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THE EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr A Puri **v** **Intralinks Limited**

Heard at: London Central **On**: 25 – 28 September and in chambers on 2 October 2017

Before: Employment Judge Auerbach
Members: Ms P Hornby
Ms G Gillman

Representation:

Claimant: in person

Respondent: Ms N Owen, Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

1. All of the Claimant's claims of direct race discrimination fail and are dismissed.

2. The Claimant's claim of breach of contract fails and is dismissed.

3. The Claimant's claim of unlawful deduction from wages in respect of holiday pay fails and is dismissed.

REASONS

Introduction

1. The Claimant was employed by the Respondent from 25 January 2016. On 18 October 2016 he was given four weeks' notice to terminate his employment and placed on garden leave for the notice period. His employment came to an end on 15 November 2016.

2. The Claim Form was presented on 20 February 2017. The complaints are of direct race discrimination, breach of contract and unlawful deduction from wages.

3. As to race discrimination, by reference to his Indian ethnic or national origin, the Claimant complains that there were a number of episodes of discriminatory treatment during employment, and that his dismissal was also an act of direct race discrimination. As to breach of contract, the Claimant complains that he was dismissed without any prior warning that he was at risk of dismissal, but that the Respondent was contractually obliged to forewarn him. The wages claim relates to holiday pay, and arises as follows. When he was given notice, the Claimant was told that he was required to take his accrued but unused holiday entitlement during the notice period. The Claimant's case is that this contravened the **Working Time Regulations 1998** and/or the terms of his contract, so that the accrued entitlement remained unused at the end of his employment, and that he was then entitled to a payment in lieu, the failure to pay which was an unlawful deduction from his wages.

4. A response was entered defending the claims on their merits, and raising time points in relation to some of the discrimination claims.

5. There was a Case Management Preliminary Hearing on 25 May 2017 at which there was some initial identification of the issues to which the complaints gave rise and directions were given. Following that hearing, further particulars of claim were tabled by the Claimant and amended grounds of resistance were tabled by the Respondent. The Respondent also tabled a further revised draft list of issues.

6. The matter came for hearing before the present Tribunal initially on the basis of a four-day allocation. However, during the course of the hearing it became plain that the Tribunal would require further time for deliberations; so an additional day in chambers was added to the listing.

7. The Claimant has throughout been a litigant in person. In view of that, particular time was spent at the start of the hearing discussing how it would be conducted and matters of procedure.

8. It was confirmed at the start, that the draft revised List of Issues previously prepared by the Respondent was agreed by the parties as fairly and correctly identifying the issues which we had to consider. A copy is attached to this decision. During the course of the hearing the Claimant also withdrew two particular complaints of discrimination, being that referred to at paragraph 2.3 (b) of the List of Issues (relating to the introduction of hot desking) and that referred at paragraph 2.5 (d) (relating to what the Claimant was or was not told about whether he was entitled to appeal against dismissal and/or invoke the Respondent's grievance procedure).

9. In the lead up to the hearing, the Claimant had made applications for specific disclosure. LinkedIn materials requested by him had been disclosed and added to the bundle. The other applications were resisted and we heard argument in relation to them. There were some requests relating to emails. We declined to order the Respondent to carry out further searches in relation to those, as we considered that the material was not sufficiently relevant, the requests not sufficiently precise, and the requests had been so made so late that to require the relevant individuals to devote time to processing them, might potentially disrupt the smooth progress of the hearing. We also bore in mind that the Claimant would be able to cross examine the Respondent's witnesses in relation to the matters to which they related, which indeed in due course he did. However, we did order disclosure in relation to heat-map material; and such material as the Respondent was then able to locate was disclosed and provided to us before the start of live witness evidence.

10. It was agreed that we would hear evidence and argument in relation to matters going to liability only, although, depending on our decision in respect of the race discrimination claim in relation to dismissal, we might potentially also consider what lawyers refer to as *Polkey/Chagger* type issues, if any arose (this concept was explained to the Claimant).

11. The Claimant gave evidence on his own behalf. The witnesses for the Respondent were Anna Lester and Adriana Toma. We had witness statements for all of them, and all were cross-examined. We had a single bundle, supplemented during the course of our hearing by the heat-map disclosure, the Respondent's disciplinary and grievance procedures (which incorporate their performance procedure) and some further emails and documents relating to the creation of the Claimant's letter of dismissal. Ms Owen tabled a chronology and cast list. She had also compiled a table extracting statistics relating to the Claimant's weekly performance against key performance indicators, from primary documents in our bundle. A corrected version of that was provided at the end of evidence, and agreed as accurately presenting the numbers extracted from the primary documents.

12. As to the performance procedure, the Tribunal requested sight of this when Ms Toma was giving evidence. She was able to call it up electronically, and it was shown around in this form. The Claimant was given the opportunity to consider the contents and then further cross examined Ms Toma with respect to it. Ms Lester (who had already given her evidence) was available

to give further evidence in relation to it, if required, but neither the parties nor the Tribunal required this. Hard copies of the document were then provided on the morning of submissions.

13. Evidence was completed at the end of day three. We received written submissions from Ms Owen and heard oral submissions from both her and the Claimant during the morning of day four, and Ms Owen also tabled some material relating to the law. The Tribunal took the remainder of day four and the fifth day to deliberate our reserved decision, which we now provide.

The Facts

14. The Respondent describes itself as a global technology provider of content management and collaboration solutions software for organisations. It is indeed an international organisation. During 2016 around 120 people worked at the London office, although that figure will have fluctuated. The Respondent also embarked, at some point during 2016, on a restructuring and reorganisation programme, which had resulted, by the time of our hearing, in the head count in London reducing to around 85 people.

15. The Claimant was employed in London from 25 January 2016. Throughout the period of his employment, Anna Lester was the Sales Manager Advisory Northern Europe. Although she had some other responsibilities, her main responsibility during this period was for the management of the UK Advisory Team. This was so-called because it was a sales team that dealt with clients who were themselves advisors to their own clients. It was the clients' clients who were the intended actual users of the Respondent's product.

16. In particular, members of the Respondent's team sold virtual data room services, through their contacts with financial advisors in banks and other financial advisory organisations, to clients of those organisations engaged in merger and acquisition transactions. Members of the Respondent's sales team would deal, typically, with institutional investment-banker clients, and, more specifically, with their individual contacts among the bankers who worked for those institutions. The Respondent's team members sought to form relationships with those contacts with a view to persuading them, in turn, to recommend the Respondent's product for use by their clients engaged in such transactions.

17. On paper, the UK Advisory sales team had a multilayered hierarchical structure, the most junior member of the team having the title of Sales Associate and above them there being positions of Junior Account Executive, Account Executive and Senior Account Executive. At the management tier above all of them, there were positions of Team Leader, Sales Manager and then more senior positions above those.

18. However, in practice, there was no fixed requirement or structure, to the effect that the team had to have a certain number of incumbents of each of

these positions. Numbers fluctuated as a result of internal moves, promotions, hires, departures and other contingencies; and work had to be managed and allocated, within the constraints of the cohort in fact available to do it from time to time.

19. In principle, a member of the sales team would have assigned to them a portfolio, consisting of a number of identified institutional clients as well, potentially, as what were called greenfield clients, in alphabetical groupings. The greenfield clients were those in respect of whom, thus far, there had been no remunerative work. Such an assigned portfolio of clients is referred to in the Respondent's jargon as a territory. As we will explain in more detail, each of them would have their performance measured and monitored, on a weekly basis, by reference to weekly key performance indicators (KPIs); and each of them would have financial targets for the financial year, which, in this business, is the calendar year. These targets are known, in the Respondent's jargon, as quotas.

20. In practice, responsibility for a territory could be allocated to someone who had the title of Junior Account Executive, Account Executive or Senior Account Executive. The Tribunal found that there was an expectation that those who started as Juniors would transition to being Account Executives; and the best Account Executives might achieve the title of Senior Account Executive. So, the awarding of these titles was used as a motivational tool.

21. The KPIs applied to all members of Ms Lester's UK Advisory sales team who had responsibility for a territory were the same, regardless of whether the individual had the title of Account Executive, Junior Account Executive or Senior Account Executive. That said, we accepted Ms Lester's evidence to the effect that, in general terms, she would tend to give more personal support and attention, and, potentially, indulgence, to the junior and less-seasoned members of the team, compared with those who were more seasoned and experienced.

22. In what follows we use the general term "Executive" to refer to an Account Executive, Junior Account Executive or Senior Account Executive.

23. Sales Associates did not have territories assigned to them, and it was not their job, as such, to sell. Rather, they were intended to be a resource, providing administrative or other support to their colleagues who were responsible for sales.

24. Separate from the UK Advisory Team, there was a Client Services Team. Once a member of Ms Lester's team had in fact concluded a sale to a given end-user client, the administration and implementation of that deal would be handled by a member of that other team, called a Client Service Manager.

25. The Respondent has a section of its UK Employee Handbook concerned with the topic of Valuing Diversity and Dignity at Work, which sets out its

values in this area, and contains material concerning dignity at work and harassment. There is also an Equal Opportunity policy identifying forms of discrimination which are unlawful and/or against the policy. This also cross refers to the disciplinary and grievance, and harassment, policies.

26. The Handbook also contains a Discipline and Poor Performance Procedure (DPPP) and a Grievance Procedure. The DPPP is describe as "a guide to the way in which the Company will normally operate and will be followed by the Company where practicable but the Company may depart from it at its discretion. It is a policy document and does not form part of your terms and conditions of employment and does not, therefore, give rise to any contractual entitlement on the part of any employee."

27. On the subject of poor performance, the policy includes the following:

> Where it appears that the inadequacy/deficiency in performance can be remedied by proper or increased supervision, training, assistance or support, this will be provided where reasonable and appropriate by your manager and/or the Company. Where it appears that you are capable of attaining the required standard whether with or without supervision, training, assistance or support, you will be given a reasonable period in which to attain it. If it becomes clear that you are not capable of attaining the required standard, for whatever reason, consideration will be given to offering you an alternative position within your capability.

28. The policy goes on to describe the stages of formal action that might apply where there is a performance issue, leading, potentially, to warnings and/or dismissal, and it refers to a right of appeal in respect of any formal action.

29. Towards the end of 2015 two new Executives were externally recruited, with a view to their joining the UK Advisory Team, which Ms Lester was to head up from the start of the financial year 2016. They were the Claimant and Chris Dixon.

30. A letter of 7 January 2016 offered the Claimant the position of Account Executive – Advisory, reporting to Ms Lester, with an anticipated start date of 25 January 2016. It referred to an enclosed contract of employment for the full and definitive terms. It offered a basic salary of £50,000 per annum and a potential incentive payment, depending on targets being met, of a further £50,000 per annum. It provided that following successful completion of the probationary period, the notice period would be four weeks. Enclosed with that letter was a contract of employment, signed on behalf of the Respondent on 7 January, and by the Claimant on 8 January 2016.

31. Clause 2.4 of the contract provided for a probationary period of 90 days during which the notice entitlement would be two weeks; but also gave the Respondent a discretion to extend that period by up to a further three months.

32. Clause 9 of the contract, concerning holidays, included the following:

> 9.3 If the Employee leaves the Company during the holiday year, the Company will require the Employee to take during his notice period any accrued but untaken holiday entitlement up to the date of leaving.
>
> 9.4 In the event the Employee is prevented from taking accrued holiday during the period of notice, then the Employee shall be entitled, on termination of his employment, to a payment in lieu of accrued but untaken holiday up to the date of leaving.

33. Clause 13 concerned termination. Omitting irrelevant sub-sub-clauses, it provided as follows:

> This Agreement may be terminated:
>
> 13.1 During the probationary period described in clause 2 by the Company giving the employee two (2) weeks' written notice to terminate his employment or by the Employee giving the Company two (2) weeks' written notice to terminate his employment.
>
> 13.2 Following successful completion of the probationary period, by either the Company or the Employee giving the other the greater of:
>
> 13.2.1 the period specified in the Offer Letter; or
>
> 13.2.2 one week's written notice for each complete year of continuous service (up to a maximum of 12 weeks' notice where the Employee has 12 or more years' continuous service with the Company or an Associated Company);
>
> 13.3 Summarily by the Company giving the Employee written notice of immediate termination pursuant to this clause and within 60 days of such notice paying the Employee a payment in lieu of notice of his basic salary for the balance of his notice period; or
>
> 13.4 Summarily by the Company without notice or payment in lieu of notice, and with immediate effect if it has reasonable grounds to believe that the Employee's conduct justifies immediate dismissal, including:
>
> [13.4.1 – 13.4.5 *omitted*]
>
> 13.4.6 If the Employee's job performance remains below the standard expected of him by the Company after adequate warning;
>
> [13.4.7 – 13.4.9 *omitted*]

34. In the autumn of 2015, Ms Lester set about allocating territories to the Executives who she anticipated would form part of the UK Advisory Team in

2016. When her first draft chart was drawn up, Chris Dixon's recruitment to the team had been confirmed, but the Claimant's had not. The chart identified five Executives who would each have their own territory: Jonny Vroobel, Michael Taylor, Michelle Lee, Marina Ghilchik and Chris Dixon. Subsequently, the Claimant's recruitment was confirmed and it was also confirmed that Ms Ghilchik was to leave in January. Ms Lester then produced a revised list showing the Executives having territories as Mr Vroobel, Mr Taylor, Ms Lee, the Claimant and Mr Dixon. On this list the Claimant's named accounts corresponded to those which had previously been allocated to Ms Ghilchik, but with the addition of UBS, which had previously been allocated to Mr Dixon. The Claimant also had greenfield accounts for letters K – R financial advisory.

35. Weekly KPIs were set, which were the same for all the Executives. Each week, Ms Lester would circulate a table, showing how they had all performed against the KPIs in the previous week, with additional columns showing quarterly and annual running totals. The specific KPIs covered by these tables throughout 2016 were: number of meetings attended, number of contacts met, number of incoming emails received, number of calls made, Deal Team Exchanges (DTEs) and opportunities created for new projects. Initially a further KPI measured number of calls made, but in mid-April 2016 this was abandoned.

36. The DTE was a product which would enable a client to prepare for due diligence on their next deal. The Respondent's practice was to provide this product to potential clients for free in the hope that it would be taken up and used in an actual remunerative transaction. This was a commonly used tool to create pipeline business, although it was also possible for a deal to be secured without using a DTE, instead going, in the jargon, straight to live.

37. For the KPIs that applied throughout the year, the weekly performance targets were: 8 meetings, 18 contacts, 80 emails, 1 DTE and 5 opportunities created. The entries in the tables showing the figures actually achieved, were colour coded, with green indicating that the figure meets (or exceeds) the KPI in question, orange indicating that the figure represents 80% - 99% of KPI, and red indicating that it is below 80%.

38. There were also periodic meetings to review progress against goals, recorded in spreadsheet form. These predominately concerned performance goals, which incorporated and reflected the KPIs, but also embraced a wider discussion of performance and included some developmental goals.

39. The UK Advisory Team as a whole was expected to achieve a financial target of booked income from sales, known as quota. The overall team quota was not determined by Ms Lester, but she was responsible for dividing it among Executives, to give them individual quotas. Income going to meet quota might be generated from entirely new bookings or from what was called EOI, generated on existing bookings. The E referred to the extension of an existing booking and the I to the adding incrementally of further or

enhanced provision of service, in either case generating further additional income. (O stood for Overages but was not relevant to the Claimant's work.)

40. As well as having a financial bookings income target, individual Executives also had a deal count target.

41. Achievement against these targets determined the performance component of an individual's pay, but with a weighting of 70% to bookings income and 30% to deal count.

42. On 27 January 2016 Ms Lester circulated the KPI statistics for week three of the year, confirming adjustments to the levels of certain of the KPIs that would apply henceforth and indicating that, as new starters, the Claimant's and Mr Dixon's KPI assessments would not kick in until week seven

43. On 3 March 2016, the Claimant was notified of his performance targets. As he had only joined during January, these covered an 11-month period from 1 February. At this point Ms Lester had not yet been given the overall quota for her team for 2016, so she based these targets on date from 2015, with a measure of increase.

44. New recruits were required to attend a week's training in New York, and to undertake further online training over the course of a week. They were then subject to 30, 60 and 90-day training assessments. The Claimant's attendance at the training in New York was delayed by two weeks because of a problem with his flight. He completed his 30, 60 and 90-day training assessments by the end of March 2016. These were generally positive in their outcomes, although they identified some points for improvement.

45. Ms Lester had weekly one to ones with members of her team, including the Claimant. She also periodically discussed the performance of team members with her superior, Laurent Sultan, Senior VP for the EMEA area.

46. On 14 March 2016 Ms Lester and Mr Sultan had a discussion with the Claimant. On 15 March she emailed the Claimant what she described as a brief summary of it. She wrote that the transition of many accounts to him seemed to have been relatively smooth and that his pipeline was broadly up to date although he had inherited a number of opportunities which were likely to have died. She continued: "To ensure you are growing your pipeline aggressively I would strongly recommend you meet and exceed both your meeting and contacts met KPIs. You will need to overbook (~30%) to compensate for dropouts. This will ensure you are covering your territory as quickly as possible and pitching on as many deals as possible."

47. On 6 April 2016, Ms Lester was given her overall team quota for bookings (whether new or EOI) and for deal count.

48. On 7 April 2016 Ms Lester emailed the Claimant his 2016 goals, which she indicated they would discuss in their next one to one.

49. As the end of the Claimant's 90-day probation period approached, Ms Lester reviewed the position and consulted with Adriana Toma of HR. Ms Lester was minded to terminate the Claimant's employment. A dismissal letter was drafted, it being envisaged that this would be given to the Claimant on 12 April with notice taking effect on 27 April 2016. Ms Toma prepared the letter from a standard template, but incorporating specific data provided to her by Ms Lester. It referred to the Claimant having attended an average of 4.4 meetings per week (pw), which was under a new starter benchmark of 6pw, a KPI of 8pw and a GTM goal of 10pw. It also indicated that he should have been able to increase the number of new business opportunities by the new starter benchmark of between +100% and +200% increase within 2 months but that growth during February and March had been +13%. It also indicated that DTE creation growth had been 0% in the first 2 months, whereas the new starter benchmark was between +70% and +200% within 2 months.

50. However, the planned meeting with the Claimant was delayed, and in the meantime the KPI figures for that week were produced. These showed that the Claimant had had 15 meetings, 36 contacts and 166 incoming emails as well as 5 opportunities created. Following review of these figures, Ms Lester emailed HR that she had decided not to terminate the Claimant's employment but instead to extend his probation period. In the meantime, the Claimant also produced improved figures the following week, with 11 meetings, 26 contacts, 119 emails in and 2 opportunities created.

51. Ms Lester met the Claimant for his probation review on 20 April 2016. The review document included positive comments but also indicated that he was still behind on all his KPI measurements and that he "needs to continue the last two weeks of aggressive coverage moving forward to ensure he meets his quota." Further on it stated: "It is important that Amit proves that he can maintain this aggressive approach and increase the number of net new deals in his directory (DTEs). Within this extended probation period Amit should be able to prove that he can maintain high activity and grow his territory in a consistent manner."

52. The same day, 20 April 2016, HR wrote to confirm the 90-day probation extension to 22 July, and identified the objectives that the Claimant was expected to achieve during that period. These included: increasing the number of meetings to 8pw, which were currently 4.9pw, being under the new starter benchmark, the KPI and the GTM goal; to increase the number of new business opportunities to an average of 5pw; and to increase DTE growth to 4 on average each month. It was indicated that there would be weekly review meetings throughout the extended probation period to support the attainment of these objectives.

53. On 13 June 2016, a further updated goal plan spreadsheet for the Claimant was produced. This showed him as behind or at risk in relation to his bookings target, but otherwise having completed goals, all being on target.

54. In June 2016 Ms Lester conducted a mid-year review of the allocation of territories among members of her team, making changes which took effect from 1 July. A new Junior Account Executive, Chris Swann, transferred into her team from that date. He had experience in real estate, and some real estate client accounts were transferred from other team members to him. Ms Lester also took the decision to combine Jonny Vroobel and Chris Dixon into one unit, adding their quotas together. The Claimant had some green field accounts removed from him. Ms Lester met him to discuss this, allowing him the opportunity to identify any green field accounts that had proved remunerative and which he did not want to be taken away.

55. As a result of these changes, the new structure showed Mr Dixon and Mr Vroobel as having a combined client list, with separate client lists for Mr Taylor, Ms Lee, the Claimant and Mr Swann.

56. The Claimant's further probation review was conducted in early July and he was informed at this point that he had now successfully completed his probation period. This was confirmed in a letter of 6 July 2016.

57. In early July, Ms Lester's team's overall sales quota was reduced. She used this to reduce the Claimant's quota by 5% going forward and that of Mr Dixon by 10% going forward. The granting of such a reduction is known in the Respondent's jargon as quota relief.

58. On 10 August 2016 the Claimant sent Ms Lester an email with suggestions that he postulated would help increase productivity. As well as raising issues about hot desking, that had been introduced in London, and arrangements in relation to CSMs, he referred to the fact that he was using a heat map in Excel to track his contacts, separately from the Respondent's contacts database known as MTC. He indicated that when he updated that database he was having to perform the same exercise on his heat map; and suggested that a way should be found to incorporate the heat map into the database, which would, he wrote, increase productivity.

59. On 16 August 2016 Mr Sultan sent to Ms Lester and others an email headed "Skill Will" asking them to rank their Executives and to indicate which of them was on their "oh shit" list, meaning that if the individual left it would cause a panic. This followed a discussion of these concepts and the matrix that might be applied to put together the rankings. In her response to Mr Sultan, Ms Lester identified the Claimant, Mr Vroobel and Mr Swann as having Skill Will levels of 3, and Mr Dixon a 4. Mr Dixon was on her "oh shit" list. The Claimant, Mr Vroobel and Mr Swann were not.

60. On 9 September 2016 Ms Lester emailed Mr Sultan confirming how she had implemented quota reductions. The Claimant's original quota of $1,145,850 had been reduced by 5%, that is, by $57,292.50. Mr Dixon's original quota of $1,399,595 had been reduced by 10%, that is, by $139,959.50. (Figures for a third person, not relevant to our concerns, were also given.)

61. We accepted from Ms Lester that in September 2016 she conducted a broad review of the overall performance of members of her team in the year up to that point, with a view to considering what, if any, steps needed to be taken in respect of individuals who were not considered to have performed sufficiently well, before the start of the next financial year. This was in keeping with the general practice within the Respondent of reviewing a sales team's performance at around this point in any given year.

62. For these purposes Ms Lester referred to a spreadsheet extracted from a global rankings table. This showed the global rankings of Mr Vroobel at number 107, Mr Dixon at 125, the Claimant at 144 and Mr Swann at 155. It showed individuals' quotas for new and EOI bookings, their actual achievements against quotas and the latter as a percentage of the former. It also showed equivalent figures for deal count quota. Ms Lester explained in evidence, however, that some adjustment was required to Mr Swann's raw figures, because of him having joined the team only at the beginning of the second half of the year, and to Messrs Vroobel and Dixon's figures, because of them being combined into a single unit at the half yearly-point.

63. The spreadsheet showed that Mr Vroobel had achieved 50.01% of bookings quota, Mr Dixon 39.52%, the Claimant 24.4%, and Mr Swann (after adjustment), 20.59%. In evidence Ms Lester acknowledged that she had not carried out the precise calculation of what the adjusted percentages for Mr Dixon and Mr Vroobel should be, but said that she reckoned that Mr Dixon's actual performance against quota would likely be in the range of 55-60%, and Mr Vroobel's, around 45%. As for deal count, the percentage that performance represented of quota was 50.54% for Mr Vroobel, 36.72% for Mr Dixon and 61% for the Claimant. Figures were not shown for Mr Swann.

64. Around this time, Ms Lester came to the view that she was minded to dismiss the Claimant. She discussed with Ms Toma how this should be handled. Ms Toma indicated that he could be put on a performance improvement plan (PIP), but that it would also be open to Ms Lester to proceed directly to dismissal, by providing the Claimant with a letter at a meeting, without the need for any prior warning or formal performance management process. The latter was the route that Ms Lester wanted to follow.

65. We found that, in Ms Toma's experience, it was normal practice at the Respondent to deal with performance-related dismissals of individuals with less than two-years' service in this way; and she had a standard template letter for use in such cases. This approach was plainly informed not only by the fact that it was considered that the contract of employment specifically catered for it, but also, we inferred (though Ms Toma did not expressly say

this in evidence), by an awareness that individuals with less than two years' qualifying service are not ordinarily qualified to claim unfair dismissal.

66. That said, Ms Toma did consider it to be part of her task to establish that Ms Lester did, in her mind, consider that there was a proper substantive basis for her current performance concerns. Ms Toma was, in this regard, aware that there was a record of such concerns having been identified when the initial probation period was extended, and that the extension had been premised on the need for continued monitoring of this. However, she asked Ms Lester to provide her with substantive material relating to the Claimant's performance, in the period since the end of the extended probation, and leading up to the dismissal, which could be set out in the dismissal letter.

67. The Claimant was due to have a one to one meeting with Ms Lester, originally on 17 October, but put back to 18 October 2016. The dismissal letter was finalised with that date, and Ms Toma accompanied Ms Lester to that meeting, with it in hand. There was no dispute before us that the Claimant had no forewarning that this was to be other than a routine one to one meeting, or that Ms Toma was coming to it. We had evidence from all three participants about this meeting, as well as a brief note of it that was made by Ms Toma. There was no material dispute about the essentials of how the meeting unfolded. We make the following findings about that.

68. Ms Lester began by informing the Claimant that a decision had been taken to terminate his employment on grounds of performance and that Ms Toma was in attendance to provide support. Ms Lester said that his performance was not satisfactory enough for someone of his seniority; and she referred him to particular statistics extracted in the dismissal letter (which we set out below). The Claimant responded by raising a number of matters, including as to the particular territory he had been given, and concerning the performance of colleagues. Ms Toma responded to the effect that the purpose of the meeting was to discuss *his* performance, and that he should focus on that, so that he could understand the decision to terminate his employment. Ms Lester went on to expand on the performance issues as she saw them.

69. Ms Toma then explained various formalities set out in the dismissal letter regarding notice, garden leave, holidays and other matters. The Claimant was given two copies of the dismissal letter and was requested to countersign and return one, which he did.

70. The meeting then concluded and Ms Toma departed. As the Claimant and Ms Lester were leaving the room, he pressed Ms Lester as to why he had been dismissed when (he asserted) his performance was, at worst, on a par with that of most other team members. She responded with words to the effect that he was not a good fit for this particular role.

71. In our bundle was a copy of the dismissal letter from Ms Toma. It was dated 18 October 2016, referred to the meeting of that date, and continued:

The reason for your termination is that your sales performance has proven to be significantly lower than required for an Account Executive position. Your performance was not satisfactory, particularly in these areas:

- Your sales performance level is below standard with only 1 deal closed in Q3 and 4 DTEs. A satisfactory level would have been 6 deals and 8 DTEs within the named accounts during your quota carrying months.

- Your win rate and opportunity creation is below standard at 37.5% and 86 respectively. A satisfactory level would have been 45% win rate and 140 opportunities created.

- Your activity level and account coverage is not sufficient. You have made only 198 meetings when there are over 1,500 contacts in your territory."

72. The letter gave formal notice of termination and stated that the Claimant's final day of employment would be 15 November 2016. It placed him on garden leave and explained what this meant. It also stated: "You will have accrued 16 days outstanding holiday by 15 November 2016 of which you will take 16 during garden leave. No outstanding holidays will be paid in your last payroll." It went on to set out various other implications of the termination in relation to benefits, payroll arrangements and so forth.

73. During the course of Ms Lester's oral evidence, the Claimant put it to her that there was a difference between the copy of the termination letter in our bundle and the version that had actually been given to him at the meeting and countersigned by him. This was that in the third bullet point, the version actually given to him referred to there being "over 1,500 never met contacts".

74. Following further investigation on the Respondent's side, we were informed that it was agreed that the Claimant was correct about this, and that the version in our bundle was in fact the penultimate draft. We were provided with further disclosure of emails between Ms Toma and Ms Lester, and of different versions of the termination letter extracted by Ms Toma from the Respondent's systems, and we heard evidence on this point from Ms Toma on which the Claimant cross-examined her.

75. The Claimant invited us to conclude that the Respondent had deliberately placed the wrong version of the termination letter in our bundle, because it was aware that its statistics on this particular point were unreliable; and indeed aware that the Claimant regarded them as contentious, because he had raised this point in his later grievance letter (to which we will come).

76. However, in light of the further disclosure, and having heard Ms Toma's evidence, we accepted that this was not deliberate, but a genuine error. The disclosure showed that, on the morning of the dismissal meeting, Ms Toma had emailed the draft letter to Ms Lester and Ms Lester had emailed back indicating that an amendment was required to alter the reference to "1,500

contacts" to read "1,500 never met contacts". We accepted that Ms Toma then made that correction. However, the meeting was now so imminent that she did not email the corrected version back to Ms Lester, but merely printed out hard copies to bring to the meeting. We also accepted Ms Toma's evidence that, when responding to the Respondent's solicitors' requests for disclosure documents, she had provided them with the email trail and attached draft letter, without recalling that this was the penultimate draft or realising that she had failed also to provide the solicitors with the final draft.

77. On 25 October 2016 the Claimant called Ms Toma. He asked if he could raise a grievance about his dismissal. She told him that he could raise a grievance, during his employment, about any matter of concern, including, for example, the conduct of the meeting at which he had been dismissed; but she told him that the decision to dismiss, itself, was final, and that he could not appeal against it.

78. It is the Respondent's standard practice to ask departing employees to complete an online survey. On 26 October 2016 Ms Toma emailed the Claimant a link for this, and requested him to complete it. She added: "I would like to reinforce that the Company's decision to terminate your employment remains final and cannot be appealed. If you wish to discuss further, I am copying my manager, Michelle Kelly Donohue, VP Talent Management."

79. On 14 November 2016 the Claimant emailed Ms Kelly-Donohue, referring her to an attached letter of grievance "on the grounds of discrimination". Attached was a six-page document headed "formal grievance".

80. In the preamble to this document the Claimant alleged that he had been "directly and indirectly discriminated against". In a section headed "Performance & Discrimination" the Claimant complained of the failure to warn him of any performance issue that might lead to termination, set out matters said to have affected his performance, and described a number of interactions with Ms Lester over the course of his employment. He went on to complain that he had no prior warning of the termination meeting or opportunity to prepare, and that he had been ambushed with false information. He went on to give his responses to the bullet points in the termination letter. He also challenged the Respondent's position regarding holiday entitlement. He asked for a response at early convenience, referring to the need to take legal action if necessary within a given time frame.

81. On 22 November 2016 Ms Kelly-Donohue emailed the Claimant. She set out the Respondent's case that his holiday was required to be taken during his notice period, and asked if he still had an issue with this. She also asked him what outcome he was requesting from the grievance process. On 9 December he replied. He set out his case in that the Respondent's handling of the holiday pay issue was in breach of the Working Time Regulations. Regarding the outcome he was seeking, he wrote that it would be untenable for him to be reinstated and, as he had proved discriminatory behaviour, he

was seeking financial compensation, including for injury to feelings, personal injury, aggravated damages and interest. Again, he referred to the possibility of legal action.

82. On 18 December 2016 Ms Kelly-Donohue responded, setting out the Respondent's analysis of the position regarding holiday pay. She noted that the Claimant had stated that he would like financial compensation as the outcome of the grievance. She wrote that this request was denied, as it was not the purpose of the grievance procedure, and that the Respondent denied that the Claimant was entitled to compensation. As they were unable to provide him with his desired outcome, he was asked to confirm whether he would still like them to proceed with a grievance outcome in writing.

83. The Claimant did not reply to that email. However, on 21 December 2016, he commenced the formal ACAS early conciliation (EC) process which concluded with the issue of the EC Certificate on 21 January 2017. The Claim Form was then presented on 20 February 2017.

The Law

84. Section 4 **Equality Act 2010** identifies various protected characteristics, including race, defined in section 9 as including colour, nationality and ethnic and national origins. Section 13 defines the concept of direct discrimination, including, at section 13(1), that "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." Section 23 includes provision that, on a comparison of cases for these purposes, there must be no material difference between the circumstances relating to each case. Section 39, among other things, prohibits discrimination by employers against employees, by dismissing them or subjecting them to any other detriment.

85. Section 123 concerns time limits. The starting point is that a complaint must be presented within three months starting with the date of the act complained of. However, section 140B provides for an extension of this period to facilitate the EC process. Section 123 also provides for the Tribunal to substitute such other period as it thinks just and equitable and that conduct extending over a period is to be treated as done at the end of the period.

86. Section 136 includes the following.

> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

87. We reminded ourselves of a number of established principles that emerge from the authorities in relation to claims of this type. First, in order for such a claim to succeed it is not necessary that the Tribunal conclude that race was the sole or even principal reason for the treatment complained of. It is sufficient if the Tribunal concludes that it was a material contributory reason. Secondly, direct discrimination can occur both consciously and subconsciously. Thirdly, particularly where it is alleged that there have been a number of instances or episodes of discriminatory conduct, the Tribunal needs to look at the wider picture, drawing on all its findings of fact, as well as on the particular facts or circumstances attending each incident. In what follows, we will of necessity set out our conclusions in relation to each of the distinct complaints set out in the List of Issues in turn, but they draw on all our findings of fact and the overall picture emerging from them as a whole.

88. **Efobi v Royal Mail Group Limited**, UKEAT/0203/16, 10 August 2017, draws attention to the fact that section 136 does not place any burden on a claimant to show that sub-section (2) applies. Rather, having considered the evidence before it, and made its findings of fact, the Tribunal must simply decide whether there are such facts as it contemplates, or not. However, the authorities indicate that a mere difference in race and difference in treatment between a claimant and the comparator will not alone be sufficient to satisfy sub-section (2). There needs to be some further pertinent feature of the facts. Further, a conclusion that a claimant has in some way been treated unreasonably or unfairly should not by itself be equated with a conclusion that the treatment was because of race. But such treatment may provide the additional ingredient which causes the burden to shift to a Respondent to show a non-discriminatory explanation. If sub-section (2) is engaged, then sub-section (3) places the burden on a respondent to show (on the balance of probabilities) that discrimination has not occurred.

89. The **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994** give Tribunals, subject as there provided, jurisdiction to consider claims by employees for damages for breach of contract arising or outstanding on termination of employment.

90. Regulations 13, 13A and 16 of the **Working Time Regulations 1998** confer minimum rights on workers to take paid annual leave. Regulation 15, concerning dates on which the leave is taken, provides, in part:

> (1) A worker may take leave to which he is entitled under regulation 13(1) on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).
>
> (2) A worker's employer may require the worker—
>
> (a) to take leave to which the worker is entitled under regulation 13(1); or
>
> (b) not to take such leave,
>
> on particular days, by giving notice to the worker in accordance with paragraph (3).
>
> (3) A notice under paragraph (1) or (2)—

(a) may relate to all or part of the leave to which a worker is entitled in a leave year;

(b) shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and

(c) shall be given to the employer or, as the case may be, the worker before the relevant date.

(4) The relevant date, for the purposes of paragraph (3), is the date—

(a) in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and

(b) in the case of a notice under paragraph (2)(b), as many days in advance of the earliest day so specified as the number of days or part-days to which the notice relates.

(5) Any right or obligation under paragraphs (1) to (4) may be varied or excluded by a relevant agreement.

A "relevant agreement" is defined in regulation 2 as including any enforceable written agreement between the worker and the employer.

91. Where, as at the termination of employment, a worker has accrued but unused annual leave, regulation 14 confers a right to payment in lieu. Part II of the **Employment Rights Act 1996** confers rights on workers, as there provided, not to have unlawful deductions made from their wages. For these purposes the definition of wages includes holiday pay.

The Tribunal's Further Findings and Conclusions

Direct Race Discrimination

92. We say something first about the general context or background.

93. We bore in mind that discriminatory treatment is not always signposted by, for example, the overt use of pejorative language, or overt display of discriminatory attitudes. It may be said, in a given case, however, that there are other, more subtle or indirect, features of behaviour or discourse occurring in the workplace, which form part of a picture which may support inferences that individual episodes of treatment were influenced by race. That said, it must always also be borne in mind, that the ultimate question for the Tribunal is whether the *particular* treatment complained of was, in the material sense, because of race.

94. In the present case, the Claimant relied on the fact that he was the only BME Executive in Ms Lester's team. He put it to her that corporate entertainment that was organised, such as clay-pigeon shooting, Henley, Polo and Twickenham, were commonly associated with a particular demographic, to which she replied that there were others, but those particular ones were "very British, as are you." The Claimant also told us that another Executive, Mr Taylor, had commented to him on one occasion that his (the Claimant's)

"face does not fit", and that the Respondent did not normally hire people with his hairstyle and background, preferring the public-school type, like Mr Vroobel. Ms Lester commented that Mr Taylor himself had a "rock-star" background, and had himself been known as "the one with the hair".

95. The Claimant also relied upon the remark made by Ms Lester, as the dismissal meeting was wrapping up, which he submitted again carried the implication that it was (literally) his face that did not fit. She told us that her point was not this, but to convey that he had many skills, but they were not a good fit for this particular role. She said that this was a narrative she had learned to use from a former manager, whenever terminating someone's employment, as intended to provide them with some reassurance that there would be other jobs to which their undoubted skills were a better match.

96. We considered that there was, perhaps, some support in this material, for the existence of, at least, a perception in this workplace of a culture that was skewed in favour of a certain *class* background or image. But, in the context of a direct race discrimination claim, that is not to be simply equated with an issue of race. Having heard Ms Lester's evidence tested in cross-examination, we also accepted her account of the remark made at the close of the termination meeting, and what lay behind it. There was no wider or other evidence to support an inference that there was a wider culture within the Respondent's organisation in which individual attitudes that might be antipathetic to people of the Claimant's racial background were encouraged or tolerated; and we did not consider the features just summarised to be, by themselves, sufficient to support such a contextual inference.

97. We turn to the individual complaints as summarised in the List of Issues.

98. The first concerned what was described as the way the sales territories were "carved up" by Ms Lester, and, within that, the specific complaint that at the start of the year the Claimant was assigned more key accounts than Mr Dixon, and his territory was larger than that of Mr Dixon.

99. Ms Lester's evidence was that she had initially drawn up a proposed allocation of territories for the coming year in the autumn of 2015. She then subsequently revised this in light of further developments in January 2016. This was supported by the documents we had, and we accepted it. Ms Lester also explained cogently, and again the documents supported her, that her starting point in relation to the Claimant was that he should simply inherit the specific client accounts that would have gone to Marina Ghilchik, had she not left. Further, back when she drew up the initial allocation, Chris Dixon's appointment had already been confirmed but that of the Claimant had not. All of this satisfied us that in relation to all of *these* accounts, the explanation for the allocation had nothing to do with the Claimant's race.

100. The Claimant, however, questioned her decision, in the final allocation made in January, to transfer the client UBS from Mr Dixon's allocation to his. Ms

Lester's answer was that, before she made this adjustment, there was a significant disparity between Mr Dixon's and the Claimant's financial targets. After reallocating UBS, Mr Dixon's financial target still remained the higher of the two, but the difference was much less. The Claimant referred to Ms Lester's evidence to the effect that the difference which remained, namely of $300,000, was within acceptable tolerances. He suggested that a disparity was acceptable, so that there had been no need to make the adjustment. However, Ms Lester pointed out that without making the adjustment, the difference would have been very much higher, and in any event it remained in the Claimant's favour. That, we found, was a cogent and persuasive explanation of why she made the change: the allocations did not have to be identical, but she thought it desirable to reduce the disparity to a degree.

101. We concluded that we accepted Ms Lester's explanation for this conduct, and that race did not form any part of the reasons for it.

102. The Claimant also complained that the *size* of the territory that he had to cover was larger than that of Mr Dixon. Ms Lester accepted that the Claimant had six named corporate accounts as against Mr Dixon's five. But she made the point that within each client, or its relevant team, there will be a number of individual contacts. She believed a number of Mr Dixon's clients had very large relevant teams, and she did not accept that there was an appreciable disparity, when assessed in that way. She also suggested that having a greater number of clients as such also gave the Claimant a greater range of opportunities to meet the financial target.

103. Once again, we found Ms Lester's evidence to be cogent and believable. She did not consider there was a significant disparity between the make-up of the Claimant's respective territories, and those of Mr Dixon, however assessed, and viewed overall. We were satisfied by her that race was not in any way a factor in the allocation of territory at the start of 2016.

104. Next, under section 2.2 of the List of Issues, the Claimant complained that the targets that he was given at the start of 2016 involved discriminatory treatment in a number of ways.

105. First, he complained that Ms Lester had used data from the previous financial year to calculate those targets. However, as already noted, Ms Lester explained that the calculation of the targets was necessarily done by reference to the then available data, more specifically that for the first three quarters of 2015, which she then projected forward. This was consistent with the fact that she was not given the actual targets for her team as a whole until later in 2016. This, we add, was also the same approach that she took to the setting of everyone's targets, including those of Mr Dixon, who was relied upon as comparator. We concluded that there was no materially different treatment of the Claimant in that regard; and in any event that the explanation for the conduct had nothing to do with race.

106. Secondly, the Claimant said that the clients who were allocated to him in 2016 had, in 2015, formerly been serviced by two Executives, not one, as now required of him. However, Ms Lester told us that a number of accounts that had been transferred to her team for 2016 had previously been allocated to a separate Investment Banking Division (IBD). That division had followed the model of generally pairing up Account Executives. Although, later in 2016, Ms Lester herself paired up Mr Dixon and Mr Vroobel, that was not the general model that she adopted at the start of the year. Further, this was also true of a number of the accounts allocated to Mr Dixon. She added that she considered a base quota of $1m to be a reasonable expectation of a single Executive in any event. We accepted that evidence, and, once again, we did not find any materially different treatment of the Claimant and his comparator; and were satisfied that what had been done was not, in any sense, because of race.

107. The Claimant also complained that Mr Dixon inherited territories which had a significant amount of "legacy revenue" whereas his territories only had a limited amount. This referred to revenue that might be generated from EOI. It could therefore be said to be not dependent on the individual's own efforts in the year to come, but effectively a windfall. However, it was clear that the model applied by the Respondent generally, and which Ms Lester had to follow, included EOI or legacy revenue as a component of what would count towards the revenue target. We found no basis to infer that Ms Lester had, in some way, sought to use this feature of the system to disadvantage the Claimant, and we found no materially different treatment in this respect.

108. Pausing there, on this point, as on some other points, it was perfectly clear that the Claimant considered the approach that was taken to be unfair to him. He considered that it would have been fairer for targets to be set without reference to legacy income, or to provide for some compensating adjustment to take account of its differential impact. However, we were concerned with whether his race was, consciously or not, a factor in Ms Lester's approach to the decisions which she took. Given the system that the Respondent did adopt, and in light of her evidence, we were satisfied that it was not.

109. The Claimant also complained that what he called fraudulent data had been used in the setting of his targets. This related to accounts that he had inherited from a former Executive, Joe Chen. Mr Chen had been found guilty of misconduct by way of signing up clients for bogus deals, which he knew in fact would not be revenue generating. Some of these clients then came down to the Claimant, via Ms Ghilchik. Ms Lester, however, said that the Claimant was not singled out in relation to this inheritance. We accepted that this was correct: a table in our bundle showed that a number of the clients concerned did not move to her team at all and, of those which did, at least one of them was inherited by Mr Dixon. Further, we accepted that the allocation of clients, and setting of targets, was done on the basis of the actual revenue that had been allocated, so the fact that such clients did not generate revenue did not lead to any reliance on false figures.

110. The Claimant, however, also argued that these clients would, because of Mr Chen's dealings with them, be unreceptive to working again with the Respondent, so that he would now struggle to generate revenue from them. Ms Lester, in evidence, argued that it should not be assumed that the relationship was irredeemable. She maintained that all Executives would have some clients who were more difficult or challenging to sell to; and that it was part of what the Executives were expected to do, as sales people, to engage with such clients, and to seek to turn the relationship around.

111. More generally, we accepted Ms Lester's evidence that in settling upon the targets, she simply followed the Respondent's established model and practice, and we accepted that is was her genuine belief that all of the members of her sales team had a fair prospect of generating the income required by their targets, from the portfolios of clients assigned to them. We did not find that she had singled out the Claimant for allocation of clients tainted by Mr Chen's conduct, or that there was any treatment because of race in this respect.

112. The next specific complaint identified in the List of Issues under the general theme of targets was that Ms Lester had made concessions for Mr Dixon's alleged poor performance, but had failed to do the same for the Claimant. The wider topic of Ms Lester's approach to the respective performances of the Claimant and Mr Dixon over the period up to when the Claimant was dismissed is a subject to which we will return. However, as to this specific complaint, the only specific example given by the Claimant in his particulars of claim, as amounting to a concession to Mr Dixon, concerned the impact of the Brexit vote in June 2016 upon his performance.

113. As to that, Ms Lester gave evidence that she had had a discussion with Mr Dixon in which Mr Dixon had put it to her that what might be called the Brexit effect had led to diminished client activity, and hence adversely affected his performance. She had responded by acknowledging that the Brexit vote had had a negative impact on the volume of deals being done, and commenting that, had that not happened, they might have been having a different conversation with him at that point. However, she told us that she recognised that the Brexit effect would not just affect him, and she did not give him greater indulgence in this regard. She merely responded to Mr Dixon having specifically raised it, and would have responded similarly to the Claimant, had he specifically raised it with her too.

114. That account was reinforced by Ms Lester's evidence regarding quota relief. As noted, Mr Sultan secured a measure of quota relief for her team around this time. Ms Lester told us that he had, at least in part, been successful in that, because of a recognition of what might be called the Brexit effect.

115. Once again, we were satisfied by the Respondent's evidence that there was a non-discriminatory explanation for Ms Lester's exchange with Mr Dixon on the subject of Brexit; and that the Claimant was not treated less favourably in this regard, whether because of race, or at all.

116. Finally, under the general topic of targets, the Claimant further complained that there was discriminatory treatment insofar as Mr Dixon was awarded a quota reduction of 10%, whereas he was only awarded a quota reduction of 5%. Ms Lester's evidence on that subject was as follows. Firstly, she made the point that quota relief was not used as a response to underperformance but rather as what she called a retention and motivation tool. She told us that, at the time, she considered that there was a risk that Mr Dixon might leave. This was particularly in view of Mr Dixon and Mr Vroobel having been combined, which was done in view of concerns about Mr Vroobel's performance. She was concerned that the quota adjustment needed to take account of this, as Mr Dixon might feel that he was now being required, as it were, to carry Mr Vroobel.

117. Further, Ms Lester made the point that, while the Claimant focussed on the 10% relief given to Mr Dixon, compared with the 5% given to him, this neglected the wider picture in which other Executives in this team were given zero quota relief. She said that this reflected her recognition that there were *some* more challenging elements within the Claimant's client portfolio, making it fair that he be given a measure of quota relief.

118. Looking at the wider picture, we accepted that, Mr Sultan having secured a measure of quota relief, Ms Lester decided who in her team should or should not receive a share of it, and, if so, how much, by appraising as she saw it, the circumstances of each Executive, and the case that could be made, treating it as a retention and motivation tool. We were, again, satisfied, that the explanation for this particular conduct had nothing to do with race.

119. The next section of the List of Issues grouped a number of complaints together under the general heading of "Lack of Support." A complaint about the introduction of hot desking was withdrawn during the hearing. The main complaint under this heading concerned the Claimant not having "adequate resources". Specifically, he complained that he was not given a replacement Sales Associate in the reshuffle of July 2016, and that he did not have a dedicated Sales Associate, by comparison, he said, with Mr Swann.

120. Ms Lester made a number of points in response to this complaint. Firstly, she said that while particular Sales Associates would be allocated to work particularly with one or more Executives, they were not allocated on an exclusive one to one basis, and were still intended to be a shared resource, as needed, for the whole team. Secondly, she said that throughout 2016 the team as a whole was under-resourced with Sales Associates. This problem partly stemmed from the fact that Sales Associate was a starter role from which individuals of ability tended regularly to be upwardly promoted.

121. By reference to tables in our bundle, Ms Lester noted that an associate called Matt Corbin had initially been assigned to the Claimant but also to Mr Dixon and Mr Vroobel. Mr Corbin was then promoted in July 2016, but at this point David Otto, who had been a long-term intern in the Frankfurt Office, began working in London, assigned to the Claimant, as well as another

intern, Dominic Birch. The Claimant also had some support from Clark Henderson. While the Claimant shared Mr Otto with Mr Taylor, he therefore did have some ongoing support, she said; and his colleagues Ms Lee and Mr Swann also had to share Lorna Sheldon. Ms Sheldon and Mr Henderson also gave some support to Messrs Dixon and Vroobel.

122. When these points were put to him in cross-examination, the Claimant said that Messrs Otto and Birch were not as experienced or useful to him, particularly in selling activity at meetings, as the other Sales Associates would have been; and he maintained that Messrs Dixon and Vroobel had better support. However, Ms Lester stressed her point that, while Sales Associates were encouraged to go to such meetings to learn more about selling, providing support in the selling process was not, as such, their main function, which was to provide administrative support.

123. It seemed to us that there were differences in view between the Claimant and Ms Lester, as to the capabilities of these various individuals, and the degree of useful support that the Claimant, as opposed to Messrs Swann, Dixon or Vroobel, received. But bearing in mind the overall limited resource in this area, and the way in which it was distributed, it seemed to us that the Claimant was not the only one who could have made a case that he needed more help. Mr Taylor and Ms Lee might possibly have felt that they were less well supported than Messrs Dixon and Vroobel as well. But, however that may be, we did not find any sufficient basis to infer that the Claimant was deliberately allocated less resource of this kind, because of race.

124. Finally, under this particular heading in the List of Issues, the Claimant complained that he was forced by Ms Lester to attend a work social gathering at an establishment called Madison, despite having at the time a problem with his teeth that was causing him severe pain and ultimately led to him having an operation on his wisdom teeth.

125. It was clarified in the course of evidence, and by reference to the particulars of claim, that this particular allegation related to an event that took place at this venue on 14 April 2016. The Claimant's evidence was that, during the course of the meeting with Ms Lester and Mr Sultan on 14 March, he formed the impression (although he did not allege that anything was expressly said along these lines) that his job would be at risk if he did not attend that event.

126. Ms Lester denied that the Claimant had been placed under any such pressure or peculiarly treated in this regard. The point was also made that, although it transpired that the Claimant's problems with his teeth persisted, requiring him to have an operation around the time of this event, that would not have been appreciated at the time of the earlier discussion in March.

127. Given the dispute as to what, in fact, was said, about this event during the March discussion, that the Claimant did not allege that he was told in terms that he had to attend, and the point of timing, we did not find sufficient

evidence to infer that the Claimant was singled out for peculiar treatment in this regard, still less that there was detrimental treatment because of race.

128. We turn to the complaints relating to the process leading to the dismissal and the dismissal itself.

129. The Claimant complained that he was not, at any point prior to being dismissed, warned in any way that he might be dismissed if his performance did not improve; and that he was dismissed at what was scheduled to be a routine one to one meeting, without any prior warning of what was actually going to happen, so that he had no opportunity to prepare for it.

130. As we have found, Ms Lester told Ms Toma that she was minded to dismiss the Claimant on performance grounds, and they then discussed how this would be handled. Ms Toma advised that, in this case, there was no obligation first to take the Claimant through a performance management process; and she considered that it was open to the Respondent simply to effect the dismissal at a meeting, without the need for any prior warning of its purpose.

131. As we have recorded, Ms Toma's evidence was that she was, in this, following what she understood to be the Respondent's general practice in cases of dismissal on performance grounds of employees with less than two years' service. But we found that she also considered the circumstances of the particular case, including the particular history of which she was aware, regarding the Claimant's extended probation; and she asked for the main points, as Ms Lester saw them, in support of her assessment of the Claimant's more recent performance, for inclusion in the dismissal letter.

132. The Claimant plainly considered it extremely unfair to him that he was not, prior to the dismissal meeting, ever warned that if his performance did not improve in a given way within a given timescale, he might be dismissed. He also, plainly, felt it was profoundly unfair that what he thought was a routine one to one was used to dismiss him without any prior intimation. He plainly also found that aspect of the dismissal itself particularly distressing.

133. The Tribunal had no difficulty understanding the Claimant's feelings. Having regard to these features, had his claim been one of unfair dismissal, we would certainly have found the dismissal, in all the circumstances, to be unfair. However, what we had to decide was whether these features pointed to a potential inference that race was a factor in his treatment, and/or whether we were presented with a non-discriminatory explanation.

134. The Claimant did not pursue a distinct complaint to the effect that he was not permitted to challenge the decision to dismiss him, by way of appeal or grievance. But he did question whether it was in fact the Respondent's general practice to take a different approach in cases where the employee had short service. He pointed to the fact that Mr Chen, who had less than

two years' service, had been given the right to appeal against his dismissal. Ms Toma responded that she had not been involved in that case; and speculated that he might have been given a right of appeal, because he had been summarily dismissed for alleged misconduct. She pointed to another example, that of Jennifer Wilson, a Junior Account Executive with short service, who was dismissed for redundancy without a right of appeal. As we have noted, there was also a standard HR template for use in such cases.

135. In the collective industrial experience of the Tribunal, while some employers will observe the precepts of fair process regardless of whether the employee is qualified to claim unfair dismissal, it is not unusual for some employers to take a different approach where the employee lacks qualifying service. Whilst, as we have indicated, we had no difficulty with the proposition that the Claimant was not fairly treated by the matter being handled procedurally in the way it was, we were satisfied that the explanation for this lay in this being handled in line with what Ms Toma understood to be the Respondent's general practice for performance related dismissals of those with less than two years' service, where notice is given or a payment in lieu is made. So we concluded that this feature did not lend any support to the discrimination complaints relating to the dismissal process or the decision to dismiss.

136. We come now to those complaints of direct race discrimination that gave the Tribunal greatest concern. Taking them together, these were the complaints that the Respondent had not considered what the Claimant called his mitigating circumstances when deciding to dismiss him (comparing himself to Chris Dixon), that the data and metrics used in the termination letter were inaccurate, cherry-picked and/or never used to measure actual performance; and that other options, such as a change in role or move to another team, were not considered (comparing himself to Johnny Vroobel).

137. At the heart of the Claimant's case here was the proposition that the hard data collated in relation to the KPIs and income generated by deals done, did *not* show him to be a poor performer by comparison with his colleagues, and in particular by comparison with Mr Dixon, but rather showed him to have a comparable or, in some respects, better performance record. The Claimant submitted that this pointed to the conclusion that alleged performance concerns were not the true, or at least, not the whole explanation for his dismissal; as the Respondent's attempts to justify and explain his dismissal by reference to such data were so at odds with what the hard data in fact showed that they were not credible.

138. By particular reference to Mr Dixon, who was recruited by a similar process and joined at the same time as him in the same job role, the Claimant invited us to conclude that the only obvious difference between the two of them was the difference of race (Mr Dixon not being of Indian ethnicity or national origin). We were invited to conclude, at least, in light of the hard data to which the complaint pointed, that the burden fell on the Respondent to explain this treatment and to show that race had not influenced it, but that the Respondent had failed to discharge that burden.

139. A considerable part of the witness and documentary evidence put before us concerned rival arguments about analysis of the KPI data in respect of both the Claimant and his comparators; and, crucially, as to what Ms Lester said in evidence was the approach that she took to the raw data, in evaluating the performance and progress of the Claimant and his colleagues over the course of the year, and whether her account of this was credible or not. The Tribunal correspondingly spent significant time during its deliberations in chambers carefully reviewing all of this evidence and what conclusions we felt we could draw from it in relation to these particular complaints.

140. We start by considering the data at what appeared potentially to be significant points during the course of the Claimant's employment.

141. The first of these was around the time of his meeting with Ms Lester and Mr Sultan on 14 March 2016. The KPI spreadsheet for week 9 (as at 9 March) showed the following year-to-date figures for the Claimant: 13 meetings, 35 contacts, 211 emails, 3 DTEs and 29 opportunities created. Turning to the time of the probation reviews in April, the year-to-date figures as at 15 April for the Claimant were 41 meetings, 122 contacts, 679 emails, 4 DTEs and 28 opportunities created (the last appears to have been readjusted from earlier figures). Revenue and deals done figures at this point were not clear to us.

142. These were the cumulative totals. But Ms Lester's evidence was that she was concerned to see reasonably consistent performance, week by week, as she regarded this as the best indicator of future performance. Reviewing the week by week data (as collated in the agreed compiled spreadsheet that we had been given) the Claimant's performance with respect to most indicators in most of the first twelve weeks was below KPI; but he then produced a significant improvement in the second half of April, with two particularly strong weeks, substantially increasing his numbers for deals done and revenue generated. This, she said, was the reason why there was concern about his performance in March, and why she was initially minded to terminate his employment in early April; but also why she then relented on seeing figures that indicated that he may, perhaps, have turned a corner.

143. However, the Claimant relied on the comparison with Mr Dixon. Mr Dixon's corresponding KPI figures for week 9 were 21, 22, 140, 5 and 22. It also appears that the Claimant had at this point generated $1000 of revenue, but Mr Dixon none, and the Claimant had done three deals and Mr Dixon none. For the week of 15 April, the corresponding KPI figures for Mr Dixon were 43, 68, 361, 11 and 22. Why, then, asked the Claimant, was Mr Dixon's performance as of March not also of such concern as to warrant a discussion involving Mr Sultan, and as of April such as to call into question whether he should be dismissed or his probation period extended?

144. Pausing there, we were mindful that there was not in fact a complaint of discrimination in relation to the meeting involving Mr Sultan in March (save on the discrete question of the forthcoming Madison social event), nor a complaint in relation to the decision to end the Claimant's probation in April.

But we considered, by way of background, what happened at these earlier stages, and what it might or might not contribute to our understanding of the reasons behind the eventual decision to dismiss the Claimant. The provisional take-away from this exercise so far was that, while Ms Lester had put forward a potentially coherent explanation for her concerns about the Claimant's performance, viewed in isolation, the comparison with Mr Dixon suggested that more explanation was needed.

145. Moving on to July 2016, at this point the Claimant's revenue had remained static. However, Ms Lester noted that his statistics for week 25 showed an improvement in his performance with respect to meetings and contacts met. The tenor of her evidence was that she therefore again gave him the benefit of the doubt at this point, and, on the basis also of reassurances from him, decided to pass his probation period. But she said that she still remained concerned to see further consistent improved performance going forward.

146. Ms Lester gave further evidence, in her witness statement, and under cross-examination, about her approach to the data and to the overall evaluation of past, and prospective future, performance, during the course of the year. From this, the following further points emerged.

147. Firstly, we accepted that she did not view all of the KPIs as being equally significant as indicators of performance, and her view was that which KPIs were more significant or informative, as predictors of future performance, changed over the course of the year, as an Executive worked through a cycle of activity in relation to a newly-acquired territory. She attached greater significance to those KPIs which she felt the individual could influence by their own efforts. She also attached more weight at the start of the year to the KPIs for what she called lead indicators, and in particular DTEs, because she considered that in the early months, these were the best indicator of the promise of further income that might be generated by done deals further down the line. In later months of the year, however, she was more concerned with deals actually done and income generated.

148. In addition, whilst Ms Lester regarded the KPIs as an important tool, if evaluated reflectively, she told us that she also considered them only to be part of a wider picture of an individual's performance and the future promise that it held. In particular, a constant theme of her evidence was the importance of the quality of the client relationships built through successful interactions at meetings with clients, and the need to understand the clients' market. Her evidence was that she would herself attend some client meetings with new recruits, to observe for herself such interactions, and that she did so with both the Claimant and Mr Dixon. A consistent theme of Ms Lester's evidence was that the Claimant's performance in actual interactions gave some cause for concern, whereas this was an area in which she considered that Mr Dixon excelled and gave no real cause for concern.

149. The Claimant invited us to attach little, if any, weight to this aspect of Ms Lester's evidence, because it was based not on hard verifiable metrics, but

on what he described as opinion or mere assertion. It was plainly correct, as such, that evidence about an evaluation of qualitative aspects of the Claimant's performance, was not able to be simply verified by hard data. We also bore in mind the possibility that Ms Lester's recollection today, of the approach she took at the time, might not be entirely reliable. However, this was not a reason to wholly discount this evidence as such. Though the Claimant may have considered that he should be judged by the raw KPIs alone, our task was to come to a view as to how she actually did evaluate his performance, and how this did or not feed into her decision to dismiss.

150. We found that Ms Lester's evidence, under cross-examination, that she did have concerns about the Claimant's performance in actual interaction with clients, was plausible. She gave the example of a meeting at which she considered his approach was too heavily technical for the level of seniority of the person he was addressing. While the Claimant strongly disagreed with that critique, we accepted that this was her genuine view. There were also some signs in the narrative of the probation reviews and associated ratings, which supported Ms Lester having had concerns about aspects of the Claimant's practical knowledge of the clients' field and interactions; whereas the material relating to Mr Dixon's probation revue was consistent with her evidence that she had no similar concerns in relation to him.

151. A further constant theme of Ms Lester's evidence was that she looked for a measure of consistency in levels of performance from week to week, over a period time. She told us that, while she recognised that the Claimant had had a burst of improved performance in April, and again held out the promise of this in July, she did not see a pictured of sustained week on week improvement in the period leading up to his dismissal. Again, the Claimant challenged this as mere opinion, and argued that it was unrealistic to expect consistency week by week, and that what mattered more was the cumulative end-of-quarter or year-to-date KPI figures at any given point.

152. However, once again, we considered that Ms Lester's overall evidence on the question of the approach that she in fact took (whether or not the Claimant thought it was right or fair) had cogency and credibility. She accepted that an individual Executive could not be expected to produce precisely or very closely consistent numbers every single week, but she maintained that a broadly consistent level of performance, week by week, was a hallmark of good prospects for sustained levels of future performance, whereas the same could not be said of sporadic bursts of high numbers that were not replicated in the weeks or months in between. In this vein she pointed to the fact that the Claimant's burst of activity in April was not sustained in the weeks that followed. Similarly, in the following quarter, while the Claimant booked early revenue of $26,000 from two deals, this level of performance was not sustained through the quarter.

153. The credibility of this evidence was also supported by the very fact that KPIs were indeed tabulated and reported to the Executives, often accompanied by exhortatory commentary from Ms Lester, on a week by week basis, reflecting

the underlying expectation, in this highly pressurised working environment, that effort and performance needed to be constantly maintained.

154. Ms Lester's evidence developed these themes in other, consistent, ways. She told us (we summarise her theme) that her developing concern over time was that the Claimant did not have sufficient independent drive and self-motivation to maintain consistently the highest levels of performance of which he was, at best, capable. Rather, it was only in reaction to particular "external" pressures, that he intensified his activity, such as following the meeting with herself and Mr Sultan in mid-March and in the run up to his probation review in mid April. She said that she expected someone who had been recruited into a role of this seniority to be highly self-motivating, and for his performance not to be dependent on the motivation of such "sticks".

155. Whilst, again, the Claimant argued that these themes of Ms Lester's evidence were "opinion" and self-serving, again there were some signs in the documentation that they did convey a genuine account of the outlook and philosophy that Ms Lester brought to bear at the time. For example, the probation review documents raised the need for consistency to be demonstrated in the future. Also noteworthy was Ms Lester's evaluation of the Claimant (and Mr Dixon) in response to Mr Sultan's request for a skill-will assessment to be fed back to him in August. Though the approach may have been somewhat crude, this was an internal communication between managers in which she was invited to, and did, give her unvarnished views.

156. In short, the general context, we found, was one in which Ms Lester's outlook was that she expected someone recruited into this role to show independent drive, initiative and motivation, leading to consistent results; and that they should use their sales and other skills to make the very best of their territories, maximising meetings and client contacts, identifying opportunities, building on good relationships, and re-engaging with, and seeking to turn around, those that had been neglected or gone bad. A constant theme of her evidence, was that this was the very nature of the role. Again, that this was her genuine attitude was borne out, for example, by the job description for the position, which indicated that what was sought was a "high-energy, motivated" Account Executive working in a "fast-paced" team, with a high volume of transactional business.

157. Consistent with this was Ms Lester's attitude, which was entirely apparent from her evidence, towards what the Claimant regarded as various legitimate mitigating circumstances, beyond his control, that had affected his performance. So, while the Claimant considered it unfair not to recognise the legacy of past difficulties that had affected some of the accounts that he inherited, Ms Lester's perspective was that it was part and parcel of the nature of the job that he was employed to do, to make the very best of the territories he had been given, and to proactively seek to turn around accounts that might have been blighted or neglected in the past.

158. Similarly, from the Claimant's point of view, insufficient account was taken of the fact that he had a serious problem with his teeth in the spring, causing him considerable pain, affecting his jaw, and ultimately leading to his having to have a wisdom tooth operation. During the same period he also had to cope with his grandmother's illness and passing away. It was clear to us that Ms Lester's outlook, however, was that everyone was beset by health problems, or stressful personal circumstances, from time to time; but her expectation was that people in this role should still have the drive and energy to deliver on their goals and targets, despite any such problems.

159. Similarly, the Claimant referred to the fact that, through no fault of his own, he had not been able to fly to New York at the scheduled time for the first week's training. As a result, he argued, the point at which he was able to start meaningful work in the job was put back, compared with colleagues such as Mr Dixon; yet, unfairly, no account was taken of this. Ms Lester, when this was put to her in evidence, did not accept that view. She said that there was other online studying that also needed to be done as part of the initial training, and the Claimant could and should have made it his business to work around the problem by reordering his activities.

160. We stress, again, that in reviewing the evidence, and setting out our further findings in relation to these various matters, our concern is not with whether these aspects of the sales and management culture might be open to praise or to criticism, but to form a picture, as best we could, of the actual reasons which, ultimately, consciously or sub-consciously, contributed to Ms Lester's decision to dismiss the Claimant. Pausing here, we accepted the broad tenor of her evidence, that these broader features all did inform her outlook and attitude to the Claimant's performance, during 2016, and when she came to take the decision to dismiss him in the autumn of that year.

161. As to the *timing* of that decision, Ms Lester's evidence was that her general practice was, every autumn, to review the performance of members of her sales team over the year thus far, and to make decisions, looking forward to the year ahead, about whether to keep individuals on, whether to let them go, or whether to take some other step to address any abiding concerns. Again, this seemed to us to fit in with the picture of a hard-nosed sales environment and culture, in which an annual evaluation, in which decisions were taken about who to keep on and who to let go, was considered to be an ordinary part of the annual cycle of business decisions.

162. It appeared to us that this philosophy also informed Ms Lester's approach to the figures that she gave as examples supporting her evaluation of the Claimant's performance in the letter of dismissal. She considered that reference to number of deals closed and DTEs generated in the third quarter of the year (as opposed to the year as a whole to date), was pertinent because of the particular guide that this gave to likely future performance and the issue of consistency. The Claimant criticised her reference to win rates, as this had not been identified as a distinct KPI. Further, he and his colleagues had been encouraged to close down inherited leads that were

effectively dead, which would adversely affect this measure. However, Ms Lester made the point that he was not treated any differently from others in this regard, and said that her main focus, in this bullet point of the letter, was on the number of opportunities created. She also did not agree that it was plain that the Claimant's record on opportunities created at this point was better than Mr Dixon's, as account had to be taken of the fact that Mr Dixon and Mr Vroobel had been combined in a changed territory. The Claimant also put it to her that he had the highest number of meetings at the point of his dismissal. She accepted this but maintained that it was necessary to look also at the quality of those interactions.

163. Ms Lester also maintained that she took a different approach in terms of her expectations of a junior, to whom she would expect to have to devote more of her time and who was paid less, as opposed to someone such as the Claimant, who was recruited externally (also thereby incurring hiring fees) and was more highly paid. When the Claimant put it to her that the same must apply to Mr Dixon, her response was that she did not have the same performance issues with him (referring, it appeared to us, from the drift of this part of her evidence, to matters such as Mr Dixon's performance in client meetings). She also referred to Mr Dixon having been a consistent performer, particularly in the months between May and September, and to his average rate of deals generated. In relation to Mr Vroobel, Ms Lester told us that it was because of concerns with his performance that she decided at mid-year to pair him up with Mr Dixon. Once again, the concern was not with his raw KPIs, alone, but with his performance in meetings, and in particular with senior client contacts. This was consistent with a general theme of her evidence that she attached considerable weight to this aspect of an individual's performance.

164. The Claimant also criticised Ms Lester's reference, in the dismissal letter, to his having 1500 "never met" contacts, which ignored, he said, the high number of actual meetings that he had engaged in. Ms Lester's response, however, was that her concern was that he was not doing enough to exploit the potential available to him to approach, and seek to meet with, many more potential contacts, which he could have done, had he shown more initiative and drive. Again, this reflected the language used in his performance assessment documentation and her theme that she expected the Claimant to be proactive without having to be driven by pressures of the threat of a probation assessment or the pressure of a management meeting.

165. The Claimant maintained that a further reason why reliance on this statistic was unfair, was because the Respondent's database of contacts was unreliable and out of date (because some individuals would have left the client concerned, moved onto other roles and so forth). But Ms Lester argued, when this was put this to her in cross-examination, that it was precisely part of the Claimant's function to take proactive steps to review and update the accuracy of the database, whether or not he also used heat maps of his own as a tool in this area.

166. Standing back from this survey, in summary, we accepted the Claimant's specific submission that, measured by the periodic cumulative KPI data, considered alone, it was hard to see why his performance would have been appraised less favourably than that of Mr Dixon. There was sufficient in this data to cause the burden to fall on the Respondent to satisfy us of the explanation for what we were told was a decision to dismiss on performance grounds, and that race formed no part of it. However, we accepted that Ms Lester did not take that narrow focus, and that the various other factors, considerations, and approach described, all contributed to her overall appraisal of how successful he had been in the job to date, and the prospects for the future; and we accepted that, as a matter of fact, she did not share his view that there were a number of significant mitigating circumstances, for which greater allowance should have been made.

167. In summary, and in particular, we concluded that Ms Lester was influenced by her dissatisfaction with what she regarded as the Claimant's lack of consistency of performance, week on week, month on month; her concerns about the quality of his interactions with clients at the meetings she had observed; her concern that he was too ready to find reasons – or, as she saw it, excuses – for deficiencies in his performance; rather than, as she saw it, being proactive and highly motivated to maximise the opportunities which his territories gave him, and to turn around the more challenging parts of that inheritance, and not to be held back by personal difficulties along the way.

168. During the course of our hearing, the Claimant argued and laid out his case with considerable passion, and immense command of the hard data, that his treatment, particularly by reference to the cumulative KPI data, was unfair, particularly when viewed alongside the corresponding data relating to his comparators, most particularly Mr Dixon. The thrust of the Respondent's case was that there was a more wide-ranging and bigger picture that he was missing, both when he worked there, and in the presentation of his case. The Claimant argued that this supposed bigger picture amounted to mere assertion and opinion, unsupported by hard data.

169. Our task, when considering his discrimination claim, was to evaluate what we believed was the matrix of factors serving to explain the reasons for the treatment complained of, and whether, the burden having fallen on it, we were satisfied on the balance of probabilities by the Respondent, that we had been given an explanation which showed that his race was not, consciously or otherwise, among the reasons for the treatment. Though unfairness may, as we have explained, be a feature that can be a pointer to possible discrimination, ultimately our concern was not with fairness, as such, but with whether there was indeed discriminatory treatment.

170. We concluded that the Respondent had satisfied us that the explanation for the decision to dismiss him was, indeed, in short, because of the overall view that Ms Lester took of the Claimant's performance, the match of his skills and temperament to the demands of the position, and the prospects of change in the future. On that last point, we also accepted that Ms Lester, advised by

Ms Toma, was of the view that in the Claimant's case other remedial measures short of dismissal, such as placing him into a different role (as was done with Mr Vroobel, although he remained under Ms Lester's management), or placing him on a performance improvement plan, would serve no useful purpose. This was because we accepted that Ms Lester concluded that the extended probation period had effectively served the same purpose as a performance improvement plan, and that by the time she took the decision to dismiss the picture that had emerged to her suggested that a PIP, or change of role, would not have any realistic prospect of leading to a sustained change in the Claimant's performance in the future.

171. For all these reasons we were, accordingly, also satisfied, that the associated complaints that the Claimant's mitigating circumstances had not been considered, or properly considered, that the alternatives to dismissal had not been (properly) considered, and that inaccurate data and metrics were solely applied to him, in each case because of race, were also not well founded, having regard to the explanations shown by the Respondent for its approach to all of these matters.

172. Accordingly, for all of the foregoing reasons, all of the claims of direct discrimination failed on their merits. So we did not need to consider the time points raised by the Respondent in relation to certain of them.

Breach of Contract Damages

173. We turn to the Claimant's claim for damages for breach of contract. The specific claim was that it was a breach of contract for the Respondent to have dismissed him without any prior warning that he might be dismissed on performance grounds. He relied, specifically, on Clause 13.4.6 of his contract of employment. He submitted that this contemplated that the employment could be terminated by the Respondent on grounds of poor performance only "after adequate warning"; but, in breach of that provision, no warning at all had been given in his case.

174. However, clause 13 sets out four potential routes to termination in compliance with its provisions, in sub-clauses 13.1, 13.2, 13.3 and 13.4. Sub-clause 13.4 sets out the circumstances in which the Respondent might terminate "without notice or payment in lieu of notice". The contract only permits it to terminate in *that* way if one of the scenarios in the further sub-provisions in clause 13.4 applies. In particular, if it wishes to terminate without notice, or payment in lieu, on grounds of performance, then the contract only permits it to do so if clause 13.4.6 is fulfilled, including the requirement for the termination to have been preceded by adequate warning.

175. However, the clause also gave the Respondent the alternative option, in clause 13.2, of terminating, following completion of the probationary period, by giving the Claimant the requisite period notice in accordance with that sub-clause. That period was the greater of one week for each complete year

of service or the period specified in the Offer Letter. That period was, in the Claimant's case, four weeks. So, this sub-clause allowed the Respondent the option of terminating, following completion of the probation period, by giving the Claimant four weeks' notice.

176. In the present case the Respondent did not claim to avail itself of the option of terminating without notice or payment in lieu pursuant to sub-clause 13.4. Instead it availed itself of the option in clause 13.2 to terminate by giving the Claimant the required four weeks' notice. That clause did not impose any condition of prior warning, or indeed require the Respondent to have any particular reason for terminating at all. It was simply entitled, as a matter of contract law, to terminate the employment by the giving of four weeks' notice, which is what it did. Further, Clause 14.1 specifically entitled the Respondent to place the Claimant on garden leave during that notice period.

177. Accordingly, there was no breach of contract by the Respondent failing to give the Claimant prior warning, as alleged, as the Respondent exercised a contractual right to terminate in a manner which did not require any prior warning to have been given.

178. Accordingly, the claim for damages for breach of contract failed.

Wages in Respect of Holiday Pay

179. We turn, finally, to the claim for wages in respect of holiday pay.

180. This claim was advanced on the basis of the rights in respect of paid leave, conferred by the Working Time Regulations 1998. We have set out earlier the relevant provisions. Regulation 15(4) provides that an employer's notice requiring an employee to take unused leave on certain dates, must be given at least twice as many days in advance of the earliest leave day, as the length of the leave required to be taken. However, by virtue of regulation 15(5) that requirement may be varied by a relevant agreement, which, by regulation 2, includes any written contract of employment.

181. In this case the Respondent relied on clause 9.3 of the contract as entitling it, as it did, to require the Claimant to take his unused leave during the notice period. The Claimant, however, argued that clause 9.4 applied. He argued that he was "prevented" from taking leave during the notice period, and so he was entitled to payment in lieu of the accrued leave instead. As to what prevented him from taking leave, the Claimant sought, as we understood it, to rely on regulation 15(4). The Respondent required the leave all to be taken before the employment ended, but, given the number of days accrued, had not given the length of advance notice required by that provision. So, the regulation had the effect that he was prevented from taking it.

182. We did not agree with that argument. The advance notice requirement of regulation 15(4) simply did not apply in this case, because it was supplanted

by the provision in clause 9.3 of the contract. That expressly entitled the Respondent to require him to take his unused leave during the notice period. It did not require the Respondent to give him any particular amount of advance notice. In any event, it could not sensibly be construed as requiring it to give him notice to take the leave, sooner than it gave notice to terminate. Nor could it be construed as doing other than excluding the notice provisions of regulation 15(4): otherwise it would serve no purpose at all.

183. The natural construction of clause 9.4 was *not* that it was intended to reverse the effect of clause 9.3 and reinstate regulation 15(4). Rather, it was there to cater for the possibility that the Claimant might, for some particular *factual* reason, be prevented from taking the leave, or all of it, during the notice period, perhaps through serious illness, or something of that sort. But it was not suggested by the Claimant that there was any factual circumstance which prevented him from taking the leave in this case. As we have noted, he was on garden leave, and not required to do any work during this period.

184. Accordingly, the Respondent properly exercised its right to require the Claimant to take his unused leave during the notice period, he had sufficient time to do so, and was not required to do any tasks for the Respondent during that time, or otherwise practically prevented from doing so. Accordingly, he had no unused entitlement as at the termination of employment, and his claim for a payment of wages in lieu therefore fails.

Outcome

185. For all of the foregoing reasons all of the Claimant's claims fail and are dismissed.

Employment Judge Auerbach on 10 November 2017