EMPLOYMENT TRIBUNALS

Claimant: Mr. R. Hastings

Respondent: Kings College Hospital NHS Foundation Trust

Heard at: London South, Croydon
On: 21- 29 March 2017 and 24-26 May 2017 and the 26-27 July 2017 in chambers

Before: Employment Judge Sage
Members: Ms. B. Brown
Ms. SV MacDonald

Representatives

Claimant: Mr. D. Stephenson of Counsel

Respondent: Ms. H. Patterson of Counsel

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal is well founded.
2. The Claimant's claim for direct discrimination is well founded.
3. The Claimant's claim for victimisation is not well founded and is dismissed.

REASONS

*Corrected as highlighted in **bold***

1. By a claim form presented on the 29 January 2016 the Claimant claimed unfair dismissal, direct race discrimination and victimization. The Claimant had worked for the Respondent from the 2 December 1996 and was dismissed on the grounds of gross misconduct in respect of an incident that occurred on the 29 July 2015 in the car park with a third party delivery driver.

2. The Respondent denies all allegations and stated that the Claimant was dismissed for gross misconduct.

The Issues

Unfair dismissal

3. The Respondent will say that the dismissal was fair and on the grounds of conduct and they followed a fair procedure.

4. The Claimant asserts that the procedure was unfair for the following reasons:
    a. The investigation was not even handed or reasonable, Mr Yousuf made up his mind as to the Claimant's guilt at an early stage and only pursued lines of enquiry to prove his guilt;

    b. The panel failed to take proper account of the fact that he was racially abused and/ provoked;

    c. The sanction was too severe;

    d. There was inconsistent treatment;

    e. The suspension, investigation and dismissal were tainted by subconscious racial bias and as a result the Claimant was treated as the aggressor and/or failed to have due regard to the racial provocation he was subjected to and/or failed to properly investigate the racial abuse he suffered. The panel were overly reliant upon CCTV evidence at the expense of other material which pointed in the Claimant's favour and made snap judgments based on incomplete information.

5. The Respondent will say that they acted reasonably in treating that reason as the reason for dismissal.

6. The issue will be whether dismissal was within the band of reasonable responses.

7. Polkey and contribution will be a matter for the Tribunal.

Direct Discrimination

8. The Claimant is Black and of African Caribbean origin

9. Did the Respondent treat the Claimant less favourably than it treats or would treat others because of race?

10. The Claimant alleges that the Respondent subjected him to the following acts of less favourable treatment:

    a. Suspension by Colin Sweeney on the 31 July 2015

    b. The manner in which Mr Yousuf conducted the investigation and his recommendation that the Claimant should attend a disciplinary hearing

    c. Ms Cassettari by summarily dismissing the Claimant on the 14 October 2015;

d. Failing to properly investigate the Claimant's complaint of race discrimination;

e. Permitting the dismissal to be tainted by unconscious bias. It was submitted that the Respondent was overly reliant upon CCTV evidence at the expense of other material which was in the Claimant's favour and made snap judgments based on incomplete information. All witness statements referred to the Claimant as a "large black male", the predominant descriptor being colour. The Claimant states that the suspension, investigation and dismissal were tainted by unconscious racial bias, the effect of which was to treat the Claimant as the aggressor throughout the incident and/or failed to have due regard to the racial provocation he was subjected to and/or failed to properly investigate the racial abuse suffered.

11. The Claimant relies upon the following comparators:

a. **Comparator 2** – who racially abused the family of Ola Okesola
b. The white sales representative that the Claimant reported to Mr Sweeney in or around 2006;
c. **Comparator 1** was not suspended by Mr. Sweeney for acting aggressively towards Rukhsana Arain in or around 2007;
d. **Comparator 3** was not suspended or disciplined for acting aggressively towards Ola Okesola;
e. **Comparator 4** abused Brenda Green, however Nick Penlington did not carry out any reasonable investigation into this complaint and was subsequently sanctioned by the HR director for failing in his duty of care. This action only took place because Brenda Green made a personal complaint to the Chief Executive on (approximately) 21/03/2007

12. If so was the less favourable treatment because of race or can the Respondent show a non-discriminatory reason for any of the proven treatment?

Victimisation

13. Did the Claimant carry out a protected act?

14. The Claimant relies on the following acts:
    a. Complaining to Mr Yousuf at the meeting on the 20 August 2015 about the racial comments and discrimination arising from the incident of the 29 July 2015.

    b. Complaining during the disciplining hearing on the 28 September 2015 about racial comments and discrimination during the incident on the 29 July 2015

    c. Complaining to Ms. Wood at the appeal hearing on the 14 December 2015 about the racial comments and discrimination arising from the incident of the 29 July 2015.

15. Did the Respondent subject the Claimant to the following detriments:

a. The commencement of the disciplinary hearing on the 31 July 2015
b. The dismissal on the 14 October 2015

16. If so was the protected act(s) the reason or part of the reason for the detriment suffered?

Witnesses before the Tribunal

The Claimant
For the Respondent, the Tribunal heard from:
Mr Sweeney Director of ICT
Mr. Penlington ICT Services Manager
Mr. Yousuf Security Operations Manager
Ms. Cassettari Dismissal Manager
Ms. Wood Appeals Manager
Mr. Taylor Head of Security

Findings of Fact

17. The Claimant was employed by the Respondent from the 2 December 1996 firstly as a Network Analyst and was later promoted to the position of ICT Infrastructure Analyst in October 2013. It was not disputed that he had a clean conduct record at the date of the incident that led to dismissal. The Claimant is Black and of African Caribbean origin.

18. The Tribunal saw the Respondent's disciplinary procedure at pages 68-78 of the bundle. The policy stated that witnesses will be called if they have a significant contribution to make to the case (page 70). It provided for suspension at paragraph 4 at page 69 and it was stated that it would appropriate if there was a need to protect patients, staff or the business interests of the Trust pending a full investigation of allegations of gross misconduct and there is no workable alternatives to suspension. The Tribunal were also taken to paragraph 5.4 of the disciplinary policy, where it dealt with counter allegations where it stated that "**if appropriate, it may be necessary to consider the counter allegation prior to the disciplinary meeting taking place if the outcome could have an impact on the case to be heard".** The policy at paragraph 10 (page 72) required that it "**will be applied fairly and consistently in line with the Trust's Equal Opportunities Policy"** and a general statement at paragraph 10 of the policy stated that "**the Trust will support staff involved in traumatic or stressful incidents, including when staff are subject to allegations of unfair or inappropriate treatment …".** Gross misconduct was identified as "**verbal and physical assault**" (page 76). The procedure to be adopted in disciplinary meetings (at Appendix 2 of the Disciplinary Procedure) required the investigations manager to present the case and the chair of the disciplinary panel had the opportunity to ask questions (page 78). It was noted that after summing up of the evidence by the employee and the investigations manager, "**no new evidence**" should be presented.

19. The Respondent had a Dignity at Work Policy which was provided during the hearing and was marked R2, the Tribunal ordered these documents to be produced on day three of the hearing and they were produced on the

24 March 2017. The Tribunal were taken to the definition of Bullying and Harassment which stated "**bullying and harassment may be by an individual or involve groups of people. It may be obvious or it may be insidious; it may be persistent or an isolated incident; it may be targeted at third parties [e.g. jokes about sexual orientation of family member of a colleague]; and it can take place both inside and outside work. Whatever form it takes, it is unwelcome, demeaning and unacceptable to the recipient**". An example given at paragraph 3.1 was of "**unwelcome remarks about a person's age, dress, appearance, race or marital status**", it was also said to include "**unwanted touching, petting or assault**". At paragraph 3.2 it stated "**it is important for managers to be vigilant with regards to harassment, bullying and victimisation in the workplace. Identifying potential indicators of such behaviour at an early stage can greatly contribute to reducing the impact of harassment, bullying and victimisation**". The Tribunal were also taken to paragraph 4.1 of this policy which stated that all managers have a responsibility to implement the policy in their work area and one way of doing this was to "**treat a complaint seriously and deal with it promptly and confidentially"**. The implementation of the policy also included an expectation that managers should set a positive example by "**treating others with respect and setting standards of acceptable behaviour".** The policy at paragraph 7.6 stated that the Respondent had a pool of independent assessors to deal with first stage grievances which hear complaints of bullying, harassment, victimisation or discrimination; this included where "**formal disciplinary meetings where the member of staff has made a counter allegation of bullying, harassment, discrimination or victimisation during the investigation of the conduct".** This also extended to **"meetings which hear appeals against formal sanctions under the Disciplinary and Performance Capability Policies, if the counter allegations form part of the grounds of appeal".**

20. The Respondent also had an Equal Opportunities Policy which again was not included in the bundle but was produced during the hearing (again on the fourth day) and was marked R3. Ms Cassetari was asked in cross examination why the Harassment and Equal Opportunities policy was not in the bundle when she gave evidence and she could not assist the Tribunal as to why this document was not in the bundle. It was noted that this policy applied to contractors on site as well as to employees (paragraph 5.1). The Tribunal were taken to paragraph 6 of the Policy dealing with the responsibilities of the Respondent and particularly to paragraph 6.4 where it stated that there was a duty on managers to effectively communicate the policy to staff and that "**managers must investigate and deal appropriately with any concerns reported to them by staff. Managers must monitor the behaviour of staff they manage, and take appropriate action if necessary".** At paragraph 10 of this policy it confirmed that "**unlawful discrimination will be treated as a disciplinary offence under the disciplinary policy and may warrant dismissal".** At paragraph 10.2 it confirmed that "**any person who complains about discriminator (sic) behaviour will not receive less favourable treatment than other employees**". At paragraph 10.3 it stated that the Respondent "**will ensure that all managers and employees are aware of their personal responsibility for preventing acts of discrimination by employees**".

21. The Tribunal were also taken to the Code of Practice on Racial Equality in Employment (page 274A-G) and specifically to paragraph 4.70 (page 278E) where it recommended that before taking disciplinary action, employers should consider the possible effect on a worker's behaviour of the following "**racist abuse or other provocation on racial grounds".**

22. The Claimant's direct line manager was Mr Penlington for most of his employment. Mr Sweeney was the Director of ICT and he stated at paragraph 2 of his statement that the Claimant reported through to him from 2004. The Tribunal heard that the Claimant worked in Unit 5 but the Security Team (including Mr Taylor and Mr Yousuf) worked in Unit 7 as well as some of the contractors involved in the incident referred to below (Mr McVay, Mr Carrol and Mr Tully).

a. The Incident that led to dismissal.

23. The incident that led to dismissal occurred on the 29 July 2015 and the incident is described in the Claimant's statement at paragraphs 3.1-3.6 and paragraphs 18 to 34 and in his ET1 at paragraphs 8-16 (pages 18-20 of the bundle). The Claimant's statement of the incident was at pages 110-1 of the bundle (which was produced for the disciplinary investigation). In this statement the Claimant described driving into the Respondent's car park at 9.30, into the business park at Unit 5 where he worked and into the loading bay as a temporary measure (until a space became free). As he manoeuvred into the space, a white van "**accelerated very fast and was swearing at me as he passed**". He stated that in his view, the white van was being driven dangerously and with aggression, especially considering it was a busy hospital car park. The Claimant also stated that as he was parking, he was aware that a person on his mobile was walking behind his car, he did not wish to reverse until he was sure that the pedestrian had seen him (paragraph 20 of his statement).

24. The Tribunal were informed that the speed limit in the car park was 5mph. The Claimant stated that he parked his vehicle and walked over to where the white van was parked at Units 6 & 7 and his reason for so doing was to get the driver's registration number and any information from the van about the Company in order to lodge a complaint about the driver's driving with his employer. The CCTV clips of this part of the incident were marked DVR1-657-Unit 5E and DVR-03-676 Unit 6G and the clip of him walking towards the white van was DVR-12-694 Unit 8.

25. The Claimant approached the white van and the driver (Mr Archard who was employed by a company called Baldwins) who was with two others which the Tribunal were informed were Mr McVay and Mr Carroll. The Claimant stated that Mr Archard was abusive to him and swore at him (using the c*** word). The Claimant stated in this statement that he tried to explain to Mr Archard that he was speeding and that he wanted to take his number plate and he replied that the Claimant was "stupid" and he could not speed because he had a tacograph. In his statement the Claimant further added (paragraph 24) that Mr Archard asked him whether he knew what a tachograph was and added "**you can't eat it**". There was a further exchange during which Mr Archard informed the Claimant that he was

"**f****** stupid**" because he had not put his hazard lights on when reversing. The Claimant then said that one of the men (Mr McVay) stood between him and the number plate and the Claimant stated that he squeezed between him and the vehicle to see the number plate; he accepted that he made some contact with Mr McVay (his shoulder) but only because he was deliberately standing in the way. Whilst conducting this move, the Claimant stated that Mr Archard said to Mr McVay "**careful it doesn't come off"** which the Claimant understood to be a reference to his race and skin colour (Black). Whilst the Claimant was moving to the back of the vehicle, he was on the phone to security (CCTV clip DVR-12-678 Unit 6C) asking for help; he informed them that he was being abused by three contractors. No assistance was provided and no record kept of the call. The Respondent did not dispute that the Claimant called security and Mr Taylor was aware of the call at the time.

26. The Claimant's statement then reflected that he gave Mr Archard his name and he replied "**what's your name, that's not your real name**" and kept insisting that the name given was not his real name. The Claimant took this comment to infer that he would not have such an "English sounding" name for a Black man. The Claimant also told the Tribunal at paragraph 24 of his statement that Mr Archard referred to him as "son" in this exchange which the Claimant took to be an old racial epithet (see paragraph 23). The Claimant admitted that by this stage they got into a "war of words" and he accepted that he swore at Mr Archard but in his defence he stated that he felt very threatened. The Claimant stated that during this war of words, Mr Archard had said "**What are you! Are you a fucking manager?"** and when he confirmed that he was a worker at the Hospital, he stated that Mr Archard replied "**Look! They'll let anything happen here**", the Claimant perceived this as a racially motivated comment (paragraph 25). He stated that all three were attempting to prevent him reporting what he perceived to be a health and safety threat. Although not in his written statement produced for the investigation meeting (at page 110-1), the Claimant accepted that he called Mr Archard a **"f******* idiot**" and a pussy (meaning coward).

27. The Claimant accepted that at some time during the exchange Mr Archard placed his hand on his forearm and the Claimant lifted his arm to extricate himself and in doing so made contact with Mr Archard's face but he denied that he hit or punched him (page 111). The Claimant also told the Tribunal that during this altercation Mr Archard pushed his papers into his stomach (paragraph 29). It was agreed that during this part of the incident Mr Archard told the Claimant that he "tried to call the police" but the call would not connect (see Claimant's statement paragraph 30 and page 107C of the bundle). The Claimant perceived that the incident was turning physical and he noticed that the van door was open and aware of the tools inside. The Claimant then walked back to his car and parked it in a parking space that had become free. The van drove past his car on the way out of the car park and stopped, Mr Archard wound his window down and asked what the Claimant's name was in what he described as a "**sneering manner**"; the Tribunal saw evidence of this exchange on the CCTV DVR-12-694-Unit 8 and DVR-01-657-Unit 5E.

28. After this incident, the Claimant went to his office and spoke to his colleagues Kola Raheem and Wale; they encouraged him to report the incident (see page 108 of the bundle). Prior to this being placed on Datix (adverse incident reporting system) the Claimant also spoke to Mr Taylor about the incident (see Mr Taylor's statement at page 150) and paragraph 6-7 of Mr Taylor's statement. Mr Taylor accepted that he was aware that the Claimant had phoned security as he had overheard the radio communications; he decided to telephone the Claimant to see if he was OK. Mr Taylor told the Tribunal (paragraph 7 of his statement) that he had been told by the Claimant that he had been verbally abused by a driver and his mate. He advised him to put in a Datix report.

29. The Tribunal saw the Datix report that was filed at pages 99-102 dated the same day as the incident. The description of the incident was "**A delivery driver verbally abused me as I was parking my car in the car park. I asked him to repeat what he said and again verbally abused me calling me a "f****** c***". He was driving a white van the registration number was along the lines of TW59 xxx. I called King's Security to deal with the person and passed the registration on to the security staff who received the call. I left the scene and went to the ICT department. I do not know the name of the individual who verbally abused me**". The Claimant accepted that he made no reference to racial abuse or about being physically assaulted in this original report. The Datix report was escalated to several people in security and health and safety departments (and to the Claimant's Department Head) at 17.45 (page 102-3).

30. After this incident was posted, Mr Penlington emailed the Claimant on the 30 July 2015 (page 104) to indicate that he was sorry about what he had read and offered to talk to the Claimant about the incident. The Claimant had said that he felt that "**these things sometimes happen**" and confirmed that he had already spoken to Mr Taylor about the incident.

31. Mr Taylor told the Tribunal that when he received the Datix report (either that day or the following day) he felt it was a matter of "tittle tattle" (he described it as a situation of "he said she said") and there was no mention of race and no mention of assault. However, the Tribunal note that the categorization on the Datix report classified the incident as "**violence and aggression**".

32. Mr Taylor gave evidence to the Tribunal on the 28 March 2017, having provided a statement that morning. He was able fill in some of the evidential gaps for the Tribunal. He told the Tribunal in evidence in chief at paragraph 12 that Mr Lock, an employee of the Trust who works in Unit 7 (the same unit where Mr McVay and Mr Carroll are located), came to see him on the 31 July to inform him that he had been "**told by contractors who had witnessed an incident outside unit 7 on the 29 July 2015 that a driver had been assaulted by a King's Employee**". Mr Taylor said that he felt this may be connected to the matter that the Claimant had escalated via the Datix system. Mr Taylor made no note of his discussion with Mr Lock and no reference appears in the bundle of this discussion. The identity of Mr Lock was mentioned for the first time in the hearing. Mr Taylor told the Tribunal in cross examination that this new evidence made the matter more

serious as reference was made to an assault, however this still appeared to be a matter of hearsay and at that stage no statement had been taken from the Claimant. No statement was taken from Mr Lock and there was no reference to Mr Lock in any of the documents in the bundle.

33. After the conversation with Mr Lock, Mr Taylor told the Tribunal that he contacted Mr Archard (by telephone) and he stated that he was left with the impression that Mr Archard felt that he was the "wronged party". He told the Tribunal that after his conversation he viewed all the CCTV of the incident and from this formed the view that the Claimant had "**pushed or punched Mr Archard**" (paragraph 18). He contacted Mr Sweeney and they met to view the CCTV evidence and they agreed that the matter should be investigated. Mr Sweeney told the Tribunal that it was his decision to suspend and he relied upon the CCTV evidence and advice from HR. Mr Taylor offered to write the suspension letter and Mr Taylor told the Tribunal that this was to help the department out (see page 107H where Mr Taylor is seen to seek advice from Mr Preston of HR).

The Suspension

34. The Claimant was called into the office by Mr Sweeney at 3.00pm on the 31 July 2015 and in the presence of Mr Taylor he was suspended; the letter of suspension was at page 105-6 signed by Mr Sweeney. The letter stated that the Claimant was suspended due to an allegation that he had "**acted aggressively towards and physically assaulted two other persons**". Mr Sweeney's evidence to the Tribunal was that he was advised by Mr Taylor to take away the Claimant's remote access and his ID and Mr Taylor told the Tribunal that this was the normal process followed in cases of suspension. Mr Taylor also accepted that once the Claimant's remote access was taken away he could not then amend his Datix report and it was his view that he could have done this on the 29 or the 30 July but he failed to do so. Mr Sweeney confirmed to the Tribunal that in his view there was no alternative to suspension because "**if I had let him carry on working he could have assaulted someone else"** and his concern was the "**physical aggression".** He confirmed that he did not consider any alternatives to suspension. Mr Sweeney confirmed that he had worked with the Claimant and had no reason to doubt his honesty and integrity but he was shocked at how the Claimant had conducted himself when he saw the CCTV footage. He denied that he had unconsciously assumed that the Claimant was the aggressor because of his race.

35. The Claimant's evidence to the Tribunal about the suspension meeting was that he informed Mr Sweeney that during this incident there was a racial element and this was corroborated by Mr Sweeney in his statement and in cross examination; he also accepted in cross examination that on being told that there was a racial element to the incident he should have gone into it in more detail, however he felt that would be picked up in the investigation. It was put to the Claimant in cross examination that he was raising the issue of the racist comment as provocation, but this he denied stating that he did not mention the racist element in the Datix report but he was aware of the "racist undertones" of the comments made during the incident (but it was not what he described as "outright racist"). He told the Tribunal that he was not asked for details of what the racist comments were. Mr Taylor denied that the Claimant made any refence to racist comments in the meeting (he

stated that he was "**100% on oath I didn't hear a racist comment"**). The Tribunal find as a fact on the balance of probabilities that the Claimant mentioned that race played a part in the incident. It was not disputed that no questions were asked of the Claimant of what he was alluding to and he was not asked for his version of the events prior to suspension. The Claimant was not provided with the details of the allegations against him during the suspension meeting. The Tribunal noted that no notes were taken at the suspension meeting and the Respondent did not appear to keep in contact with the Claimant during the suspension period.

36. Mr Sweeney accepted in cross examination that he had previously banned a sales representative from another company from the site because of racial abuse. The Tribunal find as a fact that the Claimant was suspended because Mr Sweeney viewed the incident as an assault and felt it was appropriate to do so on the evidence before him. The Claimant referred to an incident relating to a white employee Comparator 1 which involved verbal abuse only and did not involve an official complaint being escalated, although it was noted that he was not suspended, the Tribunal conclude that the circumstances were not the same or were not materially different therefore this was not an appropriate comparator. The Tribunal also accept the evidence of Mr Sweeney that he expected the Claimant's allegations of racial abuse to be investigated which was reasonable and a view that was consistent with the Respondent's policies (see above at paragraphs 19 and 20).

The Investigation

37. After the Claimant was suspended, Mr Taylor commenced preparation for the investigation and drew up a list of witnesses to the incident and this was sent to Mr Preston at 16.11 (page 107E). The witnesses were Mr Archard, Mr McVay, Mr Carroll, Mr Tully, Mr Galea, Mr Pitt, Mr Aka Sebastian Ngbin and a Medirest porter. Mr Taylor was identified as the person who was "leading the investigation" (see Mr Sweeney's email at page 107E dated the 31 July 2015 at 16.14). It was noted by the Tribunal that Mr Taylor had confirmed in this email to HR that he had spoken to Mr Archard that morning (the 31 July) but no record was made of their discussions. He eventually assigned the investigatory role to Mr Yousuf on the 3 August.

38. In the meantime, Mr Archard had provided Mr Taylor with a typed but unsigned and undated statement on the 1 August 2015 at 22.19 (see page 107B of the bundle) and the statement was seen at page 107C (page 109). In his statement, he alleged that the Claimant had bent down and smelt his head and said that he "**smelt like a dirty c***"** and had called him a "**dirty c*****". He also alleged that the Claimant had said that he had "**beaten and taken apart people like him**". He alleged that the Claimant pushed him into being aggressive and he accepted that he "**was so close that I couldn't move so I pushed him away from me**" and at that point the Claimant was alleged to have "**struck out and hit me hard to the left side of my head**". He then stated that he went back to his van to call the police but couldn't get through. Mr Archard accepted that he kept asking for the Claimant's name. Mr Archard further stated that whilst he was driving out of the car park he saw the Claimant again outside Unit 5 and it was his evidence that

the Claimant started swearing at him and he smiled and said "**see you later**". He stated that he then reported the matter to his manager at Baldwin's and he referred to other witnesses outside Unit 5. This evidence relating to what happened when he was driving out of the car park appeared to corroborate the Claimant's evidence that he stopped on his way out and a further altercation ensued (see above at paragraph 27). The Tribunal having viewed the CCTV evidence many times found it impossible to tell if the Claimant, who was much taller than Mr Archard, bent down and smelt his head. The CCTV also had no sound therefore it was impossible to tell what words were spoken and when.

39. Mr Yousuf could not recall when he discussed the conduct of the investigation with Mr Taylor but he accepted in cross examination that he must have discussed the matter when Mr Archard's statement was handed over to him when he was assigned the investigation on the 3 August. Mr Yousuf could not recall whether he discussed with Mr Taylor how the complaint made by Mr Archard and Mr McVay arose. It was his evidence that he was told by Mr Taylor that he was to conduct an investigation into the complaint by Mr Archard and although he was aware of the Datix report there was no reference to the Datix "in the email", it was his view that he was only conducting an investigation in relation to the complaint made by Mr Archard and the letter from G A Baldwins & Sons (at page 107C and page 107). Mr Yousuf could not recall when he was advised of the limits of the investigation by Mr Taylor. He accepted in cross examination that the Datix report **"related to the complaint**" (and he obtained a copy of the report during the investigatory hearing).

40. On the same day that Mr Yousef was appointed, G A Baldwin & Son wrote a complaint letter dated the 3 August 2015 (page 107 of the bundle), addressed to Mr Taylor stating that their employee had been "**verbally abused and assaulted**" and asked to be advised of the "**present situation concerning your investigation**". This letter was put to the Claimant in cross examination and he told the Tribunal that he was not aware of this letter and there was no evidence that he was provided with a copy (see below). Both Mr Taylor and Mr Yousef told the Tribunal that no reply was sent to this letter but Mr Yousuf confirmed that he recalled discussing this matter with Mr Taylor but could not assist the Tribunal with what was said and no notes were taken of these discussions. He accepted that when he spoke to witnesses, he took no notes of any discussions (despite accepting that he was aware of the importance of keeping notes of an investigation). He accepted in cross examination that he spoke to Mr Archard in the course of his investigation on the telephone but he could not recall when or what was said and he made no notes of their discussion. He also accepted that he spoke to Mr Eist of G A Baldwins again no notes were made of this call. He accepted that in hindsight it would have been a good idea to have done so. He accepted that he saw the CCTV evidence between the 3 – 7 August and discussed the contents with Mr Taylor.

41. Mr Yousuf confirmed in cross examination that he was handed the statements of Mr McVay and Mr Carroll on separate dates but did not speak to either witness and he could not recall precisely when they were handed to him. It was noted in his statement that he gave no explanation as to how

these statements came into his possession and how the witnesses knew an investigation was being conducted by him (as they did not work for the Respondent). Mr Yousuf stated in cross examination that he did not discuss the evidence with these two witnesses but in his statement at paragraph 7 he told the Tribunal that they "**stated that the contents of their statements were true**". There was no consistent evidence that suggested that Mr Yousuf asked them any questions about their evidence and no record was made of conversations with these witnesses. The Tribunal conclude on the balance of probabilities that if Mr Yousuf had been told that the contents of the statements were true, there must have been some discussion about the contents of their statements; the Tribunal conclude that his evidence that he had no discussion with these witnesses was not credible. It was also noted by the Tribunal that the witness statements were not dated and Mr Carroll's statement was not signed and both had identified the date of the incident as being on the 28 July, which was incorrect. Mr Yousuf did not pick up this evidential error and the Tribunal conclude that this reflected the considerable shortcomings of his investigation as he accepted without question the accuracy and honesty of those providing evidence against the Claimant despite the fact that the witnesses were not known to the Respondent but at least three of the witnesses giving evidence against the Claimant were known to each other.

42. Mr Yousuf took a statement from Mr Galea (an employee of Norlands) on the 7 August 2015 at page 114 of the bundle. He accepted in cross examination that he did not make a note of the questions asked or of their discussions and he conceded that it would have been helpful to do so. He accepted that by the time he interviewed Mr Galea he **"would have reviewed the CCTV**". It was noted in Mr Galea's statement, that he maintained that he was a witness to the incident and he described the Claimant as the Black Male (but also described the other people as "**white male**"). He described the Claimant as the one who was being aggressive and stated that he saw the Claimant "**shoving the white male using both hands**". In his statement, he referred to the other people involved in the incident as "Mo and Tim" (who worked for A & G Contractors), indicating to the Tribunal that they were all known to each other. The Tribunal, having seen the CCTV a number of times did not see any incident where the Claimant had "shoved" or touched Mr Archard with both hands and this was not an allegation made by Mr Archard.

43. Mr Yousuf's evidence was that he spoke to two potential witnesses to the incident outside Unit 5 (see paragraph 13 of Mr Yousuf's statement), Mr Pitt and Mr Panaki, but in his view "**neither had any recollection of the incident**". Mr Yousuf accepted in cross examination that he could not recall when he spoke to them, he took no notes of the discussion and there was no evidence that he showed them the CCTV. Ms Yousuf accepted that he worked in the same unit as Mr Pitt and saw him every day and he conceded that Mr Pitt saw the prelude to the incident. Mr Yousuf also told the Tribunal that he was aware of the identity of the witness called Sebastian and accepted that he did not contact him because it was his view that "**he could not give any direct evidence because he was outside Unit 5**". Mr Yousuf confirmed to the Tribunal that he took no notes of any discussions with potential witnesses and the only interview notes he took were those of his discussion with the Claimant and Mr Galea. The Tribunal find as a fact that

the evidence of Mr Pitt and Panaki was relevant to the sequence of events because Unit 5 was where the incident began and ended. Mr Yousuf denied in cross examination that he was ignoring evidence that may point to the Claimant's innocence, however the Tribunal find as a fact that these witnesses were independent and could have shed light on the demeanour of those involved in the incident and of the words spoken. We conclude that no efforts were made to secure the testimony of those who could have provided evidence that may have exculpated the Claimant and therefore we conclude that the initial investigation was fundamentally flawed and not within the band of reasonable responses.

44. Mr Yousuf informed the Claimant by a letter dated the 12 August 2015 that he was investigating the complaint. The allegation the Claimant faced was that on the morning of the 29 July 2015 it is alleged that he "**verbally and physically assaulted a delivery driver and a contract pipe fitter in the business park at Kings**". He was invited to attend an investigatory meeting on the 20 August 2015 and to provide a witness statement by the 14 August.

45. The Claimant telephoned Mr Yousuf on receipt of the letter and asked to view the CCTV to prepare his statement. This was then followed by an email on the 14 August explaining (page 115E) that it would assist him to put a response in to the allegations made against him and he wanted to accurately reflect the situation and to construct his defence. The Claimant stated that the incident was emotional for him. The Claimant told the Tribunal that he spoke to Mr Yousuf a number of times on telephone and he was not informed by Mr Yousuf that he could expand on his Datix report. The communications between HR and Mr Yousuf are at pages 115D-A of the bundle. It was Mr Yousuf's view that it "**may not be appropriate in the circumstances**" to allow the Claimant to see the footage because he did not want "**his recollection to be clouded**…"; the HR adviser Mr Chant agreed with this view. The Tribunal noted that by the date of the investigatory hearing, the Claimant had not seen the evidence against him or details of the allegations and he had not been able to discuss the evidence with anyone. The same could not be said for those giving evidence against the Claimant who were able to discuss the event freely and were not warned that they should not discuss this with others.

46. As part of the investigation, Mr Yousuf obtained a copy of the Claimant's diary for the day in question because "**it may assist in refuting claims he lost his temper due to being late for a meeting**" (see page 115G of the bundle). It was put to Mr Yousuf in cross examination that he was trying to "**catch the Claimant out**" and he denied this; however, he conceded that the Claimant had not submitted his statement at this stage and there was no evidence that the Claimant was running late for a meeting. The Tribunal find as a fact that Mr Yousuf's intention to refute a claim that the Claimant may rely on that he was 'running late' reflected that he was gathering evidence to undermine a potential defence that the Claimant may raise rather than to conduct an even-handed investigation into all the facts of the case. There was no evidence before the Tribunal that Mr Yousuf critically examined the evidence against the Claimant for accuracy and had failed to question the evidence even where there were obvious errors and inconsistencies.

The Investigatory Hearing

47. The investigatory meeting was held on the 20 August 2015 and the minutes were on pages 116-125, there was a note taker present and the Claimant was accompanied by Ms. Green, a colleague. It was noted by the Tribunal that the notes of the meeting (which took two hours) were amended by Mr Yousuf but there was no evidence that the Claimant was asked for his comments on the accuracy of the minutes before the report recommending disciplinary action was produced (see page 126-130 of the bundle which is undated).

48. By the start of the investigatory meeting, the Claimant had not seen any of the statements that had been handed to Mr Yousuf or the letter from Baldwins. Mr Yousuf told the Tribunal he believed that the Claimant had no right to see the letter (because it was not addressed to him) however the Claimant had a right to see this document as it was part of the case against him. The Claimant was provided with copies of the statements provided by Mr Archard and Mr McVay on the morning of the hearing but there was no evidence that he was given time to read them. At the start of the hearing he handed over the statement that he had prepared (the contents of the statement were as set down above at paragraphs [23-28] above).

49. It was noted by the Tribunal in the investigatory hearing that Mr Yousuf referred to those who had provided statements against the Claimant as "**victims**"; the Claimant objected to this description and stated that the fact find had not been conducted fairly. It was put to Mr Yousuf in cross examination that this may be his unconscious view and he accepted "**it may have been an unconscious view. I try to keep an open mind".** The Tribunal find as a fact that Mr. Yousuf had formed an unconscious view that the Claimant as a Black male, had been the aggressor in the incident. He also concluded that the two White persons shown in the CCTV evidence were the victims, we conclude that this view was formed on the basis of race and this view informed the manner in which he approached the investigation. The unconscious bias also impacted on the credibility Mr Yousuf gave to the evidence provided by each witness; he accepted without question the evidence produced by the white witnesses to the incident but the evidence given by the Claimant (who was Black) was treated with what he described as scepticism.

50. The Tribunal also noted that the hearing notes appeared to be an accurate reflection of the interview. The notes reflected that where the Claimant was providing his version of the events the words "**according to RH**" appeared. Mr Yousuf appeared to interrogate the Claimant and asked the same questions a number of times, for example in the notes at page 120 he asked the Claimant if Mr Archard had "**wound him up**" and if he "**lost his temper**". He also asked Claimant on two occasions why he didn't leave and why he didn't mention the racist element in the Datix report. The Tribunal note that the disciplinary process (page 69 of the bundle) requires the manager to "**meet with the employee to establish their version of the events",** however Mr Yousuf used closed questions in the interview to challenge the Claimant's credibility. The interview notes did not reflect Mr Yousuf trying to establish the Claimant's version of the event and there was no evidence that he went through the Claimant's written statement that had been handed to him at the start of the meeting.

51. At the start of the investigatory hearing the Claimant asked to see the CCTV as it had been three weeks since the incident. The CCTV footage was shown to the Claimant but the minutes did not accurately reflect the Claimant's evidence given in response to viewing each clip. It was noted by the Tribunal that Mr Yousuf asked the Claimant twice whether he had used his phone whilst reversing his car, even though there was no evidence that this was the case and there was no evidence of the Claimant using his mobile phone when driving in the CCTV footage. The Tribunal conclude that this line of enquiry was further corroborative evidence that Mr Yousuf was pursuing an investigation to find facts that corroborated his unconscious bias against the Claimant.

52. The Claimant also told Mr Yousuf that he phoned Security but Mr Yousuf replied that he had been "**unable to locate the recording of your phone call**", however there was no evidence before the Tribunal that this matter had been investigated prior to the investigatory hearing as this was not referred to in his statement and it was not disputed that the Claimant had telephone the security team, as corroborated by Mr Taylor. Mr Yousuf asked the Claimant to described the moment he came into contact with Mr Archard (when he asked "did you strike him?" which was another example as a closed question) and he stated (page 120) "**It's a possibility that when I pushed him away from me. I didn't punch him. They had tools**". The Claimant told the Tribunal in answers to cross examination that during this part of the incident he was defending himself because he had first been assaulted by Mr Archard. This recollection of the events appeared to be corroborated by the evidence before Mr Yousuf in Mr Archard's statement at page 107C where he states "**he was so close to me that I couldn't move so I pushed him away from me".** The Claimant denied calling Mr Archard a **"c***".** Mr Yousuf asked the Claimant if he felt that he had done anything wrong and he replied "**I shouldn't have sworn. I was subjected to abuse and in hindsight I shouldn't have reacted and sworn. He dragged me down to that level"** (page 123).

53. The Claimant explained that the reason that he decided not to walk away from the incident was because he wanted to tell his side of the story to the police and this was his evidence given in cross examination. It was noted that the Claimant was not shown the statements of Mr Galea and Mr Carroll, he was told that he would "**see them as part of the process**". The Claimant had no opportunity to comment on this evidence prior to the finalisation of the report. In the hearing the Claimant made a number of references to the racist remarks made by Mr Archard (page 119 and see above at paragraph 25) for example "**be careful it might rub off**" and "**that can't be your real name".** Mr Yousuf failed to investigate whether these allegations had merit and he was recorded to have said to the Claimant in the meeting that it was 'arguable' if this was a racial slur, this was Mr Yousuf's opinion. This was a counter allegation that should have been investigated under the Dignity at Work Policy (see above at paragraph 19). The Claimant also mentioned that he told his colleagues of the racial abuse directly after the incident. Mr Yousuf was taken in cross examination to his comment made at the end of the hearing where he stated **"these are serious allegations, racial allegations and there were witnesses who did not mention that**" (page 125) and it was put to him that this comment showed that he clearly did not believe that the Claimant was making a genuine complaint and he replied "**I**

was sceptical, they were serious allegations that had not been mentioned before", he stated that it would upset him if he thought the Claimant was making a false allegation.

54. The Tribunal noted that the investigatory meeting was the first opportunity for the Claimant to give his side of the story and therefore there appeared to be an entirely logical explanation as to why this was the first time the Claimant had mentioned the racial abuse. Even though Mr Yousuf had heard these allegations for the first time in the hearing, he did not go back to the Mr Archard, Mr McVay and Mr Carroll "the complainants" to put these allegations to them. He accepted he did not take statements from the Claimant's colleagues (Wale and Kola) despite being asked to do so by the Claimant and he accepted that they could have corroborated what the Claimant had told them (contemporaneously). Mr Yousuf's approach to the investigation reflected his disbelief in the Claimant's evidence and failed to take any steps to investigate the evidence before him in a balanced and non-discriminatory manner. The Tribunal also find as a fact that that the failure to investigate the allegations of racial harassment amounted to a breach of the Respondent's Dignity at Work Policy as they were counter allegations which should under paragraph 7.6 be referred to an independent assessor, however they were not. Mr Yousuf failed to refer to this policy in his evidence and provided no reason why this policy was not considered. The Tribunal raise an adverse inference from this as no reference was made to this policy in Mr Yousuf's evidence or at any time during the disciplinary process.

55. Mr Yousuf conceded in cross examination that the comment about '**be careful it might rub off**" was a racial slur; however, this was not a matter that he referred to in his investigation report. Mr Yousuf also accepted that the Claimant explained in the investigation meeting the context as to why Mr Archard asking for his "real" name had racial connotations. The Tribunal conclude that the Claimant's evidence of racial discrimination that occurred during the incident were either not believed (treated with scepticism) or not investigated, contrary to the Respondent's Dignity at Work Policy and we conclude that this amounted to less favourable treatment of the Claimant because of race. The Tribunal conclude that the conduct of the investigation was out with the band of reasonable responses.

The Investigation Report

56. The investigation report was seen at pages 126-130 dated September 2015 and in the Appendices attached all four witness statements (even though there was no evidence before the Tribunal that the Claimant had seen the statements of Mr Carroll and Mr Galea). In paragraph 4 of the report (page 128) Mr Yousuf stated that he had "**fully investigated the matter**" however he gave no indication how this took place and there was no evidence he carried out any further investigation after interviewing the Claimant. In the report at paragraph 5, which contained his findings he stated that the Claimant "**claims to feel strongly about road safety; however, CCTV footage does not corroborate this as it appears to show RH reversing his car outside Unit 7 whilst using a handheld device"**. The Tribunal noted that the Claimant's evidence given in the investigation was that he could not recall if he had been on the phone and there was no evidence before the Tribunal to show that the Claimant was holding his mobile whilst

reversing; this was irrelevant to the allegations that the Claimant had to answer. When Mr Yousuf was asked in cross examination about this evidence he accepted that it did not relate to the accusations he was investigating and the Tribunal conclude that the way in which the finding was included in the report had the effect of undermining the Claimant's credibility.

57. The Tribunal also noted that the Investigation report did not reflect the findings in a neutral manner, it stated on four occasions when referring to the Claimant's evidence given in the hearing that he "claimed" (see above) creating the impression that what he said was not an accurate impression of the facts. Mr Yousuf presented the evidence in a manner that implied that the Claimant's evidence was unreliable as compared to the witness statements of the complainants. Mr Yousuf's next finding was that the Claimant "chose" to engage with Mr Archard. He concluded that the Claimant physically and verbally assaulted Mr Archard and that it was witnessed by three others and that the Claimant called Mr Archard a **pussy** and a "**f******* idiot**". He also concluded from the CCTV evidence that the Claimant was the aggressor in the incident.

58. Mr Yousuf concluded that although the Claimant told him that he had been verbally and racially abused during the altercation and felt threatened, he concluded that "**none of this is corroborated by witness or CCTV evidence".** The Tribunal noted that the CCTV did not have sound and captured the images from some distance away. The CCTV could not have shed any light on the Claimant's evidence that he had been verbally and racially abused. The Tribunal also conclude that Mr Yousuf failed to put any of the Claimant's allegations of racial abuse to the complainants to clarify on the balance of probabilities whether what the Claimant said about the verbal abuse was true. Mr Yousuf concluded in the report that "**the racial comments were not heard by any witness.."** however the Tribunal noted that at no time did Mr Yousuf re-interview the three witnesses to put this matter to them and he did not interview those who the Claimant spoke to immediately after the incident. This conclusion was a matter of mere conjecture and was not tested by gathering evidence once he had heard the Claimant's version of the events. He accepted in cross examination that he did not put the Claimant's allegations of racial abuse to Mr Archard and Mr McVay because he told the Tribunal he had expected them to mention it. This again appeared to be an assumption that Mr Archard and Mr McVay were telling the truth about the incident and the Claimant was not. Mr Yousuf further concluded that there was no need to put the Claimant's version of the events to them because he believed that the white complainants were telling the truth about the altercation and their role in it and the Claimant was not. This again supported the Tribunal's view that Mr Yousuf's approach to the evidence was tainted by unconscious bias; he failed to believe the Claimant's evidence and therefore took no steps to investigate the allegations he made of race discrimination, despite this being a breach of the Dignity at Work Policy and the disciplinary procedure.

59. Mr Yousuf further concluded that the Claimant's evidence in relation to the racial abuse was not credible because he did not mention this to his line manager, or in a conversation with Head of Security (see page 129 of the bundle and paragraph 23 of his statement). Mr Yousuf was asked about this conclusion in cross examination and he told the Tribunal that he formed this

view from the witness statements he had before him. However the Tribunal find as a fact that at the date this report was written, Mr Yousuf had not taken a statement from Mr Sweeney and Mr Taylor; therefore the Tribunal conclude that his evidence lacked any credibility on this point. His conclusion also ran counter to the evidence given by Mr Sweeney to the Tribunal that the Claimant referred to racial abuse in the suspension meeting and this was not investigated at the time because he believed (not unreasonably) that it would be investigated as part of the disciplinary process. The conclusion reached by Mr Yousuf was inconsistent with the facts and was further evidence of his wholly unsatisfactory investigation.

60. Mr Yousuf accepted in cross examination that he did not know if any racial comments had been made. Mr Yousuf accepted that the Claimant told him that he had informed two work colleagues of the racial abuse and this was not "disputed" but in cross examination accepted he did not interview the two members of staff the Claimant had spoken to because "**they could give no direct evidence of what happened outside unit 7".** However, the Tribunal felt that this reflected an inconsistency in Mr Yousuf's treatment of the evidence; he had raised an adverse inference from an (incorrect) conclusion that the Claimant had not spoken with Mr Taylor or Mr Sweeney about racial abuse. Mr Yousuf considered evidence of what was said in the suspension meeting to be relevant to the reliability of the Claimant's evidence even though it did not relate to the incident in question. However he then concluded that what the Claimant said to his colleagues immediately after the incident was not relevant. This was another example of an inconsistency in his treatment of the evidence where he raised an adverse inference against the Claimant if it supported his view that the Claimant had committed the act complained of but failed to obtain evidence that may be exculpatory.

61. Under the heading mitigation, he referred to the "**severe racial provocation**" that the Claimant referred to, however he concluded that he found "**no evidence to support this mitigation**". In cross examination Mr Yousuf accepted that he carried out no investigation after the meeting on the 20 August and accepted that he could have gone back to gather further evidence but did not do so. The reason he gave for not investigating further in line with the Dignity at Work Policy was that he was "**very sceptical**". In mitigation Mr Yousuf concluded that the Claimant was the aggressor which he concluded "showed the assault occurred" and he did not feel that the racial provocation alleged would be a "lawful defence". This conclusion was based upon his preconception of the Claimant that as a Black male, he was the aggressor and his evidence that he was subjected to racial harassment was treated with scepticism and not taken seriously and not investigated. He went further to conclude that even if it had taken place it would not amount to a defence, this was Mr Yousuf's personal view and not based on any evidence.

62. In the report under the heading 'Conclusion' there appeared to be many questions asked but no clear findings of fact or conclusions, certain facts were included which were not corroborated on the evidence (for example the finding that Mr Archard sounded his horn). Under the heading 'Recommendations' he stated that the Claimant had admitted using inappropriate language and he went on to conclude that "**there is clear**

independent evidence which suggests his language went further than he has accepted". The witness statements before him were all written by those who were known to Mr Archard, they could not be described as independent and this was accepted by Mr Yousuf in cross examination. He also accepted that he did not consider witness contamination. He accepted in answers to the Tribunal that at no stage during his investigation did he clarify what words were spoken and when; he did not dispute that Mr Archard called the Claimant a "f****** c***"; even though Mr Yousuf failed to investigate what words were spoken and when, it was his opinion that "**it didn't justify what the Claimant did and said"**. Mr Yousuf told the Tribunal that he took the evidence against the Claimant at face value and without challenge because **"the Claimant's statement did not appear to match up with the CCTV evidence**". However, the Tribunal note that the Claimant's statement had been prepared from memory three weeks after the incident at a time when he had no detailed knowledge of the accusations against him and had only seen two of the four statements that had been collated.

63. The recommendation in Mr Yousuf's report stated that **"there is clear evidence which shows RH assaulted GA and MM. The evidence suggests the assault was unprovoked and unnecessary in the circumstances**". After a number of questions were put to Mr Yousuf in cross examination, he conceded that the Claimant was provoked but clarified this by saying that the provocation was not in a "physical manner" and the Claimant was not acting "**in self-defence**". It was also put to Mr Yousuf that Mr Archard accepted that he pushed the Claimant first and he accepted this was a highly relevant fact did not appear in his report, this was a material fact that was highly relevant to the understanding of the dynamics of the incident. It was then put to Mr Yousuf in cross examination that he did not believe that the Claimant had been racially abused as if he had believed it he would not say it was unnecessary and he replied that he was "**sceptical that there had been abuse, had they been able to provide direct evidence I would have spoken to them**".

64. Ms Yousuf accepted that there were inconsistencies in the evidence against the Claimant and accepted that a reference to Mr Archard wearing glasses (see Mr Carroll's statement at page 113) was also an inconsistency. It was Mr Yousuf's view that "**I would be more sceptical if they all said the same thing".** He accepted that some of the statements were not signed and dated but felt that this **"didn't affect their honesty".** He agreed when it was put to him in cross examination that the weight of the document or the credibility of the evidence was not a concern for him. It was put to Mr Yousuf in cross examination that he was looking for evidence against the Claimant and he replied that he was "**interested in understanding why he did what he did"** however he approached the investigation with an assumption that the Claimant committed the acts complained of rather than investigating the facts in an even handed way with an open mind. He denied however that he made assumptions from the CCTV footage because of race.

65. The Tribunal conclude from Mr Yousuf's evidence that he failed to interview all relevant witnesses and took no steps to investigate the Claimant's case after interviewing him. Mr Yousuf approached the investigation with a preconceived view that the Claimant was guilty of wrong doing and that the witnesses who gave evidence against him, who were white were perceived

as victims, were honest and credible and would not corroborate the Claimant's evidence. However, the Tribunal has found as a fact that during the investigatory hearing the Claimant provided evidence of racial abuse, and of foul and offensive language being directed at him, but this was not investigated, we conclude that by failing to investigate this the Claimant was treated less favourably because of race. We conclude that the investigation and the findings and conclusions reached in the report was outside the band of reasonable responses

66. Mr Yousuf accepted that after the report was produced he obtained statements from Mr Sloley page 134 dated the 7 September, and others secured statements from Mr Taylor (see page 150 dated the 28 September 2015) and Mr Penlington. Ms Cassettari told the Tribunal that it was Mr Hambleton-Ayling's decision to take these additional statements.

67. The Tribunal conclude on all the evidence that Mr Yousuf's handling of the investigation was fundamentally flawed. He failed to carry out any investigation after hearing the Claimant's evidence, he failed to establish the basic facts of the case and he failed to put the evidence against the Claimant to proof. He conceded in cross examination that there were elements of his investigation that were "incorrect". He appeared to accept without question the evidence against the Claimant but questioned the accuracy and honesty of the Claimant's evidence given for the first time in the investigatory hearing. He accepted that he could have done better. He failed to consider witness contamination and failed to put the Claimant's evidence to the witnesses providing evidence against him and did not establish whether (on the balance of probabilities) the Claimant had been subjected to racial abuse. Although the Tribunal note that one cannot expect the evidence gathering to be that of the standard of a criminal case, it was impressed upon us by Mr Yousuf that he served 17 years as a police officer, and accepted in cross examination that he had received training in the handling and preservation of evidence. He also accepted that he had received training in Equalities (after the McPherson report when working for the Metropolitan Police) and he had received Diversity Training. We conclude therefore on all the evidence that the conduct of the investigation and the report produced amounted to less favourable treatment because of race.

68. The Claimant was called to a disciplinary hearing by a letter dated the 11 September 2015 (page 131 of the bundle). The person scheduled to hear the case was Mr Penlington but this was changed at the request of the Claimant; Ms Cassettari was then assigned to hear the case. The letter stated that Ms Yousuf would be calling Mr Archard, Mr McVay, Mr Carroll, Mr Galea and Mr Sloley as witnessesThe Claimant was advised of the right to submit a written reply to the allegations before the hearing and his written response was seen at pages 141-147.

69. It was put to Ms Cassetari in cross examination that the Claimant stated that no statement was taken from a Medirest employee called Sebastian. She stated that Mr Yousuf has "**made every effort to find every witness we could**" but he was not mentioned by name. Ms Cassetari accepted in cross examination that he would have been a useful witness. However, the Tribunal find as a fact that Sebastian was identified at the very early stages of the investigation by Mr Taylor (page 107F) as a witness to the incident

and his name and identity was known to the Respondent. Ms Cassetari's evidence was inconsistent and not credible and her treatment of the evidence did not appear to be consistent with policy referred to above at paragraph 18 which states that a witness shall be called if they can make a significant contribution to the case, she accepted that this evidence was significant. We conclude that this was a relevant witness as identified by Mr Taylor and the reason he was not called as a witness appeared to be that Ms Cassetari was misled by Mr Yousuf who had concluded that his evidence was not relevant.

70. It was put to Mr Yousuf in cross examination that Ms Cassetari had told the Tribunal that the witness Sebastian could not be identified. He replied that he could be identified but it was his opinion "**as he wasn't outside Unit 7 he could not give direct evidence",** but he was a witness to the incident outside Unit 5. He accepted that he was aware of the identity of Sebastian on the 31 July and felt that Ms Cassetari was mistaken in her evidence. He accepted that the witness outside unit 5 could be identified and he could "not recall" Ms Cassetari asking for the details of the witness known as Sebastian. The Tribunal find as a fact that Mr Yousuf's evidence conflicted with that of Ms Cassetari. It appeared to the Tribunal from the evidence that Mr Yousuf decided that this witness was not relevant to the investigation despite the contrary view expressed by Ms Cassetari. She felt that the argument outside Unit 5 would have informed her of the demeanour of the parties to the incident. Mr Yousuf rejected this evidence on the basis that it was his view it was not "**directly relevant**" and we conclude that this view was formed out of his scepticism of the Claimant's evidence based on his unconscious bias. The Tribunal find as a fact that Mr Yousuf failed to disclose relevant evidence to the disciplinary hearing as required under the Respondent's disciplinary process and this was further evidence of Mr Yousuf treating the Claimant unfavourably and we conclude on the balance of probabilities taken all of the above evidence into consideration that this was less favourable treatment because of race. We also conclude on the balance of probabilities that the evidence of Ms Cassetari is to be preferred to that of Mr Yousuf who has been found to be an unreliable witness.

71. Ms Cassettari told the Tribunal that she had been informed that she was to hear the disciplinary on the 23 September 2015. She told the Tribunal that on the morning of the hearing, she viewed the CCTV evidence with Mr Yousuf, without anyone else present. This was not mentioned in her or Mr Yousuf's statement even though this was a matter that was relevant to the issues in the case as this was a concern that had been raised by the Claimant in the appeal hearing (see page 227 paragraph 31 where the Claimant referred to the undue influence posed by Mr Yousuf during the hearing). The Claimant told the Tribunal in answers to cross examination that he could not understand why Mr Yousuf was with the disciplinary panel prior to the meeting and he felt that his involvement was unreasonable.

The Disciplinary Hearing.

72. At the disciplinary hearing, Ms. Cassetari was supported by Mr Hambleton-Ayling the HR manager. The notes taken by the HR manager were in the bundle at pages 152-177 and they could at best be described as jottings and were almost incomprehensible and only covered part of the hearing and were impossible to decipher. The first time these notes were produced

where when the Claimant had sight of the bundle (in the course of disclosure in these proceedings). Ms. Cassettari took no notes herself during the hearing. This was the only record taken of the hearing. It was impossible for the Tribunal to see what questions the Claimant was asked and what evidence he gave to the hearing. Despite the contents of the letter calling the Claimant to a disciplinary hearing informing the Claimant they would call all witnesses, the Respondent only decided to call Mr Galea and to speak to Mr Sloley on the telephone.

73. Ms Casseteri told the Tribunal that she was not concerned that Mr Yousuf had referred to the witnesses who gave evidence against the Claimant as "victims" as she felt this was a "turn of phrase" and did not affect her decision making. It was put to her that the words used by Mr. Archard were racist (page 144-5) which made him the aggressor in the incident and she agreed that this was aggressive. She also agreed that the comment about "**it rubbing off on you**" was also aggressive and highly offensive and accepted in cross examination that Mr Archard struck the Claimant first.

74. It was put to Ms Cassetari in cross examination that the disciplinary process was tainted by unconscious bias because she allowed the Claimant to be referred to by a witness Mr Galea as 'black guy' even though he had been introduced by name. She accepted that this occurred and that she "**may not have picked up on it**". She told the Tribunal that it did not give her concern that the Claimant was referred to as the black guy as she felt the term was used as a 'descriptor'. She confirmed she was up to date on Equality training. She accepted in cross examination that it was unacceptable to allow someone to be referred to in this way. The Claimant's evidence to the Tribunal was that Mr Galea referred to him as the 'black guy' on a number of occasions during the disciplinary hearing.

75. It was put to Ms Cassetari that it was important to investigate the harassment the Claimant complained of and she accepted that the allegations of abuse that the Claimant raised were "potentially" significant to the outcome of the case. She stated that she didn't deny the abuse occurred but the Claimant "**could raise it formally with the Trust**". The Tribunal find as a fact that the Claimant had raised abuse formally via the Datix reporting system and gave details that he perceived it to be discrimination in the suspension meeting, in the investigatory and disciplinary hearing, however no steps were taken at any part of the disciplinary process to investigate. It was noted that the disciplinary process at paragraph 5.4 required that that counter allegations should be investigated and the Dignity at Work Policy required that complaints of racial harassment should be investigated. These policies were not complied with and the Claimant's complaints were not investigated even though they had been raised formally.

76. Ms. Casettari was taken in cross examination to the video clip marked DVR 647/U7 at 9.35 which showed the Claimant stepping back as if retreating, which (it was suggested by Claimant's counsel) showed that he was not the aggressor and she agreed with this on two occasions. She was then taken in cross examination to the video clip marked DVR-678- Unit 6 and she accepted when shown this, that the Claimant could not be the aggressor in this incident. She accepted that her conclusion that Mr Archard was the

aggressor on a number of occasions was not in the dismissal letter and it would have been helpful if it had been. She accepted that she assumed that the Claimant was the aggressor and she formed this view from the statements she had from the other white witnesses and from the views reflected in Mr Yousuf's report and from the 'relevant' parts of the CCTV that she had been taken to by him. It was also noted at paragraph 22 of her statement that Ms Cassetari stated that she was struck by "how confrontational" the Claimant appeared in the CCTV. This assumption had been formed by accepting the unchallenged evidence of the White complainants as being true and by identifying them as victims and by making an assumption that the Claimant was the aggressor, these assumptions had been made because of race formed out of the manner in which the evidence had been presented to Ms Cassetari by Mr Yousuf and she accepted without question the evidence and conclusions that had been presented to her.

77. Ms. Cassetari confirmed that she was concerned that Mr Archard's statement was not signed or dated and accepted that this evidence was accepted on face value to be true. She also could not recall whether Mr Archard was wearing glasses which was relevant to credibility of Mr Carroll's statement, which referred to the Claimant knocking Mr Archard's glasses off his face (see page 113). She accepted she took all the witnesses (who were white) statements at face value. She also accepted when it was put to her that it was only Mr Galea who reported that the Claimant had shoved Mr Archard with both hands and that this was "potentially" a cause for concern and was not consistent with the CCTV evidence. However, she did not question this in the hearing or during her deliberations after the hearing.

78. Ms. Cassetari accepted that the Claimant was only provided with the new statements taken at the commencement of the hearing and he did not have an opportunity to consider them, this resulted in a procedural unfairness that she failed to address.

79. Ms Cassetari confirmed that Mr Yousuf spoke a lot during the hearing but did not feel it was excessive or inappropriate (paragraph 11). Even though there was no accurate evidence before the Tribunal of what happened at the disciplinary hearing and no notes (save for the jottings) were retained, the Tribunal conclude on the balance of probabilities that Mr Yousuf's conduct during the disciplinary hearing was oppressive and he shouted at the Claimant during the hearing; we conclude this to be the case on the balance of probabilities taking into account the credibility of the evidence provided by Mr Yousuf, who we have found on a number of occasions to be an unreliable and inconsistent witness as compared to the Claimant who has been found to be an honest and credible witness. We also have based out conclusion on the manner in which Mr Yousuf conducted the investigatory hearing, which we have found as a fact to be in the form of an interrogation. We conclude therefore that his approach to the Claimant in the disciplinary was likely to be similar in approach especially taking into account his scepticism of the Claimant's evidence.

80. The Respondent could provide no explanation why the notes of the hearing were not retained by Ms Cassetari or by the HR Department, although the Tribunal were told that Mr Hambleton Ayling had since left the Respondent's employment, no explanation was provided as to why the notes were not

secured in the Claimant's file or in Ms Cassetari's files. We conclude that an adverse inference can be raised from the loss of the minutes, it would seem to be unfortunate to lose one set of minutes for the disciplinary but to fail to retain the minutes of the appeal hearing calls for a clear explanation. The Respondent stated that both HR managers have since left, however this did not absolve the senior managers with conduct of the hearings to secure the notes and for those remaining in the HR departments to file them appropriately.

81. Ms. Cassetari was taken to the Claimant's statement produced for the disciplinary hearing and she was taken to page 141. It was put to her that the Claimant was regretful and had expressed remorse for what happened and he had a successful 18 year career with the Respondent. This was not disputed. Ms Cassetari's concern was that in her view he should have walked away to prevent the matter escalating. She could not recall the Claimant giving assurances that it would not happen again. The Tribunal noted that the Claimant gave clear evidence in his statement to the hearing (page 147) that the incident was "totally out of character" and he had never been involved in any altercation before. It was not clear what weight, if any, was placed on these representations.

82. Ms. Cassetari was then taken to the notes of the investigation at page 123-4 where the Claimant stated that in future he would not get involved in any altercation and would just take a number plate; he specifically stated that "**I shouldn't have sworn. I was subjected to abuse and in hindsight I shouldn't have reacted and sworn".** He stated that he would not get **"dragged down to that level**". When Ms Cassetari was taken to this extract she stated that they did not read through this part of the interview however this was part of the Claimant's evidence before the disciplinary hearing which she appeared not to have considered, even though the minutes were referred to in the dismissal letter as evidence she had considered (see page 192). She accepted in cross examination that if the racist abuse had occurred at the beginning of the incident she confirmed that she "would have taken it into account". The Claimant's evidence was that the abusive language occurred from the beginning of the incident and his submissions to the disciplinary hearing were consistent with the investigatory notes (page 143). The Claimant's evidence on this point was not mentioned in the 'Findings' section of her decision.

83. Ms Cassetari accepted when taken to the notes of the investigation that the Claimant had stated that he would not do it again. She also accepted that no account was taken of the character references the Claimant provided. Ms Cassetari confirmed to the Tribunal that any evidence that went to the Claimant's innocence was "**overlooked**". The Tribunal find as a fact that the disciplinary hearing failed to consider the Claimant's evidence or his representations given at the investigatory hearing. The concession made by Ms Cassetari that his representations regarding his innocence were overlooked reflected the substantive unfairness of the process.

84. Ms. Cassetarri told the Tribunal that after the hearing, she decided it was appropriate to obtain a statement from Mr Tully which was dated the 1 October 2015 at page 180. Although new evidence was obtained, the hearing was not reconvened. Although the Claimant commented on this new evidence, there was no consistent evidence before the Tribunal that

his representations were considered before the decision was made. It was noted in the bundle at page 186 that at the date of 8 October, the Claimant had not provided his responses to this new evidence and he informed Mr Hambleton Ayling of this fact. However he was informed that they had "**already made the decision**". Ms Cassetari told the Tribunal in answer to questions about the notes of the hearing, that they made the decision "**straight after the meeting".** However, the Tribunal noted that Mr Hambleton Ayling had told the Claimant in an email at page 188 of the bundle dated the 2 October that they were due to meet "next week" to go through the evidence. The evidence of when the Respondent reached the decision to dismiss was inconsistent and lacked credibility**.** It was entirely unclear to the Tribunal how and when Ms Cassetari reached the decision to dismiss due to the lack of notes. We accept however that Ms Cassetari was the sole decision maker who was influenced by Mr Yousuf's sceptical view of the Claimant's evidence and his presentation of the 'relevant parts' of the CCTV evidence.

The Dismissal Letter

85. The dismissal letter was dated the 14 October 2015 at pages 192-7 and was signed by Ms Cassetari but written by Mr Hambleton Ayling. The dismissal letter was structured in a manner that appeared to reflect the conduct of the hearing but no clear findings were made as to whom, on the balance of probabilities they believed where there was a conflict in the accounts of the Claimant and the those who gave evidence against him. Although the letter stated at pages 192 and 196 that "we agreed" that a statement should be taken from Mr. Tully, the Claimant denied this was the case as was highlighted in his appeal letter at page 200 of the bundle. He also stated that he had been told by Mr Yousuf on two occasions that Mr Tully had no recollection of the incident. If the Claimant had not agreed to this statement being secured, it would appear to be in breach of the disciplinary policy that stated that no new evidence was to be presented at the summing up stage (page 78).

86. On page 193-195 there followed what was described as a "full reflection of a situation between Richard Hastings and Gary Archard"; however the three pages appeared to be in the form of notes of the disciplinary hearing rather than an accurate report of the facts and evidence considered at the hearing. The letter cast doubt on the credibility of the Claimant's evidence even though this evidence had not been considered at the hearing, for example the letter stated that there were a "**number of vehicles travelling as fast or faster than Gary**" at the time. This was referred to in Ms Cassetari's statement at paragraph 22 where she concluded that Mr Archard was "**not driving at speed**". There was no evidence that this was investigated prior to the outcome of the disciplinary hearing and another example of where the Claimant's evidence was treated with scepticism.

87. It was concluded at page 194 that the allegation made by two witnesses that the Claimant smelled Mr Archard's head and used the "c***" word was corroborated by the CCTV evidence even though this was denied by the Claimant as being a "complete fabrication" and the CCTV had no sound. Ms Cassetari concluded that the "**CCTV footage maybe consistent with the experience of the witnesses**". This did not appear to be a finding of fact based on the evidence as the Claimant's version of events was not

investigated further after hearing the Claimant's denial and counter allegations. Ms Cassetari also failed to consider that the contemporaneous Datix report had stated that Mr Archard had used this word when he was verbally abusing the Claimant. Although mention was made of the Datix report in the letter (at page 195) the abusive words were not referred to which again reflected the bias approach to the evidence; it was concluded that the Claimant had used the "c***" word but no such conclusion was reached as to whether Mr Archard used this word when speaking to the Claimant.

88. The letter stated at page 194 that they heard from Mr Galea who stated that the Claimant appeared to be the aggressor and the Claimant's response was that he was a colleague of Mr Archard and Mr McVay and was therefore not independent. The letter went on to state that "**it was put to you that [Mr Galea] had signed a statement saying he would be liable for prosecution if any of it were false"**, the Tribunal noted that this was evidence of the oppressive conduct of Mr Yousuf during the hearing. The reflection of the hearing suggested that greater weight was put on this statement because of the statement of truth even though the facts contained therein did not correlate with the evidence of the other two complainants.

89. Mr Galea's evidence to the disciplinary panel was recorded in the letter at page 195 and no mention was made to him referring to the Claimant as Black (which was admitted) even though reference was made to the Claimant referring to Mr Galea "appearing to be a white male", a phrase that the Claimant denied using (in his appeal letter at page 201). Mr Galea's evidence to the panel was that "**while he was concerned about you and your behaviours he wasn't that concerned as there were two other guys looking after the white guy"** (referring to Mr. McVay and Carroll see above at paragraph 42). There appeared to be no investigation of what he meant by "looking after". This evidence provided further context to the incident that was not considered by Ms Cassetari.

90. The letter at page 195 referred to a statement given by Ms Raheem in support of the Claimant; her evidence was treated with caution by Ms Cassetari as it was concluded that the reason Ms Raheem gave for resigning to the disciplinary panel (the treatment of the Claimant by the Respondent) was not corroborated in her resignation letter; it was concluded that it was not consistent with the "**content and tone of the resignation letter".** This was another example where the Respondent looked for evidence to undermine the credibility of those providing support for the Claimant during the disciplinary hearing without taking steps to ask Ms Raheem why she had failed to mention this in her resignation letter. No witness who provided evidence against the Claimant had their evidence challenged on the grounds of credibility or consistency, even though there were good grounds to do so.

91. The decision was on page 196 of the bundle and it was concluded that the allegation that the Claimant had verbally and physically assaulted Mr Archard was upheld. Even though the Claimant had denied the allegation that he used offensive words to Mr Archard, the Respondent found as a fact, relying on the evidence from the CCTV (which had no sound), that the Claimant had done so, concluding that the statements from the white witness were credible and the evidence of the Claimant was not. Ms

Cassetari confirmed in the Tribunal's questions that she should have investigated the issue of whether the Claimant used offensive words as he had consistently denied that he did so (in respect of the c*** word). She accepted that she had contradictory evidence in front of her and she never tested the other witnesses' side of the story. It was put to Ms Cassetari in re-examination that she had made a number of concessions and she was asked for her reason for not interviewing Sebastian and for not putting the Claimant's case to the other witnesses and she replied "**I had no reason to dispute or disbelieve the comments were made so I didn't look further. I thought there was a good amount of evidence to rely on".** This answer confirmed that her failure to investigate any of the Claimant's evidence as to his version of what happened was unnecessary as she had enough evidence against the Claimant to dismiss for gross misconduct; she had already confirmed that she had overlooked any evidence that pointed to his innocence. This comment corroborated that her approach was one sided and unfair, where exculpatory evidence was ignored or overlooked and the Claimant's evidence provided at the disciplinary hearing was not investigated and was considered to be unreliable or uncorroborated.

92. On the matter of the physical assault she concluded "**You admitted hitting in the face by accident**" and concluded that this amounted to an assault. Ms Cassetari failed to place any weight on the evidence that this followed a first contact by Mr Archard (as admitted by him in his own statement). She concluded in the letter that her view was consistent with the accounts she had before her, that he was the "**aggressor in the situation**". Ms Cassetari conceded in cross examination that her sole focus was on the Claimant and she assumed that the Claimant was the aggressor throughout and she formed this view "**on the statements she had from others".** The Tribunal saw no cogent evidence to suggest that clear findings of fact had been made as to the time lines of the events and her conclusion was formed from the statements provided by the witnesses who were all white. She also conceded in answers to cross examination and in answer to the Tribunal's questions that there was evidence to show that it was Mr Archard who was the aggressor in the incident.

93. Her conclusion in relation to allegation two was that the Claimant verbally and physically abused Mr McVay, it was concluded that the Claimant pushed him and Ms Cassetari concluded it was "**unnecessary**". She also concluded that he had failed to demonstrate "**appropriate leadership skills**" during the incident in car park. She made no reference to the charge of verbal abuse in her conclusion (even though she told the Tribunal in her statement at paragraph 20 that this charge was not found to be proven).

94. Ms Cassetari dealt with the Claimant's evidence of racist abuse at the end of the letter (page 197) she stated that the "**Trust will support you whole heartedly should you wish to make a complaint, or wish to report this as a crime**." However she then stated that the Claimant "**had it within your gift to end the racist abuse by calling security and allowing security to undertake their role to protect you".** She stated that "**the panel strongly recommends that you work with us to detail this incident so it can be properly investigated and appropriate action taken. Any racist abuse is unacceptable**". The Claimant had already provided detailed evidence in the course of the investigation and in the disciplinary hearing of the racist abuse suffered. There was no evidence that the panel had taken any steps

to investigate the Claimant's evidence in relation to the racist abuse or to consider what impact it played on the escalation of the incident.

95. Ms Casstetari concluded that the racist abuse did not have a bearing on the events as she concluded that he pushed Mr McVay before he was racially abused. She also concluded that "hitting" Mr Archard also had no bearing on the racist abuse. This conclusion was not consistent with the evidence provided by the Claimant to the disciplinary hearing as his consistent evidence was that the abuse occurred at the beginning of the incident, this was also corroborated by the Datix report. Although the letter appeared to accept that the Claimant had been racially abused, Ms Cassetari did not comply with the requirements of the Dignity at Work Policy or with the disciplinary policy, which required that a complaint of racial abuse or harassment should be dealt with as part of the process. The policy did not envisage that the employee should be dismissed before any investigation takes place, which is what occurred in this case.

96. The letter went on to state that the reason she felt that summary dismissal was the only option was because "**given this incident involved you being aggressive to members of the public, verbally and physically assaulted one individual and physically assaulted a second member of the public, we do not believe a written sanction will be sufficient to remedy your behaviour going forward"**. She also concluded that "**it is our belief that you did not simply intend to get the license plate and report the matter to security, or you would have done that without incident**" this was an allegation that had not been put to the Claimant. This conclusion did not appear to reflect any of the Claimant's evidence to the panel (his written evidence to the hearing (pages 141-7) and his statement sent to the disciplinary panel dated the 28 September 2015 at pages 184-4). It did not record the Claimant's mitigation; he had expressed deep regret for the situation and accepted that he would not attempt to engage a person in this way in future. Although Ms Cassetari referred to the Claimant's "**unblemished disciplinary record in the 18 years that you worked here**" there was no evidence his long service was a factor that was considered when deciding on the sanction. The Claimant was summarily dismissed for gross misconduct there was also no evidence that a lesser sanction was considered.

97. It was noted in Ms Cassetari's statement at paragraph 25 that she appeared to accept that Mr Archard's comments could potentially amount to race discrimination but "**there was no definitive evidence**" that that was what was intended. Ms Cassetari accepted that at no time did she establish as a fact what Mr Archard had 'intended' by his comments. Although Ms Cassetari denied she was influenced consciously or unconsciously by race, the Tribunal conclude on all the evidence that the Claimant has shown facts from which we can conclude that he was treated less favourably because of race. We form this conclusion from the fact that her sole focus was on the Claimant's conduct, he was assumed to be the aggressor. The white witnesses were accepted to be the victims. She allowed the Claimant to be referred to as Black in the disciplinary hearing and failed to take steps to stop this happening, she also accepted this was unacceptable. She accepted that she overlooked any evidence that may point to the Claimant's innocence and questioned the veracity of those who provided evidence in support of the Claimant. She failed to act in a manner that was consistent

with the Respondent's Dignity at Work and Equal Opportunities policy and could not explain her reason for not acting in accordance with them when chairing the disciplinary hearing and reaching a decision. She could provide no explanation why she did not ensure that the Claimant had an opportunity to comment on all the evidence and there was no evidence that she took steps to investigate the race discrimination. We conclude on this evidence that the burden of proof shifts to Ms Cassetari to show a non-discriminatory reason. Ms Cassetari has failed to show evidence that her actions were in no sense whatsoever because of race. The Tribunal also conclude that the process followed was unfair for the above reasons.

98. The Claimant's appeal was dated the 20 October 2015 and was at pages 200-5 of the bundle. It was noted that Mr Hambleton Ayling sent it to Ms Cassetari with the comment "**you will note that Richard is still insisting on ushering. I think it is a real shame**".

The Management Case for the Appeal

99. The Tribunal were taken to page 212 which was the management case for the appeal which was written by Ms Cassetari dated the 7 December 2015. Mr Hambleton Ayling had left the Trust by that date. The Claimant's response was at pages 222. The only minutes of the appeal were at page 283 had been taken by the Claimant's partner; the Respondent failed to secure the notes taken by HR. We also had what can only be described as the "jottings" of Ms Wood at pages 215A-B. The document, which is the sole record made by the Respondent of the appeal hearing amounted to a number of questions. Although Ms Cassertari was asked a number of questions about the conduct of the appeal and about her evidence, she told the Tribunal that she had no recollection of what was said during the appeal but she had no reason to dispute the minutes taken by the Claimant. The Tribunal were told that the HR manager Mr Preston who present at the hearing had taken notes but had since left the Trust. The Tribunal conclude that it was an extraordinary coincidence that the notes of the appeal had also been lost in this case and the appeals manager also failed to take any minutes of the hearing.

100. The appeal outcome letter was at pages 230-232 of the bundle. Ms Wood told the Tribunal she was asked to chair the appeal by Mark Preston of HR. Ms Wood was taken in cross examination to a number of paragraphs in the Claimant's appeal letter (paragraphs 2, 3, 6, 10, 20) and she accepted that she had not referred to these matters in the appeal letter. She told the Tribunal that she considered all the allegations. The Tribunal find as a fact that there was no evidence that Ms Wood reached a conclusion to answer the points of the Claimant's appeal as the appeal letter gave no indication what outcome was reached. She accepted when it was put to her that it was completely unacceptable to refer to the Claimant as the "black guy" in the disciplinary hearing. She also accepted that in the statements produced by the contractors (at page 113, 114, 180) they all referred to the Claimant by his race. Ms Wood confirmed that she heard this complaint made in the appeal.

101. It was put to Ms Wood that the Claimant was correct in his appeal statement at paragraph 11 (page 224) that he did not believe that a white

person would have been treated in the same way and the panel had made up their mind that he was the aggressor because he is a black man. Ms Wood disputed this analysis. It was put to her that she did not deal with the issue of race discrimination in the letter and she accepted the outcome was "in broad themes" and this was reinforced by the last sentence in the letter which was "**I hope this letter highlights the key points raised in the meeting"**. The Tribunal find as a fact that Ms Wood failed to reach a conclusion on any of the points of appeal raised by the Claimant referred to above and reached no conclusion about the Claimant's allegation that he was subjected to race discrimination.

102. Ms Wood accepted that Ms Cassetari had conceded in cross examination that it would have been appropriate for her to investigate the allegations of race and Ms. Wood replied that this was why she recommended that a "**review occurred**". The Tribunal saw reference to this in the letter at page 232 where she recommended that someone called Jorge Sousa would "**request that the Company that GA works for will formally investigate the incident, specifically the allegations of abuse and that they will take appropriate action following their own policies and procedures**". The Claimant told the Tribunal that Jorge has never made contact with him. The Tribunal noted that this alleged recommendation did not appear to appear to place any obligation on the Respondent to carry out an investigation or to take any action in respect of the racial abuse that the Claimant alleged occurred as part of the incident that occurred on the premises during working hours that led to his dismissal. This approach did not appear to be consistent with the Dignity at Work Policy or with the disciplinary procedure.

103. There was no evidence that Ms Wood investigated the Claimant's complaint that Mr Yousuf was acting in an aggressive or discriminatory manner in the hearing; she told the Tribunal that she accepted what the Claimant said. Ms Wood was taken to pages 225 at paragraphs 18-19 regarding the conduct of the suspension hearing and she told the Tribunal that Mark Preston investigated the behaviours in the ICT Department but "nothing was found"; the Tribunal saw no evidence of this investigation in the bundle; Ms Wood only referred in her statement at paragraph 13 to check whether the Claimant had previously pursued claims that he was previously racially abused.

104. Ms Wood was asked if she was concerned that a number of the statements were not signed and dated and the witnesses were not called to give evidence; she replied that she was not concerned because **"there was an agreement as to who should attend**" however this was not consistent with the evidence before the Tribunal. Her conclusion of an agreement being reached was not reflected in her appeal letter. It was also put to Ms Wood that the Claimant was unable to respond to Mr Tully's statement and she could not recall whether or not he could respond; this response highlighted the considerable failings in her appeal process as this was a ground of appeal in the Claimant's appeal statement at page 227 paragraph 28 and there was no evidence that this matter was investigated.

105. Ms Wood accepted that she did not cover the evidence of Sebastian in the outcome letter despite this being part of the Claimant's appeal. She accepted she did not deal in the outcome letter with how she reached her

conclusion and how she dealt with the Claimant's evidence of his long career and exemplary record (page 228 paragraphs 36-7). She accepted that one of the Claimant's submissions was that a disproportionate number of black staff were disciplined and she stated she did not investigate as it was "not within my gift". This was another part of the appeal that was not dealt with or even considered.

106. Even though Ms Wood told the Tribunal that the appeal hearing was not a rehearing of the evidence it was a review, she viewed parts of the CCTV evidence and formed the view that there were "**multiple points where [the Claimant] could have walked away"**. Ms Wood confirmed that the CCTV "**swung my decision**". Ms Wood's evidence of the nature of the hearing was inconsistent, if it had been a review, there would be no need to look at the CCTV evidence. Ms Wood was unable to state clearly why viewing the CCTV "swung it" for her and in what way, and how this was relevant to the points that the Claimant raised in his appeal.

107. Ms Wood told the Tribunal that she "**absolutely and categorically refute I made a decision on the grounds of race. I would have taken the same decision".** It was only in response to questions posed by the Tribunal that Ms. Wood confirmed that Ms Yousuf was present when the CCTV was viewed as he was the person who informed her who the individuals were; this evidence was not in her statement because she did not think to mention it. Ms Wood accepted that when she was taken to a number of paragraphs in the Claimant's appeal where he mentioned Mr Yousuf (paragraphs 24,31,30 and 32) that it would have been helpful to record his attendance and she inadvertently left it out of her statement. The Tribunal did not find Ms. Wood's evidence credible on this point as she had changed her evidence from saying that they worked out who the parties were on the CCTV evidence but conceded in answers to the Tribunal that Mr Yousuf was there and this had not been mentioned in her statement. This was a highly relevant fact taking into account that a number of grounds of appeal that mentioned Mr Yousuf directly, including his oppressive behaviour and potential preconception on racial grounds.

108. Ms Wood concluded that there was no evidence to suggest that the investigating officer was acting in a discriminatory or prejudicial way towards the Claimant. The Tribunal conclude on the balance of probabilities that the reason that viewing the CCTV "swung it" for Ms Wood was because Mr Yousuf had taken her through the CCTV showing her all the relevant parts as he had done with Ms Cassetari and he presented his view of the Claimant as the aggressor and the white complainants as the victims. There was no evidence that Ms Wood investigated the alleged oppressive behaviour of Mr Yousuf in the investigatory and disciplinary hearing and did not feel that he may be compromised by showing her the evidence he felt to be relevant when deciding on the Claimant's points of appeal.

109. The Tribunal put to Ms Wood that Mr Yousuf informed her which parts of the CCTV were relevant and she did not answer; however, she told the Tribunal they saw the "key bits". Ms Wood was asked by the Tribunal what made her decide that parts were not relevant and she replied "**I don't know why, I probably should have looked at it [all]**" (referring to the last incident). The document at page 281 was put to Ms. Wood in cross

examination which was the Respondent's Improvement Plan for Race Equality and Indicator 3 was put to her which was an "**overrepresentation of BME staff entering the formal disciplinary process**" and it was stated that the ratio was 2.75; Ms Wood stated that it was "something we have to address" however it was noted that one of the suggestions identified as an action point was to "**consider alternative options before BME staff enter a formal disciplinary process"**. There was no evidence that this improvement plan was considered by Ms Wood; she denied however that she was motivated by unconscious bias when she viewed the CCTV evidence.

110. Ms. Wood was taken to page 217 which was addressed to her and to Ms Cassetari (and to Mr Preston of HR) by a person from HR called Dionne, Ms Wood denied that she attended a meeting prior to the appeal with these people and stated that it would be wholly inappropriate to do so. Ms. Wood accepted in cross examination that the Claimant's claim that he had been racially abused came within the Respondent's bullying and harassment procedure at document R2. Ms Wood was asked about this policy which stated that the Respondent will deal with any allegation promptly and confidentiality and give the employee full support. She stated that she did this by dealing "sensitively with the appeal" but apart from that she had no further role to play. The Tribunal find as a fact that Ms Wood failed to follow the Dignity at Work policy by not investigating the Claimant's complaint to racial harassment during the disciplinary hearing and that suffered during the incident at the hands of Mr Archard and the contractor Mr McVay. Ms Woods provided no credible reason why this policy was not followed and why it was not referred to in her witness statement. We conclude that the reason why she failed to consider the Claimant's appeal and the reason why she failed to act in accordance with the Respondent's policies was because of race. Her evidence that the CCTV swung it for her showed that she was convinced by the visual evidence of Black male, who was assumed to be the aggressor in an altercation with two white males and on hearing Mr Yousuf's sceptical views on the Claimant's evidence. This was sufficient evidence from which we can establish that the reason why is because of race and there are sufficient facts to shift the burden of proof. Ms Wood has failed to show any evidence that her treatment was in no sense whatsoever on that ground.

111. Ms Wood stated that it was Mr Preston who drafted the appeal letter and she could not recall when it was drafted but did not know why the drafts of the letter were not in the bundle but stated that it was drafted after the appeal took place. There was no evidence that she played any part in the drafting of the letter or in the conclusions that were reached.

The Closing submissions of the Claimant

112. These submissions set out the specific factual findings the ET is invited to make, and thereafter follow the list of issues agreed between the parties during these proceedings.

The Background and material facts:

113. C was employed by the Respondent ("R") on 02.12.96 initially as a Network Analyst before he was promoted to the Infrastructure Analyst, Consultant/Team Leader and infrastructure manager on 01.10.13 **[RH/1]**.

114. Notwithstanding his hard work ethic and impeccable disciplinary record throughout his 19-years' service **[RH/1]**, he was dismissed on 14.10.15 for gross misconduct arising out of an incident which occurred on 29.07.15.

Incident on 29/7/15

115. On 29.07.15, C was involved in an altercation with a third-party delivery driver (Gary Archard, "GA") who had been delivering goods to one of the units on R's premises. C was attempting to reverse into a loading bay in R's business car park, when the van driven by GA accelerated past C, requiring him to brake suddenly. GA shouted abuse as he drove past **[RH/18-22, 142-146]**.

116. Having parked his car, C went around to where he believed GA had parked to take his registration number and report his abusive language and erratic driving to R's security **[RH/23, 143]**.

117. As C approached, GA became abusive saying, ***"what's he going to do to me, what can he do"*** and ***"look at this fucking cunt"*** or words to that effect **[RH/24, 143-144]**.

118. C asked him if he thought his actions were necessary and stated that he was driving too fast for the business park. C explained that his driving was hazardous and exceeded the safe speed limit. GA said that his vehicle was fitted with a '*tachometer and that he couldn't speed'* He asked C if he knew what a tachometer was and said, ***"You can't eat it"*** or words to that effect. GA continued to be abusive stating that C was ***"fucking stupid"*** because he did not signal when reversing into the loading bay **[RH/24, 143-144]**.

119. C asked GA if he thought this was necessary, when GA responded with ***"What are you! Are you a fucking manager?"*** or words to that effect. When C told him that he worked for the Respondent he said, ***"Look! They'll let anything happen here"***.

120. Things began to deteriorate, so C called the Security Control Desk to report what was happening. When C was on the phone to security he introduced himself as Richard Hastings, at which point GA questioned whether Richard Hastings was C's real name. GA said repeatedly ***'what's your name?'*** and ***'that's not your real name'***. The implication being that C could not have such an English sounding name.

121. C informed the control desk that there were three contractors abusing him and he was going to get the vehicle registration number of GA's van. As C tried to walk to the back of the van one of the contractors, Maurice McVay ("MM"), blocked his path. C said, "excuse me" on two occasions but MM refused to move **[RH/ 27, 144]**. When C moved MM backwards to get past him, GA said, ***'careful it doesn't come off'***. C understood this to mean that MM should be careful that his skin colour didn't rub off on him. C found these comments upsetting.

122. Ali Yousuf (AY) eventually accepted under cross examination[1] that this comment was racially motivated. AY treated C's complaint with great *"skepticism"* and did not believe he had been subjected any racial abuse. It was put to AY whether he believed that C was *"playing the race card"* and he replied that he treated C's complaint with *"skepticism"*. This phrase was a common feature of his

[1] Day 5 – 27.03.17 at approximately 3:15 pm

evidence used to explain his failure to investigate C's serious complaints of racial abuse.

123. C and GA got into a war of words and C swore at the delivery driver. He regretted his actions but had suffered severe racial provocation and was physically assaulted and verbally abused. C was the one who called King's Security to report the incident and informed them that GA was abusing him, but they were busy dealing with another incident and could not send anyone to assist **[RH/28, 144]**. Things deteriorated very quickly. C felt threatened and was concerned for his safety, so he left to move his car from the loading bay into a parking space and went to work.

124. We now know from Mr Ian Taylor's ("IT") evidence that R is required to keep a record of all such calls. IT admitted under cross examination that C's telephone call to security on the 19.07.15 would have been automatically recorded on the call logger system.[2]

125. Jenny Cassettari ("JC") accepted during cross-examination that C raised his arm to shrug GA off whilst stepping backwards, accidentally hitting GA on his chest/face.[3] She also accepted that C did not intend to hit him and conceded that GA was the aggressor on each of the following occasions:

i. DVR-U7-677-U7 – 09:35:10 – 09:35:20 – GA grabs/pushes C's arm and C steps backwards raising his right arm accidentally hitting GA's chest/face;
ii. DVR-12-678-Unit 6 G - 09:37:05 – 09:37:15 - GA raised his hand to C's face prompting C to move his head to avoid contact.
iii. DVR-12-694-Unit 8 - 09:40:10 – 09:40:35 - **Angle 1** - GA stops his van outside Unit 5 and interacts with C.
iv. DVR-01-657-Unit 5 E - 09:39:30 – 09:40:15 - **Angle 2** - GA stops his van outside Unit 5 and interacts with C.

126. JC also accepted under cross-examination that GA was the aggressor each time he racially and verbally abused C **[18-19, §§10-13]**. Notwithstanding this, and GA admitting that he pushed C during their exchange of words **[107c, §3]**, C was viewed as the aggressor throughout the incident [192-197]. C contends that JC made stereotypical assumptions about him being the aggressor throughout the incident based on his race.

127. C informed two colleagues about the racial overtones of the abuse when he arrived at work **[108]**. He explained that ***"he had become involved in an argument with a white van driver. The driver had started off by verbally abusing him and stooped to saying things about the colour of his skin and that his English sounding name could not belong to him."***

128. Both Kola and Wale advised C to include this in the Adverse Incident Form but C did not do so because he was conscious that the racial abuse was in the form of innuendos as opposed to explicit racial abuse. GA was making comments about Richard Hastings, not being his real name, and said to one of the contractors, "be careful it doesn't rub off" as he brushed past.

129. Shortly after this incident, the Claimant filled out the Adverse Incident Review Form in the following terms **[99-102]**:

[2] Day 6 – 28.03.17 at approximately 11:35 am
[3] Day 4 – 24.03.17 am

"A delivery driver verbally abused me as I was parking my car in the car park. I asked him to repeat what he had said and he again verbally abused me calling me a f**king c**t.
He was driving a white van the registration number was along the lines of TW59 xxx.

I called King's Security to deal with the person and passed the registration to the Security staff who received the call.
I left the scene and went to the ICT Department. I do not know the name of the individual who verbally abused me.

No further action has yet been taken."

130. It is common ground between the parties that C did not provide details of the racial abuse he was subjected to during the incident with GA.

131. IT confirmed that he learned of the incident between C and GA on the 29.07.15. He said that he had spoken to C on the telephone shortly after the incident and confirmed that C only gave brief details about the incident and did not mention any racial abuse.[4]

132. IT said that Adam Lock ("AL") came to see him on the morning of the 31.07.15 and informed him that he had been told by contractors who had witnessed an incident outside Unit 7 on 29.07.15 **[IT/12]**. IT said that AL provided the contact details for GA and he spoke to GA later that day and apart from confirming that GA said he had been abused, IT could not say what time he spoke to GA or provide any details of the conversation that is alleged to have taken place.[5]

133. After speaking to GA, IT said he viewed the CCTV for approximately 20-30 minutes before trying to contact C's line management team. He then viewed the CCTV again with CS before contacting Mark Preston (HR). They agreed to suspend C from duty on 31.07.15. IT said that he offered to draft the suspension letter on behalf of CS and accepted under cross-examination that this consisted of completing paragraph four of the suspension letter **[105]**. IT confirmed that he attended the suspension meeting along with CS but denied that C raised any allegations about the racial abuse. The ET is invited to find that during this meeting C did in fact formalize his complaint that GA subjected him to racial abuse **[CS/9]**.[6] CS informed C that an allegation that he acted aggressively towards, and physically assaulted, two individuals (GA and MM) had been made against him. CS advised C that an investigation would be carried out as soon as possible and he would be suspended from work with immediate effect.

134. On advice from IT, CS removed C's work identification and remote access token. IT accepted under cross-examination that without his remote access token C was unable to access the Datix report system and amend his report after his suspension on 31.07.15.[7]

135. By 31.07.15, IT had identified the following witnesses as being relevant to the investigation that C assaulted GA and MM **[107E-G]**:

i. Gary Archard (GA), the delivery driver;[8]

[4] Day 6 – 28.03.17 at approximately 11:35 am
[5] Day 6 – 28.03.17 am
[6] Day 2 – 22.03.17 RH XX. RH: I did say that the comments were not outright racist but I was aware of the undertone. R's Counsel: I appreciate that you don't remember the exact conversation with CS, he does not remember the exact conversation either, did you give any specifics. RH: I can't remember. R's Counsel: so you have no reason to dispute his account. RH: No
[7] Day 6 – 28.03.17 at approximately 12 pm.
[8] P. 107C, witness statement was not signed or dated

ii. Maurice McVay (MM), the contractor;
iii. Tim Carroll (TC), witness;[9]
iv. Brian Tulley (BT), witness;[10]
v. Josh Galea (JG), witness;[11]
vi. William Pitt (WP), witness;
vii. Aka Sebastian Ngbin (ASN), witness.

136. C had repeatedly requested that R contact ASN to take a witness statement in relation to what occurred in the immediate aftermath of the incident on 29.07.15 **[RH/16, 142, 187 and 227, §29]**.

137. On 01.08.15 GA sent an email attaching a copy of his statement **[107B-C]** and AY was appointed to investigate the complaint from Baldwins on 03.08.15 **[107 and 107D]**.

138. IT said that GA's employer (Baldwins) contacted him on 03.08.15 alleging that C abused one of their drivers. IT said that he told Mr Eist that the matter was being investigated and denied having any further contact with Baldwins.[12]

139. On 03.08.15 Baldwins wrote to IT alleging that C assaulted one of their drivers and requested the following **[107]**:

> ***"...***
> ***it would be appreciated if you would kindly advise us of the present situation concerning your investigation into this matter to enable us to decide whether further action on our behalf is required in the circumstance of extreme abuse, assault and abnormal and unfounded provocation…"***

140. Furthermore, AY said that he contacted Mr Eist at Baldwins but did not discuss the content of his letter.[13] C contends that it is inconceivable that R would not have responded to the Baldwins complaint particularly as they were considering further action pending what action R would be taking in respect of C. IT confirmed that he forwarded this letter of complaint on to someone to deal with but could not say who that was.[14]

141. Also around this time both IT and AY alleged that MM and TC hand delivered their statements in early August 2015, but were unable to explain how MM and TC would have known that there was an investigation and that AY was the person conducting that investigation. AY also alleged that both MM and TC confirmed that the contents of their statements were true when they dropped them off **[AY/7]**.

142. AY alleged that he met with JG on 07.08.15 to take his statement **[114]**. Despite his extensive experience in handling serious investigations as a police officer of 10 years' experience, and despite having his extensive knowledge on handling evidence and the importance of preserving the evidence chain, he kept

[9] p. 113, witness statement was not signed or dated

[10] p.180, witness statement obtained on 01.10.15 3-days after the disciplinary hearing had been concluded and JC/DHA considered BT's witness evidence without permitting C to comment on his evidence [178-181 and 186].

[11] p.114, witness statement obtained on 07.08.15. JG referred to C as the "black guy" throughout the disciplinary hearing even though he was introduced to C before commencing his evidence, and continued to refer to C in those terms despite C complaining to JC that it was inappropriate.

[13] Day 5 – 27.03.17 - C's Counsel: so you spoke to them but not about contents of letter, who did u speak to at Balwins. AY: I spoke to Charles East. C's Counsel: So you spoke to the author of the complaint, but did not discuss contents of letter. Can I remind you that you are under oath and someone has lost their job. AY: am I creating the impression this is a joke.

[14] Day 6 – 28.03.17 at approximately 12 pm.

no notes of his interview and cannot recall the questions he asked JG.[15] C invites the ET to reject AY's evidence.

143. By a letter dated 12.08.15, AY requested that C send a written statement by 14.08.15 in preparation for the investigatory meeting on 20.08.15. AY did not provide details of the specific allegations made against C. AY had gathered statements from GA, MM, TC and JG all believed to be present on the 29.07.15.

144. Each of these witnesses alleged that C was the aggressor, whereas C alleged, in his witness statement provided to AY **[110-111]**, that GA made racially abusive comments. C confirmed that when he asked MM to excuse him and, when, having refused to move, he ushered MM aside, GA said ***'careful it doesn't come off'***. C understood this to mean that MM should be careful his skin colour didn't rub off on him. He also complained that GA repeatedly questioned whether Richard Hastings was his real name. He is alleged to have said ***'what's your name?'*** and ***'that's not your real name'***. The implication being that C could not have such an English sounding name.

145. C also confirmed that he had been employed by R over 18 years, during which he had no history of violence or aggression. At paragraphs 13 and 14 of his statement he says **[111, emphasis added]**:

> ***"13. I am aware, as Colin will be, of several other members of staff, who over the years have been involved in arguments in the workplace. To my knowledge none of those people have been suspended or disciplined in any way… I have witnessed one team member make another one cry but no action was taken against them despite me reporting it and despite it involving aggression from one team member to another…***
>
> ***14. I understand that the matter needs investigating but I do not understand why it is being done in the context of potential disciplinary action against me. I witnessed what I believed was dangerous driving. When I tried to report, it I was verbally and racially abused in the staff car park by a third party."***

Fact finding investigation

146. On 20.08.15, AY conducted his fact-finding investigation meeting with C. Brenda Green (ICT System Manager) attended as an observer on behalf of C and Ms Cairo Okba (Training Coordinator) took notes. At the outset of the fact-finding meeting, AY handed C two statement from GA and MM, and in doing so referred to them as *'the victims' statements*'. When C objected to him calling them victims. AY challenged C to come up with a more appropriate description for them. The notes of that meeting record following replies **[116-125, emphasis added]:**

i. **DD *to his friend – "Careful, it might rub off."***

ii. **RH *"What's wrong with you? You're a fucking idiot."***

iii. **RH *claimed that this was a racial slur, which AY said is arguable.***

iv. **RH took DD's comment to be a racial remark.**

v. **AY *"Did that racial comment make you stay or did you still want to leave."***

[15] Day 5 – 27.03.17 at approximately 13:35 pm

vi. **RH** ***"I still wanted to leave. He (DD) was being extremely abusive. I reported the incident to security and stated my name as Richard Hastings."***

vii. **DD** ***"That can't be your real name. What's your real name?"***

viii. **RH** ***"What's the hell is your problem? Driving like a bloody idiot. If you have something to say about me, my colour or where I'm from, then say it."***

147. AY summarised C's version of events as follows (emphasis added):

AY: ***"Your window appears to be up whilst reversing. You stopped halfway in (parking spot) and put your window down. He said something. You finished parking and then walk up to tell him words of advice and report him. You then experienced racial comments. He grabbed your arm during the exchange and you moved your arm to release his grip..."***

RH ***"I returned to Unit 5. I saw my two colleagues (Wale Kassim, Kola Raheem) and told them what happened. He was racially abusive and put his hands on me."***

148. And summarised what had been discussed during the course of the fact-finding meeting (emphasis added):

AY: ***"in terms of acceptability of foul language, I don't think there is a sliding scale."***

RH ***"I know I shouldn't have said those things but it was under serious provocation."***

AY: ***"These are serious allegations, racial allegations and there were witnesses who did not mention that."***

149. On 07.09.15, C asked AY to take statements from two witnesses (Kola Raheem and Wale Kassim) he spoke to immediately after the incident **[125A]**. AY accepted under cross examination that he did not contact these witnesses.

150. In early September 2015, AY produced his investigation report **[126-130]** recommending disciplinary action. He also concluded **[130, emphasis added]**:

"…
There is also clear evidence which shows C assaulted GA and MM. the evidence suggests *the assault was unprovoked* and unnecessary in the circumstances.

The recommendation from this investigation is this matter is referred to a formal discipline panel for consideration"

151. As far as AY was concerned the racial abuse did not amount to provocation. He considered if proven the allegations constituted gross misconduct contrary to sections 4 and 17 of the Respondents Disciplinary Procedure, and advised C that the outcome may result in disciplinary action being taken against him, including summary dismissal.

152. By a letter dated 11.09.15 YA recommended that the matter be referred to a formal discipline panel to consider the following allegations:

On the 29.07.15 that C verbally and physically assaulted a GA;
On the 29.07.15 that C verbally and physically assaulted MM.

153. NP had been initially appointed to hear C's disciplinary hearing but he was replaced by JC on 23.09.15 **[138]**. AY sent copies of the disciplinary papers sent to NP and DHA by email date 11.09.15 **[138]**. We now know from the properties document produced on day 2 of the hearing that a copy of the disciplinary outcome letter had been printed on 10.09.15. When

154. On 25.09.15. C submitted a statement headed "*Statement in Response"* setting out his detailed account of the incident and reiterated his complaint of racial abuse **[140] and 141-147]**. Under the conclusion, C states as follows (emphasis added):

> **"In light of the witness statement referring to me as the aggressor, some of which only witnessed this incident for a matter of seconds and that too from a distance, *I would like to highlight that many studies have shown that people (black people included) still perceive a black person as more threatening if they do not understand the context. I feel that I have been deemed to be more threatening due to my being black coupled with my height* (which was also referred to by Mr Yousuf during my investigation interview on 20 August 2015) *and feel that this has resulted in my being treated less favourably. This is supported by the fact that I have been witness to several incidents throughout my career within the Trust whereby altercations between employees have not resulted in suspension or disciplinary action*.[16]"**

155. He goes on to say (emphasis added):

> **"The investigation report also questions my hesitation to report the racial abuse I received from GA. I am fully aware that this is a serious allegation and am also aware of how the comments that were made by GA can be perceived by those who have never been a victim of racial abuse. *I did not report the racial comments made to my line manager or on the Datix report as the abuse consisted of innuendoes rather than outright racially derogatory name-calling… I did however confide in colleagues close to me and discussed the racial remarks and abusive language GA used and in hindsight, should have included the racial abuse in my Datix report and to my line manager*. However, I would like to point out that I have grown up experiencing this type of attitude and am fully aware of what was being said and the implications that were being made…**
>
> **I find it hard to believe that I could face dismissal after being subject to racial abuse at work and am deeply saddened at the thought of not being able to return to a job that I love and where I feel I am able to contribute to a worthy cause.*"***

Disciplinary hearing

156. The disciplinary hearing took place on 28.09.15. JC heard C's disciplinary hearing. Also present were Mr Dean Hambleton-Ayling ("DHA"), HR advisor to the panel and Ms Rosemary McLarty (Trade Union Representative) [152-177]. JC confirmed under cross examination that she met with AY and DHA before the disciplinary hearing to view the CCTV. Although, she states in paragraph 5 of her witness statement that she reviewed the CCTV footage prior to the hearing starting, she did not mention that AY was present at the time. It became clear

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during her cross-examination that she tried to play down AY's involvements. Having initially accepted that he only set up the CCTV footage. She later conceded that AY was present throughout and selected which CCTV footage to show JC and DHA.

157. By an email dated 29.09.15, DHA informed YA that he had been discussing the case with JC and they asked YA to request a statement from BT about the incident **[179 and 180]**. DHA informed C of this and requested his comments on BT's statement **[179]**. C provided his response on 08.10.15 together with his comments about the disciplinary hearing on 28.09.15 **[181-184-185]** and reiterated his request that JC contact SNA **[187].** Nonetheless, by an email dated 08.10.15, DHA confirmed that he and JC *"had already made the decision"* in relation to C's disciplinary, without taking account of C's comments [186]. C contends that the decision to dismiss was jointly taken between DHA and JC and is therefore unfair.

158. By a letter dated 14 October 2015 JC informed C of the outcome of his disciplinary hearing. JC upheld the allegation that on 29 July 2015 he verbally and physically assaulted a GA and physical assaulted MM. She was satisfied that the allegations had been proven and constituted gross misconduct.

159. JC accepted under cross-examination that she did not consider statements from Christopher Chandler **[135-136, character statement]**. Moreover, having accepted under cross-examination that ASN would have been an important witness as to the racial abuse alleged to have occurred at the end of the incident outside Unit 5 but was told by AY the they did not have his identity. When she was taken to page 115E-F which showed that R was aware of his identity by 31.07.15, she accepted that he ought to have been called to give evidence.

160. As regards the racial abuse, JC said this **[197, emphasis added]**:

> **"We have also considered the racist abuse that you described. It is totally unacceptable that any member of staff should suffer racist abuse. The Trust will support you whole heartedly should you wish to make a complaint, or wish to report this as a crime. Ian Taylor has already committed to supporting you, and we would like to echo this support. *The panel understands that racist abuse can affect individuals differently. However, you had it within your gift to end the racist abuse by calling security and allowing security to undertake their role to protect you.* The panel note that you failed to report this incident to security, you failed to report it on the Adverse Incident report, and to the Head of Security when you spoke. Indeed, you only reported the racist abuse to subordinates to yourself. This not only prevented the organization being able to support you sooner but you failed to protect others from such abuse. The panel strongly recommends that you work with us to detail this incident so it can be properly investigated and appropriate action taken. Any racist abuse is unacceptable."**

161. Whilst the Panel accept as a matter of fact that he had been subjected to racial abuse as alleged, they do not take the said abuse into account under mitigation. JC continued **[197, emphasis added]**:

> **"We believe that this racist abuse does not, however, have a bearing on the allegations put to you. Since the racist abuse occurred after you pushed Maurice out of the way, it could not have had a bearing on this. Since you accepted hitting Gary by accident, it could not have had a bearing on this action...."**

162. By a letter dated 20.10.15, C appealed against the Panel's decision to dismiss him on the basis that **[200-205 and 222-229]**.

163. By a letter dated 21.12.15, AW dismissed his appeal [30-232. AW accepted under cross-examination that she failed to consider many of C's grounds of appeal.

Legislative framework

164. In so far as is material section 13 EqA deals with direct discrimination as follows:

> 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…

165. Section 23 requires a comparison by reference to the circumstances and provides that:

> On a comparison of cases for the purposes of section 13… there must be no material difference between the circumstances relating to each case.

166. Section 27 deals with victimisation and provides that:

> A person (A) victimises another person (B) if A subjects B to a detriment because-
>
> a. B does a protected act, or
> b. A believes that B has done, or may do, a protected act.
>
> 2. Each of the following is a protected Act the purpose or effect of –
>
> a. bringing proceedings under this Act;
> b. giving evidence or information in connection with proceedings under this Act;
> c. doing any other thin for the purposes of or in connection with this Act;
> d. making an allegation (whether or not express) that A or another person has contravened this Act.

167. *"Discrimination"*, as defined in Part II, EqA is only unlawful if it contravenes one of the statutory torts provided for in Parts III-VI. Section 39 (2) EqA makes it unlawful for an employer to discriminate against a person (B) –

> a. as to B's terms of employment;
> b. in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
> c. by dismissing B;
> d. <u>by subjecting B to any other detriment</u>.

168. Section 136 ('Burden of proof') provides:

> 1. This section applies to any proceedings relating to a contravention of this Act.

2. If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
3. But subsection (2) does not apply if A shows that A did not contravene the provision.
4. The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
5. …
6. A reference to the court includes a reference to –

    a. an employment Tribunal; …'

169. The Public sector equality duty is contained in section 149 and in so far as is material provides that:

1. A public authority must, in the exercise of its functions, have due regard to the need to—

    a. eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
    b. advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
    c. foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

2. …

3. Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

    a. remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

    b. take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it …

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

170. Employment Rights Act 1996

171. Section 95 ERA sets out the circumstances in which an employee is dismissed and in so far as is material provides that—

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),
(b) …,
(c) ....

172. Section 98 ERA Provides that—.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,

(4) [In any other case where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

b. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

ii. (b) shall be determined in accordance with equity and the substantial merits of the case.

C's Claims:

173. By a Claim Form presented to the ET on 29.01.16, C claims:

i. direct race discrimination contrary to sections 9 and 13 of the Equality Act 2010 ("EqA") when read with section 39 (2) EqA;

ii. victimisation contrary to sections 27 EqA when read with section 39 (2) EqA
iii. unfair dismissal contrary to section 94 of the Employment Rights Act 1996 ("ERA") when read with section 98 (4) ERA.

174. The detriment's giving rise to his claims are set out in the agree list of issues.

Submissions on the law

Direct discrimination:

175. Under section 13 (1) EqA 2010 read with section 9, direct discrimination takes place where a person treats C less favourably because of race that that person treats or would treat others. Under section 23(1), when a comparison is made, there must be no material difference between the cirmstances relating to each case. Comparators can be appropriate even if the situations compared are not precisely the same. It is a question of fact and degree: *Hewage v Grampian Health Board* [2012] IRLR 870 SC. As well as actual comparators, there may also be looser comparators of some less evidential value.

176. In many direct discrimination cases, it is appropriate for an ET to consider, first whether C received less favourable treatment than the appropriate comparator and then, secondly , whether the less favourable treatment was because of the relevant protected characteristic. However, in some cases, for example where there is only a hypothetical comparator, these question cannot be answered without first considering the 'reason why' C was treated as he was: *Shammoon v Chief Constable of the Royal Ulster Constabulary* [2203] UKHL 11.

177. Under section 27 EqA 2010, it is victimisation if R subjected C to a detriment because he had done a protected act or because they believed that he had done or may do a protected act. A 'protected act' included making an allegation (whether or not express) that someone has contravened the EqA 2010. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith. No bad faith defence was run by R.

178. Decisions are frequently reached for more than one reason. Provided the protected characteristic or, in a victimisation claim, the protected act, had a significant influence on the outcome, discrimination is made out: *Nagarajan v London Regional Transport* [1999] IRLR 572, HL.

179. In *Shamoon v Chief constable of the Royal Ulster Constabulary* [2003] UKHL 11, the House of Lords said this:

> **"In order for a disadvantage to qualify as a "detriment", it must arise in the employment field in that the court or Tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to a "detriment". However, contrary to the view expressed by the EAT in Lord Chancellor v Coker, on which the Court of Appeal relied in the present case, it is not necessary to demonstrate some physical or economic consequence.**
>
> **The test that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstance to his detriment must be applied by considering the issue from the point of view of the victim. If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold. That ought to suffice. While an unjustified sense of grievance about an allegedly discriminatory decision cannot constitute "detriment", a**

justified and reasonable sense of grievance about the decision may well do so."

Burden of proof:

180. Under section 136 EqA 2010, if there are facts from which a Tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the Tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision.

181. The guidelines set out by the Court of Appeal in *Igen Ltd v Wong* [2005] ICR regarding the burden of proof (in the context of case under the Sex Discrimination Act 1975) are as follows:

i. Pursuant to section 63A of the 1975 Act, it is for the Claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal ***could conclude***, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the Claimant which is unlawful by virtue of Part 2, or which, by virtue of section 41 or section 42 of the 1975 Act, is to be treated as having been committed against the Claimant. These are referred to below as "such facts".

ii. If the Claimant does not prove such facts he or she will fail.

iii. It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. ***In some cases, the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".***

iv. In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.

v. It is important to note the word "could" in section 63A (2). At this stage, the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage, a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

vi. 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***.

vii. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the 1975 Act.

viii. ***Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section*** 56A (10)

of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

ix. Where the Claimant has proved facts from which conclusions could be drawn that the employer has treated the Claimant less favourably on the ground of sex, then the burden of proof moves to the employer.

x. It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

xi. To discharge that burden, it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since ***"no discrimination whatsoever"*** is compatible with the Burden of Proof Directive.

xii. That requires a Tribunal to assess not merely whether the employer has proved 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 sex was not a ground for the treatment in question.

xiii. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, ***a 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***.

182. The ET can take into account R's explanation for the alleged discrimination in determining whether C has established a prima facie case to shift the burden of proof: see *Laing v Manchester City Council* EAT [2006] IRLR 748; 1519 the EAT spelt out how the burden of proof provisions should work in practice (see also *Madarassy v Nomura International plc* [2007] IRLR 246, CA):

a. "First, the onus is on the complainant to prove facts from which a finding of discrimination absent an explanation can be found. Second, by contrast, once a complainant lays that factual foundation, the burden shifts to the employer to give an explanation. The latter suggest that the employer must seek to rebut the inference of discrimination by showing why he had acted as he has. That explanation must be adequate, which as the courts have frequently had cause to say does not mean it should be reasonable or sensible but simply that it must be sufficient to satisfy the ET that the reason has nothing to do with race."

183. The Court of Appeal in Madarassy states:
"The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that on the balance of probabilities, the Respondent had committed an unlawful act of discrimination."

184. The ***"something more"*** that is needed was identified by Sedley LJ in *Deman v Commission for Equality and Human Rights* [2010] EWCA Civ 1279 at §19:

a. ***The "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances, it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances, it may be furnished by the context in which the act has allegedly occurred.***

185. Mere unfairness cannot shift the burden of proof. However, a false explanation for the less faovurable treatment added to a difference in treatment and difference in race can constitute the 'something more' required to shift the burden of proof: *The Solicitors Regulation Authority v Mithcell* UKEAT/0497/12.

186. C also relies upon the following general principles of law:

i. where there are multiple allegations, Tribunal should consider whether the burden of proof has shifted in relation to each one. It should not take an "across-the-board approach" when deciding if the burden of proof shifted in respect of all the allegations (*Essex County Council v Jarrett UKEAT/0045/15*).

ii. "those who discriminate on grounds of race or gender do not in general advertise their prejudices: indeed, they may not even be aware of them" (*Glasgow City Council v Zafar [1998] IRLR 36 (HL)*).

iii. "many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated" (*Nagarajan* v London Regional Transport and others [1999] IRLR 572 (HL)).

iv. "in some cases the discrimination will not be ill-intentioned but based merely on an assumption that a person would not 'fit in'" (*King v Great Britain-China Centre [1991] IRLR 513 (CA)*).

v. the ET may cast its net widely to look for facts that are consistent with discrimination and may therefore give rise to a prima facie case. It will take account of circumstantial evidence, including matters occurring before the alleged discrimination (even those outside the limitation period) and matters occurring afterwards, if they are relevant (*Din v Carrington Viyella Ltd [1982] ICR 256; Chattopadhyay v Headmaster of Holloway School and others [1981] IRLR 487*).

vi. there is also no need for a Claimant to show that a circumstantial event in itself constitutes an unlawful act of discrimination before the Tribunal can take it into account (*Qureshi v Victoria University of Manchester and another [2001] ICR 863*).

vii. if any provision of the *EHRC Employment Statutory Code of Practice* (EHRC Code) appears to the ET to be relevant to any question arising in the proceedings, it must be taken into account in determining that question. Failure to comply with a statutory code of practice may establish a prima facie case.

viii. an inference of discrimination may in any event be drawn from an evasive or false explanation in a document other than a questionnaire: see *Dattani v Chief Constable of West Mercia* UKEAT/0385/04/RN.

ix. the fact that the Respondent has offered no credible explanation gives rise to an inference of discrimination: *Birmingham City Council v Millwood* [2012] EqLR 910 EAT.

x. inconsistent explanations give rise to an inference of discrimination: *Hussain v Vision Security Ltd & Another* [2011] EqLR 699 EAT.

187. The Tribunal must therefore enquire as to the **conscious or subconscious** mental processes which led R to take a particular course of action in respect of C, and consider whether a protected characteristic played a significant part in the treatment (*Nagarajan*).

Submissions on credibility

188. As to the credibility of the witnesses, the ET is invited to find that C was a sincere and credible witness. The manner in which he gave his evidence was clear and concise. He did not seek to maintain any positions that could not be sustained. He was frank, open and honest. He gave a very detailed account of events and, where he could, sought to assist the ET at every opportunity. For example, when questioned about the extent of his complaint of racial abuse on 31.07.15 suspension meeting, he gave the following account:

> R's Counsel: Do you accept CS called you into his office on xx
> RH yes
> R's Counsel: and this is when you first time you inform anyone that racial abuse occurred with management?
> RH: yes.
> R's Counsel: given this is this is the first time you mention it, do you accept that are raising these issues to explain your behaviour?
> RH: No.
> R's Counsel: but you had the opportunity to put it in your report so you would have put it in there?
> RH I did say that the comments were not outright racist but I was aware of the undertone
> R's Counsel. I appreciate that you don't remember the exact conversation with CS, he does not remember the exact conversation either, did you give any specifics?
> RH I can't remember
> R's Counsel: so, you have no reason to dispute his account?
> RH: No

189. His evidence has been honest and consistent throughout **[110-111, 141-146 and 222-229]**. Insofar as there are conflicts of evidence, the ET is invited to prefer C's evidence to that of R's witnesses.

190. In stark contrast, R's evidence lacked credibility in many respects. JC was evasive and could not recall many aspects of what happened during the disciplinary hearing. She did not take any notes during the hearing and in breach of the EHRC Code of Practice on Employment, R was unable to produce the complete notes that DHA is alleged to have taken. Crucially, she omitted key facts from her witness statement. For example, she forgot to mention that she met with the investigating officer prior to the disciplinary hearing. Furthermore, she sought to play down A/Y's involvement in the meeting. She initially said that he only set up the CCTV, but changed her evidence when questioned and accepted that he showed her various clips. Interestingly, AY went much further in his evidence when cross examined. He accepted that he showed several clips that he felt were relevant, but not those clips that favoured C. for example, AY did not show clip DVR-01-657-Unit 5 E - 09:39:30 – 09:40:15 - **Angle 2** - GA stops his van outside Unit 5 and interacts with C

191. Despite being present in the ET when the Learned Judge reminded R of its ongoing duty to disclose documents, JC failed to disclose key emails that were sent between her and DHA. Notwithstanding, her admission that these documents were readily available, R failed to disclose these documents. JC also failed to investigate C's complaints of racial abuse prior to his disciplinary hearing taking place as required by its Disciplinary Policy [71, §5.4]; its Equal Opportunities Policy [R1, §§6, 6.4, and 10] and its Dignity at work Policy – The Management of Complaints of Harassment or Bullying [R2, §§3.1, 3.2, 5, 6, 7.6 and 8].

192. Likewise, AY was evasive and changed his evidence many times. His evidence lacks credibility and should be scrutinized. His inability to answer simple questions was telling. For example, he sought to persuade the ET that despite his extensive experience in handling serious investigations as a police officer, and despite having his extensive knowledge on handling evidence and the importance of preserving the evidence chain, he forgot to make notes of his interviews and could not recall what he asked JG when he took his statement.[17] His evidence is simply not worthy of belief. For example, JC confirmed under cross-examination that AY told her that he did not have the identity of ASN (the witness outside unit 5 when GA stops his van and interacts with C, which was simply not true. ASN's identity was known by 31.07.15 **[107E-F]**. Notwithstanding this and C's repeated requests, he was not contacted to take a witness statement in relation to what occurred in the immediate aftermath of the incident on 29.07.15 **[RH/16, 142, 187 and 227, §29]**.

193. AW gave evidence she accepted that each of the incidents identified in C's further and better particulars would constitute gross misconduct under R's disciplinary policy [75-76], and if true, she would have expected the appropriate action to have been taken under R's disciplinary policy. Furthermore, despite accepting under cross examination that it would be wholly inappropriate for the hearing officer to meet with the investigating officer prior to the meeting and without C being present, she did not see anything wrong with her and MP meeting with AY to view the CCTV after the appeal hearing had been concluded. She also sought to play down AY's involvement. She initially suggested that he only loaded the CCTV footage, but it true picture became clear as her evidence began to unravel under cross examination. It soon became clear that AY, as he did with JC, showed the CCTV footage that he believed was relevant, and only showed those clips which he believed proved the case against C. For example, AW admitted under cross examination that she only viewed clip DVR-01-657-Unit 5 E - 09:39:30 – 09:40:15 – (**Angle 2** - GA stops his van outside Unit 5 and interacts with C), in preparation for the ET hearing. She also admitted under cross examination that this evidence was relevant and should have been considered.

194. NP simply was unable to recollect key decisions that he must have been involved in or party to. His evidence was that he did not discuss C's case with anyone. NP said that he wanted to remain independent because he was due to hear C's disciplinary. However, it is clear from page 138 that he was in contact with AY and given that AY had met with both JC and AW to view the CCTV footage, it is inconceivable that he would not have met with NP. How did NP view the CCTV footage? No doubt he would have been shown like JC and AW, and if not, that begs the question why it was necessary for AY to show the CCTV footage to the disciplinary and appeal panels.

195. CS was unable to provide any details about the sequence of events leading to C's suspension. He confirmed that he viewed the CCTV and was shocked by

[17] Day 5 – 27.03.17 at approximately 13:35 pm

what he had seen, but could not say what was discussed with IT during the viewing. He could not say who he spoke to, when and what they said.

196. The ET is invited to treat IT's evidence with caution. He sought to defend R's position at every opportunity. He was asked to produce a statement dealing with his involvement in the suspension and initial investigation, but the majority of his six-page statement was devoted to his negative views about C's case. Despite not possessing any qualification in body language, he sought to suggest that the body language exhibited by C's was *"aggressive"* to any other party viewing it [IT/16] and his *"stride was purposeful"* [IT/15], i.e. he was intent on doing something. He also said that the CCTV footage showed C pushing or punching GA [IT/18]. He was more concerned with justifying R's actions as opposed to giving full and frank answers to questions and he sought to do so at every opportunity.

197. For example, in his desire to suggest that C had no right to approach GA in the first place, he sought to suggest that GA was not speeding. He confirmed that he reviewed the CCTV footage before C was suspended on 31.07.15. He said that the footage showed that GA drove past C at a speed that he considered safe [IT/14]. He then said that he checked GA's speed against other vehicles travelling in the Business Park on the same day and his speed was comparable to other vehicles [IT/14]. However, when he was asked under cross examination why would he be checking GA's speed on 31.07.15 when C did not provide any details as to GA's driving speed and manner until 20.08.15. IT sought to maintain his position that he checked the driving manner, when plainly there would have been no reason for him to do so.

198. Moreover, he was adamant that C did not complain of race during the suspension meeting. He gave a very persuasive retort to the suggestion that he was aware. The evidence against him is clear. CS admitted that C raised the issue of racial abuse during the suspension meeting [CS/9], which is consistent with C's account at paragraph 78 above. The ET is invited to find that C did, in fact, complain that he had been subjected to racial abuse during the incident on 29.07.15 and R failed to investigate his complaint contrary to its Equal Opportunities Policy [R1, §§6, 6.4, and 10] and its Dignity at work Policy – The Management of Complaints of Harassment or Bullying [R2, §§3.1, 3.2, 5, 6, 7.6 and 8].

Disputes of fact issues

199. The proper starting point to resolving any dispute of fact is to identify the common ground between the parties. It must follow that any events that are wholly inconsistent with that common ground are unlikely to be true.

Submissions on direct discrimination

200. Overall R's evidence is marked by lack of transparency. Clearly relevant documents have been missing or disclosed in drip feed fashion during the hearing because of applications made by C. Explanations have been lacking. Whilst C's treatment is striking in its unfairness in many respects. Unfairness is not the same as discrimination. The ET must be careful to ask itself the correct question.

201. C contends that this is a reason why case. What was the reason for the treatment? Was is because of conscious or unconscious racial bias and/or because C complained of racial abuse or some other non-discriminatory reason.

202. The first question the ET must decide is whether or not the alleged conduct took place. It is common ground between the parties that R subjected C to the following detriments:

i. CS suspending C on 31.07.15;

ii. The manner in which AY conduced his investigation and his recommendation that C should attend a disciplinary hearing;
iii. JC summarily dismissing C on 14.10.15;
iv. Failing to properly investigate C's complaints of race discrimination; and
v. Permitting the dismissal to be tainted by unconscious bias.

203. All of whom were overly reliant on the CCTV footage at the expense of other material which pointed in C's favour and made snap judgments based on incomplete information. All the witness statements provided for the investigating officer/disciplinary hearing refer to C as a large black man/male, the predominant descriptor being his colour.

204. Accordingly, his suspension, the investigation and dismissal were tainted by unconscious racial bias, the effect of which was to treat C as the aggressor throughout the incident. Further and alternatively, R failed to have due regard to the racial provocation he was subjected to, and/or failed to properly investigate the racial abuse suffered.

205. In terms of his victimisation claim, C relies upon the protected acts identified in §6 of the Agreed **List of Issues, i.e. the complaints of racial abuse** leading up to and during his investigatory meeting on 20.08.15, leading up to and during his disciplinary hearing on 28.09.15 and leading up to and during his appeal hearing on 14.12.15.

206. **Suspension on 31.07.15;**

207. The decision to suspend C was couched in secrecy. There were some disturbing features to CS's evidence. Despite knowing C personally for over 11 years and despite having a close working relationship, he suspended him on 13.07.15 without considering any alternatives to suspension. CS accepted under cross examination that:

i. was a hard working and diligent employee;
ii. C had never displayed any aggressive behaviour during the 11 years they worked together;
iii. C had never displayed any rude or discourteous behaviour during that time;
iv. he (CS) had no reason to doubt his character or integrity in any way;
v. C's appraisal in June 2015 which was very positive.

208. Nonetheless, he said that having viewed the CCTV he was so concerned that he only considered suspension:

C's Counsel: it's right that you didn't do anything to investigate his claim of racial abuse before suspending
CS: yes
C's Counsel: you didn't consider any alternatives other that suspension and your policy on pg. 69 para 4 so it's right that you don't need to suspend in all circumstances, examples gives
CS: I accept that but staff could have been involved
C's Counsel: where does it say that and what staff were involved
CS: **RH physically assaulted someone, potentially he could have done that to someone else**

C's Counsel: You just gave evidence that you had prior knowledge of him never having behaved aggressively?

CS: I do that's why I was shocked RH had behaved like this
C's Counsel: I suggest that you were unconsciously assumed he was the

aggressor because of his race
CS: no
C's Counsel: disciplinary can suspend providing there are no workable alternatives, do you accept there were workable alternatives
CS: the concern I had is that there was physical aggression and that could happen again anywhere
C's Counsel: and this is based on your viewing of CCTV
CS: yes, I felt it the safest way forward
C's Counsel: why is none of that mentioned in your witness statement
CS: I was writing what happened on the day

C's Counsel: u didn't consider any other alternatives on, on 31st July
CS: my view was there had been a physical assault
C's Counsel: my question is that u did not consider that on 31st
CS: I considered it with HR
C's Counsel: are you changing your evidence and saying you considered alternative options
CS: no I considered physical assault
C's Counsel: so, u agree u didn't consider alternative options
CS: I suppose yes

CS: I agree alternatives were never discussed and I agree the view is that he had been the aggressor.

209. C contends that this exchange reveals to true extent of the unconscious racial bias [258-273] he suffered when CS and others viewed the CCTV footage. It is submitted that we live in a culture, where negative stereotypes, associations and prejudices about black individuals are pretty well established for all the wrong reasons. One of those stereotypes is that we equate black men with fear. When the member of the ET asked why he would suddenly be fearful of C, when he had known him for so long, CS could not explain why that was apart from pointing to the CCTV footage.

210. It is submitted that this was a case of racial stereotypes and assumptions that C was the aggressor. Accordingly, the Shamoon approach should be adopted. It is submitted that ETs may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as they were, and postponing the less favourable treatment issue until after they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason? If the former, there will usually be no difficulty in deciding whether the treatment afforded to the Claimant on the proscribed ground was less favourable than was or would have been afforded to others: See *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 HL.

211. In *Hewage v Grampian Health Board* [2012] ICR 1054, SC, Lord Hope approved the obiter comments of Underhill J (as he then was (president)) in *Martin v Devonshire's Solicitors* [2011] ICR 352, Para 39, that it is important not to make too much of the role of the burden of proof provisions. Lord Hope said [Para 32] (emphasis added):

a. ***They will require careful attention where there is room for doubt*** *as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or another.*

212. If the ET are satisfied that CS was motivated by unconscious racial bias by viewing the CCTV, then it is perfectly entitled to so find. C relies upon the

disproportionate numbers of BME staff being disciplined/dismissed in support of his contention that he was suspended because of his race. The Workforce Race Equality Standard – Improvement plan conformed that BME staff are 2.75 times more likely to enter the formal disciplinary process than other staff **[p. 281]**.

213. Moreover, CS failed to investigate C's complaint of racial bias and could not provide any explanation for this failure. This is not only contrary to R's Equal Opportunities Policy [R1, §§6, 6.4, and 10], and Dignity at work Policy – The Management of Complaints of Harassment or Bullying [R2, §§3.1, 3.2, 5, 6, 7.6 and 8], but is also in breach of its obligations under sections 149 EqA 2010.

214. C contends that R failed to comply with following paragraphs of the EHRC Code of Practice for Employment:

i. **Para 17.4 - EHRC Code of practice:**

ii. Employers are strongly advised to maintain proper written records of decisions taken in relation to individual workers, and the reasons for these decisions.

iii. Written records will be invaluable if an employer has to defend a claim in the ET

iv. **Para 17.93 – 17.99 EHRC Code of practice:**

v. *Employers should ensure that when conducting disciplinary and grievance procedures they do not discriminate against a worker because of a protected characteristic.*

vi. *Employers must not discriminate in the way they respond to grievances. Where a grievance involves allegations of discrimination or harassment, it must be taken seriously and investigated promptly and not dismissed as 'over-sensitivity' on the part of the worker.*

vii. *Wherever possible, it is good practice – as well as being in the interests of employers – to resolve grievances as they arise and before they become major problems. Grievance procedures can provide an open and fair way for complainants to make their concerns known, and for their grievances to be resolved quickly, without having to bring legal proceedings.*

viii. *It is strongly recommended that employers properly investigate any complaints of discrimination. If a complaint is upheld against an individual co-worker or manager, the employer should consider taking disciplinary action against the perpetrator.*

ix. *Whether or not the complaint of discrimination is upheld, raising it in good faith is a 'protected act' and if the worker is subject to any detriment because of having done so, this could amount to victimisation (see paragraphs 9.2 to 9.15).*

x. Disciplinary procedures - 17.98 Employers must not discriminate in the way they invoke or pursue a disciplinary process. A disciplinary process is a formal measure and should be followed fairly and consistently, regardless of the protected characteristics of any workers involved. Where a disciplinary process involves allegations of discrimination or harassment, the matter should be thoroughly investigated and the alleged perpetrator should be given a fair hearing.

xi. Avoiding discrimination during employment – *17.99 If a complaint about discrimination leads to a disciplinary process where the complaint proves to be unfounded, employers must be careful not to subject the complainant (or any witness or informant) to any detriment for having raised the matter in good faith. Such actions qualify as 'protected acts' and detrimental treatment amounts to victimisation if a protected act is an effective cause of the treatment.*

xii. Para 18.3 - EHRC Code of practice – Equal Opportunities Policy

xiii. is key to helping employers and others comply with their legal obligations

xiv. it can minimise the risk of legal action being taken against employers and workers

xv. demonstrates to ET that the Respondent takes discrimination seriously and has taken all reasonable steps to prevent discrimination.

215. There is an Interesting point concerning the legal effect of paragraph 4.70 of the Commission for Race Equality Code of Practice [278]. The CRE Code of Practice Order bringing the code into effect (Race Relations Code of Practice relating to Employment (Appointed Day) Order 2006) appears to have been repealed as is no longer in force. The general rule is that if an enabling Act (here RRA) or the enabling section of it, is repealed, instruments made under it will lapse unless they are saved, i.e. continued in effect. If it lapsed then the CRE code is no longer in force.

216. We say that the ET can still make primary findings of fact as to whether or not R should have taken proper account of the racial abuse that it accepted had occurred. And may draw adverse inferences in the usual way. In any event, para 17.98 of the EHRC Code of Practice covers the same territory.

217. Moreover, there were many inconsistencies in the witness evidence that should have alarmed the individuals involved.

i. GA admitted pushing C first;
ii. JC admitted that C was the aggressor at several points during the incident;
iii. Neither GA nor TC's statements were signed or dated;
iv. The neither the AY (investigating officer) nor JC (dismissing officer) nor AW (Appeal officer) appeared concerned by the absence of any signed statements;
v. CS failed to investigate C's complaints of racial bias and could not explain why he did not consider any alternatives to suspension.

218. Accordingly, it is submitted that there is ample evidence to support C's contention that by suspending him in the manner they did, R directly discriminated against because his race.

219. Further and alternatively, C contends the same outcome is achieved under the two-stage analysis. It is submitted that C was treated less favourably than the following comparators identified in his Reply to R's Request for Information [51-52]:

i. A white colleague (**Comparator 2**) while looking at a black colleague's (Ola Okesola) family pictures stated: *"Don't all black people look shit in photographs".* The white male was offered the rest of the day off and continued to work unsanctioned;

ii. A sales representative referred to black pigmy races which the Claimant found extremely offensive as did the other sales representative who was present. C reported this incident to CS who did not act on my complaint.

iii. **Comparator 1**, a white colleague, shouted abuse at an Asian work colleague, (Rukshana Arain). He behaved aggressively towards her and the Claimant had to step in between Peter and Rukshana to calm the situation. Rukhsana broke down in tears at this assault, C offered comfort and support to Rukhsana, then asked a female co-worker (Veronica Duhaney) to assist Rukhsana as Rukhsana went into the ladies' toilets to try and compose herself.

iv. **Comparator 3**, a white colleague (ICT Security Manager), acted aggressively towards a black colleague (Ola Okesola) over the black co-workers' lunch. He did not like the smell of the lunch and launched into an aggressive, threatening and abusive tirade against the black co-worker. The Claimant's team manager, NP, witnessed this incident and did not take any action against Comparator 3.

v. Comparator 4 told a black colleague, Brenda Green, to "fuck off". This incident was reported to Nick Penlington (ICT Services Manager). Comparator 4 received no reprimand or sanction.

220. The first question the ET must decide is whether or not the alleged conduct took place. The ET is invited to accept C's evidence in its entirety. He has given a clear and consistent account of events some of which have been corroborated by CS. Whereas, both CS and NP in particular had little recollection of events. Furthermore, AW gave evidence she accepted that each of the incidents identified in C's further and better particulars would constitute gross misconduct under R's disciplinary policy [75-76], and if true, she would have expected the appropriate action to have been taken under R's disciplinary policy.

221. Accordingly, there is evidence to support C's contention that he was treated less favourably. The ***"something more"*** that is needed is more than satisfied to shift the burden of proof: see Sedley LJ in *Deman v Commission for Equality and Human Rights* [2010] EWCA Civ 1279 at §19. In other words, C has proved facts from which the ET *could reasonably conclude* that the R had discriminated against C because of his race.

222. C relies upon R's inconsistent and inadequate explanations generally and its failure to disclose key documents relevant to the issues the ET have to determine. C relies upon the fact there are no contemporaneous records leading up to the suspension. The absence of any such documents speaks volumes. C invites the ET to infer that the decision to suspend C was tainted by unconscious racial bias [258-273].

223. CS's explanation that he suspended C because of what he witnessed on the CCTV footage does not stand up to scrutiny and the ET is invited to reject that explanation. The ET is invited to accept C's evidence in its entirety and find that his complaints of direct race discrimination under sections 13 EqA are well founded.

Investigation on 20.07.15;

224. The way AY conducted his investigation into the allegations against C is extremely troubling. Despite his extensive experience in handling serious investigations as a police officer of 10 years' experience, and despite having his extensive knowledge on handling evidence and the importance of preserving the evidence chain, he kept no notes of his interview and cannot recall the questions he asked any of the witnesses. Rather than seeking to establish the facts, he sought to catch C out by contacting his manager to check his movements *'to assist in refuting any claims he lost his temper due to being late for a meeting'* [115G].

225. He immediately viewed GA and MM as "victims". He sought to prove a case against C at every opportunity and sought to construe C's attempts to explain what happened in a negative light. For example, he accused C of reversing too slowly **[117]** but in his witness statement said he reversed quite quickly **[AY/21]**. Furthermore, AY was extremely skeptical of C's complaints of racial abuse. He eventually accepted under cross examination[18] that GA's comments were racially motivated. AY treated C's complaint with great *"skepticism"* and did not believe he had been subjected any racial abuse. It was put to AY whether he believed that C was *"playing the race card"* and he replied that he treated C's complaint with *"skepticism"*. This phrase was a common feature of his evidence used to explain his failure to investigate C's serious complaints of racial abuse.

226. Furthermore, his failure to contact witnesses identified by C and his false explanation provided to JC for not contacting ASN is evidence which the ET should consider carefully. His evidence is simply not credible. For example, JC confirmed under cross-examination that AY told her that he did not have the identity of ASN (the witness outside unit 5 when GA stops his van and interacts with C, which was simply not true. ASN's identity was known by 31.07.15 **[107E-F]**. Notwithstanding this and C's repeated requests, he was not contacted to take a witness statement in relation to what occurred in the immediate aftermath of the incident on 29.07.15 **[RH/16, 142, 187 and 227, §29]**.

227. As for C's victimisation claim, C has given a detailed and consistent account of AY's aggressive behavior towards him during the investigation meeting on 20.08.15 and disciplinary hearing on 28.09.15 **[222, §2]**. JC accepted under cross examination that C complained about AY's conduct during the disciplinary hearing. She stopped short of admitting he was shouting at C. She said that she would not describe it as shouting. It is clear from AY's response to C's answers during the investigation meeting that he did not believe C was subjected to racial abuse, and he confirmed the following under cross examination:

> AY: no, I'm not saying that, I'll be honest and say I was sceptical, many people in this room have been subject to racism but he hadn't mentioned it before
>
> C's Counsel: so, your evidence, if he were making false allegations that would upset you
>
> AY: yes
>
> C's Counsel: I suggest you believed he was making false allegations and you did get upset
>
> AY: I did not get upset and his rep would have stopped me

228. C contends that the reason why he subjected C to hostile behavior was because he complained of racial abuse, which he did not believe. Accordingly, his

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decision to recommend disciplinary action was linked to his complaint of racial abuse **[130, emphasis added]**:

> **"…**
> **There is also clear evidence which shows C assaulted GA and MM. the evidence suggests *the assault was unprovoked* and unnecessary in the circumstances.**
>
> ***The recommendation from this investigation is this matter is referred to a formal discipline panel for consideration"***

229. For all these reasons the Claimant respectfully requests that the ET find that his complaints of victimisation under sections 27 EqA are well founded.

Dismissal on 14.10.15;

230. The disciplinary hearing took place on 28.09.15. JC heard C's disciplinary hearing. The ET is invited to find that:

i. The decision to dismiss had been predetermined. The draft letter dated 08.10.14 bearing NP's name could only have been produced and printed on 10.09.15. NP could not explain why that document would have his name on it. The ET is invited to infer that NP had printed the document on 10.09.15 as confirmed by the properties documents produced by R.

ii. Secondly, the ET is invited to find that both DHA and JC made the decision to dismiss jointly. JC was on holiday from 08.10.15 and did not contribute to the drafting of the outcome letter that was sent to C on 14.10.15. Furthermore, DHA confirmed that he and JC planned to meet week commencing 05.10.15 to reach a decision [188] and confirmed the same to C on 08.10.15 when he said "Jenny and I have already made the decision in relation to the disciplinary [**186 and 190-191**].

iii. JC confirmed under cross examination that she met with AY and DHA before the disciplinary hearing to view the CCTV. Although, she states in paragraph 5 of her witness statement that she reviewed the CCTV footage prior to the hearing starting, she did not mention that AY was present at the time. It became clear during her cross-examination that she tried to play down AY's involvements. Having initially accepted that he only set up the CCTV footage. She later conceded that AY was present throughout and selected which CCTV footage to show JC and DHA.

iv. JG referred to C as the "black guy" throughout the disciplinary hearing even though he was introduced to C before commencing his evidence, and continued to refer to C in those terms despite C complaining to JC that it was inappropriate.

v. All the witness statements provided for the investigating officer/disciplinary hearing refer to C as a large black man/male, the predominant descriptor being his colour.

vi. There were many glaring inconsistencies in the witness evidence of GA, MM, TC, BT, JG but this was not considered inappropriate by JC.

231. Further and alternatively, C relies upon all facts and matters identified in paragraph 99-118 above in support of his contention that he was subjected to direct race discrimination and/or unlawful victimisation.

Unfair dismissal

232. Section 98 (1) and (2) ERA 1996 require an employer in an unfair dismissal case to show the reason for dismissal as being one within those subsections. The Respondent relies upon misconduct.

233. Section 98(4) provides as follows:

a. "The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(1) depends whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably as treating it as a sufficient reason for dismissing the employee, and

(2) shall be determined in accordance with equity and substantial merits of the case."

234. A dismissal for misconduct will only be fair if, at the time of dismissal *British Home stores v Burchell* [1978] IRLR 379, it was held that where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair an employment Tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question "entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time."

235. A dismissal for misconduct will only be fair if, at the time of dismissal:

i. The employer believed the employee to be guilty of misconduct
ii. The employer had reasonable grounds for believing that the employee was guilty of that misconduct, and
iii. At the time it held that belief, it had carried out as much investigation as was reasonable in all the circumstances of the case.

236. Gross misconduct means the most serious types of misconduct, and includes theft or violence. What constitutes "gross misconduct is a mixed question of fact and law: *Sandwell & West Birmingham Hospitals NHS Trust v Westwood* UKEAT/0032/09. The EAT found that it involves deliberate wrongdoing or gross negligence. The former must amount to wilful repudiation of the express or implied terms of the contract: *Wilson v Racher* [1974] ICR 428.

237. In *Sandwell*, the EAT held that the Tribunal must consider both the character of the conduct and whether it was reasonable for the employer to regard that conduct as gross misconduct on the facts of the case. It held that the employee's breach of her employer's policy did not necessarily amount to gross misconduct simply because the employer's disciplinary code stipulated that it would. It had been open to the ET to find that the employee's serious failure of professional judgment could not reasonably be characterized as deliberate wrongdoing.

238. As for the instant case, any conduct should be viewed in its proper context rather than in isolation. It would usually be reasonable for an employer to dismiss and employee for acts of violence and swearing. However, this will not always be

so and the employer must still consider the particular circumstances of the case: See *Taylor v Parsons Peebles NEI Bruce Peebles Ltd* [1981] IRLR 119.

239. Long service, previous good conduct and provocation are all mitigating factors that may be relevant when deciding whether dismissal is the appropriate sanction. In *Capps v Baxter and Down Ltd* EAT/793/78, the EAT held that the employer had been wrong to view dismissal as inevitable after the employee struck his foreman, because the foreman had provoked the employee. In *Taylor*, the EAT held that a reasonable employer would have taken account of the employee's long service and employment history, and so dismissal was unfair even though the employer had a policy of always dismissing any employee who deliberately struck another.

240. R had no regard to C's long and distinguished service and failed to take account of the character references, all of which ought to have been put before the disciplinary Panel. JC failed to take account of the following relevant factors:

i. He did not deliberately strike the van driver;
ii. The van driver put his hand on the Claimant first;
iii. He was subjected to verbal abuse and provocation;
iv. The abuse was racial in its nature;
v. He had 19 years' good service;
vi. He admitted swearing at the van driver and showed remorse for his actions;
vii. No prior disciplinary record or allegations of misconduct.

241. In *London Ambulance Service NHS Trust v Small [2009] IRLR 563* the Court of Appeal held that an employment Tribunal had seriously strayed from its path of reviewing the fairness of the employer's handling of the dismissal. Instead it had substituted its own view of the facts relating to Mr Small's conduct, retrying certain factual issues, and concluded that the employer did not have reasonable grounds for believing that Mr Small was guilty of misconduct. Despite having reminded itself of the correct test, the employment Tribunal had fallen into the very trap it had warned against. The Court of Appeal commented that "it is all too easy, even for an experienced ET, to slip into the substitution mind-set", especially in misconduct cases, where the employee often comes to the Tribunal with more evidence than they had at the original hearing, determined to clear their name. There is nothing new in the principle affirmed in *Small* but it is a powerful reminder that the Tribunal should not focus on the employee's guilt or innocence but should confine itself to reviewing the reasonableness of the employer's actions. The Tribunal had been wrong to introduce its own findings of fact about Mr Small's conduct, including aspects that had not even been disputed at the disciplinary hearing.

Respondent's closing submissions

242. The Claimant was employed by the Respondent from 2 December 1996 until he was dismissed summarily for gross misconduct with effect from 14 October 2015.

243. The Claimant was dismissed as a result of an incident which occurred at the Respondent's Denmark Hill site on 29 July 2015. The incident involved the Claimant, Gary Archard (CA Baldwin & Co Driver) and Maurice McVay (a contractor).

244. At the time of his dismissal, the Claimant was employed as a Band 8b ICT Infrastructure Manager at the Respondent's Denmark Hill site.

Direct Race Discrimination contrary to section 13 of the Equality Act 2010

245. Much of the recent case law (prior to the EqA) on the burden of proof remains relevant. In particular, the Tribunal is referred to the guidelines set out by the Court of Appeal in *Igen Ltd v Wong* [2005] ICR. Which are as follows:

(1) Pursuant to section 63A of the SDA, it is for the Claimant who complains of sex discrimination 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 which is unlawful by virtue of Part II or which by virtue of s. 41 or s. 42 of the SDA is to be treated as having been committed against the Claimant. These are referred to below as "such facts".

(2) If the Claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.

(5) It is important to note the word "could" in s. 63A(2). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(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.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.

(8) Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to section 56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the Claimant has proved facts from which conclusions could be drawn that the Respondent has treated the Claimant less favourably on the ground of sex, then the burden of proof moves to the Respondent.

(10) It is then for the Respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a Tribunal to assess not merely whether the Respondent has proved 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 sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a 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.

246. The Tribunal is also referred to the case of *Madarassy v Nomura International Plc* [2007] EWCA Civ 33, [2007] ICR 867, [2007] IRLR 246. In this case the Court of Appeal confirmed that a Claimant must establish more than a difference in status (eg disability) and a difference in treatment before a Tribunal will be in a position where it 'could conclude' that an act of discrimination had been committed.

247. The conduct must be connected with the protected characteristic - *Comr of Police of the Metropolis v Osinaike* [2010] UKEAT/0373.

248. For the purposes of direct discrimination it is irrelevant whether the alleged conduct was unreasonable unless it was because of a protected characteristic. This approach was supported by the House of Lords in *Glasgow City Council v Zafar [1998] IRLR 36*, where Lord Browne-Wilkinson said: "I*t cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances*."

Unconscious Bias

249. Although showing direct discrimination will usually involve an analysis of A's reasons for treating B less favourably, it is accepted that it is not necessary for B to show that A discriminated consciously.

250. It is therefore appropriate for the Tribunal to enquire as to the conscious or subconscious mental processes which led A to take a particular course of action in respect of B, and to consider whether a protected characteristic played a significant part in the treatment (*Nagarajan v London Regional Transport and others* [1999] IRLR 572 (HL)).

Sole Decision Maker

251. Where A is the ultimate decision-maker, but has been influenced by others, this enquiry should be limited to A's own mental processes, assuming that it is A's discriminatory act about which B is complaining.

Joint Decision

252. Conversely, where the allegedly discriminatory decision is made jointly, the conscious and subconscious motivation of all those responsible must be considered, as a discriminatory motivation on the part of any of them would be sufficient to taint the decision (*CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439).

Tainted Information

253. Tainted information applies in cases where a detrimental act is done by an employee (x) who is innocent of any discriminatory motivation, but who has been influenced by information supplied, or views expressed, by another employee (Y) whose motivation is alleged to be discriminatory.

Allegations of Direct Discrimination

General

254. It is accepted that the Respondent may have approached the allegations by placing too much emphasis on the fact that Mr Archard was not their employee and the Claimant was. The Tribunal are invited to find that this may have caused them to be overly focused on the Claimant's role in the incident on 29 July 15 and not Mr Archard's. Although this approach may be criticised by the Tribunal, it is not because of conscious or unconscious bias and it is not discriminatory.

Colin Sweeney suspending the Claimant on 31 July 2015

255. Mr Sweeny explained clearly in evidence that he made the decision to suspend the Claimant and that he was the individual with authority to do so. Accordingly, the Respondent submits that he was the sole decision maker.

256. It is accepted that Mr Taylor was involved in the suspension process. However, it is clear that he was drawn into the matter as a result of the circumstances. In particular, his role as Head of Security and his friendship with the Claimant.

257. The Respondent submits that there is nothing unusual about Mr Taylor's involvement in any of the following events:

- Overhearing the security radio traffic in his role as Head of Security.
- Contacting the Claimant as a concerned friend.
- Receiving a copy of the Datix (Mr Taylor explained that because of the way it was categorised he was automatically copied in).
- Mr Adam Locke informing him as Head of Security about the allegation that Gary Archard had been assaulted by the Claimant.
- Contacting Mr Archard (a member of the public) to enquire whether he had been assaulted by a Trust employee.
- Reviewing the CCTV which was readily available to him.

258. In light of the above chain of events, it was entirely proper for Mr Taylor to contact the Claimant's line manager (in this case the person available in Mr Penlington's absence) to explain that there were concerns about the Claimant's conduct.

259. If an allegation of physical assault is raised by a member of the public against an employee of the Trust, the Trust it is required to look into this matter. Even if the matter ultimately ends up being ill-founded it must still be looked into. Mr Taylor was doing no more at this stage than highlighting the concerns which had been reported to him.

260. Mr Sweeney confirmed in evidence that after Mr Taylor explained that there were concerns about the Claimant conduct to him, he watched the CCTV, took advice from HR and decided to suspend the Claimant.

261. The Respondent submits that this was not in any way Mr Taylor's decision. It is denied that Mr Taylor influenced Mr Sweeney but even if he did the Respondent submits that the Tribunal only needs to concern itself with Mr Sweeney's mental processes (please see paragraph 12 above).

262. It is accepted that Mr Sweeney viewed the CCTV evidence in the presence of Mr Taylor. However, it is denied that this was in anyway improper. The Claimant's line manager simply viewed CCTV footage of an altercation in which the Claimant was involved in the presence of the Head of Security.

263. When considering the CCTV footage, the panel is asked to have regard to the following.

On any viewing of the CCTV footage it is apparent that:-

(1) The Claimant walked from where he was parked outside unit 5 to unit 7.
(2) He approached Gary Archard.
(3) It was the Claimant's choice to confront Gary Archard.
(4) He placed himself very close to Gary Archard.
(5) The Claimant clearly pushed Maurice McVay causing him to take several steps backwards notwithstanding the fact that there was plenty of open space around him meaning he did not need to make contact.
(6) There is an action which looks like the Claimant striking Mr Archard.
(7) The Claimant slammed Gary Archard's door when he left.

264. Allegations had been made against the Claimant and these allegations, along with the CCTV footage, meant that this matter needed to be investigated. Whether or not Mr Archard was aggressive at points during the altercation this was still a matter that needed to be investigated. Even if the Claimant had an explanation for the events as portrayed on the CCTV, the Respondent had an obligation to suspend him until it could investigate the concerns which had been raised.

265. The Claimant accepted the assault was categorised as gross misconduct [page 76] in the Respondent's Disciplinary Policy. It is not unusual for individuals to be suspended whilst matters of gross misconduct are investigated. The Respondent submits that Mr Sweeney was acting from a genuine concern and was not motivated by any bias about the Claimant because of his race.

266. It is also denied that Mr Taylor was influenced in any way by unconscious bias or this influenced the way he viewed the CCTV. It is agreed between the parties that Mr Taylor had known the Claimant for many years. The Respondent submits that actual knowledge of a person and their character trumps any unconscious bias. Mr Taylor knew the Claimant and he would therefore have known him not to be previously aggressive. As such, the Tribunal is invited to find that he would not have reviewed the footage presuming that just because of his race the Claimant was the one being aggressive. The Claimant makes reference in the list of issues to snap judgments based on incomplete information. The Respondent submits that all of Mr Taylor's previous knowledge of the Claimant would have worked against any possibility of him making a snap judgment. Accordingly, any suggestion that Mr Taylor was biased and presented tainted the information (i.e. the CCTV) to Mr Sweeney should fail.

267. The Respondent submits that this was in no way related to the Claimant's race, it related to his actions/involvement in the incident on 29 July 2015.

268. Mr Sweeney confirmed that he would have suspended Mr Archard if he was an employee. Again, it is submitted that this may show an over reliance on the Claimant's status as a Trust employee and lack of consideration about what could be done in respect of Gary Archard.

Racially motivated comments

269. Mr Sweeney recalls the Claimant mentioning general concerns that Mr Archard had made racially motivated comments. Although he denies that he mentioned anything specific. The Respondent submits that Mr Sweeney's explanation about why he didn't do anything in respect of this at the time is entirely reasonable. It was his expectation that this would be explored as part of the investigation.

270. Aggression/verbal abuse/racially motivated comments could, if established, provide mitigation or an explanation for the Claimant's actions. However, it is not reasonable to suggest that such provocation could justify the Claimant physically assaulting someone.

271. Swearing, being aggressive and getting physical with others at work are all very serious allegations and explanations may be given as to why such conduct occurred but it is not reasonable to suggest you can swear at someone or engage in an altercation because a person says something which is offensive. If another person acts in an unreasonable or provocative manner then there are appropriate ways to deal with it (e.g. report them to the Trust or to the police).

272. The Claimant accepted that he had previously been the subject of an offensive racist remarks and he dealt with it appropriately by reporting it to Mr Sweeney who took appropriate action (the issue with the Salesman in/around 2003).

273. As such, the Respondent submits that no inference should be drawn from Mr Sweeney's failure to act on the Claimant's general concerns. Furthermore, this was not a matter which removed the need to suspend the Claimant.

The manner in which Ali Yousuf conducted his investigation and his recommendation that the Claimant should attend a disciplinary hearing.

General

274. Mr Yousef was asked to conduct the investigation on/around 2/3 August when it became apparent that Mr Ross was not available. Mr Yousef gave evidence that he had not been involved in this matter prior to being asked to carry out the investigation.

275. Mr Yousef was provided with the terms of reference, as they were set out in the suspension letter [page 105 – 106]. These are the allegations which he looked into when carrying out his investigation. Namely, the allegation that the Claimant acted aggressively towards and physically assaulted two people. The Tribunal may find that he followed the terms of reference too closely and that his investigation could have been broader. However, this does not relate to race and the Respondent submits that this is not a matter from which it would be appropriate to draw inferences.

Victims

276. Mr Yousef accepts that he referred to Mr Archard and Mr McVay's statements as the victims statements at the investigation. He acknowledged that this was not appropriate and apologised for his mistake when giving evidence to the Tribunal. He also confirmed that this was an old habit from his background in the police. The Respondent submits that given his terms of reference this is an understandable mistake and whilst unfortunate his error was as small as not putting the word alleged before the word victim. The Respondent submits that there

is a reasonable non-discriminatory explanation for this issue and it is not something which the panel should draw an inference from.

Aggressive

277. Mr Yousef has denied that he acted aggressively towards the Claimant at any time, including during the investigatory meeting. The Respondent submits that he was a frank and candid witness who made a number of concessions in cross-examination. The Respondent therefore asks the Tribunal to accept his evidence on this point.

Scepticism about race discrimination allegations

278. Mr Yousef explained that he was sceptical about the allegations of race discrimination raised by the Claimant at the investigatory meeting. Mr Yousef explained that he was sceptical because he understood the Claimant to be raising these issues for the first time at the investigation.

279. The Claimant filled in a Datix report on the day of the incident [page 99]. In the report he alleged that he had been verbally abused by Mr Archard. Despite using the specific language used he made no mention of the alleged racist remarks. He had also not escalated this to his line manager or raised it as an issue with anyone who could escalate it or take action[19]. This was also not mentioned in any of the witness statements. Although you may not expect it to be included in Mr Archard's statement, it would not be unreasonable to expect reference to be made in either Mr McVay's or Mr Caroll's statement.

280. Given that the Claimant was raising this for the first time in response to the allegations made against him despite having had previous opportunities to do so, the Respondent suggests that it was understandable that Mr Yousef may have been sceptical.

Arguable

281. Mr Yousef explained when giving evidence that he had not heard the comment "careful it doesn't rub off" used as a racial slur before. He confirmed that he didn't immediately understand the context and, as such, made the comment that it was arguable that the comment was related to race.

282. The Claimant has confirmed on a number of occasions that the comments '*...involved innuendo and insinuations rather than hard explicit racial terms*..' [page 185]. In light of this, the Respondent submits that it is not surprising that Mr Yousef would seek confirmation of the context to understand the meaning and suggest that without context, looking at the comment in isolation, it is arguable whether the comment was intended to be racist.

Failure to speak to Kola and Wale

283. Mr Yousef did not attempt to conceal the information that the Claimant provided in respect of Wale or Kola. It was clearly documented in his report [page 129]. He also confirmed that the Claimant said he had been the victim of racist abuse. Accordingly, he fully set out the Claimant's position.

284. Mr Yousef also confirmed in his report that he didn't dispute that the Claimant may have spoken to these individuals. However, he remained sceptical

[19] It is accepted that the Claimant mentioned the discrimination to Mr Sweeney. However, it is not alleged by the Claimant that he told Mr Yousef about this at the time of the investigation.

because of the Claimant's failure to detail this in the Datix or raise it earlier with someone who could take action.

285. It is not disputed that neither Kola nor Wale could comment on the actual incident or how it unfolded. In light of the limited value of their evidence, and Mr Yousef's acceptance that the Claimant spoke with them, it was reasonable for him to decide not to speak with them. The Respondent submits that Mr Yousef has provided a non-discriminatory explanation for his decision. Again, although he may be criticised for being too focused on his terms of reference and the incident outside unit 7, there is a proper explanation for his conduct.

Failure to speak to other witnesses

286. Mr Yousef spoke to all of the relevant people who could be identified in the footage and both Mr Yousef and Ms Cassettari gave evidence that time was spent trying to identify people from the CCTV at the disciplinary. It was unfortunate that Mr Yousef did not keep notes of the discussions with witnesses who could not recall the event but there has been no challenge to the fact he did speak to them.

287. The individual who the Claimant suggests Mr Yousef should have spoken to and didn't was Mr Aka Sebatian Ngbin. The Claimant suggests that this is indicative of Mr Yousef's approach to collating the information against him and ignoring the information which may have assisted him. Mr Yousef clearly explained that he took the view this witness was not relevant to the investigation into the incident outside unit 7. His focus was clearly on the incident which occurred outside unit 7 between approximately 09:32 and 09:38. Whether he was right or wrong in this assessment, the Respondent submits that the panel can be satisfied that it was not racially motivated.

288. The Respondent accepts that Mr Yousef did look at the initial incident which occurred outside unit 5 even though that didn't provide direct evidence about the main incident. However, it submits that it is understandable why the incident which caused the chain of events to unfold, despite not providing direct evidence of the incident outside unit 7, may be relevant. As it may inform the Respondent of the parties' motivations/ who approached whom/ provide mitigation etc…

289. It is equally understandable that the incident after would be viewed as less relevant. As it would not assist with what caused the incident or what actually happened during the incident. It would simply confirm that there was an exchange of words between the Claimant and Mr Archard following the incident. Even if Mr Archard was the aggressor during this incident it would not be significant in determining how events unfolded outside unit 7.

Recommendation to progress

290. Mr Yousef confirmed in evidence that the Claimant made a number of concessions during the investigation, including confirming that he called Gary Archer a "pussy" and a "fucking idiot". These concessions alone were matters which should properly have been considered at a disciplinary hearing.

291. Again, even though the Claimant had suggested that he had been the subject of abuse and this was a two-way altercation, this did not absolve him of all responsibility for his actions. It was entirely possible at this point that a disciplinary panel may have decided the allegations were not made out, decided on a sanction short of dismissal or no sanction at all. Mr Yousef's recommendation was simply a

suggestion that this matter warranted further consideration, it was not a determination.

Unconscious bias

292. Mr Yousef confirmed that Mr Taylor had told him that the Claimant was a "good guy". As such, any prejudgment about him was informed in part by positive information. Mr Yousef also explained that his scepticism arose not as a result of the Claimant's race but because of external objective factors. In particular, he found the Claimant's account of the incident to be inconsistent with the CCTV footage[20].

293. Mr Yousef took the view that there were a number of inconsistencies between the Claimant's account and the CCTV footage. The Respondent submits that his view was well founded. For example:

(1) the Claimant's suggestion that Mr Archard's driving was dangerous[21] [para 2 on 110];

(2) the Claimant's suggestion that he only went to until 7 to get the licence plate number from Mr Archard's van[22] [para 3, page 110 and para 8, page 117]; and

(3) that Mr Mc Vay blocked the Claimant off so he couldn't see the licence plate[23] [third para from the bottom on 118 and para 5 on 119].

294. Although it is accepted that there is no sound on the CCTV, the inconsistencies identified above are all independent of the sound.

295. It is apparent from the minutes of investigation, and the Claimant accepted in cross-examination, that Mr Yousef was also struggling to understand why the Claimant failed to walk away. He asked the Claimant "*why didn't you leave?*" and the Claimant responded "*you keep asking me the same question*" [paras 8 and 9 page 120].

296. Again, notwithstanding the lack of sound it is apparent that if the Claimant wanted to leave the area where the altercation occurred he could have done so at any time. He accepted this both later in the internal proceedings and in cross-examination. As such, it is entirely reasonable that Mr Yousef would have treated his account with caution. Particularly, as the Claimant maintained that he was "*scared and concerned for his safety*" [first para on page 111] and wanted to leave.

297. Mr Yousef formed the view that the Claimant's account didn't stack up against the CCTV footage and this caused him to take a sceptical view of the information he provided. It was this view that informed his approach to the Claimant and not unconscious bias because of his race.

Jenny Cassettari summarily dismissing the Claimant on 14 October 2015

298. Ms Cassettari confirmed that she did not become involved in the process until around 23 September 2015 when she was asked to chair the hearing. She was clear that despite being guided by Mr Habelton-Aayling she was the person

[20] The Respondent asserts that it was entirely appropriate to ask witnesses to provide an initial account before reviewing the CCTV footage. All witnesses were treated equally in so far as none of them got to review it. The Claimant had the opportunity to provide his initial account, comment on the CCTV and provide further accounts.
[21] DVR 1-657-Unit 5E and DVR-03-676-Unit 6G -09:30:45 – 09:32:20
[22] DVR-12-678-Unit 6C – 09:32:00 – 09:32:30
[23] DVR-U7-677-U7 – 09:33:40 – 09:32:50

solely responsible for the decision to dismiss. Even if the Tribunal takes the view that Ms Cassetarri was influenced by him, it is only her thought process which is relevant.

299. It is accepted that Ms Cassettari did consider the CCTV footage to be compelling but she had good reason. In particular, key elements of the Claimant's account were not consistent with the CCTV. It was not because of unconscious bias.

300. Furthermore, it was not because Mr Yousef presented tainted information to her when he showed the CCTV footage. The Claimant was present at the hearing. He was also represented by his trade union at the meeting. He accepted that the CCTV footage was reviewed during the hearing and that he had an opportunity to comment and ask questions. Ms Cassettari was more than willing to accept the different points about the different aspects of the CCTV footage in cross-examination. The Respondent suggests that, particularly with a union representative present, the Claimant would have been able to put forward his points and explain his account of the CCTV for Ms Cassettari to consider.

301. It was accepted by the Claimant in cross-examination that a key issues for the Respondent throughout the investigation, disciplinary and appeal were: (1) why he engaged with Mr Archard when he didn't need to in order to report him; and (2) why he didn't leave if he felt threatened/if Mr Archard became abusive.

302. It is entirely clear from the CCTV footage that the Claimant didn't need to engage and that he could have taken appropriate action by leaving and reporting Mr Archard's driving initially, he could also have walked away at any time and reported the abuse. It is also difficult to see why a person would follow the aggressor[24] walk towards a confrontation, irrespective of what was being said, if they felt scared as alleged by the Claimant[25].

303. The Respondent suggests that it was entirely appropriate to place a large amount of weight on these inconsistencies as they go to the core of the Claimant's case that he was the subject of the attack. This decision was not based on bias; it was based on the facts.

Failing to properly investigate the Claimant's complaints of race discrimination

304. It is accepted that the Claimant's complaints were not investigated. At this stage the Respondent does not seek to convince the Tribunal that it was right in its approach but simply that it did not act as it did due to conscious or unconscious bias about the Claimant because of his race.

305. The Respondent submits that there were five key reasons for this and none of them related to bias.

(1) The Respondent viewed the Claimant's allegations as mitigation.
(2) At both the disciplinary and appeal the Respondent accepted the Claimant's account about the racist comments.
(3) At the disciplinary the Respondent offered to support the Claimant in making a complaint to Baldwins.
(4) At the appeal Ms Wood made a recommendation that the Respondent take further action.

[24] DVR-12-678- Unit 6 C – approx. 09:32:25 – 09:32:30
[25] DVD-U7-677-U7 09:33:50 – 09:34:30

306. The Claimant accepted that he only complained about the racist remarks to management after he'd been informed that allegations had been made against him. As such, whether right or wrong, the Respondent submits that there is a clear explanation why this was treated as mitigation rather than a separate complaint.

307. Mr Sweeney explained that he thought this matter would be taken up at the investigatory stage.

308. Mr Yousef detailed the Claimant's complaints about the racist remarks in his report for them to be considered further by the panel. Which ultimately they were. They were considered and accepted. His reasons for not speaking with Kole and Wale, the only potentially relevant witnesses identified by the Claimant, are detailed above.

309. Whilst both Ms Cassettari and Ms Wood considered this was relevant mitigation. They did not investigate it because they accepted it had occurred as alleged. Given that they completely accepted the Claimant's allegations about the remarks, they did not identify a need for further investigation. They determined the appropriate approach was to take it into account for mitigation purposes and then offer to support the Claimant in making a separate complaint [pages 197 and 232].

310. Although the Tribunal may take a different view on the correct approach, the Respondent submits this approach is understandable in the circumstances. Particularly, where Mr Archard was not employed by the Trust. As such, there is a clear none discriminatory reason for the Respondent's approach.

Permitting the dismissal to be tainted by unconscious bias, specifically, by being overly reliant on CCTV footage.

311. For the reasons set out above, the Respondent denies that it permitted the dismissal to be tainted by unconscious bias. Whilst there are learning points for the Respondent and the witnesses made concessions that with hindsight things could have been done differently, it is not a case where they were prompted by unconscious bias.

312. It is suggested that there was over reliance on the CCTV footage. The Respondent did consider the CCTV footage to be compelling but it submits with good reason not because of unconscious bias. In particular, because elements of the Claimant's account were not consistent with the CCTV. Even if the Tribunal find that the Respondent was overly reliant on the inconsistency in the Claimant's account and the CCTV footage, this does not relate to his race and is not discriminatory.

Comparators

313. On a comparison of cases for the purposes of section 23 Equality Act 2010, it is for the Claimant to show that he has been treated less favourably than a **real** or **hypothetical** comparator whose circumstances are not materially different to his.

314. The relevant "circumstances" are those factors which the Respondent has taken into account in deciding to treat the Claimant as it did, with the exception of the element of race (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 (HL)).

315. The Respondent asserts that none of the individuals put forward by the Claimant as actual comparators qualify. The material difference between the Claimant's case and the comparators' is that he was accused of physical assault against a member of the public and none of the named comparators were. There is also no evidence that any of the incidents to which the Claimant refers were escalated as formal complaints.

316. In so far as the Claimant invites the Tribunal to use the comparators to draw inferences that the Respondent treated issues affecting BME staff and none BME staff differently the Respondent details its response in respect of each comparator below.

Comparator 2

317. The incident involving Comparator 2 is a historic allegation from over 13 years ago which did not involve any allegation of physical assault. It was allegedly reported to Lisa West who was not involved in any way with the Claimant's case. Comparator 2 left the Trust in 2012 and the Respondent was not able to find out any information about the alleged incident.

318. The information available in respect of this incident is not sufficient to enable the Tribunal to draw inferences about a difference in approach to issues affecting BME staff and none BME staff.

A white sales representative

319. Despite the Claimant previously alleging that Colin Sweeney did not act on his complaint [page 52], he accepted in cross-examination that Mr Sweeney did contact the company the sales representative worked for, that he reported the incident and asked for the sales representative not to come back to the site. The Claimant also confirmed that Mr Sweeney informed him of the action he had taken.

320. Accordingly, it is apparent that Mr Sweeney acted entirely appropriately on this occasion and took the Claimant's concerns seriously. Again, this incident is not indicative of a difference in approach.

Comparator 1

321. The Claimant did not suggest that this incident involved physical violence. Mr Sweeney confirmed that he did not have any recollection of an incident arising between Comparator 1 and Rukshana Arian. He did not recall any formal complaint being raised.

Comparator 3

322. The Claimant mentioned for the first time when giving evidence that the incident between Comparator 1 and Ola Okesola became physical. The Claimant made reference to this matter in his Particulars of Claim and in his Further and Better Particulars [page 52]. Despite having been asked to provide specifics about the situation he did not make any mention of the incident becoming physical. This is a highly relevant factor and the Respondent suggests that if it had been this would have been specifically mentioned originally.

323. In any event, Mr Sweeney did not witness the incident and understood it to be a dispute between two colleagues that was resolved. Mr Penlington was also clear in his evidence that he did not see the incident occur. There is no evidence that a complaint was raised in relation to this incident. Furthermore, the Claimant

accepted that the incident related to Mr Okesola bringing fish into work for lunch and it smelling. As such, this was not an issue which related to race.

324. Accordingly, the Respondent submits there is no evidence that this matter was handled inappropriately or in a racially biased way.

Comparator 4

325. It is alleged that Comparator 4 told Brenda Green to "fuck off". The Claimant has not suggested that this incident involved physical violence. Accordingly, it is materially different from the incident involving the Claimant in any event.

326. It is denied by Nick Penlington that this incident was reported to him. He confirmed that Paula Porter would have been Comparator 4's line manager and she is the individual who would have dealt with it. Brenda Green was a union representative and, accordingly, it is expected she would have been able to escalate matters if not appropriately dealt with.

327. The Respondent submits there is no evidence that this matter was handled inappropriately or in a racially biased way.

Victimisation contrary to section 27 of the Equality Act 2010

328. It is not disputed that the acts relied on by the Claimant, and listed below, occurred or that they were protected acts.

a. The Claimant complaining to Mr Yousuf at the meeting of 20 August 2015 about the racial comments and discrimination arising from the incident of 29th July 2015.

b. The Claimant complaining during the disciplinary meeting of 28 September 2015 about the racial comments and discrimination arising from the incident of 29th July 2015.

c. The Claimant complaining to Ann Wood at the appeal hearing of 14 December 2015 about the racial comments and discrimination arising from the incident of 29th July 2015.

329. It is disputed that the Respondent commenced the disciplinary proceedings or dismissed the Claimant because he complained as alleged. In *St Helens Borough Council v Derbyshire and others* [2007] IRLR 540, a victimisation case under the old regime, the House of Lords stated that the reason for the treatment should be assessed by asking "why" the employer acted as it did, and whether the treatment was "because" of a protected act.

330. It is accepted that if A's reason for subjecting B to a detriment was unconscious, it can still constitute victimisation (*Nagarajan v London Regional Transport and others* [1999] IRLR 572).

331. It is also accepted that the protected act need not be the main or only reason for the treatment; victimisation will occur where it is one of the reasons (*paragraph 9.10, EHRC Code*) However, the protected act must be more than simply causative of the treatment (in the "but for" sense). It must be a real reason.

The commencement of disciplinary proceedings by the Respondent on 31 July 2015.

332. Mr Yousef had reviewed the witness statements, the CCTV and had met with the Claimant at the point he recommended that his case should go forward to a disciplinary hearing.

333. The Claimant accepted that he made physical contact with both Mr McVay and Mr Archard during the altercation. He also accepted that he swore at Mr Archard using the words "pussy" and "fucking idiot".

334. Given the fact that there was evidence supporting the allegations and the Claimant's concessions, it was entirely appropriate for Mr Yousef recommend that the matter progress to a disciplinary hearing. Again, even though the Claimant had suggested that he had been the subject of abuse and this was a two-way altercation, this did not absolve him of all responsibility for his actions. It was entirely possible at this point that a disciplinary panel may have decided the allegations were not made out, decided on a sanction short of dismissal or no sanction at all. Mr Yousef's recommendation was simply a suggestion that this matter warranted further consideration, it was not a determination.

335. Even if Mr Yousef was sceptical about the vailidity of the racist remarks because of the timing, there is no evidence that Mr Yousef took against the Claimant for raising these remarks or targeted him because of it. Both Mr Yousef and Ms Cassettari were clear that Mr Yousef did not shout at the Claimant during the meeting. Again, the Respondent refers the Tribunal to the fact that the Claimant was accompanied by his union representative at this meeting. The Respondent submits that Mr Yousef had genuine concerns about the Claimant's conduct and it was for this reason he took the decision to make the recommendation which he did.

The dismissal of the Claimant with effect from 14 October 2015

336. Ms Cassettari fully accepted the Claimant's allegations that he had been subject to racist abuse, she took this into account when reaching her decision and she offered to support the Claimant in raising any concerns with Baldwins. This is confirmed in the disciplinary outcome letter [196 & 197] and it was confirmed by Ms Cassettari in her evidence. All of these factors run contrary to the suggestion that Ms Cassettari dismissed the Claimant because he had raised these concerns with her. She was a frank and candid witness who made concessions and the Tribunal is invited to accept her evidence.

Unfair Dismissal

Potentially fair reason

337. The Respondent contends that the reason for dismissal was conduct. It is denied that the Respondent had any ulterior motive for dismissing the Claimant or that it was motivated by his race. The Respondent relies on the points set out above.

General Fairness

338. *British Home Stores Ltd v Burchell* [1978] IRLR 379 established the test for fairness in conduct cases. A dismissal for misconduct will only be fair, if at the time of dismissal:

- The employer believed the employee to be guilty of misconduct.
- The employer had reasonable grounds for believing that the employee was guilty of that misconduct.

- At the time it held that belief, it had carried out as much investigation as was reasonable.

339. The burden for satisfying the Burchell test is neutral (*Boys and Girls Welfare Society v McDonald* [1996] IRLR 129 EAT).

Genuine Belief

340. Mrs Cassettari was a credible witness who made a large number of concessions and she gave a full and frank account of herself. The Respondent asserts she held a genuine belief that the Claimant had committed the alleged misconduct.

Reasonable grounds to hold the belief

341. Statements were taken from all of the individuals present outside unit 7 (who could be identified) when the altercation between the Claimant, Mr Archard and Mr McVay occurred.

342. The Claimant also had numerous opportunities to provide his account in the form of statements and at meetings [pages 110-111, 116 – 125, 141 – 147, 152 – 177, 200 – 205, 222 – 229 and 288 – 296].

343. CCTV evidence was reviewed and the Claimant was provided with an opportunity to present statements or to call relevant witnesses at the disciplinary hearing. As such, he was provided with an opportunity to challenge any of the evidence which he didn't accept.

344. The witness accounts of Mr McVay, Mr Archard and Mr Carroll were inconsistent in parts which the Respondent argues lends credibility to them. It is difficult to see how they could have colluded if their statements didn't completely match.

345. The key findings were that the Claimant pushed Mr McVay. This is clear from the CCTV footage[26]. That he swore at Mr Archard. The Claimant concedes that he used the swear words "pussy" and "fucking idiot" and the witness statements are all consistent on the fact that the Claimant had smelt Mr Archard's hair and called him a C*** [pages 107c, 112 and 113].

346. The allegation that the Claimant verbally assaulted Mr McVay was not upheld [page 197]. In relation to the strike incident. The Claimant admitted that he may have struck Mr Archard after he made contact [page 120]. The physical contact is also clear from the CCTV footage. The issue for the Respondent on this particular point - which has been made clear throughout - was not whether the Claimant was the aggressor but rather that he allowed himself to get into a situation and remained in a situation where he ended up striking another person [page 197].

347. It was also the Claimant's consistent evidence that the racist remarks occurred after he pushed Mr McVay [pages 110-111, 116-125 and 141 – 146].

348. For the reasons detailed above, the Respondent asserts that Ms Cassettari had reasonable grounds to sustain the belief that the Claimant committed the allegations where upheld.

Band of reasonable responses

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349. Physical and verbal assault are acts of gross misconduct. Notwithstanding the Claimant's mitigation and his long service, it was appropriate to dismiss him in the circumstances.

Polkey

350. *Polkey v AE Dayton Services Limited* [1988] ICR 142 [1987] 3 WLR 1153 [1988] 1 AC 344 will apply where the ET finds that the procedure followed by R was flawed but R can show that the end result would have been the same notwithstanding the procedure.

351. The ET is referred to the case of *Software 2000 Ltd v Andrews & ors* 2007 ICR 825, EAT. In this case Elias J confirmed that: 'The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed…..'

Brian Tully

352. Ms Cassettari confirmed that she would have made the same decision even if she discounted Mr Tully's evidence. As such, even if the panel had concerns about Ms Cassettari seeking this evidence after the disciplinary, it can be satisfied that it would have made no difference to the decision to dismiss.

Other witnesses

353. The only witness identified who the Claimant alleged should have been spoken to was the individual outside unit 5. He could not have provided any direct evidence on the incident and it is unlikely that his evidence would have made a difference to the Trust's decision. Ms Casserrati accepted in re-examination that his evidence was likely to be limited.

Challenging witness evidence

354. Claimant was given an opportunity to call and challenge the witness evidence in the presence of his union representative which he accepts he did not take. In any event, the Respondent submits that challenging the evidence is likely to have had little impact on the decision. Witnesses are generally unlikely to accept they have given a false/inaccurate account.

Race Allegations

355. As the disciplinary chair and appeal chair confirmed that they accepted the mitigation and a statement was provided from Kola, it is submitted that there would have been no difference to the outcome of the disciplinary or appeal if further investigations had taken place.

Contributory fault

356. The Respondent asserts that that s123(6) ERA 1996 imposes an absolute duty on employment Tribunals to consider the issue of contributory fault in any case where it is possible that there is blameworthy conduct on the part on the employee.

357. The Claimant approached Mr Archard in the first place. It is apparent that this was not necessary. Had the Claimant taken appropriate steps and just reported Mr Archard's driving as he alleges he wanted to then the incident would never have occurred.

358. The Claimant accepted that he used the words "pussy" and "fucking idiot". These are potentially gross misconduct offences in their own right. Even taking into account the Claimant's provocation, they are very serious.

359. The Claimant also clearly pushed Maurice McVay despite being able to walk around him. This occurred on the Claimant's own case (at least until after the disciplinary hearing) prior to when the racist remarks were made. Suggesting the provocation was less at this point and there was less mitigation for his conduct.

360. The Claimant allowed himself to be in a situation where he ended up striking someone. It can be seen that he walked into close proximity with Mr Archard and remained very close to him immediately prior to the incident.

Documentation

361. It is accepted that issues have been identified in respect of the documentation during the course of the hearing. This incident and the internal process which followed took place a significant length of time ago and it is unfortunate that both of the HR managers involved in the disciplinary and the appeal have left the Trust.

362. This is not indicative of the approach taken by the Trust and it would not be appropriate to draw inferences as a result of it.

Conclusion

363. The Respondent invites the Tribunal to dismiss the Claimant's claims.

The Law & Authorities

The law and authorities are dealt with above in closing submission

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Decision

364. The unanimous decision of the Tribunal is as follows:

365. The Tribunal first would like to deal with the issue of the credibility of the Respondent's witnesses as compared to the evidence given by the Claimant. We concluded that Mr Yousuf's evidence was not credible on a number of occasions and we concluded that at times his evidence was less than clear. For example his evidence as to the witness Sebastian conflicted with that of Ms Cassetari. He also could provide no reason why he failed to take minutes of discussions with potential witnesses (Mr Pitt and Panaki). His evidence as to what he was told by the complainants (as to the truth of their statements see above at paragraph 41) was found not to be credible. Mr Yousuf was also found to have given inconsistent evidence in relation to his conclusions on the Claimant's evidence in relation to the racial discrimination, he told the Tribunal that he formed the view (expressed in his investigation report) that the Claimant's evidence was not credible from the statements he had before him; but the consistent evidence before the Tribunal was that no statement was taken from Mr Taylor until after the report had been produced (see above at paragraph 59 and 66). He failed to record in his statement that he viewed the CCTV with the dismissal and appeals managers and Ms

Cassetari and Ms Wood similarly failed to mention his involvement in viewing the evidence. We were also concerned that none of the Respondent's witnesses made reference to their own Dignity at Work Policy and Equal Opportunities Policy which was not produced until the fourth day of the hearing after the Tribunal had requested sight of it. These documents were highly relevant to the issues in the case and the latter policy applied to contractors. They were not mentioned by any of the Respondent's witnesses nor were they referred to during the disciplinary process, we also raise an adverse inference from this.

366. On the other hand, we found the Claimant to be measured and honest in his testimony and he accepted candidly that he accepted some responsibility for the incident and showed significant insight into his culpability where he stated that he was disappointed that he had "come down to their level". We conclude that the Claimant was an honest and straightforward witness.

367. The Respondent is also subject to the Public Sector Equality duty which is set out in the Claimant's closing submissions at paragraph 169 above which seeks to eliminate discrimination and to advance the equality of opportunity between persons who share the protected characteristics and those who do not. We have also been taken to the test set out in the case of Igen v Wong [2005] ICR (above at paragraph 181 (viii) where a Tribunal must decide if any provision of a Code of Practice is relevant and whether inferences should be drawn and the explanation for the failure to deal with a code of practice (paragraph 177(xiii)). The Respondent has found to have failed to maintain proper records of the disciplinary and appeal hearing in breach of the EHRC Code of Practice at paragraph 17.4; although the Tribunal was informed that the relevant HR persons had left this was not an answer as to why the Respondent's managers with conduct of the hearing and appeal, failed to secure these documents. As we have stated above it appears to be an unfortunate coincidence that all the minutes of the hearing and appeal are missing and neither manager chairing the hearings took minutes during the hearing, we raise an adverse inference from this.

368. The EHRC Code of Practice at paragraph 17.95-6 (see above at paragraph 214) requires employers to resolve grievances as they arise and to "properly investigate any complaints of discrimination", this was not done and we have found as a fact that the Respondent failed to carry out any investigation into the Claimant's complaints of racist abuse, despite this being a breach of their own policies and procedures. We raise an adverse inference from this as the reason given by Mr Yousuf for not investigating was he was sceptical. The Code of Practice at paragraph 17.98 states that employers must not discriminate in the way a disciplinary procedure is invoked or pursued and it further states that where allegations of discrimination or harassment are involved "the matter should be thoroughly investigated", in this case it was not investigated and no enquiries were made at any stage of the process to establish all the facts of the case. We raise an adverse inference as the facts of this case show that the Claimant's counter allegations were not investigated, this was a breach of the Statutory Code of Practice and of the Respondents policies and procedures.

369. Turning to the burden of proof, we accept the Claimant's submissions that we should adopt the reason why approach, to concentrate on why the Claimant was treated as he was, as the less favourable treatment appears to be intertwined with the reason why. We also accept the Respondent's submissions that the comparators identified in the list of issues are not appropriate. The Claimant also submits that the 'something more' to shift the burden of proof was because the Race Equality Standard (page 281) which concluded that BME staff are 2.75 times more likely to enter formal disciplinary proceedings than other staff. Ms Wood was taken to this document and accepted that this was something the Respondent had

to address (see above at paragraph 105) but there was no evidence that the findings and actions points in this document were considered even after the Claimant had raised allegations of racial harassment together with evidence to support the allegations.

370. We now turn to the allegations before the Tribunal and the first issue is whether the Claimant was subjected to direct discrimination by Mr Sweeney on the 31 July when he was suspended. The evidence of the meeting and the events leading up to the meeting are dealt with in our findings of fact at paragraphs 34-36; Mr Sweeney considered no alternatives to suspension as he concluded after watching the CCTV evidence that this was a case of physical assault, he accepted that he heard the Claimant refer to a racial element to the incident and conceded that he should have gone into more detail but felt, not unreasonably, that this would be picked up as part of the investigation as was consistent with the policies we have referred to above.

371. The Tribunal conclude that the reason why the Claimant was treated as he was by Mr Sweeney was because he concluded that suspension was appropriate because he viewed this as a case of assault. Although he accepted that he conducted no investigation into the allegations of racial abuse, this was because the matter was yet to be investigated, suspension being a neutral act and no decision had yet been taken on whether a disciplinary hearing was necessary. The Tribunal also took into account that Mr Sweeney had previously taken action to ban a sales representative who had made racially offensive comments to the Claimant. This reflected that he had previously taken appropriate action against a person who acted in a discriminatory manner in the workplace.

372. The Tribunal conclude on all the evidence that the suspension was not an act of less favourable treatment because of race; it was a decision taken by Mr Sweeney after considering that a complaint had been made, after viewing the CCTV evidence, taking advice from HR and concluding that suspension was necessary in this case. We accepted Mr Sweeney's evidence that he was shocked when he viewed the CCTV and he felt that suspension was necessary not because of the Claimant's race or for any stereotypical assumptions about race, as he had worked with the Claimant for over 11 years, he concluded that it was necessary due to what he saw.

373. Turning to the next issue of whether the investigation conducted and the conclusions reached by Mr Yousuf were less favourable treatment because of race, we conclude that they were. Mr Yousuf impressed upon the Tribunal his 17 years' experience as a police officer in conducting investigations and with evidence handling but the conduct of the investigation showed unconscious bias. There were a number of examples that the Tribunal refer to in support of this conclusion, the first being that he referred to the white complainants as victims. Although it was put in closing submissions that his conduct was understandable and not evidence of unconscious bias on the grounds of race, we do not accept that this was a simple turn of phrase carried over from his previous career. The Tribunal did not consider the use of the term 'victim' in isolation but part of a larger picture of the approach adopted by Mr Yousuf.

374. The Tribunal also considered the manner in which he presented the Claimant's evidence, which was prefaced with the words "according to RH" which implied that his version of the events may not be considered to be truthful; this same approach was not adopted with those who provided evidence against the Claimant, who were assumed to be truthful. We again refer to an issue of credibility at paragraph 365 above about the witnesses informing him that their statements were true (see above paragraph 41). He concluded that the CCTV evidence corroborated what the complainants had reported. He accepted without question

what the witnesses said about the Claimant's conduct and he failed to challenge their evidence (even where there were inconsistencies) see above at paragraph 64. He professed to be sceptical about the Claimant's evidence that he was subjected to race discrimination and did not investigate. His failure to investigate was in breach of the Respondent's policies as referred to above and in breach of the EHRC Code of Practice. There has been no explanation from any of the Respondent's witnesses as to why they failed to comply with their policies despite three HR managers having involvement throughout, Mr Chant advising Mr Yousuf, Mr Hambleton Ayling advising Ms Cassetari and Mr Preston assisting Ms Wood.

375. The Claimant's evidence of race discrimination was not investigated by the Respondent at any stage of the process. Mr Yousuf put to the Claimant evidence that undermined his credibility (about holding a mobile phone when driving) even though there was no evidence of this and it was irrelevant to the case. We also found as a fact that the investigation was conducted like an interrogation of the Claimant rather than an attempt for the him to tell his side of the story. He also sought to establish if the Claimant was "late" by obtaining a copy of his work diary to refute the Claimant's evidence that he may have been late for a meeting. Mr Yousuf failed to interview witnesses that had been identified by Mr Taylor (Sebastian) and appeared to have misrepresented his knowledge of Sebastian to Ms Cassetari, this undermined his credibility as we found that his explanation given to the Tribunal was unreliable (see above paragraphs 69-70). We also found that Mr Yousuf interviewed a number of witnesses (Mr Panaki and Mr Pitt) but failed to make a note of their evidence (paragraph 43 above).

376. The Claimant's evidence to the investigation was that he had contacted security but no investigation was conducted into what was reported as referred to above in our findings at paragraph 52 (although a statement was seen from Mr Sloely the guard on duty that day at page 134 of the bundle dated the 7 September 2015 referred to above at paragraph 66, there was no evidence this was provided to the Claimant prior to the disciplinary hearing). Mr Yousuf failed to mention or refer to the Dignity at Work Policy at paragraph 7.6 or to the disciplinary policy that required any counter allegations to be considered prior to the disciplinary hearing, if the outcome could have an impact on the case. Mr Yousuf did not consider the whether the counter allegations should be investigated. He allowed what he described as his scepticism of the Claimant's evidence to cloud his judgment. The Tribunal conclude that he formed the view that the Claimant was not telling the truth about the racist allegations and failed therefore to follow the Respondents procedures. The Tribunal conclude that the reason why he came to this conclusion was due to an unconscious bias against the Claimant because of his race. We conclude this was a detriment to the Claimant. The burden of proof shifts to Mr Yousuf to show that the manner if his investigation was in no sense whatsoever less favourable treatment because of race.

377. We also found that the investigatory report was worded in a manner that called into question the veracity of the Claimant's evidence and failed to accurately record that an act of assault had been committed by Mr Archard first. Although it has been put to us by the Respondent that Mr Yousuf's use of the word victim may have emanated from his previous role as a police officer and that explanation was reasonable and non-discriminatory taking into account the terms of reference of the investigation, we have taken into account that the terms of reference were reflected above in our findings at paragraph 39 that he was requested to investigate Mr Archard's complaint, which we conclude must include the consideration of the possibility that the complaint may not be genuine or could be exaggerated, after taking into account all the evidence.

378. Mr Yousuf accepted that the Datix report was relevant to the investigation but the allegations contained therein were not investigated. His approach to the

investigation and in the report that he produced reflected (as we have found as fact) a preconceived view that the Claimant as a Black male was the aggressor in the incident and this view permeated the entire process from the initial interview to the production of the report. He accepted in cross examination that he could have had an unconscious bias but failed to provide any reason for approaching the investigatory investigation in the way he did. Mr Yousuf conceded in cross examination that there were elements of his investigation that were incorrect and he could have done better. We conclude that the procedural and substantive failings identified in the investigation were less favourable treatment of the Claimant because of his race, Mr Yousuf being unable to provide any credible non-discriminatory reason for his conduct, we conclude that the Claimant's claim for direct discrimination is well founded.

379. The Tribunal now deal with the Claimant's complaint that he was victimised by Mr. Yousuf because he made a protected act in the investigatory and as a result he was subjected to a detriment by being referred to a disciplinary hearing. In considering this the Tribunal must consider why Mr Yousuf acted as he did and we have concluded that he did not believe the Claimant's allegations that he was subjected to racial harassment and this was because of his race. There was no evidence to suggest that the Claimant's complaints of race discrimination during the investigatory hearing was the reason why the matter was referred to a hearing. All the evidence was consistent that the Claimant was considered to be the aggressor and we have concluded that this was because of his race; there was no evidence to suggest that the protected act was the real or a substantial reason for the matter to be escalated by Mr Yousuf. The Claimant's claim for victimisation is not well founded and is dismissed.

380. The Tribunal have concluded that Ms Cassetari alone took the decision to dismiss however the dismissal letter was written by Mr Hambleton Ayling. Although Ms Cassetari made the decision alone, we conclude from all the evidence that she was significantly influenced by Mr Yousuf due to the evidence that unfolded in the course of cross examination, where it was admitted that he played what he considered to be the 'relevant parts' of the CCTV to her when they were alone. This meeting was not documented and was not mentioned in either of their witness statements. It was accepted by Ms Woods that this would be inappropriate however this was a process he adopted at the appeal stage as well. We considered Ms Woods evidence to be unreliable due to her failure to mention Mr Yousuf's assistance in her statement and her misleading evidence to the Tribunal that she had "tried to work out who the parties were" on the CCTV (see above at paragraph 104). His influence over the entire process was substantial. We raise an adverse inference from the fact that the pre-meeting CCTV viewing was not minuted and was not referred to in the witness testimony.

381. The Tribunal turn to the issue at paragraph 10b, that the Claimant's claim for race discrimination at the disciplinary was not investigated, Ms Cassetari accepted that this was not investigated and the dismissal letter stated that if he "wished to make a complaint" the Respondent would "support him". She accepted that even though the Claimant had raised a discriminatory allegation in the disciplinary hearing and in his written submission before her, she did not investigate and this was a breach of the Respondent's policies and procedures as seen above. There was an obligation on all managers under the Dignity at Work Policy and the Equal Opportunities policy to consider these matters and Ms Cassetari failed to do so even though she told the Tribunal that she had been trained in Equal Opportunities.

382. The Respondent's submissions as to why they did not investigate the complaints of discrimination was firstly because they viewed it as mitigation but this did not appear to be an explanation that complied with the Respondent's own

policies and it did not seem to be a cogent reason why this should not be investigated. The allegations of race discrimination made by the Claimant together with his Datix report (where he uses the word abuse) were inextricably linked to the incident in question. These were not allegations of mere mitigation but central to the issues in the case and their own policies required that they be investigated. This was not done. The Tribunal noted that the Equal Opportunities policy at R3 applied to contractors on site therefore this would have applied to Mr McVay (and may have applied to Mr Archard as he was described in the dismissal letter as a contractor), no efforts were made to comply with the policy and to investigate the Claimant's complaints.

383. Although the Respondent in closing submissions referred to the offer of support in the dismissal letter, this did not comply with the expectation in the above policies that these allegations should be dealt with before dismissal and not afterwards. The Tribunal therefore conclude that Ms Cassetari failed to investigate his complaints of race discrimination and we conclude the she did so because of the Claimant's race. We have taken into account the failure to comply with polices and we raise an adverse inference from the Respondent's failure to provide copies of the above policies until they had been ordered by the Tribunal and in the light of the inadequate reasons given by Ms Cassetari for failing to deal with this matter when raised in the hearing before her. We have concluded that the reason why she failed to investigate was because of the Claimant's race. The Claimant was presumed to be the aggressor and the Respondent placed undue weight on the CCTV evidence and failed to investigate his complaints, which were not believed. We conclude that this placed the Claimant at a detriment as his evidence given during the disciplinary process was not investigated. We conclude that the burden of proof shifts to Ms Cassetari to show that the decision not to investigate was in no sense whatsoever on the grounds of race, as she has failed to provide a non-discriminatory reason, we conclude that the complaint is well founded.

384. The Tribunal turn to the next question of whether Ms Cassetari permitted the dismissal to be tainted by race discrimination and we have made a number of findings of fact about the conduct of the disciplinary hearing and of the conduct of Mr Yousuf at that hearing. It was accepted by Ms Cassetari that she allowed the Claimant to be called the black man by a contractor called to give evidence at the disciplinary hearing, despite introductions having taken place. She accepted that that this was unacceptable but she may not have picked up on it (see above at paragraph 74). The Tribunal noted that contractors are subject to the policies and procedures of the Trust on issues of equality (see above at paragraph 20). She took no issue with white witnesses being referred to as victims brushing it off as a 'turn of phrase'. She made a number of concessions in cross examination in respect of the evidence and we refer to them above at paragraph 76-8. She also accepted that she overlooked any exculpatory evidence (see above at paragraph 83).

385. The dismissal letter reached no clear findings of fact and did not appear to reflect the evidence that the Claimant provided to the hearing. We raise an adverse inference from the failure to secure any coherent notes of the hearing and that no emails were disclosed to evidence the drafting of the dismissal letter. The dismissal letter was confused and was not entirely consistent with her own statement (paragraph 93) in relation to what allegations she found to be proven. Although unreasonable and incompetent handling of a process cannot be equated to discrimination, the catalogue of failings in the disciplinary process showed a correlation between the less favourable treatment of the evidence provided by the white complainants as compared to the disbelief and the distrust shown by Ms Cassetari when considering the Claimant's evidence. Ms Cassetari formed this view even though he was a long serving employee of 18 years' service with a clean conduct record and Mr Sweeney had told the Tribunal that he had no reason to

doubt the Claimant's honesty and integrity (see above at paragraph 34). She also could not explain why she failed to comply with the Respondent's policies when considering the Claimant's case. We conclude that the Claimant has shown sufficient facts from which the Tribunal could conclude that he has been treated less favourably because of race. The burden of proof shifts to the Respondent to show that the treatment was in no sense whatsoever on the grounds of race. Ms Casseatari has provided no credible reason for failing to comply with policies, failing to investigate the Claimant's evidence of race discrimination and failing to conduct a fair and non-discriminatory process. The claim for race discrimination by summarily dismissing him is well founded.

386. Turning to the Claimant's complaint of victimisation, he states that he carried out a protected act at the dismissal and appeal stages by raising his complaint of race discrimination, this is not disputed. The next issue is whether he was subjected to a detriment because he did a protected act; we conclude that the reason why he was dismissed was because of conscious and unconscious bias by Mr Yousuf and Ms Cassetari and the manner of the dismissal process was tainted by discriminatory stereotypical assumptions about the Claimant that as a Black man he was considered to be the aggressor in the incident. There was no evidence that he was subjected to a detriment because he raised a complaint, the complaint was not taken seriously due to stereotypical assumptions adopted by those in the disciplinary process because of his race not because he had done a protected act. We do not find the claim of victimisation well founded.

Unfair Dismissal

387. Turning to final matter in this case which is the claim for unfair dismissal. We accept that the Respondent dismissed the Claimant for a potentially fair reason namely conduct. We conclude that conduct was the reason for dismissal.

388. We have been reminded in the closing submissions that we should follow the guidance in Burchell v BHS and the first part of the test is whether the Respondent believed that the Claimant was guilty of misconduct. That belief must be formed on reasonable grounds after conducting a reasonable investigation, one that falls within the band of reasonable responses.

389. The Tribunal have been reminded by the Claimant in closing submissions of the dangers of falling into a substitution mindset and we have been taken to the case of London Ambulance service NHS Trust v Small [2009] IRLR 563 CA. In that case Tribunals were reminded that they should confine their consideration to the facts found by the employer at the time of dismissal and it is the conduct of the employer which falls to be addressed not the unfairness or the injustice caused to the Claimant. We have taken into account the ratio of this case and reminded ourselves that it is not for us to substitute our view for that of the employer and the burden of proof is neutral.

390. We have concluded that the investigation was not reasonable and fell outside of the band of reasonable responses. Mr Yousuf failed to interview witnesses that the Claimant identified as being central to his defence (Sebastian, Kola and Wale). Mr Yousuf spoke to Mr Pitt and Mr Panaki but failed to mention this to the Claimant and provided no record of what was said. It was also noted that a statement was taken from Mr Tully after the disciplinary hearing (in breach of the disciplinary policy) and the Claimant's comments on this evidence were not considered before the decision to dismiss was reached. The investigation failed to comply with the Respondent's disciplinary policy and with the Dignity at Work and Equal Opportunities Policy that required counter allegations of discrimination to be investigated. The Claimant's counter allegations were not investigated at any stage prior to his dismissal.

391. The Claimant in his Datix report was categorised as 'violence and agression' (see paragraph 29) and the Claimant indicated he was subjected to two incidents of foul and abusive language. In each part of the disciplinary process (including the suspension meeting) he made reference to the racial abuse, however his Datix complaint and his allegations of racial abuse were not investigated. Mr Yousuf failed to investigate because he was sceptical of this evidence and he concluded, without carrying out any investigation, that the evidence of the complainants was consistent and honest but the Claimant's evidence of verbal and racist abuse was not. He accepted that there were elements of the investigation that were incorrect and he "could have done better" and also accepted that he was not concerned about the credibility of the witness evidence against the Claimant (see above at paragraph 64). The conclusions reached in the investigation report were not founded on all the facts and only after considering half the story. Mr Yousuf failed to investigate the credibility of the allegations against the Claimant but doubted the credibility of the Claimant's evidence, his conclusions on credibility were not formed after conducting an investigation but on his personal views of the veracity of Claimant's counter allegations. The Tribunal conclude that his investigation was fundamentally flawed and outwith the band of reasonable responses.

392. Ms Cassetari conceded that her sole focus was on the Claimant and she had assumed in the disciplinary hearing that he was the aggressor throughout but conceded in cross examination that this was not the case and Mr Archard was the aggressor when shown the CCTV evidence as we have recorded above (para 76). There was no mention of Mr Archard acting aggressively in the dismissal letter which indicated that she had been influenced by Mr Yousuf's interpretation of the evidence. Ms Cassetari failed to investigate the Claimant's evidence that foul and offensive language was used by Mr Archard and the impact that this had on him and his behaviour in the exchange. In paragraph 25 of Ms Cassetari's witness statement she concluded that the comments attributed to Mr Archard could potentially amount to racial discrimination but she concluded, without conducting any further investigation, that "**there was no definitive evidence that this is what was intended**". There was no evidence of what Mr Archard said or what was intended because there was no investigation. Ms Cassetari concluded that even if the Claimant had been racially abused, she felt he was still culpable for the escalation of the incident because he "had the opportunity to remove himself".

393. The Respondent in their closing submissions have stated that the issue in this case is not whether the Claimant was the aggressor but he "**allowed himself to get into a situation and remained in a situation where he ended up striking another person**" (see above at paragraph 346). The Tribunal noted that this submission was not consistent with the charges the Claimant had to face which were that he "verbally and physically assaulted" a delivery driver and a contractor. The reason for dismissal was confirmed in the dismissal letter that the Claimant was found to have physically assaulted Mr McVay (but not verbally assaulted) and that he physically and verbally assaulted with Mr Archard.

394. The Tribunal now consider whether the conduct that led to dismissal could properly be described as gross misconduct and if on all the evidence the Respondent was entitled to dismiss summarily. We conclude that although the allegations the Claimant faced were abuse and physical assault and were potentially acts of gross misconduct, the Respondent failed to consider the character of the conduct and the evidence of the Claimant. Ms Casseatari failed to make findings of fact on the balance of probabilities and did not consider whether the Claimant's conduct was tantamount to deliberate wrong doing and wilful repudiation to properly conclude that an offence of gross misconduct had been committed or if a lesser sanction may have been more appropriate. If the

Respondent dismissed because (as referred to above at paragraph 392) the Claimant allowed himself to get into this situation, as had been put to us, this suggested that the character of the conduct was not consistent a deliberate act of misconduct and could not properly be characterised as gross misconduct. We conclude on all the evidence that the conduct of the Claimant cannot, on the evidence before the Respondent, and in light of the concessions made by Ms Cassetari, amount to an act of gross misconduct.

395. Ms Cassetari accepted that she took the witness evidence against the Claimant at face value and 'overlooked' any evidence that suggested the Claimant's innocence (see above at paragraph 83). Ms Cassetari accepted that after the disciplinary hearing she failed to investigate the Claimant's counter allegations and speak to Sebastian because she concluded that they had a "**good amount of evidence to rely on"**. This reflected the one-sided nature of the disciplinary process and of the unfairness of the disciplinary hearing. Although the Claimant's response to the allegations had never been investigated, it was felt that they had enough evidence to find the allegations proven, even though they only had one side of the story.

396. By failing to investigate the Claimant's version of the events and his counter allegations of race discrimination made against Mr Archard, Ms Casstetari was in breach of the Respondent's policies and resulted in a substantively and procedurally unfair process. The Respondent was unable to explain why they failed to comply with their Dignity at Work Policy, the disciplinary policy and the ECHR Code of Practice which required grievances and counter allegations to be investigated, this was not done and no explanation was given as to why in this case the policy was not followed or referred to in the statements of Ms Cassetari, Ms Woods and Mr Yousuf. The Respondent was also unable to explain why the HR advisers failed to keep notes of the disciplinary and of the appeal process and why the dismissal and appeals managers failed to take any notes of the proceedings.

397. Ms Cassetari had before her evidence provided by the Claimant in mitigation in terms of his length of service, his unblemished record and his acknowledgement that he was wrong to swear and accepted that he should not have reacted in the incident. This was a one-off incident in a long career with the Respondent, where the Claimant showed contrition and insight into his actions and where he provided evidence of provocation. It was also not disputed that the incident (and the conduct of the Claimant) was also totally out of character. He explained the reason for his actions. Ms Cassetari told the Tribunal that she did not recall the Claimant giving assurances that it would not happen again and did not read his submissions where he accepted that he was wrong to swear (paragraph 81-3). We conclude that even though this evidence was before the dismissal manager it was not taken into account when deciding whether the conduct was culpable and whether it was an offence of gross misconduct.

398. We conclude that the disciplinary process was procedurally and substantively unfair. Although the Claimant took the opportunity to appeal to Ms Woods, we found as a fact that she failed to deal with the Claimant's points on appeal and failed to comply with the Respondent's policies. She accepted in cross examination that it would have been appropriate for her to investigate the allegations of race discrimination but did not do so (see above at paragraph 102). The recommendation in the outcome letter put the onus on Baldwins to investigate Mr Archard's conduct and placed no obligation on the Respondent to investigate this matter. The Tribunal conclude that Ms Wood failed to conduct the appeal fairly and there was no consistent evidence that she had any input in writing the appeal outcome. The Tribunal conclude that the appeal was incapable of rectifying the

substantive unfairness of the investigation and of the disciplinary process and outcome.

399. We conclude that the Respondent acted unreasonably in treating the reason shown as the reason for dismissal, taking into account the size and economic resources of the Respondent's undertaking and equity and the substantial merits of the case. This was a large employer, with policies to ensure that disciplinary hearings were conducted fairly and equal opportunities policies to ensure that allegations of discrimination were investigated, even where they were made in the course of a disciplinary hearing. These policies were not followed and there was no explanation why this was the case. The Respondent also had the benefit of a large human resources department but the investigation followed was one sided and inadequate and the minutes of the hearing and appeal were lost.

400. The Tribunal conclude that although this was an unfair dismissal, there should be a reduction of 10% as contributory fault to recognise the extent of his blameworthy conduct by the Claimant in that he accepted that he reacted and swore and he admitted that this was unacceptable.

401. The Respondent asked for a reduction for Polkey to reflect that, had any procedural faults not occurred it would have made no difference. The Tribunal have concluded that the defects in the procedure were more than mere procedural defects, they amounted to substantive failures. The Respondent failed to carry out a fair process that complied with their policies and procedures and failed to subject all the evidence to proper scrutiny and failed to consider the Claimant's evidence. We conclude that it is not appropriate to make a deduction under Polkey.

402. This matter will now be listed for a remedy hearing. The Claimant is ordered to provide to the Respondent, with a copy to the Tribunal, an updated schedule of loss within 14 days of the date of promulgation of this decision. The parties are encouraged to see if this matter can be resolved without the need for a further hearing. If settlement is not possible then the parties are ordered to make a joint application for the matter to be listed for a remedy hearing, giving a time estimate for the length of hearing and dates to avoid. The parties are to agree a joint bundle for the remedy hearing 28 days before the hearing and to exchange statements 14 days before the hearing.

Employment Judge **Sage**
Date: 15 August 2017

Corrected version signed on the 30 January 2019