



# EMPLOYMENT TRIBUNALS

## Claimant

Mr A Jadav

## Respondent

v Carter Jonas LLP

**Heard at:** Bury St Edmunds

**On:** 3 – 8, 10 September 2018

**In Chambers:** 11, 12 September 2018

**Before:** Employment Judge Warren

**Members:** Mr C Davie and Mr B Smith

## Appearances

**For the Claimant:** Mr T Sheppard, Counsel

**For the Respondent:** Mr P Strelitz, Counsel

## RESERVED JUDGMENT

The Claimant's claims that he was discriminated against by reason of race and/or perceived religious belief fail and are dismissed.

## RESERVED REASONS

### Background

1. Mr Jadav was employed by the respondent as a Graduate Development Surveyor, from 1 August 2016 until his dismissal on 22 May 2017. He brings this complaint of discrimination and harassment in relation to race and perceived religious belief.

### The Issues

2. The parties had agreed upon a list of the legal and factual issues in the case, which was presented to us at the outset of the hearing as set out below.

**BACKGROUND**

*The Claimant is of Indian Asian ethnicity and of the Hindu religion.*

*The Claimant has brought claims against the Respondent for:*

*(a) direct race and/or perceived religious discrimination under s.13 Equality Act 2010 (“EqA 2010”);*

*(b) indirect race discrimination under s.19 EqA 2010; and [not pursued]*

*(c) harassment by reason of race or perceived religion under s. 26 EqA 2010.*

*The Respondent denies each of the Claimant’s claims made against it.*

*The Claimant’s claims are based on 16 numbered allegations of fact (each an “Allegation”). The Allegations are set out in Schedule 1 to this List of Issues.*

**DIRECT RACE AND/OR PERCEIVED RELIGIOUS DISCRIMINATION**

1 *In relation to each of Allegations 1 to 12:*

1.1 *did the relevant acts or omissions alleged by the Claimant occur?*

1.2 *if the acts or omissions did occur, do they constitute a continuing act under s. 123(1)(b) ERA 1996 such that they are not time-barred from forming part of these proceedings.*

1.3 *if the acts or omissions did occur but they do not constitute a continuing act under s. 123(1)(b) ERA 1996, which of Allegations 1-12 fall within three months of 21 July 2017 (the date on which the ACAS Early Conciliation Certificate indicates that ACAS was notified of the Claimant’s intention to bring a claim and which was the latest possible date he could do so).*

1.4 *specifically, has the Claimant established facts (in relation to any of Allegations 1-12 that are not time-barred and which the Tribunal finds occurred), from which the Tribunal could decide that race and/or perceived*

*religious discrimination has occurred, in the absence of any other explanation (for the purposes of s. 136 EqA 2010)?*

1.5 *if yes (in relation to any of Allegations 1-12 that are not time-barred and which the Tribunal finds occurred), what comparator should be used for determining whether the Claimant has suffered less favourable treatment because of his race and/or perceived religion, for the purposes of s. 23 EqA 2010? Specifically, is the correct comparator:*

*(i) a real comparator identified by the Claimant, whose circumstances are not materially different to those of the Claimant; or*

*(ii) a hypothetical person of non-Asian ethnicity and/or not perceived to be of the Muslim faith, who is a Graduate Surveyor at the Respondent and/or whose circumstances are not materially different from the Claimant (including his responsibilities)?*

1.6 *having established the correct comparator (the “**Relevant Comparator**”), has the Respondent shown that in relation to any of the Allegations 1-12 that are not time-barred and which the Tribunal finds occurred, it treated the Claimant no less favourably, because of his race and/or perceived religion, than it treated or would have treated the Relevant Comparator, for the purposes of s. 13 EqA 2010?*

## **HARASSMENT**

2 *In relation to each of Allegations 14 to 16 only (for the purposes of s. 26 EqA 2010):*

2.1 *did the relevant acts or omissions alleged by the Claimant occur?*

2.2 *specifically, has the Claimant established facts from which the Employment Tribunal could decide that the Claimant experienced unwanted conduct related to his Asian ethnicity and/or the perception that he was of the Muslim faith?*

2.3 *if yes, has the Claimant established facts from which the Employment*

*Tribunal could decide that this conduct had the purpose or effect of either violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant having regard to the perception of the Claimant, the other circumstances of the case and whether it was reasonable for the conduct to have that effect?*

**REMEDY**

- 3        *If any of the Claimant's claims under EqA 2010 should succeed:*
- 3.1        *should the Tribunal make a declaration and/or recommendation as to the rights of the Claimant and the Respondent, for the purposes of s. 124(2)(a) and (c) EqA 2010?*
- 3.2        *what, if any, compensation should the Tribunal award to the Claimant, for the purposes of s. 124(2)(b) EqA 2010, in relation to: (i) any financial losses caused by any discrimination and/or harassment and/or victimisation; and (ii) injury to feelings.*
- 3.3        *what, if any, reduction should be made to any compensation awarded to the Claimant, for:*
- (i) failure to lodge a grievance in respect of matters that he alleged took place during his employment with the Respondent; and/or*
- (ii) failure to appeal against the Respondent's decision to terminate his employment.*
- 3.4        *What, if any, increase should be made to any compensation awarded to the Claimant, for any failure by the Respondent to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures?*

**SCHEDULE 1**

**ALLEGATIONS OF FACT**

**DIRECT DISCRIMINATION**

1. ***Allegation 1 (Paragraphs 16, 23, 31 and 33 of Grounds of Claim; paragraphs 1 – 40 of Further and Better Particulars):*** *Between January – May 2017, Mathew Forster (“MF”) isolated the Claimant in team meetings and specifically excluded him from team group communication by reason of the Claimant’s race and/or perceived Muslim.*
2. ***Allegation 2 (Paragraph 16 and 23 of Grounds of Claim; paragraphs 41 – 49 of Further and Better Particulars):*** *Between January – May 2017, MF expected the Claimant to generate new work from his own initiative with no guidance provided, unlike the other graduates, by reason of his race and/or perceived religion as a Muslim.*
3. ***Allegation 3 (Paragraph 16, 28, 29, 32, 35 and 36 of Grounds of Claim; paragraphs 50 – 75 of Further and Better Particulars):*** *Between January – May 2017, the Claimant’s workload was increased to an unmanageable burden with unrealistic targets by reason of his race and/or perceived religion as a Muslim.*
4. ***Allegation 4 (Paragraph 17 of Grounds of Claim; paragraphs 76 – 87 of Further and Better Particulars):*** *Between January – May 2017, MF did not return the Claimant’s phone calls or emails by reason of his race and/or perceived religion as a Muslim.*
5. ***Allegation 5 (Paragraph 18, 30, 31, 32, 37 and 38 of Grounds of Claim; paragraphs 88 – 100 of Further and Better Particulars):*** *Between January – May 2017, MF did not provide the same level of managerial support to the Claimant as the other graduates experienced by reason of his race and/or perceived religion as a Muslim.*
6. ***Allegation 6 (Paragraph 21 of Grounds of Claim; paragraphs 101 – [101] of Further and Better Particulars):*** *The Claimant’s initial appraisal on 7 March 2017, took place in a meeting room, whereas other members of his team had their appraisals in a pub or at Costa Coffee. Despite the Claimant’s request he was not permitted to have his appraisal in a similar more relaxed venue by reason of his race and/or perceived religion as a Muslim.*

7. ***Allegation 7 (Paragraph 24 of Grounds of Claim; paragraphs 103 – 105 of Further and Better Particulars):*** On 7 March 2017, when MF learned of the Claimant's ambition to take Planning to 'Level 3', he told him to not "get out of his depth" out of a desire to hold back the Claimant's progress by reason of his race and/or perceived religion as a Muslim.
8. ***Allegation 8 (Paragraphs 25, 26, 29, 30, 31 and 34 of Grounds of Claim; paragraphs 106 – 109 of Further and Better Particulars):*** Following the Claimant's appraisal on 7 March 2017, further reviews were scheduled on 6 April 2017 and 11 May 2017, without properly outlining the areas of performance to improve and without sufficient support or time for the Claimant to improve (as he would be taking 11 days of annual leave before the appraisal meeting on 11 May 2017). This treatment was by reason of the Claimant's race and/or perceived religion as a Muslim.
9. ***Allegation 9 (Paragraph 27 of Grounds of Claim; paragraphs 110 – 113 of Further and Better Particulars):*** On 7 March 2017, MF refused the Claimant's requests to attend appropriate and relevant courses by reason of his race and/or perceived religion as a Muslim.
10. ***Allegation 10 (Paragraph 40 of Grounds of Claim; paragraph 115 of Further and Better Particulars):*** Between January – May 2017, MF excluded the Claimant from client meetings by reason of his race and/or perceived religion as a Muslim.
11. ***Allegation 11 (Paragraphs 41 and 44 of Grounds of Claim; paragraphs 116 - 127 of Further and Better Particulars):*** Between February – May 2017, the Respondent sought to circumvent the contractual procedure for dismissal by reason of his race and/or perceived religion as a Muslim.
12. ***Allegation 12 (Paragraphs 43, 45 and 46 of Grounds of Claim):*** The Claimant was dismissed from employment on 22 May 2017 for unclear reasons by reason of his race and/or perceived religion as a Muslim.

**HARASSMENT**

13. ***Allegation 14 (Paragraphs 10-13 of Grounds of Claim):*** *On Thursday 8 December 2017 at approximately 7pm at the Cambridge Wine Merchant, MF engaged the Claimant in conversations regarding religion which had the purpose or effect of violating the Claimant's dignity by reason of his race and/or perceived religion as a Muslim.*
14. ***Allegation 15 (Paragraphs 14-15 of Grounds of Claim; paragraphs 130 – 133 of Further and Better Particulars):*** *On Thursday 2 March 2017, MF mocked the Claimant for cycling to work and between the period of February 2017 – March 2017 mocked the Claimant for the smoothies that he consumed which had the purpose or effect of violating the Claimant's dignity by reason of his race and/or perceived religion as a Muslim.*
15. ***Allegation 16 (Paragraphs 16, 19 – 20, 22, 33 and 37 of Grounds of Claim; paragraphs 134 – 144 of Further and Better Particulars):*** *Between January – May 2017, MF targeted the Claimant's work for criticism and lost his temper with the Claimant without checking his work properly, which had the purpose or effect of violating the Claimant's dignity by reason of his race and/or perceived religion as a Muslim.*
3. At the outset of the hearing, Mr Shepherd confirmed that the complaint of indirect discrimination is not pursued.
4. Unfortunately, the list of issues was not as comprehensive as I would have liked, in that the above listed allegations do not reflect a series of specific allegations, (and therefore disputes as to fact), set out in further and better particulars provided by Mr Jadav, in an undated document appearing in the bundle at pages 68 – 107. I summarise those additional allegations as expanded by the further and better particulars, in the following paragraphs below. One or two planning matters have been anonymised by me, just in case they are sensitive, bearing in mind these reasons will now be published on the internet.
5. Allegation 1, (isolated from meetings and communications):
  - 4.1 Being excluded from what were known as, New Homes meetings;
  - 4.2 Being excluded from Eastern Division Residential Team communications;

- 4.3 Being excluded from informal catch ups;
  - 4.4 Being excluded from instructions and projects, (including inter alia Salhouse Road, Sprowston, Rackheath, Thaxted and Project R), and
  - 4.5 Being excluded from communications in relation to appraisals and reviews
5. Allegation 2, (expected to generate new work):
- 5.1 In February 2017, instructed by Mr Combes that he should generate new work to impress Mr Forster;
  - 5.2 On 23 February 2017, Mr Forster asked Mr Jadav what work, if any, he had brought in;
  - 5.3 On 6 April 2017, Mr Forster told Mr Jadav he did not know what new work he had brought in, and
  - 5.4 On 6 April 2017, Mr Forster asked Mr Jadav what, if any, fees he had made that month
6. Allegation 3, (work load increased to unmanageable burden):
- 6.1 On 15 February 2017, post it sticker, "find comparable evidence";
  - 6.2 On 15 March 2017, Mr Forster required Mr Jadav to research sales revenues in respect of various locations by 17 March, knowing that Mr Jadav was due to attend residential graduate training on 16 and 17 March;
  - 6.3 On 15 March 2017, Mr Forster told Mr Jadav to work over the coming weekend;
  - 6.4 On 20 March 2017, when Mr Jadav informed the Eastern Division Planning and Development team of his job list for that week, the team manager, Mr Brown, commented, "*That's a lot of work*";
  - 6.5 On 5 April 2017, Mr Combes instructed Mr Jadav to attend the Cambridge City Council committee meeting that afternoon;
  - 6.6 In a letter dated 24 April 2017, Mr Jadav was provided with a, "*list of colossal jobs to be undertaken*", before 11 May 2017;
  - 6.7 On 8 May 2017, Mr Forster instructed Mr Jadav to prepare a last minute proposal for Project L;
  - 6.8 Mr Combes instructed Mr Jadav to prepare 12 development appraisals between 9 and 16 May 2017;



- 6.9 Mr Jadav was expected to present a Vision 2020 presentation on 16 May 2017, and
  - 6.10 On 18 May 2017, Mr Jadav was given last minute instructions to undertake research in respect of Project R.
7. Allegation 4, (Mr Forster did not return the claimant's phone calls or emails). Specifically, Mr Jadav complains of Mr Forster not replying to the following:
- 7.1 Email of 11 January 2017, regarding APC and a reminder on 22 February 2017;
  - 7.2 Email of 31 January 2017, in respect of attending a course relating to his APC;
  - 7.3 Email of 3 March 2017, regarding Mr Jadav's capacity for work;
  - 7.4 On weekend of 18 and 19 March 2017, Mr Jadav says he sent several text messages and left several voice mails;
  - 7.5 Email 19 March 2017, in which Mr Jadav asked Mr Forster whether he should bring anything to a meeting on 19 May, relating to the Thaxted site;
  - 7.6 Mr Forster needed reminding to reply to a leave request;
  - 7.7 Mr Forster failed to reply to a request made on 21 May, to postpone a meeting on 22 May, at which Mr Jadav was dismissed.
8. Allegation 5, (not providing Mr Jadav with the same level of managerial support as others):
- 8.1 Mr Forster met with graduate surveyors, Jeremy Gibson and Jack Sharp, in respect of the Thaxted project and other projects to brief them, but did not provide the same support to Mr Jadav;
  - 8.2 Mr Forster instructed Mr Jenners from the planning team to prepare notes for the Thaxted site which he knew, Mr Jadav could have done;
  - 8.3 On 13 March 2017, Mr Forster emailed Mr Jadav with unclear instructions relating to Kier Homes;
  - 8.4 Mr Forster instructed Mr Jadav to assist other graduates with their projects;
  - 8.5 Mr Forster spoke pleasantly to Mr Gibson and Mr Jenners, but swore at, lost his temper with and mocked Mr Jadav;

- 8.6 Mr Forster returned the phone calls and emails of other graduates, but did not afford Mr Jadav the same courtesy.

[There are no additional allegations to note in respect of Allegations 6 to 10]

9. Allegation 11, (seeking to circumvent procedure for dismissal):
- 9.1 Providing insufficient notice of capability concerns;
  - 9.2 Not providing Mr Jadav with examples;
  - 9.3 Not putting in place a performance improvement plan;
  - 9.4 Ignoring Mr Jadav's requests to attend a course;
  - 9.5 Did not give Mr Jadav warning about the potential consequences of his failure to improve;
  - 9.6 Did not provide Mr Jadav with notes of meetings;
  - 9.7 Did not provide Mr Jadav with notice of dismissal;
  - 9.8 Did not allow Mr Jadav to be accompanied at his dismissal meeting;
  - 9.9 Did not allow Mr Jadav to appeal his dismissal;
  - 9.10 Mr Forster was aggressive and lost his temper with Mr Jadav on 7 March, 6 April and 11 May in meetings and mocked Mr Jadav.
10. Allegation 16, (Mr Forster targeted Mr Jadav's work for criticism and lost his temper, without checking his work properly):
- 10.1 On 7 March 2017, Mr Forster lost his temper, swore at Mr Jadav for submitting his appraisal form three days and not five days before the date of the appraisal;
  - 10.2 On 7 March 2017, Mr Forster criticised Mr Jadav for not having a marketing board erected in good time and ignored his explanation that he had chased the company responsible;
  - 10.3 On 6 April 2017, during the second appraisal, Mr Forster dismissed Mr Jadav's work in relation to what we call Project M without in fact checking that it had been done;
  - 10.4 On 8 May 2017, Mr Forster lost his temper and mocked Mr Jadav whilst reviewing his work in relation to what we will call Project L;

- 10.5 On 11 May 2017, Mr Forster failed to appreciate how hard Mr Jadav had worked to complete new work, which had been set for him within a short time frame;
- 10.6 After the final appraisal of 11 May, Mr Forster did not view the work which Mr Jadav had completed in respect of the North Hertfordshire Site Search Project.

**Evidence**

- 11. For the claimant, we had a witness statement from Mr Jadav and a statement from a Ms Stephanie Lott.
- 12. For the respondent, we had witness statements from:
  - 12.1 Mr Richard Combes;
  - 12.2 Mr Nicholas Muncey;
  - 12.3 Mr Matthew Forster, together with a supplemental witness statement;
  - 12.4 Ms Natali Edgell;
  - 12.5 Mr Robert Preston, and
  - 12.6 Ms Katherine Oughton.
- 13. We did not hear evidence from Ms Oughton. However, we were asked to take the evidence of Ms Oughton into account and we did so, attributing to her witness statement such weight as we considered appropriate, bearing in mind that she was not here to have her evidence challenged under oath.
- 14. We had before us four paginated and indexed bundles of documents, three prepared by the respondent, a fourth provided by Mr Jadav.
- 15. I would make the observation as a matter of practice, that employment tribunals tend to find it more helpful if bundles of documents are assembled in chronological order, rather than in batches of documents matching particular descriptions.
- 16. On day one, we read the witness statements and read or looked at, the documents referred to therein. We reminded the representatives that they must not assume that we have read and taken on board everything in the documents and they must make sure that they take us to what they consider to be important, during our hearing of the evidence.
- 17. Over the course of four and a half days, we heard evidence from the witnesses, with closing submissions being completed by lunch time on day six, the 10 September 2018.

### **The Law**

18. The relevant law is set out in the Equality Act 2010.
19. Section 39 provides an employer must not discriminate against an employee by dismissing him or subjecting him to a detriment.
20. Race and religious belief are two of a number of protected characteristics identified at s.4.

### ***Direct Discrimination***

21. Mr Jadav says that he was directly discriminated against because of his race and/or his perceived religion. Direct discrimination is defined at s.13(1):

*“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”.*

22. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the claimant, but not having his protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The employee must show that he has been treated less favourably than that real comparator was treated or the hypothetical comparator would have been treated.
23. How does one determine whether any particular less favourable treatment was, “because of” a protected characteristic? Under the previous legislation, the term used to proscribe direct discrimination was, “on the ground of” the particular protected characteristic. In the Court of Appeal, Lord Justice Underhill confirmed in Onu v Akwiwu and Taiwo v Olaigbe [2014] IRLR 448 at paragraph 40 that there was no difference in meaning between, “because of” and “on the grounds of”.
24. As Lord Justice Underhill explained in Onu v Akwiwu and Taiwo v Olaigbe, what constitutes the grounds or reason for treatment will vary depending on the type of case. He referred to the paradigm case in which a rule or criterion that is inherently based on the protected characteristic is applied. There are other cases, not involving the application of discriminatory criterion, where the protected characteristic has operated in the discriminator’s mind in leading him to act in the manner complained of. The leading authority on the latter is Nagarajan v London Regional Transport [1999] IRLR 572 and in particular, the speech of Lord Nicholls of Birkenhead, (I quote from paragraphs 13 and 17):

*“...in every case it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator...”*

*I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn.”*

25. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, “significant influence”:

*“Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.”*

26. Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285; the Tribunal has to find that by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work.

### **Harassment**

27. Harassment is defined at s.26:

*“(1) A person (A) harasses another (B) if—*

*(a) A engages in unwanted conduct related to a relevant protected characteristic, and*

*(b) the conduct has the purpose or effect of—*

*(i) violating B's dignity, or*

*(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B...*

*(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*

*(a) the perception of B;*

*(b) the other circumstances of the case;*

*(c) whether it is reasonable for the conduct to have that effect.*

*(5) The relevant protected characteristics are—*

*...*

*race;*

*religion or belief;*

*...*

28. We will refer to that henceforth as the proscribed environment.
29. The conduct complained of that is said to give rise to the proscribed environment must be related to the protected characteristic. That means the Tribunal must look at the context in which the conduct occurred. It also means that general bullying and harassment, in the colloquial sense, is not protected by the Equality Act; protection from such behaviour only arises if it is related in some way to the protected characteristic. See Warby v Wunda Group Plc UKEAT/0434/11/CEA
30. The EAT gave some helpful guidance in the case of Richmond Pharmacology v Dhaliwal [2009] IRLR 336. It is a case relating to race discrimination, but his comments apply to cases of harassment in respect of any of the proscribed grounds.

*“We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person’s dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. Whilst it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred). It is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every*

*unfortunate phrase.”*

**Burden of Proof**

31. Section 136 deals with the burden of proof:
- “(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*
32. The Appeal Courts guidance under the previous discrimination legislation continues to be applicable in the context of the wording as to the burden of proof that appears in the Equality Act 2010. That guidance was set out in Igen Limited v Wong and others [2005] IRLR 258. That case sets out a series of steps which we have carefully observed in the consideration of this case and we will set them out-
- 32.1 It is for the Claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation that the Respondent has committed an act of discrimination against the Claimant.
- 32.2 If the Claimant does not prove such facts, he will fail.
- 32.3 It is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit discrimination even to themselves.
- 32.4 The outcome, at this stage, of the analysis by the Tribunal will, therefore, depend upon what inferences it is proper to draw from the primary facts found by the Tribunal.
- 32.5 At this stage the Tribunal does not have to reach a definitive determination that such facts would lead to the conclusion that there was an unlawful act of discrimination. At this stage the Tribunal is looking at the primary facts proved by the Claimant to see what inferences of secondary fact could be drawn from them.
- 32.6 In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.
- 32.7 These inferences can include, in appropriate cases, any inferences that are just and equitable to draw from evasive or equivocal replies to questionnaires.

- 32.8 Likewise, the Tribunal must decide whether any provision of any relevant Code of Practice is relevant and if so to take it into account. This means that inferences may also be drawn from any failure to follow a Code of Practice.
- 32.9 Where the Claimant has proved facts from which conclusions could be drawn, that the Respondent has treated the Claimant less favourably on the prohibited grounds, then the burden of proof moves to the Respondent.
- 32.10 It is then for the Respondent to prove that it has not committed the act.
- 32.11 To discharge that burden of proof it is necessary for the Respondent to prove, on the balance of probabilities, that the prohibited ground in no sense whatsoever influenced the treatment of the Claimant, (remembering that the test now is whether the conduct in question was, "because of" the prohibited ground – see Onu v Akwivu referred to above).
- 32.12 The above point requires the Tribunal to assess not merely whether the Respondent has provided an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the prohibited ground was not a ground for the treatment in question.
- 32.13 Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, the Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.
33. This does not mean that we should only consider the Claimant's evidence at the first stage. Madarassy v Nomura International plc [2007] IRLR 246 CA is authority for the proposition that a Tribunal may consider all the evidence at the first stage in order to make findings of primary fact and assess whether there is a *prima facie* case; there is a difference between factual evidence and explanation. That case also confirms that a mere difference in treatment is not enough.
34. Tribunals are cautioned against taking too fragmented an approach when there are many individual allegations of discrimination. Although we should make individual findings of fact on each allegation and consider whether they amount to an instance of discrimination, we should also stand back, look at the bigger picture and adopt a holistic view on whether the Claimant has been subject to discrimination. See Quershi v Victoria University of Manchester [2001] ICR 863, Rihal v London Borough of Ealing [2004] IRLR 642 and Fraser v Leicester University



EKEAT/0155/13/DM

**The Facts and Chronology**

35. The respondent is part of the Carter Jonas Group of companies, providing property development advice and transaction services UK wide. It employs something in the region of 750 individuals, in addition to which there are 100 partners.
36. The respondent has provided statistics as to the diversity of its workforce. This information has been provided in response to a specific request from the claimant, as to the make-up of its workforce as at September 2016. The information supplied shows that of 59 graduates employed on 1 September 2016, 55 gave as their ethnicity, white, 1 Chinese, 2 Asian or Indian and 1 was not disclosed. As to nationality, 55 were described as British, 1 Bulgarian, 1 Chinese, 1 Indian and 1 not disclosed. The respondent did not at that time keep information as to the religious diversity of its workforce. Across the business, the information as to diversity has only been provided as to 120 or so employees; this is because the respondent had not been recording the ethnicity of its workforce, just nationality. As to nationality, 614 are recorded as British and the remainder recorded as being from a wide variety of different nationalities. Limited information is given as to the overall religious make-up of the workforce; 32 described as Christian, 2 Hindu, 2 Muslim, 29 “non” and 1 not disclosed. Again, because the respondent had not been previously recorded the religious make-up of its workforce. This information is at page 914 and 915.
37. Mr Jadav ascribes to himself the ethnicity of British Asian Hindu.
38. The respondent has an equal opportunities policy, which is set out at page 222. It provides for suitable training and makes reference to a grievance procedure relating to equal opportunities and harassment issues.
39. In respect of equality and diversity training, the respondent has a programme whereby employees are required to complete online training every three years. Of the protagonists in this case, we note that Mr Forster was requested to complete such training on 3 January 2017 and did so on 7 February 2017. Mr Combes was requested to do that training on 25 January 2017 and did it on 23 February 2017. Mr Jadav was requested to do it on 3 November 2016 and despite a number of reminders, never completed it.
40. Mr Jadav graduated in 2016 with a degree in planning and development.
41. During his academic studies, Mr Jadav had been placed at a firm called, Januarys Consultant Surveyors, between September 2013 and September 2014. He worked in the planning team for a partner called Mr Hyde. During this time, Januarys was taken over by the respondent.

42. The year at Januarys was a successful year for Mr Jadav and it led to his being offered employment with the respondent as a Graduate Trainee after he had graduated.
43. Mr Jadav's employment with the respondent commenced on 1 August 2016. A copy of his contract of employment was in the bundle at page 151. The contract provides that Mr Jadav would report to a partner called Mr Brown. His hours of work were 9 to 5:30 pm, or such other hours as he needed to perform his duties, without further remuneration. Clause 22.1 of the contract provides that the respondent's disciplinary procedure does not form part of the contract.
44. On the subject of disciplinary procedure, the disciplinary policy is in the bundle at page 218. This policy is said to apply to both conduct and performance. It states that employees with less than two years' service may not be covered by the disciplinary process.
45. There is a job description for Mr Jadav in his role as Graduate Development Surveyor, at page 245 of the bundle. There was controversy in this regard, because the document clearly refers to page 1 of 2 and the second page is missing. In respect of other similar documents in the bundle, the second page is included, see for example, the job description for Graduate Planner at 247 and for Graduate Commercial Surveyor at page 243. Mr Sheppard suggested the respondent had deliberately omitted to include page 2 so as to disguise the fact that this was not a bespoke job description, but an advertisement and to make it look as if the claimant was misleading the tribunal when he said he could not find his job description on the intranet. The fact of the matter is that on the face of page one of the document, one can see that it is clearly part of a job advertisement. For example, the third paragraph begins with, *"We are hiring a Graduate Development Surveyor to join our Planning and Development Division in Leeds"*. Nevertheless, this is offered by the respondent as the job description, applicable to the claimant in his role as a Graduate Development Surveyor and it lists his primary tasks as follows:
- 45.1 Supporting the professional team with development and agency sales and acquisitions;
- 45.2 Assist with project management and development opportunities;
- 45.3 Develop relationships with clients, attend client meetings and ensure client requirements are met;
- 45.4 Report writing;
- 45.5 Carry out research to support the professional team with client requirements;
- 45.6 Support with valuations;

- 45.7 Assist with other general or professional work;
  - 45.8 Support the team with day to day activities;
  - 45.9 Develop knowledge with the Carter Jonas Business Structure, its clients and systems and processes;
  - 45.10 Work diligently towards achieving MRICA qualification, through the APC Structured Training Scheme;
  - 45.11 Take responsibility for personal development, actively seeking out opportunities to broaden skills and experience;
  - 45.12 Identify opportunities to develop the business.
- 46. Certainly, that list of tasks accords with our understanding of the role of the Graduate Development Surveyor, which Mr Jadav was employed to undertake
  - 47. It is interesting to note that the job description appearing at page 247, is that of Graduate Planner, the alternative role which ultimately the respondent suggested Mr Jadav was better suited to.
  - 48. Part of either role, is to achieve the RICS APC.
  - 49. Mr Jadav joined the Residential Development Team. That is the team that deals with land that has the potential to gain planning permission for residential development. The work might involve consultancy, acquisition or brokerage. It is not to be confused with the work of the Planning Team, which deals with planning applications, promotion and site analysis.
  - 50. Qualifying for RICS APC is usually expected to take about two years.
  - 51. The Residential Development Team and the Planning Team work together within an over-arching structure as the Planning and Development Team.
  - 52. There are three other aspects to the respondent's business referred to as Commercial, Residential and Rural.
  - 53. At the time Mr Jadav joined, the Residential Development Team was without a manager. He was therefore at that point, the third in a team of three, the other two members being Mr Combes, an Associate Partner whose speciality was Public Sector Consultancy and Mr Muncey, who was a Residential Land Broker. The team reported to Mr Brown, Head of Planning and Development.
  - 54. To assist with the APC, Mr Rooke was appointed as Mr Jadav's APC counsellor, (Mr Rooke had previously worked with Mr Jadav at Januarys), and Mr Combes was appointed to work as his APC supervisor.

55. Mr Muncey had known Mr Jadav at Januarys. He told us that he had concerns about Mr Jadav joining the Development Team from the start and that he had raised his concerns with Mr Hyde, who had led on Mr Jadav's recruitment. Mr Muncey describes the difference in aptitude between planning and development as that planning requires technical analysis, whereas development requires an outgoing personality and strong communication skills, someone who is good at relationship building. He was not sure that Mr Jadav would be a natural at this type of work.
56. On 10 August 2016, Mr Jadav attended what is known as a New Homes meeting, which was a regular meeting between the development team and the New Homes team, whose role was to sell new build properties. The planned future meetings were subsequently entered into Mr Jadav's outlook diary by the receptionist Ms Oughton, on the instructions of Mr Muncey. Mr Jadav complains that Mr Forster instructed him not to attend subsequent meetings on 13 February, 13 March and 10 April. As we will see below, Mr Jadav did attend a New Homes meeting on 10 May 2017, because, (he says), Mr Muncey, Mr Combes and Mr Forster were unable to. He had asked Mr Muncey if he could therefore attend and he agreed. When he had mentioned it to Mr Forster, Mr Forster had objected but he attended anyway on encouragement from Mr Muncey, without Mr Forster's knowledge.
57. Mr Forster joined the respondent as Head of the Residential Development Team on 3 October 2016.
58. On 21 October 2016, Mr Jadav completed his probationary period. His employment was confirmed by a letter sent to him of that date, page 180.
59. After Mr Forster's arrival, regular team meetings were held in a local pub. Mr Jadav attended them all and he drank alcohol along with everybody else.
60. The events on 8 December 2016 are controversial. There was a Christmas meal for the Planning and Development Team. At the invitation of Mr Forster, drinks were to be taken before hand at a nearby bar. Mr Jadav says that Mr Forster turned the conversation to God and said that he didn't understand why anybody would pray and that he made reference in negative terms to people praying five times a day. Later in the restaurant, Mr Jadav says Mr Forster engaged him in conversation about religion and God and that Mr Jadav turned the conversation towards networking, when M Forster agreed that networking was a good practice in order to cultivate business. Suffice to say, at this stage, Mr Forster denies all of this.
61. On 11 January 2017, Mr Jadav sent an email addressed to Mr Forster, Mr Muncey and Mr Combes, which begins, "*Dear Matt, et al*", (Matt is an abbreviation for Matthew, Mr Forster's first name). In this email he set out in tabular form, APC competencies which he has selected. It concludes with his saying that he is keen to help the development team with those

areas of work, that he had spoken to Mr Combes about the need to carry out some work in other teams, and concludes, *"I hope this is useful in the very first instance"*. Mr Jadav complains that Mr Forster did not reply to this email. On 22 February 2017, Mr Jadav resent the email to Mr Forster alone, writing that he would be grateful if they could discuss these competencies, *"next Wednesday morning"*. The following Wednesday would be 1 March and there is an entry in Mr Jadav's diary for a meeting that day, but that would appear to be with Mr Rooke, his APC Counsellor. The purpose of the meeting is expressed in the diary to be to, "review APC docs."

62. On 13 January 2017, Mr Jadav sent an email to Mr Forster and to Mr Combes, asking if he could attend an online seminar on 7 February. He complains that this request was ignored by Mr Forster.
63. On 9 February 2017, Mr Forster sent an email to Mr Combes and Mr Muncey, opening with the salutation, *"Dear Both"*, informing them that he had secured instructions to try and buy a particular piece of development land through an organisation called, PP. Mr Jadav complains that he was left out of this and that from this point onward, he felt that Mr Forster intended to alienate him.
64. Mr Forster encouraged and helped Mr Jadav set up and run a networking event, a curry night, on 9 February 2017. As well as encouraging him to run the event, he helped him put together a list of people to invite and he made sure that there was money available for drinks. After the event, he sent an email on 10 February 2017, (at page 284) in which he encouraged Mr Jadav to do it again later in the year.
65. On 15 February 2017, Mr Jadav complains that he found a post-it note left on his telephone by Mr Forster, asking him to research sales revenues. It related to the PP opportunity, page 733. This information was to be found by the next day and Mr Jadav complains this was the first of many occasions on which Mr Forster dropped a large task on him without warning, increasing his workload to unsustainable levels. Mr Jadav agreed that this particular piece of work took him three hours.
66. Mr Jadav's first appraisal was scheduled to take place on Thursday 23 February 2017. He was to complete a performance appraisal form, page 737, which was to be submitted five days before the meeting, that is Friday 17 February 2017. He in fact submitted it on Tuesday 21 February and as a consequence, Mr Forster felt he had not had time to review the appraisal form. The appraisal was therefore deferred until 7 March. Mr Jadav draws comparison with the situation for Mr Combes, whose appraisal had also been scheduled for the 23 February and who had also submitted his form late. Mr Combes submitted his appraisal form on Monday 20 February. Mr Combes appraisal was not postponed. Mr Forster explains that he received Mr Combes appraisal on Monday 20<sup>th</sup> when he was in the office for the day and was therefore able to review it. Whereas, by the time he received the claimant's appraisal, he was not

scheduled to be in the office any further and would not have time to review it.

67. On 23 February 2017, there was a Residential Development team meeting at a local pub, in which Mr Jadav complains that Mr Forster challenged him about what work, if any, he had brought into the team.
68. Mr Jadav also complains that in late February 2017, Mr Combes had told him that Mr Forster was unhappy with him because he had not brought in any new work.
69. Mr Jadav says that on 2 March 2017, Mr Forster saw him cycling into work and mocked him. Mr Forster acknowledges that he laughed with, (not at) Mr Javad, who he thought looked ungainly, but denies having mocked him.
70. Mr Jadav also complains that twice in early March, Mr Forster mocked him for drinking smoothies and protein shakes, of which Mr Forster says he has no recollection.
71. On 2 March 2017, the respondent's Head of Human Resources, Ms Matthews, wrote by email to Mr Forster, referring to their earlier conversation that day, confirming that Mr Jadav was not on a fixed term contract and that one month's notice is required, should they choose to part company with him for poor performance. The email gives advice that at the pending appraisal, Mr Forster should spell out to Mr Jadav where he falls short of expected performance, giving clear examples, which should be recorded in the appraisal. She suggests that Mr Jadav then be allowed a further month to demonstrate improved performance and that if no improvement is made, he be called to a further meeting and given his one month's notice. She says that Ms Edgell, (who is copied in on the email), would provide support.
72. At a networking meeting on the evening of 2 March 2017, Mr Forster told Mr Jadav that his APC would be discussed at the appraisal on 7 March.
73. On 3 March 2017, Mr Jadav sent an email to Mr Forster, Mr Combes and Mr Muncey, *"Whilst I have some bits and bobs to be getting on with, I do have a fair bit of capacity. If anyone has any jobs for me, I'd be very grateful."*
74. On 6 March 2017, Mr Muncey sent an email to Mr Forster, stated to be in anticipation of Mr Jadav's appraisal, setting out what he describes as typical issues. These were:
  - 74.1 That in respect of a marketing board to be put up outside a property in Newmarket Road, he was supposed to have checked that it was in place on his way into work and had not done so;
  - 74.2 That in a mail shot of sale particulars to some developers, he had left off the heading, *'subject to contract'*;

- 74.3 That in carrying out something called an Argus Appraisal, Mr Muncey said that he had provided Mr Jadav with basic information and had sat down with him to go through it at 5:30 pm. He commented that there were a number of issues and, *“that just before 7 pm, on the fifth version, I spotted the CIL costs had not been increased when the units increased. We agreed to revisit the next day and an acceptable version was created first time.”*
75. Mr Jadav's appraisal took place on 7 March 2017. Beforehand, he had written to propose it should take place at Costa coffee, (at which Mr Combes' appraisal had taken place), see page 745. However, the appraisal went ahead in the office.
76. As to the appraisal, Mr Jadav complains that Mr Forster:
- 76.1 Was angry with him as he had submitted his paperwork late, (Mr Forster denies that he was angry but does in his witness statement refer to being exasperated);
- 76.2 Sought to dissuade him from taking Town Planning Level 3, warning him not to get out of his depth;
- 76.3 Did not approved the courses that Mr Jadav wanted to go on;
- 76.4 Criticised him for not completing tasks, in particular about a marketing board not being erected;
- 76.5 Suggested to Mr Jadav he would be better suited to planning work.
77. The minutes for the appraisal meeting are at page 750, they were not sent to Mr Jadav to approve at the time and he complains they focus on the negative. The minutes are noteworthy in respect of the following points:
- 77.1 They record Mr Combes asking Mr Jadav whether he saw his skill set as lying in planning or development. Mr Jadav's noted response clearly indicates that he saw himself in the field of development;
- 77.2 Mr Forster is recorded as expressing frustration that the appraisal was received late;
- 77.3 References are made to a wide-ranging discussion; Mr Forster referring to lack of initiative and giving as an example, the sign board not being erected on the property and his being said not to have done anything about it;
- 77.4 Mr Jadav having said in his appraisal and during conversation, that he wanted to do higher level work, indicating that he wanted to be a senior surveyor in two years, which Mr Forster suggested was

unlikely and he was warned against trying to run before he could walk;

- 77.5 Mr Jadav was encouraged to cooperate with his peer group and interact with them more;
  - 77.6 Mr Forster suggested that Mr Jadav seemed to possess client facing skills and that he ought to exercise more initiative;
  - 77.7 Mr Jadav is recorded as saying that he felt foolish but that he felt reassured that he simply needed to focus on the structured training of the APC, and
  - 77.8 The minutes conclude with Mr Forster recorded as saying they would revisit the situation in a month's time.
78. On 9 March 2017, Mr Combes took Mr Jadav out for lunch because he was, "down" following his appraisal. He says that he gave Mr Jadav some advice. For example, perhaps taking a jacket and tie to work and that it would be better not to appear regularly to turn up to work one minute before 9 o'clock and leaving one minute after 5:30 pm. Mr Jadav says that Mr Combes asked him whether he wanted to move home to the East Midlands, was negative about his performance, suggested he stopped going to the gym and that he went into work earlier and left later.
79. Mr Jadav complains about the events of the week commencing 13 March 2017. He complains firstly of Mr Forster dropping on his desk a last minute task of finding out some information for Kier Homes. He complains that this was dropped on him when he already had a heavy workload and he was due to be attending a residential graduate training event in Bath, on Thursday 16 and Friday 17 March 2017. He then further complains that Mr Forster gave him another task to complete, researching sales revenues in Norfolk, for which the deadline was Friday 17 March 2017. Mr Jadav says he explained that he was on a residential course and that in response, Mr Forster told him to work at the weekend and give him the information before his scheduled conference call on Sunday 19 March 2017. Mr Jadav further complains that having worked over the weekend he tried to communicate with Mr Forster, who did not take his calls or reply to his emails. Finally, Mr Jadav complains of being excluded from the conference call on Sunday 19 March 2017.
80. In an email of 15 March 2017, a Wednesday, Mr Forster acknowledged the piece of work that Mr Jadav had just done for him for Kier Homes. He responded, *"I am 100% aware of what's available on the websites, (Kier are a very old client!), I just would like the sq ft of the units released. I will source tomorrow. Have a good time in Bath."* This indicates not only that he was not entirely satisfied with the work which Mr Jadav had done for him, but also indicates that he was not expecting, nor had he asked Mr Jadav to, work at the weekend.



81. Whilst in Bath at the graduate training event, Mr Jadav had a meeting with the APC team leaders, a Mr Hoddinott and Mr Nicholson. The purpose of these meetings is to give graduates the opportunity to raise any concerns. Mr Jadav raised no concerns.
82. On 20 March 2017, Mr Jadav attended a Planning and Development team meeting from which Messrs Muncey, Combes and Forster were absent. He describes in his witness statement how he had told that meeting what work he had on at that time, including calling 200 plus developers to prepare a Leicestershire and Cambridgeshire developers list, to research and prepare an option planning report in relation to a particular piece of land, to attend a Vision 2020 meeting, to prepare a HCA DAT development appraisal, to research and call ten local authorities, to prepare an affordable housing note, to research comparable evidence and calculate sales revenues in respect of a particular site, to prepare a bid submission form and schedule of interest for a particular site, to prepare a schedule of interest for another site, to chase updates on two other sites and start a North Hertfordshire site search project. To this he says that the head of the team, Mr Brown, had commented, *"That's a lot of work"*. Mr Forster says that Mr Jadav is exaggerating how much work that all amounts to.
83. On 23 March 2017, Mr Jadav took a telephone call from a land owner in Norwich, who was seeking advice in respect of development potential for a piece of land. He complains that he secured her instructions but that he was subsequently not involved in the project.
84. On 29 March 2017, Ms Edgell of HR, emailed somebody else in HR asking in relation to Mr Jadav, whether she could, *"Do an extension to probation?"* Of course, Mr Jadav had long since passed his probationary period. Ms Edgell's explanation is that she had just received the March 2017 appraisal, had been in a rush, had not read it properly and had just assumed that extending probation was the appropriate next step.
85. It is at this time that Mr Jadav received the completed appraisal form himself, which is at page 737:
  - 85.1 In the review of the last 12 months' performance, we note the manager's comments that whilst there had been isolated examples of networking, these needed to be developed and built upon.
  - 85.2 It was noted that Mr Jadav has a good general grasp of planning, but there were areas for improvement.
  - 85.3 He was told to concentrate on his personal performance and raise his profile, attending business development and working events.
  - 85.4 He was also told to have a clearer focus on establishing firm grounding in development, rather than trying to, *"run before you can walk"* and that he should look to operate more within his peer group.

- 85.5 Under the heading of objectives for the coming 12 months, nothing appears.
- 85.6 For training and development requirements for the coming 12 months, it is noted that his APC pathway is planning and development and that competency level 3 is the most advanced. It is agreed he should attend a course called Argus. He was told to focus on securing grounding and development work and not to get out of his depth.
- 85.7 In a section of the form, headed, 'Manager's Support', Mr Jadav has commented with regard to Mr Forster, *"He is a pleasure to work with and very sociable"*.
- 85.8 Under the heading of 'Career Aspirations', Mr Forster has written, *"Whilst no one wishes to dampen anyone's aspirations, the target of Senior Surveyor within the specified time scale is ambitious and perhaps needs to be reconsidered in the light of our wider discussion"*.
- 85.9 Under the heading of, 'Final Comments', Mr Forster has written, *"We agreed that given the issues arising both over the previous months and during the course of our meeting, that we would review Anish's progress in a month's time and agreed to meet once more on 6 April 2017"*.
86. We have seen that the appraisal form was sent to Human Resources on 29 March 2017. In his email, Mr Forster commented to HR, *"At present the jury is still out and we are going to extend the review by another month – we are still far from convinced, but he has shown enough improvement to grant himself a stay of execution"*, see page 755.
87. In the further and better particulars, Mr Jadav refers to an email exchange on 29 March between Ms Gritt, of Human Resources and Mr Forster, in which she asks for clarification if the Argus Developer advanced course was the only approved course. To which Mr Forster replied, *"at present we are going to review next week and I will drop you a line immediately afterwards"*. This is in the context of allegation 9 and Mr Jadav's complaint of Mr Forster refusing to approve his attending relevant courses. We were unable to locate the email in the bundle but feel sure it was referred to and we are frustrated here by the fact that the bundle is not assembled in simple chronological order. We assume the email exchange was as Mr Jadav suggests.
88. Mr Jadav complains that on 5 April 2017, he was required at short notice to attend a committee meeting of the Cambridge City Council to hear the outcome of a particular planning application. He complains that Mr Combes told him to go and do that at the bidding of Mr Forster, so as to deliberately put pressure on him. He complains that other graduates who had been asked to attend that meeting had been able to decline because

they were too busy. The request was made by Mr Coombes. He was out of the office for 2 hours. He responded politely without objection, (page 275).

89. Mr Jadav complains that he was excluded from an informal coffee meeting with colleagues on 6 April 2017. It was another meeting to discuss Mr Jadav's performance, immediately prior to his second appraisal meeting.
90. Mr Jadav complains that during the morning of 6 April 2017, Mr Forster said to him that he didn't have a clue what jobs he was working on and asked him whether he had secured any new work. The second appraisal, or review meeting, took place on 6 April 2017, attended by Mr Combes and Mr Forster. Mr Jadav complains that Mr Forster berated him for not finishing work that had been set for him in relation to a site in a sensitive location, which he had in fact finished. He says Mr Forster swore at him when he tried to tell him that he had finished it. He says that he explained that he had not yet been able to start the site search project that he had agreed to do previously, because of his workload. He says Mr Forster complained to him that he was not adding value to the team in terms of securing new work.
91. The minutes of the meeting on 6 April 2017 are at page 757, in which is recorded:
  - 91.1 That it had been noted Mr Jadav had improved his attendance at the office but that this needed to be for a productive purpose and not just for the sake of it;
  - 91.2 They had noted, in relation to his job list, he frequently said he had not had time to complete work;
  - 91.3 That Mr Forster had observed it was not appropriate to put Mr Jadav in client facing situations, which is why he had not been included in a recent pitch in Norfolk;
  - 91.4 That it was apparent Mr Jadav did not appreciate that he was not making the expected progress, that he was struggling and did not appear to have aptitude for the work the team was doing; Mr Forster making reference to market research which had required two attempts to get right;
  - 91.5 Reference was made to an error of judgment related to forwarding emails to another partner within the business, (who had made a mistake), in respect of the sensitive site referred to above;
  - 91.6 Reference was made to the requirement for a graduate to add value;
  - 91.7 As to the way forward, it was suggested that Mr Javad should produce a work programme with six items, consisting of 3 columns

for Job, Task and Completed, so as to help him assess priorities and work with more structure.

- 91.8 Finally, it was noted that Mr Combes had asked Mr Jadav if he recognised the significance these appraisals and meetings in terms of his position and Mr Jadav's recorded answer is that he did not.
92. Later that day at a team meeting in a pub in the evening, Mr Jadav complains that Mr Forster asked him what, if any, fees he had made that month. During this conversation, Mr Combes told him that he could bill a particular piece of work, in response to which Mr Jadav complains Mr Forster commented, *"that would be the first time he had billed anything."*
93. On 12 April 2017, Mr Jadav requested leave from 18 – 26 April, (six working days).
94. WhatsApp messages between Mr Jadav and a friend of his appear in the bundle. In messages exchanged on 27 April 2017, talking about how busy he is, Mr Jadav comments, *"boss is a c\*\*\*"*, (he did not use asterixis) and he also wrote, *"he's a twat, stuck up and bully"*.
95. Mr Jadav received a letter from Mr Forster dated 24 April 2017 entitled, 'Performance Review', (page 765). This summarised the appraisal discussions, setting out that they were not seeing the progress anticipated and that Mr Jadav was failing to deliver to the required standard. The letter sets out the six tasks he was to work on, with a view to a further review on 11 May 2017. He was also encouraged to work with his peers in his department and work closely with the Planning Graduates, looking to assist them in ongoing site search exercises.
96. Mr Jadav complains that on his day off on 25 April 2017, he received a number of queries from Mr Combes by text and phone call, which made it impossible for him to relax.
97. On 3 May 2017, Mr Jadav drafted an email relating to Thaxted, which Mr Forster amended, at page 404 / 405. On analysis, the amendments appeared to us to be very minor and stylistic only.
98. On 3 May 2017, Mr Brown wrote an email to a number of people, in which he refers to Mr Jadav as being on *"special measures"* and comments that it is possible they may have to terminate his employment. However, he goes on to say,
- "I just want to sound you out on whether we think there is any scope for Anish to switch back to being a planner, or whether we also might have concerns about his ability to work to deadlines and to inspire greater confidence in clients etc."*
99. Mr Mark Hyde, (Partner in charge of planning, for whom Mr Jadav had worked whilst he was at Januarys), replied to say that he was surprised,

as Mr Jadav's time at Januarys had been positive, acknowledging at that time he had been focused on planning. Mr Hyde remarks,

*"If he wanted to switch back to a planning role, then I would want to give him a chance to do so; but it has to be something that he wants to do. I'm not sure it is as he has said to me in the past that the **RICS P&D** route was his preferred route."*

100. Mr Forster replied on 4 May 2017, making it clear that he would not be seeking to replace Mr Jadav, which makes redeploying him potentially more practicable as they would not be adding to the head count. He comments, *"this might make things clearer for one and all when considering offering Anish a switch to planning"*.
101. Mr Jadav complains that on 8 May 2017, he was asked at the last minute by Mr Forster to prepare a fee proposal for Project L and that he was given two and a half hours to complete it; given to him at 3 o'clock and to be finished by 5:30. He further complains that Mr Forster mocked his work and lost his temper. Mr Forster in turn says that he had to amend the document extensively. The final version of the fee proposal is in the bundle at 433, but we do not have the benefit of the original draft and seeing what the amendments were.
102. Mr Jadav complains that on 9, 11, 12, 15 and 16 May 2017, he was continuously instructed by Mr Combes to prepare 12 separate development appraisals.
103. On 10 May 2017, Mr Jadav attended a New Homes meeting as referred to above, in circumstances where he says nobody else was available to attend. He suggested to Mr Muncey he could go, Mr Muncey agreed, Mr Forster did not know about it.
104. It is also on 10 May 2017 that Mr Jadav submitted his work in respect of the six items referred to above, in anticipation of his review the following day.
105. Mr Jadav complains that at the appraisal on 11 May 2017, Mr Forster's attitude was dismissive, angry and sarcastic. He says he showed no interest in the work Mr Jadav had undertaken, perfunctorily reviewing his site search project and Mr Forster and Mr Combes together arguing with him over his personal SWOT analysis. The minutes of the meeting are at page 847 and 848. These record:
  - 105.1 Mr Forster commenting that the work had arrived just the day before and he had not had time to review it. He queried why this had not been produced earlier, as each task was completed. The reason recorded as given by Mr Jadav being the Easter break and his leave;

- 105.2 There was a discussion about the North Hertfordshire site search. Mr Forster criticised the lack of a summary or conclusions, indicating where the key opportunities might be that were worth pursuing. Mr Jadav is recorded as saying that he was still working on that;
- 105.3 The discussion about the SWOT analysis is recorded, Mr Forster saying that he disagreed with Mr Jadav's self-analysis, that his communication skills were relatively poor, he had not seen evidence of quality report writing, he had only attended a handful of networking events, he had not made progress in meeting his peer group and making connections;
- 105.4 Mr Forster says he saw Mr Jadav's strengths in planning, the use of technology and diligence, (although often tasks were not carried out accurately).
- 105.5 Overall, Mr Forster said he saw Mr Jadav's weakness as lack of initiative;
- 105.6 Mr Forster said that over 10 months, Mr Jadav had not been making the expected progress and appeared to be going through the motions;
- 105.7 Mr Combes is recorded as expressing concerns as to how Mr Jadav would cope in an intense, difficult or emotionally charged situation;
- 105.8 In conclusion, Mr Forster said that he would review the work that he had been provided with the day before and reflect.
106. On 13 May 2017, Mr Forster emailed Ms Edgell, in response to her query as to how the appraisal had gone, commenting, *"An interesting meeting with Anish, which leaves us unmoved on our chosen course of action."*
107. This is followed by a telephone conversation on 15 May 2017, between Mr Combes, Mr Forster and Ms Edgell, in which the decision to dismiss Mr Jadav was made, by Mr Forster.
108. On 16 May 2017, Mr Jadav made a presentation to the Vision 2020. This was something Mr Jadav had volunteered for and had nothing to do with Mr Forster.
109. On 17 May 2017, Mr Jadav complains that he was excluded from an email to the Residential Development team, (ie Mr Combes and Mr Muncey) confirming that formal instructions had been received in respect of the sale of development land in Norwich.
110. On 18 May 2017, Mr Jadav complains that Mr Forster set him what he describes as a large task, to review aspects of the viability of a 1,500 home

development we will call Project R, by close of business that day. He received help from others. He completed the work in time. He complains subsequently that Mr Forster sent an email thanking people for their work on that exercise, but omitted Mr Jadav, page 509. Mr Forster says that was just an oversight.

111. In the further and better particulars at paragraph 82, Mr Jadav complains that Mr Forster did not return an email in which he had asked if there was anything he could bring to a meeting at the Thaxted site on 19 May 2017. Mr Jadav says that he had not been invited to attend the meeting on 19 May 2017, but that he had heard about it and had therefore sent an email on 18 May 2017, asking Mr Forster whether he could come along and Mr Forster replied, in effect, "yes you can", page 503. Mr Jadav's email of the morning of 19 May 2017 is at the top of page 506, he does not ask if there is anything that he "*should bring*", rather he asks, "*If you need me to bring anything from the office, please let me know.*"
112. At 6:30 pm on Sunday 21 May 2017, Mr Jadav received an email inviting him to a meeting the next day at 10:30 am.
113. The following morning at 9:17 am, Mr Jadav sent an email, page 862, requesting, due to short notice, that the meeting be rearranged for after the bank holiday weekend, a delay of one week. He received no reply and the meeting went ahead.
114. Mr Jadav was dismissed at the meeting on 22 May 2017. In attendance were Mr Forster, Mr Combes and Ms Edgell. The minutes are at page 186. The meeting opens with Mr Forster informing him that they had decided to dismiss him. Mr Jadav asks for the opportunity to respond and Ms Edgell replies that he may do so, but the decision has already been made and there is no legal right to appeal. Mr Jadav protested that he had delivered on all items without assistance, he had met his targets, to which Mr Forster replied that they had not seen this. Mr Jadav again asked for the opportunity to respond and Ms Edgell invited him to respond in writing. He was handed the letter of dismissal, which we will turn to in a moment. Mr Jadav is recorded as going on to protest that this was not fair, that he had been excluded from things, citing recent examples. Mr Forster responded that the decision to part company had been made the previous week, which is why things had not been sent to him. Ms Edgell explained that the respondent took the view that as he had less than two years' service, they do not have to follow a set process, but nevertheless they had been through three meetings with him to discuss performance concerns.
115. Dismissal was confirmed by a letter of the same date, which as we have seen, was handed to Mr Jadav during the meeting. It states, "*The reason for this decision is that despite the performance reviews and coaching, you have not met the standards required of you in your role.*" The letter recites the appraisal meetings on 7 March 2017, 6 April 2017 and 11 May 2017. It refers to the work he was to complete for 11 May 2017, but submitted on

10 May 2017, too late for Mr Forster. Mr Forster expressed his disappointment at Mr Jadav's lack of visible motivation and energy and confirms the details with regard to payment in lieu of notice and for accrued holiday pay.

116. On 22 May 2017, Mr Forster sent an email to Mr Brown, referring to the dismissal in which he comments:

*"It took a long time for the penny to drop and when it finally did, it became clear that he still just didn't get it and hadn't picked up anything from the meetings that Rich and I had held with him... We think that there's a family member in the background and, regrettably, I have a feeling that he's going to play the race card, but we'll see."*

### **Analysis of Criticisms of the Claimant**

117. An important feature of the case is to analyse the criticisms the respondent makes of Mr Jadav and his work, as this will assist us in analysis of the reason for dismissal and in forming a view as to what may have been in the mind of Mr Forster throughout.

#### *Mr Muncey's Criticisms*

118. Mr Muncey was an experienced graduate supervisor. He worked closest with Mr Jadav and made criticisms of him in his witness statement.
119. Mr Muncey said that he was concerned from the outset about Mr Jadav's recruitment into the development team and that he had seen him more as a person with an aptitude to planning. He described Mr Jadav as polite, but not having much get up and go. We have noted that Mr Muncey nevertheless, approved Mr Jadav passing his probationary period, (having said during evidence originally that he had not been consulted).
120. Early criticisms of Mr Jadav were that he did not seem particularly excited or enthusiastic, failing to seize opportunities, failing to get involved with other graduates and failing to make much of an effort to forge relationships.
121. As for some specific criticisms made by Mr Muncey:
- 121.1 On 9 March 2017, (page 330) it looks as if he made a mistake with a telephone number to go on an advertising board. Perhaps a very minor mistake;
- 121.2 On 10 May 2017, from an exchange of emails, we can see that somebody prepared proofs for an advertising banner which Mr Jadav passed on to Mr Muncey for approval. Mr Muncey spotted a misplaced website address. Mr Muncey agreed in cross examination that this probably was not Mr Jadav's fault as he did



not prepare the proof, but that Mr Jadav should have spotted the error.

- 121.3 On 27 April 2017, (page 403) we see an email from Mr Jadav to Mr Muncey attaching an unfinished list of developers. On cross examination, Mr Muncey agreed that he had asked Mr Jadav to forward to him what he had completed so far, but his point of criticism was that by this point, the work should have been finished.
- 121.4 On a similar point, on 27 January 2017, Mr Jadav forwarded a draft brochure to Mr Muncey which was unfinished.
- 121.5 At page 340 is an email of 19 March 2017, to which Mr Muncey refers. It is a report on a developer. His criticism is that Mr Jadav has provided links to websites rather than setting out in the document, the relevant information.
- 121.6 Mr Muncey also referred to an email dated 4 April 2017, (page 393). This relates to a brochure for some premises we will call, HR. Mr Jadav had prepared the draft brochure. We do not see the draft, but we do see Mr Muncey's comments that the brochure was much better now that Mr Jadav had followed the brief and it makes reference to various tracked changes, corroborating Mr Muncey's evidence that changes were necessary to the brochure.
122. Mr Muncey acknowledged in cross examination that these were examples he found looking through his inbox whilst he was preparing his witness statement. However, they do provide corroboration to his impressions of the quality of Mr Jadav's work.
123. On page 327, we see an email dated 6 March 2017 from Mr Muncey to Mr Forster, in anticipation of the appraisal meeting with Mr Jadav scheduled for the next day. In his email, Mr Muncey sets out three criticisms of Mr Jadav's work, which he offers up as, "*typical issues*":
124. The first is very minor indeed and amounts to a criticism of his failing to cycle into work via a particular property, in order to check that a board had been put up. The second two criticisms are more serious.
125. The second is that he omitted to write the crucial words, "*Subject to contract*", on a mail shot.
126. The third was that in preparing what was referred to as an Argus Appraisal, Mr Muncey explains he had provided basic information so that Mr Jadav could prepare the appraisal, but he then had to go through it with him several times, five versions being completed between 5:30 pm and 7:00 pm, even in that fifth version errors were spotted so that the matter had to be revisited the next day.

*Mr Combes's Criticism*

127. The one criticism we found by Mr Combes is at paragraph 37 of his witness statement; he refers to a letter drafted by Mr Jadav which needed correcting. He refers us to an email dated 8 March 2017, (page 328) which does not tell us anything; we do not see the draft letter and we do not see the necessary corrections.

*Mr Forster's Criticisms*

128. At paragraph 16.2.1 of his witness statement, Mr Forster refers to a letter drafted on 3 May 2017 regarding Thaxted, which Mr Forster said he had to correct. As we have already observed, the corrections were very minor and more a matter of style.
129. At paragraph 16.2.2, he refers to Mr Jadav attending a meeting with a client and Mr Forster's perception was that Mr Jadav was awkward and in particular, he refers to Mr Jadav inappropriately beginning to speak about another client. There is no document to reference.
130. At paragraph 16.8, Mr Forster criticises Mr Jadav's drafting of a particular draft pitch. The final version is at page 433. We do not have the unamended version and are therefore unable to see what amendments were necessary. This is the second time such evidence has not been provided that we have noted.
131. At paragraph 17.2, Mr Forster refers to Mr Jadav's tendency to provide internet links rather than specific information or summaries, a point also made by Mr Muncey. In his witness statement, Mr Forster refers us to an email of 19 March 2017, regarding the Norwich development already referred to by Mr Muncey and to an email of 18 May 2017, (page 464) regarding a site in Cambridge.
132. Mr Forster criticises Mr Jadav for providing him with completed work for the six tasks set for him at the review in April, just one day before the review, ie on 10 May 2017.

*Analysis of the six pieces of work handed in by Mr Jadav, for the review meeting on 11 May 2017*

133. At the appraisal / review meeting of 6 April 2017, Mr Forster and Mr Combes set for Mr Jadav, six particular pieces of work which were to be completed by the next review. These are summarised as listed in the subsequent letter of 24 April 2017, (page 765) and we analyse each of them in turn as follows:
- 133.1 North Hertfordshire Site Search – Mr Jadav described this as a colossal amount of work. As we will explain below, we heard from Mr Preston and in light of his evidence, we did not find that assertion credible. This is a piece of work he had been working on

since at least 20 March 2017, when he had mentioned it in the team meeting with Mr Brown. He acknowledged in cross examination that he had been working on it for a couple of weeks before that. There is no specific criticism of this piece of work as such, the respondent's issue is how long it took him to complete it and the fact that he submitted it the day before his final review.

- 133.2 The SWOT analysis, (page 775), is a simple document that would take very little time to complete.
- 133.3 List of developers – this is something he had been working on since 20 March 2017 and analysing the list he provided behind tab 163, it is not a document we imagine would have taken a great deal of time to complete.
- 133.4 CIL - that is a reference to the Community Infrastructure Levy – the task was to provide an analysis of local authorities' policy in respect of the same in the local area. It does not strike us as a hugely complicated, overly time consuming document to produce.
- 133.5 Ongoing agency work - this is just a list of agency work he was undertaking at the time, (page 816-817) and would not have taken much time to put together.
- 133.6 Work list break down – similarly this is just a list of the work that at that time he is carrying out, set out at page 815 and is not something which would have taken a great deal of time to put together.

#### **Was Mr Jadav Overworked?**

- 134. At paragraph 36 of his witness statement, Mr Jadav recites that he attended a meeting, (it was referred to as a team huddle) of the whole Planning and Development team, from which Messrs Muncney, Combes and Forster were absent. He tells of reciting a list of the work that he was undertaking at that time, to which the head of the department, Mr Brown, had commented, *"That's a lot of work"*. This is put forward as the basis on which Mr Jadav says that Mr Forster and Mr Combes, working at Mr Forster's bidding, were piling work onto him, setting him up to fail and to illustrate how it is that he was under pressure in the closing stages of his employment. We analyse and consider each of the pieces of work he referred to, bearing in mind Mr Forster's comments and our own observations:

- 134.1 He was calling 200+ developers – he referred to this piece of work as being *"colossal"*. In our view, that is an exaggeration. It looks more like a list of 100 or so developers, he had been asked to start the work before the 20 March 2017 and he completed it on 11 April 2017, (page 1133).

- 134.2 Option report – Mr Forster said that Mr Jadav would not have been asked to produce a full option report, but he might have been asked to do some preparatory work.
  - 134.3 Planning report – this would have been a basic, straight forward exercise.
  - 134.4 Attending Vision 2020 meetings – this was an hour long meeting once a week and would not have required any preparation other than the one occasion at the end of his employment when he chose to make a presentation.
  - 134.5 Development appraisal using an online spreadsheet – this is simple data input.
  - 134.6 Researching and calling 10+ local authorities – he submitted an incomplete document six weeks later on 10 May 2017.
  - 134.7 Researching comparable evidence for a particular site and sales revenues – this would have been a standard piece of research.
  - 134.8 Preparing a bid submission – Mr Jadav agreed this was a straight forward exercise.
  - 134.9 Site search project for North Hertfordshire – this was a project undertaken over a period of time and is discussed elsewhere.
135. Of course, day by day, over the period between 20 March 2017 and 22 May 2017, Mr Jadav would have been asked to do other pieces of work, many of which have been discussed in the above 'Facts and Chronology, but overall our finding is that Mr Jadav was not as hard pressed as he would have the tribunal believe, in terms of workload.

### **Credibility**

#### **The Claimant**

- 136. It is fair to say, Mr Jadav did make concessions during cross examination. He accepted that not inviting him to a breakfast meeting which was to discuss his performance was not an act of discrimination and he accepted that there was good reason for his not having been invited to the three lunches he complained about not having been invited to. He also agreed he ought not to have expected to have been put on management courses.
- 137. We did however, have problems with Mr Jadav's credibility in some respects.
- 138. Mr Jadav's evidence was that he formed the view that Mr Forster believed that he was a Muslim from 8 December 2017, following the conversations at the Christmas drinks and dinner. As a matter of logic and common

sense, it seems to us that simply does not make sense; if Mr Forster were discussing his disapproval of belief in God and prayer, it does not follow that this is because he thinks Mr Jadav is a Muslim. We are not convinced that Mr Jadav genuinely formed such a view.

139. As we have seen, Mr Jadav complains of being overworked, on 20 March 2017 and then subsequently. We have seen that on 3 March 2017, he sent an email saying that he had capacity, effectively looking for more work. If he had been given too much to do thereafter, one would have thought he might have sent another email saying he now had too much. Furthermore, one would have thought that if he was under such pressure and given that he had tasks to complete before the review on 11 May 2017, he would not have opted to have taken the six days holiday. He gives us his reason for that, that the holiday year was coming to an end and he had been told to use the holiday up, but one would have thought if that were the case, if he was under such pressure, he would have asked the respondent to carry the leave over.
140. Mr Jadav sought to imply that he did not know of the list of jobs that he had to do until the letter of 24 April 2017, but it was clear to us that he did, from the meeting on 6 April 2017.
141. If Mr Jadav had thought that Mr Forster was racially motivated, he would have said so in the WhatsApp messages to his family and friends, which were in all other respects robust in their comments about him.
142. The reference to smoothies and protein drinks in the ET1 and the further and better particulars, making Mr Jadav feel uncomfortable became, in his witness statement, a feeling of humiliation and of being singled out and an allegation of race and religious discrimination. This left us with the impression of exaggeration and embellishment. Furthermore, seeking to link Mr Forster's remarks to race or religion does not seem to us to make sense. This is especially so against a background of a culture of meeting in pubs for team meetings at which Mr Jadav would drink alcohol, (see below).
143. The claimant's case is that Mr Forster perceived him as Muslim and that is rather difficult to believe. He suggests Mr Forster will have had this impression because he is Asian in appearance and he has a beard. Against that, one has to say firstly, that Mr Jadav's beard is just the sort of fashionable trimmed beard that many young men have these days. He attended regular meetings drinking alcohol, which is not to make the stereotypical assumption that just because one is drinking alcohol, one cannot be a Muslim, but on the other hand, third parties looking on are less likely to make the stereotypical assumption that an Asian person is a Muslim, if they see them drinking a pint of beer. Lastly, Mr Jadav's name is not suggestive that he is of the Muslim faith.
144. It is Mr Jadav's case that Mr Forster was determined to remove him from the business after 8 December 2016. This is not borne out, by for example,

Mr Forster's efforts to support him in his networking curry night on 9 February 2017.

145. Mr Jadav does not suggest that Mr Muncey treated him differently because of his race. Mr Jadav worked mostly with Mr Muncey. He described Mr Jadav as, "fairly useless" and as we have seen, was critical of his work. His view, on 11 May 2017, was that Mr Jadav should be dismissed.
146. True to say that we completely understand and accept why Mr Jadav would not want to complain to anybody within the respondent's business about discrimination, if that is what was happening to him, on the basis that he was just starting out in his career in a well known company, anxious to get on and succeed. It is not quite so clear why, if he thought he had been subjected to discrimination, he did not complain immediately after he was dismissed.
147. We heard Mr Jadav was receiving advice from a Human Resources 'expert', (Ms Lott, who gave evidence) in June and July 2017. If Mr Jadav really thought that he had been discriminated against, then with the benefit of such advice, we would certainly then have expected to have seen a grievance submitted, if only to avoid the potential of any future compensation being reduced for failure to comply with the ACAS Code in respect of grievances and also, with a view to seeking redress and corroborative evidence of one's allegations.
148. Mr Jadav says that the appraisal form for March 2017 left out much of what had been discussed at the actual appraisal. However, it was sent to him to approve and sign, he knew he could make amendment and he did not do so.
149. The email, (page 344) of 15 March 2017, in which Mr Forster says that he will, "work on it" the following day, belies Mr Jadav's assertion that Mr Forster had told him to work at the weekend of the 18 and 19 March 2017.
150. As we have analysed above, we do not find credible, Mr Jadav's assertion that he was overworked on 20 March 2017 and thereafter.
151. An important moment for the tribunal, was the evidence of Mr Preston in respect of the prospective sites research. Mr Jadav had made a great deal of what a huge, colossal amount of work this was. No doubt acting on instructions, Mr Forster was subjected to vigorous cross examination, vilifying his assertion that it was work that would take two days. Mr Preston struck us as an individual who was giving honest evidence, not wishing to do any harm to the claimant's case unnecessarily and yet, he tellingly confirmed that it was work he would have thought would have taken a day or so, if it had been done in one go. We find that Mr Jadav grossly exaggerated the amount of work this particular document represented.

152. Mr Jadav's case was that his being asked to go and attend a Cambridge City Council committee meeting to hear the outcome of a particular planning application, (pursuant to a request from another department) was an act of race or religious discrimination. He acknowledged in cross examination that the suggestion that he might be able to go to that meeting, came from Mr Combes. He confirmed that he was not suggesting Mr Combes was acting under motives of race or religious discrimination. He was then asked if the allegation could be withdrawn, but he would not do so, suggesting that it would have to stand because Mr Forster and Mr Combes were working together to increase his workload. That was an allegation we simply found not credible and an unwillingness on Mr Jadav's part to acknowledge a failing in his case.
153. Mr Jadav complains of Mr Forster not approving a holiday request. We have seen at page 298 that the holiday request was made at 16:52 hrs on 21 March 2017 and approved at 08:20 hrs on 22 March 2017.
154. There is a tension in Mr Jadav's case that on the one hand, he complains that he had too much work to do and he was being set up to fail and on the other hand, he was saying that he should have been given more work so that he could develop. For example, in respect of his request to attend the meeting regarding the Thaxted project on 19 May 2017.
155. Mr Jadav said in his evidence that he was deeply disturbed and shocked when Mr Forster laughed at him when he was riding his bicycle. This strikes us as hyperbole and exaggeration.
156. Lastly, Mr Jadav wrote in his appraisal form that Mr Forster was a pleasure to work with. By then, on Mr Jadav's case, Mr Forster was in his perception, treating him less favourably because of his race and his perceived religion. We do not believe Mr Jadav would have written that in his appraisal if that had really been his belief at the time.

Mr Forster

157. Mr Forster's position had been, until the hearing, that there had been no telephone conference on 19 March 2017. He was taken to an email from him dated 19 March 2017, (in the claimant's bundle at page 267) in which he refers to a discussion via conference call that morning. He also says that he was waiting for some market research for submission at the meeting the following day, which does tend to suggest that he was waiting for some information from Mr Jadav.
158. It was suggested by Mr Sheppard that Mr Forster does not really, in his witness statement, deny the allegations on 8 December 2016. In paragraph 14 of this witness statement, he states that he does not recall speaking to Mr Jadav, or anybody else, about belief in God or the value of praying. When cross examined he was clear and adamant he did not discuss religion.

Mr Coombes

159. We had no particular reason to doubt the credibility of Mr Combes.

Mr Muncey

160. The one problem with Mr Muncey in his evidence, was that he denied having been consulted with regard to Mr Jadav finishing his period of probation. That turned out to be incorrect, on production of an email by Mr Jadav. It is a very brief email exchange, at page 303 of the claimant's bundle. In an email to Mr Muncey and Mr Forster, Mr Brown asks, "*I assume we are content with Anish?*". Mr Muncey replies, "*Fine by me*". Mr Forster replies, "*Absolutely Colin*". To us, it was probably a genuine oversight in respect of a very minor email exchange. However, it casts a different light on Mr Muncey's criticism of the claimant from an early stage.

**Conclusions**

**The Burden of Proof**

161. We consider whether there are facts from which we could properly conclude that race or perceived religion lay behind any of the alleged acts of direct discrimination or harassment, in so far as any of the allegations may be upheld. We considered and kept in mind, the following:

161.1 The conversation, in so far as there may have been any conversation, about religion on 8 December 2016: it does not necessarily follow, because an individual holds atheist views or beliefs, that the expression of the same, (however ill advised in a work place situation) raises an inference that such an individual would treat any differently, or any less favourably, a person of Asian ethnic origin or of the Muslim faith, than any other person of any other ethnic origin or religious belief.

161.2 What of the humour, mocking or otherwise, in respect of an Asian man, a man of perceived Muslim faith, riding a bicycle, drinking a smoothie, or drinking a protein shake? We were unable to understand how one could say there was any connection, any link, between those matters. There are no stereo typical assumptions known to us, or suggested to us, in respect of any person from any ethnic origin or of any religious faith, riding bicycles, drinking smoothies or drinking protein shakes.

161.3 The absence of a good reason and a genuine reason for dismissal, might have been the basis upon which we might have raised inferences that race or religion may have lay behind the appraisal and review process and the decision to dismiss. However, on the facts, that is not what we have found. We find that there were genuine concerns about Mr Jadav's performance and that those concerns were what led to the process and the dismissal.



- 161.4 What of the failure to apply the disciplinary and performance policy? The policy expressly states that it may not be applied if an individual does not have two years' service. The respondent's policy in practice was not to apply the policy and procedures where an individual does not have two years' service. That is a common enough approach, although not a wise one, not what one might describe as conducive to good employment relations. Mr Jadav was treated no differently than any other. For example, Mr Samuel Green was dismissed for poor performance without following the procedure, as evidenced by the documents starting at page 990. Employers who adopt such an approach are in this tribunal's view, foolish. They leave themselves vulnerable to accusations of discrimination, as the respondent in this case has discovered.
- 161.5 Everybody appreciates that had this been a case of unfair dismissal, Mr Jadav would undoubtedly have succeeded:
- 161.5.1 In so far as his dismissal was arrived at without his having been expressly warned that a dismissal might be an outcome to the process, (we do find that he must in fact have been aware);
  - 161.5.2 He was not given adequate warning of the dismissal meeting;
  - 161.5.3 It was not made clear to him that the work he was to complete before the appraisal on 11 May 2017, had to be handed in by a particular date;
  - 161.5.4 He was not permitted to respond in any meaningful way at the dismissal hearing on 22 May 2017, and
  - 161.5.5 Last but by no means least, he was not given a right of appeal.
- 161.6 These are not matters one would have thought the respondent could have been particularly proud of, but they are consistent with the way that they treat others without two years' service and do not give rise to an inference that the reason that lies behind what happened to Mr Jadav was his Asian ethnic origins or his perceived religious beliefs.
- 161.7 What of the statistics relating to the ethnic and religious makeup of the respondent's workforce and the related demographic? The statistics produced by the respondent are odd, but the explanation is that they were produced at the bespoke request of the claimant. What we do not know, because we do not have the evidence before us, is how the respondent's statistics compare to the community at large or the pool from which they are recruiting. In other words, we

do not know the percentage makeup in the local population of people of Asian ethnic origins, or of Muslim religious belief. Nor do we have those statistical figures on the pool of graduates from which they would have been recruiting. This is not therefore evidence from which we can raise an inference. One might have expected the respondent to have produced such evidence; we bear that in mind.

161.8 The respondents do have an equal opportunities and diversity policy in place. They also have a training programme in place for the individuals. All had recently been through that training, ironically, with the exception of the claimant.

### **The Allegations**

162. Neither Mr Forster nor anyone relevant in the employ of the respondent, perceived Mr Jadav to be Muslim. We say that at the outset, so as to avoid repeating in respect of each allegation, that nobody's motive at any time, was a perception that Mr Jadav was Muslim.

### **Harassment**

163. We take the allegations slightly out of order and deal with the allegations of harassment first. It is usually wise to deal with harassment first because as a matter of definition, an act of harassment is not an act of direct discrimination. Furthermore, in this case, everything stems from the allegations which Mr Jadav makes about the events on 8 December 2016.

Allegation 14 - On 8 December 2016, at Cambridge Wine Merchant, Mr Forster engaged the claimant in conversations regarding religion.

164. The evidence in this case shows in our view, that Mr Jadav has had a tendency to exaggerate and embellish. It is true to say that Mr Forster did not, in his witness statement, directly deny being engaged in a conversation about religion, albeit he resolutely denied it in cross examination. We do not think that Mr Jadav would have said something that was completely untrue, but rather that he is likely to have taken something that has been said and to have exaggerated or embellished it. Our view on the balance of probabilities, is that what was said on 8 December 2016, is not as Mr Jadav alleges. On the other hand, we recognise the background is that it is Christmas time, the location is adjacent to Kings College and its Chapel, there is a particular atmosphere to that location, it is possible that religion might have been in Mr Forster's mind. He might have been reflecting upon his father, who was at Kings College. Mr Jadav is probably not completely making this up. We find on the balance of probabilities, Mr Forster probably made some passing reference to his atheist beliefs in the midst of a full evening of conversation and alcohol. It was not of a nature that either he or anybody else, apart from Mr Jadav, would recall. They were not remarks directed at Mr Jadav,

nor did he perceive them as such, they did not have the proscribed effect, nor could it reasonably be said that the conduct would have the proscribed effect, having regard to all the circumstances of the case and Mr Jadav's perception. Mr Forster did not think that Mr Jadav was a Muslim and such remarks as he may have made, were not in any way related to the fact that Mr Jadav was of Asian ethnic origin.

Allegation 15 - On 2 March 2017, Mr Forster mocked the claimant for cycling to work and between February and March 2017, mocked Mr Jadav for drinking smoothies.

165. Dealing with the cycling first, the word 'mocked' is probably the wrong adjective. Mr Forster acknowledges that he laughed and he found the sight of Mr Jadav wobbling on his bicycle, amusing. That did not create the proscribed atmosphere, nor could it reasonably be said to do so in the circumstances of the case and having regard to Mr Jadav's perception. It is not related to Mr Jadav's ethnicity.

166. As for the drinking of smoothies, (and protein shakes, which does not appear in the list of issues) in our view on the balance of probabilities, it is likely that Mr Forster said something about Mr Jadav drinking smoothies and protein shakes, probably something humorous, but Mr Jadav has embellished that to use the adjective, 'mocked'. It is not something which has created the proscribed environment, nor could it reasonably be said to have created that environment, having regard to all the circumstances and Mr Jadav's perception.

Allegation 16 - Between January and May 2017, Mr Forster targeted the claimant's work for criticism and lost his temper with the claimant without checking his work properly.

167. From March 2017, Mr Forster was targeting Mr Jadav's work for criticism. The reason was that he had decided he felt that Mr Jadav's performance was not adequate. He had sought Human Resources advice, which was that he gather evidence and go through some form of process. It was not something which was related to Mr Jadav's ethnic origins, nor could it reasonably be thought to be so related, having regard to the circumstances and to Mr Jadav's perception.

168. We find that Mr Forster did not lose his temper, but that, consistent with the evidence of Mr Muncey and Mr Combes, he raised his voice and his doing so did not relate to Mr Jadav's race. He did not mock his work.

169. As for the allegation that Mr Forster was not checking Mr Jadav's work properly, this is a matter of Mr Jadav's perception and in our judgement, is not accurate. Mr Forster was checking his work properly.

***Direct Discrimination***

Allegation 1 - Between January and May 2017, Mr Forster isolated the claimant in team meetings and specifically excluded him from team group communications.

170. Further and better particulars were provided in respect of this allegation.
171. Mr Forster told Mr Jadav not to go to the New Homes meetings because he did not think it would be useful for him to do so.
172. With regard to being omitted from team communications, this was sometimes because it was appropriate to leave Mr Jadav out. On one or two occasions, it was a mere oversight.
173. Mr Jadav was omitted from catch up meetings at Costa Coffee for good reason, because the meetings were about him.
174. With regard to the meeting on 19 May 2017 regarding the Thaxted project, Mr Forster let Mr Jadav attend when he asked, but more significantly, by this point Mr Forster knew that Mr Jadav was going to be dismissed.
175. With regard to his omission from the Project R update on 19 May 2017, this was an oversight. His exclusion from other meetings was either oversight or because his attendance was not thought appropriate.
176. Mr Jadav complains that he was not provided with copies of the notes of meetings in relation to his appraisal and reviews as others within the business were, ie Human Resources. This was because that was the respondent's policy and he was not treated any differently from anybody else in that regard.
177. An overall comment; Mr Forster wanted to keep Mr Jadav focused on what was important for his development. Mr Jadav seems to have expected to be treated the same as the two other members of his team, who had 20-30 years of experience. That was an unrealistic expectation. The reason for exclusion on some occasions from communications was relative experience and not because of race. A hypothetical comparator, where that is a person in precisely the same circumstances as Mr Jadav, but not of Asian ethnic origin, would have been treated in the same way.

Allegation 2 - Between January and May 2017, Mr Forster expected the claimant to generate new work.

178. Whilst there may have been references to generating new work in February and April 2017, or a question asked about what fees had been generated, these are natural points of interest in this industry. There was no expectation on Graduate surveyor's or mr Jadav in particular, to generate new work or fees and race did not lie behind the enquiries made of Mr Jadav..

Allegation 3 - Between January and May 2017, the claimant's workload was increased to an unmanageable burden with unrealistic targets.

179. On 3 March 2017, Mr Javad sent an email asking for more work; he was not overworked at that stage.
180. The research request of 15 March was reasonable and we find that he was not asked to work over the following weekend.
181. We have analysed above the list of work he said he had to do at the team meeting on 20 March 2017.
182. The request to attend the Cambridge City Council meeting was reasonable and not onerous. He does not accuse Mr Coombes, who asked him to go, of race discrimination. His suggestion that Mr Coombes was doing Mr Forster's bidding is not credible, he was not.
183. The list of jobs Mr Javad was given in the meeting on 6 April 2017, (before the letter of 24 April) was not, "colossal".
184. The request to prepare a proposal for Project L was reasonable.
185. The request to carry out appraisals between 9 and 16 May 2017 was not unreasonable and was not onerous.
186. The Vision 2020 initiative was something Mr Javad had volunteered for and was nothing to do with Mr Forster.
187. The work Mr Javad was given on Project R was completed in the required time frame and was not, we find, an inappropriately onerous task.
188. We have analysed Mr Javad's workload and have concluded that he was not overworked. His workload was not increased to an unmanageable burden and he was not set unrealistic targets.

Allegation 4 - Between January and May 2017, Mr Forster did not return the claimant's phone calls or emails.

189. Mr Javad complains about Mr Forster not replying to his email regarding his APC competencies. The initial email did not appear to call for a response. Mr Forster was not his APC counsellor and these were not a matter for him.
190. It is ironic that Mr Javad complains he did not receive a reply to his email of 3 March 2017, asking for more work. Certainly, on Mr Javad's case, he received more work.

191. It is probably true that on the weekend of 18/19 March 2017, Mr Forster did not reply to telephone messages and emails from Mr Jadav. We accept that on 18 March 2017, he was with his family and his phone was switched off. On 19 March 2017, we know that he was working because he took part in a telephone conference and he could then have replied to the emails or telephone calls, but there is nothing to suggest that his failure to do so was because of Mr Jadav's race.
192. With regards the email of 19 May 2017 in respect of which, Mr Jadav complains that Mr Forster did not reply to his question as to whether there was anything he should bring to the meeting at Thaxted, we have seen above that Mr Jadav has misrepresented the question which he posed, which was, *"If you need me to bring anything from the office, please let me know."* This is not a question which necessarily calls for an answer. If Mr Forster wanted him to bring something, then he would have replied and said so. Mr Forster did not need reminding to reply to a leave request and in fact, replied promptly, see paragraph 153 above.
193. Mr Jadav complains that he received no reply to his email of 22 May 2017, asking for the meeting to be postponed. The fact of the matter is, he was in the building with Mr Forster and received his response verbally from Mr Forster; the meeting went ahead.

Allegation 5 - Between January and May 2017, Mr Forster did not provide the same level of managerial support to the claimant as he did to the other graduates.

194. There is no evidence to support this allegation. We do not uphold the allegation. Any differences there might have been in Mr Jadav's treatment, is more likely to have been because of the difference in role from that of any other graduate, (such as Messrs Gibson, Sharp and Jenners) and a difference in approach of those managing such other graduates and not because of Mr Jadav's race. We were unable to find an email of instruction relating to Kier Homes on 13 March 2017, but there is email traffic on 14 March, (pages 337/338) the content of which did not strike us as unclear. Graduates were expected to help each other, (Mr Javad was treated no differently in being asked to help others). Mr Forster did not lose his temper with, swear at or mock Mr Javad and spoke to Javad no differently from the way he spoke to Mr Gibson or Mr Jenner.

Allegation 6 - 7 March 2017, holding the claimant's appraisal in a meeting room rather than in a pub or at Costa Coffee.

195. This was for a good reason, which is that there were serious matters to discuss which would not have been appropriate for a venue such as a pub or a coffee bar. The reason was not Mr Jadav's race.

Allegation 7 - 7 March 2017, Mr Forster said of Mr Jadav's ambition to take planning to level 3, he should not get out of his depth.

196. This was genuine advice. He was not holding Mr Jadav back. The reason for this advice was not Mr Jadav's race.

Allegation 8 - The further reviews on 6 April and 11 May 2017, did not properly outline areas of performance to improve. Mr Jadav was not given sufficient support or time to improve.

197. The process followed by the respondent was certainly not perfect. However, after the appraisal on 7 March 2017, they did give Mr Jadav two further opportunities to improve, conducting two further reviews approximately one month apart. Mr Forster and Mr Combes did try to explain to Mr Jadav what the problems were with his performance. They did stipulate six specific items of work that he was to complete for the final review. It ill behoves the claimant to complain of lack of time, when in the critical period he elected to take six days holiday. We find that such failings as there may have been in the performance review process, were not because of Mr Jadav's race, but because of the respondent's apparent practice of taking a more relaxed approach to dismissals in circumstances where the employee in question does not have two years' service.

Allegation 9 - On 7 March 2017, Mr Forster refused Mr Jadav's request to attend appropriate and relevant courses.

198. Mr Forster approved the course, which he genuinely thought was appropriate for Mr Jadav at that time. Mr Jadav agreed in evidence that his request to attend management courses was not appropriate. Any failure to approve Mr Jadav attending any other courses which he desired at the time, was not because of his race or any perceived religious belief, but because the one course they did approve was that which they thought appropriate at the time.

Allegation 10 - Between January and May 2017, Mr Forster excluded Mr Jadav from client meetings.

199. Mr Jadav was included in meetings with clients by Mr Forster when he thought it appropriate. In his role as a trainee graduate it would be unrealistic for Mr Jadav to expect to sit in and attend on all such meetings. In so far as he was not invited, or permitted to attend meetings with clients, that was not because of his race.

Allegation 11 - Between February and May 2017, the respondent sought to circumvent its procedure for dismissal.

200. The written procedure stipulated that it may not apply if the employee did not have two years' service. Whatever we may think of that, the respondent's reason for adopting that approach was not because of Mr Jadav's race. Mr Forster was not aggressive with, did not lose his temper with and did not mock, Mr Javad in the meetings on 7 March, 6 April and 11 May 2017.

Allegation 12 - Mr Jadav was dismissed on 22 May 2017, for unclear reasons.

201. The reasons for dismissal were clear; the respondent's and Mr Forster's genuine perception as to Mr Jadav's capabilities in the particular role. It is tolerably clear from the documents what the problems were. The explanations are not perfect, in so far as they could have been more precise and more clear. The failing in that regard was not because of Mr Jadav's race.

### **Final Conclusions**

202. In so far as we have upheld any of the factual allegations, we have concluded, having regard to the matters discussed under the heading, "Burden of Proof", that in so far as they amount to unwanted conduct or detriment, Mr Javad has not proven facts from which we could properly conclude that the same related to race or perceived religion and had the purpose or effect of creating the proscribed atmosphere, or were because of race or perceived religious belief. We have stood back and looked at the facts of this case as a whole and reflected upon whether one might say that Mr Jadav has been treated less favourably than a hypothetical comparator would have been; a person not of Asian ethnic origin or a person who might be perceived as being of Muslim faith, and whether the reason for any such less favourable treatment might have been differences in ethnicity and religious belief. Our conclusion is he was not treated less favourably than a hypothetical comparator would have been.
203. For all of the above reasons Mr Jadav's complaint of race and religious discrimination fails and is dismissed

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Employment Judge Warren

Date: ...7 November 2018.....

Sent to the parties on: 14 November 2018

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For the Tribunal Office