EMPLOYMENT TRIBUNALS

Claimant: Mr I Haider

Respondent: Virgin Media Limited

HELD AT: Leeds **ON: 8, 10-12, 15 October 2018**

BEFORE: Employment Judge J M Wade
Ms H Brown
Mr D W Eales

REPRESENTATION:

Claimant: In person
Respondent: Mr T Shepherd (counsel)

Note: The written reasons provided below were provided orally in an extempore Judgment delivered on 15 October 2018, the written record of which was sent to the parties on 15 October 2018. A written request for written reasons was received from the Claimant on 16 October 2018 and from the respondent on 31 October 2018. The reasons below, corrected for error and elegance of expression, are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 15 October 2018 are repeated below:

JUDGMENT

The claimant's complaints of direct discrimination because of race, and victimisation, do not succeed and are dismissed.

REASONS

Introduction

1. Mr Haider made complaints of race discrimination and victimisation following his dismissal by the respondent from his post undertaking door to door sales of its media packages. He had less than a year's service. He attended a case management hearing before Employment Judge Jones. The complaints were clarified and set out in a clear issue list and directions given. The issues appear below. This hearing was listed over five days; we did not sit on Tuesday of last week for reasons of judicial training.
2. Was the claimant subjected to the following detriments:

    (i) Being told not to speak with Asian colleagues but only to speak to English colleagues, by Mr Hartley;

    (ii) By failing to pay him a bonus when he referred Mr Malik Farhan Ahmad for employment with the respondent;

    (iii) By, David Hartley, checking the claimant's mobile phone in September and November 2017;

    (iv) In November 2017 by allocating a job to Mark Boyce rather than the claimant;

    (v) Between April and December 2017 not allocating a fair proportion of the web leads;

    (vi) By not providing the claimant with an equal distribution of lightning doors;

    (vii) By requiring the claimant to travel to attend the office, a 50-mile round trip, thereby wasting his time and opportunities to sell;

    (viii) In July 2017 not agreeing to his request to work in Keighley;

    (ix) In August 2017 informing the claimant that there was a new release (lightning doors) in Carlisle when in fact it had already been marketed for the previous 12 months leading the claimant to waste time in attending Cumbria;

    (x) On November 2017 refusing to allow the claimant to book a one or two-week holiday, either in November or December;

    (xi) On 20 November 2017 by David Hartley threatening to dismiss the claimant on the spot;

    (xii) On 22 November 2017 booking one room for the claimant and his colleague, Malik, in contrast to the booking of separate rooms for their colleagues, J and Kerry, and in not paying the claimant and Malik their food expenses in contrast to the payment of such expenses to Jamie and Kerry;

(xiii) On 1 December, by David Hartley raising his hand as if to touch the claimant's badge in an aggressive manner;

(xiv) On [1 December], by David Hartley threatening the claimant that if he were to appeal his final payment would be delayed;

(xv) Delaying the payment of the claimant's expenses until 22 January 2018.

3. If such actions arose and were detriments, were they because of the claimant's race or alternatively, in respect of item (xi), because the claimant had made a complaint that he was being unfairly treated because of his race, to Mr Hartley, on [20] November 2017?
4. In addition, was the dismissal of the claimant because of his race?
5. Were any of the detriment complaints presented out of time, that is more than 3 months and due account for the early conciliation period after they occurred? Taken together, did they constitute conduct, the last part of which fell within time? If not is it just and equitable to consider any claims which are out of time?
6. As to limitation, the last act complained of was dismissal on 1 December 2017. The claimant commenced early conciliation on 27 January 2018, a certificate was issued on 12 February 2018 and his claim was presented on 15 March 2018. Events complained about before 28 October 2017 might therefore have been out of time, but given that the Claimant's case of a series of discriminatory acts commencing in July 2017, the Tribunal could not determine limitation without hearing the whole case and deciding the merit of the earlier allegations. Sensibly the Respondent did not address limitation in its response and in the event, as it was necessary to examine each element, the just time limit for presentation of complaints from July to 28 October 2017 was 15 March 2018.
7. During the hearing it was apparent that complaint (xiv) was in fact a complaint about conduct on 1 December 2017, not 20 November 2018 but there was no prejudice in the Tribunal deciding the complaint on the correct date – all the parties understood it as an error.

The Law

8. We set out the relevant law early in these reasons because it has informed our approach to the evidence and the relevant issues.
9. The Equality Act 2010 relevantly provides:

10. Section 39(2):
"*An employer (A) must not discriminate against an employee of A's (B) –*
(b) in the way A affords B access, or by not affording B access to, opportunities for promotion…..or for receiving any other benefit, service or facility;
(c)by dismissing B;
(d)by subjecting B to any other detriment."

11. Section 39(4):
"An employer (A) must not victimise against an employee of A's (B) –
(b) in the way A affords B access, or by not affording B access to, opportunities for promotion…..or for receiving any other benefit, service or facility;
(c)by dismissing B;

(d)by subjecting B to any other detriment"

12. Section 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."

13. Section 27: "*A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act.*

14. It was not in dispute that if the Claimant had said words to Mr Hartley, the gist of which was, "you are not treating me equally with white colleagues" (in terms of sales opportunities), that would amount to a protected act within Section 27 (2)(c) or (d),

15. Section 136: *"(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.*

16. "Because" in these provisions means "materially influenced by".

17. We also gave ourselves the following direction in relation to finding facts:

Is the account consistent with contemporaneous material, including increasingly, social media, smart phone and meta data based evidence?

Is the account consistent with subsequent investigations or witness statements given?

What evidence is there from others about the witnesses' conduct and demeanour at the time, both before and after any allegations?

What other evidence is there about the way the witnesses behaved on other occasions, perhaps not in dispute?

What was the Tribunal's impression of the witnesses when questioned: was the impression that they were telling the truth?

What was the Tribunal's assessment of the witnesses' reliability on relevant matters: were they generally consistent with other material and good historians or were they mistaken in their recollections or beliefs?

What does the totality of the chronology or circumstances tell the Tribunal about the inherent likelihood of the accounts?

An initial impression or assessment of a witness has to be checked against all the other factors;

Placing too much significance on demeanour can be unsafe: a confident witness is not necessarily a truthful witness and a nervous one is not necessarily lying;

A genuinely held belief which is wrong, or one untruth told, does not necessarily render other evidence from that witness unreliable;

People often deny unlawful acts ("well he would, wouldn't he");

Generally good historians still tell untruths; people do, on occasions, behave in unexpected ways, whatever the overarching likelihood;

Skilled cross examination can demolish an otherwise cogent case;

The Tribunal has a duty to put the parties on an equal footing during a hearing as part of the overriding objective;

The formal rules of evidence do not apply to the Tribunal;

Justice requires witnesses to have the opportunity to comment on disputed matters in, what is still, an adversarial process.

Evidence and hearing

18. We heard from the Claimant, who had provided a full written statement, and from Mr Ahmad who was a former colleague of the Claimant and current friend. On behalf of the Respondent we heard from Mr Hartley, sales manager, who was the Claimant's manager and the person against whom the allegations were directed; Mr Owens, Mr Hartley's manager and regional sales manager, who heard an appeal against the claimant's dismissal; and Miss Rennison, sales administrator, who was present at the meeting at which the Claimant was dismissed.

19. The assessment that we made of the oral evidence of the protagonists is explained in our findings, where necessary. We did not find Mr Ahmad to be a reliable historian at all, not least because of his lack of clarity in relation to very recent matters concerning employment; further we know that his statement was prepared with the Claimant and may not have reflected his own recollection without prompting. We have not therefore placed a great deal of weight on his evidence; he was present for some matters, but not those which are pivotal. Miss Rennison and Mr Owens appeared to give entirely straightforward and reliable evidence.

20. We had a reasonably large bundle of documents, and the Claimant's own bundle. Much of the most helpful evidence was before us because of the claimant's efforts in preparation. We had a reasonably lengthy chronology about which we had to make findings of fact and then apply the law to those facts.

21. It is fair to say that the Claimant is a very thorough and prepared litigant in person. He did not, however, put most of the allegations of discrimination and the complaints of victimisation to Mr Hartley, the alleged discriminator. The Tribunal had to intervene on a number of occasions to focus the evidence on the relevant matters, including relevant background. It is fair to say that his complaint could also be characterised as a list of all the reasons why it was not "fair" for his employment to be terminated at the end of probation and his frustrations in post. Mr Hartley was a calm and composed witness whose evidence was straightforward and generally probable.

22. The Tribunal sought to put the parties on an equal footing, and ask the questions that perhaps the Claimant did not realise he had to ask to pursue his case of discrimination. We did so not least because the purpose of the Equality Act 2010 is to eliminate all discrimination whatsoever. It is convenient to address the

overarching factual chronology and context before addressing the Claimant's specific complaints.

Findings of fact

The Claimant's early employment

23. The Respondent sells packages of broadband, landlines, SIM cards ("sims") and on demand television. It does so through different sales channels, including direct sales: cold calling and door knocking. The conversion of potential customers who may have applied on line, but have not completed that process, is a significant source of sales and those potential customers are known as "web leads".

24. The respondent's direct sales force operates and is managed regionally. The Claimant, who is a Pakistan national, applied for a field sales advisor role and he was successful in that application. He was appointed by Mr Hartley, one of two field sales managers based in Wakefield. The employment commenced in May of 2017.

25. The Claimant completed two weeks "boot camp training", in Cheltenham, and that was to equip him for door to door sales activities. He then joined Mr Hartley's team and he started work in the field. The remuneration package for his employment included a company car, a basic salary and a large commission element of pay, with substantial on target earnings available.

Mr Hartley's sales team

26. In the spring of 2017, Mr Hartley's sales team comprised: one white British colleague with 15 years' service, two white British colleagues with 12 or so years' service, two white British colleagues with seven or so years' service, six or eight colleagues with shorter service, and they were of equal diversity between Asian British and white British colleagues. The more recently appointed cohort of colleagues was very diverse, and there were also a further seven "probationers" in the period with which we are concerned. They, like the Claimant, joined in 2017. There were three white British, three Asian British and of course the Claimant from Pakistan.

Managing sales targets

27. The Claimant's contract of employment provided for a six month probationary period, during which employment could be terminated on giving a week's notice. The Respondent had a written probationary policy. It provided for regular probationary review meetings. The clear message from those policy documents was that a failure to meet satisfactory selling performance would result in the employment ending (employment would not be confirmed to be "permanent" without sales targets being met).

28. Where there are unmet targets, the policy provides for termination of employment after six months, or for an extension of probation of up to three months. The Respondent had, of late, increased that standard probationary period from three months to six months, which was the case when the Claimant commenced employment. The increase was to try to address an attrition date for new sales representatives ("reps") which was quite high.

29. The targets and commission to be achieved in probation were structured so as to increase over time. The first three months involved commission being paid on all sales. That was described as a safety net. After that commission was only paid if

80% of the targets were achieved. The Respondent had sales forecasts nationally and regionally predicting on a monthly basis the sales that would be achieved. Mr Hartley's role included ensuring that his team achieved overall sales "on target". That was his job. He did not himself engage in door to door selling, other than if he was supporting members of his team to achieve those sales by, for instance, accompanying them in the field.

30. The basic monthly targets for all probationers were 18 sales, 24, 28 and 32 by the fourth month for a full time appointment. These basic targets were subject to reduction for holidays booked, or other absence, on a pro rata calculation by reference to the number of working days in the month. There were very frequent and necessary target adjustments. At a target of 32 sales, commission was therefore earned if a field sales advisor reached 26 sales in that month. Performance below 26 was not acceptable.

31. The Claimant's sales figures in his first seven months were as follows: 7, 10, 19, 14, 9, zero and 20. An Asian colleague who joined on the same day as the Claimant achieved sales figures of 4, 6, 3 and none in August. That colleague was dismissed at the end of August.

32. A white colleague who joined on 6 February, a little earlier than the Claimant, was dismissed on 2 October 2017. His sales performance from May was: 11, 22, 5, 10 and 3 and was dismissed at the end of probation after a month's extension. An afro Caribbean colleague who joined on 3 February had sales of 9, 20, 2, 14 and 10 from May. He too was dismissed on 2 October. An Asian British colleague who joined in January 2017 made the following sales: 30, 7, 11, 13, 3, 27, 27. His employment was confirmed as permanent.

33. Mr Ahmad, an Asian colleague recommended by the Claimant, joined the respondent on 11 August. He achieved sales in September of 1, 10 sales in October, 11 sales in November and he resigned in January 2018, making allegations of unequal treatment on grounds of race. He did not take that complaint any further.

34. A white colleague who joined on 14 July achieved one sale in July, 14 in August, 16 in September, 16 in October, 8 in November, and 19 in January when her probation was extended for a month. She then achieved 29 sales in February and was confirmed in post.

35. Returning to the Claimant's chronology, in the first few months of employment he received favourable feedback with some points to work on. His performance and his sales showed some promise, and some likelihood of him succeeding, albeit there were things to do. Similarly he gave very positive feedback about Mr Hartley's support of him. The support in the field continued to be given from coaches who had trained the Claimant previously, and through monthly reviews and some direct support from Mr Hartley.

<u>September to Suspension</u>

36. In September, by which time the Claimant was no longer entitled to commission on sales unless he met targets, there were some "lightning doors" released in Carlisle. "Lightning doors" are those addresses where there is a new technical installation or service provision, which enables the respondent to sell services in a particular street or postcode. The Claimant and Mr Ahmad went at that time to Carlisle to seek to sell to those addresses.

37. They were told on the door step that some doors had already had sales reps call. Mr Hartley's belief in giving those opportunities to the claimant was that a previous sales team had been disbanded, meaning that the Carlisle doors not been been worked sufficiently or effectively. No part of this thinking was to set the Claimant up to fail: the reverse was true – he wished the Claimant to succeed, which supported him achieving his targets.

Suspension concerning the right to work

38. The Respondent's HR service was in touch with Mr Hartley in October concerning the Claimant's visa expiry. He had come to study in the UK in 2012 and then he found work. The visa was due to expire on 11 October and the Claimant was removed from the respondent's payroll system and suspended from work, because by that date he had not provided proof of his right to work, or of an application having been made to appeal or otherwise remain in the UK. His sales performance in the first few days of October before suspension was zero. That may well have been affected by his concerns about his visa, and his efforts trying to sort that out.

39. Such was the close management of the sales force, that Mr Hartley had identified that the Claimant had done fewer "door knocks" on Monday 9 October than was acceptable. He picked that up in an email and spoke very plainly to the Claimant about what was the expected level of sales activity. Plain speaking to his team in to encourage sales was typical of Mr Hartley.

40. On 11 October Mr Hartley conducted a review with the Claimant, including explaining that the full sales target would apply for November (32 sales and four sim sales).

41. The visa issues were resolved when the Claimant provided a certificate of application. He returned to work in the last week of October. Mr Hartley happened to be on holiday at that time and the Claimant dealt with Mr Hardcastle, Mr Hartley's deputy. The claimant asked Mr Hardcastle if he could take holiday in November and was referred on to Mr Hartley.

The first half of November

42. When Mr Hartley returned to work the Claimant again asked for holidays in November but Mr Hartley refused. That was in a conversation on or around 6 November. There was then a probation review meeting on the same day and Mr Hartley agreed to extend the Claimant's probation to 30 November 2017. It had been due to expire in October, when the Claimant was in his period of suspension. Mr Hartley sent a confirmation of the extension and set out the targets for November in writing again. The email confirmation of that review was very clear to the Claimant that if he failed to make sufficient progress he would in all likelihood be dismissed. In the meeting Mr Hartley confirmed that he was there to help the Claimant, and to support him achieve his targets, and the Claimant was asked to keep in touch daily, because this was clearly going to be a very critical period for him.

43. After that meeting on 7 November the Claimant sent an email to Mr Hartley explaining that he was depressed, and that he needed some rest and time with his family, having not had any time off work since April. He did not refer to the two week period when he was not able to work for visa reasons.

44. The Claimant knew that he had one month to hit his sales target in November, but he asked in that email for a further month's extension to the end of December. He

asked Mr Hartley to monitor his sales in December, but to give him holiday for, in effect, the rest of November (the 13th to the 30th).

45. There was no written reply to that request, but Mr Hartley refused it in circumstances where he had too many people absent already in November, one for serious injuries, and he needed the Claimant's sales to support the department sales that month. He already had three probationers who not lasted the year and no doubt that would have impacted on sales forecasts as well. He also told the Claimant that holidays were not permitted in December, other than the Christmas break. The Claimant was therefore very clear about what he needed to do in the month of November to be confirmed in post as permanent.

46. Mr Hartley had given a wrong instruction to payroll about re-starting the Claimant's employment from 6 November, because he had been on holiday; in fact that was resolved such that the Claimant was paid for the two days or so that he worked in the last week of October and in full for November.

47. The Claimant then rose to the sales challenge he faced. He made 16 sales between 6 and 16 November and he did so in circumstances in which, to use Mr Hartley's words, Mr Hartley flooded him with work. He sent the Claimant a whole series of either web leads, sometimes described as hot leads, in the Bradford area, in early November, in response to which the Claimant was clearly successful in making sales.

48. Also, in those first two weekends of November, Mr Hartley was clear about the need for his whole team to work at the weekends. He was instructing everybody to work very hard over those two Saturdays and Sundays. On Friday 17 November that was certainly the case and it was on the basis that most of the sales team were not on target at that stage.

<u>Allegation (xi) - Mr Hartley threatening to dismiss the Claimant on the spot</u>

49. Having worked on 18 and 19 November the Claimant came to work the following Monday feeling very down. The sales position was this: having achieved 16 sales in the first two weeks, the Claimant finished the November month end on 20 sales, two of which were made in Carlisle later in the month. In all likelihood the claimant only made one or two sales, if that, on 18 and 19 November. The Claimant's case is that on Monday 20 November he told Mr Hartley he was not being treated equally in comparison with white colleagues (in terms of access to sales opportunities). The Claimant's case is that Mr Hartley then became very angry, saying, "this is very offensive - if you say that again I will dismiss you on the spot". That was the Claimant's allegation.

50. Mr Hartley's oral evidence was that the Claimant did make that allegation of unequal treatment in comparison with white colleagues, but that he reacted very differently and indeed his support continued.

51. This was a significant conflict in the oral evidence. Applying our fact finding direction, there are only one or two matters in support of the Claimant's allegation. The Claimant was doing very well in the first two weeks of November with Mr Hartley's support to achieve confirmation in post. He clearly was unhappy on that Monday morning and he clearly did make the allegation to Mr Hartley. We know that there was a conversation, and we know that there was a response from Mr Hartley (his evidence was he was totally shocked and he asked the claimant why he said that, and when he could not get the Claimant to explain why, he said he

assured him it wasn't the case and he tried to treat everyone as fairly as possible). That was around lunchtime, and later he went out with the Claimant to assist him in the field. The Claimant then did not achieve the same, or anything like his early November performance, in the next two weeks. That may be grounds to find that the conversation was not as affable as Mr Hartley described and something went wrong, and we bear that in mind.

52. The second matter in the Claimant's favour in weighing this allegation is that Mr Hartley's account of that meeting on the Monday morning of 20 November, and in particular his discussion of the Claimant's making the allegation, was heard for the first time, as we understand it, in this Tribunal. It was not something that Mr Hartley said in his interview for the Claimant's subsequent appeal against dismissal conducted by Mr Owens. It was not set out in his witness statement. It did not appear in the Respondent's response to these proceedings. The fact of an allegation of race discrimination having been made by the claimant was not talked about in those terms by Mr Hartley previously, and that begs the question why not, if he now accepts the allegation was made. He has, however, been clear in these proceedings, and previously that he did not say, "he would sack the claimant on the spot if the claimant said that again" – or words to that effect.

53. These two matters (context and late admission) might weigh in the Claimant's favour. Further, in general the Claimant's evidence struck us as cogent and thoughtful, and ostensibly reliable, albeit on some matters we did find his perception and account inconsistent with the known history.

54. Against the Claimant's version of events, there were a number of compelling factors. As we have indicated we did not consider Mr Ahmad, in his evidence, reliable, but much more importantly there was nothing from Mr Ahmad at the time. There were no complaints at the time, there was nothing to Mr Hartley at the time. There were no text messages, nothing at all to indicate that the account the claimant gave of this very serious and striking allegation was told to Mr Ahmad on or around 20 November.

55. Equally strangely, when we go to the Claimant's complaint document, which was sent within 10 days of this alleged comment (if you say that again I will sack you on the spot), sent on the same day as his dismissal, it is not there.

56. We take into account that the Claimant is writing in a second or perhaps third language and we give due weight to that. He said this in his complaint on 1 December 2017: "in November Malik got BD6 area in walk in card and he went to knock one street where he realised that someone has knocked an hour ago and Malik realised that street was released a day ago, but that was given to Kevin and another colleague. I went to office on next Monday and asked for support from Dave. He asked me to knock normal doors. I requested him give me some new release or web leads as I realised him that there are loads of releases in BD5, BD8, BD6. Also I realised him that you are not treating equally".

57. It is entirely probable that the Claimant's use of "realised" is, in truth an expression of "I advised him" or "I told him" or "I relayed to him". In our judgment his complaint accurately reflects the November chronology which is supported by the contemporaneous documents. Those include details of the sales leads in Bradford which were clearly being given and the Claimant had done very well with ""warm or hot" leads in the first two weeks. He was then asking, on 20 November, for more

such leads to enable him to be able to deliver the same sales performance in the second two weeks of November after a poor weekend.

58. He and Mr Hartley say, and we accept the claimant said words to the effect of: "I told him you were not treating equally" and by inference of express words "compared with white colleagues". If the response from Mr Hartley was, "I'll dismiss you on the spot if you say that again", it would then be extraordinary, not impossible but extraordinary, that the claimant did not include that alleged comment in his written complaint, which was, we remind ourselves, a complaint about dismissal. The allegation of Mr Hartley's response was only relayed to Mr Owens during the appeal meeting on 18 December, a month or so later.

59. We further take into account are that there were no contemporaneous documents from the Claimant recording the allegation around 20 November, nor is the following chronology necessarily supportive: Mr Hartley went out with the Claimant that evening to do some sales with him and there was further activity the following week. The totality of the chronology does not necessarily lend itself to it being likely that the "dismiss on the spot" comment was made on 20 November.

60. Weighing all the matters we have decided that it simply is not safe to conclude that the comment was made, only on the basis of the Claimant's allegation a month later, and that his sales performance in the second half of November deteriorated.

Events from 20 November to dismissal

61. Returning then to the chronology after 20 November, Mr Hartley went out that evening with the Claimant. He gave some selling feedback in Walker Drive, and the next morning the Claimant and others were tasked with other sales leads in ever more focussed efforts to achieve November sales. Mr Hartley said this to all his sales reps[1]: "phone web leads…lightening releases on Tuesday 21st… phone them please if you can't visit them".

62. As part of these efforts there was a potential customer in Bradford who was telephoned by the Claimant on or around the 21st, in accordance with that instruction for a "lightning release" in her area. On Friday 24 November she telephoned back. She had been convinced that she wanted to sign up to the respondent's services. She asked for 15 minutes to seek permission to cancel her BT contract, and said she would ring the Claimant back. In the meantime, the Claimant's colleague, Mr B, had visited the customer in his capacity as "sweeper" to make sure that any lightning releases were sold. He received instructions to do so via his iPad and the respondent's systems and he then did close the sale. He checked with Mr Hartley, because the Claimant had also been involved in that sales process, but was told to carry on and close the sale. He then received the benefit of that sale and the Claimant did not.

Allegation (xii)

63. On Wednesday 22 November 2018 the Claimant and Mr Ahmad were asked if they would like to go to Carlisle to make sales. They said they would. We do not accept Mr Hartley's evidence that he asked these two colleagues if they would like to go, and whether they were prepared to share a room, and they agreed. We consider, having reviewed the documents, that his account of a request concerning the room is unlikely. It is apparent that Ms B (the other probationer) booked her own room

[1] 240 to 245

in Carlisle. It is apparent that all other rooms for the Carlisle sales drive were booked by Mr Hartley and he booked all other colleagues (who were not probationers) single rooms and some in different hotels. We consider that he booked a room in the Claimant's name only intending Mr Ahmad and the Claimant to share that room. The budget was very tight and that was his reason for booking a shared room. He gave them the choice of going to Carlisle (or not) but having indicated that they would go he booked that shared accommodation in circumstances where that had been done in the past, when there was no budget to make these sales.

64. The Claimant made no more than two sales in Carlisle. We accept his evidence that there was a conversation with Mr Hartley about that, and he was told to come back. He, and indeed the other probationers, Ms Buckley and Mr Ahmad, also came back. The lack of meals on the Claimant's room booking, we accept, may well have been an error at booking agency's end, or if it was Mr Hartley's doing, it was for exactly the same reason as booking one room: pressure on budget.

<u>The meeting at which the Claimant was dismissed</u>

65. At the end of the following week on at 1.15pm on 1 December it was the Claimant's probationary review. He had not met the November sales target set. We have very clear handwritten notes from Miss Rennison about what took place in that review and the tone and content was professional and courteous on Mr Hartley's part. We consider those manuscript notes the most reliable account of what happened. Mr Hartley had asked in advance for details of the claimant's accrued holiday entitlement in the expectation that the Claimant's employment would be terminated, because that was the respondent's normal approach for failed probationary sales performance. He wanted to be able to give the Claimant details of what he would be paid and when. However, he started by talking through the last month and asking for the Claimant's comments. The Claimant simply wanted to know his decision, and would not engage with that decision and so he gave that decision. The Claimant's employment was terminated for that reason (and with a heavy heart said Mr Hartley) and a payment in lieu was then to be made.

66. There was then a more strained conversation in which the Claimant said he refuted (or refused) the termination and Mr Hartley explained the appeal process.

67. A handover process took place with the Claimant being asked his iPad (which he could not provide as it was at home) and Mr Hartley asked for his badge and said that his car would be collected at 5pm. Mr Hartley said payments would be made on 20 December. It is not in dispute that Mr Hartley leant across and reached out his hand towards the Claimant in order to seek his badge and the Claimant refused and Mr Hartley has to ask a colleague to join them to ask for the badge (which was then provided). What is in dispute, is that Mr Hartley said that if the Claimant challenged this decision, or words to that effect, then his payment would be delayed. We know, having examined the chronology thereafter, that Mr Hartley went on and ensured that the Claimant's December salary was processed in the usual way with pay in lieu and holiday pay addressed. Miss Rennison left the room before the Claimant and Mr Hartley left, and may not have heard the entirety of the closing comments after the Claimant had given his badge to Mr G and he was escorted by Mr Hartley outside.

Allegations (xiv) and (xv): On 1 December Mr Hartley threatened the claimant saying if he appealed the dismissal his final payment would be delayed; and delaying the final payment until 22 January 2018.

68. It appears there was some very small error in the Respondent's holiday pay calculation for the Claimant because Mr Hartley had not appreciated the Claimant's employment had re-commenced in the last week of October (when he was away) but instead calculated holiday pay by reference to it recommencing on 6 November. Mr Hartley entered the Claimant as a leaver on the Respondent's system that afternoon (1 December), after their meeting, and he promptly arranged pay and 13 days' holiday pay to be paid in the December payroll as he had told the Claimant.

69. The claimant's petrol expenses were delayed, in the sense that they were not paid in December, but in January. The Claimant's colleague, Mr Ahmad, had brought in the Claimant's expenses claim the following week (Monday 4 December 2017) and Mr Hartley had sought to deal with it properly and promptly by forwarding it on 5 December manually. It is entirely probable, as Mr Hartley says and applying our industrial knowledge, that an electronic expenses claim on the respondent's Oracle system cannot be done for a colleague by anybody else. It has to be done by the individual on line, or a manual process is required. In these circumstances, the Claimant could not undertake an electronic claim, and Mr Hartley had to forward a manual claim on behalf of the claimant, which he did promptly. When the Claimant later complained in January about delay, again, Mr Hartley promptly emailed the expenses team. His email recalled the figure on the manual claim as £161, which was not entirely correct. A payment was then made of £181.70. Mr Hartley's account entirely reflects the contemporaneous documentation and the probable chain of events. In these circumstances the fact that payment was not received until 22 January is not supportive of an allegation that on 1 December Mr Hartley said to the claimant, out of ear shot of Miss Rennison, that if he challenged the decision his payments would be delayed.

The Claimant's appeal

70. There was a communication about an appeal against dismissal from the Claimant the same day (1 December) and we adopt the entirety of that email sent at 5.40 on 1 December into these findings; it did not include any complaint about a threat about delayed pay, or as we have indicated above, that Mr Hartley would "dismiss the Claimant on the spot".

71. At an appeal meeting with Mr Owens on 18 December 2018 the Claimant and his union representative presented a list of 14 complaints which included these further allegations and they were discussed in the meeting. There were also further matters added later by the claimant by email and there were then 16 complaints in total, many of which were repeated in the Claimant's originating complaint in these proceedings.

72. Mr Owens dealt with those complaints and was unable to make findings about some of them, but he gave his reasoned response and sought to deal with each of them, having interviewed a number of people including two of the Claimant's former Asian colleagues. The Claimant made no complaint about Mr Owens' conduct of his appeal or complaint.

73. Those are our outline findings of fact over the chronology of the Claimant's complaints.

74. As to the Claimant's allegations of race discrimination and victimisation which appear above, we have made the following further findings and reached conclusions as set out below.

(i)Being told not to speak with Asian colleagues but only to speak to English colleagues, by Mr Hartley

75. In evidence this allegation was that on two occasions Mr Hartley had said to the Claimant, do not speak to a particular Asian British colleague, Mr A, about work matters, who had been with the respondent since June 2016, but instead speak to Mr H (a White British colleague who had been with the respondent since 2005 and who stood in for Mr Hartley as a deputy), Mr B (also 2005 seniority) or Mr G (a peer manager of Mr Hartley's) or words to that effect. For a probationary employee with less than seven months' service, that is a probable instruction to give. Mr Hartley denied saying that the Claimant could not speak to Asian colleagues, but on balance he may well have instructed the Claimant to speak to Mr H, Mr B or Mr G on two occasions. We have constructed a hypothetical white probationer colleague, who is talking to another white colleague who is also a relatively junior member of the team for advice, would Mr Hartley have suggested speaking to the senior member instead? In all probability he would. This conduct is about junior members of the team and more experienced members, in our judgment. These are not facts which could lead us to make a finding of less favourable treatment on grounds of race.

(ii)By failing to pay him a bonus when he referred Mr Malik Farhan Ahmad for employment with the respondent;

76. Mr Ahmad was referred to the Respondent as a potential candidate for employment by the Claimant in the Summer of 2018. There was, at the time, a probationary policy which differed slightly from the current policy. It did involve processing a bonus for the referral on the Respondent's IT system. It did not take very long as a process, but it had to be done by the individual. Mr Hartley did not assist the Claimant to undertake that process. The Claimant did not raise it with him at any time before his dismissal.

77. Are these facts from which we could conclude less favourable treatment because of race? Again the Claimant can point to no direct actual comparators for this complaint. We constructed a white colleague in similar circumstances, introducing another white colleague, who does not raise the bonus with Mr Hartley, but who knows there is a policy, who is himself or herself on probation, and whose employment is then ended. In those circumstances is there any material from which we could find that Mr Hartley would have done anything differently? For example, would he have gone to that white colleague proactively and said, "you need to sit down with me and process this bonus because I have remembered it three, or four, or five months later"? These are simply not facts from which we could reach that conclusion.

(iii)Mr Hartley checking the Claimant's mobile phone in September and November.

78. This is a matter again where the Claimant's account in evidence developed the complaint made previously. He said that he had asked in the 1 December meeting

why Mr Hartley was looking at his mobile telephone, "do you think I am recording you?" Miss Rennison recalled that question being asked but it did not appear in her note because it happened towards the end of the meeting and she wanted to go because she had commitments and so she put a line to indicate the end of her note taking (and the end of the meeting). The Claimant wanted a note to be made of his telephone comment, but it was not.

79. That development did not help us make findings of fact in relation to the Claimant's bare allegation that on two occasions when he had been in the office (once in September and once in November) Mr Hartley had picked up his mobile telephone (to show him who was boss, he elaborated). He could not give us any context, who was there, what were the circumstances and so on. There was therefore very little to suggest that the picking up happened, and there was certainly no contemporaneous evidence of it happening, or of any objection to it. Mr Hartley could not recall picking up anyone's phone, but even if it did, there was nothing to suggest that Mr Hartley would not have done so with a white colleague. It might be something which we would all regard as undesirable, depending on the circumstances. It might be a technology based interest generating curiosity, but either way there is nothing on those facts, even if proven, that would suggest less favourable treatment on grounds of race.

(iv) In November 2017 by allocating a job to M B rather than the claimant

80. We have dealt with the closing of the sale by Mr B and the circumstances in which it arose. The real issue was whether Mr Hartley, when approached by Mr B, could have done anything, as it were, to manually transfer that sale to the Claimant (and his failure to do so was therefore less favourable treatment than would have been accorded to white colleagues). Mr Hartley explained why that could not be done because the system worked on a five day "lead time" for lightning releases to be closed by the sweeper (Mr B). Again there are no facts from which we can conclude that race played any part in this episode.

(v)Between April and December 2017 not allocating a fair proportion of the web leads
(vi)By not providing the claimant with an equal distribution of lightning doors

81. These allegations are framed in this way, in our judgment, because they reflect a misunderstanding or a wrong perception of the Claimant about the way that this sales team was managed. It was managed to maximise sales. Mr Hartley did not claim that people were provided with equal amounts of lightning doors or web leads; for instance he "flooded the Claimant" with hot leads in the first two weeks of November; but then gave them to others. It was for him to ensure that important sales opportunities were closed and he did it, as he could, doing his best amongst his sales force. He was trying to juggle: the need to close the department's budgeted sales; the need to meet everyone's individual targets; and the need to give probationers, of whom we have indicated there were seven in 2017, an opportunity to meet their targets. Proving an unequal distribution amongst the team at large is not a fact from which we could conclude less favourable treatment on grounds of race in a team where the more recent appointees have diverse ethnic backgrounds. There was simply not the evidence that Mr Hartley had deprived the Claimant of better sales opportunities, or that he had preferred white colleagues in this endeavour. The proper comparator, in any event, would be a white probationer,

and the Claimant did not establish that in April to November he had received less favourable sales leads than his colleagues who were white probationers. Indeed we know that a number were dismissed.

(viii)By requiring the claimant to travel to attend the office, a 50-mile round trip, thereby wasting his time and opportunities to sell

82. Every member of the sales team had to deliver their paperwork (that is signed contracts and the like) to the office typically daily (that formed part of the Claimant's training). Those two or three "sweepers" or senior members of the team who had particular qualifications that enabled them to sort out technical matters in the network, and problem sales, did not attend every day because they had very particular tasks to do which did not necessarily involve ordinary contracts. All other team members came in daily at times to suit their own particular circumstances. It may well be that the Claimant observed fewer white colleagues coming in at the times that he was there. His perception may well be of a lack of fairness in that respect, but the reality was again, and accepting the Respondent's evidence, daily attendance was required typically, but time of attendance varied. For comparators whose circumstances are materially the same, other probationers in the team, there was no evidence to conclude that they were not required in the office every day. There was no less favourable treatment in comparison with comparator colleagues, much less influenced by race.

(viii) In July 2017 not agreeing to his request to work in Keighley

83. This allegation was put in the Claimant's claim form as "No support from Manager/Not Equal Treatment". The Claimant's evidence was that he made this request to Mr Hartley to work in Keighley but he continued to be allocated "low demographic" postcodes, whereas white colleagues were allocated better addresses. Mr Hartley's evidence, which we accepted, was that addresses are subject to a rotated contact strategy set at Regional level to deliver contact every six months. Keighley was not in target at that time and therefore he could not allocate it to the Claimant. There was no comparator for this allegation, other than reference to a white probationer Ms B, who in his evidence the Claimant said joined in July 2017 and did not hit her target of 32 sales until December 2017 and was made permanent in January 2018, which appears to be consistent with the Respondent's general approach to probationers (that those who succeed are kept on and those who don't are dismissed in quick order).

84. As to postcodes generally, within those targeted for contact, colleagues no doubt did at times ask for particular postcodes, and those requests may or may not have been granted. We know that in November Mr Hartley did provide a huge number of opportunities for the Claimant. In all these circumstances the Keighley complaint does not reveal facts from which we could conclude less favourable treatment on grounds of race.

(ix) In August 2017 informing the claimant that there was a new release (lightning doors) in Carlisle when in fact it had already been marketed for the previous 12 months leading the claimant to waste time in attending Cumbria

85. In fact this occurred in September 2017, and it was to Mr Ahmad, that a potential customer said that there had already been callers at particular doors in Carlisle. This occurred against a complex picture of another sales team in the North being

disbanded. The street had been approached or "knocked" before by that disbanded team but, where the Respondent's services have recently become available, it will make several contacts on a schedule to seek to sell there. Mr Hartley could only do what Mr Owens required which was to service an area which would otherwise be neglected from his sales team, many of which made successful sales in the area. There are simply no facts in this from which we could conclude less favourable treatment on grounds of race.

(x) In November 2017 refusing to allow the claimant to book a one or two-week holiday, either in November or December

86. The background facts are straightforward and recorded above. We have constructed the comparable white probationer in these circumstances, which include that there were already four or five other team members on leave in November arising from earlier requests. There is no evidential basis to suggest that a white colleague, who had had two weeks' off work sorting out a right to work issue, would have had short notice holidays approved. Even if there were, this complaint cannot succeed when one considers the reason why the holidays were refused and the circumstances.

87. We have dealt with allegation (xi): on balance we have found the threat was not made.

(xii) On 22 November 2017 booking one room for the claimant and his colleague, Malik, in contrast to the booking of separate rooms for their colleagues, Jamie and Kerry, and in not paying the claimant and Malik their food expenses in contrast to the payment of such expenses to Jamie and Kerry

88. Our findings above clarify that Ms B booked her own room. Mr N was not a probationer; he had been with the Respondent since 2016. He was also booked by Mr Hartley for more than one night at the outset, whereas Ms B was just booked for one night as a probationer to see what sales she could make. Mr N, on the other hand, had a sales track record at that stage and that was why a longer booking was prudent for him. We do not consider he a comparator whose circumstances were materially the same, whereas Ms B is. On this complaint the claimant has established less favourable treatment than Ms B, and it was to his detriment to be expected to share a room and fund his own meals (albeit he could later claim them as expenses). That was all the more so when in training, his other main experience of staying in hotels at the respondent's expense, single occupancy rooms were booked.

89. We may consider this episode highly undesirable, not least because it appeared that Mr Ahmad was not recorded in the hotel's documentation at all, which was potentially putting him at risk in an emergency. These are straightforward facts from which we could conclude that less favourable treatment was because of race, and we go to Mr Hartley's explanation. It was a constrained budget, and his belief that Ms Buckley, being the only female sales representative, could not be expected to share a room with a male colleague. We accept that was the explanation, and whatever we make of it, and however undesirable this episode, we are satisfied that the less favourable treatment was not because of the Claimant's or Mr Ahmad's race.

(xiii) On 1 December, by David Hartley raising his hand as if to touch the claimant's badge in an aggressive manner

90. The Claimant needed to establish that Mr Hartley would not have put his hand out to retrieve the identity badge to a white colleague, in comparable circumstances. The claimant's evidence included that his gesture was accompanied by "gimme, gimme, gimme" or words to that effect, invaded his personal space and showed a lack of respect. These are the reasons for characterising the conduct as aggressive, which was denied by Mr Hartley.

91. The character of Mr Hartley's evidence in this Tribunal gave a calmer impression that the the realities of sales team communications on the ground: we know from the emails to generate sales, and to the Claimant, that in real life communication were much more direct, if I can put it in those terms. In the context of the 1 December meeting, at which no doubt all present were somewhat under strain, it is entirely likely Mr Hartley put his hand out accompanied by those words, after the Claimant has "refused" the termination of his employment and become unsettled. It is also entirely likely the Claimant would have felt affronted and stressed by that gesture. Can we say that Mr Hartley would not have behaved in a similar way to a white colleague in similar circumstances? No we cannot. This is a driven, performance based sales environment, where people speak very plainly to each other and where dismissals of underperforming probationers are common place (or were at this time). Mr Hartley, in our judgment would have reacted in exactly the same way had a white probationer been resisting dismissal, or to put it another way, been in denial that he had been dismissed and Mr Hartley wished to retrieve the relevant items and draw the meeting to a close. Again, this may not be a desirable episode, but it was not unlawful discrimination because of race; it concluded by Mr Hartley leaving the room and asking another manager, Mr G, to politely request the badge, whereupon the Claimant provided it.

(xiv)<u>On 20 November, by David Hartley threatening the claimant that if he were to appeal his final payment would be delayed</u>

(xv)<u>Delaying the payment of the claimant's expenses until 22 January 2018</u>

92. We have dealt with these matters in our factual findings. The allegation of a threat has not been proven. The fact of delay in the expenses payment has been explained and there was no less favourable treatment by Mr Hartley or the Respondent at large. There is no actual comparator (a white departing colleague who had expenses paid more promptly) but even if we were to construct or find a comparator, it is entirely likely that any delay through the manual process would have been the same, given the system that the Respondent deploys (or any more prompt payment would be due to happenstance – there was a delay at the administrative end on this occasion – there may not always be those delays).

<u>Was the Claimant's dismissal because of, or materially influenced by, his race?</u>

93. The only proven less favourable treatment that we have found up to dismissal relates to the hotel and meals booking, and the allocation of sales leads in the round, which cannot be proven to be rigorously equal between white and non white probationers, or between probationers and established colleagues, or between established colleagues and specialist colleagues. The reason for the unequal treatment we have found however, is nothing to do with race, and everything to do with Mr Hartley seeking to deliver the Respondent's demanding sales, within his limited budget.

94. The thrust of the Claimant's case, the way it was prepared, documents sought, and cross-examination conducted, is that he considers many wrong things were done by Mr Hartley in this chain of events and his dismissal must have been influenced by race. The Claimant would not engage at all with the facts, which by his efforts emerged, that it was the Respondent's usual practice if sales performance was not delivered, to dismiss. It was clear that, because of his dismissal, he considered Mr Hartley a very bad manager; but this was not his impression in the early part of his employment, when his commission was guaranteed and he was not at risk and he appeared happy with his support.

95. One example of his criticism was the "Probationary Review Meeting Policy" not being observed to the letter, in that that there was no adjournment in the meeting for Mr Hartley to consider his decision. Certainly, delivering a foregone conclusion might be something which, if there were other facts from which the Tribunal could conclude a dismissal influenced by race, might call for an explanation. But in this case, it was clear that Mr Hartley was routinely dismissing probationers of all races, and his lack of adjournment on this occasion was because the Claimant insisted on knowing his decision before he would talk about his own sales performance.

96. There were a number of other matters where the Claimant pointed to errors in procedure or policy, in which the Respondent has participated: we have found some matters to be less than ideal in a working environment. We do, however, deploy our industrial experience: this is a sales environment and it is driven and relentless in prioritising sales over other matters. None of the faults to which the Claimant properly drew our attention are such as to suggest there has been less favourable treatment influenced by race. Our overarching impression of the evidence, is that it is very tough being a probationer in this business and anyone who cannot make the sales target in the timescales envisaged is going to be dismissed. There are no doubt very strong commercial imperatives for that approach: it is not an environment which is weighted in any way against any particular group and the reason why the Claimant was dismissed was his sales performance, and only that. The Tribunal rarely adopts this expression but in this case it seems to us that the complaints have no merit at all and they do not succeed.

Employment Judge JM Wade

Date: 7 December 2018