificate stated that Mr Johnson had been absent because he had malaria and there seems no additional requirement for a UK fit note to state that. There is also a requirement to produce a certificate of clean health if suffering from a communicable disease, but this diagnosis was definitely malaria, which is not communicable to other staff, so that would not apply either. There was every reason for Ms Miotti not seeing it as a serious offence when Mr Johnson did not produce a UK GP Certificate, irritating though it may have been to the Claimant. We cannot say that failure to discipline Chris Johnson for this breach was something which had the effect of harassing the Claimant on racial grounds; although the effect may have been felt by the Claimant as humiliation, Mr Johnson's race, as compared to the Claimant's, was nothing to do with the failure to insist on a certificate. It was an administrative matter, not apparently required by the rules, which was not followed up.

1.7 Premature Display of the Rota

79. The seventh allegation is that on 29 January, Ms Miotti rebuked the Claimant for putting up the rota before Mr Johnson signed his new contract. As stated it seems to us that Ms Miotti was right to be concerned, even angry, about the Claimant's apparently thoughtless action. The Claimant says that he got a bollocking for this action, whereas when Chris Johnson did things wrong he was treated with white gloves for wrongdoing, the wrongdoing alleged against Chris Johnson resulted in a first warning, then a final written warning. Failures to fill in the late book or failing to produce a certificate, were not in the same order of seriousness as ignoring a management instruction to a manager who had put up the rota prematurely in contravention and was unable to produce any clear explanation of why he

had done so, even whether it was deliberate defiance or simple error. We concluded that Ms Miotti's rebuke was merited, and it was not public. We could not see this as harassment whether racial or not, or that he was treated less harshly than Chris Johnson. The offences were not comparable.

1.8 Sunday Rota

80. This allegation was that on 21 January Ms Miotti overrode the Claimant's decisions about the staff rota. We are to compare them with the diplomatic tone used when Chris Johnson altered the rota. The Claimant objected to Ms Miotti making changes to the rota, suggesting that as it had been delegated to him it was not something she could do for herself. While it may be from time to time managers micromanage, and this might be an example of it, it was not a major issue at the time, the complainant did not complain about it until much later, after 15 March meeting and in the context of being told that he had to arrange cover for Liam. It was not considered unfavourable treatment at the time, and we could not see in the context of this relationship that it was less favourable treatment. We were also unable to discern in what respect Chris Johnson had altered the rota. It was suggested he had taken holiday at various points at short notice, but that these were agreed and negotiated with his manager, rather than a more senior manager trying to tweak a task for which he had responsibility. The obvious difference was that Mr Johnson did not have the responsibility for ensuring that there was cover at every point. We do not conclude that there was unfavourable treatment, nor that this was an act of harassment. The Claimant only resented it at a later point when he was told it was his responsibility to arrange cover.

1.9 2nd February

81. The next episode we have to consider is that on the 2nd February, Ms Miotti gave the Claimant unsympathetic treatment when Liam rang in sick, telling him to cover the shift himself. We should contrast this with the treatment of Chris Johnson when he was sick. The difference as we see it is that Mr Johnson was responsible only for his own absence and the need to certify

when required under the rules. Mr Johnson did not have the responsibility of arranging the rota and seeking that there was cover, which is what Ms Miotti was asking him to do, when she said that if necessary he would have to cover it himself. In any event the Claimant was not required to cover, as by the end of the shift when this occurred it had been fixed by Mr Field. Other than this angry exchange, there was no requirement to cover when ill. There was no material comparison to be made because Mr Johnson was not a manager. It was not her less favourable treatment, nor was it humiliating for the Claimant. If Ms Miotti was firm with him it was in the context of an ongoing managerial relationship.

1.10 15 March Meeting

82. The tenth episode complained of is the meeting with Ms Miotti on 15 March, when she expressed concern about the Claimant's attitude towards her, contrasted with her approach to Chris Johnson's grievance about the Claimant. The Claimant did write to Ms Miotti in very firm terms about being told off for having to come into work. He complains of this meeting which was confrontational: "I would not accept a bollocking for her" and that he was "bullied to come to work." The Claimant compares Chris Johnson being told not to argue with managers, Chris Johnson being late in December 2015, and not being rebuked for this, and Chris Johnson not producing a GP's sick note in January 2016. None of these did Ms Miotti take further. We note however that the Claimant was not disciplined either following the 15th March meeting. He was merely being told off, and warned not to persist in this. There was no material comparison to be made. If there was a difference in treatment, it was not about the difference in race but because of insubordination. The sick note has been discussed. The Claimant was supposed to speak to Chris Johnson about lateness. We note too that when Chris Johnson was involved in conduct towards members of the Club, he was subject of a warning, even if he was not rebuked for his conduct towards the Claimant. We note too that while Chris Johnson had lodged a grievance, the Claimant himself had not brought a grievance, and this would perhaps result in different handling. A grievance requires a procedure to be followed, and Mr Johnson's was rejected. The

Claimant had not brought a grievance, he had complained to Ms Miotti, and she met him to discuss it. We could not see that this was either discriminatory treatment, or harassment of the Claimant related to race.

1.11 Sickness Certificates April 2016

83. The next episode is that in April 2016 the Respondent's failed to discipline or dismiss Mr Johnson when he returned to work after sickness without producing a medical certificate. It is doubtful that Mr Johnson had to produce the certificate when he was only off sick for four days. We know that the Claimant was concerned whether he may have a communicable disease, saying that people were concerned about infection. We have no evidence that swine flu is communicable or a disease requiring a certificate. It is not made clear in the emails or specific in the witness statement that this was a clear breach of club rules, we have read the rules for ourselves and did not discern one. We concluded that it was unclear whether Mr Johnson had breached any rule. There was no reason to discipline him for this.

1.12 Suspension

84. When the Claimant was suspended before commencement of an investigation into the complaints about him, we are invited to contrast this to the treatment of Chris Johnson, who was not suspended on either of the occasion of complaints about his behaviour towards members of the club. The Respondent's explanation is that it was the nature of the complaints: there were two complaints brought against the Claimant, one by a member of the club, the other by Chris Johnson. Both concerned bullying of colleagues, both race discrimination. The difference, they said, was that they were concerned that the matters were ongoing, and that if the Claimant was not suspended there might be further bullying. By contrast, in the episodes involving Mr Johnson, each was investigated straightaway and acted on straightaway, so that there was no reason to suspend.

85. As a Tribunal we accept that in general employers will suspend for fear of repeat offences, if it involves bullying, say, or dishonesty, that it may also be related to the time it would take to investigate an episode and its complexity, if there is a risk of repeat offences, or it may be necessary to suspend where there is concern about intimidation of witnesses.
86. Of these, it was the possibility of repeat bullying that was relevant and they involved more than one person. We contrast the complaints about Mr Johnson: isolated incidents which could be investigated quickly and where a decision was made quickly. We therefore concluded that suspension was not an act of race discrimination, but was reasonable management action, which would have been carried out if a hypothetical comparator was black and accused of the same matters. Nor was it harassment. It was not, in the circumstances of the case, an action whose purpose or effect was intimidating or hostile.

Conclusion

87. None of the various matters alleged as detriment or harassment, were in our finding made out; in the alternative, we accept that the Respondent had good reasons for their action, and it is not established that race was the reason. Although the Claimant said that he was asked to go easy on Chris Johnson for fear of a race complaint, he was also asked in the same period to go easy on other members of staff who were white, or of unidentified ethnicity for similar reasons, we also bear in mind that the Claimant was capable of being scathing with colleagues, not least because of an episode to which we were taken in connection with a matter which is not now pursued, where he was invited to comment on applicants for a post and did so in searing terms, such that he was asked by HR to moderate his tone, and he in turn accused them of political correctness. In other words, we conclude that the behaviour was reprehensible, and that he would have been reprimanded or asked to adjust his behaviour regardless of the ethnic identity of the other people concerned.

Dismissal

88. We turn to the dismissal, alleged as race discrimination and unfair dismissal.
89. We must first consider the reason for dismissal. It seemed clear to us on the facts that conduct was the reason for dismissal. It is a potentially fair reason, so it falls to us to consider the Burchell issues of whether it was reasonable to rely on that as a reason to dismiss.
90. We must also consider whether the Claimant would have been dismissed if he had been black, rather than white or if a black person would not have been dismissed.
91. We have to consider whether the Respondent's belief in the Claimant's misconduct was the genuine reason; we accept that it was.
92. We then considered whether they had reasonable grounds for holding that belief and in particular whether they had carried out a reasonable investigation. There were a number of concerns about the quality of the investigation. One was that the witness statements prepared by Mr Field were all unsigned: they should have been signed, because of the obvious openings for misunderstanding of what the witnesses had said, as well as outright misrepresentation of what they had said. We were also concerned that Mr Hooker had never been asked to specify what it was he had heard which led to him to be concerned. Despite that, we are satisfied firstly that, as Mr Field put it, there was no need to go to Mr Hooker direct because they knew Mr Hooker well, and he would not have complained without good cause, given his usual good relations with the staff, which the Claimant does not dispute, secondly because when asked about it, both Pardeep Sandhu and the Claimant described what had been said with good recall and a reasonably consistent account, so it does not seem to us that there was any reason to doubt that what Mr Hooker heard was what Mr Sandhu and the Claimant both said had been said.

93. We considered too whether more of Chris Johnson's allegations could have been corroborated, for example his allegations of colleagues keeping him at a distance, or using hand gel when shaking hands with him. It was not clear to us why this was not followed up; it would have made clearer whether what he alleged was race discrimination. There might have been more investigation of why Mr Johnson had lodged his complaint when he did. It concerned us that many of Mr Field's interview notes were not disclosed to Mr Spence, although they were ultimately shown to the Tribunal part-way through the hearing. A number of the night staff were interviewed who could not recall the Claimant discussing Chris Johnson's absence, or what illness he had, which might have been relevant to a decision-maker in deciding whether what was said to have occurred. As a result it is possible that neither Mr Spence nor Mr Beet had a clear picture of the decision. We know too that the investigator Mr Field already held the view that the Claimant was a poor manager. The final concern about procedural matters is that Mr Spence forgot to send the Claimant the notes of the first meeting, although we note that the Claimant's corrections of these were in fact gone through at a second meeting.
94. Despite these concerns we concluded the evidence that the Respondent obtained was adequate. There was some evidence to confirm the view that the Claimant had been discussing Mr Johnson's continued sickness absence, if not that he had a communicable disease, for example the conversations with the receptionists which Mr Field obtained showing that in one case the Claimant had discussed it with one of the receptionists on the bus. Remarks the Claimant made himself during the interview were also telling against him, such as the remark about Mr Johnson's use of English; and that he did not require fit notes from others when they had communicable diseases abroad, just Africans. It would have been evident to the Respondent, as it was to the Employment Tribunal, that the Claimant was fixated on demonstrating that Mr Johnson was a liar and that they needed to find evidence to justify Chris Johnson's dismissal. In this that they had adequate evidence to support the findings of bullying, in the one to one notes, in the emails the Claimant had sent about Chris Johnson, and in his comments about him in the investigation meeting and the two

disciplinary hearings, as well as the appeal hearing. Delay of Mr Johnson in bringing his complaint was not sinister; other evidence showed acceleration in the bullying and that was enough to explain why he complained when he did.

95. As for whether the Respondent had adequate evidence to reach the findings that he had done what he was accused of, we start first with Mr Hooker's allegation in relation to Pardeep Sandhu because it stands alone. In our view it was hard for us to understand why saying to Pardeep Sandhu that his mother had sent him out in the yard to chase chickens and that was why he was so thin, was a racist remark. Mr Sandhu is a British Asian, said to have been brought up in London. Mr Field is from South Africa and said that he associated having to chase chickens for food with third world backwardness and poverty. Mr Spence reached the same conclusion. We note that Mr Hooker was unable to say what it was about it that was racist but that it was "borderline racist". We note that Mr Spence did not accept the Rocky explanation that was produced at the disciplinary hearing because it was said to be about food and going out to get it, while the film is about gym training. It is possible that the Claimant was confused, remembering the chicken-chasing episode in Rocky without the context; Mr Beet had not seen the film. Against that, it was clear that Mr Hooker was on friendly terms with all staff, and the fact that he saw fit to complain about it was a fact to be taken account of by itself, as evidence that something unpleasant had occurred. We note too that Pardeep Sandhu has said 'if he had not been a friend' it would have been offensive; given his subordinate position this justifies a conclusion that it was offensive.
96. Our conclusion is that we did not understand how this remark was racist. It was undoubtedly unpleasant, and appeared to be sneering at Mr Sandhu, but the Respondent has not been able to explain to our understanding their interpretation of this as racist. We simply say that it is possible that some British Asians may grow up in poor circumstances where chickens are caught in the yard, but we find it hard to understand this from the Respondent's own explanations to us. There was undoubtedly bullying

going on in that a member of the club saw fit to complain, it was loud, and in the presence of club members, even if it was not racist.

97. Of the other three allegations against the Claimant and whether the Respondent had evidence of them, of the cleaning up after the member episode, that the Claimant wanted to praise Mr Johnson for his cleaning ability is implausible when he had been reluctant to praise him for anything hitherto, showing photographs about it would be offensive to Mr Johnson. What was harder to understand is why this is thought to be racist. We can understand that the Claimant suggesting Mr Johnson's English was inadequate indicates that the difference in race was part of the Claimant's hostility, and we know that Mr Beet and Mr Spence were influenced by the remarks the Claimant had made in the context of Mr Johnson's health, that he held a stereotype that people from Africa would bring infectious diseases, but not if they had been elsewhere. There is also the stereotype that Nigeria is entirely corrupt and no document from that country can be believed; the medical certificate from Nigeria is well typed, expressed in good English, and there seems no reason on the face of it to believe that it is a false document. These factors in the Claimant's account of his actions could justify the Respondent in concluding that the reason why the Claimant had a down on Chris Johnson was because of the difference in race.
98. On the breach of confidentiality, given the incomplete and unsigned evidence, it was not demonstrated that the Claimant had in fact discussed the nature of Mr Johnson's illness with his colleagues, although it was clear that he had discussed his concern about Chris Johnson's sickness absence, his failure to produce a sick note and the possibility that he was pulling a fast one. However, in the interview the Claimant did not deny that he had discussed that Mr Johnson's communicable disease with colleagues, instead he impliedly conceded it when his answer to this question was "people came to me, they had concerns", which suggests agreement that he had discussed it, but had not initiated the discussion. We balanced the lack of corroboration with the fact that the Claimant himself had fostered suspicion that Chris Johnson had a communicable disease, adding that Mr Johnson himself had got wind of the fact that

colleagues were being told that he had a communicable disease and that this came from the Claimant. It seemed to us that Chris Johnson's concern was unlikely to be made up, nor was it likely that other staff would be concerned that he had a communicable disease brought from Africa unless the Claimant had suggested it to them. The Claimant does not seem to have passed on to staff that malaria was not contagious and will not require a doctor's sign off, and he was angry that Mr Field should even say this. The Claimant said he had not been told not to discuss Chris Johnson's health with colleagues. It seemed to us that the Respondent is right that someone with 17 years experience of management jobs should know to keep staff health confidential; further, he had been told in a number of handover notes not to identify the shortcomings of individuals in the presence of others, and plainly he had discussed Chris Johnson's shortcomings with his colleagues. They had grounds to conclude that he was guilty of this as Chris Johnson complained. Of the allegation that the Claimant was using his position to bully Chris Johnson, they had the written evidence of the one to one notes and they also had the Claimant's explanation that he had been told by Mr Field and Ms Miotti not to go ahead and to report back to them. It may be that the Claimant misunderstood, wilfully or innocently, when he had these discussions with his team members, but it is hard to see how the Claimant could be innocent of discussing his concerns about Mr Johnson with other team members when told to anonymise his complaints and express criticism in general terms.

99. We know that the Respondent made their decision in the context of the August email, which demonstrates that the Claimant had a down on Chris Johnson, although it was not until the last minute that Mr Spence knew about the earlier grievance, because it was the Claimant who brought up the May episode and so made plain that the history of his relationship with Chris Johnson was very relevant to understanding his actions.
100. We concluded that vendetta was not too strong a word for the position for the relationship as Mr Spence and Mr Beet perceived it on the available evidence, and the very fact that the Claimant was still pursuing an investigation of the flight tickets and the Territorial Army duty as late as the

appeal, suggesting that Chris Johnson was a liar who should be sacked for it served to confirm Mr Beet's view that the Claimant had not dealt in a fair and balanced way with Chris Johnson. Both in relation to the specifics alleged by Chris Johnson and the wider background the Respondent had ample reason to accept the complaint of bullying.

101. The weakest point of the matters found by the Respondent, is the allegations of *racial* bullying. As stated we thought that this was not a conclusion that they could reasonably reach in relation to Mr Sandhu, but we understand that they had evidence from which to conclude that the treatment of Mr Johnson was racist as well as bullying, namely his criticisms of his English and his concern that everything in Nigeria was corrupt.
102. We considered whether a reasonable employer would have dismissed without the Pardeep Sandhu episode. We concluded that on the matters alleged in relation to Chris Johnson the Respondent had ample reason to dismiss for gross misconduct. As for whether a reasonable employer could have dismissed without the racism allegation, having read the Respondent's own personal harassment policy in the code of conduct, which refers to bullying, including exclusion and insensitive jokes, the Claimant had been guilty of this in relation to Chris Johnson, and it had been persistent and pronounced. The Respondent could have dismissed the Claimant without the added allegation of racism. In any event they had reason to believe some of the bullying was racist. This was not an unfair dismissal.
103. We considered that whether this was a discriminatory dismissal, bearing in mind the Claimant's argument that Chris Johnson had not been dismissed for the allegations about his behaviour to club members, but instead received a final warning and a final written warning. It seems to us that the Respondent had taken a firm view of Mr Johnson's conduct; issuing a final written warning is not a step to be taken lightly, nor is it a step that avoids the risk of a race discrimination allegation. In contrast, while Mr Johnson's episodes were two in sequence, spaced apart, there were other allegations against the Claimant which indicated persistent abuse of his management

role in bullying Mr Johnson, and this accounts for their decision, despite his otherwise clean disciplinary record, to dismiss him without notice.

104. To conclude, none of these claims succeed.

Employment Judge Goodman

Date 10 October 2017