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EMPLOYMENT TRIBUNALS

Claimant: **Mr M Elias**

Respondent: **Thyssenkrupp Elevator (UK) Ltd**

Heard at: **East London Hearing Centre**

On: **3-6, 10 October & 11-12 October 2017 (in chambers)**

Before: **Employment Judge Barrowclough**

Members: **Mrs G A Everett**
Mr D Kendall

Representation

Claimant: Mr N Bidnell-Edwards (Counsel)

Respondent: Miss K Jeram (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that all the Claimant's complaints fail, and are themselves dismissed.

REASONS

1 By his claim, presented to the Tribunal on 25 January 2017, the Claimant Mr Monty Elias, who was born on 31 August 1965 and who identifies himself as being a black British man of West Indian origin, raises a number of complaints against Thyssenkrupp Elevator (UK) Ltd, his former employers. These include: -

1.1 unfair dismissal (ss.94 & 98 Employment Rights Act 1996);

1.2 race related harassment (ss.9 & 26 Equality Act 2010);

1.3 direct race discrimination (ss.9 & 13 Equality Act 2010);

1.4 victimisation (s.27 Equality Act 2010);

1.5 an unlawful deduction from wages, alternatively breach of contract (s.13 Employment Rights Act 1996, Article 3 Employment Tribunals (Extension of Jurisdiction Order) 1994).

2 The Respondent accepts that it employed the Claimant from 28 June 2011 until 8 October 2016, when he was dismissed, it is asserted by reason of redundancy; but disputes and resists all the Claimant's complaints.

3 We heard this case over the course of five days of evidence and submissions, from 3 to 6 October and on 10 October. The Tribunal met in the absence of the parties on 11 and 12 October to review the evidence and submissions we heard, and to reach this judgment and these reasons in relation to the Claimant's complaints.

4 The Claimant was represented by Mr Bidnell-Edwards of Counsel, and gave evidence in support of his claim. He also called as a witness a former colleague, Mr Terry Dellar, who had been a Senior Sales Manager with the Respondent. The Respondent was represented by Miss Jeram of Counsel, who called as witnesses (a) Dr William Nehring, the Respondent's CEO since 1 April 2014, who was the Claimant's line manager and who took the decision to dismiss him; (b) Mr Burkhard Schlenker, the CEO of the Respondent's BBN Operating Unit, which includes the UK, who heard and dismissed the Claimant's appeal; (c) Mr Rasmus Dyring Andersen, the Respondent's Head of Escalator Business for the Respondent's BBN Operating Unit including the UK, who attended a number of meetings at which both the Claimant and Dr Nehring were present; (d) Mr Rod Graham, the Respondent's Human Resources Vice President for the UK; and finally (e) Mr David Burywood, the Respondent's Head of Sales in their UK elevator division.

5 We find the following to be the relevant facts. The Claimant has considerable experience working in the escalator and/or elevator business, as his CV in the agreed trial bundle makes clear. He first worked for the Respondent as a self-employed contractor commencing in November 2010, and at the conclusion of that engagement in June 2011 joined the Respondent as an employee in the role of operations manager. The Claimant was subsequently promoted to the role of general manager in 2013, before being designated as a director of the Respondent company in July 2015, although his terms and conditions of employment otherwise remained as before which, it is agreed, were equivalent to those of a branch manager. All the Claimant's roles and the associated duties undertaken by him were within the Respondent's escalator division. At the time of his dismissal, the Claimant was based at Bishops Stortford and his annual salary was approximately £65,000.

6 The Respondent company currently has approximately 450 employees within its UK undertaking or business, which is the sale, installation, maintenance, and service or repair of lifts and escalators throughout the UK. A significantly greater part of the Respondent's business in the UK relates to lifts, rather than escalators; although it was not disputed that there was significant potential for growth and expansion of its

escalator division.

7 The Claimant's original (and brief) terms and conditions of employment are at pages 5 to 9 in the bundle. Neither in that document, nor in any subsequent terms and conditions or contract of employment, is there any mention of any entitlement on the Claimant's part to either bonus or commission. It is however clear that there were a succession of annual bonus schemes for many of the Respondent's staff, including the Claimant, and in which he participated from 2011 onwards. The bonus scheme for the year 2011/12 is at pages 14 to 19, and the documentation in relation to later years is also included in the bundle. Whilst there were variations in the applicable bonus scheme from year to year, in broad terms it operated in such a way that there would be discussions between the Respondent's management and qualifying staff members concerning their potential annual bonus, depending on targets being met, at around Easter each year, which is about half way through the Respondent's financial year, ending on 30 September. Following the relevant year end, there would be further discussions and agreement about the actual sum to be paid to each employee, once their individual figures and performance during the preceding year were known; and the annual bonus then agreed would be paid to individual staff members (including the Claimant) a few months later. It is clear that as far as the applicable scheme for the year 2015/16 is concerned, it was a condition of payment of any bonus that the employee (in this case the Claimant) be in the Respondent's employment as at 1 July 2016, and additionally not be under notice on the date payment of the bonus was due. There is no mention of any entitlement on the Claimant's part to any commission (as opposed to bonus) payments at any stage of the Claimant's employment in any of the documentation which we have seen; and the Respondent's case is that commission was only payable to members of their sales staff, on any transaction or deal which they had secured and at the rate of 0.5% of the contract price; but to no other employees, including the Claimant.

8 In August 2013, however, the Respondent accepted that the Claimant had been instrumental in obtaining a potentially lucrative contract for the installation of escalators with Harrods (known as the 'Harrods Door 3' project); and that his efforts in so doing should be recognised and rewarded. A letter confirming the award of what is described as a *"discretionary bonus"* of £5,000 from the Respondent's then CEO, Mr Kevin Taylor, to the Claimant is at page 21; and it is expressed to be an advance on the Claimant's year-end bonus, and which would need to be taken into account in relation to the calculation of his overall annual bonus.

9 In April 2014, Mr Taylor was replaced as the Respondent's CEO by Dr Nehring, Mr Taylor remaining with the Respondent thereafter in the capacity of part-time chairman. Prior to his formal appointment, Dr Nehring had in fact been working informally in the UK for a month or so. The Claimant therefore reported to and was line managed by Dr Nehring from April 2014 onwards; and it was Dr Nehring who appointed the Claimant as a director of the Respondent company in July 2015.

10 In the autumn of 2015, the Respondent was engaged in negotiations towards a significant escalator maintenance contract with an undertaking called 'Forever 21', who have commercial premises throughout the UK. However, the contractual negotiations between Forever 21 and the Respondent for the provision of such services were protracted and difficult, and the projected start date for the nationwide maintenance

contract of 1 November 2015 came and went without any deal or agreement having been reached by the two companies. The history of the progress (or lack of it) in the discussions between the parties is complicated and is not relevant to the matters in dispute in these proceedings, and we need not refer to it. Ultimately, and the Claimant alleges following a considerable delay on the part of at least some of his colleagues, in December 2015 a decision was taken by the Respondent that the contractual terms on which Forever 21 were insisting were not acceptable, although the Respondent remained willing to undertake maintenance work for Forever 21, if other and better terms could be agreed. When that decision was communicated to Forever 21, it was met with understandable astonishment, since it was pointed out to the Respondent (in the form of Dr Nehring) that his company had already signed and delivered the relevant maintenance contract. The relevant issue in these proceedings is that it was in fact the Claimant who had signed off the contract with Forever 21 in mid to late November on behalf of the Respondent (and as a director he had actual authority to do so and to bind the company); and at a later stage, mistakenly and apparently in his absence, the signed contract had been sent to Forever 21 by his assistant. Additionally, the Claimant had repeatedly confirmed to his colleagues that he had not in fact signed any agreement with Forever 21. This episode inevitably caused considerable embarrassment for Dr Nehring in his dealings with Forever 21, quite apart from the Respondent being contractually bound on apparently disadvantageous terms. The upshot was that the Claimant was invited to a disciplinary meeting on 18 December 2015 to be conducted by Dr Nehring, the invitation and the disciplinary offence alleged being set out in the letter at page 45; and the outcome of which was that the Claimant was given a 'Stage 2' written warning, as confirmed in Dr Nehring's letter to him dated 22 December 2015 at page 52.

11 In his witness statement, the Claimant says (at paragraph 10) that from the time of his appointment as a director in July 2015, he immediately felt that he had been placed 'under a microscope' by Dr Nehring in relation to his overall work performance, essentially because he is a black man, and since the Respondent has or had no other black directors. In his oral evidence, and when that was put to him in cross-examination, the Claimant said that he believed that that was certainly the case from November 2015 onwards. There were a number of specific instances, the Claimant said, when things (he alleges) Dr Nehring said or did highlighted or illustrated that approach, and that he had been singled out by Dr Nehring for unfavourable treatment. One such instance was the imposition of the written warning in December 2015, referred to in the previous paragraph, whereas other senior members of staff who had, the Claimant says, delayed the negotiations with Forever 21 were not disciplined.

12 Another alleged example of Dr Nehring's treatment of the Claimant arose out of another escalator installation project or agreement with Harrods, known as "Harrods Door 5". That contract had been obtained at some stage in 2015; and was certainly going ahead in the period between December 2015 to April 2016. It is agreed that, as before, the Claimant had had a large part in obtaining that deal, and that, potentially at least, it was good business for the Respondent. In January 2016 the Claimant submitted to Dr Nehring what he described as a *"commission calculation"* based upon the overall contract price, calculated as a 0.05% figure, amounting to £8,256.81; and Dr Nehring responded by offering to pay the Claimant what he described as a *"discretionary bonus"* of up to £6,000, £3,000 to be paid there and then, with the balance of £3,000 to be paid *"upon successful completion of this project"*.

13 Unfortunately, however, the Harrods Door 5 project was neither simple and straightforward, nor smooth running; and it is agreed that there were a series of meetings (two at least) on site, with representatives from Harrods, the relevant subcontractors, as well as from the Respondent being present, when problems and delays in the agreed work were discussed. The Claimant's allegation is that at one of these meetings, probably in early 2016, Dr Nehring stated, in the presence of witnesses and whilst plainly looking at the Claimant *"Who do I have to blame, who do I have to kill, who do I have to sack?"*; and that as a result the Claimant felt threatened and humiliated.

14 On another occasion Dr Nehring and the Claimant had lunch together at a restaurant in St Katherine's Dock. The date of their lunch is not clear, but it was certainly after the Claimant's appointment as a director in July 2015, and may well have been towards the end of that year. The Claimant alleges that Dr Nehring then said to him that he must *"act (as) a slave"* at work and in terms of his performance; and that he himself had had to do so under his own previous boss, Dr Berlien. Once again, the Claimant says that he was shocked and taken aback by Dr Nehring's approach and language to him as a black man.

15 Dr Nehring completely rejects any suggestion that he said anything like what the Claimant alleges on either such occasion, whilst accepting that he did attend at least one meeting concerning the Harrods project when the Claimant was present, and that it is perfectly possible that they had gone out to lunch together; and also denies that the Claimant's race or colour had anything to do with his treatment of him concerning the commission/discretionary bonus issue arising from the Harrods Door 5 project. Dr Nehring says that it is unthinkable that he would ever adopt such a racist or discriminatory approach or attitude towards the Claimant, not least since, as is not disputed, he is himself married to a black woman and, like the Claimant, has mixed race children.

16 It should be noted that the Claimant does not say in his witness statement that he raised any of his concerns at his perceived humiliating and offensive treatment because of his race or colour from July 2015 onwards with Dr Nehring, HR or anyone else at the Respondent company, prior to the redundancy exercise in June/July 2016, which resulted in his dismissal. However, in answer to a question from the Tribunal at the conclusion of his evidence, the Claimant said that he had in fact told Kevin Taylor, the Respondent's part-time chairman and his former line manager, what Dr Nehring had said to him and how he had behaved towards him before then (June/July 2016); although the Claimant could not say exactly when he had done so; and if he did tell Mr Taylor, nothing seems to have resulted, at least so far as we were told.

17 The next significant event is that the Claimant was called to a meeting with Dr Nehring and Mr Graham late in the afternoon on 20 June 2016. It is accepted that the Claimant had no notice or warning of what was then to be discussed. At the outset, the Claimant was informed that the purpose of the meeting was for Dr Nehring to explain to him his proposals for a restructuring of the Respondent's escalator division. In summary, Dr Nehring said that the current set up in the UK escalator division was unusual, so far as the Respondent was concerned, in that there was an operations director – in this case the Claimant – who oversaw the branch managers or their

equivalents who dealt with the sale, installation, maintenance, repairs and modernisation of the company's products, as well as participating in those functions himself; and that he proposed to remove that layer of management, effectively making the Claimant's role redundant, and to divide the Claimant's operational workload, assigning the respective functions to the corresponding three branch managers or their equivalents in the escalator division. The Claimant was accordingly placed on garden leave with immediate effect, told that there would be a further consultation meeting in a week's time, and, as is apparently standard practice for the Respondent in such circumstances, had to hand over his laptop to Mr Graham at the end of the meeting. Those matters were recorded and confirmed in the letter sent to the Claimant shortly thereafter (page 59 in the bundle, albeit the copy there is incomplete, unsigned and undated).

18 Four days later, the Claimant consulted his GP and was signed off sick for what was described as *"essential hypertension"* for a fortnight from 24 June; and in fact, he did not return to work for the Respondent thereafter, a succession of subsequent fit notes for substantially the same condition being submitted up until 8 October 2016, the effective date of termination.

19 It is not clear when the Claimant's first fit note came to the Respondent's attention; but in any event the proposed reconvened consultation meeting with Dr Nehring and Mr Graham was postponed from 27 June to 1 July 2016. That date was equally ineffective, and Mr Graham wrote to the Claimant on 30 June, fixing their meeting for Tuesday 5 July at the Respondent's London office, the Claimant being informed that if he could not then attend in person, it was open to him to submit written representations, or participate by way of telephone conference call, if he wished. The Claimant did not respond to Mr Graham's letter, either by phoning him or in writing; although it is possible, as the Claimant asserts and Dr Nehring accepts may have happened, that he and the Claimant spoke on the telephone on 4 July.

20 In any event, the Respondent went ahead with the reconvened consultation meeting on 5 July, in the Claimant's absence and without any participation by him or on his behalf. In the circumstances, and as is recorded in his letter to the Claimant of 5 July (page 63), Dr Nehring proceeded to confirm the proposals which had been outlined at the meeting with the Claimant on 20 June, giving three months notice of termination of employment on grounds of redundancy, the Claimant's last day of employment being 8 October 2016 (although the Claimant was not required to and did not work out his notice). The Claimant was informed in that letter of his right of appeal, and it also contains details of his redundancy entitlements.

21 It is agreed and accepted by the parties that there was at least one telephone conversation between Dr Nehring and the Claimant in July 2016, during which 'without prejudice' discussions about a potential settlement of any claims arising from the termination of the Claimant's employment took place. The Claimant says that one such conversation took place on 4 July, when he also informed Dr Nehring that he believed he had been subjected to bullying, discrimination and less favourable treatment by him, and that if he were in fact dismissed at the meeting on the following day, he would take action against the Respondent. Dr Nehring, whilst as noted accepting that he may have spoken on the phone to the Claimant on 4 July, says that the first intimation by the Claimant to him of any such claims and allegations was in a phone call on 19 July, as

recorded and summarised in his contemporaneous email to his German managerial colleagues at page 72a of the bundle. As is clear from that email, Dr Nehring then understood that what was being advanced by the Claimant were allegations of racial discrimination, victimisation, and breach of contract, as well as unfair dismissal.

22 The Claimant duly presented what was treated by the Respondent as a notice of appeal coupled with a grievance in the form of his letter of 7 July (page 64), in which he alleges not only that he had been unfairly dismissed, but also that he had been bullied, racially discriminated against, and treated less favourably by the Respondent. The Respondent replied on 12 July (page 67) stating that it would arrange an appeal meeting, which could take place at a neutral venue if the Claimant wished, and that he could participate by either attending in person, or by setting out and submitting his appeal together with any additional claims in writing. There was further correspondence between the parties, and in his letter of 14 July (pages 78-80) the Claimant raised for the first time his detailed allegations about Dr Nehring's alleged behaviour towards him at the Harrods Door 5 project and at their lunch at St Katherine's dock; and a combined appeal against dismissal and grievance hearing was duly arranged. Whilst not spelt out in the correspondence, it is clear that the Respondent treated the allegations raised by the Claimant of bullying, discrimination, and less favourable treatment as amounting to a grievance, since they had not been raised either at or before the redundancy consultation meetings with the Claimant.

23 There was then some delay consequent on a number of unsuccessful attempts to arrange the combined grievance and appeal hearing on a mutually convenient date; and on 23 September Mr Graham wrote to the Claimant's solicitors (who had by then become involved, and who were in correspondence with the Respondent) identifying a vacancy for an escalator sales position (which was accepted to be a more junior role than that which the Claimant had previously undertaken) which had arisen and which might be of interest to him, as an alternative to dismissal for redundancy; and also putting forward a final proposed appeal hearing date of 7 October, at the Respondent's London office; and at which the Claimant could once again participate either in person, or by written representations, or via a telephone conference call, and which could, if desired, be moved to a neutral venue. There was no substantive response to that letter before the Claimant's solicitors wrote to the Respondent by email on 6 October 2016, confirming that the Claimant would not attend the appeal hearing on the following day; that the grievance issues were *"entwined"* with the appeal; and setting out in summary the Claimant's grounds of appeal against his dismissal for redundancy, namely (a) the selection criteria were unfair; (b) a redundancy pool of the Claimant alone (and not including those of branch manager, or similar status, within the escalator division who reported to him) was unfair; (c) that no genuine attempt had been made to identify any alternative employment as an alternative to redundancy; (d) that the decision to dismiss the Claimant had been pre-determined, and (e) that the Claimant was treated less favourably on account of his race. The solicitors' letter ends by observing that it would be inappropriate for Mr Graham to chair the Claimant's appeal hearing; although, and as they had in fact already been informed on 4 October, Mr Burkhard Schlenker had been nominated to hear the appeal, and duly did so.

24 The appeal meeting went ahead on 7 October in the Claimant's absence and without any further representations or participation by him or on his behalf, and with Mr Graham in attendance as an HR adviser. Mr Schlenker had been provided in

advance with a summary of the Claimant's points of appeal/grievance allegations, which had been prepared by Mr Graham, and a copy of which is at pages 2/3 of Exhibit R-6, together with the supporting documentation from which that summary was taken, in the form of a bundle of correspondence and other documents; and also saw the Claimant's solicitors' letter of 6 October. The position is by no means clear, but it seems that Mr Graham and Mr Schlenker had met on 6 October, when Mr Graham showed Mr Schlenker his summary, which the latter read, albeit (as he accepted in his evidence) he did not read the original material upon which that summary was based. Following the hearing on 7 October, Mr Schlenker adopted Mr Graham's suggestion in interviewing those who were witnesses to or were otherwise relevant to or concerned in the Claimant's allegations of bullying and discrimination by Dr Nehring, and notes of those interviews, which took place on or about 17 October, are at pages 120 to 128 in the bundle. No notes were made of Mr Schlenker's interview with Dr Nehring because, Mr Schlenker says, Dr Nehring simply rebutted and denied the Claimant's allegations in straightforward and comprehensive terms, and accordingly there was no perceived need to note his answers.

25 Mr Schlenker thereafter prepared and circulated his appeal outcome email dated 28 October 2016 (page 134), in which he determined that there was in fact a redundancy situation in the UK escalator division; that the only redundancy candidate in the 'pool' was the Claimant; and that a proper consultation process had been followed. Accordingly, he upheld the decision to dismiss the Claimant for redundancy. Mr Schlenker went on to state that he had interviewed all relevant employees in relation to the Claimant's allegations of race discrimination, less favourable treatment, and bullying; that none of them had provided any evidence to support any of those allegations; and that he dismissed them.

26 Dr Nehring told us in his evidence that he had been thinking about restructuring the management of the escalator division, and the proposals which he put forward to the Claimant at their meeting on 20 June 2016, for some time, probably a period of some months; and that as part of that exercise, he had interviewed Karen Rollings, in charge of UK escalator service and repairs, Stephen Travers, who headed up new escalator installations, and David Burywood, head of sales. All three of them reported to the Claimant, whose own role and duties covered and included all three areas of sales, new installations and service and repairs. Each of them had agreed with Dr Nehring to take on and absorb, at least on an interim or temporary basis, the corresponding parts of the Claimant's workload; and did so, following the Claimant being placed on garden leave on 20 June. Thereafter on 12 August 2016, all members of staff who reported to the Claimant were informed in an email from Mr Graham's assistant (page 87) that the Claimant was then on garden leave, although his appeal against the termination of his employment had yet to be determined. The email went on to say that, at least for the time being, Ms Rollings would take on the service and repairs matters previously dealt with by the Claimant, Mr Burywood sales, and Dr Nehring himself (rather than Mr Travers) new installations.

27 The situation was finally confirmed on 11 November 2016, when all relevant staff were informed by email that the Claimant had left the company in October 2016; that the post of operations director in the escalators division would not be filled or continued; and that the previous interim allocations of the Claimant's workload were

confirmed, apart from escalator installations, which would be headed by Mr Pekka Annunen, previously Head of the Respondent's Finland Operations. By that time, we were told, Mr Travers had left the Respondent's employment, having previously reverted briefly to his pre-June 2016 role and duties. Dr Nehring was not asked during his evidence about Mr Travers' apparent unwillingness or inability to continue to undertake the enlarged installations role, even on a temporary basis; nor was he questioned about the appointment of Mr Annunen in place of Mr Travers. In his evidence, Mr Graham said that he believed that Mr Travers had left the Respondent's employment by the end of 2016, and that in fact he had done so after the expiry of the Claimant's notice period on 8 October 2016.

28 Having summarised our findings of fact, we move on to consider the complaints to be determined by the Tribunal, as they were raised and addressed by Counsel in their closing submissions. An agreed (and exhaustive) List of Issues was submitted at the preliminary hearing, albeit not all of those matters were canvassed or addressed in great detail before us, and we deal with them in so far as they arise for determination.

29 First, the Claimant claims to be contractually entitled to an annual bonus of £14,000 arising from the final year of his employment with the Respondent, namely 2015/2016. The Claimant alleges that this was the figure he agreed with Dr Nehring in November 2015 as his projected bonus figure if he met his agreed financial targets for that year; and that he was well on track towards meeting those targets at the time he was placed on garden leave (20 June 2016).

30 Dr Nehring disputes that account. His evidence was that the terms of the bonus scheme changed from year to year, as already noted; and that, as is clear from pages 26 and 29 in the bundle, the Claimant's individual projected entitlement was based on and equivalent to the template for branch managers. The bonus actually payable following the end of the year depended upon the individual employee's performance against set targets. The relevant agreement with the Claimant for the Respondent's financial year 2015/2016 is at page 29. That specified a *"planned bonus"* of £10,000 (rather than £14,000, as the Claimant alleges) **if** the agreed targets were met (our emphasis). At the foot of page 29 are two relevant notes, namely (a) that the bonus is not payable if the employee is under notice; and (b) that Dr Nehring's decision was final. Finally, on page 28 is a copy of the Respondent's annual pay review document which was sent to qualifying employees, in this case the Claimant. That provides that:
"To qualify for payment, staff must have been in employment from 1 July 2016 and not be under notice on the date of payment is due… Employees participating in any kind of commission or bonus scheme are excluded."

31 In her admirably clear skeleton argument on behalf of the Respondent, Ms Jeram submits that, whether the Claimant's claim is considered as an unlawful deduction from wages in breach of s.13 Employment Rights Act 1996 (in which event it is prima facie out of time, pursuant to s.23(2)), or alternatively as a breach of contract under the 1994 Extension of Jurisdiction order, it is bound to fail. Before consideration of whether or not there has been any unlawful deduction from wages (which would include bonus or commission payments), it has to be determined whether there is any sum '*legally*' or '*properly payable*'. There must be an entitlement (on the part of the employee) to be paid, and an obligation (on the part of the employer) to pay. That is reflected or mirrored in the contractual *'sum due'* under the 1994 Extension of

Jurisdiction Order. In either case, the entitlement/obligation can only arise through either express or alternatively implied incorporation into the agreement between employer and employee.

32 Applying those principles to the facts of this case, Ms Jeram submits that there were at least three occasions when a contractual entitlement to bonus payments (or commission) could have been clearly and expressly included in the written agreements between the parties, namely in June 2011, at the outset of the Claimant's employment, and on the Claimant's promotions in November 2013 and July 2015. Yet on none of those occasions was the opportunity to do so taken; and in fact and on the contrary, any bonus payment or scheme was always described as *'discretionary'.* For such an entitlement to be impliedly incorporated into the contract between the parties as a matter of custom and practice, then Ms Jeram submits that it is very well settled law that the custom asserted must be *'reasonable, notorious and certain'*. That is not the case here, since on every occasion a bonus was paid or mentioned, it was described as being *'discretionary'*, with no evidence of any objection to that description; that the Claimant (and other staff) were individually notified of their eligibility for the annual bonus scheme in each year of employment; that the bonus scheme itself was changed and altered from time to time; and that bonus payments were not made automatically, but after discussion and calculation.

33 Finally, Ms Jeram submits that even if the Claimant's alleged bonus entitlement was somehow incorporated into the agreement between him and the Respondent, the terms of the scheme under which he is claiming are fatal to his claimed entitlement. The 2015/2016 scheme (page 28 in the bundle) confirms the Claimant's annual salary from October 1 2015, and goes on to give details of the *'profit related bonus initiative'* which would apply in his case, subject to a number of conditions. Those include, and as already noted, that the employee must still be employed by the Respondent from 1 July 2016, and must not be under notice on the date payment is due. Payment of any such bonus cannot have been due before 30 September, the Respondent's financial year end, when the Claimant was under notice, and indeed remained so until 8 October, when his employment came to an end.

34 In reply, Mr Bidnell-Edwards deals with the matter briefly in his skeleton argument, albeit he went on to expand in his closing submissions on the points raised. He asserts that a bonus of £14,000 was discussed and provisionally agreed with Dr Nehring, and that the Claimant is entitled to that sum. He accepts that there is an express reference to there being a discretion on the part of the Respondent, but submits that this relates to the actual amount of the bonus payment only, rather than to the right to a bonus payment per se. Insofar as the Respondent had a discretion, that could not be exercised unreasonably, and since there is no question of misconduct being alleged on the Claimant's part, and he was apparently on track to achieve his projected annual target, then he should have been paid £14,000.

35 In our judgment, and essentially for the reasons put forward by Ms Jeram, there was no contractual right or entitlement, whether express or implied, on the Claimant's part to an annual bonus, and no obligation on the Respondent to provide and pay any sum by way of bonus. All the references in the documents to which we have been referred make clear that any such scheme and payments were discretionary, that the bonus scheme could and in fact did change from year to year, and that individual

payments thereunder were subjects for negotiation and agreement, rather than questions of right; and there is no evidence to suggest that any of those matters had been challenged or disputed by the Claimant or any other qualifying employee. In relation to the discretionary bonus scheme which had in fact been agreed with the Claimant for the Respondent's financial year 2015/2016, the Claimant cannot satisfy the condition that he not be under notice of termination at the time payment became due following the year end on 30 September, since his notice only expired on 8 October 2016, an issue not addressed or disputed by Mr Bidnell-Edwards in his closing submissions. Dealing with the points he did raise, there is no evidence to support the figure of £14,000 the Claimant claims, and indeed the undisputed contemporaneous documents specify a projected annual bonus figure of £10,000; there is once again no evidence to support or confirm that the Respondent's discretion was limited to the size of the bonus payment, rather than to whether any bonus was payable; and nothing to suggest that the Respondent's discretion was exercised arbitrarily or capriciously, rather than in accordance with their discussions with the Claimant and other qualifying staff. Finally, it was by no means clear that the Claimant was in fact 'on track' to meet his agreed targets for the year 2015/2016 – if anything, the figures we were shown suggest that it was likely that there would be a significant shortfall against those objectives. Overall, and for these reasons, the Claimant's claim for an annual bonus fails and is dismissed.

36 We should make clear that the Claimant's bonus claim was specifically put in the agreed List of Issues as a contractual entitlement, rather than as an unjustifiable failure to make a discretionary payment. Insofar as that appeared to be less certain during Mr Bidnell-Edwards' cross-examination of Dr Nehring and in his closing submissions, we accept Ms Jeram's submission that it would not be fair or appropriate to allow the Claimant to 'move the goalposts' by putting the claim on that alternative basis at such a late stage, without warning or enabling the Respondent to address the matter fully. Additionally and in any event, and as mentioned briefly above, we do not think that it can sensibly be argued that the Respondent acted perversely or irrationally in the (suggested) exercise of its discretion in not paying the Claimant a bonus, since in doing so it acted in accordance with the terms of the bonus scheme it had adopted for that particular year, and which it had disclosed to and discussed with its qualifying employees, including the Claimant.

37 We consider next the Claimant's claim to be entitled to a commission payment of £8,256.81. That is calculated as representing 0.5% of the overall order value of the Harrods Door 5 project to which we have previously referred, apparently totalling £1,651,362. The Claimant submitted a claim for such commission, supported by that calculation, to Dr Nehring on 15 January 2016 under cover of his email at pages 53-54, requesting that the sum be included in his salary for that month. Dr Nehring said, and it was not disputed, that having received that claim he subsequently had a meeting with the Claimant, in which he accepted that the Claimant should be rewarded for introducing what was, potentially at the very least, the good business opportunity represented by this second contract with Harrods.

38 Dr Nehring claims that their meeting took place on 21 January in Solihull, when he told the Claimant that he was not entitled to commission as he had claimed, but that the Respondent was appreciative of the Claimant's successful achievement, and was accordingly prepared to pay him a bonus of £6,000 in relation to the Harrods Door 5

project. Of that sum, £3,000 would be payable in February 2016, and the balance of £3,000 would be paid to the Claimant upon successful completion of the project. Dr Nehring goes on to say that the Claimant was happy with that arrangement, and that they shook hands on it.

39 The Claimant does not entirely agree. In the first place, he says that his meeting with Dr Nehring in Solihull took place on 12 February, rather than 21 January; and that he was then handed a letter setting out the reward for his efforts on the Harrods Door 5 project, rather than there being any form of consensual discussion. The Claimant goes on to say that he did not feel that his rights or previous agreements with the Respondent were being honoured, and that the proposed payments to him were inadequate; but that he felt uneasy about and wary of making any sort of issue concerning this with Dr Nehring.

40 The objective evidence in relation to this issue is largely represented by the letter at page 57in the bundle. It is dated 22 January 2016, and is addressed to the Claimant, and signed by both Dr Nehring and Mr Graham. The letter states: *'We would like to pay you a discretionary bonus of £3,000 for the order intake on the Harrods project which you were personally leading the sales for. This will be payable in February 2016. An additional £3,000 will be paid out to you upon successful completion of this project.'* (our emphasis).

41 The undisputed evidence was that the Harrods Door 5 project was problematic, and indeed gave rise to a number of meetings involving the Respondent, their client and the relevant subcontractors in order to discuss the problems and delays arising. The Respondent's evidence, which was not ultimately contested, was that they did not in fact make a profit on the whole project.

42 Ms Jeram submits that in any event the Claimant was not entitled to any sales *"commission",* to which only dedicated sales staff and personnel are contractually entitled. Further, and as is not disputed, at no previous stage in his employment had the Claimant ever claimed any entitlement to, or been paid, *"commission"* (as opposed to a *"discretionary bonus"*), including in relation to the Harrods Door 3 project. Additionally, and in the light of the Respondent's own evidence, the Door 5 project was not successfully completed, but resulted in an overall loss. Finally, there is a complete absence of certainty about what would or would not constitute *"successful completion"* of the Door 5 project since *"success"* is never identified or defined.

43 Mr Bidnell-Edwards deals with this issue at paragraph 47 of his skeleton argument, once again briefly, simply asserting that 0.5% of the project value was the "going rate for commission". In his closing submissions, Mr Bidnell-Edwards suggested that the non-payment of the commission claimed (as well as of the allegedly outstanding bonus payment due) were instances of direct and overt race discrimination: that the Claimant was simply not paid either by reason of his race and/or colour. Subject thereto (and we will address those submissions hereafter) he added little to what he sets out in his skeleton argument.

44 We have little difficulty in concluding that the Claimant was never entitled to payment of any commission, whether by virtue of any express or implied agreement, or

the exercise of any discretion. We accept Dr Nehring's evidence of his meeting and discussion with the Claimant at Solihull on 21 January 2016, and that the matters then discussed and agreed were accurately recorded in the virtually contemporaneous letter at page 57, the terms of which could hardly have been clearer, in preference to the Claimant's own and unsupported account. Had the position been as the Claimant suggests, then we can see no reason why he did nor protest at his perceived ill-treatment, or at the very least flag up his concerns about apparently being cheated out of his lawful entitlements, particularly since he was a director of the Respondent company, who had only recently been appointed by Dr Nehring, who had recently approved an increase in his annual salary. The Claimant was awarded and paid a discretionary bonus, and there is no evidence to suggest that that arrangement was ever disputed or queried at any time prior to the Claimant's dismissal. In relation to the second part of that discretionary bonus, the unchallenged evidence was that, through no fault of the Claimant's, the Harrods Door 5 project could not ultimately be realistically described as having been 'successfully completed'; and it was entirely at the Respondent's discretion whether or not they chose to pay the Claimant the second tranche of £3,000. Since the project was unprofitable, it cannot be said that the Respondent's decision not to do so was arbitrary or perverse. Accordingly, we dismiss the Claimant's claim for commission, whether as a breach of contract or as an unlawful deduction.

45 We now turn to address the Claimant's race discrimination allegations. As was correctly pointed out at the preliminary hearing, those allegations should be assessed in the first instance as potential harassment claims, falling within s.26 Equality Act 2010; and it is only in the event that they do not come within that section that we go on to consider them as amounting to potential direct race discrimination.

46 In relation to s.26 harassment, we accept that the questions to be determined by the Tribunal are those identified in Richmond Pharmacology v Dhaliwal [2009] IRLR 336 and Nazir v Aslam [2010] ICR 1225. They can be summarised as: (a) what was the conduct complained of; (b) was it unwanted?; (c) did it have the purpose of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?; (d) did it have the effect of doing so, having regard to an objective reasonable standard and the Claimant's perception?; and (e) was the conduct related to the protected characteristic relied upon (in this case race)? In relation to s.13 direct discrimination, have facts been established from which we could conclude, in the absence of a satisfactory explanation, that the Respondent's treatment of the Claimant was in any way attributable to the protected characteristic of his race? If so, the burden of proof shifts to the Respondent, who must prove on a balance of probabilities that such treatment was in no sense whatsoever on the protected ground; failing which the claim must succeed.

47 Ms Jeram helpfully summarises the individual acts or conduct complained of and relied upon by the Claimant as amounting to harassment (failing which, direct discrimination) at paragraph 51 of her skeleton. She there lists a succession of acts or omissions, commencing in about December 2015, and continuing through to and beyond the Claimant's dismissal on 8 October 2016; initially on the part of Dr Nehring alone, albeit subsequently adopted and pursued by the Respondent company. We have already summarised the relevant issues to be determined in our findings of fact in relation to most of those allegations; and now set out the remainder.

48 It is suggested by the Claimant that during 2016 Dr Nehring introduced and attended (unusually frequent) fortnightly meetings of staff in the escalator division, which was headed up by the Claimant, at which Dr Nehring continued to focus on the Claimant or *'put him under a microscope,'* intending both by his manner and in what he said to undermine the Claimant. Secondly, that whilst the Claimant was on garden leave and/or during the course of his notice, Dr Nehring said to one of the Claimant's colleagues (Mr Steve Hope) that the Claimant would not be returning to work for the Respondent; and that he also informed the Claimant's colleagues at a meeting on 18 July 2016 that a settlement had been reached with the Claimant when in fact this was not the case. Thirdly, that the Respondent failed to provide any details of any discrimination and diversity training which its directors and/or senior employees had undertaken, as requested in the Claimant's letter of 8 August 2016 (page 84), which request was repeated some three weeks later, on 22 August. Finally, and as already noted, the Claimant alleges that both the non-payment of bonus and commission, and the adoption of a sham or at least unfair redundancy process, were further incidents of harassment or direct discrimination.

49 First of all, we make plain that in our judgment, there was no evidence before the Tribunal to suggest, or from which we could reasonably conclude, that the Respondent's refusal to pay the Claimant an annual bonus in respect of 2015/16 of £14,000 (or £10,000, or indeed any such bonus) and also to pay him any commission from the Harrods Door 5 project was in any way caused by, or connected or related to, the Claimant's race or colour. Secondly, we will consider and determine the Claimant's allegations of harassment and/or discrimination in relation to the redundancy process and its outcome when we come to review those matters in the context of the Claimant's unfair dismissal complaint.

50 The remainder of the Claimant's harassment/discrimination allegations can be divided into two categories: (a) alleged acts and omissions where the Respondent disputes the factual matrix – in other words, that anything like what is alleged actually happened (e.g. the Claimant *'must act as a slave'*); and (b) acts and omissions which the Respondent accepts actually occurred, but where it denies that its treatment of the Claimant was in any way connected to his race (e.g. the disciplinary process and warning in December 2015). The following observations, we think, generally apply to both categories, albeit inevitably to different degrees.

51 The allegations raised by the Claimant in the summer of 2016 about Dr Nehring's treatment of him, in particular what he had said to and how he had behaved towards the Claimant in meetings or with witnesses being present, were investigated by Mr Schlenker as part of his combined grievance/appeal process, and we were provided with the resulting notes of interview. It is fair to say that none of those interviewed supported or corroborated the Claimant's allegations in any way. Mr Steve Hope said that he had *'100% never heard these things'* in relation to suggestions that Dr Nehring had bullied or discriminated against the Claimant, or spoken about slavery or the colour of his skin. He added that he was *'pretty sure'* that someone in the staff meetings would have spoken up, had any such conduct occurred. Another of those interviewed was Mr Gerald Whittington, one of the Respondent's branch managers, who is also black. He stated: *'Certainly I have not been party to any meetings where* (Dr Nehring) *put forward racial discrimination and bullying, not at all. In*

meetings (Dr Nehring) *asked tough and uncomfortable questions, he has been direct, also to me, but never singled anybody out. I am black as well and I never saw or felt discrimination, not by the company nor by* (Dr Nehring*). I would also have picked up this topic, if I would have heard anything like that. Dr Nehring is professional and challenging, but never unprofessional. But racism, no way.'*

52 It is also, we believe, significant that it was only at the conclusion of his oral evidence to the Tribunal that the Claimant said for the first time that he had raised or told anyone about Dr Nehring's allegedly bullying and discriminatory behaviour and remarks towards him, prior to his raising those allegations in his grievance/appeal letter of 7 July 2016, or in his telephone conversation with Dr Nehring during that month. We bear in mind that it was Dr Nehring who had appointed the Claimant as a director of the Respondent company in July 2015, shortly after his own arrival, and who had approved an increase in the Claimant's salary in about November 2015, as well as giving him a discretionary bonus in relation to the Harrods Door 5 project. There was no evidence and it was ultimately not suggested that, up until November 2015 at least, the working relationship between the Claimant and Dr Nehring was anything other than straightforward or business like. If, as the Claimant alleges, Dr Nehring's approach towards him then radically changed for the worse for no apparently good reason, then one might reasonably expect the Claimant, as a senior employee of the Respondent with a number of years' accrued service, to have at least sought an explanation by raising the matter with Dr Nehring; and if that was unsuccessful, then possibly with Mr Graham, the Head of HR in the UK; or even Mr Kevin Taylor, the Claimant's former boss and the Respondent's part time chairman; particularly since the Claimant alleges that Dr Nehring persisted in such unpleasantly aggressive behaviour for a period of months. Yet the Claimant never suggested that he had attempted to take any of those steps until the conclusion of his evidence, when he said he had spoken to Mr Taylor. That however raises further questions. If that is right, then one has to ask why the Claimant did not mention it before. Secondly, if the Claimant did in fact approach and inform Mr Taylor of Dr Nehring's conduct, as he now says he did, then it is reasonable to expect some action at least to have been taken in relation to what are on any view very serious allegations: yet it is not suggested that Mr Taylor took any steps (or indeed failed to do so). Finally, had this suggestion been raised at an earlier and more appropriate time, then it would have been open to the Respondent to call Mr Taylor as a witness before this Tribunal to confirm or deny what is now being said. In all the circumstances, we consider that it is unlikely that the Claimant did in fact say anything to Mr Taylor about any alleged concerns concerning Dr Nehring's treatment of him; and that it is probable that the Claimant put forward the suggestion when the absence of any prior complaint was first put to him.

53 Having heard and seen Dr Nehring over the course of his lengthy evidence, he did not strike us as the sort of individual who is likely to have acted in the aggressive and offensive manner alleged by the Claimant at either the Harrods Door 5 project meetings or in context of a private lunch. Of course, we appreciate that witnesses giving evidence to the Tribunal are usually on their 'best behaviour'; and we do not set any great store or weight on such impressions. More importantly, Mr Dyring Andersen, who of course has far greater knowledge and experience of Dr Nehring than ourselves, stated plainly that any such conduct would be completely out of character. It is significant that the only reason Mr Dyring Andersen travelled from Sweden to give

evidence to the Tribunal was in response to the earlier indication by the Claimant's legal advisers that they would be calling as a witness a Harrods employee who had attended the Door 5 project meetings (when Mr Andersen was also present) and who could apparently confirm how Dr Nehring had then behaved and what he had said. In fact, no such witness was called by the Claimant.

54 In relation to the Claimant's disciplinary hearing and outcome in December 2015, and the investigation leading up to it, we reject the Claimant's assertions that he was treated less favourably in comparison to other colleagues who were equally at fault, or who had in the past themselves committed the Respondent to deals which were at ostensibly lower prices than the Forever 21 contract, but who were not disciplined; that the investigation was biased and slanted against him; and that it was inappropriate and unfair to penalise him, when he had not in fact sent out the signed contract. We found Dr Nehring's evidence in relation to this issue to be clear and compelling. He accepted that everyone makes mistakes from time to time; that there may have been delay and confusion by other employees in advancing the contractual negotiations with Forever 21; that potentially a deal with Forever 21 could have been advantageous for the Respondent, which is why it had indicated a willingness to continue negotiations in December 2015; that the Claimant had a previously clean disciplinary record and that it was unusual to hold a disciplinary hearing for such a senior employee as a director (and indeed to issue him with a written warning); and that it was the Claimant's assistant who sent out the signed contract in the Claimant's absence. Dr Nehring explained that what concerned him above all, and what led him to take the steps that he did, had been the Claimant's lack of clarity, candour and frankness when he was repeatedly asked by senior colleagues whether or not he had signed the Forever 21 contract (which he had), and whether or not it had been sent out (irrespective of who had actually sent it). It was as a result of the Claimant not disclosing what were obviously vital facts that the Respondent had sought to withdraw from an apparently disadvantageous deal with Forever 21, only to be told that they were already contractually bound. In Dr Nehring's view, that conduct by a senior employee was of a different order of significance when compared with delay or simple oversight; and it was not so much the mistaken transmission of the contract by the Claimant's assistant, as the Claimant's subsequent failure to inform his colleagues when asked, that should be marked in a formal manner, rather than by an informal chat. It is not for us to say whether Dr Nehring's approach was right or wrong in all the circumstances; what we do say is that we are quite satisfied that his approach and the manner in which he dealt with the issue is certainly understandable, and cannot possibly be described as unreasonable or obviously unjustified. We find that there is no evidence and nothing to suggest that the Claimant's race had any bearing whatsoever on how he dealt with this issue or the Claimant in relation thereto.

55 Overall, we accept the evidence given by Dr Nehring, who we found to be a careful and reliable witness; we prefer his evidence to that of the Claimant, concerning whose credibility we have reservations for the reasons outlined above; and where their accounts differ or conflict, we have no hesitation in accepting that of Dr Nehring. In our judgment, there are no facts that suggest that the Respondent's conduct towards the Claimant had anything at all to do with his race, or from which we could conclude that its treatment of the Claimant was attributable in any degree to his race. We do not accept the Claimant's account of the Harrods Door 5 project meetings, or of the uncommon frequency of escalator department staff meetings, or of Dr Nehring's

conduct towards him at such meetings; or that Dr Nehring ever said anything like *'acting like a slave'* to the Claimant. Finally, whilst there was indeed some delay on the Respondent's part in providing details of the diversity training provided for their senior staff, we find nothing sinister in that: the Claimant's (perfectly proper) request was first put forward after the decision to dismiss him had been made and communicated to him, and we accept that such delay was probably due to the difficulty in locating records of the fairly limited training which had in fact been undertaken by the Respondent's staff. It follows therefore that in our judgment both the Claimant's harassment and direct race discrimination complaints fail and must be dismissed.

56 In relation to the Claimant's s.27 victimisation allegation, there is an admissibility issue. That was initially raised at the outset of the full merits hearing but, with Counsel's agreement, the issue was then 'shelved' to be addressed and determined by the Tribunal after we had heard all the evidence, together with submissions. The point arises in the following way. As already noted, the Claimant says that he spoke to Dr Nehring on the telephone on 4 July. Dr Nehring agrees that they did speak on the phone during July, and that one of their conversations may have taken place on that date. The Claimant says that during their phone conversations (including that on 4 July), he and Dr Nehring discussed possible settlement of any claim that the Claimant might bring against the Respondent arising out of the termination of his employment (which was confirmed following the second consultation meeting on 5 July, which the Claimant did not attend) on a 'Without Prejudice' basis. Dr Nehring agrees that they certainly had a number of such discussions on the phone, albeit they were ultimately unsuccessful. The Claimant's account is that during their discussions on 4 July, he went on to tell Dr Nehring that he would be presenting a grievance arising out of Dr Nehring's bullying, harassment and racial discrimination of him, and that, if the Respondent went ahead and terminated his employment (as anticipated at the consultation meeting on 20 June and confirmed in subsequent correspondence), then the Claimant would interpret that as victimisation, in addition to his claim for racial discrimination. As we have already set out, on 5 July it was decided that the Claimant be dismissed with three months' notice, and on 7 July the Claimant wrote to the Respondent, notifying them of those allegations against Dr Nehring, which were subsequently treated as a grievance. For his part, Dr Nehring strenuously denies that any mention of those allegations was raised by the Claimant on 4 July, and says that the first time he was personally informed of them was during his phone conversation with the Claimant on 19 July, following which he notified his managerial colleagues in Germany, as appears from the email at page 72A.

57 As we have already stated, we prefer Dr Nehring's evidence to that of the Claimant, and we think it more likely that Dr Nehring's recollection, supported by his contemporaneous email at page 72A, is correct. Accordingly, the Claimant's victimisation complaint cannot succeed, since the detriment complained of – in this case the decision to dismiss him – was taken on 5 July 2016, before the Respondent was first notified of the Claimant's allegations of bullying, harassment and race discrimination in his letter of 7 July, and before Dr Nehring was personally informed of them on 19 July.

58 However, in case we were wrong in coming to that conclusion, we go on to consider the situation in the event that the Claimant is correct, and that he did inform

Dr Nehring of the bullying, harassment and race discrimination allegations he was raising against him on 4 July. Plainly those allegations necessarily involve one or more breaches or *'contraventions'* of the Equality Act; equally plainly, they were communicated (assuming the Claimant is right) to the person who decided to dismiss him on the very next day. The issue then becomes whether the phone conversation between the Claimant and Dr Nehring is admissible since, on this version of the facts, it contained not only the critical notification of the allegations amounting to breaches of the Equality Act, but also 'Without Prejudice' discussions.

59 Both Counsel set out their submissions in relation to this issue extensively, Mr Bidnell-Edwards in a dedicated skeleton argument, and Ms Jeram at paragraphs 58 to 70 of her skeleton; and we do not repeat them here. Bearing in mind in particular the observations of Robert Walker LJ in Unilever plc v Procter & Gamble Co. [2000] 1 WLR 2436, as approved by Lord Clarke in Oceanbulk Shipping & Trading v TMT Asia Ltd & Ors [2010] UKSC 44, we agree with Ms Jeram that it is not possible as a matter of law for us to 'carve out' part of a telephone conversation, which it seems would not have taken place had there not been the possibility of a 'Without Prejudice' settlement between the parties, as being privileged and protected, since it referred explicitly to such a possible settlement, and simultaneously hold that the remainder of that phone conversation, in which the Claimant allegedly put forward his allegations of bullying, discrimination, and less favourable treatment, is admissible. The alternative course advanced by Mr Bidnell-Edwards seems to us to raise an artificial distinction between the two topics discussed, since we do not think it is possible to say, clearly and without doubt, that the allegedly admissible part of the conversation was not related and was wholly unconnected with the plainly inadmissible part of the conversation dealing with possible settlement. There must be a substantial risk that the two were inter-related, and that the threat of a grievance and discrimination proceedings was being used by the Claimant to put pressure on the Respondent to meet his settlement demands, whatever they may have been. Accordingly, in our judgment the whole of that alleged conversation on 4 July is inadmissible, and the Claimant's victimisation complaint would fail. Finally, and in the event that we were once again in error in coming to that conclusion, and that the part of the conversation in which the Claimant told Dr Nehring of his complaints that he would be pursuing as a grievance, and would allege victimisation if he were to be dismissed is in fact admissible evidence, then we make clear that we would not uphold that victimisation complaint. Our reasons for not doing so can be summarised as (a) that the Respondent's reason for dismissing the Claimant was already crystal clear – that he was the only candidate in a redundancy exercise; and (b) even if that was incorrect, and the redundancy exercise was a sham, then the reason for the claimant's dismissal was (as the Claimant himself alleges) his race, rather than anything he had said or threatened.

60 In relation to the Claimant's complaint of unfair dismissal, the first question to be determined is whether or not the Respondent has proved, on a balance of probabilities, that its reason for dismissing the Claimant was a potentially fair reason falling within section 98(1) or (2) Employment Rights Act 1996. The Respondent contends that its reason for dismissing the Claimant was redundancy, and that there was as a matter of fact a redundancy situation at the time of the Claimant's dismissal. The Claimant disputes that, arguing that because the Respondent acted unreasonably towards the Claimant, its suggestion that the reason for his dismissal was redundancy should not be accepted, that there was in truth no redundancy situation, and that the real reason

for the Claimant's dismissal related to his race. As before, we find that there is simply no evidence to suggest that the Claimant's race had anything to do with his dismissal, or that the redundancy exercise undertaken by the Respondent was an elaborate sham to cover up its genuine reason. Whilst we examine the overall fairness of the process adopted by the Respondent and its outcome hereafter, there is nothing to suggest that the Claimant's race played any part in it; and the evidence we heard suggested that the Respondent followed their standard redundancy practice and procedure (such as it is) in the Claimant's case. Whilst it is right to say that the other potential members of the redundancy pool for whom the Claimant contends (Ms Rollings, Mr Travers & Mr Burywood) are white and the Claimant is black, we bear in mind the Court of Appeal's guidance in Madarassy that something more than a difference in treatment and status is required to shift the burden of proof: and in our judgment, no such evidence or material has in fact been put forward. Similarly, and with respect to Mr Bidnell-Edwards, in Anya v Oxford University [2001] ICR 847, the Court of Appeal made clear that whilst unreasonable behaviour on the part of an employer might be evidence supporting an inference of discrimination, it does not on its own mean that there has been discrimination. We dismiss the suggestion that the real reason for the Claimant's dismissal was, or was connected to, his race, and go on to consider whether the Respondent has proved that it had a potentially fair reason, namely redundancy, for dismissing the Claimant, and whether or not there was in fact a redundancy situation.

61 The Respondent submits that the requirements of s.139 Employment Rights Act 1996 are satisfied, in that their requirement for employees to carry out work of a particular kind (in this case that of an escalator operations director) had ceased or diminished; alternatively, that this is a straightforward case where the same amount of work previously undertaken by the Claimant as escalator operations director and Ms Rollings, Mr Travers & Mr Burywood could be undertaken by fewer pairs of hands. In response, the Claimant submits that, even if the Respondent's reason for dismissing him was redundancy, there was no genuine redundancy situation, since there was no suggestion that the work which had previously been done by the Claimant would cease or diminish, merely that it would be allocated to others.

62 We remind ourselves that it is well established law that it is not the job of the courts or tribunals to review the decision of employers to make workers redundant; nor to decide whether an employer could have acted more fairly in adopting another course: the question is whether the course adopted by the Respondent employer fell within the range of reasonable responses available to it.

63 In our judgment, there is no doubt that the Respondent genuinely believed that a redundancy situation existed, and that that was their reason for dismissing the Claimant, since all the evidence points in that direction, and no other reason for their doing so has been suggested or established in evidence, other than that of the Claimant's race, which we have already rejected. We also accept that there was a genuine redundancy situation. Whether or not the "work of a particular kind" is simply limited to the functions and duties undertaken by the Claimant at the level of operations director, as we would accept to be the case here, or whether it covers the functions and duties undertaken by him and by Ms Rollings, Mr Travers and Mr Burywood, the fact remains that there was a reduction in the Respondent's requirement for employees to undertake that particular work, and that is an example of a redundancy situation.

64 The next issue to be addressed is the make-up of the redundancy pool which was established by the Respondent, consisting of the Claimant alone. The Claimant's argument from the outset has been that this was manifestly unfair, and that since he essentially undertook work of a broadly similar nature to that performed by Ms Rollings, Mr Travers and Mr Burywood, there should in fairness have been a pool of four, rather than simply himself. That can be most clearly seen in the Claimant's letters to the Respondent dated 13 and 14 July 2016 at pages 68 and 78 in the bundle; and in his solicitor's email (page 117) in advance of the Claimant's appeal, stating that: *'the Claimant's case is that the selection criteria was unfair; the pool of candidates being solely confined to him was unfair …'.*

65 We were reminded of the applicable principles in relation to the issue of the correct pool of redundancy candidates, as helpfully set out by the Employment Appeal Tribunal in Capita Hartshead Ltd v Byard [2012] IRLR 814. That provides inter alia that, whilst there is no legal requirement that a pool should be limited to employees doing the same or similar work, the question of how the pool should be defined is primarily a matter for the employer to determine; and that it would be difficult for the employee to challenge it where the employer has genuinely applied his mind to the problem. Secondly, the Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy. If so, it would be difficult, if not impossible, for an employee to challenge it.

66 Applying those principles to the evidence we heard, we are satisfied from Dr Nehring's evidence that he had in fact, and as he says, been considering a reorganisation of the Respondent's escalator division for a period of some months, and how that should proceed, prior to his meeting with the Claimant on 20 June 2016. Dr Nehring explained that the situation in the escalator division was an unusual one for the Respondent, in that exceptionally there was separate line of management represented by an operations director (the Claimant in this instance) over and above the branch manager or equivalent level, and which did not exist for example in the Respondent's larger UK elevator division, or in their counterparts abroad. That is reflected in Mr Graham's note of the first consultation meeting on 20 June 2016 when he records Dr Nehring as telling the Claimant: *'I want to explain to you my thoughts and proposal for a new structure for escalators. The present one is not usual.'*; and then goes on to outline the suggested division of the Claimant's duties between Ms Rollings, Mr Travers and Mr Burywood. Dr Nehring's approach is set out in the undated letter subsequently given or sent to the Claimant (page 59), which commences: *'As you know, wherever we can reduce indirect cost we must seek to do so, and against this background over several months I have been considering the structure in the escalator division and believe that the following changes would save cost and improve effectiveness…'*. Finally, Dr Nehring confirmed in his oral evidence that this was a rationalisation of the structure of the division for reasons of economy and that that was indeed the method he had adopted; and his evidence on this issue was not substantially challenged. In these circumstances, we accept that the Respondent employer had in fact given proper thought to the question of the appropriate redundancy pool; that it was entitled to come to the conclusion that the Claimant, in his capacity as escalators' operations director, was the only redundancy candidate; and that accordingly no issue concerning appropriate selection criteria

arose.

67 In relation to the issue of redundancy consultation, the first point to be made is that the Respondent has no redundancy policy. The Claimant was called to a meeting with Mr Graham and Dr Nehring on 20 June 2016, it is accepted with no warning or notice as to what was then to be discussed, and Dr Nehring immediately proceeded to outline what effectively was the Claimant's redundancy situation. It seems likely to us that the undated letter at page 59 was handed to the Claimant at that meeting, and in fact there is reference to a letter of that type being produced and handed over in Mr Graham's notes of the meeting. Whilst that letter fails to specify the return date for further discussion or consultation, once again Mr Graham's meeting notes (page 58) record the statement of *'a need to meet again a week today at 10 in Lehman Street'*. That suggests that the second consultation meeting was due to take place on 27 June, which is in fact confirmed in the letter at page 61. For the reasons we have already outlined, that proposed meeting did not go ahead, and the suggested rearrangement for 1 July was equally unsuccessful. The Respondent's last attempt to fix a date for the second consultation meeting with the Claimant is set out in Mr Graham's letter to him dated 30 June (page 62), suggesting 10am on 5 July at Lehman Street (the Respondent's London office). In that letter the Claimant (by then signed off sick) was reminded that he could participate in the meeting either in person, or by written representations, or by telephone on the day.

68 There is no evidence of any response from the Claimant or on his behalf to Mr Graham's letter of 30 June prior to the meeting on 5 July 2016 at Lehman Street, which he did not attend or participate in. As already noted, the Claimant's evidence was that he spoke to Dr Nehring on 4 July 2016, and Dr Nehring accepts that that is possible. What is however singularly absent is any suggestion from the Claimant, either in writing or orally, that he had had insufficient time or opportunity within which to consider matters, or that any further consultation meeting was premature at that stage. We also bear in mind that the Claimant, having said that he could not attend the proposed meetings on 27 June and 1 July, did not give any indication of when he would be able to attend any reconvened consultation meeting; that he never suggested that his inability to attend work due to ill-health also prevented him from either submitting written representations, or participating in any such meeting by telephone; and that as a matter of fact he was then well enough and able to instruct solicitors and to commence settlement negotiations with the Respondent, both via his solicitors and through his own correspondence and phone calls with them. Finally, there was no suggestion by the Claimant's solicitors at the appeal stage that the original decision to dismiss him was flawed or unfair due to the Claimant not having had adequate time or opportunity within which to prepare his response, or to participate fully in the consultation process. In all these circumstances, whilst we record our concerns at the Respondent's complete lack of any published or disseminated redundancy policy and procedure, the already noted omissions in the important confirmatory letter at page 59, and the absence of any specific enquiry or reference to the Claimant's ill-health and his resulting absence in Mr Graham's subsequent letters to the Claimant, we have come to the conclusion that the consultation process adopted by the Respondent in this case was, as we were told by Mr Graham, typical of their normal practice in such situations, and that it fell within the range of reasonable responses open to an employer, particularly in the absence of any complaint from or alleged prejudice to the Claimant. We are satisfied that the Respondent endeavoured to involve the Claimant in a second

consultation meeting, once he had had a chance to consider their proposals and formulate his response; that they repeatedly adjourned such a meeting, effectively at the Claimant's request; that the Claimant at no point indicated that it was inappropriate for such a meeting to then take place or that he was prevented from attending or participating; and that it was through no fault of the Respondent's that consultation with the Claimant was limited to the initial meeting on 20 June.

69 Turning to the issue of possible alternative employment, the evidence is that prior to the hearing of the Claimant's appeal a vacancy did arise at the Respondent for someone to fill an escalator sales role, a lower level role to that the Claimant had previously performed, and that the role was offered to the Claimant under cover of Mr Graham's letter of 23 September 2016. Once again, there seems to have been no response to or engagement with that offer, either from the Claimant or from his solicitor. Secondly, and although it was not explored in any detail in the evidence and submissions, there is a question mark concerning the leadership of the escalator new installation department, and the role of Mr Travers, which remains slightly unclear. Dr Nehring's evidence was that he had spoken to Mr Travers, in charge of escalator new installations, in advance of his meeting with the Claimant on 20 June 2016, and that Mr Travers had then agreed to undertake the additional burden of the new installation work which had previously been done by the Claimant, at least on an interim basis. Since Mr Travers had left the Respondent's employment by the end of 2016, it is clear that that interim arrangement did not last very long. Dr Nehring was not questioned about this matter at all, although it will be recalled that in the memorandum dated 12 August which was circulated to relevant staff members, it was stated that Dr Nehring, rather than Mr Travers, was taking on the Claimant's new installation work, at least on a temporary basis. The only evidence we heard concerning this was from Mr Graham, which was that he believed (without we think being entirely sure) that Mr Travers had left the Respondent's employment after the expiry of the Claimant's notice period on 8 October 2016, but before the end of that calendar year, and that Mr Annunen had been appointed to head that function. It might have been helpful to hear from Dr Nehring, since from the surrounding evidence it seems at least possible that he was the individual involved in any discussions or negotiations with Mr Travers; but he was not asked any questions about this matter, and it would be wrong for us to speculate. Overall, we accept that on the basis of the evidence we heard the Respondent has demonstrated that it undertook a reasonable search to identify alternative employment for the Claimant, but that none that was acceptable to him was identified.

70 That brings us finally to the appeal stage. Here again, we have some reservations about the procedure adopted by the Respondent. These include the fact that Mr Schlenker, the officer hearing and determining the appeal, on his own admission did not actually read the original documents and statements from witnesses concerning the Claimant's redundancy consultation and dismissal, or indeed the Claimant's subsequent allegations of bullying and discrimination that were treated as his grievance; but contented himself with simply reading the precis or summary of that documentation prepared for him by Mr Graham. Additionally, it is surprising that no notes were made of his interview of Dr Nehring concerning the Claimant's serious allegations against him, even if only to record the robust denials that Mr Schlenker says were all he responded; albeit interviews were conducted (and notes taken) with all other staff members relevant to or involved in the grievance allegations. We should

make clear that we raise no criticism of Mr Schlenker personally, since, as he frankly told us, this is the only appeal that he has ever been asked to deal with; and his own background and experience is in Germany, running the supranational unit of which the Respondent is a part. Given the seniority of Dr Nehring as the Respondent's CEO, and that the Respondent is the UK subsidiary of a fundamentally German (or at least European) undertaking, it is not surprising that a senior employee from an associated company with little if any prior experience or knowledge of English employment law and practice was appointed to hear the Claimant's appeal and to determine his grievance; and any procedural shortcomings arising as a result do not amount, in our judgment, to evidence of less favourable treatment of the Claimant on the grounds of his race. In any event, and despite our reservations, the main purpose of an appeal in almost all disciplinary or redundancy proceedings, including this one, is (at least potentially) to assist a respondent employer if and when something has gone amiss at the disciplinary stage, when it is possible that a full re-hearing can "cure" any such defect. However, that is not the case here, since the Claimant chose not to attend or participate in the appeal hearing, relying solely on the points made on his behalf by his solicitor in the letter of 6 October, which simply restated the claimant's position, and which points were addressed in Mr Schlenker's outcome letter. Accordingly, any defects in the Respondent's appeal procedure do not assist the Claimant.

71 In these circumstances and for these reasons, we are satisfied that the Claimant was not unfairly dismissed, and accordingly this complaint is dismissed as well.

Employment Judge Barrowclough

28 November 2017